SUMMARY

DECISION NO. 63/98R

Reconsideration (error of law); Non-economic loss [NEL] (preexisting condition); Future economic loss [FEL])preexisting condition); Causation (thin skull doctrine).

The worker applied to reconsider Decision No. 63/98. In addition, the Board requested assistance in implementing the decision.

The worker suffered a back injury in April 1990. He suffered further back disability in August 1992. The vice-chair hearing the original appeal found evidence of continuity of back symptoms. The original vice-chair also noted evidence of a preexisting underlying condition. The original vice-chair granted full temporary benefits for the acute phase of the recurrence but directed that the quantum of the NEL and FEL benefits be discounted by 50%.

Both the worker and the Board submitted that the thin-skull doctrine applies to the workers' compensation system. If a worker suffers a personal injury by accident arising out of and in the course of employment, the worker is entitled to benefits for the consequences that result from the injury. If a consequence results from the injury, nothing in the Act permits reduction of benefits to account for any non-work-related factors that may have combined to contribute to that consequence.

The Vice-Chair agreed and noted that the provisions in the pre-1997 Act for NEL and FEL awards make no reference to discounting an award in recognition of an underlying condition. The Vice-Chair concluded that the was a clear error of law in the original decision.

The application to reconsider was granted. The nature and extent of benefits for the recurrence had not been considered by the Board. The part of Decision No. 63/98 that limited entitlement to NEL and FEL should be revoked. The determination of the nature and extent of benefits was referred back to the Board for initial adjudication. [8 pages]

DECIDED BY: Faubert
DATE: 26/10/98
ACT: WCA 42, 43
CROSS-REFERENCE: Decision No. 63/98

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 63/98R

[1] This request for reconsideration was considered October 19, 1998, by Tribunal Vice-Chair M.J. Faubert.

THE RECONSIDERATION REQUEST

[2] The worker is requesting that the Tribunal reconsider its *Decision No. 63/98,* dated January 28, 1998. In addition, the Workplace Safety and Insurance Board has requested the Tribunal's assistance in implementing this decision.

[3] The materials considered on this application were *Decision No. 63/98,* March 2, 1998, submissions from the Board's General Counsel and Vice-President, Legal Services, Paul Holyoke, and submissions from the worker's representative dated May 28, 1998. The employer did not participate in the original hearing, and thus has not been given notice of this request.

THE ISSUES

[4] The worker is claiming that *Decision No. 63/98* should be reconsidered because that portion of the decision which purports to discount the worker's benefits due to an underlying condition constitutes an error in law.

THE REASONS

(i) The reconsideration test

[5] The *Workplace Safety and Insurance Act* provides that the Appeals Tribunal's decisions shall be final. However, section 129 of the Act provides that the Tribunal may reconsider its decisions "at any time if it considers it advisable to do so". Similar provisions are found in the pre-1997 Act. Because of the need for finality in the appeal process, the Tribunal has developed a high standard of review, or threshold test, which it applies when it is asked to reconsider a decision.

[6] Generally, the Tribunal must find that there is a significant defect in the administrative process or content of the decision which, if corrected, would probably change the result of the original decision. The error and its effects must be significant enough to outweigh the general importance of decisions being final and the prejudice to any party of the decision being reopened. The threshold test has been discussed in some detail in *Decisions No. 72R* (1986), 18 W.C.A.T.R. 1; *72R2* (1986), 18 W.C.A.T.R. 26; *95R* (1989), 11 W.C.A.T.R. 1; and *850/87R* (1990), 14 W.C.A.T.R. 1.

[7] In this case, the worker had injured his low back in a compensable accident on April 30, 1990. After a brief period of disability, the worker resumed his employment as a carpenter. The worker was treated for a low back disability again beginning on August 19, 1992. He claimed further compensation

benefits for this disability. The Vice-Chair identified the issue before him to be "whether the worker is entitled to benefits for a recurrence of his low back condition as of August 19, 1992".

[8] The Vice-Chair was satisfied that there was "sufficient continuity of low back symptoms from the time the worker was cleared to resume employment on September 5, 1990, until the second documented phase of disabling low back problems experienced on August 19, 1992". However, the Vice-Chair also found it necessary to address the causal significance of the worker's underlying degenerative condition which had been discovered in a 1986 x-ray. The Vice-Chair found it appropriate to recognize the importance of this condition by granting full temporary disability benefits for the acute phase of the worker's recurrence, but to "discount the quantum of the NEL and FEL benefits payable by 50%". The decision contains no reference to the specific period during which the full temporary disability benefits were to be paid, and remitted the matter to the Board for adjudication based upon the "discounting formula" contained in the decision.

