SUPREME COURT OF YUKON

Citation: *Byblow v. Workers' Compensation Appeal Tribunal*, 2014 YKSC 38

Date: 20140704
S.C. No. 13-AP007
Registry: Whitehorse

Between:

ASHLEY BYBLOW

Petitioner

And

WORKERS' COMPENSATION APPEAL TRIBUNAL

Respondent

Before: Mr. Justice L.F. Gower

Appearances:

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

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application for judicial review of Decision #195 of the Workers' Compensation Appeal Tribunal ("the Tribunal") made on November 30, 2012. The Tribunal found:

1) that the worker, Ashley Byblow, fraudulently provided false and misleading information to the Yukon Workers' Compensation Health and Safety Board ("the Board") about his capacity to work following a work-related accident on August 3, 1994 ("the injury");

2) that Mr. Byblow was overpaid compensation by the Board in the amount of $593,970.20, and that the overpayment is recoverable by the Board;

3) that Mr. Byblow was capable of working at the level of his pre-incident employment on December 31, 1994, at the time his initial compensation was terminated, and that he does not continue to suffer from ongoing functional limitations due to the injury; and

4) accordingly, Mr. Byblow is not entitled to further compensation as a result of the injury.

[2] This judicial review is preceded by an unfortunately lengthy and convoluted history of administrative decision-making and litigation.

[3] On August 3, 1994, Mr. Byblow suffered a brain injury while working as a surveyor's assistant in the Yukon. He slid down a gravel slope approximately 27 m high and hit his head on the roadway.

[4] On September 30, 1994, the Board accepted Mr. Byblow's claim for benefits as a result of the injury.

[5] On December 13, 1994, the Board determined that Mr. Byblow was fit to return to work and that his benefits would be terminated on December 31, 1994. For the period from the date of the injury to December 15, 1994, Mr. Byblow received total temporary disability of $12,203.38. From December 16th to 31st, 1994 he received re-employment assistance benefits totalling $1,457.12. Therefore, he received a total of $13,660.50 over that time period.

[6] On June 13, 1995, the Board determined that Mr. Byblow had 9% permanent partial impairment as a result of a loss in his field of vision from the injury. For that he was awarded a lump sum of $10,352.40.

[7] Mr. Byblow returned to work at various jobs, including a three-year term with TransCanada Credit.

[8] On November 1, 1999, Mr. Byblow requested that his benefits claim be reopened on the basis that he was experiencing ongoing symptoms related to the injury. The Board had Mr. Byblow assessed by a number of medical professionals.

[9] August 31, 2001, Mr. Byblow received notice from the Board that his benefits claim was reopened and that he would receive retroactive benefits from January 1, 1995 in the amount of $164,640.86. The Board had Mr. Byblow assessed by further medical professionals.

[10] On November 20, 2003, the Board determined that Mr. Byblow was deemed unemployable as a result of the injury and that he would be receiving a monthly wage loss supplement of $44,548.44 annually ($3,712.37 monthly). Mr. Byblow was advised that his entitlement would be subject to annual review and to adjustment for changes in his employment circumstances, if any, and inflation. He was asked to provide proof of earnings for 2003 by way of a T4 slip or an income tax return.

[11] In January 2004, Mr. Byblow applied to the Board seeking to increase his permanent partial impairment award to a level greater than 9%.

[12] In August 2004, the Board had Mr. Byblow assessed by Touchstone Rehabilitation Services, and notably by a Dr. Stoddard, who concluded that Mr. Byblow was intentionally attempting to appear more impaired than he truly was.

[13] In November 2004, the Board's medical consultant, Dr. Reddoch, determined that there was strong evidence to support Dr. Stoddard's opinion. He further agreed with Dr. Stoddard that it would be helpful to obtain Mr. Byblow's scholastic and military records to better determine his pre-injury level of functioning. In particular, Dr. Reddoch opined that Mr. Byblow may be malingering. Nevertheless, on the premise that he was not intentionally exaggerating his symptoms for the purpose of obtaining compensation benefits, Dr. Reddoch suggested that Mr. Byblow's permanent partial impairment level could be increased from 9% to 18%.

[14] For reasons which remain unclear, the Board took no action in response to the opinions of Dr. Stoddard or Dr. Reddoch for approximately five years.

[15] In May 2009, the Board assigned two private investigators to do an investigation of Mr. Byblow in his home community of Kelowna, British Columbia. The investigators determined that Mr. Byblow was intentionally exaggerating his symptoms from the injury.

[16] On December 4, 2009, the Board's Director of Claimant Services wrote to Mr. Byblow. On behalf of the Board, the Director had determined that Mr. Byblow had knowingly provided the Board and several healthcare providers with false and misleading information regarding the nature and extent of his injury, and that he did not suffer from significant ongoing functional limitations. The Director further determined that Mr. Byblow's wage loss benefit should be terminated, and that he had been overpaid in the amount of $620,768.18.

[17] In response, Mr. Byblow retained Dr. Norman Brodie for an independent psychological assessment. On May 25, 2010, Dr. Brodie released his assessment report regarding Mr. Byblow. Dr. Brodie opined that Mr. Byblow was not malingering, that the

injury severely aggravated a pre-existing Attention Deficit Hyperactivity Disorder ("ADHD") condition, and that he was 100% unemployable, pending further treatment and other therapy.

[18] On July 8, 2010, the Board, again through its Director of Claimant Services, reviewed its earlier decision of December 4, 2009, considered the new evidence from Dr. Brodie, and determined that its original decision would remain unchanged.

[19] Mr. Byblow appealed the Board's decision to the Tribunal, which dismissed the appeal in its Decision #174, dated November 9, 2010. However, in that decision, the Tribunal expressly disagreed with the Board's finding that Mr. Byblow had committed fraud by providing false and misleading information. Rather, the Tribunal determined that, once it received Dr. Stoddard's report, the Board should have investigated further rather than to continue to pay Mr. Byblow wage loss benefits for an additional five years.

[20] Mr. Byblow applied to this Court for judicial review of Decision #174.

[21] On April 27, 2012, Veale J. quashed Decision #174 and ordered a rehearing to address:

1) the recovery of overpaid compensation;
2) the issue of information received by the Tribunal after the hearing;
3) Mr. Byblow's capability of employment; and
4) the calculation of wage loss benefits.

[22] A new Tribunal was constituted to rehear the matter.

[23] On June 6, 2012, the Tribunal convened a prehearing conference with Mr. Byblow and his Worker's Advocate to discuss the appeal procedure, the Board policies which

were going to be considered and to request the disclosure of certain medical, military personnel and employment information from Mr. Byblow.

[24] On June 19, 2012, the hearing commenced, but did not finish. It was continued on August 24, 2012. On November 30, 2012, the Tribunal released its 73-page Decision #195.

[25] On August 21, 2013, Mr. Byblow filed his application to this Court for judicial review of Decision #195.

[26] On January 20 and 21, 2014, the judicial review hearing proceeded. At the close of that hearing, I requested further written submissions from the Tribunal's counsel by January 31, 2014, and reply submissions from Mr. Byblow's counsel by February 12, 2014.

ISSUES

[27] Mr. Byblow's counsel raised eight grounds for this judicial review. Because I found the issues to be rather complex, I would prefer to err on the side of caution by quoting them from counsel's written argument, rather than risking a misstatement of any of them:

> "1. WCAT erred in law, lost or exceeded its jurisdiction, or made an unreasonable error in ignoring or defying the express direction of the Court Decision to rehear the matter to the limited extent of providing the Petitioner the documents it received and considered after the hearing leading to the Original Decision to allow the Petitioner to make submissions on how they affected his claim and creditability with a view to re-considering decisions made to:
>
> 1. recover payments; and
> 2. deny the Petitioner future benefits.

