

## **DECISION OF THE APPEAL DIVISION**

#2002-0146

#2002-0147

January 18, 2002

RE: Appeal Division Reference #2002-0146 and #2002-0147

Panel Appointed:  
John Steeves  
Glen W. Bell  
Teresa White

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### **Introduction**

- (1) This case involves two matters. They arise from the worker's claim for compensation for respiratory problems that he says are related to his work in the paving industry. The Board denied the worker's claim. On appeal the Workers' Compensation Review Board found that 10% of the worker's disability was work related. The worker appeals from the finding of the Review Board, dated March 19, 2001. That is the first matter. In addition, the President of the Workers' Compensation Board has referred the same finding of the Review Board to the Appeal Division for redetermination on the ground that it was based on an error of law and contravention of published Board policy.

### **Issue(s)**

- (2) The issue in the appeal is whether the worker's chronic obstructive pulmonary disease (COPD) was due to the nature of his employment.
- (3) The issue in the President's referral is whether the finding of the Review Board erred in law or contravened published policy of the governors by apportioning causation and finding the worker eligible for a corresponding portion of compensation.

### **Background**

- (4) The worker, Mr. B [not his real initial], was employed as a labourer/rakerman for the same paving company from 1965 to 1993. He stopped work in 1993 due to a back condition. However, he also developed respiratory problems, which were not disabling during his period of employment. The respiratory problems are the focus of this decision.
- (5) In 1995 Mr. B was diagnosed with asbestos related pleural disease. He applied for compensation. His claim was denied on the ground that there was no evidence of exposure to asbestos in his employment. Mr. B appealed to the Review Board, which allowed his claim in part on May 4, 1998. The Review Board panel rejected the suggestion that Mr. B suffered from asbestosis, a diagnosis for which there was no

medical support. However, the panel found that Mr. B's diagnosed condition of asbestos related pleural thickening was caused by his work exposure to asbestos, but that it was not the cause of his respiratory problems. The asbestos related pleural disease was considered to have very little significance in causing his respiratory problems, which were due to a non-compensable chronic obstructive lung disease which was caused by his long history of cigarette smoking. He therefore had no entitlement to compensation.

- (6) Mr. B appealed to a Medical Review Panel to determine if his respiratory problems were related to his work exposure to asbestos. The Medical Review Panel certificate (March 19, 1999) noted that the Board had accepted responsibility for the asbestos related pleural disease. It held that Mr. B had Chronic Obstructive Pulmonary Disease (COPD) and that it caused a disabling shortness of breath on exertion (SOBOE). It further held that the COPD had been caused 90% by his 43 pack years of smoking (with bronchial reactivity) and 10% by his long exposure to dust, including asbestos dust, in the workplace. However, while employed, Mr. B had not been disabled by his exposure to asbestos.
- (7) Following receipt of the Medical Review Panel certificate, a Board officer wrote to Mr. B (April 28, 1999). He confirmed that the claim had been accepted for asbestos-related bilateral pleural thickening. However, he denied responsibility for the worker's COPD on the ground that the exposure to workplace dust had contributed only 10% to this disease. This was not considered to be a significant contribution, but rather a *de minimis* contribution. In the absence of the worker's history of cigarette smoking, he would not likely have developed respiratory impairment due to COPD.
- (8) Mr. B appealed to the Review Board. The Review Board found that it was speculation for the Board officer to say that in the absence of the worker's smoking history he would not likely have developed a COPD impairment. The Panel referred to the Medical Review Panel certificate and found that it was determinative of the issue:

Since the Medical Review Panel has determined that 10% of the worker's COPD is compensable, this panel, therefore, finds that the Board must accept that extent of responsibility for the worker's COPD.
- (9) However, since the Medical Review Panel had certified that Mr. B had not been disabled from working due to his respiratory conditions while employed, he was not entitled to wage loss benefits, but only health care benefits.
- (10) The worker appealed to the Appeal Division, and the President referred the finding for redetermination.

