A Summary of Recent Notable Court Decisions
(plus a few classics)

Sandy MacIntosh
Workers' Compensation Appeals Tribunal
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Introduction

Decision-makers in the Workplace Safety and Insurance System have to interpret and apply the *Workers' Compensation Act* when making decisions regarding compensation, employer assessments or the right to bring a civil action. For federal employees in Nova Scotia, the *Government Employees Compensation Act* (GECA) must also be applied.

Decisions from the Courts instruct these decision-makers as to the correct interpretation and application of these Acts. In order to assist in understanding the rules that decision-makers must follow, WCAT has created this summary of recent significant Court decisions. It briefly describes the key principles from the Court decisions, including some quotes from the decisions.

As decision-makers must keep an open mind, we are always open to arguments that the author of this document may have misinterpreted a Court decision.

Case Name Index

Topical Index

The Workers' Compensation Board of Nova Scotia v. Johnstone (1999), 181 N.S.R. (2d) 247 (C.A.)

- **Causation**
- **Standard of Proof**

Mr. Johnstone, a coke oven worker, had sought recognition that his bladder cancer was a compensable occupational disease. WCAT recognized his claim. WCAT relied on generic evidence from another worker's file, where a specialist had stated that it would be reasonable to accept a bladder cancer claim for a non-smoker, where there is 10 years or more of coke oven exposure.

At the Court of Appeal, the Board had argued that WCAT erred in drawing an inference in favour of Mr. Johnstone, because no doctor had stated that Mr. Johnstone's cancer was causally connected to exposure in his workplace. The Court of Appeal held that WCAT was entitled to consider all circumstantial evidence, including: length and type of employment, the fact of the disease, the worker's non-contributory family history, evidence of carcinogens in the workplace, summaries of generic studies, and evidence that other workers in the same workplace developed bladder cancer. WCAT's decision was upheld.

At paragraphs 19, 35 and 25, the Court also interpreted section 187 of the *Workers' Compensation Act*, as follows:

> ... The worker has the primary burden of proof but, in the case of occupational illnesses as opposed to accidents, his or her knowledge is likely limited to the fact of the employment and the fact of sickness. His or her physician may not have the specialized knowledge to offer an expert opinion as to a causative link between the workplace and the malady. The Board has resources, investigative powers and expertise which may not be available to the worker. Section 187 of the new Act appears intended to offset this imbalance by relieving the worker of the requirement of proving his or her claim beyond the balance of probabilities.
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> ... In the s. 187 analysis in the case it would be more appropriate to say that the worker discharged his onus of showing on the whole of the evidence that there was a reasonable inference of causation that was at least evenly balanced with any other possible inference.
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> ... the onus was therefore thrown on the employer or the Board to introduce evidence casting doubt on the possibility to throw it into dispute. ... When there is no evidence raising a doubt, or if the evidence disputing the possibility is no stronger than the evidence in support of it, the decision must go to the worker. While s. 187 relieves that worker of proving the possibility he asserts to the civil standard of a preponderance of probabilities, the is no such relief in s. 187 for those opposing the worker's claim, who must meet the civil standard.

Ferneyhough v. The Nova Scotia Workers' Compensation Appeals Tribunal (2000), 189 N.S.R. (2d) 76 (C.A.)

- **Causation**
- **Survivor Benefits**

WCAT made the finding of fact that the Worker's occupational disease, pneumoconiosis, was 20% of the cause of the failure of his respiratory system that resulted in his death. It denied survivor benefits because it concluded that a 20% contribution was not a "substantial contributing factor" to Mr. Ferneyhough's death. The Court of Appeal reversed WCAT's decision and awarded survivor benefits. It found that this degree of contribution was material and not negligible. It also found that, but for the pneumoconiosis, Mr. Ferneyhough would not have died when he did.

The Court of Appeal discussed the causal link necessary to link an occupational disease to the death of a worker. At paragraph 17, it stated:

> ... It follows that causation for such purposes is established if it has been shown that the death would not have occurred "but for" the disease or if the disease was more than a negligible (or de minimis) contributing factor to the death.

Other descriptions the Court used were that the disease "contributed something", a "contributing cause", or that the disease contributed in a "material degree" to the worker dying when he did. At paragraph 20, the Court wrote:

> ... The correct standard by which to assess whether the required causal link has been established is that the occupational disease must be a contributing cause in the sense that, "but for" the occupational disease, death would not have occurred when it did or, that the occupational disease contributed to the death in a material degree. The term "material degree" should be understood, as it was in *McGhee* and *Athey*, to mean something beyond the de minimis range, that is, something that is not negligible.

Canada Post Corp. v. Nova Scotia (Workers' Compensation Appeals Tribunal) (Nurnber) (2004), 224 N.S.R. (2d) 276 (C.A.)

- **Causation**
- **Stress**
- **GECA**

This was a gradual onset stress claim under GECA. The Court of Appeal declined to address whether a gradual onset stress claim was compensable under GECA, as it found that WCAT made a fundamental error which allowed the Court to overturn WCAT's decision without deciding all issues.

The Court found that WCAT had erred by applying a legal test for causation that relied solely on medical opinions, to the exclusion of all other evidence. The Court stated that decision-makers cannot simply defer to medical opinions in determining causation. Instead all relevant evidence must be considered. At paragraphs 24 and 25, the Court stated:

> ... While, of course, expert opinion evidence will often be of great assistance in determining questions of causation, it neither necessary nor necessarily dispositive.
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> ... WCAT should weigh all relevant evidence and approach causation as a practical question of fact which can best be answered by ordinary common sense.

Durnford v. Workers' Compensation Board (N.S.) et. al. (2000), 188 N.S.R. (2d) 318 (C.A.)

- **Causation**
- **Deference to Hearing Officer findings**

This appeal concerned WCAT's finding that this blackjack dealer's tennis elbow symptoms arose out of her employment at the casino.

The Court clarified that the workplace does not have to be the sole cause of an injury or disablement to be compensable, and that disabling symptoms arising out of and in the course of employment were sufficient to establish a right to compensation. Also, it is not necessary to identify a specific pre-existing condition that causes one worker to be symptomatic, while others in the same workplace are not. At paragraph 19, the Court stated:

> ... when symptoms severe enough to cause "disablement" arise out of and in the course of employment, causation is established for purposes of the *Act*. It is not necessary to probe deeper and find the underlying medical reasons that one worker could develop disabling symptoms under the same workplace conditions that left other workers symptom free. The cause, in that sense, may be hereditary, the result of an old trauma, or even spontaneous. It is irrelevant to determining causation under the *Act*.

Ms Durnford had no history of tennis elbow, but became symptomatic within six months of working at the casino. The Court stated that it is relevant to consider the temporal relationship between work duties and a worker becoming symptomatic. The Court upheld WCAT's decision.

