Graham v. WCB et al, 2007 NWTSC 54

Date: 2007 08 01
Docket: S-0001-CV-2005000278 &
S-0001-CV-2004000076

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

TIMOTHY GRAHAM

Applicant

- and -

WORKERS' COMPENSATION BOARD OF THE NORTHWEST TERRITORIES AND NUNAVUT and THE APPEALS TRIBUNAL

Respondents

Application for judicial review and an order quashing two decisions of the Appeals Tribunal established pursuant to the *Workers' Compensation Act*, R.S.N.W.T. 1988, c.W-6 (as amended). Application dismissed.

Heard at Yellowknife, NT, on June 6 & 7, 2007.

Reasons filed: August 1, 2007.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Counsel for the Applicant: T.G. Ison & A.F. Marshall

Counsel for the Respondent (WCB): G.A. McKinnon

Counsel for the Respondent (Appeals Tribunal): J.J.P. Donihee

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REASONS FOR JUDGMENT

[1] The applicant, Timothy Graham, seeks judicial review and an order quashing two decisions of the Appeals Tribunal established pursuant to the *Workers' Compensation Act*, R.S.N.W.T. 1988, c.W-6 (as amended). The decisions relate to a refusal by the Tribunal to reconsider the applicant's claim for compensation which it had rejected in 1998. That claim is based on an injury suffered by the applicant in 1977.

[2] To fully understand the scope of this application, it is necessary to explain, first, the statutory framework governing the Appeals Tribunal and, second, the history of the applicant's dealings with the workers' compensation system.

Relevant Statutory Framework:

[3] The *Workers' Compensation Act* (the "Act") sets up a comprehensive scheme to provide no-fault benefits to workers injured on the job. It is similar in scope to workers' compensation systems established throughout Canada. The Workers' Compensation Board, through its "Governance Council", is the central governance body setting policies and overseeing administration of the Act.

[4] The Appeals Tribunal is established as the final level of appeal in two areas. First, it reviews decisions of the Board's review committee regarding claims for compensation (see s.24); and, second, it reviews decisions of the review committee regarding the amounts of employer assessments (see s.64). The Appeals Tribunal is composed of members appointed by the responsible cabinet minister: s. 7.1. It has the power to set its own rules and procedures and may conduct its proceedings in any manner it considers appropriate: s. 7.5. Its decisionsare protected by a strong privative clause: s. 7.9. A decision of the tribunal is "final and conclusive" and it may not be questioned or reviewed in any court.

[5] Numerous cases from this jurisdiction have described the independent quasi-judicial role of the Appeals Tribunal: see, among others, *Northern Transportation Co. Ltd.* v. *Northwest Territories (Workers' Compensation Board)*, [1998] N.W.T.J. No. 3 (S.C.); *Braden-Burry Expediting Services Ltd.* v. *Northwest Territories (Workers' Compensation Board*), [1998] N.W.T.J. No. 174 (S.C.), affirmed[1999] N.W.T.J. No. 84 (C.A.); *Northwest Territories (Workers' Compensation Board)* v. *Nolan*, [1999] N.W.T.J. No. 12 (S.C.).

[6] The Appeals Tribunal also has the power to vary a decision or to reconsider a matter. This is provided for in s. 7.8 of Act:

> 7.8 The appeals tribunal may vary a decision made by it and may, on its own motion, rehear an appeal.

[7] The extent of this rehearing power is at the heart of this application. The Act does not set out the procedure that the Tribunal must follow nor the criteria it must apply when making a decision under this section.

History of These Proceedings:

[8] The applicant was injured on October 19, 1977. He was working as a diver on a drill rig on the Beaufort Sea. He was struck in the head by an air hose that had broken loose. The applicant claimed compensation and he was paid temporary benefits for approximately 6 months. At the time, his injury was regarded as nothing more serious than a concussion and bruising. He was determined to be fit to return to work at the end of the period of temporary benefits.

[9] Between 1982 and 1990 the applicant suffered a number of head and soft tissue injuries as a result of several different accidents. Sometimeafter this he was diagnosed

as suffering from impairments compatible with a brain injury. The applicant then applied for benefits for a permanent partial disability. This was rejected by the Board, and subsequently by the Board's review committee, in 1995. The basis for rejection was that no "clear causal relationship" could be determined as between the applicant's current condition and the 1977 accident.

[10] The applicant then appealed to the Appeals Tribunal. A hearing was held over 2 days in October and November of 1996 at which the applicant participated along with his counsel. Three doctors who had assessed the applicant testified. One doctor related his observation that the applicant suffers from an array of cognitive and behavioural problems which do not allow him to function effectively. Another testified that the applicant's symptoms are consistent with a brain injury. Reportsfrom several other doctors were also entered into evidence. But no one could give a definitive opinion as to the cause, or causes, of the applicant's condition.

[11] Subsequent to the hearing, the Appeals Tribunal advisedthe applicant'scounsel that it would be helpful if the applicant would undergo an independent neuro-psychological assessment. The Tribunalhad requestedthe Board's MedicalAdvisor to locate a neuropsychologist who could carry out the assessment. An appointment was therefore arranged with a Dr. Keegan in Edmonton. The Tribunal offered to pay travel and subsistence costs for Mr. Graham and a family member to accompany him.

[12] The applicant's counsel objected to the involvement of the Board's Medical Advisor and the fact that the Tribunal had made arrangements without prior consultation. The response of the Tribunal was to the effect that if the applicant was not willing to attend for an independent assessment, then it would proceed and make a decision based on the information that was already before it.

[13] As a result, the Appeals Tribunal issued its decision on May 29, 1998. It upheld the review committee's decision to deny the applicant's claim for benefits due to an inability to establish a "clear causal relationship" between the applicant's current condition and the 1977 accident. In its reasons for decision the Tribunal referred to conflicting evidence as to causation because of the numerous unrelated accidents suffered by the applicant (both before and after the 1977 incident). At the conclusion of its decision, however, the Tribunal added the following comment:

> The panel strongly urges the appellant to attend an examination by an independent specialist, so that essential medical evidence can be brought forth. As a part of this decision, the Appeals Tribunal extends the offer to cover the appellant's costs for this examination and to provide a medical escort for the duration of the trip.

[14] Subsequently, Mr. Graham agreed to be examined by Dr. Keegan. This took place in late September of 1998. Dr. Keegan's reports were providedto the applicant's counsel who, in turn, provided those reports for review by the applicant's doctor, a Dr. Vondette. Dr. Keegan noted the difficulty in separating the effects of the 1977 accident from the subsequent injuries, in particular, a 1982 accident. Dr. Vondette, however, after reviewing Dr. Keegan's report, stated his opinion that the applicant's brain injury can be traced to the 1977 accident. A major point of difference appears to be over the doctors' respective assessments of the severity of the injury suffered in 1977. Dr. Keegan concluded that the applicant suffered a mild traumatic brain injury which should not have led to ongoing cognitivedisability; Dr. Vondetteconcluded that the applicant sustained a severe traumatic injury as evidenced by his history of persistent and significant cognitive dysfunction.

