SUPREME COURT OF YUKON

Citation: Byblow v. Workers' Compensation Appeal Tribunal, 2012 YKSC 31

Date: 20120427
S.C. No. 11-AP001
Registry: Whitehorse

Between:

ASHLEY BYBLOW

Petitioner

And

WORKERS' COMPENSATION APPEAL TRIBUNAL

Respondent

Before: Mr. Justice R.S. Veale

Appearances:

Alfred C. Kemp — Counsel for the Petitioner
Debra Fendrick — Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] Ashley Byblow brings an application for judicial review from a decision of the Workers' Compensation Appeal Tribunal ("the Tribunal") dated November 9, 2010, in which the Tribunal confirmed and varied the decisions of the Director of Claimant Services ("the Director") dated December 4, 2009 and July 8, 2010. The Director found that Mr. Byblow had been capable of working since January 1, 1995 and terminated his wage loss benefit resulting in an overpayment of $620,768.18. The Director concluded that Mr. Byblow, in violation of s. 14 of the *Workers' Compensation Act*, S.Y. 2008,

c. 12, ("the *Act*"), provided false and misleading information on the nature and extent of his injury.

[2] Mr. Byblow appealed the decision of the Director to the Tribunal. The Tribunal confirmed that he was capable of working and that payments for loss of earnings were recoverable from January 1, 1995. However, the Tribunal decision varied the Director's decision in that the Tribunal did not find fraud on the part of Mr. Byblow. Rather, the Tribunal found that the Workers' Compensation Health and Safety Board (the Board) erred in its earlier 2001 decision to reinstate Mr. Byblow's claim.

[3] As a result, the Tribunal found that Mr. Byblow's claims for loss of earnings before January 1, 1995 and a 9% permanent partial award of $10,352.40 for permanent loss of vision were valid. The Tribunal also ordered that the Board pay for Board-ordered medical testing and other expenses for the entirety of Mr. Byblow's claim. The Tribunal's decision did not state the exact amount of the recoverable overpayment, but counsel for Mr. Byblow advises that the Board is pursuing recovery in an approximate amount of $600,000.

[4] The 2001 decision was made by the Board's Disability Case Manager. Both the Director and the Disability Case Manager are Board employees. The Tribunal is an independent body that hears appeals from Board decisions.

BACKGROUND

[5] Ashley Byblow is in his early forties at the time of this judgment. On August 5, 1994, he filed a claim for compensation arising out of his brief seasonal employment as a surveyor's assistant. His claim stated that he was injured on August 3, 1994, when he slid down a steep gravel hill injuring his head, jaw, left knee, hip and wrist.

[6] The Board accepted the claim, and Mr. Byblow received benefits until December 31, 1994, when he was deemed fit to return to work by a neurologist. He worked as an assistant manager from April 1996 to March 1999 for Trans Canada Credit Corporation, a finance company in the personal loan business. Trans Canada Credit Corporation advised that Mr. Byblow earned the following annual salaries:

From	April 15, 1996	$21,417.00
From	October 14, 1996	$23,130.33
From	March 03, 1997	$25,905.97
From	September 15, 1997	$28,496.56
From	January 1, 1999	$28,606.56
From	March 1, 1999	$30,322.00

[7] On June 25, 2001, Dr. Porayko, a neurosurgical consultant for the Head Injury Unit at the British Columbia Workers' Compensation Board, reviewed Mr. Byblow's file and concluded that Mr. Byblow "sustained a moderately severe brain injury as a result of the industrial accident which occurred on August 3, 1994". The Board accepted Dr. Porayko's report and determined that his claim should be re-opened, based upon the diagnosis of cerebral contusion. This resulted in a retroactive earnings payment to Mr. Byblow of $164,640 on August 31, 2001 and continuing monthly payments. The Board conducted a further review to determine Mr. Byblow's employability and, on November 20, 2003, decided that he was unemployable due to his compensable head injury. At this time, the Board gave Mr. Byblow a monthly wage loss award in the amount of $3,712.37.

