
CANADA / JUDGMENT

Branch v. Workers' Compensation Appeal Tribunal

2017 BCSC 97

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2017 BCSC 97 Branch v. Workers' Compensation Appeal Tribunal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Branch v. Workers' Compensation Appeal Tribunal,

2017 BCSC 97

Date: 20170123

Docket: S151554

Registry: Vancouver

Between:

Eric Todd Branch

Petitioner

And

Workers' Compensation Appeal Tribunal

Respondent

Before: The Honourable Mr. Justice Butler

On judicial review from: A Decision of the Workers' Compensation

Appeal Tribunal dated October 27, 2014, WCAT-2014-03141

Reasons for Judgment

Counsel for the Petitioner:

Monique Pongracic-Speier

Counsel for the Respondent:

Meera Bennett

Place and Date of Hearing:

Vancouver, B.C.

September 12, 2016

Place and Date of Judgment:

Vancouver, B.C.

January 23, 2017

- [1] The petitioner, Eric Branch, was injured on August 3, 2011 while working as an ironworker on a bridge construction project for Peter Kiewit Infrastructure Co. A cable stay began to fall and the petitioner was forced to move quickly to get out of the way of the falling stay. In doing so he tripped and fell, sustaining injuries, including those to his neck and back. He filed a claim under the Workers Compensation Act, R.S.B.C. 1996, c. 492, (the "Act"), to get compensation for the injuries suffered in the accident.
- [2] The petitioner's claim to the Workers Compensation Board (the "Board") took considerable time and the process was somewhat convoluted. On April 24, 2012, the Board determined that the petitioner suffered a temporary neck strain and permanent, chronic neck pain due to the accident. The petitioner sought review of that determination by the Review Division on the basis that the Board had not considered all of the injuries he sustained in the accident. On November 27, 2012, the Review Division declined to consider the petitioner's argument that he sustained additional injuries. The petitioner then sought review of the decision to the Workers' Compensation Appeal Tribunal (the "Tribunal") based on the allegation that he suffered numerous other conditions arising from the accident. In a preliminary decision on August 29, 2013, the Tribunal referred the petitioner's claim back to the Board to consider and make a determination about whether 18 enumerated conditions or symptoms arose out of and in the course of the petitioner's employment.
- [3] A Board case manager then appointed a medical advisor, Dr. Dunn, to provide an opinion on the alleged conditions. Dr. Dunn provided that opinion on June 17, 2014. The Board accepted the opinion of Dr. Dunn and on July 7, 2014, the case manager sent a letter to the petitioner containing the Board's determination that one of the conditions (cervicogenic headaches) arose out of and in the course of his employment. However, the Board determined that the other 17 conditions did not arise out of and in the course of employment and were thus not compensable.

- [4] The petitioner then appealed to the Tribunal but did not request an oral hearing. The appeal was considered by way of written submissions. The Tribunal issued a final decision on October 27, 2014 (WCAT-2014-03141) (the "Decision"), in which it confirmed all of the determinations made in the July 7, 2014 letter. The petitioner now applies to set aside four of the determinations in the Decision. He asks for an order requiring the Tribunal to reconsider whether the following conditions are compensable:
- a) depression, or an aggravation of depression;
 - b) C7 radiculopathy;
 - c) chronic right C7 denervation; and
 - d) aggravation of pre-existing cervical spondylosis.
- [5] The employer did not participate in the appeal to the Tribunal and is not a party to this proceeding. The Tribunal seeks standing to make submissions on the merits of this application for judicial review. However, it takes no position on the petitioner's application regarding C7 radiculopathy and chronic right C7 denervation.
- [6] For the reasons that follow, I allow the petitioner's application regarding his C7 radiculopathy and chronic right C7 denervation. Those conditions are referred back to the Tribunal for reconsideration. With regard to the petitioner's alleged depression or aggravation of a pre-existing condition of depression, the petition is dismissed because the issue raised on this judicial review was not considered by the Tribunal. This dismissal does not preclude the petitioner from approaching the Board to seek a determination as to whether his psychological symptoms are compensable consequences of his work injury. The petitioner's application for judicial review of the Tribunal's decision on cervical spondylosis is denied. The Tribunal did not fail to consider evidence or otherwise come to a patently unreasonable decision.

