WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1716 98 2

[1] This appeal was heard in Toronto on November 18, 2002, by Tribunal Vice-Chair B.L. Cook.

THE APPEAL PROCEEDINGS

[2] This appeal arises from an appeal brought by the worker from a decision of Appeals Officer O.J. McMahon, dated January 20, 1997. The appeal of that decision was decided by a Panel of the Tribunal in *Decision No. 1716/98*, dated April 23, 1999. That decision concluded that the worker was entitled to a pension reassessment and to a pension supplement under section 147(4) of the pre-1997 *Act*, but not entitled to benefits for a psychotraumatic disability.

[3] The worker applied for a reconsideration of the Panel's decision. The reconsideration request was considered by the Panel vice-chair, J. Sandomirsky. In *Decision No. 1716/98R*, dated April 12, 2002, the vice-chair concluded that the worker had provided significant new evidence, which was not available at the original hearing and which may have resulted in a different decision. The request for reconsideration was granted on that basis.

[4] The appeal was then assigned to me, and a hearing was held on November 18, 2002.

[5] The worker appeared and was represented by Richard Fink, a lawyer. The employer participated in the original hearing before the Panel in *Decision No. 1716/98*. The employer was advised of the new appeal but elected to not participate.

THE RECORD

[6] The record in this case includes the Case Record and three Addenda that were marked as exhibits by the *Decision No. 1716/98* Panel, together with a Reconsideration Record and a Reconsideration Record Addendum.

[7] Oral evidence was heard from the worker. Submissions were made by Mr. Fink.

THE ISSUES

[8] The issue in the appeal before me is whether the worker is entitled to benefits under the Board's psychotraumatic disability policy.

[9] The worker suffered a work-related motor vehicle accident on November 20, 1972. The worker suffered serious multiple injuries. A co-worker who was a passenger in the car, died as a result of his injuries.

[10] The worker also suffered motor vehicle accidents in February 1984 and October 1992. He has also experienced other non-compensable problems.

[11] The *Decision No. 1716/98* Panel accepted that the 1972 work-related accident was traumatic and that it had a significant emotional impact on the worker. However, the Panel found that the worker did not seek medical treatment for his psychological condition until 1992. The Panel noted that the Board's policy provides that entitlement may be granted for psychotraumatic disability provided that the disability became manifest within five years of the injury or last surgical procedure. The Panel found that the worker was not entitled to benefits for his psychological disability because the condition did not become manifest within five years of the injury or last surgical procedure.

[12] The reconsideration request was submitted by Mr. Fink in December 2000. He provided new evidence in support of the request. The new evidence was a report prepared by Dr. Adrian Hanick, a psychiatrist, and a letter dated November 17, 2000 from Dr. Rachel Edney. Dr. Hanick has been treating the worker since November 1996. Dr. Edney has been the worker's family doctor since 1982. In her letter, Dr. Edney notes that the worker had surgery to his left arm in 1982. She indicates that she saw him in February and April 1984, with complaints of arm pain. The letter states:

> [The worker] was very distressed with his inability to work and I gave him supportive psychotherapy.

[13] In *Decision No. 1716/98R* the vice-chair noted that the Board has accepted that the 1982 arm surgery was related to the 1972 work-related injury. She noted that Dr. Edney's letter established that the worker had received psychotherapy in 1984, which was within five years of the last surgical procedure in 1982. The vice-chair accepted that Dr. Edney's letter was significant new evidence, not available at the time of the original hearing that might have led to a different decision and the reconsideration was granted on that basis.

[14] Mr. Fink confirmed at the hearing on November 18, 2002 that, pursuant to *Decision No. 1716/98*, the Board had re-assessed and increased the pension the worker receives for his shoulder injury, and also granted the worker a supplement under section 147(4) of the pre-1997 *Act*, although he was not clear about the effective date of the supplement. Mr. Fink confirmed that the only issue at present is whether the worker is entitled to benefits under the Board's psychotraumatic disability policy.

THE REASONS

(i) Background

[15] The background facts to this case were set out in *Decision No. 1716/98*, and are reproduced here.