[8] In February 2004, the workers' advocate requested a file review to determine if Mr. Byblow was entitled to an additional permanent impairment award in addition to his 19% combined permanent partial impairment award. The Board requested that Dr. Stoddard, a neuropsychologist, assess Mr. Byblow. Dr. Stoddard concluded that,

while, Ashley Byblow “acquired a mild level of cognitive and emotional dysfunction as a result of the compensable accident of 1994”, his impairment was neither significant, nor even moderate. Dr. Stoddard also stated that Mr. Byblow “was intentionally attempting to appear more impaired than he truly is.”

[9] In May 2009, two Investigative Specialists hired by the Board travelled to Westbank, British Columbia, where Mr. Byblow now resides, to conduct surveillance on him. Based upon their Narrative Report (undated, but presumably made in the Fall of 2009) and the medical reports obtained since 1994, the Director concluded that Mr. Byblow had been providing health care professionals and Board staff with false and misleading information. As noted, on December 4, 2009, the Director terminated Mr. Byblow’s benefits and found an overpayment of $620,768. On January 28, 2012, the Board filed a Certificate in this Court for that amount pursuant to s. 88 of the *Act*, which may be enforced as a court order.

[10] While the December 2009 decision is the main decision of the Director, he reviewed additional information provided by Mr. Byblow, including a report from Dr. Brodie (a consulting neuropsychologist retained by Mr. Byblow), and confirmed his decision on July 8, 2010. On June 22, 2010, the workers’ advocate filed his appeal which has been treated as an appeal of both decisions of the Director.

The Director of Claimant Services’ Decisions

[11] The Director’s decisions of December 4, 2009 and July 8, 2010, are not appealed directly, however they are clearly relevant to the Tribunal decision that is on appeal.

[12] In reaching his conclusions, the Director did a complete file review, from the 1994 accident claim up to and including the 2009 Narrative Report of the Investigative

Specialists. In essence, he gave little weight to the evidence that suggested Ashley Byblow had significant functional and cognitive limitations: Dr. Porayko (neurosurgical consultant), June 2001; Dr. Morrison (psychologist), April 29, 2002; Dr. Snelgrove (psychiatrist/physician), June 24, 2002; and Dr. Phillips (general practitioner), May 18, 2004. He gave greater weight to the reports suggesting minor functional and cognitive limitations: Dr. Novak (neurologist), October 13, 1994; Dr. Seland (neurologist), March 2, 1999; Dr. McIntyre (psychiatrist), July 10, 2000; Dr. Stoddard (neuropsychologist), August 16, 2004; the Board Medical consultant November 8, 2004; and the Narrative Report of the Special Investigators dated fall of 2009.

[13] The Director summarized his decision at p. 17 of his December 4, 2009 decision:

> Based on the balance of evidence on file I am left to conclude that you have knowingly provided the YWCHSB as well as several healthcare providers with false and misleading information regarding the nature and extent of your work-related injury. Similarly, you have failed to provide the YWCHSB with full and accurate information regarding your work-related injury and in doing so have failed to fulfil your duty to take all reasonable steps to reduce or eliminate the loss of earnings resulting from your work-related injury, in violation of s. 14 of the Act and Board Policy RE-03.
> On a balance of all of the available evidence, I am also left to conclude that you do not suffer from any significant ongoing functional limitations as a result of your work-related injury. The apparent deterioration in your reported functioning is not supported by the balance of medical evidence, nor is it supported by the balance of the other objective evidence that is now part of your claim file. The balance of evidence indicates that you have extensive functional and cognitive abilities such that I conclude that you have been able to perform the duties of many occupations, including your pre-injury occupation, since at least January 1, 1995.
>
> As a result, your wage loss benefit is now coming to an end, effective immediately, with a resulting overpayment under your claim of $620,768.18.

> The evidence does indicate that you continue to suffer from some effects of your work-related injury, in particular a permanent loss of vision in the lower left quadrant and mild impairment of functioning for which you have received an 18% combined permanent partial impairment award from the YWCHSB. In that regard you have received compensation from the YWCHSB for the loss of use and function in relation to your residual work-related injury.