[15] Dr. Keegan's reports contained a number of salient comments: (i) the effects of head injuries are additive and one might expect more pronounced effects from head injuries subsequent to the 1977 injury; (ii) it is not possible to specify which head injury accounts for any neuropsychological impairment unless one had neuropsychological evidence from after the 1977 accident and prior to any subsequent accident; (iii) one would not expect either the 1977 or 1982 accidents, based on the available information, to be permanently disabling; (iv) the available medical records do not support an attribution of persistent dysfunction from the 1977 accident; (v) neuropsychological testing done subsequent to the 1982 accident do not reliably differentiate the specific causes of Mr. Graham'sdisabilities; and, (vi) there is evidence that non-neurological factors also contributed to Mr. Graham's cognitive complaints.

[16] In June of 2003, the applicant requested the Appeals Tribunal to rehear his appeal and reconsider his claim for compensation. His counsel filed Dr. Vondette's report as well as extensive written submissions. He also filed a report from a Dr. Wild who also reviewed Dr. Keegan's reports. The applicant had been a client of Dr. Wild (a registered psychologist) since 1992. Dr. Wild disagreed with Dr. Keegan's conclusion. His opinion was that the applicant's 1977 injury resulted in a permanent neuropsychological disability.

[17] On January 22, 2004, the Appeals Tribunalissued a decisiondenying the request for a rehearing. In it the Tribunal referred to Dr. Keegan's reports as well as the reports from Doctors Vondette and Wild. The Tribunal noted that both Doctors Vondette and Wild had provided oral and written evidence at the original 1996 hearing. It noted the disagreement between the doctors and concluded that there is nothing new which would give cause to order a rehearing.

[18] Subsequent to receiving this decision, the applicant's counsel ascertained that there were only 2 members of the panel that had made the decision to reject the request for a rehearing. Counsel then filed an application for judicial review seeking to quash the decision on the basis that the Tribunal failed to have a proper quorum. Section 7.1(7) of the Act requires a hearing panel to consist of three members. The Board did not dispute that the 2004 decision was made without a proper quorum. There then ensued a lengthy series of communications involving counsel for the applicant, the Board, and the Appeals Tribunal, which resulted in (a) the applicant's discontinuance of the judicial review proceedings, and (b) the Tribunal convening a proper quorum to reconsider the applicant's request for a rehearing.

[19] There is considerable disagreement as to the terms under which the discontinuance and new rehearing request came about. This will be discussed later in these reasons. Suffice it to say that the applicant wanted the opportunity for an oral hearing with respect to the renewed request for a rehearing; the Tribunal decided to review the request in writing only.

[20] The applicant's counsel filed further submissions. These includeda report from a Dr. Bishop who treated the applicant after a head injury suffered by the applicant in 1975 and after the 1977 injury. He also saw the applicant intermittently up until 1990. Dr. Bishop's opinion was that the 1975 injury was not significant but that the 1977 injury had a significant effect. He could not comment on the effects of subsequent injuries in 1982, 1987 and 1990.

[21] In a decision dated August 4, 2005, but not releaseduntil September6, 2005, the Tribunal denied the applicant's request for a rehearing. It concluded that the applicant had failed to provide any new evidence to support a rehearing of the 1998 decision. The substantive parts of that decision are as follows:

> The Appeals Tribunal has reviewed your submission. In this particular case, the Appeals Tribunal had to determine if the interests of justice and fairness would be best served by granting a rehearing. The Appeals Tribunal asked itself the following three very specific questions as a basis in rendering its decision.
>
> 1. Is there new evidence that might result in a different outcome if the hearing were to take place?
>
> The information in your submission does not provide the Appeals Tribunal with any new evidence or reasons as to why the original decision should be overturned or reheard.

> 2. Was there some error or problem with the original decision that should be addressed in a rehearing?
>
> There was no evidence or problem found with the original decision or the procedure that was followed that would require the Tribunal to grant a re-hearing.
>
> 3. Are there any other factors that would mitigate in favor of a rehearing?
>
> In reviewing the appellant's submissions, the Appeals Tribunal was unable to identify any other factors that would mitigate in favor of a rehearing.
>
> The Appeals Tribunal has determined that the information before it requesting a rehearing fails to provide any new evidence to substantiate the appellant's present condition was caused by his accident twenty-eight years earlier. Since this information does not provide the Tribunal with any new evidence or reasons as to why the original decision should be overturned, your request is hereby denied.

[22] The applicant then filed a further judicial review application seeking to quash not just the 2005 decision but also the 2004 decision. This resulted in various other motions, including a motion by the Board to dismiss the applicationinsofar as it relates to the 2004 decision as an abuse of process, a motion by the applicant to set aside the notice of discontinuance of the 2004 application, and a motion adding the Appeals Tribunal as a party. Eventually an order was issued on consent whereby the Tribunal was added as a party respondent but all other questions were left for the hearing before me.

Issues:

[23] Some may well think that the most obvious questionthat arises,after a review of the history of these proceedings, is how a system that is meant to be simple, efficient and cost-effective, could take so long to address this worker's claim. But that is not the question before me; nor was I provided with an explanation as to why this claim has consumed so much time.

[24] The fundamental question is how much deference is owed to the Appeals Tribunal's decision denying a rehearing. But there are also allegationsof apprehended bias, a lack of procedural fairness, and legal error, which must be addressed as well.

[25] The pertinent issues can be summarized as follows:

1. What is the subject matter of this application? The applicant contends that this court can go back to review the original Tribunal appeal decision of 1998. The Board argues that this review is limited to the 2005 decision to reject the applicant's request for a rehearing.

2. What is the appropriate standard of review? This requires a characterization of each specific question under review.

3. Is there cause for an apprehension of bias? The applicant submits that bias is demonstrated by (i) the Board's lawyer acting on behalf of the Tribunal in the negotiations leading up to the discontinuance of the first judicial review application, and (ii) the Tribunal's reliance on the Board's Medical Advisor.

4. Was there a lack of procedural fairness? The applicant submits that he should have been granted an oral hearing by the Tribunal when it consideredhis request for a rehearing.

5. Did the Tribunal commit errors of law? The applicant argues that the relevant legal and medical issues were never addressed by the Tribunal; that the Tribunal failed to "recognize evidence as evidence" (to quote applicant's counsel); and, that the Tribunal erred in its application of the burden of proof to the issue of causation.