[9] It must be inferred from the decision that the Vice-Chair was satisfied that the worker's low back disability in 1992 resulted from his April 30, 1990, accident. In addition, although no specific evidence was cited or finding made on this point, the reference in the decision to entitlement to a Non-Economic Loss (NEL) award and Future Economic Loss (FEL) award suggests that the Vice-Chair was satisfied that the worker had met the statutory criteria for entitlement to these benefits.

[10] Neither the worker's representative nor the Board has taken issue with the conclusion that the worker is entitled to further benefits for a recurrence of his April 30, 1990, compensable accident. Instead, the submissions of both parties are directed toward the statutory authority for the "discounting formula" for the NEL and FEL awards applied by the Vice-Chair. Both parties took the same position on this issue. Mr. Holyoke noted that the *Workers' Compensation Act* does not contemplate the "discounting" of a worker's benefits to account for a pre-existing condition. In describing the legal significance of such conditions, he wrote:

> The issue of how pre-existing conditions are handled in the worker's compensation/workplace safety and insurance system is quite complex in its details. The general principles, however, are well-established.
>
> The 'thin-skull' principle, which holds that one takes a worker as one finds him or her, is a cornerstone of the workers' compensation (and workplace safety and insurance) system. Both the Board and the Appeals Tribunal have consistently stated that, in order for an injury to be work-related, the work need not be the *sole* cause of the injury. The test that has routinely been applied by the Appeals Tribunal is to inquire whether work was a significant contributing factor to the injury by accident. Although the Board has never formally adopted this test, it has applied a similar approach since the Workers' Compensation Act first came into force in 1915.
>
> If a worker has suffered a personal injury by accident arising out of and in the course of employment, the Act requires the Board to provide benefits for the consequences that 'result from' the injury. If a consequence 'results from' the injury, nothing in the Act permits the Board to reduce the benefits to account for any non-work-related factors that may have combined to contribute to that consequence. If the accident is found to be work-related, the worker is entitled to the full benefit provided by the startute for any consequence that results from the accident. If the accident is not work-related, the worker may not receive any benefits under the statute.

[11] The worker's representative concurred with Board's position that there is no legislative authority to discount a worker's benefits where the accident is found to be work-related. I agree with this submission, which is supported by a review of the relevant statutory provisions on NEL and FEL benefits. For the sake of completeness, I quote them in full here:

> **42(1)** A worker who suffers permanent impairment as a result of an injury is entitled to receive compensation for non-economic loss in addition to any other benefit receivable under this Act.
>
> **(2)** The compensation for a worker's non-economic loss from an injury is determined by multiplying,
>
> (a) the percentage of the worker's permanent impairment arising from the injury as determined by the Board; and
>
> (b) $45,000,
>
> (i) plus $1,000 for each year of age of the worker under forty-five years at the time of the injury, to a maximum of $20,000, or
>
> (ii) minus $1,000 for each year of age of the worker over forty-five years at the time of the injury, to a maximum of $20,000.
>
> **(3)** If the compensation for non-economic loss is greater than $10,000, it shall be paid as a monthly payment for the life of the worker unless the worker elects to receive the compensation as a lump sum.
>
> **(4)** If the compensation for non-economic loss is less than or equal to $10,000, it shall be paid as a lump sum.
>
> **(5)** The Board shall determine in accordance with the prescribed rating schedule and having regard to medical assessments conducted under this section the degree of a worker's permanent impairment expressed as a percentage of total permanent impairment.
>
> **(6)** A medical practitioner who conducts a medical assessment under this section shall,
>
> (a) examine the worker; and
>
> (b) assess the extent of the worker's permanent impairment, having regard to the existing and anticipated likely future consequences of the injury.
>
> **(7)** In conducting a medical assessment, the medical practitioner shall consider any report by the treating physician of an injured worker.
>
> **(8)** A medical practitioner shall promptly forward a copy of a medical assessment to the Board.
>
> **(9)** After maximum medical rehabilitation of an injured worker is achieved, a medical assessment of the worker shall be conducted.
>
> **(10)** The worker may select a medical practitioner from a roster provided by the Board who shall conduct the worker's medical assessment.
>
> **(11)** If a worker does not make a selection under subsection (10) within thirty days after the Board provides the worker with a roster of medical practitioners, a medical practitioner appointed by the Board shall conduct the medical assessment.
>
> **(12)** The Board shall send a copy of a medical assessment conducted under subsection (9) to the worker and to the employer who employed the worker on the date of the injury.
>
> **(13)** A worker, an employer or the Board may, within forty-five days after the medical assessment is sent under subsection (12), require a second medical assessment of the worker.