On WCAT's deference to Hearing Officer's findings, the Court stated at paragraph 12:

> ... the legislature could not have intended for the Tribunal to pay a high degree of deference to conclusions reached by the Board. Consideration of the additional factors requires an independent adjudicative assessment by the Tribunal and sharply curtains any deference that can be paid to conclusions, as opposed to findings of credibility or particular facts, by the hearing officer.

Nova Scotia (Department of Transportation and Public Works) v. Nova Scotia (Workers' Compensation Appeals Tribunal) (Puddicombe) (2005), 231 N.S.R. (2d) 390 (C.A.)

- **Definition of a Compensable Accident**

A snow plow driver, who had a car accident on a snow-covered road while commuting to work in response to an urgent call outside of normal work hours, was found to have suffered a compensable injury. The Court stated that generally, a worker will not be acting in the course of their employment while driving to or from work. However, while not performing a work duty, this particular snow plow driver was performing something directly related to his work duties. Also he was exposed to a special risk different than the general public when he responded to the employer's call to remove the very snow which caused his accident.

The Court said there is no comprehensive test for when an injury arises out of and in the course of employment. However, it did state at paragraph 27:

> ... the phrase 'in the course of employment' does not simply refer to things done pursuant to an employment contract, but also to things reasonably incidental to the performance of a contractual duty.

It also quoted with approval this passage at paragraph 37:

> The words "in the course of employment" refer to the time, place and circumstances under which the accident takes place. The words "arising out of employment" refer to the origin of the cause of the injury. There must be some causal connection between the conditions under which the employee worked and the injury which he received ....

Michelin North America (Canada) Inc. v. Workers' Compensation Board (N.S.) (2003), 211 N.S.R. (2d) 273 (C.A.)

- **Definition of a Compensable Accident**
- **Historic Compromise**

Some people develop a temporarily psychological disablement when their natural sleep/wake cycle is disrupted. The Court of Appeal reversed the finding of WCAT that the symptoms of Richard Ross' shift-work maladaptation syndrome arose out of and in the course of his employment. It stated that merely having symptoms manifest themselves at the workplace does not mean that the symptoms arose out of and in the course of employment. Normal working conditions, like the scheduling of an 8-hour shift, are not an "accident" under the *Workers' Compensation Act*.

At paragraph 14, the Court also discussed the historic compromise:

> A worker's right to be compensated under the Workers' Compensation Act for workplace injuries must be found within the Act itself, as interpreted in the jurisprudence. The right arose with what is known as the "historic tradeoff": workers lost the right to bring individual actions against their employers in return for access to a legislated scheme providing accessible compensation for a range of broadly-defined workplace accidents without the necessity of proving the employer at fault. Employers contribute financially to the scheme, which brings stability to the workplace and spares them the risk of ruinous damage awards. They retain an interest in the operation of the scheme because the more generous the benefits it provides for workers, the more employers are assessed to pay for it. This underlying tension is kept in balance by the legislation, including regulations and policies, as interpreted by the courts. While the concept of fault generally has no place in workers' compensation law, the scheme's adversarial origins should not be forgotten in attempting to understand its modern context. The economy of the language in which many of the principles are expressed should not be allowed to obscure basic concepts.

Thomson v. Nova Scotia Workers' Compensation Appeals Tribunal (2003), 212 N.S.R. (2d) 81 (C.A.).

- **GECA**
- **Statutory Interpretation**

The Court of Appeal found that it had jurisdiction to hear appeals of WCAT GECA decisions, reversing its earlier decision in *Salloum v. Workers' Compensation Appeals Tribunal (N.S.)* (2001), 190 N.S.R. (2d) 77.

Therefore, an appeal of a WCAT decision regarding compensation under GECA may be brought under s. 256(1) of the *Workers' Compensation Act*. The right of appeal under GECA is the same as the right of appeal of a decision regarding compensation under the *Workers' Compensation Act*. The Court stated at paragraph 19 that:

> ... it was Parliament's purpose to incorporate the procedural provisions, including rights of appeal, provided under provincial legislation, for workers in the federal sphere who are employed in the province. ... it was the legislation's purpose to ensure that cases under GECA should be addressed by the same machinery and tribunals as address workers' compensation claims within the province.

At paragraph 16, the Court set out the general test it uses in the interpretation of statutes (this test was also applied by the Court of Appeal in several other decisions):

> As in any case of statutory interpretation, the Court must strive to give the statute its most appropriate interpretation. The appropriate interpretation is to be arrived at by taking account of the statute's total context having regard to its purpose, the consequences of proposed interpretations and presumptions and special rules of interpretation. The appropriate interpretation is one which is plausible in the sense that it complies with the text of the statute, which is efficacious in the sense that it promotes the legislative purpose and that is acceptable, in the sense that the outcome is reasonable and just. : Ruth Sullivan (ed.) Driedger on the Construction of Statutes (3d, 1994) at 131.

Cape Breton Development Corporation v. Estate of James Morrison (2003), 218 N.S.R. (2d) 53 (C.A.).

- **GECA**
- **Statutory Interpretation**

Section 187, the benefit of the doubt under the *Workers' Compensation Act*, applies to claims of federal employees for compensation under GECA In general, a claim for compensation under section 4(1) of GECA is treated the same as if it were a claim for compensation under the *Workers' Compensation Act*. The Court also stated that the purpose of s. 187 is to correct the imbalance of resources between injured workers and the Board.

At paragraph 68 and 69, the Court quoted with approval this interpretation of the interplay between the two statutes:

> The provincial workers' compensation scheme governs claims submitted under GECA provided that:
>
> (a) the provision in issue is reasonably incidental to a "rate" or "condition" governing compensation under the law of the province, and
>
> (b) the provision is not otherwise in conflict with GECA.
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> ... Whether "reasonably incidental" in (a) is referred to as "integral" (*Smith*) or "sufficiently linked or connected to compensation" (*Bergeron* [1997] A.Q. No. 811), the concept is common in the jurisprudence. There must be a close nexus between the provincial provision sought to be invoked and compensation. Section 187 of the Nova Scotia Act is intended to correct the imbalance of resources of the Workers' Compensation Board and individual worker seeking compensation.

Burrell v. Nova Scotia (Workers' Compensation Appeals Tribunal) (2003), 212 N.S.R. (2d) 278 (C.A.)

- **GECA**

The Court of Appeal found that there may be some significance to the definition of accident in the *Workers' Compensation Act* explicitly including disablements, while the definition of accident in GECA does not explicitly include disablements. It directed WCAT to rehear the appeal.

Commentary: The former *Workers' Compensation Act* did not explicitly mention "disablement" in the definition of accident. However, the Nova Scotia Supreme Court interpreted the former definition of accident to include disablements (*Poan, Walker*). The Newfoundland Court of Appeal has recently interpreted the GECA definition of accident to include gradual onset stress, a disablement (*Rees*). In coming to that conclusion, the Newfoundland Court of Appeal applied the approach suggested by the Nova Scotia Court of Appeal when it decided *Cape Breton Development Corporation v. Estate of James Morrison.*

The WCB Board of Directors appear to accept that the GECA definition of accident implicitly includes disablements, as they have recently adopted a policy for the acceptance of gradual onset stress claims under GECA.

Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v. Laseur, [2003] 2 S.C.R. 504

- **Chronic Pain**
- **Charter Jurisdiction**
- **Equality Rights**

The Supreme Court of Canada held that WCAT could and should refuse to apply sections of the *Workers' Compensation Act* which violate the *Canadian Charter of Rights and Freedoms.* Implicit from the decision, Board decision-makers may have the same jurisdiction. At paragraph 29, the Court wrote:

> ... Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts.

WCAT has the power to decide general questions of law necessary to carry out its functions. At paragraph 52, it wrote:

> These questions include the law of contracts, evidence, causation, employment, corporate relationships, conflicts of law, administration of foreign workers' compensation schemes, and motor vehicles, to name but a few. Denying the Appeals Tribunal the authority to decide such questions would seriously impede its work and threaten the access by injured workers to a forum capable of deciding all aspects of their case.

The former section 10B and the former FRP Regulations violated the equality guarantee of the *Charter*, and were not justified as a reasonable limit under s. 1 of the *Charter*. Workers with chronic pain were treated differently than other injured workers. They were discriminated against due to their disability. At paragraph 90, the Court described some of the stereotypes:

> The troubling comments made by some case workers in the Laseur file appear to betray such negative assumptions. Thus, statements that Ms. Laseur had "fallen into the usual chronic pain picture" and that "[t]his is basically a chronic pain problem, perhaps even a chronic pain syndrome although she seems to be a very pleasant individual with not the usual features of this type of problem" were clearly inappropriate and suggest that Ms. Laseur's claim may have been treated on the basis of presumed group characteristics rather than on its own merits.

The Court summarized its reasoning at paragraphs 5 to 7:

> ¶ 5 In my view, the Nova Scotia Court of Appeal also erred in concluding that the challenged provisions of the Act and the FRP Regulations did not violate s. 15(1) of the Charter. By entirely excluding chronic pain from the application of the general compensation provisions of the Act and limiting the applicable benefits to a four-week Functional Restoration Program for workers injured after February 1, 1996, the Act and the FRP Regulations clearly impose differential treatment upon injured workers [page517] suffering from chronic pain on the basis of the nature of their physical disability, an enumerated ground under s. 15(1) of the Charter. In the context of the Act, and given the nature of chronic pain, this differential treatment is discriminatory. It is discriminatory because it does not correspond to the actual needs and circumstances of injured workers suffering from chronic pain, who are deprived of any individual assessment of their needs and circumstances. Such workers are, instead, subject to uniform, limited benefits based on their presumed characteristics as a group. The scheme also ignores the needs of those workers who, despite treatment, remain permanently disabled by chronic pain. Nothing indicates that the scheme is aimed at improving the circumstances of a more disadvantaged group, or that the interests affected are merely economic or otherwise minor. On the contrary, the denial of the reality of the pain suffered by the affected workers reinforces widespread negative assumptions held by employers, compensation officials and some members of the medical profession, and demeans the essential human dignity of chronic pain sufferers. The challenged provisions clearly violate s. 15(1) of the Charter.
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> ¶ 6 Finally, I am of the view that this violation cannot be justified under s. 1 of the Charter. On the one hand, budgetary considerations in and of themselves cannot justify violating a Charter right, although they may be relevant in determining the appropriate degree of deference to governmental choices based on a non-financial objective. On the other hand, developing a consistent legislative response to the special issues raised by chronic pain claims -- such as determining whether the pain is actually caused by the work-related accident and assessing the relevant degree of impairment -- in order to avoid fraudulent claims is a pressing and substantial objective. However, it is obvious that the blanket exclusion of chronic pain from the workers' compensation system does not minimally impair the rights of chronic pain sufferers. The challenged provisions make no attempt whatsoever to determine who is genuinely suffering and needs [page518] compensation and who may be abusing the system. They ignore the very real needs of the many workers who are in fact impaired by chronic pain and whose condition is not appropriately remedied by the four-week Functional Restoration Program. A last alleged objective of the legislation is to implement early medical intervention and return to work as the optimal treatment for chronic pain. Assuming that this objective is pressing and substantial and that the challenged provisions are rationally connected to it, however, they do not

minimally impair the rights or chronic pain sufferers. No evidence indicates that an automatic cut-off of benefits regardless of individual needs is necessary to achieve that goal. This is particularly true with respect to ameliorative benefits which would actually facilitate return to work, such as vocational rehabilitation, medical aid and the rights to re-employment and accommodation.

¶ 7 I thus conclude that the challenged provisions violate the Charter and should be struck down.

Huphman v. Workers' Compensation Board (N.S.) et al., (2001), 191 N.S.R. (2d) 384 (C.A.)

- **Chronic Pain**

The Court stated that an injury may have both a chronic pain and a non-chronic pain component. It also stated that a psychiatric condition connected to chronic pain is included in the definition of chronic pain. At paragraph 22, the Court wrote:

> There may very well be cases where a psychiatric condition does not come within the definition of chronic pain in s. 10A of the Act because it is not related to the chronic pain. However, that is not the case here. In view of the unchallenged factual finding of the Tribunal - that the appellant's psychiatric condition is connected to his chronic pain - that psychiatric condition comes within the definition of chronic pain in s. 10A of the Act.

Lloyd v. Workers' Compensation Board (N.S.) et al. (2002), 201 N.S.R. (2d) 368 (C.A.)

- **Chronic Pain**

The Court of Appeal found that an injury may have two components - It can have both a chronic pain component, and a non-chronic pain component.

MacEachern v. Nova Scotia (Workers' Compensation Board) (2003), 214 N.S.R. (2d) 302 (C.A.).

- **Stress**
- **Transitional Provisions**

Where a worker experienced stress before the current *Workers' Compensation Act* came into force (February 1, 1996), but did not file a claim until after February 1, 1996, the current definition of "accident" applies to their claim, including the stress exclusion. The Court applied principles from its earlier decisions in *Johnstone* and *Muise*. The general rule is that, except where a contrary intention appears, outstanding claims which arose prior to February 1, 1996 are determined under the current *Workers' Compensation Act*. At paragraph 16, the Court wrote:

> Although Mr. MacEachern was "injured" while the former Act was in force, his claim was first made under the current Act (subsequent to February 1, 1996). It is our view that the above comments from Muise are equally applicable to Mr. MacEachern's claim. There is no "contrary intention" leading to the conclusion that unclaimed events, such as this, are to be governed by the former Act. The claim must be adjudicated applying the current Act, including the current definition of "accident".

Children's Aid Society of Cape Breton-Victoria v. Nova Scotia (Workers' Compensation Appeals Tribunal) (2005), 230 N.S.R. (2d) 278 (C.A.)