[26] It could be argued that this case really presents only one issue, that being the decision to reject the request for a rehearing. The power to grant a rehearing has been quite correctly characterized as a purely discretionary decision by the Tribunal. Such decisions are ordinarily owed a great deal of deference. But the manner in which this case was presented leaves me no alternative but to address these issues separatelyeven though some will overlap each other.

The Subject-Matter of this Application:

[27] The subject-matter of this application, on the face of it, should be the 2004 and 2005 decisions of the Tribunal rejecting the applicant's request for a rehearing. After all, those are the only decisions mentioned in the Originating Notice seeking judicial review. However, at the hearing, counsel for the applicant raised for the first time the validity of the original 1998 Tribunal decisionrejecting the applicant'sappeal from the Board's refusal of his claim for compensation. Counsel for the respondent Board objected on the basis that this argument could not have been anticipated and, if the 1998 decision is to be reviewed, then a whole other Record is needed.

[28] The applicant's argument, in essence, is that the 1998 decision was not a "final" decision, merely an "interim" one, because the Tribunal held out the option for the applicant to undergo an independent examination. This the applicant agreed to do. Thus, the 1998 decision would have been "final" only if the applicant had decided to forego that examination. Applicant's counsel submitted that the 2003 request for a rehearing was not really for a "rehearing" but a request to "continue" the original hearing. The 2005 decision was, in counsel's submission, a completion of the 1998 decision and therefore inseparable from it.

[29] With respect, I fail to discern any logical or legal basis for counsel'ssubmission. The Tribunal clearly dismissed the applicant's appeal by its 1998 decision. It stated: "The Appeals Tribunal upholds the Review Committee's decision..." This was not a conditional or interim decision. It gave reasons for that decision. The offer held out by the Tribunal to pay for the applicant to attend for an independent examination was just that, i.e., an offer to pay if the applicant decides to have such an examination. What would happen after that was not said. There was no reference to either a continuation of the original appeal or a guarantee of a rehearing.

[30] Furthermore, all of the material filed on behalf of the applicant in 2003, leading up to the 2004 Tribunal decision, refer explicitly to a request to "rehear" his appeal. There is no reference to "continuing" his appeal. Everyone, including the applicant, acted as if the Tribunal made a decision in 1998 and the further proceedings were a request for a rehearing pursuant to s. 7.8 of the Act. Indeed that section is referenced specifically by counsel in his written "Submission for Rehearing" filed with the Tribunal on July 3, 2003.

[31] The applicant's counsel, however, requested that if the application for judicial review is not to be regarded as encompassing the 1998 decision, then the Originating Notice be amended so as to include a reference to that decision. I cannot allow this. To do so would open up an entirely different field of inquiry requiring, as noted by respondent's counsel, an entirely different Record.

[32] In my opinion, the only decision that is properly the focus of this judicialreview application is the 2005 Tribunal decision rejecting the request for a rehearing. No steps were taken to seek judicial review of the 1998 decision when that was available. The limitation period set by the Rules of Court has long expired (see Rule 596). With respect to the 2004 decision, even though that is mentioned in the Originating Notice, it however was the subject of a previous application that was discontinued. So there is nothing to review.

[33] The parties agreed that the 2004 decision was a nullity because of the lack of a properly constituted quorum. They agreed to a rehearing. The terms of that rehearing are in dispute but that will be discussed later. As stated in *Chandler* v. *Alberta Association of Architects*, [1989] 2 S.C.R. 848, a tribunal may always rehear a matter anew if its original decision was vitiated by an error rendering it a nullity. It does not have to wait for a court order to do so. That is what happened here. So, even if there were grounds to set aside the notice of discontinuance, there is nothing to judicially review with respect to the 2004 decision since it was a nullity.

Standard of Review:

[34] In every case where a court is called upon to review a decision by a statutory decision-maker, whether it is by way of an application for judicialreview or a statutory right of appeal, the court must begin by determining the appropriate standard of review. This is done by applying a "pragmatic and functional" analysis which entails consideration of four well-established contextual factors: the presence or absence of a privative clause or a right to appeal; the expertise of the tribunal relative to the expertise of the reviewing court on the questions at issue; the purpose of the legislation and any particular provision in question; and, the nature of the question at issue (whether it is one of law, fact, or mixed law and fact). The aim of this analysis is to ascertain what the legislature intended to be the degree of deference to be accorded to decisions of the tribunal in question: *Pushpanathan* v. *Canada*, [1998] 1 S.C.R. 982; *Dr. Q.* v. *College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226; *Law Society of New Brunswick* v. *Ryan*, [2003] 1 S.C.R. 247.

[35] In this case both counsel for the Board and the Appeals Tribunal submitted that the standard of review for decisions of the Tribunal is patent unreasonableness. The applicant's counsel, while not conceding the point, acknowledged that, because of the privative clause protecting Tribunal decisions, the standard of review is usually patent unreasonableness. Numerous cases have applied that standard in reviews of this Tribunal's decisions: *Braden Burry (supra)*; *Clark* v. *Northwest Territories(Workers' Compensation Board)*, [1998] N.W.T.J. No. 122 (S.C.); *Fullowka* v. *Witte*, [1999] N.W.T.J. No 134 (C.A.); *Saftner* v. *Northwest Territories and Nunavut (Workers' Compensation Board)*, [2001] N.W.T.J. No. 5 (S.C.).

[36] Patent unreasonableness is the most deferential standard of review. The hallmark of a patently unreasonable decision, it has often been held, is the immediacy or obviousness of the defect in the decision: *Canada* v. *Southam*, [1997] 1 S.C.R. 748 (at para. 57). It is a decision that is "clearly irrational" or "evidently not in accordance

with reason": *Canada* v. *Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 (at pp. 963-64). It does not, in any way, permit a reviewing court to review the decision on its merits.

[37] The fact that counsel may agree on the appropriate standard of review is not determinative of the issue. The standard of review is a question of law and the pragmatic and functional analysis must be conducted in each case: *Monsanto Canada Inc.* v. *Ontario,* [2004] 3 S.C.R. 152 (at para. 6).

[38] Also, the fact that previous decisions of this court have determined the standard of review does not automatically determine the standard in this case. A fresh pragmatic and functional analysis must be done in each case and for each disputed issue: *Alberta (Workers' Compensation Board)* v. *Appeals Commission*, [2005] A.J. No. 1012 (C.A.); and, see *Nabors Canada LP* v. *Alberta (Workers' Compensation Appeals Commission),* [2006] A.J. No. 1507 (C.A.), leave to appeal denied [2007] S.C.C.A. No. 49.

[39] Generally speaking, courts like to operate on the assumption that there is one complete decision that is being reviewed. There is a disinclination to separate out or divide a decision into distinct subsidiary determinations. But there may be, as in this case, several different issues to address or some distinct extricable question of law. These will generally require different approaches. Recent jurisprudence confirmsthat there is no one, correct, standard of review for all decisions of a specific tribunal or all questions within a specific category: *Voice Construction Ltd.* v. *Construction & General Workers' Union, Local 92,* [2004] 1 S.C.R. 609.