[16] The worker was involved in a motor vehicle accident on November 20, 1972, while driving from Toronto to a job site in Belleville. The worker's co-worker, who was a passenger in the vehicle, was killed in the accident. The worker did not file a claim for workers' compensation benefits until 1982, at which time the Board began an investigation into the worker's status under the *Act*. The investigation continued for 12 years, culminating with *Decision No. 406/94*, which concluded that the worker was an independent operator who did not employ workers, and,

therefore, according to the policy of the Workers Compensation Board in effect in 1972, was deemed to be a worker under the *Act*.

[17] The Board then made a determination on the worker's benefit entitlement. Initially, it granted entitlement to temporary total disability benefits for six months following the accident. On March 8, 1995, the worker was assessed for a permanent pension. The Board granted a 3% pension for a midshaft fracture of the left humerus, a 5% pension for a pelvic injury, and a 5% pension for the fracture in the left femur. The pension assessor also noted that, if the worker had entitlement for the left shoulder, an additional 5% award would be recommended. The worker was found to have no residual impairment in the right knee or left foot. Subsequent to the pension review, the Board also denied entitlement to supplementary benefits, on the basis that the worker did not suffer a loss of earnings capacity related to the compensable injury.

[18] The worker was involved in a non-compensable motor vehicle accident in February 1984. As a result of this accident, he reinjured his left arm, and began to have problems with his low back. In April 1989, the worker sustained a left massive pneumothorax. In April 1991, he had a further pneumothorax. The worker had another non-compensable motor vehicle accident in October 1992, and has not worked since that accident.

[19] The worker was diagnosed with the following injuries after the 1972 motor vehicle accident:

1. transverse fracture middle third left humerus;
2. fracture proximal third left femur;
3. tear of medial collateral ligament right knee;
4. mid-tarsal subluxation left foot;
5. multiple pelvic fractures;
6. multiple lacerations.

[20] Both the left humerus and left femur were surgically repaired. Notes from the surgeon, Dr. R.W. Jackson, indicate that the worker made excellent progress, and, by May 1973, was noted to have been back to work full-time. One year after the accident, Dr. Jackson noted that "functionally and clinically he is excellent with no complaints whatsoever about any of his previous injuries." The worker underwent further surgery on his left arm in February 1974, when the plate inserted in 1972 was removed. A final clinical note, dated January 1975, stated that the worker had minimal symptoms, but x-rays showed the left arm fracture remained in a state of non-union.

[21] The next medical reports on file were from 1982, when the worker saw Dr. D.J. Ogilvie-Harris for continued left arm pain. X-rays were reported to reveal a non-union of the humerus, and the worker underwent further surgery in December 1982. In the surgical report, Dr. Ogilvie-Harris noted the following: "We opened the old exposure of the rotator cuff, explored it and there was a small bony chip off one portion of the rotator cuff in which I put a suture; however, the Rush rod was not clearly visible and obviously not irritating the rotator cuff itself."

[22] The next report from Dr. Ogilvie-Harris was in March 1984, after the worker's noncompensable motor vehicle accident in February 1984. He noted in the report that the worker injured his left arm again in the accident, and also developed pain in his low back and left paracervical area. In a medical-legal report regarding the worker's symptoms subsequent to the 1984 motor vehicle accident, Dr. Ogilvie-Harris noted that prior to that accident, the worker had occasional pain in the midportion of his left humerus and in the bicep muscle, however, aside from that, he had no significant problems. Dr. Ogilvie-Harris went on to note that he had discharged the worker from his care in June 1983 as having essentially recovered. After the motor vehicle accident, the worker was off work with pain in his neck, low back and left arm.

[23] The record also contains the clinical notes from the worker's family doctor. Dr. R. Edney, between 1982 and 1989. The note from February 13, 1984, the date of the first non-compensable motor vehicle accident, reports tender left shoulder. The note also indicates that the worker hit his left side and shoulder in the earlier motor vehicle accident. There are no references to left shoulder problems in the prior notes from 1982. There is, however, an x-ray report from February 8, 1984, revealing no evidence of fracture or dislocation, and the left clavicle was reported to be unremarkable.

[24] The worker continued to see Dr. Edney. In 1989, he was admitted to the hospital with a complete collapse of his left lung. He was admitted to the hospital again in 1991 for the same condition.

