

Court of Queen's Bench of Alberta

Citation: Shuchuk v. Alberta (Workers' Compensation Board, Appeals Commission), 2005 ABQB 526

Date: 20050725
Docket: 0403 23325
Registry: Edmonton

In the Matter of the *Workers' Compensation Act*, R.S.A. 2000, c. W-15 ("WCA")

And in the Matter of Appeals Commission Decision No. 2004-617 Made the 12th day of July 2004 Relating to Thomas Shuchuk Claim File 332-7549 ("the Decision")

Between:

Thomas Shuchuk

Applicant

- and -

Appeals Commission for Alberta Workers' Compensation

Respondent

**Reasons for Judgment
of the
Honourable Mr. Justice E.S. Lefsrud**

[1] This is an appeal under s. 13.4 of the *Workers' Compensation Act*, R.S.A. 2000, c. W-15 (the "Act") of a written decision of the Appeals Commission for Alberta Workers' Compensation ("Commission") dated July 12, 2004.

Background

[2] On April 10, 1992, Mr. Shuchuk (the “Applicant”) was injured in a motor vehicle accident in the course of his employment as a Rehabilitation Consultant with the Workers’ Compensation Board (“WCB”). His vehicle was struck from behind while stopped at an intersection. He was wearing his seatbelt at the time and his head did not strike any object inside the vehicle.

[3] The Applicant returned to work part-time on April 11, 1992 but was unable to continue after a short time and went on medical leave.

[4] The WCB initially accepted that the Applicant suffered soft tissue injuries to his cervical spine and low back. He was paid temporary total disability (TTD) benefits on a continuous basis from April 11, 1992 until April 3, 1996.

[5] Following the accident, the Applicant sought treatment for a number of psychological/psychiatric symptoms.

[6] In February 1993, the WCB terminated the Applicant’s employment.

[7] In January of 1995, after being assigned as the third case manager, Randy Wolfert insisted that the Applicant attend for further neuropsychological examinations by a separate neuropsychologist. The Applicant’s treating experts and Dr. Truscott (WCB’s psychological consultant) recommended against such a step for fear of the Applicant suffering an emotional collapse.

[8] On April 3, 1996, the WCB terminated the Applicant’s TTD payments retroactive to October 1, 1992 on the ground that there was insufficient evidence to substantiate that he had an ongoing brain injury and psychiatric problems. The Applicant asked the Claims Services Review Committee (“CSRC”) to review this decision. The CSRC upheld the WCB’s decision on October 6, 1998.

[9] The Applicant appealed the termination of his TTD benefits before the Commission on July 13, 1999 and the Commission ordered reinstatement of benefits on August 19, 1999, finding that the Applicant had suffered a mild traumatic brain injury and psychological/psychiatric problems which had arisen out of the mild brain injury.

[10] The WCB then advised the Applicant that he would be required to undergo a further psychological assessment. The parties could not agree on reinstating benefits pending this testing and a file review was done instead of an assessment.

[11] The Applicant’s benefits were terminated effective June 30, 2000 under s. 33 (now s. 38) of the Act on the basis that he refused to undergo an examination by a physician selected by the WCB. He asked the CSRC to review the suspension of benefits and the WCB’s refusal to pay for psychological counseling. The CSRC denied the appeal on February 28, 2001.

[12] The Applicant appealed to the Commission, which determined on September 28, 2001 that he continued to be totally disabled from employment and directed that TTD benefits be reinstated. The Commission also concluded that the Applicant's treating psychologist was entitled to payment for reports and counseling.

[13] On October 31, 2001, the WCB (as the employer's representative) requested reconsideration of the August 19, 1999 Commission decision. The WCB also requested reconsideration of the September 28, 2001 Commission decision, but this request was subsequently withdrawn.

[14] On January 23, 2002, the Board of Directors of the WCB passed a motion directing the Commission to rehear the September 28, 2001 appeal and stayed the decision of that date pending the rehearing.

