IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Workers' Compensation Act (Re) and O'Donnell #2*, 2007 YKSC 07

Date: 20070119
S.C. No. 05-AP009
Registry: Whitehorse

**IN THE MATTER OF THE WORKERS' COMPENSATION ACT
R.S.Y. 2002, ch. 231**

and

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
IN RESPECT OF DECISION #106 OF
THE WORKERS COMPENSATION APPEAL TRIBUNAL**

by

**CHAROLETTE O'DONNELL and THE WORKERS' ADVOCATE
ON BEHALF OF CHAROLETTE O'DONNELL**

PETITIONERS

Before: Mr. Justice L.F. Gower

Appearances:

Richard A. Buchan	Counsel for Petitioners
Penelope Gawn	Counsel for Respondent, Government of Yukon, Public Service Commission
Debra Fendrick	Counsel for the Workers' Compensation Appeal Tribunal

REASONS FOR DECISION

INTRODUCTION

[1] This is an application for judicial review of a decision by the Workers' Compensation Appeal Tribunal (the "Appeal Tribunal"), which held that the petitioner worker did not suffer a work-related disability as a result of a disciplinary suspension, and later termination, of her employment with the Government of Yukon in 2002. The Workers' Advocate has made this application on the worker's behalf and seeks a

certiorari order quashing the Appeal Tribunal's decision and confirming the previous decision of the hearing officer of the Workers' Compensation Health and Safety Board ("WCHSB" or "the Board").

ISSUES

[2] The principal issue is whether the Appeal Tribunal committed a reviewable error in deciding that the worker did not suffer a work-related disability. However, a number of sub-issues were raised in the hearing before me, which are to some extent interrelated. Those sub-issues, as I see them, are as follows:

(a) Did the Appeal Tribunal commit a reviewable error by failing to consider s. 6 of the *Workers' Compensation Act*, RSY 2002, c. 231 (the "*Act*"), which presumes a disability to be work-related, unless the contrary is shown, if the disability arises out of or in the course of the worker's employment?

(b) Did the Appeal Tribunal commit a reviewable error by failing to specifically consider the presumption in WCHSB Policy CL-42, entitled "Arising Out of and in the Course of Employment", which presumes a disability to have arisen out of and in the course of employment, unless it can be shown that the disability was not work-related?

(c) Did the Appeal Tribunal commit a reviewable error by misapplying Policy CL-42 to the facts?

(d) Did the Appeal Tribunal commit a reviewable error by concluding that "Work stressors must involve events that could be considered "traumatic" in the broadest sense of that term . . ."?

(e) Did the Appeal Tribunal commit a reviewable error by failing to consider the applicability of the WCHSB Policy CL-47, entitled “Pre-Existing Conditions”?

[3] The second major issue raised by counsel for the Worker’s Advocate is whether the Appeal Tribunal committed a reviewable error by posing questions to the independent medical examiner, appointed under s. 19(2) of the *Act*, which allegedly exceeded the scope of the grounds of appeal originally stated in the employer’s Notice of Appeal.

[4] The final general issue is what standard of review to apply to each of the above questions.

BACKGROUND

[5] The worker commenced her employment with the Government of Yukon in 1988. She accepted a term position in another jurisdiction in January 2002. During her absence, certain of the worker’s files were independently reviewed and inconsistencies were allegedly found in the management of those files. On August 5, 2002, the worker returned to her position in the Yukon and she met with her employer to discuss the alleged inconsistencies. That meeting resulted in the worker’s suspension from her duties, pending further investigation.

[6] On August 7, 2002, the worker completed and filed with the WCHSB a “Worker’s Report of Injury/Illness”, which claimed that the worker had been injured as a result of the events of August 5th. Under that part of the form which asked the question “What part of the worker’s body was injured?”, the worker wrote “mental & physical (entire body)”. Further, when asked on the form “What happened to cause the injury/illness?”,

the worker wrote “see medical”. This presumably referred to the report of Dr. Vaughan, entitled “Doctor’s First Report”, which was also dated August 7, 2002. Dr. Vaughan was the physician temporarily filling in for the worker’s family physician, Dr. Densmore. In this report, under the section entitled “Worker’s Description of Injury”, Dr. Vaughan wrote

> “Placed on suspension for alleged mismanagement of file case load, poor performance. Very sudden upon return from 8/12 post in NWT. Very disruptive.”

Under that part of the form where the physician was asked to describe subjective complaints and objective findings, Dr. Vaughan wrote:

> “- difficulty sleeping, early waking
> - [decreased] interest
> - low energy
> - mood 0/10, very low
> - loss appetite
> - agitation
> - poor concentration.”

Dr. Vaughan diagnosed the worker’s condition as an “adjustment disorder” and indicated that “workplace stress” was a factor which might complicate her recovery.

[7] On August 13, 2002, the worker met with her employer again, together with her union representative, and was informed that her employment was terminated.

[8] The worker authorized the Workers’ Advocate to represent her from August 14, 2002 to date.

[9] On August 15th, Dr. Vaughan completed a further progress report and under the section entitled “Any Change in Diagnosis?/Factors Complicating Recovery?”, the doctor indicated in the affirmative and wrote “Now fired” and repeated the diagnosis of

"adjustment disorder". The list of the worker's subjective complaints was similar to that noted on Dr. Vaughan's August 7th report.

[10] On September 12, 2002, Dr. Densmore provided the WCHSB with "chart notes" from June 18, 1996 to September 6, 2002. Dr. Densmore's covering letter stated that the worker had been a patient of hers since 1979, but that there was a gap between February 1997 and August 7, 2002 when she did not see the worker at all.

[11] On October 15, 2002, psychologist Alberta Rooney provided a report indicating that she had assessed the worker and confirmed the diagnosis of "Adjustment Disorder with Mixed Anxiety and Depressed Mood, Acute". Ms. Rooney further opined that the symptoms of this disorder do not generally persist for more than six months after the original stressor, or its consequences, have terminated.

[12] By her letter of October 25, 2002, a WCHSB adjudicator accepted the worker's claim for compensation, having determined that the worker suffered a disability as defined by the *Act* and Board policy, specifically an illness described as an adjustment disorder. The employer appealed that decision to a WCHSB hearing officer.

[13] Between the adjudicator's decision and the appeal before the hearing officer, the worker filed a number of supplementary progress reports from her physician as well as reports from another psychologist, Marilyn Smith, all of which continued to state that the worker was not yet able to return to work. The review by the hearing officer resulted in a decision on August 11, 2003 which confirmed the adjudicator's decision of October 25, 2002 that the worker had suffered a work-related disability. The employer appealed this decision to the Appeal Tribunal.

[14] Most unfortunately, the hearing of the merits of the appeal before the Appeal Tribunal was significantly delayed because of a lengthy dispute over the scope of disclosure of the worker's claim file maintained by the WCHSB. That dispute went through a hearing before the Appeal Tribunal, followed by a judicial review proceeding and a judgment of this Court on July 19, 2004: *Workers' Compensation Act (Re) and O'Donnell*, 2004 YKSC 51.

[15] Prior to the Appeal Tribunal hearing the merits of this matter, the worker filed further updated reports from psychologist Marilyn Smith and Dr. Densmore, all of which continued to opine that she was unfit to return to work. In particular, the worker was evaluated by psychiatrist Armando Heredia on January 30, 2004. Dr. Heredia noted that the worker reported that shortly after the termination of her employment, she began to experience severe anxiety and mood symptoms which prompted the consultation with psychologist Alberta Rooney, which I just referred to. Dr. Heredia noted that Ms. Rooney concluded that the worker was suffering from an adjustment disorder with mixed anxiety and depressed mood. Dr. Heredia further noted that the worker had not responded to past medical interventions and it appeared to him that the worker's problem had "become chronic and is now requiring continued intervention in order to decrease her mood symptoms". He recommended a specific program of medication. The worker reported to Dr. Heredia at that time a "possible weight gain of almost 20 pounds".

