

CLAIM HISTORY AND APPEAL PROCEEDINGS:

This is an appeal from a January 9, 2007 Hearing Officer supplementary decision. The Hearing Officer determined that the Appellant (the surviving spouse of the Deceased Worker) was not entitled to survivor benefits because her husband's death was not caused, or contributed to in any material way, by his compensable back injury.

The Deceased Worker passed away on May 17, 2004. The precise cause of death was a matter of contention in this appeal. At the time of his death, the Deceased Worker was apparently in receipt of a number of permanent medical impairment ["PMI"] rating awards, totalling 48 percent. Of particular relevance to this appeal, the Deceased Worker was in receipt of a 30 percent PMI rating concerning his back, flowing from a November 26, 1975 compensable incident, and a 10 percent PMI rating respecting coal workers' pneumoconiosis. In addition, the Deceased Worker was in receipt of a 5 percent PMI rating concerning his right knee, and a 3 percent PMI rating concerning his left hand. (For the sake of completeness, I note that the Deceased Worker indicated in an October 2, 2001 submission to a workers' compensation Review Committee that he was also in receipt of a 10 percent PMI rating concerning an ankle). At the time of his death, the Deceased Worker was also scheduled to be considered for the award of benefits pursuant to the *Chronic Pain Regulations*.

There is a very lengthy procedural history underlying this appeal. I will set out only those portions of the procedural history most relevant to this decision.

A July 22, 2004 Occupational Disease Adjudicator decision denied the Appellant survivor benefits because the Deceased Worker's coal workers' pneumoconiosis had not contributed to his death. The Appellant appealed that decision, which resulted in an October 28, 2004 Hearing Officer decision which found that the Deceased Worker had died due to coronary artery disease, and that simple coal workers' pneumoconiosis had not contributed in a material way to his death. The Appellant appealed the October 28, 2004 Hearing Officer decision, which resulted in an oral hearing before the Workers' Compensation Appeals Tribunal [the "Tribunal"]. That appeal was resolved by *Decision 2004-641-RTH* (February 18, 2005, NSWCAT). Among other things, the Tribunal directed that the Hearing Officer consider whether the Deceased Worker's decreased activity level due to his back injury had contributed to a material degree to his death.

Decision 2004-641-RTH resulted in a March 22, 2005 Hearing Officer's Preliminary Reconsideration decision, a May 3, 2005 Medical Opinion of Dr. Pooyania, Board Medical Advisor, and a July 5, 2005 Hearing Officer's Supplementary Reconsideration decision. In the July 5, 2005 decision, the Hearing Officer determined that the Deceased Worker's 40 percent PMI rating and inactivity had not materially contributed to his death. The Appellant appealed the July 5, 2005 Hearing Officer decision to this Tribunal. That appeal

proceeded by oral hearing, and resulted in *Decision 2005-293-RTH* (July 31, 2006, NSWCAT). The Tribunal referred the matter to the Hearing Officer because of the large amount of evidence which had been adduced by both participants since the July 5, 2005 Hearing Officer decision.

Decision 2005-293-RTH resulted in a September 28, 2006 Hearing Officer's Preliminary Reconsideration decision, an October 4, 2006 Medical Opinion of Dr. Marche, Board Medical Advisor, and the January 9, 2007 Hearing Officer Supplementary decision which forms the subject matter of this appeal. The Hearing Officer concluded that there was insufficient evidence on which to base a reasonable finding that the Deceased Worker's death was caused, or was contributed to in a material way, by his compensable back injury. Therefore, the Appellant was not entitled to survivor benefits.

This appeal was commenced by the Appellant's filing of a February 8, 2007 Notice of Appeal with the Tribunal. The Workers' Representative appended written submissions to the Notice of Appeal.

This appeal proceeded by way of oral hearing, held on September 11, 2007 at Sydney, Nova Scotia. The Appellant attended at the oral hearing and provided brief oral testimony. The Appellant was represented by a Workers' Representative, who is a member of an injured workers' group. The Workers' Representative questioned the Appellant, and provided submissions. The Employer was represented by the Employer Representative, who is an employee of the Employer. The Employer Representative provided submissions to the Tribunal.

ISSUES AND OUTCOMES:

At issue is whether the Deceased Worker's compensable injuries materially contributed to either the occurrence or the timing of his death, and as a result whether the Appellant is entitled to survivor benefits.

The Appellant's appeal is allowed, for the reasons below. Given the evidence before me and the request of the participants that this matter be finally resolved, I find that the Deceased Worker's injuries materially contributed to the occurrence or the timing of his death. Consequently, the Appellant is entitled to survivor benefits.