[25] In September 1992, the worker came under the care of Dr. G. D'Onofrio, who referred him to Dr. M.W. Roscoe, an orthopaedic surgeon, because of continued complaints of pain in the left shoulder and arm. In October 1992, the worker had a further motor vehicle accident and injured the left side of his head, his left shoulder and left arm. Dr. Roscoe diagnosed ongoing symptoms related to a prior fractured humerus. He noted good movement in the worker's shoulder, with pain at the extremes. In May 1993, Dr. Roscoe concluded that the worker had an ongoing disability related to a left upper arm injury, which was muscular in nature.

[26] Dr. D'Onofrio also referred the worker to Dr. G. Figlioli, a psychiatrist, who began to see the worker in November 1992. Dr. Figlioli diagnosed anxiety and depression.

[27] A medical-legal report from M.C. Hall, dated March 19, 1993, concluded that the worker injured his left arm, side and head as a result of the 1992 motor vehicle accident, but he was not significantly injured at that time. Dr. Hall also noted that the worker had been receiving treatment from a psychiatrist, and that the worker continued to receive rehabilitation treatments subsequent to this motor vehicle accident.

[28] A further independent medical report from Dr. A.M. Daglea, dated April 15, 1994, noted that the worker's left shoulder showed evidence of a ruptured bicep, which appeared to be old. Dr. Daglea concluded that the worker sustained a mild-to-moderate exacerbation of a previous injury to his left shoulder and cervical musculature.

[29] A report from Dr. Figlioli, dated December 9, 1994, noted that the worker was suffering from a severe post-traumatic reactive depression, and it was Dr. Figlioli's opinion that the symptoms stemmed from the serious motor vehicle accident of November 1972. Dr. Figlioli

stated that, over the years, the worker has been subjected to an incredible amount of stress ensuing from the accident, to the point where he is now suffering from a major depression. Dr. Figlioli noted that the worker was employed in a high-risk occupation as a crane operator, and frequently had nightmares about re-injury and the original accident. Dr. Figlioli provided the clinical diagnosis of anxiety neurosis, with phobic features involving fear of heights and fear of re-injury.

[30] Starting in 1995, reports from Dr. Roscoe, Dr. A. Gigliano, Dr. P. Kirwin, and Dr. Figlioli noted that the worker suffered from chronic pain syndrome. In 1995, the worker was also examined by Dr. Y. Sadak, Dr. J. Patcai, and Dr. F. Habal, for treatment of his ongoing symptoms.

(ii) The worker's evidence

[31] At the hearing on November 18, 2002, the worker provided oral testimony, as he had at the original hearing.

[32] In his evidence before me, the worker indicated that he came to Canada in 1965, when he was 16 years old. In 1969, he started to work as a crane operator, and became a licensed crane operator in 1970 or 1971.

[33] At the time of the accident in 1972, he was working as a construction foreman for a construction company. The accident happened on the 401 when he was driving to the job site in Belleville. The worker testified that he has no memory of the details of the accident. He was later told that the car had slid on ice and hit a bridge. He was initially treated at the Cobourg hospital, and then transferred to Toronto. He was released from hospital in January 1973. At about the time he was released, he learned that the co-worker who was a passenger in the car had died from his injuries. The worker indicated that his mother came to help care for him during his convalescence.

[34] The worker testified that he returned to work in 1973 as a crane operator. After only a few weeks, he suffered another accident when he slipped while attempting to get into the cab of the crane. It appears that this resulted in only minor injuries.

[35] In February 1994, the worker had further surgery on his leg, to repair a plate.

[36] The evidence concerning the worker's activities subsequent to 1973 is somewhat confusing, owing mostly to the passage of time. According to *Decision No. 1716/98,* the worker told the Panel that he became a part owner of his brother's construction company, and then resumed work as a crane operator in 1978.