[16] On November 26, 2004, the employer wrote to the Appeal Tribunal requesting that an independent medical examination ("IME") of the worker be conducted pursuant to s. 19 of the *Act*. In making that request, the employer suggested a number of specific questions be posed to the independent medical practitioner. On December 2, 2004, the

Appeal Tribunal wrote to the employer and the Workers' Advocate confirming the request for an IME, seeking further submissions on whether such an examination was necessary and requesting that those submissions be provided no later than December 15, 2004.

[17] On December 21, 2004, the Appeal Tribunal again wrote to the Workers' Advocate and the worker's physician on the topic of the IME and suggested a number of questions of its own which might be put to the independent medical practitioner. That letter sought a response as soon as possible.

[18] On January 10, 2005, the Appeal Tribunal again wrote to the Workers' Advocate acknowledging its responsibility under the *Act* to consult with the worker on the question of the IME and invited the Workers' Advocate to provide suggestions for a list of appropriate questions as part of the consultative process. The Appeal Tribunal sought a response on or before January 31, 2005 and noted that time was of the essence.

[19] On March 17, 2005, the Appeal Tribunal yet again wrote to the Workers' Advocate requesting a response on the issue of the IME.

[20] On March 21, 2005, the Workers' Advocate responded to the Appeal Tribunal giving its position on the IME and suggesting four specific questions which could be posed to the independent medical practitioner. The Appeal Tribunal replied to the Workers' Advocate by its letter of April 6, 2005 confirming that it felt the IME was necessary pursuant to s. 19(1)(b) of the *Act*, due to the uniqueness of the claim. That letter also posed four specific questions which the Appeal Tribunal intended to ask of the

psychiatrist performing the IME. Finally, the Appeal Tribunal's letter asked for a response no later than April 15, 2005, failing which it intended to proceed unilaterally.

[21] On April 19, 2005, the Workers' Advocate sent an email to the secretariat of the Appeal Tribunal which confirmed that the worker had "attended the psychiatrist" the day before (I assume this was Dr. Heredia, as the IME had not yet been conducted). The email continued that the worker relayed to the Workers' Advocate verbally that the psychiatrist "was also asked to comment on the questions to which he felt that they were acceptable. Please relay our position to the Committee" (the "Committee" here presumably refers to the Appeal Tribunal).

[22] On April 20, 2005, the Appeal Tribunal sought an IME from psychiatrist Dr. Paul Darlington. In addition to forwarding Dr. Darlington the worker's complete medical and psychological file on record with the Appeal Tribunal to that date, it posed the following four questions:

> "1. Was this worker incapacitated by a medical condition arising from the worker's termination on August 13, 2002?
>
> 2. If the worker was incapacitated from the workplace incident, is that incapacity properly referred to as an Adjustment Disorder?
>
> 3. What is the anticipated period of recovery for a person afflicted with this type of disorder? What might hinder this worker's recovery?
>
> 4. Is this worker capable of performing the duties of her previous occupation or any occupation?"

It is important to note that these are the exact four questions which the Appeal Tribunal noted in its letter to the Workers' Advocate on April 6, 2005, to which the Workers' Advocate replied by email on April 19th indicating that his position was that the questions "were acceptable".

[23] Dr. Darlington provided his report to the Appeal Tribunal on June 3, 2005.

[24] The Appeal Tribunal finally heard the matter on its merits on November 24, 2005 and rendered its decision ("Decision #106") on December 21, 2005. As a result of the decision, the WCHSB immediately advised the worker that her workers' compensation benefits had been terminated.

[25] The worker and the Workers' Advocate filed the within petition on January 10, 2006. However, for reasons of which I am unaware, the hearing of the petition did not take place until October 27, 2006.

DETERMINING STANDARDS OF REVIEW

[26] As I indicated in my list of the issues, it is necessary to address the standard of review for each of the questions under review, before moving on to the individual analysis of those questions: See *Alberta (Workers' Compensation Board)* v. *Appeals Commission,* 2005 ABCA 276, at paras 9, 12 and 17.

[27] It is now settled law that on applications for judicial review courts must apply the pragmatic and functional approach to determine the standard of review: *Pushpanathan* v. *Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19; and *Law Society*

of New Brunswick v. *Ryan*, 2003 SCC 20; and *The Workers' Compensation Appeal Tribunal* v. *The Workers' Compensation Health and Safety Board*, 2006 YKSC 4.

[28] The three recognized standards of review are as follows:

1. Correctness - where little or no deference is given to the tribunal below;
2. Patent unreasonableness – where considerable deference is called for; and
3. Reasonableness - where the standard of deference is somewhere in the middle.

See *Dr. Q*, cited above, at para. 35.

[29] Determining which standard is appropriate involves a consideration of four contextual factors:

1. The presence or absence of a privative clause or statutory right of appeal;
2. The expertise of the tribunal below, relative to that of the reviewing court, on the issue(s) in question;
3. The purpose of the legislation in general and the specific legislative provisions in particular; and
4. Whether the question at issue is one of law, fact, or mixed law and fact.

These factors may overlap and the analysis of them should determine the degree of deference which the reviewing Court should afford to the tribunal below. I will deal with each in turn.

1. The Presence or Absence of a Privative Clause or Statutory Right of Appeal

[30] A statute which affords a broad right of appeal to a superior court suggests less deference (that is, a more searching standard of review), whereas one which contains a privative clause militates in favour of a more deferential position.

[31] In this case, s. 25(1) of the *Act* gives the Appeal Tribunal "exclusive jurisdiction to examine, inquire into, hear, and determine all matters arising in respect of an appeal". While this provision prevents an appeal to this Court on the merits, it does not confer authority on the Appeal Tribunal to decide which matters are within or outside its jurisdiction. Rather, this Court retains that right through its inherent jurisdiction: see Jones and de Villars, *Principles of Administrative Law*, 4th ed., (Ontario: Thomson Carswell, 2004) at p. 490.

[32] Section 25(3) of the *Act* provides that, with a couple of exceptions which are not applicable here, the 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". Again, this means that no appeal lies to this Court on the merits, but it does not deprive this Court, as a superior court, of its inherent jurisdiction to review the legality of the Appeal Tribunal's actions: Jones and de Villars, *Principles of Administrative Law*, p. 488.

[33] Finally, s. 25(4) of the *Act* states that no proceedings before the Appeal Tribunal shall be "removed by *certiorari* [or] judicial review . . . in any court, in respect of any act or decision of the appeal tribunal within its jurisdiction". This privative clause is stronger than the two above, but it still does not prevent judicial review of any jurisdictional defect in the Appeal Tribunal's decisions: Jones and de Villars, *Principles of Administrative Law*, p. 490.

[34] Bastarache J., in *Pushpanathan*, cited above, at para. 30, stated that a "full" privative clause is "one which declares that decisions of the tribunal are final and conclusive from which no appeal lies and all forms of judicial review are excluded".

Further, that the presence of such a clause “is compelling evidence that the court ought to show deference to the tribunal’s decision, unless other factors strongly indicate the contrary. . . “.