## Submissions

- (11) The President submitted that the Review Board had erred in law in apportioning causation and assigning the Board responsibility for a corresponding portion of the worker's COPD condition. In doing so the Review Board had not applied the correct test for determining causation of disability. The proper test was to determine if the work-related cause was significant in causing the worker's disability. If so, then the Board was responsible for the entire disability. If not, then the disability was not caused by the employment. This was the effect of section 6 of the *Act* and Board policy as published in the *Rehabilitation Services and Compensation Manual (RSCM)*. It was the approach that had also been adopted in a number of decisions of the Appeal Division. The President also submitted that it was not the function of the Medical Review Panel to determine whether a condition was compensable and it had not done so in this case, contrary to how the Review Board had interpreted the certificate. The finding of the Review Board should therefore be redetermined.
- (12) The worker submitted that either the apportionment of causation was allowed by the Act and Board policy, or a finding of a 10% contribution in causing the worker's COPD was not insignificant. Since the worker's employment had caused at least part of the worker's condition, he submitted that he was entitled to a pension for the full amount of his disability.

## Analysis

- (13) The *Workers Compensation Act* (the *Act*) authorizes an appeal to the Appeal Division from a decision of the Review Board. The Appeal Division rehears and redetermines the matter: section 91. It may inquire into all of the issues arising out of the appeal. The *Act* also authorizes the President to refer a finding of the Review Board to the Appeal Division for redetermination on grounds of error of law or contravention of published policy of the Board governors: section 96(4).
- (14) No oral hearing was requested in this appeal and we find the evidence on record, coupled with written submissions from the parties, to be sufficient to allow us to make a fair decision.

### *Causative Significance for Occupational Diseases*

- (15) We will first address the issue of the proper test to be applied in determining whether an occupational disease is due to the nature of any employment.
- (16) To be compensable an occupational disease must be "due to the nature of any employment in which the worker was employed": section 6(1) of the *Act*. This is a question of fact relating to causation: *Snell v. Farrell*, [1990] 2 S.C.R. 311. The test for

determining whether an occupational disease is due to the nature of a worker's employment, i.e. whether it has been caused by the employment, is whether the employment was of causative significance in producing the disease. If so, the disease is then due to the nature of the employment. As such it is compensable in its entirety. If not, then the disease is not caused by the employment and is not compensable. The "causative significance" test applies even when there are other non-compensable causes contributing to the disease.

(17) This has been discussed by several decisions of the Appeal Division: #98-1062, #98-1122, #2001-1575. The Panel in Decision #98-1062 considered the meaning of section 6 of the *Act* and how it related to Board policy, specifically #26.22, #28.00 and #32.20, *RSCM*. Policy #26.22 applies to the investigation of the cause of occupational disease where there is no presumption in favour of causation under Schedule B. It requires the adjudicator to seek evidence which tends to establish either that there is or is not "a causative connection" between the work and the disease. Policy #28.00 deals with the issue of establishing causation in cases of contagious diseases. It states: "For the disability to be compensable, there must be something in the nature of the employment which had causative significance." The phrase "causative significance" is also used in Policy #32.20 (Physical and Emotional Exhaustion). (We also note that the phrase used in relation to the establishment of the cause of personal injury is "causative significance": Policy #15.00 (Natural Causes), *RSCM*.)

(18) The Appeal Division states in Decision #98-1062:

Overall the policies seem to suggest that the test here is whether the worker's employment had causative significance in the development of his disease and not whether employment was the sole causative factor . . .

The test as to whether a worker's occupational disease is due to the nature of his employment is whether the workplace exposures were a significant contributing factor.

(19) Professor Ison describes the same test in his text, *Workers' Compensation in Canada* (2 ed.), p. 58:

Disabilities commonly result from the interaction of multiple causes. If an employment event, exposure, or other circumstance had causative significance, a claim is not barred because other factors unrelated to the employment were also causative. The test is: would the worker be suffering from the disability but for the employment event, exposure, or circumstance? [Fn – BC and Ont. cases] ". . .it is not necessary that the worker's employment be the *most* significant factor in her ongoing condition; it is sufficient that the employment was a significant contributing

factor.” [Fn – Ont. case] It is irrelevant to classify one cause as primary and the other as secondary, and it is improper to screen out contributing causes by seeking to identify “*the cause*”. If the employment contributed in a material degree to the disablement or death, it is compensable. [Fn – Ont. cases] Thus, for example, where a disablement has resulted from the combined and possibly synergistic effect of industrial contamination and cigarette smoking, it is compensable. [Fn – Alta. policy]