[15] On November 1, 2002, the Commission issued a reconsideration decision with respect to its August 19, 1999 decision. The Commission granted the reconsideration application based on a 1997 report written by Dr. Paul Darlington which the WCB argued was substantial new evidence that could not have been presented to the original panel. It was determined that the Commission would reconstitute a panel to rehear the appeal.

[16] In a March 25, 2003 letter, the Commission advised the parties the rehearing of the two previous decisions would be conducted as a single hearing by a newly constituted five-member panel.

[17] The Commission rendered the decision which is the subject of this appeal on July 12, 2004. It concluded that the evidence did not support a finding that the Applicant suffered a brain injury as a result of the motor vehicle accident. It found that he did suffer a psychiatric or psychological condition that was compensable under WCB Policy ADJ-39. The Commission further found that, after December 31, 1996, his psychiatric or psychological condition was no longer a result of an emotional reaction to the accident.

Issues

[18] The Court must determine the following issues:

1. What is the appropriate standard of review?
2. Did the Commission commit a reviewable error?

Standard of Review

[19] The factors to be addressed when taking a pragmatic and functional approach to determining the appropriate standard of review are set out in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982:

- the presence of a privative clause
- the expertise of the tribunal
- the purpose of the act as a whole and the provision in particular, and
- the nature of the problem in question.

Presence of a privative clause

[20] Section 13.1 of the Act provides that the Commission has exclusive jurisdiction to examine, inquire into, hear and determine all matters and questions arising under the Act and regulations, and that the decision of the Commission is final and conclusive and not open to review or question in any court. Subsection (9) provides that no proceedings by or before the Commission shall be restrained by injunction, prohibition or other process or proceedings in any court or are removable by *certiorari* or otherwise into any court. Prior to amendments passed in 2002, it was held that the appropriate standard of review for Commission decisions was patent unreasonableness: ***Ramey v. Alberta (Workers Compensation Board)*** (1997), 200 A.R. 59 (C.A.); and ***Sammut v. Alberta (Workers Compensation Board Commission)***, [2002] A.J. No. 425, 2002 ABCA 87.

[21] Section 13.4(1) of the Act, which was added in 2002, provides that: “ The Board and any person who has a direct interest in a decision of the Appeals Commission made pursuant to section 13.2 may appeal the decision to the Court of Queen's Bench on a question of law or jurisdiction.” At the same time as the s. 13.4 appeal provision was added, the right of the WCB to request a rehearing was removed. The appeal provision does not allow the Court to substitute its own decision, but only to confirm or set aside the Commission’s decision (s. 13.4 (11)). The courts have considered whether this legislative change affects the standard of review. Belzil J. held that it did not: ***The Workers' Compensation Board v. Appeals Commission (Labounty)*** (2003), 332 A.R. 342, 2003 ABQB 233, ***Bachmann v. Alberta (Workers' Compensation, Appeal Commission)*** (2003), 350 A.R. 14, 2003 ABQB 975. Subsequent decisions have come to the opposite conclusion: ***Akita Drilling v. Alberta (Workers' Compensation, Appeal Commission)***, [2003] A.J. No. 1562, 2003 ABQB 1030, ***Nabors Canada v. Alberta (Workers' Compensation Appeals Commission)***, [2004] A.J. No. 1484, 2004 ABQB 856, ***Alberta (Workers' Compensation Board) v. Appeals Commission***, [2005] A.J. No. 233, 2005 ABQB 161. Moen J. found in the latter case that the appeal clause militates in favour of a standard of review of reasonableness *simpliciter* for questions of mixed fact and law, and possibly correctness for questions of pure law.

[22] Given the right of appeal on questions of law and jurisdiction, it is logical to conclude that issues of law or jurisdiction enjoy lower protection than questions of pure fact, which are still subject to the full privative clause. I am persuaded by the reasoning in the cases cited above which concluded that the real purpose of the amendments was not solely to remove the right of the Board to direct a rehearing.