2. WCAT erred in law, lost, or exceeded, its jurisdiction, or made an unreasonable error, when it ignored or defied the direction of the court in the Court Decision to consider and apply the “recovery (of payment) policy” given that the Petitioner was found to be not fraudulent and the Board was found to have made several mistakes in the adjudication of the claim.

3. WCAT erred in law, lost, or exceeded, its jurisdiction, or made an unreasonable error in reconsidering whether or not the Petitioner committed fraud.

4. WCAT erred in law, lost, or exceeded, its jurisdiction, or made an unreasonable error in determining that that [as written] there was an overpayment to the Petitioner starting in January 1, 1995 because:

   (a) Section 65(3) of the Act provides that the “…decisions of the appeal tribunal on any matter within its jurisdiction are final and conclusive…”;

   (b) In the Original Decision, WCAT found that the Petitioner did not commit fraud. Without fraud, Policy EL-04 provides that there can be no overpayment to the Petitioner. That decision was confirmed by the Court.

5. WCAT erred in law, lost, or exceeded, its jurisdiction, or made an unreasonable error by fettering its discretion under the Act and policy to waive overpayments. Policy EL-04 gives discretion to the WCAT to waive an overpayment in the event that the application of the Overpayment Policy would result in an unfair or an unintended result.

6. WCAT erred in law, lost, or exceeded, its jurisdiction, or made an unreasonable error by seeking out and considering “new evidence” contrary to Board Policy AP-03 and the rules of natural justice. The “new evidence” was not new and could have been accessed by the Board and previous WCAT panel, with due diligence.

> 7. WCAT erred in law, lost, or exceeded, its jurisdiction, or made an unreasonable error in not taking into consideration and applying sections 17-19 of the Act.
>
> 8. The New Decision is unreasonable because WCAT misinterpreted factual matters, ignored important facts, made incorrect assumptions of fact, and made findings of fact not based on any evidence."

[28] I summarize these issues as follows. Issues one through seven allege that the Tribunal erred in law or committed a jurisdictional error by:

1) exceeding the scope of the rehearing ordered by Veale J. in his decision of April 27, 2012;
2) ignoring Veale J.'s direction to consider and apply the recovery of payment policy;
3) considering whether fraud was committed;
4) determining that there was an overpayment;
5) fettering in its discretion under the *Workers' Compensation Act,* S.Y. 2008, c. 12, ("the *Act*") and Policy EL-04 two ways overpayment;
6) seeking out and considering "new evidence"; and
7) failing to take into account ss. 17 to 19 of the *Act.*

Finally, issue number eight alleges that the Tribunal made findings of fact not based on any evidence.

ANALYSIS

1. Standard of Review

[29] This judicial review is governed by s. 59(3) of the *Act*, which states:

> "Despite subsections 65(3) and (4), a worker, a dependent of a deceased worker, or an employer may make an

> application to the Supreme Court for judicial review of a decision of the appeal tribunal on a question of law or jurisdiction."

[30] The parties are agreed that for all the questions of law arising on this judicial review, the standard of review is reasonableness. The leading case on judicial review is *Dunsmuir v. New Brunswick*, 2008 SCC 9. The majority described the reasonableness standard at para. 47:

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

[31] However, for questions of true jurisdiction, the standard of review is correctness. *Dunsmuir* determined that jurisdiction has to do with whether or not the tribunal had authority to embark upon its inquiry. At para. 59, the majority stated:

> "59 Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/ preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the

> narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf ed.), at pp. 14-3 to 14-6…." (my emphasis)

2. Reconsidering Fraud

[32] The first four issues can be conveniently dealt with together. The essence of Mr. Byblow's argument is that, while this Court directed a rehearing, the rehearing was to be focused on the specific issues of concern he addressed, and should not have included the issue of fraud. With due respect to Veale J., the confusion here seems to arise from the somewhat ambiguous directions he gave in different parts of his reasons. At paras. 49, 50 and 56, he said:

> "49 I therefore order that the Tribunal rehear the matter to the extent of providing the documents received after the hearing to Mr. Byblow, permitting him to present further evidence in respect of them, and hearing submissions on how this affects the merits of his claim and his credibility. The Tribunal is required to approach this evidence and re-hearing with an open mind to reconsider its decision. I wish to make it clear that because the consequences of the Tribunal's adverse credibility findings are far-reaching, this reconsideration will require a review of the Tribunal's **entire decision**, including the recoverability of overpayment and their finding on Mr. Byblow's capacity for employment.
>
> …
>
> 50 As a result of my determination that the Tribunal must reconsider its entire decision as a matter of procedural fairness, I do not find it necessary or helpful to review this aspect of the Tribunal's decision. The Tribunal's decision may change when it hears Mr. Byblow on the information it received and relied on after the hearing.

…

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

[33] Mr. Byblow's counsel argued that the Tribunal's reconsideration should have been limited to: (1) the recovery of overpaid compensation; (2) the late disclosure issue; (3) the capability of employment; and (4) the calculation of wage loss benefits. In all other respects, counsel submitted that Decision #174 should stand, including the express finding that there was no fraud. I disagree.

[34] The Tribunal's jurisdiction to hear appeals under s. 65(1) of the *Act* is sweeping. The Tribunal is to "determine all matters arising" out of a Board decision. There is a further non-limiting list of jurisdictional powers under s. 65(2) which supports the breadth of the Tribunal's considerations. Further, Decision #174 was expressly "quashed" by Veale J. Therefore, it is logical that the Tribunal was left with the appeal from the decisions of the Board at first instance (December 4, 2009 and July 8, 2010). Those decisions included the finding that Mr. Byblow had provided false and misleading information. Interestingly, neither expressly determined that Mr. Byblow committed fraud by doing so. Rather, the question of fraud was considered by the previous tribunal pursuant to Board Policy GN-05, which defined fraud as "knowingly misrepresenting information through deceit, falsehood or other deceptive means with the intent to defraud". Thus, the issue of misrepresentation and fraud was squarely before the Tribunal on the appeal. Finally, a comment by Veale J. at para. 38 of his reasons

arguably suggests that he expressly intended the Tribunal to re-address address the issue of fraud:

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

[35] Given Veale J.'s ambiguous language, and keeping in mind the deference to be given to specialized tribunals in matters falling under their jurisdiction, I prefer to regard his decision as providing guidance to the subsequent tribunal on the areas of inquiry, rather than strictures on its jurisdiction.

[36] As for the standard of review, in my view, the first four issues deal with the question of jurisdiction. I conclude that the Tribunal correctly decided that it was to reconsider the entire decision of the previous tribunal. Accordingly, this ground of review is dismissed.

[37] Mr. Byblow's counsel also submitted that the Tribunal "focused exclusively on the question of fraud and made no reference to the Repayment Policy." That is simply incorrect. The Tribunal referred to the policy entitled "Recovery of Overpaid Compensation", numbered EL-04, at para. 241 of its reasons as well as in point # 4 in the last sentence of Decision #195.

[38] Mr. Byblow's counsel further argued the applicability of s. 65(3) of the *Act*, the relevant portion of which states:

> "… the acts or decisions of the appeal tribunal on any matter within its jurisdiction are final and conclusive and not open to question or review in any court."

[39] As I understood the argument, it is an assertion once again that the current Tribunal was bound by the finding of the previous tribunal in Decision #174, i.e. that Mr. Byblow's conduct was not fraudulent. Further, that based on s. 65(3), that finding was "final and conclusive". If that indeed is the argument, then it is logically inconsistent. If it was not open to Veale J. to direct a reconsideration of the finding that there was no fraud, then according to this argument, it would also not have been open to Veale J. to direct a reconsideration of whether there was an overpayment of over $620,000. In addition, this argument seems to ignore the fact that s. 59(3) of the *Act*, which authorizes a worker to apply to this Court for judicial review of a decision of the appeal tribunal on a question of law or jurisdiction, operates "despite" s. 65(3). In the result, I reject the argument.

[40] I also note here that Mr. Byblow himself, through his Worker's Advocate, specifically sought a declaration from the Tribunal that he did not commit fraud (Decision #195, para. 13).