Standing

- [7] At the hearing of this application, the Tribunal sought standing to defend the merits of the Decision on judicial review. The petitioner did not oppose that position. It is within the discretion of this Court to grant standing to a tribunal to make submissions on the merits. In doing so, the Court must strike a balance between the need for tribunal impartiality and the need to facilitate a fully informed adjudication on review: *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44 at para. 57.
- [8] I indicated to the parties that I would exercise my discretion to grant the Tribunal standing to address the merits on this application. My reasons for doing so can be stated briefly. The Tribunal is the only respondent in these proceedings and, clearly, has the ability to address the merits of this application for judicial review. Hearing submissions from an informed respondent helps the Court to fairly adjudicate the issues with the benefit of comprehensive argument. I also took into account the petitioner's lack of opposition to the Tribunal's

standing. In addition, there is precedent in this Court for this exercise of discretion. In *Shamji v. Workers' Compensation Appeal Tribunal*, 2016 BCSC 1352 at paras. 5-11, Voith J. exercised his discretion to permit the same Tribunal to defend the merits of its decision.

Standard of Review

- [9] The petitioner applied for compensation under s. 5(1) of the Act on the basis that he suffered personal injury arising out of and in the course of employment. He appealed the denial of compensation for the conditions which are at issue on this judicial review to the Tribunal pursuant to s. 239(1) of the Act. He now seeks judicial review of that Decision.
- [10] The Act contains a strong privative clause in s. 255(1), which provides as follows:
- 255 (1) Any decision or action of the chair or the appeal tribunal under this Part is final and conclusive and is not open to question or review in any court.
- [11] Section 245.1(w) of the Act provides that s. 58 of the Administrative Tribunals Act, S.B.C. 2004, c. 45 ("ATA") applies to the Tribunal. Section 58(1) of the ATA provides that a tribunal must be considered expert relative to the courts in relation to all matters over which it has exclusive jurisdiction, if the tribunal's enabling statute contains a privative clause. Section 58(2)(a) of the ATA provides that:
- (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
- (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable.
- [12] There is no doubt that the questions in issue on this application involve matters over which the Tribunal has exclusive jurisdiction. Accordingly, the Court will only interfere with the Tribunal's decisions if they are patently unreasonable.
- [13] There is a substantial body of jurisprudence in this province interpreting patent unreasonableness, and there is no issue between the parties about how to apply that standard. In *British Columbia Ferry and Marine Workers' Union v. British Columbia Ferry Services Inc.*, 2013 BCCA 497, the court accepted the chambers judge's summary of the proper approach, emphasizing that the question is "whether the result (not the reasons) is "openly, clearly, evidently unreasonable": para. 54.
- [14] When applying the standard, the court must give the tribunal decision the highest degree of deference for findings within its exclusive jurisdiction: *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80. With regard to findings of fact, the proper approach was explained in *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25 at para. 30:

a court must defer where there is evidence capable of supporting (as opposed to conclusively demonstrating) a finding of fact, patent unreasonableness is not established where the reviewing court considers the evidence merely to be insufficient (Speckling at para. 37). Simply put, this standard precludes curial re-weighting of evidence, or rejecting the inferences drawn by the fact-finder from that evidence, or substituting the reviewing court's preferred inferences for those drawn by the fact-finder.

[15] The Tribunal's appreciation and application of Board policy on matters within its exclusive jurisdiction is entitled to deference unless it is "clearly irrational" or "evidently not in accordance with reason": *Prest v. Workers' Compensation Appeal Tribunal*, 2015 BCCA 377 at para. 27. However, it is patently unreasonable for the Tribunal to fail to apply applicable Board policy in an appeal: *Schulmeister v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2007 BCSC 1580 at paras. 122-126.