[35] In this case, s. 25(11) of the *Act* provides that a worker or an employer may make an application for judicial review of a decision of the Appeal Tribunal “if there has been an error in law or in jurisdiction”. Accordingly, the provisions in ss. 25(1), 25(3) and 25(4) can only be seen as “full” privative clauses with respect to decisions of fact, or mixed law and fact, within the Appeal Tribunal’s jurisdiction. Of course, the corollary is that, even when dealing with questions of fact and questions of mixed law and fact, there may still be judicial review if the Appeal Tribunal commits a jurisdictional error. As noted in *Alberta (Workers’ Compensation Board)*, cited above, at paras. 8 and 9:

> “Because superior courts retain supervisory jurisdiction over administrative tribunals, the legislature cannot completely preclude judicial review, no matter how clear and strong the wording of the privative clause. However, the legislature's intended protection is not ignored by the reviewing court.
>
> . . .
>
> The presence or absence of a privative clause is relevant, though not wholly determinative . . .”

[36] In *Logan* v. *Nova Scotia (Workers’ Compensation Appeals Tribunal)*, 2006 NSCA 88, Cromwell J.A., speaking for the Nova Scotia Court of Appeal, was addressing the *Workers’ Compensation Act* in that province, which is similar to the Yukon legislation in that it provides for a statutory appeal on questions of law and jurisdiction, but not on questions of fact. Cromwell J. commented, at para. 17, that the appeal provision supported “a more searching standard of review” of the appeal tribunal’s resolutions of such questions.

[37] Thus, I conclude that, to the extent a particular question at issue is one of fact or mixed law and fact and was decided by the Appeal Tribunal within its jurisdiction, I am prohibited by the *Act* from proceeding with any judicial review. However, if I find that the Appeal Tribunal acted in excess of its jurisdiction in answering such questions, or if the question is one involving a matter of law alone, whether within or outside its jurisdiction, then I am free to apply a less deferential standard of review.

2. The Expertise of the Tribunal Below, Relative to that of the Reviewing Court, on the Issue(s) in Question.

[38] The analysis under this factor has three components. First, the reviewing court must characterize the expertise of the tribunal below; second, it must consider its own expertise relative to that of the tribunal; and third, it must identify the nature of the specific issue before the tribunal relative to this expertise: *Dr. Q*, cited above, at para. 28.

[39] While there is no evidence of the relative expertise of the members of the Appeal Tribunal, some amount of expertise can be presumed. The members of the Appeal Tribunal represent both employers and workers and are appointed only after consultation by the Minister responsible with employers, employer organizations, workers and organized labour. Further, the members of the Appeal Tribunal are appointed for a term of three years and are eligible for reappointment. They may be removed only for cause. Thus, they have an opportunity to gain experience over their term and may sit for more than one term. On the other hand, the Appeal Tribunal members are only part-time appointments and consequently would not have the same opportunity to develop the degree of expertise which might be acquired by a full-time

tribunal. Finally, while the members have access to legal counsel and some training in administrative law and decision writing, they have no particular legal expertise: see also *Workers' Compensation Act (Re) and O'Donnell*, cited above, at para. 33.

[40] Therefore, the Appeal Tribunal likely has greater expertise than this Court in deciding questions of fact arising under the legislation. However, it would have no special expertise on questions of law alone, or even questions of mixed law and fact, where such questions are more law intensive than fact intensive. Not surprisingly, this Court has previously indicated that it is best suited to handle questions of a legal nature: *Workers' Compensation Act and Murphy et al.*, 2001 YKSC 26, para. 35.

[41] Lastly then, under this contextual factor, it becomes necessary to identify the nature of the specific issues before the Appeal Tribunal and now before this Court. However, I will more fully explore this component of the expertise factor when I address the fourth and final factor of the pragmatic and functional approach.

3. The Purpose of the Legislation in General and the Specific Legislative Provisions in Particular.

[42] The overall purpose of workers' compensation legislation, including the Yukon *Workers' Compensation Act*, is to create a comprehensive scheme for resolving workers' compensation issues outside the court system, without resort to principles of tort liability. As was stated in *Logan*, cited above, at para. 22:

> "At the heart of the workers' compensation system is the historic trade off of no fault compensation to workers in exchange for immunity from civil actions for workplace injuries in favour of employers."

[43] The specific purpose of the appeal provisions of the *Act* are generally to allow workers and employers to appeal decisions of a hearing officer (or panel of such officers), the president of the WCHSB, or the Board itself. The issues may include determinations of entitlement to compensation, access to a worker's file, and suspension or reduction of compensation. The Appeal Tribunal has exclusive jurisdiction to hear all such appeals and, pursuant to s. 25(1) of the *Act*, may "confirm, reverse or vary" the decisions below. As previously noted, the decisions of the Appeal Tribunal are generally considered to be final, unless it has committed an error of law or jurisdiction, or where there is an issue about whether a Board policy is consistent with the *Act*.

[44] As I noted in *The Workers' Compensation Appeal Tribunal*, cited above, where a statute purports to confer a broad discretionary power upon a decision-maker, this will generally suggest a policy-laden purpose and, consequently, a more deferential standard of review: *Dr. Q*, cited above, at para. 31. On the other hand, the more the legislation suggests that the decision-maker should act like a court in determining the rights between two parties, the less the reviewing court will be required to defer to the decision of that tribunal.

[45] In *Logan*, at para. 20, the Nova Scotia Court of Appeal felt that the legislative purpose specifically relating to the mandate of the appeal tribunal in that province had more in common with a "judicial paradigm" than with the exercise of a broad, policy-laden jurisdiction. The Court of Appeal therefore concluded that this factor tended towards "less rather than more deference".

[46] In the present case, I similarly find that the Appeal Tribunal was acting more like a court than a policy-maker. Therefore, this factor indicates decreased deference.

4. Whether the Question at Issue is One of Law, Fact, or Mixed Law and Fact.

[47] Here, I can do no better than to quote McLachlin C.J., in *Dr. Q*, at para. 34:

> "When the finding being reviewed is one of pure fact, this factor will militate in favour of showing more deference towards the tribunal's decision. Conversely, an issue of pure law counsels in favour of a more searching review. This is particularly so where the decision will be one of general importance or great precedential value. . . Finally, with respect to questions of mixed fact and law, this factor will call for more deference if the question is fact-intensive, and less deference if it is law-intensive."

[48] I must also remind myself that in the context of judicial review of administrative action, the nature of the question is not entirely determinative, but rather is just one of the four factors to consider in deciding upon the standard of review: *Dr. Q*, at para. 33. Further, although questions of law will not always attract the correctness standard, an appeal which turns on an interpretation of workers' compensation legislation and the application of principles from the judicial case law will usually result in a standard of review based on correctness: *Logan*, at para. 27.

[49] I will now return to the issues I noted at the outset of these reasons and attempt to individually identify them as constituting either a question of law, fact, or mixed law and fact.

[50] The first major question was whether the Appeal Tribunal committed a reviewable error in finding that the worker suffered no work-related disability. It seems to me that in order to decide whether the worker suffered a disability and whether that disability was

work-related, the Appeal Tribunal had to consider the potential applicability of a number of legal points:

1. Section 3(1) of the *Act*, which sets out entitlement to compensation for a work-related disability;
2. Section 117 of the *Act*, which defines “work-related”;
3. Section 6 of the *Act*, which presumes a disability to be work-related if it arises out of or in the course of employment, unless the contrary is shown;
4. Board Policy CL-40 entitled “Disability”;
5. Board Policy CL-42 entitled “Arising Out of and in the Course of Employment”, including the presumption portion of the Policy;
6. Board Policy CL-47 entitled “Pre-Existing Conditions”;
7. Sections 24(3) and 32 of the *Act*, which requires the Appeal Tribunal to apply the *Act*, the regulations and all Board policies to its decision;
8. Section 25(1) of the *Act*, which authorizes the Appeal Tribunal to “examine, inquire into, hear, and determine all matters arising in respect of an appeal“;
9. Section 25(2) of the *Act*, which authorizes the Appeal Tribunal to determine, among other things:
    a) whether the disability was work-related;
    b) the duration and degree of the disability; and
    c) entitlement to compensation.
10. Section 33 of the *Act*, which requires the Appeal Tribunal to give the worker the benefit of the doubt when there is doubt on an issue respecting an application for compensation and “the disputed possibilities are evenly balanced”; and

11. Section 19(12) of the *Act*, respecting the extent to which the Appeal tribunal was bound to accept the opinion of the independent medical examiner that the termination of the worker's employment "significantly . . . contributed to the previous adjustment disorder."