[41] If I am wrong about the question of jurisdiction on grounds three and four regarding the Tribunal's findings of fraud and overpayment, then I would conclude in any event that these alleged errors were ones of mixed fact and law and are not subject to judicial review under s. 59(3) of the *Act*.

3. The Tribunal Fettered its Discretion on Recovery

[42] I begin here by noting that s. 123 of the *Act* provides that the decision about whether to recover compensation paid to a person who is not entitled is discretionary. The section states:

> "123 If the board pays compensation to which a person is not entitled, that amount may be recovered from the person by the board in whole or in part by way of
>
> (a) a debt due to it by that person;
>
> (b) set-off against any compensation payable to that person." (my emphasis)

[43] The Tribunal's position appears to have been that there was no room for discretion within Policy EL-04 "Recovery of Overpaid Compensation" and that, in any event, the matter of recovery was to be dealt with by the Board and not the Tribunal. I disagree with both these propositions.

[44] First, it is trite law that a policy cannot fetter discretion that exists within legislation.

[45] Second, I disagree with the submission by the Tribunal's counsel that, pursuant to s. 5 of the Policy, it is the Board which decides when and how to recover an overpayment, including whether to waive recovery. That section reads as follows:

> "5. Overpayment Waived
> Except where the conditions of fraud, nondisclosure or misrepresentation apply, or where the worker knew or reasonably ought to have known that he/she was overpaid, collection of an overpayment to a worker or dependent may be waived where:
>
> a) the worker or dependent was not notified in writing within 90 days of the YWCHSB identifying the overpayment;
>
> b) the overpayment is identified by YWCHSB more than two years after it occurred;
>
> c) the YWCHSB determines that repayment of the overpayment will result in financial hardship due to circumstances which are unlikely to change. (In cases where the inability to repay is temporary, the

> YWCHSB will consider flexible recovery arrangements); or
>
> d) bankruptcy or death of the worker or dependent occurs.
>
> The authority to waive collections of overpayments rests with the Director of Claimant Services for amounts up to the maximum of his or her signing authority under the *Financial Administration Act*, R.S.Y. 2002. For amounts above the director's signing maximum, the authority to waive overpayments rests with the President/CEO of the YWCHSB."

[46] The problem here is that the Tribunal applied the version of Policy EL-04 dated July 1, 2008. However, that Policy was superseded by a new version of Policy EL-04 dated January 1, 2012, which expressly revoked the version of July 1, 2008. Pursuant to s. 2 of the "*Transition Policy-Workers' Compensation Act 2008*", IN-03, dated January 1, 2013: "Policies of the Board of Directors that were in force at the time of the worker's injury will apply, unless a subsequent policy states otherwise." I interpret this to mean that if a subsequent policy expressly revokes the previous one, then the subsequent policy has stated "otherwise". In other words, the Tribunal was bound to apply the 2012 version of Policy EL-04, and that version interestingly does not include the section entitled "Overpayment Waived" from the 2008 version, which I quoted above. Rather, the 2012 Policy does not contain any language reserving waiver of overpayments to the Board. Moreover, it expressly acknowledges its application to the Tribunal under the heading "Application", which states:

> "This policy applies to the Board of Directors, President/CEO and staff of the YWCHSB; to the Workers' Compensation Appeal Tribunal; and to employers, workers and workers' dependents covered by the *Act*."

[47] Further, both versions of the Policy contain a section entitled “Exceptional Circumstances”. The 2008 and 2012 versions of this section are virtually identical, with the exception that the text in square brackets below is present in 2008, but absent in 2012:

> “In situations where the individual circumstances of a case are such that the provisions of this policy cannot be applied or to do so would result in an unfair or an unintended result, [the] YWCHSB will decide the case based on its individual merits and justice in accordance with YWCHSB’s policy, “Merits and Justice of the Case”. Such a decision will be considered for that specific case only and will not be precedent setting. [Exceptions to this policy may be made by the Director of Claimant Services.]”

It is significant that, at para. 234 of Decision #195, the Tribunal quoted the 2008 version of Policy EL-04, but omitted to include the section entitled “Exceptional Circumstances”.

[48] At para. 238 of Decision #195, the Tribunal stated: “Policy EL-04, section 3(e) provides the board with the ability to recover if there is a finding of fraud or misrepresentation.” Section 3(e) of the 2008 Policy stated:

> “Once an overpayment more than fifty dollars ($50.00) has been identified, it will be recovered from the injured worker when:
>
> …
>
> e) There is fraud: If it is determined by the YWCHSB that the overpayment resulted from fraud, misrepresentation, or failure to report an obvious error, the overpayment will be recovered notwithstanding any other provisions, <u>unless the YWCHSB determines that another approach would be more beneficial to the YWCHSB’s achievement of desired outcomes in a fraud situation.</u>” (my emphasis)

It is interesting that even this section, although improperly applied by the Tribunal, contains a discretion to not recover.

[49] The 2012 Policy contains a section entitled “Decision to Recover”, which includes the following:

> “…If YWCHSB determines the overpayment is the result of fraud or deliberate misrepresentation, the overpayment will be recovered regardless of any other provisions…”

[50] Despite these statements in each of the Policies, both were subject to the “Exceptional Circumstances” provisions, providing discretion to the decision-maker not to apply the Policy. Further, in the case of the 2012 Policy, that discretion was expressly granted to the Tribunal.

[51] I also note here that in the Policy entitled “Application of Board of Directors’ Policies”, IN-01, dated July 1, 2008, the following is stated:

> “It is recognized that the policies of the Board of Directors cannot be tailored to meet every situation which may arise in applying the policies of the *Act*, and therefore are not meant to fully replace the exercise of judgement by YWCHSB staff.
>
> The exercise of good judgment is an essential component of decision making which must be carried out when the policies of the Board of Directors do not provide direction in a given situation, or when the situation is unique or was otherwise unanticipated when the policy was established.
>
> In these circumstances, appropriate solutions based on sound reasoning that is consistent with the intent and purposes of the *Act* and policies of the Board of Directors are required…”

That Policy is also specifically applicable to the Tribunal.

[52] The Tribunal’s brief handling of the issue of recovery was dealt with in three paragraphs in Decision #195:

> "[238] Policy EL-04, section 3(e) provides the board with the ability to recover if there is a finding of fraud or misrepresentation. According to a November 25, 2010 letter from the board to the worker, he was provided with $593,970.20 in wage loss benefits for the period January 1, 1995 to November 30, 2009. We find the worker was overpaid the sum of $593,970.20. We consider this to be and overpayment which is recoverable by YWCHSB.
>
> …
>
> [241] We conclude the worker is in an overpayment situation. Pursuant to Policy EL-04, the sum of $593,970.20, as noted in a letter to the worker dated November 25, 2010, is recoverable by the YWCHSB.
>
> …
>
> XVI, #4. The remainder of claim costs [as written] will be considered an overpayment and are recoverable under Policy EL-04 in the amount of $593,970.20."

[53] In my view, the Tribunal erred in its rigid application of Policy EL-04 without averting to the discretion it had under the "Exceptional Circumstances" provision, and the provisions I quoted above in Policy IN-01, dated July 1, 2008. Further, the Tribunal erred in ignoring its discretion under s. 123 of the *Act*.

[54] This is a case with obvious exceptional circumstances. For reasons which remain unclear, the Board took no action in response to the opinions of Dr. Stoddard and its own medical consultant, Dr. Reddoch, in August and November 2004 for over five years, until its decision on December 4, 2009 to terminate benefits and recover the overpayment. This was a period of five years in which Mr. Byblow received benefits with no indication that there were any concerns about his eligibility to receive them. In my view, the Board's inaction in this regard was manifestly unfair.