[40] With respect to the central question, that being judicial review of the 2005 decision denying the request for a rehearing, I conclude that the standard of review is indeed one of patent unreasonableness.

[41] There is a full privative clause. Decisions of the Tribunal are final and conclusive and may not be questioned or reviewed in any court. The expertise of the tribunal, even though its members may be part-time, comes from their familiarity with the compensation process. While the statute does not prescribe any specific qualifications for members it does require that certain members be appointed on the recommendation of representatives of employersand workers and each panel of 3 must include at least one of each. Members are appointed for fixed terms. They are expected to develop an expertise in the purpose and policies of the Act and the factual issues relating to compensation and assessment that come before them. All of this suggests that a high level of deference should be accorded to Tribunal decisions.

[42] The purpose of the Act as a whole is to provide a system of compensation without the need to go to court. The Tribunal plays a central role in achieving that purpose. So, again, a high level of deference is indicated.

[43] The most important consideration in my view, however, is the nature of the question. This was a request pursuant to s. 7.8 to rehear Mr. Graham's appeal. That section empowers the Tribunal to vary a decision made by it or to rehear an appeal. Since an administrative tribunal has only those powers granted to it by statute, in the absence of s. 7.8 there would be no power to rehear the appeal.

[44] Generally speaking, a statutory power to vary or reconsider is construed liberally. It is considered to be a plenary independent power that is necessary for an administrative decision-making body to do its work efficiently and fairly: see, for example, *Bakery and Confectionary Workers International Union* v. *White Lunch Ltd.*, [1966] S.C.R. 282.

[45] It is significant that the statute does not fix any criteria by which to exercise the power under s. 7.8. It is a purely discretionary decision on the part of the Tribunal. Thus this case differs from many others where there is a rehearing power but there are specific criteria enumerated (such as in the Manitoba case of *Ringer* v. *Workers' Compensation Board*, [2005] M.J. No. 71 (C.A.), where the statute specified "new evidence" as the factor necessary for exercise of the discretion). The fact that the Tribunal enjoys such a wide discretion also suggests a high degree of deference.

[46] Finally, the type of issue that the Tribunal had to address, that being a question of medical causation, is ordinarily a factual one requiring the Tribunal to assess all of the evidence presented to it. Therefore, a high degree of deference is again warranted. Even if it can be said that a question of medical causation is one of mixed fact and law, that too compels a certain degree of deference, albeit not as much as in the former case.

[47] It is apparent that, even though the Act does not specify what factors must be taken into account in exercising the discretion under s. 7.8, the Tribunal set some factors for itself. The text of the 2005 decision set out the test the Tribunal applied: "Consideration to vary or rehear a decision is given if substantial new evidence or information not previously reviewed (which might result in a different outcome) is submitted." The text also set out (as reproduced earlier) the specific questions the Tribunal asked itself:

1. Is there new evidence that might result in a differentoutcome if the hearing were to take place?

2. Was there some error or problem with the original decision that should be addressed in a rehearing?

3. Are there any other factors that would mitigate in favor of a rehearing?

[48] The Tribunal, even though it said the relevant factor is new evidence, actually applied a three-part test: (a) new evidence; (b) error in the original decision; and, (c) any other factor favouring a new hearing. There is nothing in the legislationto suggest that these are not factors that the Tribunal could consider as relevant criteria; nor is there anything in the statute to suggest that the Tribunal must consider some other factors. The important point to note is that the Tribunal did set some criteria for itself so that the exercise of this discretionary power is not totally open-ended or arbitrary.

[49] The fact that the Tribunal set for itself the relevant factors to consider under a s. 7.8 request begs the question: Did the legislature intend that the Tribunal set for itself what is or is not a relevant factor? In my opinion, it did. If the legislature did not intend to do so, it could have itemized the factors that must be taken into account. But here it left the discretion to the Tribunal to exercise in the context of the overall aims and objectives of the workers' compensation schemeand appealprocess created by the Act. In such a case it is not the function of a reviewing court to weigh the merits or relevance of any particular factor in the absence of some error in principle or evidence that the Tribunal has exercised its discretion in a capricious manner: see *Pezim* v. *British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (at p. 607). In my opinion, considering that the subject-matter is a request to rehear something already decided, the questions posed by the Tribunal are relevant and rationally-connected to that exercise.

[50] All of this leads me to the conclusion that a high degree of deference is owed to the Tribunal's decision. Therefore the applicable standard of review is patent unreasonableness.

[51] The next step is to apply that standard to the decision. However, the applicant raised a number of other issues which implicate the standard of review.

[52] The applicant alleged bias and a lack of procedural fairness. Issues of natural justice are not subjected to the pragmatic and functional analysis. The function of the

court on judicial review in such circumstance is to determinethe scope of the particular tribunal's duty of fairness and to decide whether the tribunal adhered to that duty. Thus, issues of natural justice are reviewed on a standard of correctness: *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1992] 2 S.C.R. 817. The denial of a right to a fair hearing will always render a decision invalid, regardless of what the reviewing court may think of the merits of the decision: *Newfoundland Telephone Co.* v. *Newfoundland*, [1992] 1 S.C.R. 623.

[53] The applicant also argued that the Tribunal made errors of law. If there are any extricable questions of law, then they would be assessed on a different standard. Generally, questions of law that engage the specialized expertise of the tribunal in question, and where other factors lead to a deferential standard, attract a standard of reasonableness. Questions of law that are of general application, for which the particular tribunal has no special expertise, are reviewed on a standard of correctness: *Moreau-Bérubé* v. *New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249.

[54] Before I leave this topic, I wish to make a comment on the Appeals Tribunal's role in these proceedings.

[55] As noted previously, the Appeals Tribunal was added as a party by a consent order issued prior to the hearing before me. There were no terms or conditions set out in the order as to the scope of the Tribunal's participation in this hearing. In his pre-hearing brief, the Tribunal's counsel addressed the question of the standard of review. At the oral hearing, however, counsel limited his submissions to a clarification of the record (no doubt partly in response to some expressions of skepticism on my part as to the propriety of the Tribunal addressing the standard of review).

[56] In his brief, counsel cited the decision in *CAIMAW Local 14* v. *Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983, where LaForest J. said as follows on the scope of tribunal standing (at para. 36):

> [The Tribunal] has standing before this Court to make submissions not only explaining the record before the Court, but also to show that it had jurisdiction to embark upon the inquiry and that it has not lost that jurisdiction through a patently unreasonable interpretation of its powers.

[57] Based on this quote, and because in *Paccar* the tribunal in questionwas allowed to make submissions as to the standard of review, counsel thought it appropriate to address the standard of review in his brief. In this he is not alone since the same view has been adopted by some courts: see, for example, *Children's Lawyer for Ontario* v.