(14) A worker or an employer who requires a second medical assessment shall give notice thereof to the Board within the forty-five day period referred to in subsection (13).

(15) If a second medical assessment is required, the Board shall provide the worker and the employer with a list of at least three medical practitioners selected from a roster, from among whom the worker and the employer, by agreement and within thirty days after receiving the list, may select a medical practitioner who shall conduct the medical assessment.

(16) If the worker and the employer fail to agree upon a medical practitioner to conduct the second medical assessment, the Board shall select a medical practitioner from a roster and, if possible, one who was not named on the list provided to the worker and the employer, and the medical practitioner selected shall conduct the medical assessment.

(17) If the Board considers it to be impractical to provide a list of medical practitioners under subsection (15) because of the nature of a worker's impairment, the Board shall appoint such medical practitioner to conduct the second medical assessment as the Board considers appropriate.

(18) The Board shall send a copy of the second medical assessment to the worker and the employer.

(19) The Board shall forthwith determine the degree of a worker's permanent impairment,

(a) after the expiry of the forty-five day period referred to in subsection (14) if a second medical assessment was not required; or

(b) after it receives a copy of a second medical assessment if one was required.

(20) The Board shall give notice of its decision to the worker and the employer forthwith after determining the degree of a worker's permanent impairment.

(21) A worker may apply to the Board for a redetermination of the degree of the worker's permanent impairment,

(a) if the Board has determined that the worker has a permanent impairment; and

(b) if the worker has suffered a significant deterioration of condition that was not anticipated at the time of the most recent medical assessment under this section.

(22) Subsections (5) to (20) apply to a redetermination as though it were an initial determination by the Board, with such modifications as the circumstances require.

(23) No worker may apply under subsection (21) until twelve months have elapsed from the most recent decision by the Board respecting the degree of permanent impairment of the worker.

(24) The Lieutenant Governor in Council, on the recommendation of the Board, may establish one or more rosters of medical practitioners who are qualified to conduct medical assessments under this section.

(25) A medical practitioner who conducts an assessment under this section shall be paid such sum for services and expenses as the chairman of the Board may determine.

(26) Subsections 76(3) and (4) apply with necessary modifications to all medical practitioners who conduct medical assessments under this section.

43(1) A worker who suffers injury resulting in permanent impairment or resulting in temporary disability for twelve continuous months is entitled to compensation for future loss of earnings arising from the injury.

(2) An injured worker ceases to be eligible for compensation for future loss of earnings when the worker reaches sixty-five years of age.

(3) Subject to subsection (8), the amount of compensation payable to a worker for future loss of earnings arising from an injury is equal to 90 per cent of the difference between,

(a) the worker's net average earnings before the injury; and

(b) the net average earnings that the worker is likely to be able to earn after the injury in suitable and available employment.

(4) Despite clause 148(2)(b), the amount of compensation payable under this section to a worker for future loss of earnings arising from an injury shall be adjusted in accordance with subsections (5) and (6).

(5) The amount of compensation calculated by the Board under subsection (3), (8) or (13) shall be adjusted in accordance with clause 148(2)(b).

(6) The amount of compensation payable under this section in each year after the year in which the initial calculation is made by the Board shall be adjusted by applying the indexing factor to the amount of the previous year's compensation as adjusted under Part IV.

(7) For the purposes of subsection (3), in determining the amount that a worker is likely to be able to earn in suitable and available employment, the Board shall have regard to,

(a) the net average earnings, if any, of the worker at the time the Board determines compensation under this section;

(b) any disability payments the worker may receive for the injury under the Canada Pension Plan or the Quebec Pension Plan;

(c) the personal and vocational characteristics of the worker;

(d) the prospects for successful medical and vocational rehabilitation of the worker;

(e) what constitutes suitable and available employment for the worker; and

(f) such other factors as may be prescribed in the regulations.

(8) A worker may elect to receive an amount equal to a full monthly pension for old age security under section 3 of the *Old Age Security Act* (Canada), including amendments thereto, instead of the amount of compensation determined under subsection (3) or (13) if the worker,

(a) is at least fifty-five years of age when the Board determines or reviews the amount of the worker's compensation;

(b) has not returned to work; and

(c) is unlikely, in the opinion of the Board, to benefit from a vocational rehabilitation program which could help the worker return to work.