[55] I rely upon two cases which have parallels to the case at bar on the issue of fettering: *Fahlman (Guardian ad litem of) v. Community Living British Columbia*, 2007 BCCA 15, and *Karbalaeiali v. British Columbia (Deputy Solicitor General)*, 2007 BCCA 553 (applied by this Court in *40078 Yukon Inc. (d.b.a. Heather's Snack Haven) v. Yukon (Liquor Board)*, 2011 YKSC 89).

[56] In *Fahlman*, Community Living British Columbia ("CLBC") denied benefits to an adult with profound functional difficulties. CLBC had a policy that adopted a rigid IQ criterion (below the 70 - 75 range) as a basis for affirming or denying of eligibility for benefits. It was clear that the IQ criterion was not expressly in the governing legislation. The judicial review judge ruled that this was an impermissible fettering of the discretion available to CLBC under its governing legislation, which required it to determine the case on its merits. The British Columbia Court of Appeal upheld this reasoning at paras. 43 through 56 of its decision. Of particular note, are the following passages:

> "44 The chambers judge concluded as follows at para. 28:
>
> > I am of the view that ... the CLBC has fettered its own discretion by adopting the IQ policy and then refusing to consider other factors that are relevant. … Therefore, in this case I find that the CLBC has impermissibly structured its discretion using its own rigid criteria of IQ below the 70 to 75 range in a manner which precluded it from considering the merits of [the adult's] case.
>
> …
>
> 46 As Professor David J. Mullan explains in his text at 115-16, fettering of discretion as a ground of review falls under the category of abuse of discretion. The essential allegation is that the decision-maker failed to exercise its discretionary powers genuinely in an individual case; rather,

it rendered a decision on the basis of pre-existing policy. Judicial tolerance for the adoption of guidelines has not extended to the establishment of formal rules to govern in particular cases. A specific statutory power is a prerequisite to promulgating such rules.

…

50 In the case at bar, I see no sound basis for interfering with the chambers judge's conclusion that CLBC fettered its discretion. First, I prefer the respondents' characterization of CLBC's mandate. In my view, the *Act* clearly grants to CLBC discretion in determining eligibility for adult services. As is evident from para. 37 of the chambers judge's reasons, CLBC recognized in Supreme Court its "wide ranging discretion with respect to the provision of the benefits it is authorized to administer". Whether an applicant has "significantly impaired intellectual functioning" so as to have a "developmental disability" and therefore warrant "community living support" appears to be a discretionary decision. Application of the statutory criteria does not necessarily yield an incontrovertible result. CLBC's duty to satisfy itself as to the presence of a qualifying impairment is to be exercised on the facts of each case.

51 Second, in adopting a policy interpreting "significantly impaired intellectual functioning" as requiring a below-70 IQ, CLBC can fairly be said to have fettered its discretion….

…

55 In the instant case, had the legislature intended IQ to be partially determinative of "significantly impaired intellectual functioning" and, therefore, "developmental disability", it could have invoked s. 29 of the *Act* [the power to make regulations]**.** … Instead, the legislature seemed reticent to impose rigid rules. Until the legislature decides to impose such rules, the Act as it currently reads confers discretion on CLBC to determine whether an applicant has "significantly impaired intellectual functioning" so as to be developmentally disabled and thus eligible for "community living support". In exercising its discretion, CLBC is to consider fully the facts, circumstances and merits of each application. The IQ policy precludes such consideration and application thereof gives rise to a fettering of discretion."

[57] In the case at bar, Policy EL-04 provides for discretion in the “Exceptional Circumstances” section. However the Tribunal fettered its discretion seemingly by interpreting the Policy as creating an automatic recovery by the Board whenever an overpayment results from fraud.

[58] In *Karbalaeiali*, the Director of the Employment Standards Branch of British Columbia dismissed a worker’s complaint as being filed out of time. The applicable legislation made no provision for the extension of time, but the language of the relevant section was that the Director “may” refuse to accept and review a complaint filed outside the set time limit. This discretion was ignored. The Court of Appeal described the error at paras. 11 and 12:

> “11 While the Tribunal rightly stated that the *ESA* makes no provision for the extension of time, I am of the view it failed to consider the discretion afforded the Director under s. 76 and, in particular, subsections (1) and (3)(a). The Director *must* accept and review a complaint made under s. 74 and *may* refuse to do so if the complaint is not made within the time limit specified by s. 74(3). Thus, even though a written complaint is delivered more than six months after the termination of an employee's employment, the Director must accept and review the complaint unless in the exercise of his discretion he decides not to do so. In other words, s. 74 does not, as the Tribunal said, preclude the Director's discretion to accept a complaint.
>
> 12 The question before the Tribunal was not whether the employee's complaint was statute-barred but whether the Director's delegate properly exercised her discretion in refusing to accept it, given it was not received in writing until about three months after the prescribed time. The delegate was required to exercise her discretion as she saw fit in determining whether acceptance of the complaint should be refused and the Tribunal was then required to determine whether the complaint should have been accepted and reviewed having regard for the factors it considered properly

> bore on the exercise of the delegate's discretion. But any consideration of the exercise of her discretion was foreclosed by the determination there was no discretion to be exercised."

[59] In the case at bar, the Tribunal, like the Director in *Karbalaeiali*, ignored the discretion available to it under the *Act* and the Board policies. Indeed, it would also appear that the Tribunal presumed that it had no discretion under the Act and Policy EL-04 once a finding of fraud was made.

[60] The standard of review here is reasonableness. In this regard I rely upon *Alberta (Assured Income for the Severely Handicapped, Director) v. Januario*, 2013 ABQB 677, where Brown J. held, at paras. 36 and 37:

> "36 …. While fettering discretion, like any other ground of abuse of discretion, has traditionally been understood as jurisdictional in nature (David P Jones & Anne S de Villars, *Principles of Administrative Law*, 5th ed. (Carswell, 2009) at 175, the Supreme Court in *Dunsmuir* confined true questions of jurisdiction or *vires* to "the narrow sense of whether or not the tribunal had the authority to make the inquiry." This relegates the grounds of abuse of discretion to review for errors of law. (*Pastore v. Aviva Canada Inc*, 2012 ONCA 642 at para 25.) And, as to questions of law, in *Dunsmuir* the Supreme Court also held (at paras 60 and 70) that, aside from questions of general law "that [are] ... of central importance to the legal system as a whole", a standard of reasonableness (and not correctness) should apply.
>
> 37 In other words, a finding that an administrative tribunal has fettered its discretion in deciding a matter militates against a finding of reasonableness."

[61] The Tribunal here either completely ignored its discretion or assumed it had none under Policy EL-04 and ordered Mr. Byblow to repay almost $600,000, without any

consideration for the lengthy delay of approximately five years by the Board in taking action. All the Tribunal said in this regard was in a single paragraph:

> "[239] This appeal committee has many concerns with the way this claim was adjudicated by the board. It is regrettable they did not carry out Dr. Stoddard's recommendations to obtain the worker's military, school and employment records. They also ignored their own medical consultant's November 2004 reporting that strongly suggests the worker was capable of suitable employment and that he met two of the three criteria for malingering. We are of the opinion that if these issues had been addressed this claim would have come to fruition without the need for an investigation and lengthy appeals process."

Despite these circumstances, the Tribunal failed to consider its discretion under the Policy. In my view, that failure is indefensible and outside the range of acceptable outcomes.

[62] Accordingly, I refer this matter back to the Tribunal with an express direction to consider the unusual circumstances of the delay in the investigation and in the decision to declare the overpayment, and the impact that should have on any further decision to recover the overpayment at all, or the extent to which there should be recovery. I would also urge the Tribunal to consider the inherent unfairness of this delay in coming to its determination about recovery.

4. The New Information

[63] The issue here arises from the potential application of s. 54(3) of the *Act*, which states:

> "(3) Where new or additional evidence is presented, the appeal committee shall refer the new or additional evidence to the hearing officer or panel of hearing officers under section 53, responsible for the decision being reviewed, and request that the decision be reconsidered."