ANALYSIS:

I have reviewed the materials in the Board and Tribunal files. In addition, I reviewed the recording of the oral hearing. I will set out only those portions of the testimony, evidence and submissions most relevant to my reasoning and conclusion.

The Law

The test to be applied in assessing whether an “industrial disease” or a compensable condition caused a deceased worker’s death is set out in *Ferneyhough v. Workers’ Compensation Appeals Tribunal (N.S.)* (2000), 189 N.S.R. (2d) 76 (CA). The compensable condition need not be the sole or even the predominant factor in a deceased worker’s death; it need only make a material contribution to the deceased worker’s death. The test set out in *Ferneyhough, supra*, is also met if the compensable condition hastened or affected the timing of a deceased worker’s death. The role of the compensable condition is material if it has greater than a *de minimis* effect. Moreover, in meeting the *Ferneyhough* test, the participant seeking survivor benefits enjoys the benefit of s. 187 of the *Act*, even if (like the Deceased Worker) the deceased worker was a federal employee. See *Re Morrison Estate*, 2003 NSCA 103 (CanLII). Thus, if the evidence concerning a disputed point is evenly balanced, that issue shall be resolved in favour of the participant seeking survivor benefits.

Testimony and Oral Submissions

The Workers’ Representative to great extent relied upon the submissions and materials filed in connection with the previous decisions rendered below, and the two previous hearings before the Tribunal.

In brief, the Workers’ Representative reiterated the argument put forward before the Tribunal in *Decision 2005-293-RTH*. She relied upon the opinion of Dr. Irene Campbell-Taylor that the Deceased Worker died of deep vein thrombosis and not coronary artery disease, and that the Deceased Worker’s compensable injuries materially contributed to his death due to deep vein thrombosis. She referred to various pieces of the medical evidence previously submitted in support of this theory. The Workers’ Representative further argued that neither Dr. Matthew D. Burnstein in his February 3, 2006 medical-legal report, nor Dr. Nicholas Giacomantonio in his February 21, 2006 medical-legal report, properly addressed Dr. Campbell Taylor’s opinion or the evidence supporting it.

In addition, and of particular relevance to my disposition of this appeal, the Workers’ Representative extensively referred to the Deceased Worker’s October 2, 2001 submissions to the Review Committee, in which he set out the history of his claims and his assertion that his alcoholism arose as a result of the pain flowing from his compensable back injury. She argued the reports of Dr. Burnstein and Dr. Giacomantonio did not address the Deceased Worker’s assertion that his alcoholism arose as a result of his compensable injuries. This is relevant because their reports identified alcoholism, and the resulting liver transplant and use of immunosuppressants, as significant causes of his death due to alleged coronary artery disease. Thus, the Workers’ Representative argued that even if the Deceased Worker’s death were due to coronary artery disease, his compensable injuries still constituted a material cause of his death.

The Workers' Representative noted that the Deceased Worker died at the age of 60 years, and she argued that he would not have died at that age but for the effect of the compensable injuries.

In response to the Tribunal's questions, the Appellant testified that the Deceased Worker did not suffer from a problem with alcoholism until he suffered the compensable back injury. She divorced the Deceased Worker on or about 1995 because of his alcoholism, though she remarried him in 1998.

The Workers' Representative argued that the Deceased Worker died three and a half years ago, and that the Appellant was still waiting for a final decision. She expressly indicated that there should be no referral back to the Board, but that there should be a final decision, either "yes" or "no". The Employer Representative expressed his agreement with the Workers' Representative on this point, as the matter has been outstanding for some time.

The Employer Representative relied upon the extensive material on file. He pointed to the medical-legal reports submitted by the Employer, and indicated that the physicians can assess the cause of the Deceased Worker's death better than a lay person.

Reasoning

In this appeal, the active participants are the Appellant and the Employer (a self-insured federal Crown corporation). Consequently, the resolution of this appeal will have no direct impact upon the Accident Fund. Both the active participants expressed the desire to have this matter finally resolved. This matter has indeed been outstanding for some time. Hence, I have decided to render a final decision on the basis of the evidence before me, even though (as I will explain) I ordinarily would have referred this matter back to the Board.

I will focus on the Workers' Representative's alternative argument, namely that the Deceased Worker's compensable injuries materially contributed to his death, even if the cause of death were coronary artery disease (as alleged by the Registration of Death, Dr. Burnstein in his February 3, 2006 report, and Dr. Giacomantonio in his February 21, 2006 report).