[14] The Director relied upon the following sections of the *Act*:

> *Duty to mitigate*
>
> 14(1) Every worker must
>
> > (a) take all reasonable steps to reduce or eliminate any impairment and loss of earnings resulting from a work-related injury;
> >
> > …
> >
> > (d) take all reasonable steps to provide to the board full and accurate information on any matter relevant to the worker's claim for compensation; and
> >
> > (e) notify the board immediately of a change in circumstance that affects or may affect the worker's initial or continuing entitlement to compensation.
>
> (2) The board may suspend, reduce or terminate compensation otherwise payable to a worker, where the worker fails to comply with paragraphs (1)(a), (b), (c), (d) or (e).
>
> (3) Despite anything contained in this Act, a worker may appeal a decision made under subsection (2) to the appeal tribunal directly.

The Tribunal Decision of November 9, 2010

[15] The 37-page Tribunal decision is a very thorough review of the medical and investigative reports. It extensively considers all the reports on file, including Dr. Stoddard’s report of August 16, 2004, the Narrative Report of the Special Investigators in the fall of 2009 and the report of Dr. Brodie dated May 25, 2010. Unlike

Dr. Stoddard, Dr Brodie did not detect any malingering or feigned deficits on the part of Mr. Byblow and concluded his impairment from the 1994 accident “had a marked deleterious impact on his employability ever since.”

[16] The conclusions of the Tribunal are at paragraphs 116 to 119 and are followed by its Decision:

> [116] The board found the worker committed fraud by providing false and misleading information to healthcare workers and board staff. We disagree. It was the board that made several mistakes in the adjudication of this claim. Once Dr. Stoddard reported the worker had not participated in testing fully, the board should have investigated further rather than continue to pay wage loss for an additional 5 years. We have strong concerns with the calculation of his wage loss benefits and find it was calculated incorrectly, using only his wage at the time of accident rather than averaging it on pre-accident earnings. (my emphasis)
>
> **Conclusion**
>
> [117] The worker’s history of employment indicates the claimant was capable of working and was not 100% unemployable or totally disabled. We note the worker was not employed for any length of time in a permanent position before August 1994. However, post-injury he was capable of working full-time for a three-year period as an assistant manager at a financial institution. We find that the worker has shown he is capable of assuming full-time employment for a three-year period; his benefits should have not been reinstated. We conclude the worker was provided with loss of earnings benefits for the work-related disability. Any monies paid to the worker for loss of earnings for the 1994 injury are subject to recovery beginning January 1, 1995.
>
> [118] We conclude, on a balance of the available objective evidence, the worker does not suffer from significant ongoing functional limitations as a result of the 1994 work-related injury. Medical documents indicate the worker was capable of employment, including his pre-injury occupation since January 1, 1995.

> [119] Although Dr. Brodie's findings do have merit, he indicated the worker is suffering from a pre-existing ADHD condition that increases his symptoms of pain, fatigue and emotional distress. Evidence on file indicates the worker was showing signs of ADHD during childhood and into adulthood; long before the August 1994 incident. We find this does not meet the criteria for a compensable pre-existing condition. It is not compensable.
>
> **Decision**
>
> The worker's appeal is denied. The Director of Claimant Services December 4, 2009 and July 8, 2010 decisions are confirmed and varied.
>
> 1. The board shall not recover the entire cost of $620,768.18. In doing so, the worker would be responsible for the entire claim costs.
>
> 2. The worker is legitimately entitled to wage loss benefits from the date of accident to December 31, 1994 when he was diagnosed as fit to return to work and to resume driving.
>
> 3. The worker is entitled to the 9% permanent partial award of $10,352.40 with respect to the permanent loss of vision due to the work-related injury.
>
> 4. The board will assume costs for all board-ordered medical testing for the entirety of the claim including prescriptions, travel expenses, accommodation, air/ground travel, meals and incidentals to attend medical appointments.
>
> 5. The remainder of the claim costs will be considered an overpayment.

[17] I am informed by counsel for Mr. Byblow that the reference to the 9% permanent partial award of $10,352.40 should read 8%. It is part of the 18% combined permanent partial impairment award.

ISSUES

[18] Counsel for Mr. Byblow seeks judicial review of four issues from the Tribunal decision in the following order:

a) Whether the Tribunal properly determined that there was a recoverable overpayment to the Petitioner, starting January 1, 1995;

b) Whether the Tribunal breached the rules of natural justice and procedural fairness by requesting and relying upon additional information after the hearing in order to make its decision;

c) Whether the Tribunal properly determined that the Petitioner was capable of employment since January 1, 1995 and therefore, not entitled to loss of earnings benefits;

d) Whether the Tribunal acted within its jurisdiction when it addressed the issue of the calculation of the Petitioner's loss of earnings benefit.