[64] The Tribunal made a request of Mr. Byblow that he produce: any of his WorkSafe BC claims; information about his training with the Armed Forces; his scholastic records; and further medical records. It appears from the record that some of these requests were made prior to the pre-hearing conference on June 6, 2012, but that not all of the information was provided to the Tribunal until prior to the continuation of the hearing on August 24, 2012. There is no question that the Tribunal had the authority to make this request. Section 65(8) of the *Act* provides:

> "(8) The appeal tribunal has the same powers as the Supreme Court for compelling the attendance of witnesses, examining witnesses under oath, and compelling the production and inspection of books, papers, documents, and objects relevant to the hearing."

[65] The issue is whether, pursuant to s. 54(3), the new information should have been sent back to the Board (i.e. the Director of Claimant Services) for consideration before the appeal continued.

[66] I confess I found the argument of Mr. Byblow's counsel here difficult to understand. His first point was that the information requested was not "new evidence", because it could have been accessed by the Board and the previous tribunal, with due diligence. On the other hand, Mr. Byblow's counsel purported to rely upon the Board policy entitled "New Evidence at Reviews and Appeals", AP-03, which reflects the wording in s. 54(3) and seems to indicate that the introduction of new evidence is contemplated without the application of a stringent legal test, like the *Palmer* test (*Re*: *Palmer* (1980), 1 S.C.R. 759). Under the section entitled "Purpose", the following statement appears:

> "… When new evidence is presented during a review or appeal process, the evidence will be referred back to the previous decision-maker for reconsideration."

Thus, counsel submitted, the Tribunal erred in law by failing to submit the new information to the Board before considering it.

[67] The Tribunal interpreted s. 54(3) to create a distinction between the information it "requested" Mr. Byblow to produce, and evidence which was "presented" by a party to the appeal. It concluded at para. 74 of Decision #195 that Mr. Byblow had not presented this evidence and therefore was not required to be referred back to the previous decision maker under Policy AP-03:

> "Policy AP-03, "New Evidence at Reviews & Appeals" provides guidelines with respect to this statutory requirement [s.64(4)]. Section 64(4) of [the] *Act* requires the committee to consider the worker's record, all relevant policies and "any other evidence or information it considers relevant in rendering its decision." Further, section 54(2) mandates the committee, in addition to giving the worker a right to be heard and consider the entire record of the claim and "consider further evidence that it considers necessary to make a decision." <u>The appeal committee requested the information, it was not presented by a party to the appeal</u>; <u>therefore it is not required to provide the new evidence to the previous decision-</u>maker for reconsideration under Policy AP-03." (my emphasis)

[68] I also note here that under Policy AP-03, there was a section entitled "Exceptional Circumstances", worded almost identically to the same section in Policy EL-04 on Recovery of Overpaid Compensation. This effectively preserved the Tribunal's broad discretion under the *Act* and enabled them to act as they did.

[69] At para. 54 of *Dunsmuir*, the majority stated:

> "… Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity…"

Further, as the standard of review on this alleged error of law is reasonableness, I am unable to conclude that the Tribunal's interpretation of ss. 54(2) and (3), together with s. 64(4) of the *Act*, fell outside a range of possible acceptable outcomes which are defensible: *Dunsmuir*, para. 47.

[70] In addition, Mr. Byblow's counsel has also alleged that the Tribunal's error here constituted a breach of the rules of natural justice, by which I assume he is alleging a denial of procedural fairness in the manner in which this new information was dealt with by the Tribunal. I reject this argument as well. That the Tribunal was interested in receiving further information about "medical and personnel records - Canadian Forces and Pre-accident work history" was on the agenda for the prehearing conference on June 6, 2012. Further, from what I can gather from the record, all of the new information was disclosed to Mr. Byblow and his Worker's Advocate, at the very least, prior to the continuation of the appeal hearing on August 24, 2012. Thus, Mr. Byblow had an opportunity to present evidence in relation to the new information and to make submissions on it. Thus, I cannot see how Mr. Byblow suffered any prejudice from the Tribunal's decision to deal directly with the new information.

[71] Finally on this issue, even if the Tribunal did err in failing to remit the new information to the board, it is difficult to see how doing so would have changed anything in favour of Mr. Byblow. The new information arguably tended to suggest that he had a pre-existing condition that interfered with his ability to succeed in school and training programs, and had a history of exaggerated or spurious WorkSafe BC claims. Thus, it

seems unlikely that the new information would have caused the Board to change its decision, and the appeal would have ended up back before the Tribunal. In this regard, the Tribunal's error, if indeed there was one, was inconsequential: see *Dunsmuir*, at para. 76. Lastly, in *Byblow v. Yukon (Workers' Compensation Appeal Tribunal)*, 2012 YKSC 31, at para. 30, Veale J. quoted with approval Sarah Blake, from her text *Administrative Law in Canada*, 5th ed. (Markham: Lexis Nexis Canada Inc., 2011) at p. 221, as follows:

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

5. Sections 17 to 19 of the *Act*

[72] These sections provide as follows:

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

[73] Mr. Byblow's counsel submitted that the Tribunal merely "glossed over" the consideration of these sections. Further, this was a case where there were many disputed facts, including much disagreement in the medical evidence. Counsel's position

is that the Tribunal seems to have ignored its obligation to weigh that evidence and to give effect to s. 19 by giving Mr. Byblow the benefit of the doubt.

[74] With respect, these submissions belie this error as one of law. Rather, it would appear to be an error of mixed fact and law, and as such is precluded from judicial review pursuant to s. 59(3) of the *Act*.

[75] Further, Mr. Byblow's counsel has made no submissions to support his allegation that the Tribunal has committed a jurisdictional error here. Accordingly, I give that argument no weight.

[76] Finally, with respect to the potential application of s. 17 of the *Act*, it is evident from the Tribunal's reasons that they paid close attention to the evidence contradicting the work-relatedness of Mr. Byblow's current cognitive deficits, i.e. Dr. Brodie's diagnosis of pre-existing ADHD. Furthermore, with respect to the potential application of s. 19, on the question of whether Mr. Byblow was providing false and misleading information to the medical professionals, it is implicit from reading the reasons as a whole that the Tribunal did not view the "possibilities" arising from the medical evidence as evenly balanced. Thus, the section did not assume any relevance.

[77] Once again, applying the reasonableness standard of review to this issue, I am unable to conclude that the manner in which the Tribunal implicitly applied ss. 17, 18 or 19 of the *Act*, or failed to apply, as the case may be, can be viewed as an outcome outside the range of possible acceptable outcomes. Accordingly, I dismiss this ground of review as well.

6. Alleged Errors in Fact

[78] This issue occupied the bulk of the argument of Mr. Byblow's counsel. Some 17 of the 35 pages of his original written submissions were devoted to the topic, as were 12 of the 19 pages of his reply submissions. Counsel alleged, at para. 65 of the original written submission that the Tribunal:

> "…noted inconsistencies based on a comparison of records that might have been incomplete, minor misstatements, and on the basis of assumptions of fact on its part, not based on evidence…"

Mr. Byblow's counsel also alleged, at para. 68, that the Tribunal "exaggerated and misstated the evidence, took immaterial matters into consideration, ignored material evidence, and made decisions it was not qualified to make".