[51] At the same time, the Appeal Tribunal also had to make a factual finding of whether the evidence showed that the worker was incapacitated from meeting occupational demands as a result of a work-related event.

[52] How then should this multi-faceted first question be characterized? Iacobucci J. in *Canada (Director of Investigation and Research)* v. *Southam Inc.*, [1997] 1 S.C.R. 748 summarily described the difference between questions of law, fact and mixed law and fact at para. 35:

> ". . . Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or *vice versa*." (my emphasis)

[53] The Supreme Court of Canada in *Housen* v. *Nikolaisen*, 2002 SCC 33, confirmed the distinction between questions of law and questions of mixed fact and law. The Alberta Court of Appeal in *Alberta (Workers' Compensation Board)*, cited above, applied *Housen* at para. 22, stating that:

> ". . . questions of mixed fact and law involve the application of a legal standard to a set of facts; conversely, errors of law involve an incorrect statement of the legal standard, or a flawed application of the legal test. An example of the latter occurs when a decision-maker only considers factors A, B, and C, but the test also requires factor D to be considered. The [Supreme] Court also acknowledged an exception to the distinction between questions of law and questions of mixed fact and law, when it is possible to extricate a pure legal question from what appears to be a question of mixed fact and law. . . ".(my emphasis)

[54] Later, at para. 29, the Alberta Court of Appeal continued:

> "The concept of an extricable legal error can be difficult to understand. In *Housen* at para. 36, the Supreme Court provided clarification. In that case the alleged error was a finding of negligence, a question of mixed fact and law. The Court noted that when the error in a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test or a similar error in principle, such an error can be characterized as an extricable error of law. However, when the issue on appeal involves a trial judge's interpretation of the evidence as a whole, or the application of the correct legal test to the evidence, there is no extricable error of law." (my emphasis)

[55] With these comments in mind, in my view, the general question of whether the worker suffered a work-related disability is a question of mixed law and fact. Consequently, my consideration of each of the four contextual factors under the functional and pragmatic approach for this question is as follows:

1. The presence of full privative clauses suggests that greater deference is generally due to the decision of the Appeal Tribunal on this question.
2. With respect to expertise, although the general question is one of mixed law and fact, I find that it is more law intensive than fact intensive. Thus, the relative expertise of this Court on matters of law likely puts it in a better position than the Appeal Tribunal to decide the question. Therefore, less deference is called for.

3. With respect to the purpose of the statute, the Appeal Tribunal here was acting more like a court in that it was essentially determining rights between the worker and her employer, based largely on the facts before it. This type of adjudicative function generally calls for less deference: see *Alberta (Workers' Compensation Board)*, cited above, at para. 40.

4. With respect to the nature of the problem, although the general question is one of mixed law and fact, because it is more law intensive less deference is called for: see *Dr. Q*, at para. 34.

These four factors in combination yield a somewhat ambivalent result in that they counsel for less deference, but for the privative clauses: see also *Dr. Q*, para. 37. In the result, I find that the appropriate standard of review for this question is one of reasonableness.

[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.

[57] Notwithstanding that I have classified the first general question as one of mixed law and fact, a number of pure legal questions can be extricated and considered separately as issues of law. I set these out more specifically as sub-issues (a) through (e) in my earlier list of issues. In short, they are:

- Did the Appeal Tribunal fail to consider the presumption in s. 6 of the *Act*?

- Did the Appeal Tribunal fail to specifically consider the presumption in Board Policy CL-42?
- Did the Appeal Tribunal misapply Policy CL-42?
- Did the Appeal Tribunal err by concluding that “Work stressors must involve events that could be considered “traumatic”?
- Did the Appeal Tribunal fail to consider the applicability of the Policy on Pre-Existing Conditions?

[58] For each of these questions of law, my consideration of the four contextual factors under the pragmatic and functional approach leads me to conclude as follows:

1. The absence of a privative clause on questions of law indicates that no deference is due to the Appeal Tribunal.
2. With respect to expertise, this Court is in a better position than the Appeal Tribunal to decide questions of law, and therefore less deference is due.
3. With respect to the purpose of the statute, in this case, the Appeal Tribunal was acting more like a court in that it was essentially seeking to resolve a dispute between the worker and her employer, which the employer submitted could have significant precedential value in the future. In that context, less deference is due to the Appeal Tribunal.
4. With respect to the nature of the problem, because these are questions of law, less deference is called for.

Accordingly, as little deference is called for, I find that a correctness standard is appropriate: see also *Dr. Q*, at para. 35.

[59] When reviewing a decision for correctness, “the court may undertake its own reasoning process to arrive at the result it judges correct”: *Ryan*, at para. 50; and *Logan*, at para 35.

[60] The final substantive issue I previously identified is whether the Appeal Tribunal committed a reviewable error by posing questions to the independent medical examiner, which allegedly exceeded the scope of the grounds of appeal originally stated in the employer’s Notice of Appeal. It seems to me that this is also a question of law. Further, my consideration of the remaining three contextual factors under the pragmatic and functional approach for this question would produce the same result as for the other legal questions I just addressed. Therefore, I find that the correctness standard is also appropriate here.

APPLYING STANDARDS OF REVIEW

[61] In addressing the principal issue, I propose to deal first with the specific sub-issues of law and lastly with the general question of mixed law and fact of whether the Appeal Tribunal erred in finding that the worker did not suffer a work-related disability

(a) *Did the Appeal Tribunal commit a reviewable error by failing to consider s. 6 of the Act, which presumes a disability to be work-related, unless the contrary is shown, if the disability arises out of or in the course of the worker’s appointment?*

[62] The Appeal Tribunal failed to consider or even note s. 6 of the *Act*. That section sets out the presumption of work-relatedness and states as follows:

> “If a disability arises out of or in the course of a worker’s employment, the disability is presumed to be work-related unless the contrary is shown.”

[63] Counsel for the Appeal Tribunal argued that only “work-related” disabilities are compensable under s. 3(1) of the *Act* and that a disability must arise out of and in the course of employment in order to be considered work-related. Therefore, she submitted that s. 6 places an initial burden on the worker to establish that there was a disability which is compensable. In other words, counsel for the Appeal Tribunal argued that s. 6 does not create an absolute liability provision such that any injury occurring at a workplace must be presumed to be work-related. Further, since the Appeal Tribunal did not find that the worker suffered a disability arising out of or in the course of her employment, then s. 6 was not triggered.

[64] The problem with this argument is that the Appeal Tribunal held that in order for a disability to be considered work-related, both aspects of “arising out of” and “in the course of” employment must be met: Decision #106, at para. 158. However, s. 6 is framed disjunctively, such that if the disability arises out of or in the course of employment, the disability is presumed to be work-related. The Appeal Tribunal did not address this point because it entirely failed to consider the potential applicability of s. 6 of the *Act*. Had the presumption been considered, it might have resulted in the Appeal Tribunal finding that the worker did indeed suffer a work-related disability. However, we don’t know how likely that result would be, or whether the Appeal Tribunal might alternatively have found that the “contrary was shown”, precisely because it failed to address the presumption. I conclude that this was an error of law in the sense identified in *Alberta (Workers’ Compensation Board)*, at para. 22. That is, the Appeal Tribunal’s application of the legal test for a work-related disability was “flawed”, in that it only

considered “factors A, B, and C, [when] the test also requires factor D [the presumption] to be considered” (see also s. 24(3) of the *Act*).