Expertise of the tribunal

[23] The Commission generally has expertise with respect to decisions within its statutory and

policy mandate regarding injured workers and their claims: *Medicine Hat (City) v. Wilson* (2000), 271 A.R. 96, 2000 ABCA 247 and numerous other cases. Any dispute between the parties with respect to this factor really centers on the nature of the problem in this case, which is discussed at length below.

Purpose of the Act

[24] The Act is intended to enable workers to obtain compensation for work related injuries without the need for court proceedings. Ideally, this is a more expeditious route than the court system, although not necessarily so as is demonstrated by the history of this matter.

Nature of the problem

[25] The proper characterization of the problem in this case is the major point of disagreement between the parties with respect to the appropriate standard of review.

[26] The Applicant submitted that the issues confronted by the Commission were medical conditions and causation of the same which are fundamental issues of tort law, that the impugned findings amount to questions of law and jurisdiction, and that the appropriate standard is reasonableness *simpliciter*. The Applicant reasoned that the Commission made a medical determination of the existence of a psychological injury and then determined a date when the initial cause of the injury ceased without any basis for its findings, thereby exceeding its jurisdiction. The Commission admitted that it chose the date, December 31, 1996, arbitrarily.

[27] The Applicant also argued that the Commission placed too much weight on WCB's highly paid experts. Further, the Commission exceeded its jurisdiction by ignoring its own policy in failing to give the benefit of the doubt to the worker in the face of conflicting evidence. Finally, the Commission erred in failing to resolve any uncertainty as to the interpretation of the legislation and policies of the WCB in favour of the worker.

[28] The WCB submitted that the appeal focuses almost entirely on questions of fact, and therefore the standard of review is patent unreasonableness. It agreed that on questions of law or jurisdiction, the appropriate standard is reasonableness *simpliciter*. It argued that the Applicant really takes issue with the factual conclusions of the Commission, which rendered a decision after a review of very extensive and complicated evidence presented over many days of hearings.

[29] The Commission noted that it clearly indicated that the questions before it were ones of mixed fact and law, i.e. did the worker suffer a brain injury as a result of the motor vehicle accident, and did the worker suffer a psychiatric or psychological disability as a result of the motor vehicle accident?

[30] The central conclusion of the Commission with which the Applicant takes issue is that there was at least one non-tortious intervening cause which extinguished the link between the accident and the Applicant's condition so as to render it non-compensable.

[31] None of the parties suggested that the rules of causation are any different under Workers' Compensation practice than those applied in Canadian torts law. Côté J.A. commented in *Medicine Hat (City) v. Wilson* (2000), 271 A.R. 96 at paras. 38 and 39, 2000 ABCA 247:

It is true that in Canadian torts law, any factor which contributed to the injury more than *de minimis* is a cause: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 203 N.R. 36. And as such, its author may be 100% liable, if the other causes are non-tortious: *ibid*. But the Policies of the Commission cited in this case do not seem to me to lay down a different rule. Nothing else was shown to us which would make the rule of causation different under Workers' Compensation practice. The Workers' Compensation Board intervened before us, and provided written and oral argument. Its counsel assured us that where a worker's injury is contributed to by several things, only one of which comes from the employment, full compensation is payable so long as the worker remains unable to work. I see nothing in the affidavits or law cited to us to show the contrary.

Even if the test were different in court and before the Workers' Compensation Board, one would have to consider whether the Legislature had replaced the former with the latter. There is no need to go to that question in this case.

[32] I therefore proceed on the premise that the Commission must apply the rules of Canadian tort law when considering the issue of intervening cause, subject to the application of any relevant WCB policies. It was not suggested that the applicable policies in this case conflicted with or had the effect of superceding the usual tort law rules.

[33] It is often difficult to determine whether a problem is one of fact, law, or mixed fact and law. In *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 16, Major J. for the Court stated:

[para16] In *Snell v. Farrell*, *supra*, this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475, at p. 490, and as was quoted by Sopinka J. at p. 328, it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.

Although the Court in *Athey* held that hypothetical events can be factored into the calculation of damages according to degrees of probability, it emphasized that causation of the injury must be determined to be proven or not proven.