[79] I begin my analysis here by starting with the principles emerging from *Re O'Donnell*, 2008 YKCA 9. That was also a case involving the judicial review of a Workers' Compensation Appeal Tribunal decision under the Yukon *Workers' Compensation Act.* On the judicial review, I determined that the tribunal's decision was unreasonable and remitted the matter back for reconsideration. The Court of Appeal reversed my decision and restored the Tribunal's decision. When I released my reasons on the judicial review, *Dunsmuir* had not yet been decided by the Supreme Court. I was therefore relying principally on the decision in *Law Society of New Brunswick v. Ryan*, 2003 SCC 20. At para. 24 of *O'Donnell*, the Court of Appeal held that I had "correctly" summarized the standard of review of reasonableness at para. 56 of my reasons, and quoted them as follows:

> "…[56] When reviewing a question for reasonableness, I am not to ask myself at any point what the correct or preferred

> decision would have been: *Ryan*, at para. 50. Rather, I must look at the reasons as a whole and on the basis of a "somewhat probing examination", I am to determine if there is any line of analysis which is tenable in support of the conclusion: *Ryan*, at para. 55; and *Logan*, at para. 36." (my emphasis)

[80] The Court of Appeal returned to this line at para. 45, and continued:

> "45 As the chambers judge himself noted, when reviewing a decision on the standard of reasonableness, he was obliged to look at the Tribunal's reasons as a whole and subject them to a "somewhat probing examination" to determine whether there is a tenable line of analysis, following the direction in *Law Society of New Brunswick v. Ryan*…"

The Court then quoted para. 47 of *Dunsmuir*, where the Supreme Court described reasonableness as a deferential standard of review (see para. 30 of these reasons above). The Court then continued at para. 46:

> "46 However, the chambers judge appears to have reversed the analysis. Instead of first deciding whether the decision, subjected to a "somewhat probing" analysis, was reasonable, he performed a surgical analysis of five legal issues, which he said rendered the Tribunal's decision untenable. He then considered whether the general issue to be decided by the Tribunal was reasonable." (my emphasis)

[81] It strikes me that what Mr. Byblow's counsel is inviting me to do here is a similar "surgical analysis" of numerous disputes in the evidence and findings by the Tribunal. I decline to do so.

[82] I acknowledge that there are some points on which the Tribunal failed to express itself as well as one might like. However, as the Court of Appeal cautioned in *O'Donnell*, at para. 59:

> "59 It must be remembered that the Tribunal members who wrote the decision are not judges or lawyers and cannot be expected to craft their reasons with absolute clarity. While one might wish for greater precision in the language of the decision, the task of the chambers judge was to make sense of it. The principle was well stated in *Helgesen v. British Columbia (Superintendent of Motor Vehicles)*, 2002 BCSC 1391:
>
> > [29] First, the Court of Appeal recently settled the debate over the applicable standard of review. I should not overturn the decision of the adjudicator unless it was patently unreasonable: *Gordon v. Her Majesty the Queen and The Superintendent of Motor Vehicles,* 2002 BCCA 224 at para. 28. Second, I should not "minutely dissect" the reasons in search of an error which would justify quashing the adjudicator's decision. In other words, I should give some leeway to the language used by the adjudicator, recognizing that he or she is not a lawyer or a judge. See *Johnson v. British Columbia (Superintendent of Motor Vehicles),* [2002] B.C.J. No. 89 (S.C.) at paras. 37 and 38 and cases cited therein, particularly *Larose v. British Columbia (Superintendent of Motor Vehicles),* [2000] B.C.J. No. 482 (S.C.)…." (emphasis already added)

[83] More recently, the British Columbia Court of Appeal in *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396, again emphasized the need to take a holistic approach to the adequacy of a tribunal's reasons. At paras. 55 and 56, the Court held:

> "55 The correct approach to the matter was articulated by the Supreme Court of Canada in *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247 at para. 56:
>
> > [The fact that the reviewing court must look to the reasons given by the tribunal to determine reasonableness] does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support

> for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.
>
> 56 A court assessing an administrative tribunal's decision on a standard of reasonableness owes the tribunal a margin of appreciation. The court should not closely parse the tribunal's chain of analysis and then examine the weakest link in isolation from the reasons as a whole. It should not place undue emphasis on the precise articulation of the decision if the underlying logic is sound…." (my emphasis)

[84] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, the Supreme Court quoted Professor David Dyzenhaus with approval on the topic of how reasonableness applies to reasons, at para. 12. The Court had earlier referred with approval to Professor Dyzenhaus at para. 48 of *Dunsmuir*. The quote from *Newfoundland* is as follows:

> "12 It is important to emphasize the Court's endorsement of Professor Dyzenhaus's observation that the notion of deference to administrative tribunal decision-making requires "a respectful attention to the reasons offered or which could be offered in support of a decision". In his cited article, Professor Dyzenhaus explains how reasonableness applies to reasons as follows:
>
> > "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective. [Emphasis added.]

> (David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304)"

[85] In *McInnes v. Simon Fraser University*, (1982) 140 D.L.R. (3d) 694, McLachlin J., as she then was, at para. 11, discussed the standard for setting aside a tribunal decision on the basis of an allegation that there was "no evidence" to support it:

> "11 The requirements which must be met if a Court is to set aside the decision of an inferior tribunal for "no evidence" are clearly established. If the decision is to be upheld, there must be some evidence logically capable of supporting the conclusion to which the tribunal has come. Such evidence is sometimes referred to as evidence which "reasonably" supports the conclusion, leading to statements such as that found In re *Stalybridge*, supra, to the effect that the conclusion must be one to which the tribunal could reasonably have come on the evidence. Such language does not in my view authorize the Court to embark on the exercise of weighing and evaluating evidence which was properly received by the committee and which possesses some probative value. The court of review remains confined to the initial question of whether there is some evidence capable of supporting the committee's conclusion." (my emphasis)

[86] In *Haché v. Lunenburg County District School Board*, 2004 NSCA 46, the Nova Scotia Court of Appeal stressed that the highest level of deference is due to the weighing of evidence by an administrative tribunal and that a court should only interfere with that assessment of weight when the factual conclusions are unreasonable. At para. 84, the Court stated:

> "84 I would stress the distinction between this first aspect of Mr. Haché's submission, which is concerned with relevance, from the second aspect of the issue which is concerned with the weight to be given to evidence. On this second aspect, the highest level of deference is due as it

> relates entirely to the fact-finding and evidence weighing function of the Board of Appeal. On that aspect, the court should interfere only if the tribunal's assessment of weight results in its ultimate factual conclusions being patently unreasonable."

Of course, *Haché* was pre-*Dunsmuir*, therefore, the reference to "patently unreasonable" should now be read simply as "reasonable".

[87] In *Stelco Inc. v. British Steel Canada Inc*., [2000] 3 F.C. 282, the Federal Court of Appeal held that a tribunal's failure to mention all the evidence or discuss every issue raised before it is not determinative of reasonableness, providing it explains its conclusion on those issues that are of central importance to the decision. At paras. 21, 23 and 24, the Court stated:

> "21 …the Court should be very reluctant to set aside a decision by virtue of the inferences drawn by the Tribunal from the material before it or to insist that the Tribunal's reasons canvass all the material on which the applicant and the interveners relied, when that which the Tribunal regarded as particularly important, and on which it evidently based its decision, was sufficient to provide a rational basis for it.
>
> …
>
> 23 …The Tribunal is neither legally obliged to be satisfied on each of the factors that it typically considers when making a finding on the likelihood of dumping, nor to explain the reasons for its conclusion on a given factor simply because the parties have presented evidence on it. [page294]
>
> 24 Accordingly, it cannot be inferred from the fact that the reasons do not discuss a factor on which the Tribunal heard evidence that it must therefore have failed to consider it. A tribunal that is subject to a duty to give reasons…must, of course, provide adequate reasons, but this does not mean that it must deal with every issue raised before it. Rather, it must explain its conclusion on those issues that are of central importance to the decision."

[88] In *Re: College of Physicians & Surgeons (Ontario) and K.* (1987), 59 O.R. (2d) 1, the Ontario Court of Appeal stated that it is “only in the rarest cases, that an appellate court can disturb findings of credibility [by an administrative tribunal].”