Depression or Aggravation of Depression

Position of the Parties

- [16] The petitioner says the Board's policies provide that psychological impairment may be compensable as a consequence of another personal injury. The petitioner says he presented significant evidence of psychological impairment arising from the constellation of injuries he suffered in the accident and the Tribunal's decision to deny compensation is patently unreasonable.
- [17] The petitioner argues that the Tribunal made three errors when adjudicating his claim for depression or aggravation of depression. First, the Board based its decision on the fact that the petitioner was not diagnosed with depression following the work accident. There is no requirement in the Act that a worker must be diagnosed with depression, or some other psychological or psychiatric condition, to have the condition accepted as a personal injury under s. 5(1). The only relevant consideration is whether there is evidence of psychological impairment.
- [18] The second and third errors alleged by the petitioner are closely related. He says the Board's determination on this issue was the product of deficient adjudication and that the Tribunal failed to consider evidence that was relevant to whether he experienced psychological impairment. The deficient adjudication was caused by the Board's erroneous focus on whether the petitioner had been diagnosed with depression. The petitioner says it is an error for the Tribunal to affirm a Board decision which is based on inadequate adjudication. The erroneous focus on diagnosis also led the Tribunal to not consider evidence which was highly relevant to the petitioner's psychological impairment claim. The evidence included the attending physician's reports that the petitioner suffered mood issues and prescription of anti-depressant medication.

- [19] The Tribunal argues that the only question asked and answered in the Decision is whether the petitioner had a defined medical disorder - depression - as a compensable consequence of his work injury. It says that an examination of the proceedings makes it clear that the Board and the Tribunal considered no other issues. The Tribunal argues that the petitioner is raising the issue of his psychological impairment for the first time on judicial review. The Tribunal says the Court should apply the general rule that new issues should not be entertained on judicial review. Further, it argues that the Court is not in a position to consider this issue because it requires findings of fact and interpretation of Board policy which the Tribunal was not asked to make. More bluntly, the Tribunal says there is nothing for the Court to review because the Decision did not provide reasons as to compensability of the petitioner's psychological symptoms.
- [20] Alternatively, the Tribunal says if this Court finds that the Tribunal should have considered if the petitioner's psychological symptoms were compensable and that the failure to do so was patently unreasonable, then the matter should be remitted back to the Tribunal for a decision as to whether those symptoms are compensable.
- [21] In response to the petitioner's argument that the Tribunal erred in law in finding that a diagnosis of depression was required in order to find that the petitioner was entitled to compensation for psychological impairment, the Tribunal says it is not clear from the Act or the relevant Board policies if psychological impairment means a diagnosed mental disorder or includes symptoms that fall short of a diagnosed disorder. The Tribunal says that is a question that was not considered in the Decision and that this Court should not embark on its own interpretation of this question without the benefit of reasons from the Tribunal.
- [22] The Tribunal says there is no merit to the argument that it failed to consider relevant evidence. It had before it the reports from Dr. Niou, the petitioner's treating physician, and all of the medical evidence to which the petitioner refers. The Decision specifically refers to evidence of Mr. Branch's mood in Dr. Niou's reports from December 8, 2011 and January 6, 2012. In any event, the Tribunal says it is not required to mention every piece of evidence in a worker's file. The Tribunal also says the petitioner's argument that the Board's investigation was inadequate is of no consequence; that cannot be an issue on judicial review. The only question on review is whether the Tribunal's decision was patently unreasonable.

Analysis

- [23] The arguments which the petitioner and the Tribunal raise require the Court to consider the Board's policy and examine the issues before the Board and the Tribunal. What is unusual in this case is that both the petitioner and the Tribunal base their arguments on the same adjudicative circumstance: the Decision does not address or give reasons on whether the petitioner's psychological symptoms are compensable. The difference between the positions before the Court is that the petitioner says that not dealing with this issue was patently unreasonable and invites this Court to find that the symptoms are compensable, while the Tribunal says the question was never before it, and therefore, this Court should not consider

the issue on judicial review.