[37] A letter dated November 26, 1984 was prepared with the assistance of a community legal worker at Mississauga Community Legal Services. This letter was written with respect to the worker's claim for benefits in relation to the 1982 arm surgery. The Board initially determined that the surgery was not related to the work-related 1972 accident. This letter is quite detailed in respect of the worker's activities in the period 1975 to 1982. It indicates that from 1975 to June 1978, the worker was the owner of a forming company, which employed 30 workers. He did site supervision and cost estimating but did not do heavy labour. The letter indicates that

from June 1978 to January 1981, he owned a different business that employed about 60 workers. The worker did site supervision and cost estimating work in this period. The letter states that in January 1981, the worker established another company, for which he again did site supervision and cost estimating work, and that he then returned to work as a crane operator in 1982 until he had to go off work for the arm surgery.

[38] A statement prepared by the worker's accountant, presumably for the purposes of the worker's insurance claim, indicates that the worker had no income from the date of the 1972 accident until 1978, except for three weeks of work in 1973, the period January to May 1974 and six weeks in 1977. The statement indicates that the worker had minimal earnings in 1978 and that there was "no data" regarding his earnings in 1979 and 1980.

[39] In his evidence before me, the worker indicated that the letter from Mississauga Community Legal Services is partially correct. He clarified that he did not employ workers when he operated any of the businesses. He did sub-contracting work for companies that did hire workers. The worker recalled that during the period that he operated the second company, he worked at a job site in Windsor. He stayed there during the week, and drove home on the weekends.

[40] The worker testified that he did do site supervision and cost estimating work but that he felt that he could not do as much of this work as he should have been able to do because he mentally "wasn't there." As a result, it was difficult for him to keep abreast of technical developments.

[41] The worker testified that a major issue for him in the years after the 1972 accident was his feelings of guilt about the death of the co-worker. He testified that before the accident he had been quite close with the co-worker and the co-worker's family. He had socialized with them, and taken the children on outings.

[42] After the accident, the worker visited the co-worker's widow after the funeral. She did not seem to blame him and encouraged him to stay in contact. However, he found it difficult to do this, and did not visit again until approximately 1982, when he took his wife and children to visit.

[43] The worker indicated that after the 1972 accident he was assessed periodically by his orthopaedic surgeon, who took x-rays approximately annually. He did not have a family doctor, however, he took his mother to her family doctor, Dr. Morrow. The worker indicated that he would have some conversations with Dr. Morrow about his situation during these visits. He also probably sought treatment from Dr. Morrow if he required medical treatment, for example for the flu. However, the worker testified that he really did not have any significant health problems that required medical intervention. However, he also testified that he had continuing pain in his leg, arm and groin, for which he took over the counter pain medication.

[44] In 1982, it was determined that the worker's left arm, injured in the 1972 accident, had never properly healed. As noted earlier, surgery was performed by Dr. Oglivie-Harris, who repaired the rotator cuff area.

[45] The worker indicated that this surgery had some psychological effects. He saw it as evidence of the continuing consequences of the 1972 accident. He also became concerned that he might eventually lose his arm.

[46] In February 1984, the worker was involved in a second motor vehicle accident, which was not work-related. He sustained multiple injuries, but they were not as serious as the 1972 injuries.

[47] The worker testified that he was having marital problems around the time of the 1984 motor vehicle accident. He had by then come under the care of Dr. Edney, a family doctor. Dr. Edney provided counseling to the worker and his wife.

[48] The worker explained that these problems intensified after his wife met certain family members who had a connection with the family of the co-worker who was killed in the 1972 accident. His wife then asked him a lot of questions about the 1972 accident. She did not blame him directly for the death of the co-worker but her questions were troubling nevertheless.

[49] The worker testified that he took some community college courses in psychology in approximately 1984 and perhaps earlier. He took these courses to gain an understanding of psychology so that he could better understand his own problems. He took a few such courses over about a two year period.

[50] The worker indicated that he did not ask to see a psychiatrist or psychologist because, in the culture in which he was raised, it was not considered appropriate to do so.

[51] The November 17, 2000 letter from Dr. Edney that Mr. Fink provided in support of the reconsideration request confirms that she saw the worker in May 1982, in relation to the left arm problems. It indicates that she then did not see the worker until February 13, 1984, which was the date of the second motor vehicle accident. Dr. Edney's letter does not mention the motor vehicle accident. She indicates that she saw him again on April 13, 1984. She states:

> He complained he was unable to work quite frequently, because of the pain to his left arm, which was much worse with any heavy lifting or certain movements. [The worker] was very distressed with his inability to work and I gave him supportive psychotherapy.
>
> I did not see [the worker] again regarding his arm until 1988, when we discussed problems with compensation.