Goodis (2005), 75 O.R. (3d) 309 (C.A.). I should note however that, as in *Paccar*, counsel here did not go so far as to argue the merits of the decision under review.

[58] The *Paccar* decision, if it means what Tribunal's counsel says it means, is a significant extension of the traditional role that a tribunal was permitted to take on a judicial review from its decision. The traditional view is that, in the absence of statutory provisions as to standing, the tribunal is confinedto argumentson the issue of its jurisdiction to make the decision and to an explanatory role with respect to the record: *Northwestern Utilities Ltd.* v. *Edmonton*, [1979] 1 S.C.R. 684; see also *Baffin Plumbing & Heating Ltd.* v. *Northwest Territories (Labour Standards Board)*, [1993] N.W.T.J. No. 111 (S.C.). The reason, simply put, is that a tribunal, which is required to be impartial, should not be seen as an advocate in its own cause.

[59] This is not a clear-cut issue, however, and the question of standing is one that usually depends on an exercise of the court's discretion in the circumstances of a particular case. But I think it is a reach to suggest that because of *Paccar* a tribunal is now automatically entitled to address the issue of the appropriate standardof review. I will leave this point by simply referring to the discussion regarding the uncertainty in this area to be found in an article by Laverne Jacobs and Thomas Kuttner, "Discovering What Tribunals Do: Tribunal Standing Before the Courts" (2002), 81 *Canadian Bar Review* 616.

[60] I think it would be helpful if, in the future, whenever standing is sought by any tribunal, and in the absence of any statutory provisions, that the extent of the tribunal's participation in the hearing be spelled out in the order granting standing. That way any arguments over the scope of the Tribunal's participation can be resolved before the actual hearing of the appeal or judicial review of that tribunal's decision.

Apprehended Bias:

[61] I phrase this issue as one of bias but it really entails an allegation of a lack of institutional independence by the Appeals Tribunal from the Board. The applicant's counsel advanced a number of arguments but I need to address only two: (i) the role of the Board's lawyer in the events leading to the second request for a rehearing; and, (ii) the propriety of the Tribunal relying on the Board's Medical Advisor.

[62] Earlier in these reasons I cited a number of decisions from this jurisdiction which confirmed the independent status of the Tribunal. I need not go over them. In my opinion, the Tribunal enjoys the attributes of institutional independence. This is so notwithstanding the inter-relationship of the Board and the Tribunal establishedby the

Act (and many of the earlier cases cited dealt with deficiencies in how that inter-relationship was perceived).

[63] For example, the Board has exclusive jurisdiction to examine, inquire into, hear and determine all matters and questions arising under the Act: s. 7(1). But that exclusive jurisdiction is made expressly subject to the Tribunal's authority, under s. 7.3, to determine all matters arising in respect of appeals relating to compensation claims and employer assessments. On those matters,the Tribunal'sdecisions are final. In making those decisions, the Tribunal must apply the policies established by the Board's Governance Council and, if the Board considers that the Tribunal failed to properly apply a policy, it may direct the Tribunal to rehear an appeal: s. 7.7. But, as several of those previous cases decided, those provisions do not fetter the Tribunal's independent exercise of it's decision-making authority. Furthermore, the members of the Tribunal are appointed by the Minister for fixed terms independently of the Board: s. 7.1; and, the employees appointed to assist the Tribunal are not staff of the Board: s. 1(1.1).

[64] The issue involving the Board's lawyer is problematic because, as the applicant's counsel put it, it is axiomatic that the decision-making body should be independent of the parties to the proceeding. I should point out that the "Board's lawyer" that is referred to in this context is a Yellowknife lawyer, Mr. Adrian Wright, and not Mr. Gordon McKinnon, who appeared as counsel for the Board on this hearing.

[65] The problem arose after the Tribunal rejected the first rehearing request in 2004 and then discovered the defect in the quorum which in turn led to the first motion for judicial review. This resulted in an exchange of correspondence between Mr. Wright and one of the applicant's counsel, Mr. Austin Marshall. It is this correspondence which the applicant says demonstrates that the Tribunal was receiving advice from the Board's lawyer.

[66] The exchange began with a letter, dated May 20, 2004, in which Mr. Wright conveyed a proposal from the Tribunal's counsel, Mr. John Donihee, respectinga new rehearing:

> As you know, I am counsel for the Workers' Compensation Board in the above matter. I have, however, been in communication with counsel for the Appeals Tribunal, Mr. John Donihee. Mr. Donihee has asked me to convey a settlement offer to you on behalf of your client.

> Mr. Donihee has advised me that the Appeals Tribunal is willing to assign a panel, constituted in accordance with subsection 7.1(7) of the *Workers' Compensation Act* to reconsider your clients request for a re-hearing. That panel will review all of the materials submitted in your client's original request. . .
>
> If you wish to discuss the arrangements for the reconsideration process, as opposed to the settlement of the litigation, please contact Mr. Donihee directly.

[67] Regardless of what I may think of the advisability of counsel for a party conveying messages on behalf of the tribunal whose decision is in question, it is clear that in this letter Mr. Wright identifies himself as counsel for the Board and Mr. Donihee as counsel for the Appeals Tribunal. In two further letters, dated June 28 and June 30, 2004, Mr. Wright confirmed that his client was the Board and that Mr. Donihee acted for the Tribunal. Things became less clear, however, in subsequent correspondence.

[68] On October 27, 2004, Mr. Wright wrote to Mr. Marshall stating what the Tribunal's response was to various issues raised by Mr. Marshall. There is no reference to him being merely a conduit of behalf of Mr. Donihee. On January 12, 2005, Mr. Wright wrote to Mr. Marshall in which he said "I reviewed your letter ... with the Appeals Tribunal" and later "*My client* wishes to ensure ..." (emphasisadded) leading one to make the connection that "my client" is a reference to the Appeals Tribunal. Again, on February 16, Mr. Wright communicated to Mr. Marshall as to what the Tribunal proposes. In it he referred to how the "tribunal of three members will review the evidence" and then says "and *we* will provide you with a decision".

[69] Mr. Graham's counsel submitted that this correspondence demonstrates that Mr. Wright was acting as lawyer and spokesperson for the Tribunal. At the least, he had established himself as the communication link between Mr. Marshall and the Tribunal. The applicant's counsel noted that the Act clearly contemplates that if the Tribunal requires specialized assistance, such as a legal or medical advisor, it is able to contract for that on its own: s. 7.2(4).

[70] In response to the allegation that he may have been acting for both the Board and the Tribunal, Mr. Wright swore an affidavit on March 9, 2007, in which he confirms that he was legal counsel only to the Board and that at no time did he communicate with members of the Tribunal on any matter relating to these proceedings. At all times he was merely serving to facilitate communications for Mr.