- (20) The “causative significance” test implies that a disability is compensable in its entirety, if the employment was a significant or material contributing factor. It does not allow compensation to be apportioned based on the relative contribution of work-related and other contributing factors. This approach was adopted by the Appeal Division in Decisions #98-1062 and #98-1122; both explicitly rejected the notion that compensation can be apportioned if an occupational disease is found to be due to the nature of the employment. We agree with the analysis in these decisions.
- (21) Further support for this approach is found in the law relating to causation in civil negligence claims. The test for determining causation in such claims is substantially the same. Instead of using the phrase “causative significance” to describe the test, the courts use the phrase “material contribution”. The Supreme Court of Canada described the test in *Athey v. Leonati*, [1996] 3 S.C.R. 458:

Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: *Snell v. Farrell*, [1990] 2 S.C.R. 311; *McGhee v. National Coal Board*, [1972] 3 All ER 1008 (H.L.).

The general, but not conclusive, test for causation is the “but for” test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: *Horsely v. MacLaren*, [1972] S.C.R. 441.

The “but for” test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant’s negligence “materially contributed” to the occurrence of the injury: [*citations deleted*].

...

It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant’s negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were the necessary preconditions to the injury occurring. . .As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a

reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

- (22) The Supreme Court of Canada then explained the rationale for this approach:

This position is entrenched in our law and there is no reason at present to depart from it. If the law permitted apportionment between tortious causes and non-tortious causes, a plaintiff could recover 100 percent of his or her loss only when the defendant's negligence was the sole cause of the injuries. Since most events are the result of a complex set of causes, there will frequently be non-tortious causes contributing to the injury. Defendants could frequently and easily identify non-tortious contributing causes, so plaintiffs would rarely receive full compensation even after proving that the defendant caused the injury. This would be contrary to established principles and the essential purpose of tort law, which is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant.

- (23) Similar considerations apply in the context of causation of injury or occupational disease for the purpose of workers' compensation. Workers' compensation is a no-fault insurance scheme for occupational accidents and diseases. It supplants the tort system for such claims, and benefits are a replacement for civil damages. However, the principles of causation remain the same.

*Does the Review Board finding contain an error of law?*

- (24) The Review Board, in apportioning compensation according to the relative contribution of the work-related cause of the worker's disease (exposure to dust including asbestos dust) and the non-work-related cause (smoking), adopted an approach which was not authorized by the Act or published policy of the governors. The Review Board thereby erred in law and contravened published policy of the governors.

- (25) The Review Board panel also misconstrued the effect of the Medical Review Panel Certificate. The Review Board panel proceeded on the basis that the certificate of the Medical Review Panel dictated the result. The Review Board interpreted the Medical Review Panel certificate to mean that it had found that the occupational disease was 10% compensable. We do not agree with that interpretation. The certificate of the Medical Review Panel does not say anything about the worker's entitlement to compensation; nor should it. A Medical Review Panel certificate is conclusive and binding on the Board with respect to medical issues only: section 65, Act; Policy #103.80, RSCM. Entitlement to compensation is not a medical issue. It is a legal issue. It involves applying the rules of entitlement to the evidence and reaching a conclusion

as to eligibility. The Medical Review Panel certificate is evidence and its findings of medical fact are binding. This includes findings as to the cause of an occupational disease. However, it does not determine legal issues such as entitlement to compensation, even if the finding of medical fact essentially determines the outcome of the claim. Adjudication of legal issues is the responsibility of the Board, the Appeal Division and the Review Board, not the Medical Review Panel. In this case, the certificate made a medical finding of causation, which is binding on the Board. It did not find that compensation was payable.

- (26) For those reasons, the finding of the Review Board must be redetermined.

*Redetermination of the Review Board finding*

- (27) Returning to the “causative significance” test, it is important to understand when a cause is “significant”, particularly when the degree of contribution of the target cause is small. The issue has been addressed in the law of causation in negligence cases, where the question is: What is a material contribution?