STANDARD OF REVIEW

[19] The decision of the Tribunal that the overpayment is recoverable and that he is capable of employment are issues of mixed fact and law and should be reviewed on the standard of reasonableness set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9.

[20] The jurisdiction of the Tribunal is found at s. 65 of the *Act*:

> *Jurisdiction of the appeal tribunal*
>
> 65(1) The appeal tribunal has exclusive jurisdiction to examine, inquire into, hear, and determine all matters arising in respect of an appeal from a decision of the board under subsection 14(2), from a decision of a hearing officer under subsection 53(1), or from a decision of the president of the board under subsection 56(4) and it may confirm, reverse, or vary the decision.

> (2) Without restricting the generality of subsection (1), the exclusive jurisdiction includes the power to determine, on an appeal pursuant to subsection 15(2) or 54(1)
>
> (a) whether a worker's injury was work-related;
>
> (b) the duration and degree of a work-related injury;
>
> (c) the weekly loss of earnings of a worker resulting from a work-related injury;
>
> (d) the average weekly earnings of a worker;
>
> …
>
> (3) Subject to subsections 64(8) and (12), the acts or decisions of the appeal tribunal on any matter within its jurisdiction are final and conclusive and not open to question or review in any court.
>
> (4) No proceedings by or before the appeal tribunal shall be restrained by injunction, declaration, prohibition, or other process or proceedings in any court or be removed by certiorari, judicial review, or otherwise in any court, in respect of any act or decision of the appeal tribunal within its jurisdiction.
>
> …

[21] A worker may apply for judicial review pursuant to s. 59 of the *Act*:

> *Application to Supreme Court*
>
> 59(1) Either the appeal tribunal or the board may apply to the Supreme Court for a determination of whether a board of directors' policy or an appeal tribunal decision is consistent with the Act.
>
> (2) In an application under subsection (1), both the appeal tribunal and the board shall have standing, regardless of which party makes the application.
>
> (3) Despite subsections 65(3) and (4), a worker, a dependent of a deceased worker, or an employer may make an application to the Supreme Court for judicial review of a decision of the appeal tribunal on a question of law or jurisdiction.

[22] Part 3 of the *Act* is entitled “Presumptions and Benefit of Doubt” and it sets out the following:

> *Presumption to be work-related*
>
> 17 Unless there is evidence to the contrary, an injury is presumed to be work-related if it arises out of or in the course of a worker's employment.
>
> *Decisions based on merit*
>
> 18 The decisions, orders, and rulings of a decision-maker, hearing officer, or the appeal tribunal shall always be based on the merits and justice of the case and board of directors' policies and in accordance with the Act and the regulations.
>
> *Balance of probabilities*
>
> 19 Despite anything contained in this Act, when the disputed possibilities are evenly balanced on an issue, the issue shall be resolved in favour of the worker or the dependent of a deceased worker.

[23] The decision of the Yukon Court of Appeal in *Re O’Donnell*, 2008 YKCA 9, is instructive on the application of *Dunsmuir* to this judicial review. In that case, the employer, Government of Yukon, appealed an order of this Court which quashed a decision of the Tribunal. The Court of Appeal addressed the standard of review in considering whether the chambers judge accorded due deference to the Tribunal. In *Re O’Donnell,* the Tribunal had concluded that the worker’s stress adjustment disorder from her termination of employment was a normal part of employment and not compensable.

[24] The employee brought an application for judicial review and the Superior Court judge described the applicable standard of review as follows:

> [56] When reviewing a question for reasonableness, I am not to ask myself at any point what the correct or preferred decision would have been: *Ryan*, at para. 50. Rather, I must look at the reasons as a whole and on the basis of a

> "somewhat probing examination", I am to determine if there is any line of analysis which is tenable in support of the conclusion: *Ryan*, at para. 55; and *Logan*, at para. 36.