Donihee who was counsel for the Tribunal. As Mr. McKinnon pointed out at the hearing, these statements were not challenged by the applicant's counsel.

[71] It is apparent to me, from reviewing the Record, that there was at least confusion at times on the part of Mr. Marshall as to Mr. Wright's role. A number of times he asked for clarification. It is also apparent to me that this confusion was the result of some loose or careless language in this correspondence as opposed to some actual situation of conflict. Of course some may regard this confusion as inevitable when a lawyer agrees to convey communications on behalf of someone who is not his client (even if that someone is another lawyer). But there is nothing to suggest that Mr. Wright at any time either offered advice or discussed the merits of the case with the Tribunal. He was merely a conduit. He merely agreed, as he says in his affidavit, to communicate the Tribunal's position to Mr. Marshall. I accept this.

[72] The argument regarding the role of the Board's Medical Advisor arose because the Tribunal, when it considered that it would be helpful for the applicant to undergo an independent assessment, asked the MedicalAdvisor, Dr. King, to locateone. It then had Dr. King prepare the instructions to the independentphysician (Dr. Keegan).After receiving Dr. Keegan's report, the Tribunal sought Dr. King's opinion on it. The applicant's counsel submitted that this reflected a lack of institutional independenceby the Tribunal, and undue influence by the Board, because it was Dr. King who advised on the earlier decisions that were the subject of the appeal before the Tribunal.

[73] Applicant's counsel argued that, since it looks like both the Board's lawyer and the Board's doctor were playing "leading roles" in the decision-making of the Tribunal, then there is a perception that the Board was controlling or improperly influencing the Tribunal. The extent of such influence is unknown but that, in counsel's submission, is immaterial. It is the appearance of an improper connection that leads to the reasonable perception of a lack of impartiality in the decision-maker in this case.

[74] It is important to bear in mind, as counsel for both the Board and the applicant agreed, that the Tribunal operates on an inquiry model. It may inquire into any and all matters relating to an appeal. It may determine its own procedures. It may seek information from whomever it chooses. So long as everything is disclosed to the parties, as was done in this case, and so long as the parties have an opportunity to comment on it, also as was the situation in this case, there is little ground to argue a breach of the rules of natural justice.

[75] It is well-established that, absent specific statutory language, a legislature is presumed to intend that a tribunal's process will comport with the principles of natural justice. One of the fundamental principles of natural justice is the requirement of an independent and impartial decision-maker: *Ocean Port Hotel Ltd.* v. *British Columbia*, [2001] 2 S.C.R. 781 (at paras. 21-22). The test is that of a reasonable apprehension of bias: What would an informed person, viewing the matter realistically and reasonably, conclude? Would he or she think it more likely than not that the decision-maker would not decide fairly? See *Baker (supra)* at paras. 45-46.

[76] The question of bias in respect of the Tribunal considering evidence from the Board's Medical Advisor arose in *Gélinas* v. *Northwest Territories and Nunavut (Workers' Compensation Board)*, [2002] N.W.T.J. No. 100 (S.C.). There, my colleague Schuler J. concluded that the Medical Advisor was "simply a resource for the Tribunal" and there was no unfairness since the Advisor's report was disclosed to the worker for his comments. She concluded that, because of the structure of the appeal process, this would not lead a reasonable observer to have an apprehension of bias (see at para. 32). This conclusion was affirmed on appeal: [2004] N.W.T.J. No. 70 (C.A.).

[77] In my opinion, the Tribunal's reliance on the Board's Medical Advisor to locate and recommend a doctor for the independent assessment was a practical solution. Dr. King had more knowledge than the Tribunal did. The applicant could choose to go to see Dr. Keegan or not. He eventually did go to see him. Because of the Tribunal's inquiry process it could seek information from any source. The significant point is that whatever the Medical Advisor conveyed to the Tribunal was disclosed to the applicant for his comments. I fail to see any unfairness or a reasonable apprehension of bias in this regard.

[78] With respect to the part played by Mr. Wright, there is no evidence of his having actually exerted any influence on the Tribunal's decision-making. Based on all the evidence, including the unchallenged assertions in Mr. Wright's affidavit, I fail to see how a reasonable observer could form an apprehension of bias. The fact is that no matter what role Mr. Wright played in the period after the first rehearing decision in 2004, the applicant got what he sought, which was a new opportunity to request a rehearing.

[79] I think it is also worthwhile to mention something referenced by the Board's counsel at this hearing. The Board had no stake in the applicant's rehearing request. It took no position on that before the Tribunal. It takes no position on whether the Tribunal's 1998 decision was the correct one. It appeared on this hearing only because it is the necessary party to respond to a judicial review application. Ever since the

original decision of the Board's review committee, and the appeal that led to the 1998 decision, this matter has been in the hands of the Tribunal. In these circumstances I see no basis for an apprehension of bias.

Lack of Procedural Fairness:

[80] The applicant says that there was a breach of procedural fairness in the failure to hold an oral hearing on his request for a rehearing.

[81] The jurisprudence recognizes that every statutory decision-maker owes a duty of fairness to the person whose interests are affected by the decision. The content of that duty, however, varies with the circumstances of the case. The Supreme Court of Canada has, generally, identified a number of factors to consider in order to determine the scope of the duty in each case: see *Baker (supra)*. Among the factors to consider are the nature of the decision being made and the process followed in making it; the nature of the statutory scheme; the importance of the decision to the person affected; that person's legitimate expectations; and, the procedural choices made by the tribunal.

[82] In this case, the statute does not provide for a right of appeal. In such a circumstance more robust procedural safeguards are warranted. However, the nature of the decision is a highly discretionary one regarding a request to rehear a matter originally heard several years earlier. This is far from the type of adversarial proceeding where an array of procedural protections are required. It is not a hearing at first instance, or even an appeal at first instance, so the Tribunal has great flexibility. Also, the statute makes clear that the Tribunal may set its own procedures and conduct its proceedings in a manner that it considers appropriate.

[83] The sole statutory obligation on the Tribunal is to give an appellant and any other interested person an opportunity to be heard and to present evidence: s. 7.6. The Tribunal did that. It not only gave the applicant the opportunity to make submissions but it also invited comment from the applicant on all of the material in its possession (particularly the medical reports). It therefore met the basic procedural right of the applicant, that being the opportunity to present his case.

[84] The submission that there should have been an oral hearing is premised on the correspondence that passed between Messrs. Marshall and Wright after the 2004 rejection of the applicant's request for a rehearing. Applicant's counsel argued that there was an obligation to hold an oral hearing or, at least, there was an agreement to hold an oral hearing in exchange for discontinuing the earlier application for judicial

review. The Board's counsel does not dispute that Mr. Marshall may have believed there was an agreement but, in fact, there was no such agreement nor an obligation to hold an oral hearing.