What is a material contribution must be a question of degree. A contribution which comes within the exception *de minimis non curat lex* [*the law does not concern itself with trifles – Panel*] is not material, but I think that any contribution which does not fall within that exception must be material. I do not see how there can be something too large to come within the *de minimis* principle, but yet too small to be material.

*Bonnington Castings, Ltd. v. Wardlaw*, [1956] 1 All ER 615, at 618-619  
(H.L. per Lord Reid)

- (28) Later in his judgment Lord Reid refers to the contribution of the cause in question as “not negligible”. This level of causation was held to be sufficient to establish liability (p. 620). The plaintiff in *Bonnington Castings* had developed pneumoconiosis as a result of breathing in silica dust from two different industrial processes, one of which was carried on negligently by his employer (swing grinding), the other of which was not (pneumatic hammering). The former was the lesser of the two contributing causes of the worker’s pneumoconiosis.
- (29) The principles described in *Bonnington Castings*, including the *de minimis* principle, were adopted by the Supreme Court of Canada in *Athey v. Leonati* (quoted above). These principles find their analogy in workers’ compensation law in the doctrine of “causative significance”, which implies the *de minimis* principle.
- (30) Determining whether a particular cause is “significant” is not a pure question of fact. To say that a cause is “significant” is a conclusion based on the application of an implied

test to the evidence. The test is a value judgment, and the value may not be the same depending on the role of the person making the judgment. For example there are different judgments for the assessment of causation made by a medical authority and for one made by a legal authority. From a medical perspective, whether a cause is significant is primarily a question of what science considers to be significant. This involves the consideration of scientific values. Legal assessment of significance (whether made by a court or the Appeal Division) must take into account the scientific evidence, but it must also consider other values. These values are essentially matters of law and policy. For example, a court must consider the purpose of tort liability and issues of justice. The Appeal Division must consider the purpose of the *Workers Compensation Act* and the "merits and justice of the case".

- (31) The identification of the appropriate law or policy is a question of law. The application of it to the medical facts to make a determination as to whether a cause is "significant" is a question of mixed fact and law. Deciding questions of law and mixed fact and law is ultimately the responsibility of the decision-maker. In a workers' compensation appeal where there is a certificate of a Medical Review Panel containing a finding of causative significance in relation to a particular cause, that finding is a medical fact that must be accepted by the Appeal Division. However, the Appeal Division's determination of the significance of the cause, i.e. whether it is *de minimis*, involves the application of legal values to that fact. That is a question of mixed fact and law, which only the Appeal Division can decide. The same considerations apply when the decision is made by the Board and the Review Board.
- (32) The Board officer in his decision of April 28, 1999, was attempting to apply these principles, which was the correct approach. Applying the legal test to the facts as found by the Medical Review Panel, he found that the 10% contribution of the worker's employment exposure to dust was *de minimis* and thus not of causative significance. That finding presents the issue in this appeal and we now turn to a consideration of the application of the principles to the facts of this case.

*The worker's appeal*

- (33) Given the relatively minor contribution of workplace exposure to dust to the worker's COPD, the issue is whether it is covered by the *de minimis* exception. As noted above, this judgment is primarily a legal -- not only a medical or scientific -- question. It recognizes the situation where a work-related factor may have played a role in producing a disease, but its contribution is of such a minor degree that it would be inconsistent with the purpose of workers' compensation to recognize that the disease is due to the nature of the employment. It is similar to the judgment that a court would make, if a cause of injury were so minor that it would be unjust to impose liability on that basis.

(34) The *de minimis* inquiry in this case begins with the certificate of the Medical Review Panel. It responds to a number of questions posed by the Board in a Statement of Issues, dated November 24, 1998. The responses set out the diagnosis – COPD – and his disability – SOBOE. Question 4(a) of the Statement of Issues asks for the causes of any disability. The response is:

4a The causes of his disabling SOBOE are:

- i) COPD from:
  - a. 43 pack years of smoking to which he would be more than normally susceptible due to:
  - b. An element of bronchial asthma.
  - c. To a lesser extent, dust exposure in the workplace, including Asbestos dust and cement dust over a number of years.
- ii) Obesity.
- iii) General physical deconditioning.