[25] The judge conducted an extensive analysis of each legal issue and ultimately quashed the Tribunal's decision and remitted it back for reconsideration. On appeal, the Court of Appeal described his assessment as a "surgical analysis" rather than the "somewhat probing examination" described in *Dunsmuir* as follows:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[26] In the result, the Court of Appeal allowed the employer's appeal and restored the Tribunal's decision on the basis that:

> The chambers judge obviously held a different view of the evidence. However, it cannot be said that the Tribunal's assessment of the evidence and its conclusions were not reasonable. It was not for the chambers judge on judicial review of the Tribunal's decision to dissect and re-weigh the evidence and arrive at a different conclusion. At the time the chambers judge decided this case, his task was to subject the Tribunal's decision to a "somewhat probing" examination of the decision and determine if there was a tenable analysis to support it.

[27] I should note that, while counsel for the Tribunal appeared on this application, her role was minimal. Limits on the scope of her submissions were also set out in *Re O'Donnell*:

> [61] Before leaving these reasons, I should comment on the Tribunal's submissions. Counsel for the Tribunal advised us that the Tribunal had not previously appeared in this Court and was uncertain as to the permissible scope of submissions. She sought to make submissions concerning both the standard of review and the reasonableness of the decision. We confined her submissions to the standard of review. The principle underlying that restriction was expressed in *Northwestern Utilities Ltd. et al. v. Edmonton* (1978), [1979] 1 S.C.R. 684 at 709-710:
>
> > It has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction. [Citations omitted] Where the right to appear and present arguments is granted, an administrative tribunal would be well advised to adhere to the principles enunciated by Aylesworth J.A. in *International Association of Machinists v. Genaire Ltd. and Ontario Labour Relations Board* [(1958), 18 D.L.R. (2d) 588], at pp. 589, 590:
> >
> > > Clearly upon an appeal from the Board, counsel may appear on behalf of the Board and may present argument to the appellate tribunal. We think in all propriety, however, such argument should be addressed not to the merits of the case as between the parties appearing before the Board, but rather to the jurisdiction or lack of jurisdiction of the Board. If argument by counsel for the Board is directed to such matters as we have indicated, the impartiality of the Board will be the better emphasized and its dignity and authority the better preserved, while at the same time the appellate tribunal will have the advantage of any submissions as to jurisdiction which counsel for the Board may see fit to advance.

[28] I understand the merits of Tribunal participation may not have been fully canvassed in the Court of Appeal, because, there, the employer had played a full role in the appeal. That was an unusual situation, as in judicial review cases under the *Act*, the employer rarely participates. I find the absence of a respondent is a serious concern as I am left without any advocacy in support of the Tribunal's decision. Hopefully, this Court will have an opportunity to address the matter of standing in the future, as it has so far taken an expansive view of the participatory role of tribunals in judicial review. See *Western Copper Corporation v. Yukon Water Board*, 2010 YKSC 61, and *Liard First Nation v. Yukon Government and Selwyn Chihong Mining Ltd.*, 2011 YKSC 29, where I concluded at para. 35, that "the broader the representation at the hearing, the better equipped the court will be to make an appropriate and just decision."

[29] As for the participation of the Tribunal where there is no role played by the employer, I would have much preferred to hear counsel for the Tribunal on the merits, as this would have given balance and fairness to the hearing. I note that in *Timberwolf Log Trading Ltd. V. Commissioner*, 2011 BCCA 70, at para. 11 the Court made reference to three exceptions to the *Northwestern Utilities* rule it referred to in *Re O'Donnell.* These had been set out in an article by Frank Falzon, Q.C., in *Tribunal Standing on Judicial Review,* 21 Can. J. Admin. L. & Prac. 21:

> (a) where the question is whether the tribunal has made a patently unreasonable interpretation of a statutory right to be heard;
>
> (b) where the tribunal is defending a long standing policy; and
>
> (c) where there is no one else to argue the other side.