[85] The correspondence reveals that the parties contemplated a two-step procedure: first, the applicant would make his submissions on why there should be a rehearing; then, if the Tribunal decided to grant the request, there would be a rehearing of the merits of the applicant's appeal. The first reference to an oral hearing is in a letter from Mr. Marshall to Mr. Wright dated February 8, 2005. Mr. Marshall referred to "our oral arguments" in a discussion about what evidence may be submitted. In Mr. Wright's response of February 16 there was no mention of Mr. Marshall'sreference to "oral" argument. There is then some correspondence in which Mr. Marshall indicated that he would "be available for a hearing" on certain dates. Then, on March 21, 2005, Mr. Marshall filed the applicant's Notice of Discontinuance, consented to by Mr. Wright as solicitor for the Board, in which the application was said to be discontinued "pursuant to an agreement reached between the parties".

[86] On April 12, 2005, the Registrar of the Appeals Tribunal wrote to Mr. Marshall specifying that the Tribunal will proceed to reconsider the request for a rehearing. Only if the request is granted will there be a need to set dates for a hearing. Mr. Marshall responded by a letter dated April 18 in which he stated that he "had understood that an oral hearing would be held". He also set out his argument for why there should be an oral hearing:

> We ask that the application for the rehearing be held as an oral hearing. We see it as vital to Mr. Graham's case that we have a full opportunity to present our arguments. This is not an application that lends itself to a written submission alone. While the facts and law can be put in a written submission, it can not possibly be done in a way that would admit of no misunderstanding. If the Tribunal has any questions, or it appears to us that something needs to be explained more fully, the oral hearing is the forum in which to do this.
>
> We see this as particularly important at this juncture, because the Tribunal has already had preliminary thoughts about the evidence and the process. It is up to the Board to take into account everything that is relevant and give Mr. Graham the benefit of the doubt. We want to be sure that the Tribunal has a full understanding of our arguments on these matters.

[87] On May 9, 2005, Mr. Wright replied to Mr. Marshall that the Tribunal did not agree to hold an oral hearing and that no such commitment had been made in previous correspondence. Mr. Marshall then wrote on May 12 in which he stated: "If the Tribunal will not allow us the opportunity to make oral submissions, we will want to

file some further argument on our application for the rehearing." The Tribunal agreed to accept further written submissions. In those further submissions, Mr. Marshall repeated his argument as to why there should be an oral hearing. The Tribunal did not comment on this point in its decision rejecting the application.

[88] In my opinion, the only agreement reached by the parties was that the Tribunal would reconsider the application for a rehearing and Mr. Graham would discontinue the judicial review application. There was never a mutually understood agreement to hold an oral hearing. There was no commitment by the Tribunal to do so. But, the question to ask is whether the duty of fairness in this case required an oral hearing.

[89] As discussed in *Baker (supra)*, there is no automatic entitlement to an oral hearing in the absence of some statutory dictate. Many administrative hearings proceed on the basis of written submissions only. The question in each case is whether, considering the circumstances, the persons affected had a meaningful opportunity to present their case fully and fairly.

[90] The applicant's submission on this point comes down to saying that this is a difficult case to understand. An oral hearing would provide some assurance that the Tribunal fully understood the evidence.

[91] I agree that this is a difficult case to understand. There is a great deal of information and many opinions from medical specialists, much of it conflicting. But I think it is significant that no request was ever made by the applicant to have witnesses appear for questioning. There were no issues of credibility raised. All of the information was in written form. This fact alone distinguishes this case from ones relied on by applicant's counsel, such as *Melanson* v. *Workers' Compensation Board* (1994), 146 N.B.R. (2d) 294 (C.A.).

[92] Here the Tribunal was considering a request for a rehearing. It had a discretion as to how to proceed. In my opinion, it afforded the applicant a necessary level of procedural fairness and there was no obligation to hold an oral hearing.

Errors of Law:

[93] Applicant's counsel also raised a number of issues which he characterized as errors of law. He submitted that the Tribunal failed to address the relevant legal and medical issues, failed to "recognize evidence as evidence", and failed to apply the correct burden of proof to the issue of causation. The Board's counsel responded that all of these points come down to a consideration of whether the Tribunal posed the right questions for itself.

[94] The point about the Tribunal failing to recognize evidence can be addressed briefly. It is in effect a submission that the Tribunal failed to weigh or consider the conflicting evidence as to causation. Applicant's counsel argued that it is evident that the Tribunal treated Dr. Keegan's opinion as over-riding all other opinions.

[95] In my opinion there is simply no substanceto this argument. The questionasked by the Tribunal was whether there was new evidence which might result in a different outcome. It had before it not just Dr. Keegan's reports but also the further submissions of applicant's counsel including their doctors' reports. It would be utter speculation to conclude that the Tribunal did not take all of this information into consideration.

[96] When I consider the applicant's submissions under this heading, it is apparent that they encompass two substantive complaints: (a) the Tribunal applied a wrong test for causation; and, (b) it misapplied the burden of proof.

[97] Applicant's counsel argued that the Tribunal, in upholding the earlier review committee decision, erred by applying a test of exclusivity on the causation issue. He pointed to the reference to the need to determine a "clear causal relationship". This, it was argued, ruled out the possibility of there being more than one cause for the applicant's condition. The review committee's decision was described as follows in the Tribunal's 1998 reasons:

> On February 14, 1995, the Review Committee rendered its decision and denied the worker's appeal. The Committee acknowledged that the worker had received a head injury during the October 19, 1977, accident. However, the evidence on file indicatedthat the workerhad fully recovered from the effects of that injury and was found fit to return to work. The worker subsequently suffered a number of severe traumas, including a diagnosed closed head injury in 1982, and as a result the Committee could not determine a clear causal relationship between the worker's current condition and the accident of October 19, 1977.

[98] The Tribunal upheld the review committee's decision on the same basis. It "could not determine a clear causal relationship between the appellant's current condition and his October 19, 1977, accident."

[99] Applicant'scounsel submittedthat workers' compensation law generally follows tort law on questions of causation. I agree (although I think there is nothing to prevent a Board, as part of its policy-making function, to develop a policy whereby causation principles differ from those applied by tort law). What this means in this case is that causation is to be determined on the "but for" test. The applicant has the burden of showing that "but for" the 1977 accident he would not suffer from his current disabilities. There must be a substantial connection between that accident and the applicant's current condition. This does not rule out multiple causes for his condition. As recently confirmed by the Supreme Court of Canada, the basic and primary test for determining causation is the "but for" test and this applies as well to multiple cause injuries: *Resurfice Corp.* v. *Hanke*, [2007] S.C.J. No. 7 (at para. 21).