- [24] I am of the view that the Tribunal's position is correct; the Tribunal did not consider the issue. It would be inadvisable for this Court to make a decision on judicial review when the Tribunal did not find the necessary facts or interpret the relevant provisions of the Act or Board policy.
- [25] The starting point for considering this issue is the Board policy on personal injury under s. 5(1) of the Act. Policy #C3-22.00 describes the proper approach to determining whether a "personal injury" is compensable:

Once it is established that an injury arose out of and in the course of the worker's employment, the question arises as to what consequences of that injury are compensable

Looking at the matter broadly and from a "common sense" point of view, the Board considers whether the compensable injury, or the worker's condition resulting from the compensable injury, was of causative significance in the further injury [or] increased disablement

- [26] Here, the petitioner says that depression is a compensable symptom or consequence resulting from a compensable injury. Personal injury is generally defined in #C3-12.00 as "any physiological change resulting from some cause" but psychological impairment can also constitute a "personal injury" under that policy.
- [27] Policy #C3-22.30 is the critical policy provision applicable to the petitioner's claim. It describes how to determine whether psychological impairment is compensable:

Psychological impairment may be accepted as compensable where the evidence indicates that it results as a consequence of an employment-related injury or occupational disease.

It cannot be assumed that a psychological impairment exists simply because the worker has unexplained subjective complaints or is having difficulty in psychologically or emotionally adjusting to any physical limitations resulting from a compensable injury or disease. There must be evidence that the worker has a psychological impairment.

- [28] In order to consider whether the Tribunal considered or ought to have considered the compensability of the petitioner's psychological symptoms, the Court must look at the proceedings before the Board and the Tribunal.
- [29] Before appealing to the Tribunal, the petitioner asked the Board and the Review Division to adjudicate a lengthy list of symptoms and conditions. One of the conditions listed was "depression or an aggravation of depression". Both the Board and the Review Division refused to make a decision as to whether those conditions were compensable. The petitioner then filed a notice of appeal to the Tribunal. His letter attached to the notice of appeal asked the Tribunal to adjudicate the same conditions and explained the basis of the appeal:

It is our contention that [the petitioner's] continuing pain complaints, all of which are referenced in the medical evidence on file, are causally related to his work incident under review. Therefore, we respectfully ask the Panel to conduct further medical investigation, if necessary, and compensate [the petitioner] for the injuries he has sustained as a result of his work incident.

[30] The Tribunal referred the matter back to the Board under s. 246(3) of the Act. At para. 40 of the Tribunal's summary decision of August 29, 2013, it listed all of the conditions the petitioner had previously asked the Board and Review Division to consider, and stated as follows:

I am therefore suspending the appeal and referring the file back to the Board under section 246(3) of the Act to determine whether the following conditions arose out of and in the course of employment:

[31] The Board then appointed Dr. Dunn and eventually made the determination which formed the basis of the final appeal to the Tribunal. The Board reasoned that the petitioner did not have a diagnosis of depression and therefore the condition was not compensable. The petitioner made further submissions to the Tribunal through counsel but did not ask that his "psychological symptoms" be found compensable. Rather, he reiterated the request that the list of conditions be found to be compensable.

[32] In the Decision, the Tribunal defined the scope of the appeal at para. 16:

It is important to distinguish here that the section 246(3) of the Act referral initiated by the previous panel did not request determinations on whether to accept particular complaints under the claim. Rather the determinations requested involved the question of whether there were other conditions that arose out of and in the course of the worker's employment. The practical implication of such referral questions required therefore, determinations on whether there were other conditions that were caused by the worker's fall at work on August 3, 2011, being the initiating incident to which this claim was directed.

[33] I accept the Tribunal's submission on the significance of this passage. The Tribunal is indicating that it was not considering whether symptoms (or particular complaints) which fall short of a diagnosis should be accepted under the claim. Rather, the issue that the petitioner put before them was whether "depression or aggravation of depression" was diagnosed.