(9) If a worker who is receiving compensation under this section is co-operating in a Board-authorized vocational or medical rehabilitation program,

(a) that began before the date of the Board's review under clause (13)(a); or

(b) that began within twelve months after a determination is made under subsection 42(21) of an unanticipated deterioration in the worker's condition,

the amount of compensation otherwise determined under this section shall be supplemented so that the total compensation payable to the worker while the worker is co-operating in the rehabilitation program is equal to 90 per cent of the worker's pre-injury net average earnings.

(10) Where possible, the Board shall determine the amount of compensation payable to a worker under this section,

(a) in the twelfth consecutive month during which the worker is temporarily disabled;

(b) within one year after notice of the accident in which the worker was injured is given under section 22, if during that year the Board determines that the worker is permanently impaired; or

(c) within eighteen months after notice of the accident in which the worker was injured is given under section 22, if the worker's medical condition precludes a determination within the time stated in clause (a) or (b), whichever applies.

(11) Clauses (10)(b) and (c) do not apply with respect to a worker who is permanently impaired by industrial disease.

(12) The Board may extend the time limits set out in subsection (10) in the case of a worker who is not receiving compensation under this Act and whose entitlement to compensation is in dispute.

(13) Where possible, the Board shall review its determination of the amount of compensation payable to a worker under this section,

(a) in the twenty-fourth month after the date of its initial determination;

(b) in the sixtieth month after the date of its initial determination; and

(c) within twenty-four months after a reconsideration of the percentage of permanent impairment of a worker, under subsection 42(21), results in a determination of increased permanent impairment of the worker,

but the Board shall not vary the amount of compensation payable as a result of a review unless the amount of the variation would be equal to at least 10 per cent of the amount of compensation being paid at the time of the review.

(14) Compensation for future loss of earnings is payable in monthly or other periodic payments except as provided in subsection (15).

(15) If, following the review under clause (13)(b) or (c), the amount of compensation determined to be payable to a worker under this section is 10 per cent or less of the amount of compensation payable for full loss of earnings, the Board may commute the periodic amount payable to the worker to a lump sum unless the worker elects to receive the compensation in periodic payments.

[12] Both provisions contain specific directions for the calculation of NEL and FEL awards. Neither of these provisions makes any reference to discounting of an award in recognition of an underlying condition. The legal significance of such conditions in the context of worker's compensation law was accurately stated by the Board's General Counsel. The decision to apply a discount to the benefits payable in this case cannot be supported by reference to either the applicable legislation, or the general principles of compensation law. In my view, there is a clear error of law disclosed in *Decision No. 63/98*, and I find that the Tribunal's threshold test for granting a reconsideration request has been met.

[13] There is a further difficulty with the decision which must be addressed. In order to receive a NEL award, a worker must have suffered permanent impairment as a result of a compensable injury. In the case of FEL awards, there must be either permanent impairment or a period of temporary disability for a period of twelve consecutive months. The decision in this matter directs the payment of such benefits, but provides no reasons for a conclusion regarding such entitlement. In my view, the question of the nature and extent of benefits payable to the worker is one which should have been remitted for adjudication by the Board in the ordinary course in the context of this case, as there does not appear to be sufficient evidence to determine this issue.

[14] The worker's representative has requested the opportunity to make further submissions on the merits in the event this reconsideration request is granted. Because of the view which I take of this case, the need for such submissions is unclear. The issue before the Vice-Chair was that of entitlement to benefits for a recurrence; a finding in the worker's favour was made on that point. I have concluded that that part of the decision which discounted the benefits to be paid was in error, and should be reconsidered. However, I am also of the view that entitlement to such benefits generally is a matter which ought to have been remitted to the Board for its adjudication. Accordingly, I would revoke that part of the decision which limits the worker's entitlement to NEL and FEL benefits, but I would remit the issue of this entitlement to the Board for initial adjudication. In the event that either the Board or the worker's representative wishes to make further submissions on the procedure to be followed, they are asked to do so within 30 days of this decision. Otherwise, the Board is directed to implement the worker's entitlement to benefits for a recurrence in accordance with these reasons.

THE DECISION

[15] The request for reconsideration is allowed. That part of *Decision 63/98* which limits the worker's entitlement to NEL and FEL benefits is revoked. The nature and extent of the worker's entitlement to benefits for a recurrence of his April 30, 1990, compensable disability is remitted to the Board for initial adjudication. In the event that either the Board or the worker's representative wishes to make further submissions on the procedure to be followed, they are asked to do so within 30 days of this decision. Otherwise, the Board is directed to implement the worker's entitlement to benefits for a recurrence in accordance with these reasons.

DATED: October 26, 1998

SIGNED: M.J. Faubert