[100] Causation is criticalin any compensation case becausethe fundamentalprinciple is that a worker is entitled to compensation only for injuries resulting from a work-related accident: see s. 14(1) of the Act. There is no evidence that any of the other incidents or accidents suffered by Mr. Graham, either before or after 1977, were related to employment in the Northwest Territories. Hence causation *vis-à-vis* the 1977 accident is the important question. His disability is compensable only on the basis of its connection to it. This was recognized by the Tribunal in its 1998 decision:

> It is not the mandate of the WCB to provide compensation for non-work related injuries. It is, therefore, paramount that the Appeals Tribunal has in their possession the medical evidence, which can separate the cumulative effects of non-work related injuries.

[101] In my opinion, the need for a "clear causal relationship" is not the applicationof a test of exclusivity. It is, on the contrary, the application of the "but for" test. Is there a substantial connection between the 1977 accident and the applicant's current condition? That was the question the Tribunal had to answer in 1998. That does not rule out other causes (such as the 1982 accident) that may also have a substantial connection to his current condition. But it recognizes that there must be some causal connection to the 1977 accident. And this the Tribunal failed to find in 1998.

[102] In 2005, the question was whether there was new evidence that may affect this decision. The Tribunal concluded that there was none. This is an exercisein weighing the evidence presented. And this is fundamentally a factual exercise for which the Tribunal is owed deference. This is not a question of law. This point was made by

Fruman J.A., on behalf of the court, in *Alberta (Workers' Compensation Board)* v. *Appeals Commission (supra)*, at para 69:

> Weighing evidence is generally characterized as a question of fact, as factual conclusions result from the weight assigned to the underlying evidence: Housen at para. 23. See also R. v. Spencer,2002 ABCA 32 at para. 13. There is a legal aspect to the Appeals Commission's weighing of evidence because it had to decide whether Mr. Davick suffered an injury in the accident that entitled him to benefits under workers' compensation legislation. However, the question raised by the WCB in this case, the weight given to expert medical evidence, does not have the traditional ear-marks of a legal issue: there is no legal principle or test involved and the question is specificto the case, lacking in precedential value: Southam at para. 37. Nor is there any extricable legal question. The question in issue is highly fact intensive, attracting a more deferential standard of review: Dr. Q. at para. 34.

[103] In my opinion, the fact that the Tribunal preferred some evidence over others cannot be said to be clearly irrational or patently unreasonable, much less an error of law. Whether I may have weighed the evidence in the same manner is irrelevant.

[104] I should add that, as the applicant's counsel noted, there are instances in the various doctors' reports where there are statements and perhaps mis-statementsof legal causation tests. But just because the doctors may have mis-stated those tests does not necessarily mean that the Tribunal adopted them. There is no obvious defect in the Tribunal's decision that would satisfy the test that must be applied in this case, that being patent unreasonableness.

[105] Applicant's counsel, however, also pointed to the Tribunal's emphasis on a "*clear* causal relationship" as indicative of a misapplication of the burden of proof. Counsel quite correctly noted that, while in tort law, the burden of proof is on the plaintiff to establish his or her case on a balance of probabilities, in workers' compensation cases the worker is relieved of that burden. What that means is that, if the probabilities are evenly balanced, under the workers' compensation scheme the worker succeeds, but in tort law the defendant wins. This is reflected in s. 7(5) of the Act:

> 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 evidenceadduced and medicalopinions draw all reasonable inferences and presumptions in favour of the worker.

This principle is also reflected in a "Statement of Policy" issued by the Board which, by reason of s. 7.7(1) of the Act, the Tribunal must apply.

[106] What the applicant's counsel is requesting is that I go behind the Tribunal's decision, review the material, and then engage in a weighing process, to conclude that the Tribunal had no choice, in the face of the conflicting evidence, but to resolve the conflict in favour of the applicant. But that is what I am not permitted to do. As many cases have said, in reference to the test of patent unreasonableness, the focus of a reviewing court's inquiry must be on the existence of a rational basis for the decision under review. The Tribunal here was engaged in an essentially fact-driven exercise, based on weighing conflicting medical opinions. I cannot step into their position and say that it was patently unreasonable not to find in favour of the applicant. The applicant's arguments assume that the outcome, in light of the conflict in the evidence, must be one where the probabilities are evenly balanced. That is the only cause for relying on the burden of proof. But there is no evidence that that must be the only reasonable outcome. And mere disagreement with the outcome does not make the decision patently unreasonable.

[107] Earlier in these reasons I said that this application cannot become a review of the 1998 decision. I have referred to it here because otherwise the applicant's argument as to errors of law would not be comprehensible. It was necessary to refer to it in order to have the context for this argument in reference to the 2005 decision. This should not be understood as in any way amounting to a review of the 1998 decision.

[108] Does it make any difference that the Tribunal's decision merely sets out the criteria it applied for itself and its conclusions? I think not. The jurisprudence has not gone so far as to require extensive explanatory reasons for every administrative decision (in the absence of some statutory requirement). Again it is a flexible requirement that varies with the circumstances of the case. It is an aspect of procedural fairness and not a substantive right. But I think it is significant that the Tribunal specified the factors that it applied in coming to its decision. Nothing was argued before me to the effect that those factors were either irrelevant or irrational. Furthermore, the highly discretionary nature of the decision would not ordinarily require more. There is nothing to suggest that the Tribunal did not consider all of the evidence and, since the responsibility of the reviewing court is not to engage in an analysis of the merits of the decision but on the process by which that decision was reached, the lack of fuller reasons is not fatal.

Conclusions:

[109] In this case the Tribunal was asked to consider a request for a rehearing of the applicant's appeal. The question before it was whether there was cogent evidence establishing a causal connection between the accident in 1977 and the applicant's current condition. In 1998 it decided there was no such evidence. In 2005 it decided that there was no new evidence that might lead to a different outcome. The Tribunal had before it substantive submissions and medical evidence from the applicant. Its decision was a highly fact-driven one. It exercised a discretionary power in a manner that met the requisite standards of procedural fairness, independently and without evidence of prejudgment, and without legal error.

[110] In these circumstances a court should not interfere in the absence of some obvious defect. I conclude there is none. The application for judicial review is therefore dismissed. Costs, if demanded, may be spoken to.

J.Z. Vertes
J.S.C.

Dated this 1st day of August, 2007.

Counsel for the Applicant: T.G. Ison & A.F. Marshall

Counsel for the Respondent (WCB): G.A. McKinnon

Counsel for the Respondent (Appeals Tribunal): J.J.P. Donihee

Docket: S-0001-CV-2005000278 &
S-0001-CV-2004000076

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

TIMOTHY GRAHAM

Applicant

- and -

WORKERS' COMPENSATION BOARD OF THE
NORTHWEST TERRITORIES AND NUNAVUT
and THE APPEALS TRIBUNAL

Respondents

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE J.Z. VERTES