[34] The Decision does not address or give reasons on the issue of whether the petitioner's psychological symptoms (or "complaints") are compensable. The issue of the petitioner's complaint about depression is dealt with in one short passage at para. 77:

The worker disagrees that he suffered from depression previously, although according to his attending physician he did experience previous depression for which he had trialed medication. I do not find it necessary to resolve such differing information, as the fact remains that although the worker described decreased mood he was not diagnosed as suffering from depression following the work incident. Without such a diagnosis in place, it follows in my view that the

Board correctly determined the worker did not sustain either depression or an aggravation of pre-existing depression as a result of the work incident. [Emphasis added.]

- [35] It is not clear from the Decision if the Tribunal determined that the petitioner's psychological symptoms were not compensable because of the nature and severity of the symptoms, or whether the Tribunal decided as a matter of law that the Act and Board policy require a diagnosis in order to satisfy the requirement of psychological impairment.
- [36] Much of the petitioner's argument before this Court focused on his position that psychological symptoms falling short of a diagnosed mental disorder are compensable. He relies on the decision in *McKnight v. Workers' Compensation Appeal Tribunal*, 2012 BCSC 1820, in which, at para. 81, the Court notes that the requirement for "diagnosis" is largely absent from the Act:

However, neither s. 6(1) nor s. 6(3) contain any such requirement [for a diagnosis]; they are phrased only in terms of a worker having suffered or contracted an occupational disease. Indeed, the concept of "diagnosis" is largely absent from the Act. It appears only in two places: s. 5.1(1)(b), which provides that as a precondition to compensation for mental stress, the worker must have been diagnosed by a psychiatrist or psychologist as having suffered from a recognized mental or physical condition; and s. 4(d) of Schedule B, under which causation is only to be presumed in cases of gastro-intestinal cancer when there has been a lengthy period of exposure to asbestos up to the date of diagnosis.

- [37] The petitioner acknowledges that *McKnight* deals with s. 6 of the Act, which concerns occupational diseases and so it is not directly relevant. However, he says the requirement for a diagnosis for adjudication of a "mental disorder" under s. 5.1 of the Act is plainly not applicable to a personal injury claim adjudicated under s. 5(1). Accordingly, he says that the approach in *McKnight* is, at the very least, instructive here. He says that while a diagnosis may carry significance, the lack of a diagnosis is not fatal to a psychological impairment claim.
- [38] The Tribunal agrees as a matter of law that psychological symptoms falling short of a diagnosis can be compensable under s. 5(1). It points to previous decisions of the Tribunal finding that physical symptoms were, or were not, compensable depending on the severity of the symptoms and the impairment they caused. However, it says that determining if the petitioner's psychological symptoms, falling short of a diagnosed mental disorder, are compensable would require the Tribunal to make findings of fact based on evidence - which it plainly did not do. Further, it would require the Tribunal to interpret Board policies #C3 - 22.00 and #C3 - 22.30 - which it plainly did not do. The only decision the Tribunal made, as set out in para. 77 of the Decision, was that the petitioner did not have a diagnosis of depression, therefore "depression or an aggravation of pre-existing depression" was not an injury suffered in the accident. No decision was made as to whether the psychological symptoms were a compensable consequence of the accepted work injuries.

- [39] As I have indicated, the unusual feature of this petition is that the petitioner and the Tribunal both acknowledge that there was no discussion or conclusions at the hearing about the two critical issues: whether the evidence supports a finding of fact that the petitioner's psychological symptoms were impairing; and the import, either as a matter of fact or law, of the absence of a diagnosis of depression. These questions involve interpreting Board policy and making findings of fact. Given the absence of such findings or rulings by the Tribunal, it would not be appropriate for this Court to attempt to consider these issues on judicial review.
- [40] Having determined that the Tribunal did not render a decision on these important issues, I must dismiss the application for judicial review. In doing so, I conclude that this is an appropriate case in which to apply the general rule that a court should not consider an issue which was not dealt with by the tribunal: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61. At paras. 24-25, Rothstein J. discusses the rationale for this rule:
- [24] There are a number of rationales justifying the general rule. One fundamental concern is that the legislature has entrusted the determination of the issue to the administrative tribunal (*Legal Oil & Gas Ltd.*, at paras. 12-13). As this Court explained in *Dunsmuir*, "[c]ourts . . . must be sensitive . . . to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures" (para. 27). Accordingly, courts should respect the legislative choice of the tribunal as the first instance decision maker by giving the tribunal the opportunity to deal with the issue first and to make its views known.
- [25] This is particularly true where the issue raised for the first time on judicial review relates to the tribunal's specialized functions or expertise. When it does, the Court should be especially careful not to overlook the loss of the benefit of the tribunal's views inherent in allowing the issue to be raised.
- [41] Here, the questions the petitioner seeks to have this Court answer on judicial review are directly related to the Tribunal's specialized functions and expertise. This Court should not consider these issues without having the benefit of the Tribunal's views.
- [42] In light of the decision I have reached, the appropriate order is to dismiss the application for judicial review. The dismissal is without prejudice to the petitioner's right to apply for consideration of his claim that he suffered psychological symptoms as a consequence of injuries suffered in the workplace incident.