(b) ***Did the Appeal Tribunal commit a reviewable error by failing to consider the presumption in Policy CL-42, “Arising Out of and in the Course of Employment”, which presumes a disability to have arisen out of and in the course of employment, unless it can be shown that the disability was not work-related?***

[65] The Appeal Tribunal did consider part of Policy CL-42, however, for some unstated reason, it failed to consider item B of the Policy, which deals with the presumption. The copy of Policy CL-42 filed at the hearing before me includes the following items:

> **“**A. Work Related
> In order for a disability to be compensable, it must be work-related. Work-related is defined in the Act as arising out of and in the course of employment.
>
> B. Unless the Contrary is Shown
> A disability is presumed to have arisen out of and in the course of employment or vice-versa, unless it can be shown, not proven, that the disability was not work-related.
>
> C. Arising Out of Employment
> “Arising out of employment” means that a disability was caused by a worker’s employment. It must be linked to, originate from, or be the result of, in whole or in part, by [as written] an activity or action undertaken because of a worker’s employment.
>
> D. Arising In the Course Of Employment
> “Arising in the course of employment” means the disability must be linked to a worker’s employment in terms of time, place and activity. It is the direct result of an activity, action, procedure, or conduct undertaken during a worker’s employment.”

(Item E refers to “Guidelines” for determining the foregoing, however, they are not pertinent to the present discussion.)

[66] The only items specifically quoted by the Appeal Tribunal in Decision #106 (at para. 157) were items “A-Work-Related”, “C-Arising out of employment”, and “[D]-Arising in the course of employment”. Had the presumption in item B been considered, it might have resulted in the Appeal Tribunal finding that the worker did suffer a work-related disability. For the same reasons I just gave in dealing with the presumption in s. 6 of the *Act*, I conclude that the Appeal Tribunal here also erred in law.

(c) ***Did the Appeal Tribunal commit a reviewable error by misapplying Policy CL-42 to the facts?***

[67] The Appeal Tribunal committed an error of law by stating in Decision #106, at para. 158, that:

> “For this claim to be compensable there must be a causal relationship between the activities of the worker and her capacity to work. Evidence must establish that a work activity was the contributing factor to the onset of the incapacity.” (my emphasis)

Similarly, the Appeal Tribunal wrote that it could find “nothing that the worker was doing in the course of her employment that would cause her to be injured”: Decision #106, para. 160.

[68] First, it is not necessary that there must be a causal relationship between the activities of the worker and her capacity to work. Rather, item C of Policy CL-42 simply requires that the disability be linked in some manner “in whole or in part” to an activity “undertaken because of a worker’s employment”. Similarly, item D of Policy CL-42 states that to find the disability arose “in the course of employment”, there must be some linkage between the employment and “an activity, action, procedure, or conduct undertaken” during the employment. Neither of these policy statements indicates that

the activity must be that of the worker. Rather, the worker could also be victim of an activity or action performed by someone else in the workplace.

[69] Second, the Appeal Tribunal incorrectly concluded that the evidence must establish that the work activity was "the" contributing factor to the onset of the incapacity. According to item C of Policy CL-42, it is sufficient if the disability is linked to, originates from, or is the result of "in whole or in part" the activity or action undertaken. Put another way, it is only necessary that the evidence establish that a work activity, whether performed by the worker or someone else in the workplace, was a contributing factor to the onset of the incapacity.

(d) ***Did the Appeal Tribunal commit a reviewable error by concluding that "work stressors must involve events that could be considered "traumatic" in the broadest sense of that term. . ."?***

[70] The Appeal Tribunal stated at para. 166 of Decision # 106:

> "Compensation is not paid because a worker feels upset, worried or concerned about something that occurred at work. There must be an injury before compensation is payable. Work stressors must involve events that could be considered 'traumatic' in the broadest sense of that term, and the result must be injury or disease." (my emphasis)

[71] When the Appeal Tribunal here referred to "work stressors", it must have been contemplating some form of "activity, action, procedure, or conduct undertaken" during the employment, that is, some form of work-related activity. However, nowhere does the legislation or any Board policy dictate that a work-related activity which causes a disability must be "traumatic". Rather, if a worker suffers a "disability" in the sense this term is referred to in Board Policy CL-40, such that the worker experiences a "limiting, loss or absence of the capacity . . . to meet occupational demands", and if that disability

is found to be work-related, either in fact or by operation of the presumptions in s. 6 of the *Act* and/or in Policy CL-42, then the worker is entitled to compensation regardless of how the work activity or "work stressors", as the Appeal Tribunal put it, are characterized. Therefore, I find that the Appeal Tribunal erred in law on this point.

(e) ***Did the Appeal Tribunal commit a reviewable error by failing to consider the applicability of Policy CL-47, "Pre-Existing Conditions"?***

[72] As with the presumption of work relatedness, the Appeal Tribunal once again failed entirely to consider, or even note, Policy CL-47 as potentially applicable. In my view, this was an error of law for the same reasons I gave in dealing with the presumption provisions. The preamble to Policy CL-47 generally states that there may be circumstances when a work-related disability may aggravate a pre-existing condition and that the Policy is designed to assist in determining when the pre-existing condition shall be considered compensable.

[73] The Policy defines "pre-existing condition" as including a "psychological state of health that existed prior to the compensable disability." (my emphasis)

[74] "Aggravation" is defined as the "effect of a compensable condition on a pre-existing condition."

[75] Although the portion of the Policy entitled "Entitlement to Compensation" is somewhat awkwardly worded, for the sake of completeness, I will set out the relevant portions:

> "A pre-existing condition may not negate a worker's entitlement to compensation benefits.

> If it can be shown that the pre-existing condition is worsened by the compensable condition, the pre-existing condition shall be considered compensable to the extent that the pre-existing condition has deteriorated as a result of the compensable condition.
>
> Loss of earnings benefits shall be paid for a compensable aggravation of a non-compensable pre-existing condition.
>
> Loss of earnings benefits shall not be paid for a pre-existing condition if the worker has recovered from the aggravation of a pre-existing condition to the extent that there is no loss of earnings caused by the aggravation, and the disability is the sole result of a preexisting [as written] non-compensable condition."

"Non-compensable pre-existing condition" is defined in the Policy as one which did not arise out of and in the course of employment and is therefore not work-related.

[76] In the IME, Dr. Darlington repeatedly stated his opinion that the worker suffered from a "pre-existing generalized anxiety disorder" (pages 2, 16 and 20), which I take to be a "psychological state of health". He also found that this anxiety disorder resulted in her "worrying excessively" and that the termination of her employment "resulted in her having an additional factor to worry about". Further, he stated that the termination of the worker's employment "significantly … contributed to the previous adjustment disorder [which] subsequently worsened to the point it became a major depressive episode". Finally, he opined that the worker was likely "relatively incapacitated as a result of the major depressive episode" (page 2).

[77] Therefore, had the Appeal Tribunal properly considered Policy CL-47, it would have been directed to find that if the worker's pre-existing generalized anxiety disorder was a condition made worse by the effect of a compensable condition, that is, the work-

related activities of the suspension and/or the termination, then the pre-existing condition (the anxiety disorder) “shall be considered compensable” to the extent that it deteriorated as a result of a compensable condition (the suspension and/or the termination).