[30] While it is clear that the Tribunal is entitled to deference in matters of fact and mixed fact and law, there are other issues before me. I now turn to the standard of review that should be applied to the issues that touch on procedural fairness, i.e. the Tribunal receiving and relying on documents obtained after the hearing and its calculation of Mr. Byblow's loss of earnings benefit, which Mr. Byblow did not have an opportunity to address. In my view, these decisions should be reviewed on the standard of correctness (see *Dunsmuir* at paras. 50 and 60.) However, in applying that standard, I note the caution set out by Sarah. Blake, *Administrative Law in Canada*, 5th ed. (Markham: LexisNexis Canada Inc., 2011), at p. 221:

> A court will interfere with a tribunal decision because of procedural errors committed by the tribunal only if those errors resulted in manifest unfairness or actual prejudice to the applicant's right to be heard. Minor procedural lapses are not grounds to set aside a decision. What is required is a fair procedure, not perfection.

a) The Recoverable Overpayment Issue

[31] The Tribunal is bound by the policies of the Board as set out in s. 64(3) of the *Act*, cited above. Of particular relevance is a Board Policy EL-04 entitled "Recovery of Overpaid Compensation" ("the Recovery Policy").

[32] The Tribunal decision clearly makes a determination that the compensation paid to Mr. Byblow since January 1, 1995 is recoverable. I have referred to an approximate amount of $600,000, because the Tribunal Decision does not state any exact recoverable amount after the deduction of the costs of prescriptions, travel expenses, accommodation, meals and incidentals required to attend medical appointments.

[33] I can find no explicit reference in the Tribunal decision to the Recovery Policy. Paragraph 3 of the Tribunal decision sets out five other policies forwarded by the Board

as relevant to the Byblow appeal pursuant to s. 64(4) of the *Act*. In para. 5, the Tribunal said it considered these five policies. While the Tribunal also explicitly referred to other policies not forwarded by the Board, such as EN-01, EN-02, RE-02-4 and CL-35, the last being relevant to the Board's calculation of Mr. Byblow's wage loss, it did not mention the Recovery Policy.

[34] The only reference to recovery of overpayment is found in the brief five paragraphs included under the title "Decision" and set out at para. 16, above. No reference is made here to the Recovery Policy either.

[35] I could assume that the Tribunal is presumed to know the Recovery policy and applied it implicitly in its Decision. However, I do not find this to be a tenable proposition because the decision of the Tribunal is lacking in any analysis of the alternatives that the Recovery Policy may have presented. The Tribunal simply does not clearly state the basis for its decision about the recovery of overpayment.

[36] Specifically, there is no analysis, explicit or implicit, of the following factors referred to in the Recovery policy:

> 2. Appeals
>
> The overturning of a YWCHSB decision-maker's decision, through the appeal process, does not create an overpayment.
>
> If a YWCHSB decision-maker concludes, on the evidence available at the time of the decision, that a worker is entitled to receive compensation, the payment of that compensation is lawful and does not become an overpayment, even if evidence may become available later that justifies a different decision. The exceptions to this occur when the YWCHSB decision-maker's decision has been based upon incorrect or inaccurate information provided by the worker.

> 3. Decision to Recover
>
> Once an overpayment more than fifty dollars ($50.00) has been identified, it will be recovered from the injured worker when:
>
> a) It is legal – the overpayment recovery must be in accordance with the law.
>
> b) The overpayment was caused by the injured worker or dependent.
>
> c) The overpayment was caused by the YWCHSB, employer or another third party and the injured worker knew or reasonably ought to have known that he/she was overpaid.
>
> *Example:*
> *The worker took home one thousand dollars ($1,000.00) per week pre-injury and, due to an administrative error, was paid tow thousand dollars ($2,000.00) in weekly benefits following a work-related injury. In that case, the worker should reasonably have known that he/she was overpaid and reported it to the YWCHSB.*
>
> d) It is timely – if, in the opinion of the YWCHSB, the discovery of an overpayment, not caused by the worker or dependent, occurs within two years of the start of the overpayment.
>
> e) There is fraud: If it is determined by the YWCHSB that the overpayment resulted from fraud, misrepresentation, or failure to report an obvious error, the overpayment will be recovered notwithstanding any other provisions, unless the YWCHSB determines that another approach would be more beneficial to the YWCHSB's achievement of desired outcomes in a fraud situation.

[37] While it may be that the Tribunal directed its mind to the Recovery policy, the reasons for its Decision on overpayment recovery do not reveal it. As a result, it is impossible to assess the reasonableness of the Tribunal's decision. As the Tribunal has rejected the finding that Mr. Byblow committed fraud by providing false and misleading information to health care workers and Board staff, it must address the Recovery policy

in a transparent and intelligible way. It has not done so and I remit the Decision back to Tribunal to consider and apply the Recovery policy.