C7 Radiculopathy and Chronic right C7 Denervation

Analysis

[43] The petitioner says the Tribunal's decision that his C7 radiculopathy and C7 denervation are not compensable is patently unreasonable because the Tribunal ignored or failed to take account of highly relevant evidence contained in consultation reports of Dr. Babington, a Washington state physician.

[44] In the Decision, the Tribunal noted that the petitioner had complaints that extended into his right arm but concluded at para. 79:

However, the investigations and examinations ultimately confirmed an absence of corresponding findings of C7 nerve root involvement or a confirmed diagnosis in that regard.

[45] The record does not support this finding. The petitioner was referred by Dr. Babington for electrodiagnostic testing which was performed on December 24, 2012 by Dr. Julie Hodapp. The results of the testing were abnormal; she found, "electrodiagnostic evidence of chronic right C7 denervation with no acute denervation " Dr. Babington then assessed the petitioner and in his consultation report of January 24, 2013 concluded that the petitioner suffered from "chronic C7 radiculopathy, most likely related to his cervical injury." Dr. Babington's follow-up consultation report of January 6, 2014 described the petitioner as a "41 year-old male with chronic C7 radiculopathy by EMG related to a work related injury and fall."

[46] This Court must give the highest degree of deference to findings of fact made by the Tribunal within its exclusive jurisdiction. That deference must be given where the Tribunal has considered and weighed conflicting evidence and made findings of fact. The difficulty here is that the conclusion of the Tribunal - that the investigations and examinations confirmed an absence of findings of C7 nerve root involvement or a diagnosis - is wrong. The investigations conducted by Dr. Hodapp found nerve root involvement and Dr. Babington's consultation reports confirmed the diagnosis and set out his opinion that the condition was caused by the work injury.

[47] This is not a situation where there are conflicting opinions and the Tribunal weighed the evidence and preferred one opinion over another. Rather, the Tribunal examined evidence up to October 2012 which was inconclusive; no diagnosis had been made. However, further investigation after October 2012 resulted in a diagnosis by Dr. Babington. For reasons that are not explained, Dr. Dunn makes no reference to Dr. Hadapp's findings or Dr. Babington's reports in the June 17, 2014 letter to the Board. It would appear that he ignored the most important medical evidence about the conditions under consideration; C7 radiculopathy and denervation. Similarly, the Board letter of July 7, 2014 and the Decision make no reference to that critical evidence.

[48] In these circumstances, the Decision about C7 denervation and C7 radiculopathy is patently unreasonable because the Tribunal failed to consider relevant evidence. The Tribunal arrived at a conclusion based on the erroneous assumption that the petitioner was not diagnosed with C7 radiculopathy. That portion of the Decision is set aside and the issue

regarding C7 denervation and radiculopathy is remitted to the Tribunal for a new decision. The Tribunal shall reconsider and determine the compensability of the petitioner's conditions of C7 denervation and C7 radiculopathy, taking into consideration the investigation of Dr. Hadapp and the opinion of Dr. Babington.