- **Stress**

A Worker was in a discipline meeting. His unchallenged testimony supported an inference that there was a "real and imminent threat that the meeting was about to become physically violent." He was diagnosed with post-traumatic stress disorder following the meeting. The employer appealed WCAT's finding that the Worker had an acute reaction to a traumatic event. The Court of Appeal, without deciding the degree to which the test for a traumatic event was subjective/objective, upheld WCAT's decision (the Court declined to clarify this area of law, as both the employer and worker agreed that the correct legal test had both elements).

Meechan v. Nova Scotia (Workers' Compensation Appeals Tribunal) (2001), 196 N.S.R. (2d) 313 (C.A.)

- **Time Limits for Making Claims**

On December 24, 1976, Mr. Meechan fell eight feet from a ladder injuring his back. While he reported the accident to his employer (and filled out a WCB Accident Report which he gave his employer), a report of accident was never filed with the Board. He returned to work on January 2, 1977, but twisted his back that day while on a ladder. A report of accident was filed with the Board with respect to the second injury. The Board accepted the claim, and paid Mr. Meechan a temporary total disability benefit from January 5, 1977 to June 6, 1977. Most of the medical reports filed with the Board discussed the fall from the ladder. But, it was not until 1998, when Mr. Meechan was seeking a permanent medical impairment award, that he discovered that the first accident was never reported to the Board.

WCAT had found that Mr. Meechan was out of time to file a claim in 1998 for his December 24, 1976 accident. While, s. 186 is not mentioned by the Court of Appeal, it effectively found that WCAT failed to take into account the real merits and justice of Mr. Meechan's claims. It stated that the Board was aware of Mr. Meechan's back injuries from January 2, 1977 onward. The fact that the claim really flowed from the December 24, 1976 fall was really irrelevant given the unusual circumstances. First, both episodes occurred within five days, and both were back claims. Second, most of the medical reports referred to the fall from a ladder. Third, given that the Board paid over six months of temporary benefits, it knew then that it was dealing with a more traumatic injury than a twisted back.

Walsh v. Workers' Compensation Board (N.S.) et al. (2001), 190 N.S.R. (2d) 123 (C.A.)

- **Time Limits for Making Claims**

On May 10, 1977, Ms Walsh suffered a workplace injury resulting in a permanent impairment. While she informed the employer of the injury, she never filled-out a WCB Accident Report. She did not notify the Board of her injury until March 30, 1999 - 22 years after the accident.

The Court confirmed WCAT's decision that Ms Walsh was out of time to file a claim with the Board under s. 83 of the *Workers' Compensation Act*. The Court held that the Board could not extend the time to file a claim once five years had elapsed. At paragraph 10, the Court wrote:

> The Board, however, is only permitted to act to prevent injustice caused by delay in making a claim where the delay does not exceed five years. The claim here was not brought to the Board's attention until long after that period had passed, and, therefore, the Board had no power under the Act to award compensation.

Canada Post Corp. v. Nova Scotia (Workers' Compensation Appeals Tribunal) (Myatt) (2004), 222 N.S.R. (2d) 191 (C.A.)

- **Deference to Hearing Officer Findings**

WCAT had reversed a Hearing Officer decision. It preferred the evidence of Mr. Myatt to that of the employer, unlike the Hearing Officer who preferred the evidence of the employer's witnesses. The Hearing Officer's decision was based on oral testimony, while WCAT reviewed a paper record. The Court of Appeal found that WCAT failed to properly defer to the Hearing Officer's findings of fact based on oral testimony.

At paragraph 21, the Court described the nature of WCAT appeals, including their relationship to Hearing Officer decisions as follows:

> ... WCAT proceedings are of a hybrid nature, combining features of appeals de novo with reviews of the record; WCAT is to exercise an independent adjudicative function; WCAT's deference to findings of Hearing Officers is defined and limited by its statutory mandate and its hybrid role; courts should be wary of curtailing that independent adjudicative function by imposing a rule of deference not contemplated by the legislature; and, that WCAT owes deference to a Hearing Officer's finding of fact based on the assessment of oral testimony particularly where WCAT conducts a paper review and receives no additional evidence beyond that before the Hearing Officer.

Halifax Employers Association v. Workers' Compensation Appeals Tribunal (Nova Scotia), 2000 NSCA 86

- **Deference to Hearing Officer Findings**
- **Employer Assessment Appeals**

The Court of Appeal upheld the scheme of basing assessments on the industry in which a business is part of, as opposed to the principle activity of the business. At paragraph 44, the Court also discussed the jurisdiction of WCAT, stating that when it exercises a discretion, it does so on a correctness basis, not a review of the reasonableness of the Hearing Officer's exercise of discretion.

> In general, the Tribunal exercises on to it the same discretion as is exercised by the Board acting through a Hearing Officer.

Thermo Dynamics v. WCAT, 2005 NSCA 150

- **Employer Assessment Appeals**

Thermo Dynamics had been classified incorrectly resulting it the firm being over-assessed by the Board for several years. At issue was whether more than one year of over-assessment could be refunded to the firm.

Section 122 of the *Workers' Compensation Act* provides that where a firm is re-assessed to correct an error, the amount of the reassessment that can be refunded is restricted to the one year before the correction is made. WCAT held that the Board had no jurisdiction to refund any earlier over-payments.

The Court of Appeal held that s. 190, the Board's general discretion to extend any time limit, applies to s. 122 of the *Workers' Compensation Act*. It directed the Board to consider whether it should extend the one year limit and refund earlier over-assessments to Thermo Dynamics.

At paragraph 41, the Court stated:

> The power under s. 190 is discretionary. The circumstances of each particular case need to be carefully examined to see whether an "injustice" has occurred warranting an extension of time limits. It will be for the Board to begin anew, a thorough review of the appellant's file in order to decide whether it is a clear case where an "injustice" has occurred, which the Board if so advised, might decide to correct, pursuant to s. 190.

Boyle Estate v. Nova Scotia (Workers' Compensation Appeals Tribunal) (2004), 225 N.S.R. (2d) 69 (C.A.)

- **Interest**
- **Statutory Interpretation**

At issue before the Court was whether the Board can pay interest on delayed compensation. Mr. Boyle suffered a heart attack at work in 1988, and filed a claim with the Board in 1989. He passed away in 1994. After a series of appeals, his claim was finally accepted in 2000. His estate sought interest from the Board for the delayed compensation. The Court found that there was no authority allowing for the payment of interest. It found that "compensation ... as provided by this Part" in section 10(1) of the *Workers' Compensation Act* was restricted to forms of compensation authorized by the *Workers' Compensation Act*, a regulation, or a policy. At paragraphs 61 and 68, the Court wrote:

> ... The WCB and WCAT are not given the full remedial power of a court in a civil action. Section 10(1) states that the Board "shall pay compensation to the worker as provided by this Part". The last five words qualify the power to order "compensation".
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> As stated in Martin, the Workers' Compensation Act is a "comprehensive scheme". It is a complete code with a self-financing system of no-fault insurance. The Act specifies certain benefits, and authorizes the Board to expand or refine those benefits by stating formulae in regulations or policies. The self-contained financing through assessments paid to the Fund has meant that the expenses of the Fund are those specified in the Act or in regulations or policies authorized by the Act.