[34] *St. Jean v. Mercier*, [2002] 1 S.C.R. 491 was a case arising out of Quebec, and therefore distinguishable in many respects. However, in discussing the proper characterization of questions of causation, Gonthier J. for the Court stated at para. 104:

[para104] In the determination of fault one applies norms of behaviour required by law to a set of facts. This obviously makes the question one of mixed law and fact. In contrast, in the determination of causation one is inquiring into whether something happened between the fault and the damage suffered so as to link the two. That link must be legally significant in an evidentiary sense, but it is rendered no less a question of fact.

[35] It is fair to conclude that a determination as to whether a causal link exists is a question of fact. Can the same be said of the question of whether a non-tortious intervening cause severed the link between the initial injury and the medical condition? Major J. stated in *Athey* at para. 32:

[para32] ...The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss. In the cases referred to above, the intervening event was unrelated to the tort and therefore affected the plaintiff's "original position". The net loss was therefore not as great as it might have otherwise seemed, so damages were reduced to reflect this.

[36] In determining the effect of an intervening non-tortious event, for example dismissal from work as in this case, the decision maker must consider whether the subsequent non-tortious event would have created the same losses that the Applicant suffered as a result of the initial motor vehicle accident, even if the motor vehicle accident had not occurred (L. Klar, *Tort Law*, 3rd ed. (Toronto: Thomson Carswell, 2003) at p. 414 and cases cited therein). In other words, in this case, the Commission was bound to assess how the Applicant's apparently healthy initial position would have been affected by the non-tortious causes, being his dismissal and the adjudicative events which he has endured. While elements of this determination are largely factual, the intervening cause analysis requires the proper application of the law and relevant WCB policies. The test for causation is a matter of law and failure to establish and apply the correct test is an error of law: *Meyers (Next Friend of) v. Moscovitz*, [2005] A.J. No. 277, 2005 ABCA 114.

Conclusion on Standard of Review

[37] I find that the patently unreasonable standard continues to apply to the Commission's decisions on questions of pure fact. I further find that some greater degree of deference is indicated by the appeal provision, and that for those legal or jurisdictional questions which are within the

bailiwick of the Commission, the reasonableness *simpliciter* standard generally applies. Further, the Court of Appeal has held in a number of cases, including *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, [2004] A.J. No. 1098, 2004 ABCA 309, that the standard of review of a question of mixed fact and law will vary depending on the degree to which the alleged error relates to a legal principle, or to a factual finding. I conclude that where an alleged error relates more to a legal principle than to a factual finding, the reasonableness *simpliciter* standard applies. Where it relates more to a factual finding, the patently unreasonable standard applies. I will specify the standard of review being applied with respect to the various issues in my analysis of the Commission's decision.

Commission's Decision

[38] The Commission's 46 page written decision in this case followed eight days of hearing. The decision refers to the numerous expert reports placed before the Commission. Although counsel for the Applicant attempted to construe the Commission's preference of certain medical opinions over others as contrary to policy, and therefore something other than a purely factual issue, in my view this was simply an issue of attribution of weight to the evidence, which in this case is subject to the patently unreasonable standard, and I find that the Commission's conclusions on the absence of a brain injury are supported by evidence and therefore are not patently unreasonable. WCB's "Benefit of Doubt" Policy GEN-6 does not apply where the Commission is persuaded on a balance of probabilities, which it stated that it was with respect to that issue.

[39] The further findings are more problematic. The evidence before the Commission as to the Applicant's pre-accident status was that he was physically and mentally healthy and had an excellent work record. The parties before the Commission acknowledged that the Applicant was disabled as a result of a psychiatric or psychological condition following the accident. The Commission found that the evidence supported that he has had a psychiatric or psychological condition, but it expressly made no finding as to the correct diagnosis. This failure to make any determination as to diagnosis creates some difficulty in understanding the Commission's further findings, particularly as to cessation of the condition.