[89] In *R. v. J.M.H*., 2011 SCC 45, the Supreme Court, at paras. 24 through 32, reviewed the circumstances when alleged shortcomings in the assessment of evidence can constitute an error of law. Although this was a criminal case, the principles can nevertheless be transposed to the case at bar:

1) when the tribunal has made a finding of fact for which there is no evidence;
2) when the legal effect of findings of fact or of undisputed facts raises a question of law;
3) when an assessment of the evidence based on a wrong legal principle; and
4) when the tribunal has failed to consider all of the evidence in relation to the ultimate.

At para. 32, Cromwell J. also commented:

> “32 A trial judge is not required to refer to every item of evidence considered or to detail the way each item of evidence was assessed. As Binnie J. pointed out in *Walker* [2008 SCC 34], “[r]easons are sufficient if they are responsive to the case's live issues and the parties' key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue” (para. 20)….”

[90] In the case at bar, much turned on the Tribunal’s assessment of the expert evidence of the several medical professionals. In *O’Donnell*, cited above, the Yukon Court of Appeal confirmed, at para. 48, that with respect to expert evidence:

> "…it is trite law that the weight to be assigned to expert evidence is a question of fact, which, absent palpable and overriding error, should not be disturbed on appeal or review…."

[91] It is important to note here that Decision #195, at 73 pages, was an extremely lengthy and thorough review of the entire record.

[92] I concede that there are points on which I simply disagree with the manner in which the Tribunal dealt with certain parts of the evidence. I will review a few examples.

[93] In my view, the Tribunal gave short shrift to Dr. Brodie's testimony about having administered three symptom validity tests to Mr. Byblow because of his concern that Dr. Stoddard's single symptom validity test might have produced a false positive result. Dr. Brodie testified that Mr. Byblow passed all three tests and he accordingly opined that Mr. Byblow was not malingering in his presentation of his cognitive deficits.

[94] Further, at para. 215, the Tribunal disagreed with Dr. Brodie's opinion that the Yukon injury aggravated Mr. Byblow's pre-existing ADHD. However, the Tribunal gave no rationale for this disagreement.

[95] In relation to its assessment of Mr. Byblow's credibility, the Tribunal stated, at para. 178, item 3, that Mr. Byblow was discharged from the Armed Forces "before completing officer cadet training" and that he falsely told Dr. Brodie that he had indeed completed the aircrew training. According to the military records, Mr. Byblow's training was to run from January 4 to March 30, 1990. While he ultimately received an honourable discharge, his "Certificate of Service" states that he served continuously from December 14, 1989 "until honourably released on April 5, 1990". Strangely, the

Certificate itself is dated March 28, 1990, yet there is no clear evidence to support the Tribunal's finding that Mr. Byblow was discharged before the completion of training.

[96] Also on the issue of Mr. Byblow's credibility, the Tribunal found, at para. 178, item 9 (miswritten as 8), that Mr. Byblow had "presented himself as an Engineer to get a playground equipment designing job." On my review of the record, there was no such evidence. Rather, Mr. Byblow's testimony was that he was working "very well" at this job for several months when his employer's insurance company discovered that he did not have an engineering degree, and that he was dismissed because of liability concerns.

[97] Lastly, and again in relation to Mr. Byblow's credibility, the Tribunal found, under Part XIII, item 6, that Mr. Byblow had claimed to Drs. Phillips and Beckman that his previously reported 'blank spells' had quit in 2000 or 2001, but that he told Dr. Brodie in 2010 he had been experiencing them ever since the accident. On my review of the record, there is no evidence Mr. Byblow made such statements to Drs. Phillips or Beckman, and the only reference I could find in Dr. Brodie's report is a statement that, on the date he was tested in April 2010, Mr. Byblow told him he was "still suffering… problems with orientation and confusion…".

[98] However, my disagreement does not give rise to a finding of reversible error. And, on the other hand, there is much in the evidence to support the Tribunal's ultimate conclusion that Mr. Byblow was providing false and misleading evidence about his ongoing cognitive deficits after the injury. Some of this evidence comes from the medical professionals themselves. In addition, the Tribunal also noted several legitimate points relating to Mr. Byblow's credibility. Again, I need only cite a few examples to show that the overall conclusion of the Tribunal is supportable on the evidence.

[99] Before proceeding to review these examples, I feel it is important to stress that the Tribunal acknowledged that Mr. Byblow suffered a work-related brain injury which resulted in the partial loss of his field of vision and the 9% permanent partial impairment award ($10,352.40), as well as his wage loss benefits from the date of the injury, August 3, 1994, to December 31, 1994 ($13,660.50). The issue, however, on the appeal was whether Mr. Byblow is genuinely continuing to suffer cognitive deficits from that injury to the extent that he is unemployable.

[100] The first indication of doubt in this regard came from Dr. Miller, who opined on August 20, 1999:

> "Of interest, the severity of the deficits is beyond what might be expected, based on the describe nature of the patient's head and/or brain injuries. Further, as the patient was working until recently, and is able to carry on a reasonably independent lifestyle, the present results are inconsistent with his functional presentation. At the same time, the patient is experiencing significant emotional distress, headaches, and poor sleep, which may in fact be the primary source of the patient's dysfunction. While the issue of brain injury cannot be ruled out, factors other than brain injury seem more likely to account for the patient's problems." (my emphasis)

The Tribunal placed "significant weight" on this report, as Dr. Miller was the first specialist to conduct a cognitive and personality assessment on Mr. Byblow.

[101] Dr. McIntyre also opined on July 10, 2000, as follows:

> "Based on all the information that I have at this stage, it is unclear to state whether Mr. Byblow's head injury has contributed to any significant change in his personality. It appears from the history of his wife that he even had problems with his temper before the accident and that this may be a fairly typical pattern of men in his family. As I haven't seen this patient since December of 1998 I am unable to provide you with any more information. The

> possibility that there may be secondary gain involved cannot be ruled out, plus the fact that the patient has suffered several minor head injuries since the accident. All these factors may contribute to his current presentation." (my emphasis)

"Secondary gain" refers to some ulterior motive, such as the receipt of workers' compensation benefits. The Tribunal gave "considerable weight" to this report, as Dr. McIntyre was the initial specialist to do a psychiatric assessment of Mr. Byblow.

[102] The Tribunal also placed "significant weight" on the opinion of Dr. Stoddard dated August 16, 2004. The Tribunal noted that this assessment was part of a five day neuro-occupational therapy assessment by Touchtone Rehabilitation Services, which was an agency often used to assess workers' compensation cases, and which the Tribunal noted had "expertise in that area". The Tribunal referred to Touchstone's 48 page report as "an in-depth analysis". Dr. Stoddard noted that Mr. Byblow's performances on symptom validity tests were significantly below chance and opined:

> "… While there could perhaps be reasonable or innocuous explanations for some of the individual findings, however, in combination the only reasonable conclusion was that he was intentionally attempting to appear more impaired than he truly is."

And later:

> "… the balance of evidence **does not** support a conclusion that he has acquired significant or even moderate levels of cognitive compromise." (Emphasis already added)

And still later:

> "… If one considers the combined probability arising from the poor performance across these multiple measures there is no reasonable conclusion other than finding that Mr. Byblow was intentionally responding in such a manner as to appear impaired."