[52] Dr. Edney's clinical notes, which are in the Case Record, confirm that she saw the worker on February 13 and April 13, 1984. The notes indicate that the worker was complaining that he was having difficulty working due to arm pain. There is no mention of psychotherapy. The notes indicate that Dr. Edney saw the worker occasionally in 1985 and 1986 for various unrelated problems. The entry for November 19, 1986 is quite detailed, and appears related to a more thorough check-up. The notes refer to the worker's family history and social history, but make no mention of any psychological issues.

[53] The worker indicated that after the 1982 surgery he eventually returned to work as a crane operator. He also did work as site supervisor and cost estimator. In April 1989, he suffered a collapsed lung. This recurred in April 1991. In October 1992, he suffered a third motor vehicle accident and he has not worked since.

[54] In September 1992, just prior to the third motor vehicle accident, the worker had changed family doctors, and came under the care of Dr. D'Onofrio. Dr. D'Onofrio referred the worker to

Dr. Figlioli, a psychiatrist. The worker testified that he was fairly certain that he saw Dr. Figlioli in September 1992, prior to the motor vehicle accident. However, Dr. Figlioli's letter of October 19, 1995 indicates that he first saw the worker on November 5, 1992, which was after the motor vehicle accident.

[55] Dr. Figlioli's report provides the strongest support for the worker's claim for benefits for his psychological condition. It reads in part:

> During our interviews he mentions often the fact that he is still alive whereas his friend is dead; feeling guilty and responsible for his loss. He feels also discouraged and perplexed making him have to seek help (professional). He in fact feels shame for having to require help of a psychiatrist.

[56] The report notes that the worker was suffering from a variety of psychological symptoms and concludes:

> From a psychiatric point of view it appears clear that [the worker] suffers from severe depression and that this depression is secondary to the pain and hurt he has been suffering since the time of his accident. I am of the opinion that his pain is genuine. Most likely is increased by his secondary depression.

[57] The worker continued to see Dr. Figlioli for a few years, until Dr. Figlioli died. He has subsequently come under the care of Dr. Hanick. In his report of November 25, 2000, also submitted in support of the reconsideration request, Dr. Hanick traces the worker's problems back to the 1972 accident. However, he notes that there have been a number of other factors that have contributed to the worker's situation.

(iii) Submissions

[58] In his submissions on behalf of the worker, Mr. Fink notes that there is no dispute that the 1972 accident was very serious and that the worker suffered multiple and significant injuries.

[59] Mr. Fink submits that the worker suffered from a low grade depression after the accident. This was associated with feelings of guilt and problems with concentration. The worker's physical and psychological problems together interfered to some extent with the worker's ability to work, although Mr. Fink agrees that it may be difficult to quantify this.

[60] Mr. Fink noted the Board's psychotraumatic disability rating schedule. He agreed that it was not clear that the worker would have had sufficient symptoms as to qualify for the minimum psychotraumatic disability in the years immediately following the accident.

[61] Mr. Fink concedes that it appears that psychological symptoms appear to have been formally diagnosed only in 1992, when the worker was referred to Dr. Figlioli. However, he points out that Dr. Edney has now indicated that she provided "psychotherapy" to the worker in 1984.

[62] Mr. Fink reviewed the Board's policy on psychotraumatic disability, and in particular, the provision that benefits may be granted provided that the disability is manifest within five years of the accident or the last surgery. There is clearly no evidence of any medical evidence to confirm that the worker's psychological symptoms were manifest within five years of the accident. However, on the basis of Dr. Edney's letter of November 17, 2000, it appears that the

worker may have had some psychotherapy in 1984, two years after the arm surgery. Since the arm surgery was causally related to the 1972 accident, Mr. Fink submits that the "five year rule" has been met.

[63] Mr. Fink notes that even though there is no medical evidence of psychological problems in the earlier years, the worker's evidence is that he did suffer from psychological problems and that these interfered with his ability to work and also affected his social and family life.