[40] The Commission found that although the Applicant had not suffered a brain injury as a result of the accident, his psychiatric or psychological disability initially resulted from an emotional reaction to one or a combination of the accident, injury, physical disability or treatment process, bringing it within the parameters of WCB Policy ADJ-39. That Policy provides:

POLICY:

Section 19(1) [now s. 24(1)] of the Act provides the Board may pay compensation to a worker who suffers "personal injury" by an accident. The term "personal injury" includes physical, psychiatric and psychological disability.

GENERAL:

01 ENTITLEMENT CRITERIA

The Board will consider a claim for a psychiatric or psychological disability where the condition results from:

- a) a head injury, exposure to toxic chemicals or gases, anoxia or any other injury, disease or condition causatively connected to organic brain damage, or
- b) an emotional reaction to an accident or injury, or
- c) an emotional reaction to physical disability, or
- d) an emotional reaction to the treatment process.

[41] The Commission referred to evidence to the effect that the Applicant's condition was improving during the fall of 1992 and in January 1993. The documents cited include a record of a telephone conversation dated January 26, 1993, where the case manager recorded that the Applicant was still trying to deal with significant depression, although he was less prone to distraction, and medical reports of Dr. O'Callaghan to the effect that improvement would be in the usual course for what he diagnosed at that point in time as a vestibular disturbance.

[42] Depression and cognitive difficulties were noted soon after the accident and continued to the time of his lay off. The record reveals that the Applicant was on anti-depressant medication and was attending regular counseling sessions periodically from the time of the accident to the time of his lay off. There is some indication in the evidence that his back problems were alleviated to some extent during that period, but there was no satisfactory resolution of his mental difficulties noted in the reports during that time period, other than a slight improvement in his memory problems. The case manager's report of a discussion with the Applicant's psychologist, Terry Peacock, dated February 16, 1993 indicates the Applicant "has generally gotten worse". The Applicant's employment was terminated on February 26, 1993. In a memorandum dated February 28, 1995, the WCB case manager indicated that since the date of the accident, there had been no progress in the worker's condition. The Commission does not refer to any of this evidence in concluding that his condition had been improving before his employment was terminated.

[43] The Commission noted the significant body of evidence in the years following that the Applicant suffered sustained psychiatric or psychological disabilities. At paras. 165 to 167 of its decision, the Commission stated:

[165] After this initial period of time, the ability to make any conclusion regarding the cause and the progression of an emotional reaction is complicated by the following significant characteristics of this claim:

[165.1] The diagnostic and treatment efforts after the accident focused on the presumption of a brain injury.

[165.2] There [have] been shifting diagnoses of Mr. Shuchuk's condition over the almost 12 years since the date of the accident.

[165.3] The WCB was both the worker's employer and the administrator of a controversial claim for an unusual injury.

[165.4] The worker's employment relationship with the WCB was increasingly strained following the date of the accident.

[165.5] The worker's employment relationship with the WCB was severed sometime after the date of accident.

[166] We find the fact the worker's employer was also the administrator of the worker's compensation claim is an unusual and unique feature and has had significant impact on the worker's "emotional reaction" following the accident.

[167] Shortly after the accident, there was already some evidence of a strained employment relationship developing...

[44] The Commission found that the Applicant's employment with the WCB was terminated as a result of organizational restructuring and there was no indication that the termination was related to his accident or the administration of his claim. The Commission further found that he had a significant emotional reaction to his lay off and "adjudication events" during the course of processing his claim. (The evidence indicates that the prominent symptoms he suffered following his layoff included severe depression, often manifested by tearfulness - symptoms he had been experiencing prior to the lay off, depression being noted as early as April 24, 1992.) The Commission found that the WCB's dual role as employer and claim administrator exacerbated the Applicant's situation.

[45] The Commission reviewed the medical evidence and the course of the claim adjudication and stated at paras. 173 to 182 of its decision:

[173] Given this substantial body of evidence, we must determine whether the aspects of the psychiatric or psychological disabilities continued to be as a result of an emotional reaction to one or a combination of the accident, injury, physical disability and/or treatment process.