[103] Mr. Byblow's counsel complained that the Tribunal had made a medical determination, without any medical support, that concussions, mainly resulting from sporting activities were mishaps at home, pre and post-injury, had a cumulative effect on Mr. Byblow's current symptomology. In fact, there is evidence on the record to support this finding a cumulative effect. Dr. Seland, in his report of March 2, 1999, opined that Mr. Byblow's symptoms of cognitive changes "have been worsened by some further minor "concussions"" such as injury in May 1998 while playing baseball. Further, Dr. McIntyre opined in his report of July 10, 2000, that the "several minor head injuries since the accident… may contribute to his current presentation." Finally, the Board's medical consultant, Dr. Reddoch, in his opinion dated December 1, 1999, cited a passage from "*Neurology and Trauma*", a text by Randolph Evans, as follows:

> "Patients suffering multiple head traumas have slower recovery of information processing speed than is observed after a single mild head trauma, suggesting that some degree of cumulative cognitive impairment may follow multiple episodes of mild head trauma." (my emphasis)

[104] The Tribunal noted in particular that Mr. Byblow experienced the following incidents in this regard:

- 1985: baseball struck him on the head
- 1987: motor vehicle accident
- 1989: mild concussion, loss of consciousness
- 1991: hospitalized for dizziness
- 1996: taken to hospital for head injury from an overhead beam
- 1998: taken to hospital for head injury while playing baseball

- 2003: “mild concussion” from being hit in the head with either a golf ball or a golf club
- 2008: treated in emergency for tripping while going downstairs and catching his jaw, Mr. Byblow indicated “concussions x 9”
- 2009: slipped on ice and hit his head, loss of consciousness, diagnosis “concussion”

[105] I will turn next to some examples of points which caused the Tribunal difficulty with respect to Mr. Byblow’s credibility.

[106] On page 18 of Dr. Stoddard’s report of August 16, 2004, he states that he could not administer the Wisconsin Card Sort Test or the Stroop Color Word Test to Mr. Byblow, as he indicated that he was colour-blind and therefore could not complete the measures. This is directly contradicted by Mr. Byblow’s military records, which indicate that he met the requirements of the Armed Forces test for colour vision. Mr. Byblow’s statement to Dr. Stoddard is also directly contradicted by Dr. Brodie, who testified that Mr. Byblow performed above average on the category test which uses colours on one section. Thus, there was evidence to support the Tribunal’s conclusion (under Part XIII, 8) that this was an instance of Mr. Byblow providing misleading information to one of the medical professionals involved in his case..

[107] Mr. Byblow provided to the Board a document entitled “Work history prior to 1995” dated January 30, 2001. In that document, Mr. Byblow stated that he was a “Lieutenant” with the Canadian Armed Forces, between the period from December 1989 to March 1990. He also stated that he was a “Store Security” person with a department store in Penticton, British Columbia, between May 1987 and December 1989. He

described his duties as “control theft by customers and employees”. Mr. Byblow also testified under oath before the Tribunal that this was a “store security” job. The “Lieutenant” claim was an obvious embellishment, if not an outright lie. Mr. Byblow was honourably discharged at the completion of his training program with no such rank. The “store security” claim also contradicts the documentation in Mr. Byblow’s own reports to WorkSafe BC and the Armed Forces, which indicate that he was a “stock boy” or a “stocker”. Mr. Byblow’s counsel submitted that “in fact he was both”. However there is no evidence to support that submission. Certainly, that was not Mr. Byblow’s testimony. Mr. Byblow’s counsel also attempted to downplay the implicit embellishment here by submitting that there is no evidence to suggest that working in security was a more responsible, lucrative or prestigious position that a person merely stocking shelves. This is simply argumentative and ignores the fact that Mr Byblow described his duties as a security person as controlling theft by customers and employees. This suggests that he was at a comparatively higher level than a mere stock boy. In any event, it was open to the Tribunal to conclude that Mr. Byblow was again exaggerating his status here.

[108] Mr. Byblow informed Dr. Brodie that he completed one year of “engineering studies” at the Okanagan University College, in Penticton, British Columbia. Mr. Byblow also testified before the Tribunal that when he attended college the “was studying engineering”. While Mr. Byblow’s scholastic records indicate that he took various science courses, including mathematics courses at the Okanagan College, these were merely university transfer courses and did not constitute a program within a college of engineering. While I disagree with the Tribunal’s conclusion that Mr. Byblow “misrepresented himself as an Engineer”, it is nevertheless implicit in the Tribunal’s

handling of this issue that they took this as another example of Mr. Byblow embellishing his status.

[109] The Tribunal also pointed to the discrepancy between Mr. Byblow's overall presentation of reduced employability after his injury and the statement he made to Dr. Stoddard that one of the jobs he had post-injury involved web based design, in which he was working for "a few weeks of 14-15 hour days".

[110] Mr. Byblow told the private investigators at several points to their interview of him on September 10, 2009, that he suffered from vertigo and that this impaired his ability to climb on ladders as the second rung. At p. 16 of the interview, he stated:

> "…the vertigo is constant but it varies it's degree, it will get worse as a migraine is coming on and way worse during a migraine, but it is there all the time…" (my emphasis)

Later, at p. 84, Mr. Byblow is talking about his post-injury return to employment for a number of months as a volunteer firefighter and he stated:

> "But I had post-concussion syndrome which, you know, is the thing. Um, and the, the, that is when, when I believed it is when a doctor told me and when I realized that I was dizzy all the time and I shouldn't be going up this ladder at practice." (my emphasis)

The Tribunal concluded that this was inconsistent with Mr. Byblow's evidence about his 24-day trip to the United Kingdom, which included several occasions of ascending narrow staircases in castles and other historic sites, as well as Hadrian's Wall and an 8-foot high fence near Stonehenge. There was even evidence of Mr. Byblow riding on a roller coaster. It was obviously significant to the Tribunal that all this occurred with no complaints of vertigo.

[111] Finally in this area, Mr. Byblow reported to both Dr. Stoddard and to Dr. Brodie that the reason he left the Armed Forces is because he decided to get married, but was denied permission from his superiors to do so. Mr. Byblow also testified about this before the Tribunal. The Tribunal stressed that there was no evidence whatsoever in Mr. Byblow's military records that he had requested or was denied permission to marry while in training. Indeed, the only related reference noted on his "Applicant Assessment" was, "He has a girlfriend, but has made no future plans." The Tribunal also noted that Mr. Byblow's "Course Report" described him as having a "poor attitude" and that he was a "poor leader". It further stated that he "failed to overcome his weaknesses and was therefore assessed as a training failure." Finally the Course Report noted that Mr. Byblow finished last in his class, ranking 28th of 28. It was not unreasonable for the Tribunal to conclude that these were the real reasons for Mr. Byblow's discharge, and that his evidence about the marriage issue was less than truthful.

[112] At para. 165 of its reasons, the Tribunal stated:

> "The file revealed a number of anomalies which we will comment on throughout this analysis. In isolation some anomalies appear insignificant; however, reviewed in their entirety and collectively, they reveal a comprehensive picture when weighing all the evidence."

In my view, this was not an unreasonable approach for the Tribunal to take to its assessment of the evidence.

[113] In conclusion, taking the Tribunal's reasons for its findings of fact as a whole, while I take issue with certain passages and conclusions, and applying a standard of reasonableness, I find them to be basically adequate. The overall result was not outside

the range of possible defensible outcomes. Accordingly, I dismiss this ground of review as well.

CONCLUSION

[114] Issues numbered one to four and six to eight, inclusive, are dismissed.

[115] Issue number five is granted. In my view, the Tribunal fettered its discretion to waive the recovery of the overpayment, or a portion thereof, under s. 123 of the *Act* and under Policy EL-04. In doing so, it either ignored its discretion, or assumed it had none. Such an outcome falls outside the range of possible defensible outcomes, and is therefore unreasonable.

[116] Accordingly, I refer this one discrete issue back to the Tribunal with an express direction to consider the unusual circumstances of the delay in the investigation and in the decision to declare the overpayment, and the impact that should have on any further decision to recover the overpayment at all, or the extent to which there should be recovery. I would also urge the Tribunal to consider the inherent unfairness of this delay in coming to that determination.

[117] Finally, I remind the Tribunal that, pursuant to Policy CS-08, "Determining Suitable Earnings and Capacity Loss", the Board had an obligation under s. 8, "Periodic Review" to work with Mr. Byblow:

> "…to annually determine if there has been:
> i) a change in the worker's earnings;
> ii) a change in the worker's fitness for employment; or
> iii) any new information that may affect the worker's claim."

It does not appear that the Board complied with that obligation.

[118] I did not hear from the parties on costs. However, as success here was roughly divided, I would expect them to each bear their own.

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Gower J.