[38] The Tribunal has made a far-reaching decision to order any compensation paid to Mr. Byblow after January 1, 1995, recoverable from him. However, the Tribunal's findings that there was no fraud on the part of Mr. Byblow and that the Board made several mistakes in the adjudication of his claim must be addressed in its decision to order recovery of the benefits paid beginning in August 2001.

b) Information Received After The Hearing

[39] In para. 41 of its decision, the Tribunal candidly acknowledged that it requested and received updated information from the Canada Revenue Agency after the oral hearing on August 25, 2010, (the "CRA documents"). The further information, misleadingly called "Further Disclosure", was not available at the hearing, and Mr. Byblow was unable to address it. The Tribunal stated at para. 41:

> **Further disclosure**
> [41] On October 14, 2010 the tribunal requested and received an update to the worker's claim file. Further documentation had been received at the board from Canada Revenue Agency. Included in the update was a business license history for the worker's city of residence. The worker held a business license for a "design studio" in 2000. We believe this may be for a website design business that he had in 2000. A July 26, 2001 e-mail from the worker to his adjudicator lists his employment and earnings from 1995 to 2001. For the year 2000, the worker notes, "Did not work in 2000". Canada Revenue Agency documents entitled "Income Verification Report" notes the worker claimed an income of $15,216 for gross business income in 2000.

[40] The usual procedure when a tribunal receives additional information after a hearing is to provide the information to the parties and allow further evidence and

submissions. The *Act* itself, under the appeal provisions in s. 54, provides the following direction:

> 54(2) When considering an appeal, the appeal committee established under Part 10 shall
>
> (a) give the worker, a dependent of a deceased worker, or the worker's employer the right to be heard;
>
> (b) consider the entire record of the claim in the board's possession; and
>
> (c) subject to subsection (3) consider further evidence that it considers necessary to make a decision.

[41] The *Act*'s provisions are consistent with the requirements of procedural fairness. The Tribunal may consider new evidence, but fairness dictates that a party be permitted to review and make submissions if the new evidence may have an impact on the Tribunal's ultimate decision.

[42] The question to be determined on this ground is whether Mr. Byblow has been denied a fair hearing because of the Tribunal receiving and relying on the additional information after the hearing. On the one hand, the CRA documents are but a small part of the evidence that the Tribunal relied upon. On the other hand, they go directly to Mr. Byblow's credibility, which is at the root of the Tribunal's decision.

[43] In *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396, the Court sent a matter back to the Review Officer on the basis that Petro-Canada had not been given a full opportunity to make submissions about certain orders imposed. The narrow issue was whether the Review Officer had erred in his interpretation of the word "employer', but the Court found that this error did not require the decision be quashed as unreasonable. Groberman J. stated at para. 49:

> … [the error], however, does not mean that the decision must be quashed as unreasonable. Not every error in a tribunal's chain of reasoning will compel the quashing of its decision. The role of the error in the decision is critical.

[44] In finding that the Review Officer's decision was reasonable, the court gave the tribunal "a margin of appreciation" and followed Law Society of *New Brunswick v. Ryan*, 2003 SCC 20, where the Court stated at para. 56 "…a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole."

[45] However, while the major aspects of the decision stood, because of the Review Officer's failure to provide Petro-Canada a full opportunity to make submissions respecting certain orders, those orders were remitted back. The court said at para. 65:

> Procedural fairness requirements in administrative law are not technical, but rather functional in nature. The question is whether, in the circumstances of a given case, the party that contends it was denied procedural fairness was given an adequate opportunity to know the case against it and to respond to it. In some circumstances, a tribunal's decision to address an issue not raised by the parties may constitute a denial of procedural fairness -- see, for example, *MacNeil v. Nova Scotia (Workers' Compensation Board)*, 2001 NSCA 3, 189 N.S.R. (2d) 310.

[46] There is also authority for the principle that procedural fairness must be respected even where it will not likely change the decision made. In *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165, Gonthier J. stated at para. 161:

> However, it must be remembered that natural justice requires procedural fairness no matter how obvious the decision to be made may be. It does not matter whether it was utterly obvious that Daniel Hofer Jr., David Hofer and Larry Hofer would be expelled. Natural justice requires that they be given notice of a meeting to consider the matter, and opportunity to make representations concerning it. This may not change anything, but it is what the law requires.