Fowler v. Nova Scotia (Workers' Compensation Board) (2004), 225 N.S.R. (2d) 27 (C.A.)

- **Levy on Third Party Settlements**

The Board is authorized by section 31(2) of the *Workers' Compensation Act* to deduct an administrative fee from third party settlements, to cover its internal costs of operating the third party unit.

Cherubini v. Workers' Compensation Board (N.S.) et al. (2001), 95 N.S.R. (2d) 51 (C.A.)

- **New Evidence Reconsideration**

The Court of Appeal interpreted the Board's new evidence policy (8.1.7R1). There is a two-step process in a new evidence reconsideration.

Step one - the Board must be given evidence that meets the definition of "new evidence".

Step two - if there is new evidence, the claims level of the Board must conduct a reconsideration to see if it changes the outcome of the final decision.

The Court of Appeal has interpreted the definition of "new evidence". It is evidence that:

- was not available at the time of the final decision;

- does not simply re-state evidence that was considered as part of the final decision; and

- is capable of changing the final decision.

Deciding whether possible new evidence will change the outcome of the final decision is not part of deciding whether it is new evidence. The Board policy merely requires that it be capable of changing an outcome. It is not weighed against other evidence at step 1. Do not ask yourself whether the evidence would change the mind of the original decision-maker, but instead could it change a reasonable person's mind. At paragraphs 25 and 59, the Court wrote:

> ... That is, the evidence must be sufficient to persuade a reasonable person in the position of a claims adjudicator to alter the final decision.
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> ... It can merely find that the evidence might be capable of doing so.

Weighing of evidence can only occur when step 1 identifies new evidence - after that point a reconsideration is conducted at the claims level of the Board to see if the outcome of the final decision is changed. On a reconsideration, earlier errors can be corrected that do not have anything to do with the new evidence. In other words, a decision-maker can review all the evidence and law while performing the reconsideration. At paragraph 35, the Court wrote:

> ... While an earlier error can be corrected on a reconsideration, it is not a necessary ingredient pursuant to the Policy in determining entitlement to a reconsideration.

Pasiechnyk v. Saskatchewan (Workers' Compensation Board), [1997] 2 S.C.R. 890

- **Historic Compromise**

The Supreme Court of Canada discussed that workers' compensation is based on four fundamental principles:

1. Compensation paid to injured workers on a no-fault basis.
2. Security of compensation payments does not depend on the solvency of individual employers.
3. Administration and adjudication of the workers' compensation scheme is handled by agencies with independence from Government. And
4. Compensation is paid quickly to injured workers without the need for court proceedings.

Speaking for the majority of the Court, Justice Sopinka wrote at paragraph 27:

> I would note that these principles are interconnected. For instance, security of payment is assured by the existence of an injury fund that is maintained through contributions from employers and administrated by an independent commission, the Workers' Compensation Board. The principle of quick adjudication without the need for court proceedings similarly depends upon the fund and the adjudication of claims by the Board. The principle of no-fault recovery assists the goal of speedy compensation by reducing the number of issues that must be adjudicated. The bar to actions is not ancillary to this scheme but central to it. If there were no bar, then the integrity of the system would be compromised as employers sought to have their industries exempted from the requirements of paying premiums toward an insurance system that did not, in fact, provide them with any insurance.

McCarthy v. Workers' Compensation Board (N.S.) et al. (2001), 193 N.S.R. (2d) 301 (C.A.)

- **Directors Liability**
- **Fraud Against the Accident Fund**
- **Credibility**
- **Natural Justice**

Under s. 136 of the *Workers' Compensation Act*, a director is liable for outstanding assessments of their company. At issue was whether Mr. McCarthy was a director when Allied Roofing became liable for an outstanding assessment. The Court held that the Board must prove that a person is a director on a preponderance of probabilities basis.

Mr. McCarthy's name was still on the records at the Registry of Joint Stock Companies in 1999, when the company became liable for outstanding assessments. However, he gave the Board a copy of a letter dated September 1, 1995 addressed to Allied Roofing, where he gave the company his resignation as a director. He argued that he was no longer a director after writing that letter.

WCAT found that the letter was created after the fact. The Court reversed WCAT's findings, stating that there was no evidence to support that conclusion. Also, it stated that WCAT should have given Mr. McCarthy notice that the date of the creation of the letter was in issue, before making a negative credibility finding that amounted to finding that Mr. McCarthy was attempting to defraud the accident fund.

The Court held that the records at the Registry of Joint Stock Companies merely create a presumption that Mr. McCarthy was a director. It found that Mr. McCarthy had rebutted that presumption with the uncontested letter and sworn testimony at his WCAT hearing.

Further, the Court stated that a decision-maker should only find fraud where there is "clear, cogent, and persuasive evidence" (paragraph 77).

Queen Elizabeth II Health Sciences Centre v. Nova Scotia (Workers' Compensation Appeals Tribunal) (2001), 193 N.S.R. (2d) 385 (C.A.)

- **Historic Compromise**
- **Statutory Interpretation**

This appeal dealt with whether an injured worker could sue a hospital for negligence in the treatment of his injuries. Under s. 28 of the *Workers' Compensation Act*, a worker is barred from bringing a civil suit "as a result of any personal injury by accident ...arising out of and in the course of the worker's employment ... " against any "... employer subject to this Part I...".

It was not contested that the compensable injury was the operative cause of Mr. Erl's injury, and that the claim for negligent medical treatment flowed from the original workplace injury. At issue was whether the QE II was an employer subject to Part I of the *Workers' Compensation Act.* While the list of industries subject to the *Act* under the *Workers' Compensation General Regulations* includes "operation of hospitals", the Regulations exclude workers or employees engaged in "surgical medical".

The Court of Appeal rejected WCAT's finding that whether the QE II was subject to Part I of the *Act* was to be decided on a case by case basis depending on whether the activities of medical professionals give rise to the cause of action. The Court stated that such an interpretation 1) made the *Act* unworkable, 2) confuses whether a worker is subject to the *Act*, with whether the Employer is subject to the *Act*, and 3) is at odds with the historic compromise.

At paragraph 44, the Court states:

> Again with respect, WCAT unreasonably confused the question of whether a servant or agent is covered by the Act with the question of whether an employer is subject to the Act. The provisions deal with both issues. But the inclusion or exclusion of an employer does not depend on whether its servants or agents, whose activities gave rise to a particular cause of action, are workers (and therefore covered) within the meaning of the Act. The statute clearly distinguishes between workers (who are covered by the Act) and the broader class of servants and agents (who may not be). An employer may have servants and agents who are not workers covered by the Act but that does not mean that their employer is not subject to the Act.