[emphasis added]

(35) Up to this point the focus of concern had been exposure to asbestos. The worker's exposure to asbestos dust had been limited to a relatively brief period when he was involved in installing cement drain pipes of which asbestos was a component. He was required to cut and trim the pipe ends, which could have released asbestos dust. However, the Medical Review Panel identified "exposure to dust in the workplace, including asbestos dust" as a cause of the worker's COPD. The finding is explained in the accompanying report, in which the Medical Review Panel states: "This claimant worked in a dusty environment for many years where he was exposed to Asbestos and cement apart from other environmental dusts." This finding coincided with the worker's evidence that he had been involved in sweeping out dusty buildings to prepare for the laying of asphalt paving.

(36) The Statement of Issues then asks the following question:

- 4(b) Was exposure to asbestos while employed as a labourer/rakerman, of causative significance in producing a disability?

(37) The Medical Review Panel responded:

- 4b. Yes, the balance of probabilities is that his exposure to Asbestos and dust in the workplace has played a role in the development of his COPD.

- (38) The accompanying report of the Medical Review Panel also states: "It is the opinion of this Panel that the dust exposure at work did contribute to his disabling COPD and would estimate that the causes of smoking: dust/asbestos exposure were in the ratio of 90%: 10%." In the list of causes of the worker's COPD the Medical Review Panel qualifies the dust exposure by the phrase "to a lesser extent".
- (39) In our opinion, the certificate of the Medical Review Panel finds that the worker's exposure to dust in the workplace, including asbestos dust, was of causative significance to his COPD, but that it was a relatively minor contributing factor. This is a question of medical fact and is conclusive and binding on the Board. The question whether the exposure was of causative significance, although framed in terms of the recognized test, was designed to elicit a medical or scientific response as to the etiology of the disease. This is consistent with Board policy:

#### **103.84 Cause of the Disability**

Section 61(1)(d) of the Act requires the Panel to certify as to the cause of the disability. Cause is a word much like disability in that it has different meanings, depending on the context in which it is used. Sometimes it can refer to matters of natural science, sometimes to moral value judgements, and sometimes to questions of law. The purpose of the Medical Review Panel is to provide an appeal from "a medical decision of the Board" and it is in that context that the word "cause" must be interpreted. The Board interprets the word cause in Section 61(1) of the Act to refer to the etiology of a physical or psychological disability. It means cause insofar as it is a matter of medical science, but not cause insofar as it is a matter of moral value judgements, or law, or non-medical fact.

[emphasis added]

- (40) The response of the Medical Review Panel to the question posed by the Board is its opinion as to the origin of the disability. It found that the exposure to workplace dust "played a role" in causing the worker's COPD. It assigned the relative contribution of such exposure a figure of 10% and of smoking 90%. This is a conclusion of scientific or medical fact. The Panel did not express an opinion as to whether the contribution of the dust exposure was *de minimis* or negligible. This was not a judgment it was called upon to make. Unfortunately, the Medical Review Panel was not asked whether the worker would have developed his disability but for the workplace exposure to dust.
- (41) We consider that the role played by the exposure to workplace dust in causing the worker's COPD is so minor in this case that it cannot be said to be more than *de minimis* or negligible. We refer to the Medical Review Panel's assessment of the relative contribution of the causes. The relatively low level of exposure of the worker to

dust in the workplace, including asbestos dust, also supports our conclusion. The worker was exposed to dust, but since most of his work was out of doors, it was also well-ventilated. We emphasize that our decision is not based on the notion that a set percentage of contribution is required in order for a particular cause to be considered more than *de minimis*. We only say that in the circumstances of this case, after considering all of the evidence and the merits and justice of the case, the work-related cause is *de minimis*. Therefore it is not of causative significance. For these reasons we deny the worker's appeal.

### **Conclusion**

- (42) The Panel concludes that the worker's chronic obstructive pulmonary disease was not due to the nature of his employment.
- (43) The worker's appeal is denied. The findings of the Review Board are redetermined in accordance with the terms of this decision.

John Steeves, Chair  
Appeal Commissioner

Glen W. Bell  
Appeal Commissioner

Teresa White  
Appeal Commissioner

GWB:cd