[174] One significant complicating factor in determining a causal link between the worker's psychiatric or psychological condition and the accident, injury or treatment process is that the diagnostic and treatment efforts after the accident focused on the presumption of a brain injury.

[175] A further complicating feature of the evidence is that it is difficult to distinguish between the worker's emotional reactions as they relate to the accident, injury and/or treatment process, and the worker's emotional reaction to either employment circumstances or claim adjudication activities. The inextricable link of the WCB being both the worker's employer and the administrator of a controversial claim makes it extremely complex.

[176] Although, as indicated previously, we make no finding as to psychiatric or psychological diagnoses during the years following the accident, we find that sometime during the period between February 1993 (his termination from the WCB) and 1996 (when the brain injury suggestion was ruled out medically), the aspects of Mr. Shuchuk's psychiatric or psychological condition which could be related to the accident per ADJ-39 diminished sufficiently that it could be said the accident was no longer a causative factor in Mr. Shuchuk's ongoing psychological or psychiatric condition.

[177] The evidence indicates over the course of time from early 1993 onwards the worker's employment relationship with the WCB and the change in the nature of the course of adjudication of his WCB claim became increasingly significant and predominant factors affecting his psychiatric or psychological condition.

[178] By December 1996, the evidence indicates that the cause-and-effect relationship to the accident that was evident initially had diminished such that, on a balance of probabilities, the evidence no longer indicated such a connection. Over time and certainly by December 1996, the descriptions of Mr. Shuchuk's psychiatric/psychological condition can no longer reasonably be characterized as an emotional reaction to the accident, injury, physical disability and/or treatment process.

[179] While we find that this shift in the balance of probabilities has occurred, it is, due to the myriad of complicating factors, almost impossible to identify the specific date this would have occurred. We have selected December 31, 1996 somewhat arbitrarily and generously.

[180] By the end of 1996, there is a substantial change in the evidence relating to the worker's condition. During the course of the claim up to that time, there had been investigation and support for the belief and presumption that the worker suffered a brain injury as a result of the accident. There was substantial and compelling evidence, which we have discussed earlier in this decision, that the worker had not suffered a brain injury. In 1996, the conclusion was reached that, on a balance of probabilities, a brain injury was not likely to have occurred.

[181] Taking into consideration the maximum time with respect to the extensive medical investigation, we have determined the most appropriate date is the end of

1996 because that is when we are satisfied that the evidence is conclusive with respect to the brain injury, the causative relationship to the accident was substantially diminished and gave way to intervening complicating features predominately [sic] affecting his condition. This was a time at which the WCB's extensive medical investigation of the worker's condition ended and resulted in a conclusion that the worker's condition was not the result of a brain injury.

[182] Therefore, we conclude that the worker's psychiatric or psychological condition after December 31, 1996 can no longer, based on the balance of probabilities, be reasonably related to the accident.

[46] I find that the Commission's interpretation of WCB Policy ADJ-39 was unreasonable in that it required, in essence, that the Applicant's psychiatric/psychological condition must reasonably be characterized as an emotional reaction to the accident, injury, physical disability and/or treatment process. It identified the issue before it at para. 153 as being whether the Applicant's condition after the accident "falls within the description of an emotional reaction...as anticipated by WCB Policy ADJ-39 (b) (c) and/or (d)". In para. 156 the Commission considers evidence that indicates a number of symptoms that could be described as an "emotional reaction". In para. 159, the Commission finds that there are aspects of the condition "that can be described as an emotional reaction". In para. 165 the Commission states that after a certain period, the ability to draw a "conclusion regarding the cause and progression of an emotional reaction" is complicated by a number of factors. The Commission finds in para. 166 that the WCB's involvement had a "significant impact on the Applicant's emotional reaction following the accident". The Commission found at para. 169 that he had a significant "emotional reaction" to his lay off. At para. 172, the Commission found evidence that the Applicant had a significant and enduring "emotional reaction" that impacted his condition as a result of the adjudication events. The Commission concluded in para. 178 that by December 1996, his condition "could no longer reasonably be characterized as an emotional reaction to the accident".