[64] Mr. Fink agrees however, that the available evidence suggests that the worker's psychological symptoms worsened after the two later motor vehicle accidents, and particularly after the 1994 accident. Mr. Fink submits that the "thin skull rule" applies to this situation. He argues that the question that should be answered in this case is whether the 1972 accident made a significant contribution to the worker's ongoing psychological disability. In his view, it is clear that the 1972 accident and its sequelae have contributed in a significant way to the ongoing problems. The fact that there are other significant factors that have also contributed should not deprive the worker of benefits.

[65] Mr. Fink submits that the fact that the 1972 accident is a significant factor is clear from Dr. Figlioli's report of October 19, 1995. That report clearly identified the 1972 accident as the main source of the worker's psychological symptoms.

[66] Mr. Fink referred me to prior Tribunal cases in which there were compensable and post-accident non-compensable factors that contributed to the worker's disability. He noted that these cases can be analyzed in different ways. In some cases, the disability has been apportioned between compensable and non-compensable factors.

[67] In this case, Mr. Fink suggested a number of possible approaches. One would be to grant an award with arrears only to the date that there was first medical treatment. This might be 1982, when Dr. Edney provided psychotherapy. Or it could be 1992, when the worker was first referred to a psychiatrist. Since there are a number of post-accident contributing factors, Mr. Fink suggested that apportionment might also be appropriate. Mr. Fink noted that the worker is already receiving a pension and supplements under section 147 of the pre-1997 *Act*, together with a disability pension from the Canada Pension Plan. He pointed out that in these circumstances an additional award for psychotraumatic disability might not result in any higher benefits for the worker until the worker reaches the age of 65.

(iv) Conclusions

[68] I agree with Mr. Fink that the appropriate question in this case is whether the 1972 motor vehicle accident is a factor that has contributed in a significant fashion to the worker's ongoing psychological disability. This question must be answered on a balance of probabilities. There is very often more than one factor that contributes to a disability. This is likely particularly true in the case of psychological impairment. To be compensable, the work-related accident does not have to be the sole cause or the only factor that has contributed to the subsequent disability. However, it must be a factor that has contributed significantly. In assessing the significance of the contribution, it is necessary to consider other factors that may also have contributed. In some cases, the contribution of the accident may be seen to be not significant when weighed against other non-compensable factors.

[69] In most cases, the question is the relative contribution of accident-related factors and pre-existing factors. In most of the decisions that Mr. Fink discussed at the hearing, the issue was whether the accident-related factors were a significant contributing factor in the face of significant pre-existing conditions. In those cases, the decision makers considered whether the significance of the pre-existing condition outweighed the significance of the accident-related factors. The "thin skull doctrine" applies in this analysis. This was discussed in some detail in *Decision No. 1619/00* (August 18, 2000), one of the cases to which Mr. Fink referred. The Panel in that case noted the Supreme Court of Canada[1] has affirmed that the appropriate test continues to be the test enunciated by Lord Reid in *McGhee v. National Coal Board* [1972] 3 All E.R. 1008 (H.L.), at p. 1010:

> It has always been the law that a pursuer succeeds if he can show that fault of the defender caused or materially contributed to his injury. There may have been two separate causes but it is enough if one of the causes arose from fault of the defender. The pursuer does not have to prove that this cause would of itself have been enough to cause him injury.

[70] In the case before me, the question is not the relative contribution of accident-related factors and a pre-existing condition(s). Rather, the question is the relative contribution of accident-related factors and factors that arose *after* the accident. In my view, the thin skull doctrine does not apply to this case. It applies to pre-existing conditions but not to factors that arise after the accident.

[71] I note that this was discussed in *Decision No. 1126/01* (July 24, 2000), another of the cases to which Mr. Fink referred. In that case, the worker had suffered a work-related accident and then suffered a non-compensable motor vehicle accident. The vice-chair considered whether the worker had a continuing chronic pain disability/fibromyalgia condition that arose from the work-related accident. She noted (at para. 50) that the first question is whether the results of the subsequent non-compensable accident were "so overwhelming as to render the compensable injury no longer significant as a factor in the worker's subsequent disability." She noted that in that event, "the chain of causation between the compensable injury and any subsequent disability would be broken." The vice-chair added:

> Alternatively, if the motor vehicle accident aggravated the compensable disability, that aggravation could only be compensable if the motor vehicle accident were causally related to the compensable injury.