In particular, I also emphasize the Workers' Representative's argument that the Deceased Worker's alcoholism was caused by the compensable injuries. In this connection, I have noted the Deceased Worker's assertion to this effect in his October 2, 2001 submissions to the Review Committee, which argued that an injured workers' group should receive funding. My review of the file indicates that the submission was already on file prior to the rendering of *Decision 2005-293-RTH*, and therefore the Deceased Worker's alcoholism was put into issue over a year ago. Further, the Appellant testified that the Deceased Worker did not suffer from alcoholism prior to the compensable injury. I note that the Appellant first married the Deceased Worker in 1968, prior to the 1975 compensable injury.

In short, the etiology of the Deceased Worker's alcoholism was raised on a factual level on July 11, 2006, the date of the Workers' Representative's final submissions to the Tribunal in *Decision 2005-293-RTH*, and was evidently raised in the Appellant's testimony before the Tribunal in the oral hearing of December 7, 2005.

There is no medical opinion evidence before the Tribunal concerning the etiology of the Deceased Worker's alcoholism, or alcoholism in general, though Dr. Burnstein refers to alcoholism as "a controllable risk factor" for heart disease in his February 3, 2006 report. Neither active participant requested the opportunity to submit medical opinion evidence concerning the etiology of the Deceased Worker's alcoholism, or alcoholism in general.

I reviewed recent Tribunal decisions concerning the principle of remoteness in causation.

In *Decision 2006-897-AD* (April 23, 2007, NSWCAT), a worker sought medical aid in the form of medication for cholesterol and blood pressure. The worker had suffered a significant back injury, concerning which the former Workers' Compensation Appeal Board had awarded a 50 percent permanent partial disability award. The Tribunal accepted that the worker's injuries restricted his ability to exercise, thereby increasing his risk of developing these diseases. However, the Tribunal noted there were many risk factors respecting the development of high cholesterol and high blood pressure. There was medical opinion evidence from a Board Medical Advisor identifying genetic predisposition as the main etiology. Further, the worker's physician stated only that it was "possible" the worker's back injury caused his weight gain. The Tribunal concluded it was too speculative and too remote to attribute the worker's need for medication to the compensable back injury.

In *Decision 2006-1023-AD* (March 1, 2007, NSWCAT), the Tribunal considered the situation of a worker who suffered a compensable low back injury. The Tribunal found that the compensable low back injury materially contributed to a neck injury suffered by the worker at home, while attempting to get off his couch. The Tribunal concluded that a secondary accident can be compensable, as long as the original injury is a material factor in the second accident. Further, the Tribunal found that there must not be an intervening event which breaks the chain of causation.

I also make note of the principle that a worker is entitled to compensation with respect to the consequences of medical treatment of the compensable injury. This is true even if there is negligence in the provision of medical treatment; at least in that narrow situation, the intervening cause - that is, professional negligence - does not break the chain of causation. So too, a covered employer who or which provides negligent medical treatment of the compensable injury cannot be sued with respect to medical negligence. See, for example, *Kovach v. British Columbia (Workers' Compensation Board)* 2000 SCC 3 (CanLII), *Lindsay v. Saskatchewan (Workers' Compensation Board)* 2000 SCC 4, and *Queen Elizabeth II Health Sciences Centre v. Workers' Compensation Appeals Tribunal (N.S.) et al.*, 2001 NSCA 75 (CanLII).

I note that in those cases where medical aid or medical treatment is prescribed or approved by a workers' compensation authority, any adverse consequences of such medical treatment are compensable. Of course, with respect to the present situation, the Board would never prescribe alcohol as a form of medical treatment. Further, it is common knowledge that many people suffer from pain and do not as a result become dependent on alcohol or illegal drugs.

I turn now to assessing the Workers' Representative's argument that the compensable incidents caused the Deceased Worker's alcoholism. The Deceased Worker alleged that he became an alcoholic because he was self-medicating with respect to the pain caused by his compensable back injury. He made this assertion on October 2, 2001, when he had no direct pecuniary interest in making such an assertion, though he was supporting the award of funding for an injured workers' group. Further, the Appellant swore that the Deceased Worker did not suffer from alcoholism prior to the compensable incidents. In this connection, the Appellant married the Deceased Worker in 1968, prior to the 1975 compensable back incident. Both the Deceased Worker and the Appellant identified alcoholism as a cause of the marriage breakdown.