[47] WCB Policy ADJ-39 provides for compensation where a psychiatric or psychological disability *results from* an emotional reaction. The Policy does not require that the disability *be* an emotional reaction. In other words, what is required is that the psychiatric or psychological disability be triggered by an emotional reaction; it does not require evidence of a continued emotional reaction to the traumatic event. If that were the case, it would be reasonable to conclude that most psychiatric/psychological disabilities triggered by single traumatic events would become non-compensable with the simple passage of time. Such an approach would constitute a radical departure from the principles of causation and remoteness in Canadian tort law, where mental illness generally is compensable when triggered by an emotional reaction: Klar, p. 427. To further illustrate the unreasonableness of the Commission's approach, if a similar approach is taken to entitlement under criterion (a) of the Policy, which provides for compensation for a disability where the condition *results from* exposure to toxic chemicals or gases, a continuing disability would become non-compensable when the exposure to toxic chemicals ceased. Again, this would constitute a radical departure from the principles of Canadian tort law.

[48] The wording of Policy ADJ-39 is clear. Had the Commission's interpretation been intended, the Policy would have provided for compensation for a disability which constitutes an emotional reaction or which results from a continued emotional reaction. The Act should be construed as remedial, and should be interpreted liberally so as to provide compensation for work-related injuries to as many as can reasonably be seen to fall within its purview: *Harry v. Alberta (Workers' Compensation Board)*, [2001] A.J. No. 1384 (Q.B.) at para. 30, Power J. citing *Dalling v. Prince Edward Island (Worker's Compensation Board)* (1994), 7 C.C.E.L. (2d) 157 (P.E.I.S.C.A.D.). Section 24 of the Act provides that compensation is payable to a worker who suffers personal injury by an accident. The Commission's interpretation and application of Policy ADJ-39 has the effect of narrowing the scope of the Act.

[49] This unreasonable interpretation plays a significant role in the analysis of intervening cause. The main issue in relation to intervening cause is not whether a person's unhealthy condition has been aggravated by subsequent events, but whether that person, if healthy, would have been rendered similarly unhealthy as a result of the subsequent events. That a person rendered psychologically or psychiatrically unhealthy has atypically intense emotional reactions to subsequent life events is not in itself evidence that those subsequent events would have provoked the same reaction in the same person had he been healthy.

[50] I have found that the applicable standard of review is reasonableness *simpliciter* for issues of law and mixed fact and law where the issue relates more to a legal principle than to a factual finding. I find that this is such an issue and therefore the reasonableness *simpliciter* standard applies, as Moen J. also concluded in another case involving application of WCB policy: *Alberta (Workers' Compensation Board) v. Alberta (Appeals Commission for Alberta Worker's Compensation)*, [2005] A.J. No. 233, 2005 ABQB 161. I find that the Commission's interpretation and application of Policy ADJ-39 is unreasonable and results in an undue restriction contrary to the purpose of the legislation.

[51] Further, the Commission's reasoning on the termination date (a factual finding to which the standard of patently unreasonableness applies) is irrational. It chose the end of 1996 as that was when the evidence was conclusive with respect to a brain injury.

[52] However, the Appeals Commission itself decided on August 19, 1999 that (p. 10):

...the weight of evidence supports that Mr. Shuchuk sustained mild traumatic brain injury as a result of the compensable motor vehicle accident of April 10, 1991 and as a consequence of the brain injury went on to develop psychological/psychiatric problems.

and on p. 12:

The commissioners having accepted Mr. Shuchuk sustained a mild traumatic brain injury as a consequence of the compensable injury, based on the above noted findings

conclude the weight of medical evidence supports that he remains temporarily totally disabled from employment beyond October 1992 as a direct consequence of the injuries sustained on April 10, 199[2]...