[47] This follows the decision in *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643, where Le Dain J. stated at para. 23:

> … I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

[48] This strong statement about procedural fairness was in the context of a case where the person whose rights were affected was not given any opportunity to be heard. That can be distinguished from the case at bar, where the Tribunal had a full hearing with Mr. Byblow present by telephone, as well as the Worker's Advocate making submissions on his behalf. However, the CRA documents received after the hearing directly affected Mr. Byblow's credibility, and thus was a major factor in the disposition of the appeal. It is not for this Court to speculate on whether this is a case where Mr. Byblow's review of the documents and further evidence from him or submissions by his counsel may or may not affect the result. The possibility that the 37-page decision considered so many other medical opinions and facts that the Tribunal may not change its decision is simply not sufficient to answer such a significant procedural flaw.

[49] I therefore order that the Tribunal rehear the matter to the extent of providing the documents received after the hearing to Mr. Byblow, permitting him to present further evidence in respect of them, and hearing submissions on how this affects the merits of

his claim and his credibility. The Tribunal is required to approach this evidence and re-hearing with an open mind to reconsider its decision. I wish to make it clear that because the consequences of the Tribunal's adverse credibility findings are far-reaching, this reconsideration will require a review of the Tribunal's entire decision, including the recoverability of overpayment and their finding on Mr. Byblow's capacity for employment.

c) The Capability of Employment Decision

[50] As a result of my determination that the Tribunal must reconsider its entire decision as a matter of procedural fairness, I do not find it necessary or helpful to review this aspect of the Tribunal's decision. The Tribunal's decision may change when it hears Mr. Byblow on the information it received and relied on after the hearing.

d) The Calculation of Wage Loss Benefits

[51] Counsel for Mr. Byblow submits that the Tribunal's calculation of wage loss, found at paras. 110 to 118 of its decision, is a breach of procedural fairness, as Mr. Byblow had no idea that this was an issue to be addressed, and consequently did not address it.

[52] I am in agreement that it was not procedurally fair for the Tribunal to delve into this issue. The issue of calculation of wage loss benefits arose out of the 2001 Board decision, and the decision of the Director that was under appeal did not address it. The Tribunal in this circumstance should have alerted Mr. Byblow or the Worker's Advocate that it was going to review the calculation of wage loss benefits.

[53] It is arguable that the calculation of wage loss benefits is not an error that requires a quashing of the Tribunal decision. However, it is relevant to the recovery of overpayment, assuming that it has included it as an overpayment.

REMEDY

[54] Counsel for Mr. Byblow has specifically requested that I decline to send this matter back and instead make the decision the Tribunal should have made, based on the principle in *McCarthy v. Nova Scotia (Workers' Compensation Appeal Tribunal)*, 2001 NSCA 79 at para. 52, i.e. because "there is no basis for arriving at the same result reached in the decision appealed from." In that case, the Tribunal decision was wrong in law as it assumed that certain Registry records were conclusive proof whether McCarthy was a director of a roofing company. I am not of the view that the case of Mr. Byblow is as cut and dry as the McCarthy case. I cannot say with certainty what the outcome will be when the Tribunal rehears submissions on the recovery of overpaid compensation, the new documents, Mr. Byblow's capability of employment and the calculation of wage loss benefits. The Tribunal may or may not change its decision, and that will depend on evidence and submissions heard.

[55] I am also of the view that it would only be in exceptional circumstances where the Court prohibits a tribunal from re-hearing the same matter again. Such circumstances do not exist here. See *Rathé v. Ontario (Health Professions Appeal and Review Board)* (2002) 166 O.A.C. 161, at para. 29, and *C.B. Powell Limited v. Canada Border Services Agency*, 2010 FCA 61, at para. 33.

SUMMARY

[56] To summarize, the application of Mr. Byblow is granted. I order that the decision of the Tribunal is quashed, and that there must be a rehearing to address the recovery of overpaid compensation, the documents received after the hearing, the capability of employment and the calculation of wage loss benefits.

[57] Counsel may speak to me in case management about costs of this application and the rehearing.

VEALE J.