At paragraph 46, the Court states:

> The QE II pays nearly $4 million in assessments under the Workers' Compensation Act. WCAT offers no explanation for how it is that an employer is generally subject to the Act for assessment purposes but not for the purposes of s. 28 of the Act. As noted, the same definition of the employers who are subject to the Act applies for both purposes.

Fraser v. Nova Scotia (Workers' Compensation Board) (2000), 183 N.S.R. (2d) 170 (C.A.)

- **Procedure on Finding of Permanency**

If in the course of determining the extent of a worker's temporary earnings-replacement benefit, WCAT finds that the Worker has a permanent medical impairment, WCAT should remit the appeal to the Board for it to determine permanent benefits.

At paragraph 16, the Court states:

> ... WCAT found that Mr. Fraser had suffered earnings loss as a result, at least in part, of his injury beyond October 12th, 1993, and that he suffered a permanent medical impairment beyond that date. Having made these findings, it was an error of law for WCAT to fail to, at least, remit the case to the Board for determination of the benefits to which these findings entitled Mr. Fraser.

Julien v. Nova Scotia (Workers' Compensation Appeals Tribunal), [2001] N.S.J. No. 480 (C.A.)

- **New Evidence Reconsideration**

When WCAT does a s. 251 referral to Hearing Officer, it must provide the Board with the complete record.

If, following an oral hearing, WCAT declines to decide the appeal, and instead refers the appeal to a Hearing Officer for reconsideration, WCAT should provide the transcript of the hearing. At paragraph 8, the Court stated " ... that Hearing Officer should receive a transcript of the evidence and not any summaries or findings of credibility made by WCAT."

Lanteigne v. Nova Scotia (Workers' Compensation Appeal Tribunal)(2002), 210 N.S.R. (2d) 258 (C.A.)

- **Statutory Interpretation**

Under s. 28(2) of the *Workers' Compensation Act*, a worker is not barred from bringing a civil action against a covered employer where the injury results from the use or operation of a motor vehicle registered or required to be registered under the *Motor Vehicle Act*.

This appeal dealt with whether a motorized crane, which was stationary with its stabilizers extended, was a motor vehicle. WCAT held that the crane was a multi-use or multi-purpose piece of machinery and whether it should be considered a motor vehicle depended on the purpose for which it was being used at the time of the accident. The Court of Appeal confirmed WCAT's approach. It states at paragraph 28:

> As set out in para 16 above, WCAT was of the view that the resolution of the s. 29 application turned on the Grove Carrier's status as a multiple purpose piece of machinery and selected Argue as the governing authority. Since the truck crane was stationary and operating as a crane when it fell over, WCAT decided that at the time of the accident it was not operating as a motor vehicle within s. 28(2) of the Act, and consequently the exception to the statutory bar did not apply. In my view, this determination cannot be said to be patently unreasonable.

MacNeil v. Nova Scotia (Workers' Compensation Appeals Tribunal) (2001), 189 N.S.R. (2d) 310 (C.A.)

- **Natural Justice**

WCAT identified three issues at a pre-hearing conference call, and held out that it would make a preliminary decision addressing whether the worker was an employee of DEVCO for purposes of the claim. The participants filed submissions solely addressing the preliminary issue. However, WCAT issued a final decision finding the claim was filed too late, and therefore, statute barred. The Court of Appeal found that WCAT lost jurisdiction when it failed to address the only question put to it by all participants, and issued a decision on a different issue, without giving the opportunity for submissions on that issue.

Dipersio v. Nova Scotia (Workers' Compensation Appeals Tribunal) (2004), 228 N.S.R. (2d) 134 (C.A.)

- **Statutory Interpretation**
- **Historic Compromise**

While the historic compromise can assist in interpreting the *Workers' Compensation Act*, the *Act* governs. At paragraphs 80 to 83 the Court states:

> The WCAT's chairman cited the "historic tradeoff" proposed by Sir William Meredith which was the rationale for the initial workers' compensation legislation: see Pasiechnyk v. Saskatchewan (Workers' Compensation Board), [1997] 2 S.C.R. 890 at para. 25. Workers relinquished their cause of action against their employers and, in return, gained compensation under the statutory scheme. Employers pay assessments but not damages. The chairman stated that the avoidance of double recovery promotes a reading of the current Act which authorizes the WCB to withhold Mr. Dipersio's compensation.
>
> The historic tradeoff led to the enactment of workers' compensation legislation. It is the legislation itself which governs the rights and obligations of Mr. Dipersio and the WCB. Under the former Act, for constitutional reasons and notwithstanding the historic tradeoff, Mr. Dipersio could sue in Texas while he claimed compensation from the WCB. If the former Act had contained a provision similar to the current s. 32, then the WCB could have withheld payment from Mr. Dipersio. Notwithstanding the historic tradeoff, the legislature (1) did not include such a provision in the former Act and (2) has chosen wording in ss. 32 and 227 of the current Act which does not retroactively entitle the WCB to withhold payment against a 1991 settlement.
>
> The historic tradeoff does not amend the statute. The statute governs.
>
> For these reasons, in my view WCAT erred in law by ruling that the current Act permits the WCB to withhold compensation benefits payable to Mr. Dipersio.

Logan v. Nova Scotia (Workers' Compensation Board), 2006 NSCA 88

- **Definition of Compensable Accident**
- **Stress**

The *Workers' Compensation Act* excludes stress from the definition of "accident" unless it is an "acute reaction to a traumatic event".

Ms. Logan was suddenly dismissed from her long-term employment. This had an immediate psychological effect on her. She sought workers' compensation in relation to her dismissal. WCAT found that a dismissal was not an "accident" for workers' compensation purposes as it was not a "traumatic event" as that term is used in the *Workers' Compensation Act*. It further found that whether an event is traumatic must be assessed from an objective point of view.

Applying rules of statutory interpretation, the Court of Appeal confirmed both of WCAT's legal findings.

At paragraphs 48 and 87, the Court stated:

> As WCAT recognized, there may well be gray areas in which it would not be clear where the right to sue for events related to a wrongful dismissal ends and the right to claim workers' compensation benefits begins. However, that does not cast any doubt on the general principle that a wrongful dismissal is not an accident for workers' compensation purposes. I agree with WCAT's fundamental conclusion that this result is consistent with – indeed I would say required by – the historic trade off underlying workers compensation legislation.
>
> ... There must be an objectively determinable accident which arose out of and in the course of employment. I agree with the intervenor that before one gets to the issue of causation, there must be a triggering event - an accident - as described in the statute.

Martell v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2007 NSCA 107

- **Chronic Pain**

Mr. Martell developed chronic pain as the result of a 1977 workplace accident.

Mr. Martell was awarded a pain-related impairment rating effective February 29, 1996, the date of a medical report which stated that he had chronic pain. He was not awarded an extended earnings-replacement benefit as the *Chronic Pain Regulations* provided that no extended earnings-replacement benefit is payable where the original compensable injury occurred before March 23, 1990.

The Court of Appeal allowed, in part, Mr. Martell's appeal.