[78] I will deal further with this point at paras. 85 through 91 below.

Did the Appeal Tribunal commit a reviewable error in finding that the worker did not suffer a work-related disability?

[79] Returning to the principal issue, I only intend to deal with the remaining matters of mixed law and fact which have not otherwise been addressed above as extricable questions of law. Because those purely legal questions were answered according to a standard of correctness, it would be inappropriate to reconsider them at this stage in deciding whether the Appeal Tribunal’s answer to this general question of mixed law and fact passed the test of reasonableness. To do so would confound the analysis by mixing two different standard of review.

[80] I acknowledge here that the Appeal Tribunal was faced with a daunting task in reviewing the extensive material on the record before it. It was also cognizant of the unfortunate and lengthy delay in providing a decision on the merits of this claim and it did so very expeditiously, within one month of the date of the hearing. Further, the Appeal Tribunal’s review of the evidence was generally very detailed and careful, with Decision #106 totalling 179 paragraphs and over 38 pages.

[81] In specifically analyzing the issue of whether the worker suffered a work-related disability, the Appeal Tribunal correctly referred to Board Policy CL-40 entitled

"Disability" which states: "A disability is the limiting, loss or absence of the capacity of an individual to meet occupational demands".

[82] The Appeal Tribunal further properly considered the definition of "disability" in s. 117(1) of the *Act* as meaning:

> ". . . a work-related incapacity, as determined by the board, including post-traumatic stress, a permanent impairment, or a worker's death."

I also agree with the Appeal Tribunal's determination that, although the s. 117(1) offers these three examples, it does not constitute an exhaustive list of what may be considered a disability.

[83] The Appeal Tribunal then went on to consider the definition of "work-related" in s. 117(1) of the *Act* which means, in reference to a disability "a disability arising out of and in the course of the employment of a worker".

[84] However, beyond that, I feel compelled to conclude that the Appeal Tribunal's findings and reasoning were flawed and unreasonable in two general respects: first, with respect to the manner in which it considered Dr. Darlington's evidence; and second, in its conclusion on the cause of the worker's anxiety.

1. Dr. Darlington's Evidence

[85] The Appeal Tribunal held at para. 162 of Decision #106:

> "A distinction exists between experiencing negative emotional responses and a psychological injury giving rise to disability. A negative emotional response does not mean there is an injury. There must be a sound evidentiary basis to conclude that a worker has suffered a psychological injury."

Later, at para. 179, the Appeal Tribunal concluded that the worker's "anxiety" did not constitute "a compensable injury".

[86] This conclusion ignored the evidence of Dr. Darlington at p. 19 of the IME that:

> ". . . Ms. O'Donnell appears currently at least significantly partially disabled as a result of non-volitional psychiatric sickness, disease or disorder from her own occupation." (my emphasis)

In particular, as I noted earlier, Dr. Darlington opined, at pp. 2 and 20 of the IME, that:

> ". . . the termination from her place of employment significantly, but not entirely, contributed to the previous adjustment disorder. In my opinion, the adjustment disorder subsequently worsened to the point it became a major depressive episode, which it continues to be (though it has improved from its worst, and is expected to resolve in the future)." (my emphasis)

[87] It is also critical to remember that this latter opinion was expressed in specific answer to the first question asked by the Appeal Tribunal: "Was this worker incapacitated by a medical condition arising from the worker's termination on August 13, 2002?" The question was therefore directed to the event of the worker's "termination" on August 13, 2002, and not to the event of the worker's suspension for disciplinary reasons on August 5, 2002. However, it was the former event which initially resulted in the worker's original claim for compensation, supported by the diagnosis of Dr. Vaughan that she was suffering from an adjustment disorder. I therefore interpret Dr. Darlington's reference to "the previous adjustment disorder" to be the adjustment disorder which was diagnosed by Dr. Vaughan following the worker's suspension. Further, Dr. Darlington specifically answered the question I just quoted with the opinion that the worker "likely … was relatively incapacitated as a result of the major depressive episode".

[88] It is also important to note that the second question posed to Dr. Darlington by the Appeal Tribunal was expressed as follows:

> "If the worker was incapacitated from the workplace incident, is that incapacity properly referred to as an Adjustment Disorder?"

In answering the question, Dr. Darlington did not quarrel with the premise that the worker "was incapacitated from the workplace incident". Rather, he stated as follows:

> "In my opinion, an adjustment disorder is not an adequate diagnosis to explain the alleged incapacitation, however a major depressive episode, apparently of the severity Ms. O'Donnell has previously incurred, in addition to her preexisting generalized anxiety disorder and any preexisting obsessive compulsive personality traits would adequately explain incapacitation. In my opinion, it is unclear when she graduated from an adjustment disorder to a major depressive episode." (my emphasis)

[89] With due respect to the Appeal Tribunal, it appears abundantly clear to me, from reading Dr. Darlington's answers to the first and second questions, that he was of the opinion that, prior to the worker's termination on August 13, 2002, she was suffering from an adjustment disorder and that the termination of her employment "significantly . . . contributed" to the adjustment disorder, which then worsened into a major depressive episode, which in turn caused the worker to be incapacitated.

[90] Although Dr. Darlington was unclear about when the worker may have progressed from the adjustment disorder to the major depressive episode, the point is largely moot for two reasons:

1. Item C of Policy CL-42 only requires that the disability "be linked to, originate from, or be the result of, in whole or in part" the activity or

action undertaken, which in this case included either the suspension or the termination of the worker's employment, or both.

2. As I noted earlier, had the Appeal Tribunal properly considered Policy CL-47 on "Pre-Existing Conditions", it would have been directed to find that if the worker's pre-existing generalized anxiety disorder was a condition made worse by the effect of the work-related activities of the suspension and/or the termination (the compensable condition), then the anxiety (the pre-existing condition) would be considered compensable to the extent that it deteriorated as a result of the suspension and/or the termination (the compensable condition).

[91] Thus, it was only necessary to establish that the termination aggravated the worker's pre-existing anxiety disorder as well as her adjustment disorder. Since Dr. Darlington's opinion was that the termination "significantly … contributed to the previous adjustment disorder", which then worsened into a major depressive episode, the evidence established the necessary causal chain of deterioration (or aggravation) for Policy CL-47 to apply, as well as the linkage between the disability and the work-related activity required by Policy CL-42. It therefore was unnecessary to establish precisely when the adjustment disorder progressed into the major depressive episode.

[92] Further, at para. 164 of Decision #106, the Appeal Tribunal referred to Dr. Darlington's opinion that "the termination from her place of employment significantly, but not entirely contributed to the previous adjustment disorder" as being a diagnosis based "largely in part . . . on the worker's self-report of having weight gain of thirty-five to forty pounds". The Appeal Tribunal seemed to conclude that Dr. Darlington's reliance on the worker's self-reported weight gain was flawed, because he did not know the worker's weight before her suspension and termination, and therefore had no objective evidence

to corroborate the stated weight gain. Earlier, at para. 76 of Decision #106, the Appeal Tribunal noted that the family doctor's chart notes from 1997 showed the worker's weight to be 213 pounds at that time, which was 5 years prior to the worker's termination. The Appeal Tribunal then noted that Dr. Darlington stated that the worker "appears approximately her stated 210 pounds" on the date of his assessment, which was on May 9, 2005. Consequently, the Appeal Tribunal stated there was only three pounds difference between the worker's weight at the time of the assessment by Dr. Darlington and her weight in 1997 and seemingly concluded that the worker's self-report of a weight gain of 35 to 40 pounds to Dr. Darlington must not have been accurate. Further, since Dr. Darlington himself stated that he based his opinion (that the worker was incapacitated as a result of a major depressive episode) largely on the worker's reported weight gain, then his opinion as to the incapacitation was similarly flawed.