[53] It is difficult to see how the “evidence was conclusive” or how a brain injury was “ruled out” medically in 1996 when the Commission itself found three years later that the medical evidence supported a finding of brain injury.

[54] Furthermore, the Commission, in its decision of September 28, 2001 regarding reinstatement of benefits, concluded that the weight of evidence supported a finding that the Applicant’s disability “due to a work injury” continued to disable him from employment. The Commission found that his prognosis was very poor and that he was not expected to experience any further recovery.

[55] The new evidence before the Commission in 2003 in the form of Dr. Darlington’s report only dated back to the end of October 1997.

[56] In fact, the question of whether the Applicant had suffered a brain injury remained a live issue until the Commission ruled on it in the 2004 decision which is the subject of this appeal.

[57] The Commission might have meant that the WCB itself, or its specialists, had “ruled out” a brain injury, however there is no logical linking of that fact to the Applicant’s condition, nor does such a connection come to mind after reading the decision and the materials on the record.

[58] By using a date which it deemed to signify a new understanding as to the nature of the Applicant’s condition, the Commission must have reasoned that once the Applicant and/or his treatment providers realized he did not have a brain injury, he could no longer be said to be experiencing a condition which resulted from an emotional reaction to the accident, injury, physical disability or treatment process. It is difficult to understand how this revelation as to the nature of the condition would necessarily result in cessation of the Applicant’s particular psychiatric or psychological disability (which the Commission expressly declined to identify), and no satisfactory explanation is given in the Commission’s reasons. In any event, the Applicant and his treatment providers persisted in a belief that he had experienced a brain injury until the Commission’s decision of July 12, 2004 (and they likely continue to be of that belief to the present time, given the great controversy over this issue).

[59] The Commission failed to explain the significance of December 1996 in relation to the Applicant’s condition, nor is the same apparent on the record. The Commission acknowledged the difficulty it had in reaching a determination on this issue, and I concur in its position that the date chosen is arbitrary. While I am mindful of the caution in the above noted case law that causation need not be determined by scientific precision, I find the Commission’s decision on this point to be patently unreasonable.

[60] It was argued that the Court must review the record in order to determine whether the significance of December 1996 can be supported by the evidence on some other basis, such as the

Applicant's lay off and subsequent treatment by the WCB, which are also referenced in the Commission's decision. As stated above, the evidence indicates that the Applicant was healthy prior to the accident. The Western Rehabilitation Specialists Inc. completed a lengthy pre and post accident profile dated July 10, 1995, revealing that the Applicant was a very healthy, friendly, positive, energetic, active although sometimes verbose and disorganized person before the accident. He was hard working, competent, opinionated and generally well respected at work. His employment records indicate he was very successful in his work and was consequently rewarded, and that he could anticipate further promotions in the future. The evidence further indicates that the onset of his psychological/psychiatric condition occurred shortly after the accident.

[61] There is evidence to support a finding that the Applicant's condition worsened as a result of his lay off and subsequent dealings with the WCB. However, as stated above, the question which the Commission must address is whether the Applicant, had he been healthy, would have experienced this psychological or psychiatric disability as a result of the subsequent events. The Respondents argue that the necessary analysis and findings to support the December 1996 cut off are implicit in the decision and supported by the evidence. I have found that the Commission's interpretation of Policy ADJ-39 was unreasonable and that it made a patently unreasonable determination in choosing the date of termination of benefits based on a finding that a brain injury had been ruled out by December 1996.

[62] In keeping with s. 13.4(11)(b) of the Act, I refer the matter back to the Commission for reconsideration. I will leave it to the Commission on a reconsideration to undertake the appropriate analysis on causation.

Costs

[63] If the parties cannot agree, costs may be spoken to within 30 days of the filing of this decision.

Heard on the 20th day of May 2005.

Dated at the City of Edmonton, Alberta this 25th day of July 2005.

E.S. Lefsrud
J.C.Q.B.A.

Appearances:

Roy Nickerson
for the Applicant

Craig Neuman
for the Workers' Compensation Board

Sandra Hermiston
for the Appeals Commission