Aggravation of Pre-existing Cervical Spondylosis

Position of the Parties

- [49] The petitioner says the Decision is patently unreasonable as it fails to recognize that he suffered an aggravation of pre-existing cervical spondylosis as a result of the workplace incident. The petitioner says the Tribunal's conclusion on this condition suffers from the same problem which affected the Decision on C7 denervation and radiculopathy: Dr. Dunn and the Tribunal failed to consider the highly relevant evidence of Dr. Babington.
- [50] The petitioner's argument is based on Dr. Dunn's discussion of the petitioner's radicular symptoms. Dr. Dunn states that radicular symptoms can be indicative of an aggravation of spondylosis. However, he ultimately concludes that there is no evidence to support an aggravation of pre-existing spondylosis because he could find no evidence of radicular symptoms. The petitioner argues that the latter point is incorrect because Dr. Babington found and reported on the radiculopathy.
- [51] The Tribunal says that the petitioner's arguments advance a theory of the case which was not in evidence before the Tribunal, was not argued at the Tribunal and was not supported by medical evidence. Dr. Dunn concluded that there was no clinical correlation between the work incident and the petitioner's spondylosis. It says that conclusion is reasonable on the evidence before the Tribunal.
- [52] The Tribunal says that the suggestion that it failed to consider Dr. Babington's evidence on this issue has no merit. There are three reports from Dr. Babington. One does mention the existence of spondylosis but suggests the petitioner's symptoms "appear mostly age-related". Accordingly, the error which the Tribunal concedes impacts the Decision regarding C7 denervation and C7 radiculopathy does not invalidate Dr. Dunn's opinion or impact the Decision regarding spondylosis.

Analysis

- [53] The Tribunal is correct that Dr. Babington's reports make no mention of an aggravation of the petitioner's pre-existing spondylosis and offer no opinion that the workplace incident caused such an aggravation. The Tribunal's failure to consider Dr. Babington's reports and opinions on this issue is thus not unreasonable, let alone patently unreasonable.
- [54] The petitioner is inviting this Court, on judicial review, to take all of the evidence, reconsider it, and arrive at a new conclusion that the accident aggravated his spondylosis. He is asking the Court to make a new finding of fact. The petitioner argues that if Dr. Dunn

had considered Dr. Babington's reports, he would have concluded that the accident aggravated the petitioner's pre-existing spondylosis. This is pure speculation. The Tribunal's conclusion on this issue is set out at para. 78 of the Decision, which includes the statement: "[T]here is no medical opinion to suggest the worker's pre-existing cervical spondylosis was aggravated by the work incident." That remains the case; there is still no medical opinion to suggest that the petitioner's spondylosis was aggravated by the work incident.

- [55] The Tribunal's conclusion on spondylosis is thus not affected by the same error that makes the decision on C7 denervation and radiculopathy patently unreasonable. Here, there is no contrary opinion or clearly relevant evidence which was ignored.
- [56] By asking the Court to come to a different conclusion as to the alleged aggravation of the petitioner's pre-existing spondylosis, the petitioner is inviting the Court to engage in a curial re-weighing of the evidence and to draw an inference about the possibility of such an aggravation. This is not permitted when applying the patently unreasonable standard of review. The petitioner's application to set aside the Decision on this issue is dismissed.

Disposition

- [57] In summary, I dispose of the petitioner's four grounds for review of the Decision as follows:
- a) The petitioner's application to set aside the Tribunal's decision on depression or aggravation of depression is dismissed. This ruling is without prejudice to the petitioner's right to apply for consideration of his claim that he suffered compensable psychological symptoms as a consequence of injuries suffered in the workplace incident.
 - b) The petitioner's application to set aside the Tribunal's decision on C7 radiculopathy is allowed. This issue is remitted to the Tribunal for reconsideration.
 - c) The petitioner's application to set aside the Tribunal's decision on chronic right C7 denervation is allowed. This issue is remitted to the Tribunal for reconsideration.
 - d) The petitioner's application to set aside the Tribunal's decision on spondylosis is dismissed.
- [58] Neither the petitioner nor the Tribunal seek costs, and, in any event, success was mixed. Accordingly, I make no order for costs.

"Butler J."

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