[93] Once again, I question the reasonableness of the analysis by the Appeal Tribunal on this point. I acknowledge that the family doctor's chart notes indicate that the worker's weight in 1997 was 213 pounds. However, there is a gap in the doctor's chart notes from 1997 to August 2002. Further, there is no evidence to support an inference that the worker's weight must have remained more or less constant from 1997 to 2005, a period of about eight years. Indeed, there is no evidence as to the worker's weight in August 2002, when she was initially diagnosed with an adjustment disorder. There is, however, a reference in the psychological report by Alberta Rooney dated October 15, 2002 indicating that "items endorsed [by the worker under the Beck Depression Inventory] include disturbance in . . . appetite with significant weight loss . . .". The only other reference to the worker's weight in the record appears in the psychiatric report of

Dr. Heredia dated January 30, 2004 (over 15 months after the Rooney report), where he noted that the worker reported a “possible weight gain of almost 20 pounds”. On May 9, 2005, the worker stated to Dr. Darlington that she had lost five pounds in the previous month or two in an intentional manner. She also stated that her lifestyle included activities such as swimming, aerobics and walks. She said to Dr. Darlington that she does aquacize three days per week and walks for 30 to 45 minutes every day.

[94] Taking all of these circumstances into account, I find that the implied inference of the Appeal Tribunal that the worker’s weight was more or less constant from 1997 through to 2005 was unreasonable. Nor do I accept the Appeal Tribunal’s additional conclusion that the weight gains the worker reported to Dr. Heredia and Dr. Darlington would have been so noticeable to her own physician or to either of her consulting psychologists, that one would expect this fact to be recorded by these professionals, which it was not. Rather, it seems equally likely that there was fluctuation in the worker’s weight from 1997 on. There is no evidence to suggest that the self-report of “significant weight loss” by the worker to psychologist Alberta Rooney in October 2002 was inaccurate. Nor is there any objective evidence to suggest that her report of a weight gain of 20 pounds to Dr. Heredia in January 2004 was also inaccurate. Thus, there is no reason to infer that the worker’s self-report of a weight gain of 35 to 40 pounds to Dr. Darlington in May 2005 was less accurate than any of her other reports. She could easily have lost weight after 1997. Further, there is evidence that she lost a significant amount of weight in 2002. There is also evidence that she regained about 20 pounds by 2004 and an additional 15 to 20 pounds by 2005. All this evidence is uncontradicted.

[95] I would not go so far as the submission of counsel for the Workers' Advocate that the Appeal Tribunal's reliance upon s. 19(1)(b) of the *Act* in ordering an independent medical examination presupposes that the medical issues to be addressed exceeded its expertise in that regard, and that therefore the results would effectively be binding upon the Tribunal, in the absence of evidence to the contrary. Section 19(12) of the *Act* clearly authorizes the Appeal Tribunal to decide that the response provided by an independent medical practitioner is not "final and binding on all parties", unless the Appeal Tribunal so directs. Actually, the wording in 19(12) is stated in a converse fashion to what I have just said, but the result is the same:

> "A response provided to the appeal committee by an independent medical practitioner or panel of independent medical practitioners under subsection (10) is final and binding on all parties to the proceeding to the extent that the response addresses the question determined under paragraph (2)(b), unless otherwise directed by the appeal committee." (my emphasis)

[96] Thus, I recognize that the Appeal Tribunal is the final decision-maker in such matters, subject only to the prospect of judicial review for errors of law or jurisdiction, and that it can receive and weigh the evidence in an independent medical examination just as it does with any other piece of evidence. However, if the Appeal Tribunal fails to consider relevant evidence, then it risks committing a jurisdictional error: See Jones and de Villars, *Principles of Administrative Law*, cited above, pp. 8 and 182-185.

[97] I find that the Appeal Tribunal failed to give proper consideration to Dr. Darlington's opinion that the worker was incapacitated by a psychological condition arising from her employment suspension and subsequent termination. That condition initially manifested as an adjustment disorder, but then progressed to become an

incapacitating major depressive episode. I further find that Dr. Darlington's opinion was apparently dismissed by the Appeal Tribunal on the spurious assumption that he had been misled by the worker with respect to her self-reported involuntary weight gain of 35 to 40 pounds.

2. Causation of the Worker's Anxiety

[98] My second area of concern relates to the Appeal Tribunal's reasoning on the causation of the worker's anxiety. Here, I find that the Appeal Tribunal erred at para. 163 of Decision #106 in concluding that "the worker reacted to the suspension . . . . of her employment and it is her self-reported reaction to the suspension which caused her anxiety" (it also made a similar statement at para. 168). With respect, this conclusion makes no logical sense. The worker's "self-reported reaction to the suspension" included those symptoms noted in Dr. Vaughan's first report, which included:

> "- difficulty sleeping, early waking
> - [decreased] interest
> - low energy
> - mood 0/10, very low
> - loss appetite
> - agitation
> - poor concentration."

Those symptoms are all consistent with the worker's reaction being one of "anxiety" as an effect of the suspension of her employment. Therefore, I am unable to fathom how the Appeal Tribunal also found that the worker's reaction to the suspension, that is, her anxiety as particularized in Dr. Vaughan's first report, also "caused her anxiety" (my emphasis). The Appeal Tribunal's reasoning here leads to the absurd result that *her anxiety caused her anxiety*.

[99] Furthermore, it is clear from Dr. Darlington's IME that he was of the opinion that the worker had a pre-existing generalized anxiety disorder and that the anxiety was not "caused" by the worker's self-reported reaction to the suspension. Rather, her pre-existing anxiety disorder was apparently aggravated by the worker's suspension, which led the worker to suffer the adjustment disorder, which in turn was made worse by the subsequent termination ("her termination resulted in her having an additional factor to worry about").

[100] The standard of review for this question is one of reasonableness, and therefore I should not be asking myself what the correct decision is. Rather, I must look to the reasons given by the Tribunal on the basis of a somewhat probing examination and determine whether there is any tenable line of analysis that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. As I said earlier, I find that the Tribunal's reasons, read as a whole, are not tenable as support for its decision. Therefore, the decision on this question does not pass the test and is unreasonable.

[101] If a statutory tribunal makes a decision of fact in an unreasonable manner, it risks committing an error of jurisdiction. Jones and de Villars, in *Principles of Administrative Law*, cited above, put it this way, at p. 435:

> ". . . To the extent that a statutory delegate has discretion to determine the facts, it must exercise its discretion reasonably. If it does so, it is acting within its jurisdiction, and no judicial review can arise (because there is no jurisdictional error, and there is no error of law within jurisdiction). On the other hand, if the statutory delegate exercises its discretion to determine the facts in an unreasonable manner, it has not in law exercised its discretion, but rather has declined

> jurisdiction. The normal grounds for reviewing a jurisdictional error, therefore, should in principle be available in such a circumstance."

See also Jones and de Villars, at p. 198.

[102] In *Blanchard* v. *Control Data Canada Ltd.*, [1984] 2 S.C.R. 476, Lamer J., dealt with the question of whether an unreasonable appreciation of the facts may sometimes constitute a jurisdictional defect in a tribunal's proceedings. Admittedly, the relevant issue in that case was whether the tribunal below had made a "patently unreasonable" decision. Since that case was decided, the Supreme Court confirmed in *Ryan*, at para. 26, that a reviewing court must not interfere, unless it can explain how the administrative action below was "incorrect, unreasonable, or patently unreasonable" depending upon the appropriate standard of review. Nevertheless, Lamer J.'s comments, at pp. 494-95, are instructive:

> ". . . An unreasonable error of fact has been characterized as an error of law . . . An administrative tribunal has the necessary jurisdiction to make a mistake, and even a serious one, but not to be unreasonable. The unreasonable finding is no less fatal to jurisdiction because the finding is one of fact rather than law. An unreasonable finding is what justifies intervention by the courts.
>
> . . .
>
> [T]hough all errors do not lead to unreasonable findings, every unreasonable finding results from an error (whether of law, fact, or a combination of the two), which is unreasonable.
>
> In conclusion, an unreasonable finding, whatever its origin, affects the jurisdiction of the tribunal . . .".