I find that there is sufficient lay evidence from the individuals directly involved from which I can infer that the compensable back incident, and the resulting pain, contributed to the development of the Deceased Worker's alcoholism. Because of the peculiar procedural circumstances of this appeal, there is no medical opinion evidence on file concerning the causes of the Deceased Worker's alcoholism or alcoholism in general, except for the brief reference in Dr. Burnstein's report identified above. I find I cannot take judicial notice that physical pain can never be a cause of alcoholism. I do not believe that a possible causal connection between the compensable injury and the Deceased Worker's alcoholism is on its face too remote to be recognized. Consequently, subject to the caveats I set out below, I find for the purposes of this appeal that the Deceased Worker's compensable back injury materially contributed to the development of his alcoholism.

I do not wish or intend this finding to be cited as a precedent that the pain of a compensable injury can cause alcoholism. Ordinarily, I would have referred this matter to the Board, to procure the opinion of a Board Medical Advisor concerning whether the Deceased Worker's alcoholism was caused by the compensable injury. However, I have proceeded to resolve this matter without seeking such further evidence because both active participants requested that I resolve the appeal without referral back to the Board. Further, both participants expressly relied on the materials already on file. In addition, my finding herein has no impact on the Accident Fund because the Employer is a self-insured federal Crown corporation. Moreover, this matter has indeed been outstanding for a lengthy period of time, and has already been the subject of two referrals to Board Hearing Officers. For all these reasons, I have chosen to resolve the appeal on the basis of the evidence before me. However, I note that the Board has not had an opportunity to provide medical opinion evidence or submissions, and therefore I reiterate that my finding herein concerning alcoholism is not intended to have any value as a precedent in any other appeal.

I turn now to assessing whether the Deceased Worker's compensable injuries materially contributed to the occurrence or timing of his death, on the basis that the compensable incidents contributed to his alcoholism.

The Registration of Death identified "coronary artery disease" as the "immediate" cause of death. Three conditions - hypercholesterolemia, renal failure, and diabetes mellitus - are identified as immediate "antecedent" causes of death. Finally, the fact that the Deceased Worker was the recipient of a liver and kidney transplant was identified as a significant condition contributing to death, though not causally related to the immediate cause. Both Dr. Burnstein and Dr. Giacomantonio opined that the cause of death identified in the Registration of Death should govern in the absence of an autopsy. Consequently, they dismissed as speculation Dr. Campbell-Taylor's opinion concerning deep vein thrombosis as the cause of death.

Dr. Burnstein identified alcoholism as a risk factor in the development of heart disease. He further noted that the Deceased Worker's alcoholism required a liver transplant. Dr. Burnstein acknowledged that the Deceased Worker's back pain would have inhibited his activity level. He also pointed to the impact of the liver transplant as a factor in making the Deceased Worker less active, as would chronic liver failure and the use of Rapamune, an anti-rejection drug. Dr. Burnstein identified the use of immunosuppressants as increasing the Deceased Worker's risk of infection, which could have contributed to the conditions underlying his seven-week period of hospitalization in Ontario, which ended one month before his death.

Dr. Giacomantonio also identified alcoholism as a factor in the Deceased Worker's inactivity, in addition to the back pain. Dr. Giacomantonio also indicated that alcoholism could contribute to vascular disease and impact on the Deceased Worker's approach to pain management. Further, he identified immunosuppressants as a factor which could accelerate atherosclerotic disease.

Once one accepts (for the purposes of this appeal) that the compensable injuries contributed to the development of the Deceased Worker's alcoholism, the medical-legal reports of Dr. Burnstein and Dr. Giacomantonio suggest that the compensable injuries did materially contribute to the occurrence or timing of the Deceased Worker's demise. This is particularly true given that alcoholism was the cause of the liver transplant, which in turn contributed to the need to use immunosuppressants.

Further, the Registration of Death identified the liver transplant as a significant condition contributing to death. It is the Deceased Worker's alcoholism which gave rise to the liver transplant.

Although this does not form part of my reasoning, the March 1, 2004 clinical notes from Ontario (see Exhibit No. 3 from the December 7, 2005 hearing) appear to suggest that alcohol abuse may have been a cause of the kidney transplant. If the Deceased Worker's kidney problems were caused by his alcoholism, the causal connection between the

compensable injury and his death would be strengthened further, given Dr. Burnstein's and Dr. Giacomantonio's reports.

In the light of my finding above, it is not necessary for me to address whether deep vein thrombosis caused the Deceased Worker's death (as opposed to coronary artery disease), or the related issues such as the reliability or probative value of death certificates.

CONCLUSION:

The Appellant's appeal is allowed, for the reasons above. Given the evidence before me and the request of the participants that this matter be finally resolved, I find that the Deceased Worker's injuries materially contributed to the occurrence or timing of his death. Consequently, the Appellant is entitled to survivor benefits.