The Court confirmed the Tribunal's finding that Mr. Martell was not entitled to an extended earnings-replacement benefit. It found that *Chronic Pain Regulations* create a separate scheme for the compensation of chronic pain. Where the *Regulations* differ from the *Workers' Compensation Act,* they govern. This separate scheme by regulation is authorized by the *Workers' Compensation Act.*

The Court found that Mr. Martell was entitled to an earlier date for his pain-related impairment award. It noted that the 1996 medical report stated that Mr. Martell "has been suffering from chronic ... pain." Logically, the chronic pain started at a time before the date of the report. It directed the Board to determine the correct earlier date.

Canada Post Corporation v. Nova Scotia (Workers' Compensation Appeals Tribunal) (Murphy), 2007 NSCA 129

- **Definition of Compensable Accident**
- **GECA**

Ms. Murphy had been sorting mail when her back began to seize up and she felt a snap sensation in her lower back followed by a great deal of pain.

WCAT found that Ms. Murphy had an acceptable claim as the statutory definition of "accident" includes a "fortuitous event occasioned by a physical or natural cause".

The Court of Appeal upheld WCAT's decision. It determined that the term accident, used in the sense of a fortuitous event, does not require causation to workplace duties - instead, causation must be proven when addressing whether an accident arose "out of and in the course of employment". In this case, it was clear that the fortuitous event occurred in the course of Ms. Murphy's employment.

Guy v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2008 NSCA 1

- **Statutory Interpretation**

The WCB has a policy which governs the amount of living expenses paid to a worker who must maintain a second residence while being retrained. The policy caps living expenses at $750 a month.

Mr. Guy had monthly expenses of more than $750 while being retrained by the Board. He challenged the $750 per month cap as being inconsistent with the *Workers' Compensation Act.*

The Court upheld the WCB's jurisdiction to impose the cap by policy on the living expenses it would pay. It noted that the *Workers' Compensation Act* gave the WCB a broad discretion as to what rehabilitation expenses it would pay. The Court also found that while the cap will be insufficient in some cases, it was not so inadequate across the board as to be arbitrary or unreasonable.

Bishop v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2008 NSCA 29

- **GECA**
- **Stress**

This appeal dealt with the interpretation of the WCB policy 1.3.6. It deals with the rules for acceptance of claims for gradual onset stress by federal employees.

The Court found that WCAT was wrong to compare Mr. Bishop's stress exposures to those of other miners in the same mine.

Instead, it found that the policy requires a comparison with stressors experienced by an average worker in the same or similar occupation. Mr. Bishops stress exposures should have been compared to those of the average miner. The Court stated that the onus remains on a worker to provide evidence that their stress exposures were atypical compared with an average worker in the same or similar occupation.

Embanks v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2008 NSCA 28

- **GECA**
- **Stress**

This appeal dealt with the interpretation of the WCB policy 1.3.6. It deals with the rules for acceptance of claims for gradual onset stress by federal employees.

The Court confirmed WCAT's finding that it must apply an objective test in assessing the nature of workplace events and stressors.

The Court found that policy 1.3.6 requires that there have been work-related events or stressors that are unusual or excessive. This is viewed objectively as compared to stressors experienced by an average worker in the same or similar occupation.

Pelley v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2008 NSCA 46

- **Statutory Interpretation**

In a rare divided decision, the Court overturned WCAT's finding that a worker over the age of 63 was not to be considered for earnings-replacement benefits for a recurrence of earnings-loss.

Generally, earnings-replacement benefits end when a worker turns 65. An exception is where the worker is 63 years old or older 'at the commencement' of the earnings-loss. In that case, the worker can get up to 24 months of earnings-loss. This exception is set out at s. 37(10) of the *Workers' Compensation Act*.

Ms. Pelley's earnings-loss began when she was 62 years old. She returned to employment, but had to stop working again before age 65 due to her injury. She sought earnings-loss benefits for the recurrence of her loss of earnings beyond age 65.

The Court found that WCAT was wrong to find that the second period of earnings-loss was not a 'commencement' of earning-loss. It directed the Board to consider Ms. Pelley for up to 24 months of earnings-replacement benefits following the second work stoppage.

The dissenting Judge agreed with WCAT's decision, finding that the commencement of Ms. Pelley's earnings-loss occurred when she was 62 years old as there is only one commencement. The dissenting Judge would have upheld WCAT's decision.

Downey v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2008 NSCA 65

- **Chronic Pain**
- **Equality Rights**

The Court of Appeal upheld WCAT's finding that the new rating scheme for chronic pain is constitutional.

Mr. Downey developed chronic pain due to a 1989 workplace injury. The Board awarded him benefits based on a 6% pain-related impairment, the maximum rating under the *Chronic Pain Regulations*.

Mr. Downey brought a *Charter* Challenge arguing that the 6% maximum rating for chronic pain discriminated against workers with chronic pain.

The Court concluded that Mr. Downey's Charter rights were not violated as impairment ratings do not award compensation for loss of earnings ability. Mr. Downey was not treated differently than injured workers without chronic pain. Impairment awards are not based on the impact of an injury on earnings-capacity. Also, there are many caps for impairment ratings, not just for chronic pain.

The Court stated at paragraph 75:

> The appellant says that his amount of compensation fails to reflect the impact of his condition on his ability to earn income. This submission is premised on the understanding that an impairment rating is meant to reflect the worker's level of disability in the sense of his or her ability to earn income. However, it is clear, as discussed at length earlier, that impairment ratings - whether for chronic pain or other injuries - are not intended to and do not in fact reflect disability in that sense. It follows that the appellant's attempt to compare impairment ratings on the basis of disability is based on a false premise: none of the ratings is intended to or does reflect the level of disability.

The Supreme Court of Canada dismissed an application for leave to appeal this decision of the Court of Appeal.

Canada Post Corporation v. Nova Scotia (Workers' Compensation Appeals Tribunal) (Almon), 2009 NSCA 41

- **Historic Compromise**
- **Statutory Interpretation**

Section 38 of the *Workers' Compensation Act* provides that post-accident earnings includes the "amount ... the worker is earnings ... after the loss of earnings commences".

Ms. Almon was found to be entitled to an extended earnings-replacements benefit due to her workplace injury. She was also being paid disability benefits under Canada Post's pension and disability plan. Canada Post sought to have the disability benefits paid to her under the plan deducted from her WCB earnings-replacement benefits.

The Court of Appeal upheld WCAT's finding that the disability plan payments were not post-disability earnings that could be deducted from WCB earnings-replacement benefits.

The Court stated that Ms. Almon earned her disability pension from contributions made before her accident - the pension is not being "earned" after the accident. Earnings are regular salary and wages, not a disability pension.

Workers' Compensation Board of Nova Scotia v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2009 NSCA 123

- **Chronic Pain**
- **Transitional Provisions**

Section 228 of the *Workers' Compensation Act* does not apply to an award of compensation under the *Chronic Pain Regulations.* Section 228 only applies to a recalculation of benefits awarded under the former *Workers' Compensation Act*. As there were no awards for chronic pain under the former *Workers' Compensation Act,* there can be no recalculation.