[103] Further, LeBel, J. in *Toronto (City)* v. *C.U.P.E., Local 79*, 2003 SCC 63, queried whether the theoretical effort to continue to distinguish between reasonableness and patent unreasonableness was productive. At para. 127, he stated:

> ". . . As a matter of statutory interpretation, courts should always be very hesitant to impute to the legislature any intent to let irrational administrative acts stand, absent the most unequivocal statement of such intent. . . As a matter of theory, the constitutional principle of the primacy of the rule of law, which is an ever-present background principle of interpretation in this context, reinforces the point: if a court concludes that the legislature intended that there be no recourse from an irrational decision, it seems highly likely that the court has misconstrued the intent of the legislature."

[104] In summary, I conclude that the failure of the Appeal Tribunal to pass the test of reasonableness on this question of mixed fact and law constitutes an error of jurisdiction.

[105] Before moving on, let me dispose of one remaining aspect of this issue relating to the diagnosis of "adjustment disorder". In its Notice of Appeal to the Appeal Tribunal, the employer stated its second ground of appeal as follows:

> "The employer disputes the finding that the worker suffered an 'Adjustment Disorder' and that this is a work related injury."

Presumably, this in turn caused the Appeal Tribunal to phrase its second question to the independent medical examiner as follows:

> "If the worker was incapacitated from the workplace incident, is that incapacity properly referred to as an Adjustment Disorder?"

Finally, in Decision #106, the Appeal Tribunal specifically identified the employer's second ground of appeal as "Was there an 'adjustment disorder' which constitutes a work related disability?" It proceeded to answer that question in the negative.

[106] However, I agree with the submissions of counsel for the Workers' Advocate that the *Act* does not require a work-related disability to fit within any specified diagnosis. Rather, it only requires a determination as to whether or not there was a disability and, if so, whether that disability was work-related. Consequently, characterizing the diagnosis of the disability as an "adjustment disorder", or something else, was unnecessary. Therefore, it was only necessary for the Appeal Tribunal to address the first ground of appeal, which was whether or not the worker suffered a work-related disability.

Did the Appeal Tribunal commit a reviewable error by posing questions to the independent medical examiner, appointed under s. 19(2) of the Act, which allegedly exceeded the scope of the grounds of appeal originally stated in the employer's Notice of Appeal to the Appeal Tribunal?

[107] This is the final substantive issue and, in my view, the answer must be "No" for the following reasons:

1. The worker, through the Workers' Advocate, acquiesced in the wording of the questions, as evidenced by the email from the Workers' Advocate to the secretariat of the Appeal Tribunal dated April 19, 2005.

2. Paragraphs 25(2)(b) and (h) of the *Act* clearly authorize the Appeal Tribunal, in exercising its exclusive jurisdiction on such appeals, to determine the duration and degree of the disability as well as the worker's entitlement to compensation. The questions posed by the Appeal Tribunal to Dr. Darlington were related to those determinations, as well as the primary determination of whether the worker's disability was work-related.

3. The Appeal Tribunal clearly indicated at the outset of Decision #106 that it only addressed two issues:

> "1. Did the worker suffer a work-related disability?
>
> 2. Was there an "adjustment disorder" which constitutes a work-related disability?"

Those were the only questions answered by the Appeal Tribunal. Therefore, it did not exceed its jurisdiction in going beyond the scope of the grounds of appeal.

4. In any event, pursuant to s. 25(1) of the *Act*, the Appeal Tribunal has exclusive jurisdiction to examine, inquire into, hear, and determine "all matters arising in respect of an appeal."

5. Under s. 21(2)(b) of the *Act*, the Appeal Tribunal is mandated to "consider the entire record of the claim", which in this case included various pieces of correspondence relating to the question of the duration and degree of the worker's disability. In particular, the letter from the employer to the Appeal Tribunal dated November 26, 2004, clearly raised these issues, among others. Therefore, there is no question that there was unfairness or a breach of the rules of natural justice for the Appeal Tribunal to have probed these areas in the hearing or in its analysis.

CONCLUSION

[108] For the foregoing reasons, Decision #106 is quashed.

[109] Counsel for the Worker's Advocate submitted that I should not remit the matter to the Appeal Tribunal for reconsideration for essentially two reasons: first, given Dr. Darlington's opinion, there is no latitude for the Appeal Tribunal to conclude other than that the worker's injury was work-related; second, that it has been four years since

the incidents giving rise to this claim, and that remitting the matter to the Appeal Tribunal will only result in further delay, which is prejudicial to the worker, especially if the Appeal Tribunal will inevitably have to accept the opinion of Dr. Darlington.

[110] I disagree. While I have concluded in these reasons that the Appeal Tribunal failed to give proper consideration to the relevant evidence provided by Dr. Darlington, I also recognize that Dr. Darlington's IME opinion was very lengthy, very detailed, to some extent verbose and occasionally ambiguous. For that reason, I cannot presume that another panel of the Appeal Tribunal would necessarily agree with Dr. Darlington's opinion. Further, I cannot presume what another panel of the Appeal Tribunal might decide upon a proper application of the presumptions in s. 6 of the *Act* and Policy CL-42 and upon due consideration of Policy CL-47 on "Pre-Existing Conditions". It may well be that another panel, properly taking into account all the legal and factual considerations, could rationally find a basis for discounting or disagreeing with Dr. Darlington. Further, although the delay in resolving this claim is lengthy and unfortunate, it is not so great as to constitute exceptional circumstances.

[111] In *Rathé* v. *Ontario (Health Professions Appeal and Review Board)* [2002] O.J. No. 4787, a three member panel of the Ontario Superior Court of Justice, at para. 29, acknowledged the traditional common law rule that on judicial review of administrative action, while a superior court may quash a decision of a tribunal, it cannot encroach on the tribunal's jurisdiction and prohibit it from rehearing the same matter again, unless there are "exceptional circumstances". Some of the circumstances implicitly accepted by the Court, at para. 32, as "exceptional" would be:

1. Where there was inordinate delay causing significant prejudice, such as where a key witness dies: *Re Commercial Union Assurance et al.* v. *Ontario Human Rights Commission et al.* (1988), 47 S.C.R. (4th) 477;

2. Where the breaches of statutory requirements and procedural fairness by the tribunal below have been so numerous and significant that there is good reason to fear that a fair decision could not be reached upon a reconsideration;

3. Where all the findings of the tribunal below were patently unreasonable;

4. Where the statutory requirements were breached by the tribunal below with impunity, as opposed to being committed in good faith; and

5. Where there was an intention by the tribunal below to act with clear bias or contrary to the principles of natural justice.

[112] I find that none of those exceptional circumstances pertain to the worker's case, and consequently I am bound by the traditional common law rule to remit the matter to the Appeal Tribunal for re-consideration.

[113] There is no issue as to costs. Both the petitioners and the Appeal Tribunal agreed that the parties should bear their own costs. Only the respondent employer submitted that the petition should be dismissed with costs. However, as the petitioners have been successful for the most part, that submission is of no consequence.

GOWER J.