[72] The vice-chair in that case determined that the worker had an ongoing disability that was related to the original work-related injury. The portion of the worker's overall disability that could be related to the work-related injury was compensable. The portion that was related to the subsequent non-compensable injury was not compensable.

[73] In my view, that analysis applies to this case. In my view, the question is whether the worker had a continuing psychological disability that was related to the 1972 accident and that

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[1] *Athey* v. *Leonati* [1996] S.C.J. No. 102 (QL); [1996] 3 S.C.R. 458.

would likely have resulted in a contributing disability even if the subsequent accidents and non-work-related factors had not arisen.

[74] There is no medical evidence to substantiate that the worker was experiencing a psychological disability in the years immediately following the 1972 accident. The first diagnosis of psychological symptoms was not made until the worker saw Dr. Figlioli in 1992. I have considered the worker's evidence that he may have been referred to Dr. Figlioli in September 1992, prior to the October 1992 motor vehicle accident. However, I note that Dr. Figlioli states in his October 19, 1995 report that he first saw the worker on November 5, 1992, after that injury. This was also, of course, after the February 1984 motor vehicle accident and the two pneumothorax conditions in 1989 and 1991 respectively.

[75] I have considered Dr. Edney's letter of November 17, 2000, in which she indicates that the worker was "very distressed with his inability to work" and that she provided "supportive psychotherapy." I note that Dr. Edney first saw the worker in 1982, with complaints of arm pain. She then did not see him again until February 13, 1984, immediately after the February 1984 motor vehicle accident. She indicates in the November 17, 2000 report that she provided supportive psychotherapy in the period February to April 1984, and that this was related to the worker's distress at his inability to work. It would appear that the psychotherapy that was provided was more likely directly related to the effects of the 1984 motor vehicle accident than to any continuing problems that could be related to the 1972 injury or the 1982 arm surgery.

[76] I agree with Mr. Fink's submission that the "five year rule" in the Board's policy should not be rigidly applied. There are obviously cases where a worker's psychological disability is related to the work-related accident even if it becomes manifest more than five years after the accident. The fact that a worker did not receive medical treatment for an accident related psychological disability until more than five years after the accident does not necessarily preclude entitlement if the evidence taken as a whole establishes that it is more likely than not that the accident was a significant contributing factor. However, it is clear that the likelihood that there is a relationship between the ongoing disability and the original accident diminishes the longer it is before the disability becomes manifest. In this case, the time between the original accident and the diagnosis of psychological disability is 20 years. In the interim, there had been a number of significant non-compensable problems and accidents.

[77] The worker's own evidence about his psychological status in the years following the 1972 accident was that he felt disabled by psychological symptoms, and that he had a feeling that he was "not there". This affected his ability to keep abreast of developments in the industry. On the other hand, it appears that the worker successfully owned and managed a series of companies. He was able to provide construction site supervision and do cost estimation. This would appear to be relatively complex and mentally demanding work, even if he did not also supervise his own workforce, as indicated in some of the evidence.

[78] As noted in *Decision No. 1716/98*, a problem in this case is that the worker's entitlement to benefits was not adjudicated until long after the original accident. The claim was not even filed with the Board until 1982. The fact that a worker was a worker at the time of the accident was not determined until 1994. As the worker points out, in the interim, he was forced to do the best he could without compensation or legal representation. If the claim had been filed and

recognized at an earlier date, it is possible that there would be evidence that would establish that the worker developed a psychological disability as a result of the 1972 accident. However, I must make my decision on the basis of the available evidence. On the basis of the available evidence, I must conclude, on a balance of probabilities, that the 1972 accident was not a factor that resulted in a permanent disability until after subsequent non-compensable factors. The worker is not entitled to benefits for the disability that results from these non-compensable factors. For these reasons, I must deny the worker's appeal.

THE DECISION

[79] The appeal is denied.

DATED: January 3, 2003.

SIGNED: B.L. Cook.