Halifax (Regional Municipality) v. Hoelke, 2011 NSCA 96

- **Definition of Compensable Accident**

The worker sought medical treatment for pre-cancerous spots which he attributed to sun exposure from his work as a bus driver. WCAT found that driving a bus materially contributed to the worker's condition. It noted that the condition is caused by sun exposure and that almost of the spots were on the side of the worker's face which was exposed to the sun while operating the bus (an uncommon distribution).

The municipality appealed arguing that there was no accident. The relevant portion of the definition of "accident" requires "disablement". The municipality argued there was no disablement as the worker had no loss of earnings or diminished earnings capacity.

The Court dismissed the appeal. It rejected the argument that disablement requires earnings-loss. It found that disablement refers to have an injury occurs (an over the course of time injury), not whether the injury results in disability. At paragraph 39, it discussed why the municipality's reasoning would lead to an unreasonable result:

> The result would force workers who are injured but can continue to work to go off work to receive medical aid benefits such as physiotherapy, prescription medications, etc. Such an interpretation is untenable. The appeal commissioner's determination that a loss of earnings or earnings capacity is not necessary to qualify the "disablement" aspect of the definition of accident is reasonable and keeping with the purpose and intent of the Act.

Enterprise Cape Breton Corporation (Cape Breton Development Corporation) v. Southwell, 2012 NSCA 23

- **New Evidence Reconsideration**
- **Tribunal Jurisdiction**
- **Causation**

The Court of Appeal interpreted what evidence can be considered during a reconsideration based on new evidence (policy 8.1.7R1). It held that only the original evidence and additional evidence which meets the new evidence criteria can be considered. However, it would be an error to consider additional evidence which does not meet the new evidence criteria.

The Court also considered the Tribunal's jurisdiction on appeal. It noted that there are no court-like pleadings in workers' compensation, and as such it is necessary to review the decisions leading to a Tribunal decision in order to determine what is in issue before the Tribunal (paragraph 63). The Court further held that s. 246 of the *Workers' Compensation Act* provides the Tribunal with a "broad discretion" when considering an appeal from a hearing officer. The Tribunal has a general duty to consider the provisions of the *Workers' Compensation Act*, the decision under appeal and the submissions of the participants.

Finally, the Court determined that while scientific or epidemiological evidence may be presented in order to establish that a particular workplace significantly increased the risk for an occupational disease, such evidence is not always necessary.

- **Tribunal Jurisdiction**

The Court interpreted the Tribunal's jurisdiction to refer "any matter connected with an appeal" to a hearing officer for reconsideration (s. 251 of the *Workers' Compensation Act*). It noted that this provision recognizes that the merits of an appeal might not have been properly considered at the case manager or hearing officer levels of the Board.

The Court noted that s. 246 does not restrict the Tribunal to only considering issues raised in a notice of appeal. The Court found that while an initial decision is under appeal, there is no final decision on any issue addressed in the initial decision (combined interpretation of section 185(2) of the *Workers' Compensation Act* and policy 8.1.7R1).

The Court explained that appeals in the workers' compensation system are different than court proceedings. At paragraph 30, it wrote:

> ... Workers' compensation adjudication differs significantly from private fault based litigation. There are "participants" and not "parties". There are no pleadings. The "participants" are frequently unrepresented. The system is more inquisitorial than adversarial ... In such a system, meritorious compensation should not be trumped by a narrow application of either of process or the principle of finality.

Enterprise Cape Breton Corporation v. Hogan, 2013 NSCA 33

- **Statutory Interpretation**

The calculation of earnings-replacement benefits depends, in part, on a worker's net average earnings, which are based on gross average earnings less certain required deductions. Under s. 42 of the *Workers' Compensation Act*, gross average earnings are based on the worker's "regular salary and wages" combined by with other types or amounts of income as the Board may prescribe by Regulation.

On December 20, 2000, Regulation 20 was amended to remove an expanded list of types of income included in s. 42, and the Board instead attempted to included them by policy (3.1.1R2).

The Court of Appeal found that the Tribunal reasonably interpreted the phrase "regular salary and wages" to mean income from active employment. The Court found that it was reasonable for the Tribunal to find the policy contrary to the s. 42 to the extent its attempted to expand additional types of income other than by Regulation.

Ellsworth v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2013 NSCA 131

- **Statutory Interpretation**
- **Transitional Provisions**

Section 227 does not apply to a recurrence of a pre-March 23, 1990 injury, where the recurrence occurred after March 23, 1990 and the recurrence itself meets the criteria of a 'personal injury by accident arising out of and in the course of employment'.

The Court clarified which workers fall within s. 227 and must be compensated using the former clinical rating system scheme.

At paragraphs 71 and 72, the Court wrote:

> Section 227 addresses those individuals who are receiving compensation, and those who are "entitled" to receive compensation for permanent disability as of February 1, 1996. What this means is that a person may have an appeal, or there claim has not been adjudicated for an injury that occurred prior to March 23, 1990, yet they are entitled to a permanent disability benefit as of February 1, 1996. It is the timing of the adjudication of their claim that is the issue. The Legislature was simply putting people who had their claims adjudicated and were receiving benefits on the same level as those who were entitled but had not yet been adjudicated.
>
> Read in that way, everyone injured before March 23, 1990, would be treated the same and compensated under the clinical rating system and those injured after that date would fall within the provisions of the new Act.

Veniot v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2014 NSCA 12

- **Causation**
- **Standard of proof**

A mere or remote possibility is not sufficient for a worker to meet their standard of proof under the *Workers' Compensation Act.*

The Court of Appeal raised, but did not resolve, whether the 'material contribution test' for causation still applies to workers' compensation claims in light of recent case law. At paragraphs 53 and 54, the court wrote:

> Workers' compensation is a no fault system where it is only necessary to show the injury arose out of or in the course of employment to be entitled to compensation. Whether it is the worker, a co-worker, the employer or a third party who creates the risk, would appear to be irrelevant to that analysis. The worker is entitled to recover regardless of whose act created or magnified the risk. In light of *Clements*, one may question whether "material contribution", as a test for causation, has any application in this workers' compensation context.
>
> This *Act* itself may provide an alternative to the "but for" test in s. 187. If a worker is unable to prove causation on the "but for" test, s. 187 of the Act provides an alternative to reduce the burden to one of "as likely as not".

Enterprise Cape Breton Corporation v. Anderson, 2014 NSCA 59

- **Statutory Interpretation**

Policy 3.3.4R applies to determining the degree and existence of a permanent medical impairment for injuries after the year 2000. The Court of Appeal wrote that the policy requires: 1) a review of all pertinent file information; 2) the results of a physical examination; and 3) the criteria in the AMA Guides. It is not open for the Tribunal to speculate as to what impairment may have existed in the past in the absence of medical evidence.