IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation:
The Workers' Compensation Appeal Tribunal v.
The Workers' Compensation Health and Safety Board,
2006 YKSC 4

Date: 20060110
Docket No.: S.C. No. 04–AP016
Registry: Whitehorse

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

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW OF DECISION #88 BY THE WORKERS' COMPENSATION APPEAL TRIBUNAL

BY:

THE YUKON WORKERS' COMPENSATION HEALTH AND SAFETY BOARD

PETITIONER

Before: Mr. Justice L.F. Gower

Appearances:

Bruce L. Willis, Q.C.	General Counsel for the Petitioner
Richard A. Buchan	Counsel for the Respondents, the Worker and the Workers' Advocate
Peter Morawsky	Counsel for the Respondent, Workers' Compensation Appeal Tribunal

REASONS FOR JUDGMENT

INTRODUCTION

[1] The Workers' Compensation Health and Safety Board (the "Board") has applied for judicial review of Decision #88 of the Workers' Compensation Appeal Tribunal (the "Appeal Tribunal" or the "Tribunal"). The Board says the Appeal Tribunal committed an

error of law by exceeding its jurisdiction in purporting to remain seized of the matter before it, notwithstanding that it had made its final decision on the matter and was therefore *functus officio*. In particular, the Board says the Appeal Tribunal erred by overseeing and imposing time limits for an implementation plan relating to the vocational rehabilitation of the worker. The Board also says that the Appeal Tribunal erred by stating its intention to assist the parties[1] to negotiate and develop the vocational rehabilitation training plan (the "training plan") as a "third party", thereby descending into the arena of the conflict between the Board and the worker and disqualifying itself as a future potential independent adjudicator of any continuation of that dispute.

[2] The Appeal Tribunal says that what it actually did was akin to making an interlocutory procedural order respecting the training plan, rather than a final decision. Therefore, the principle of *functus officio* does not apply. Further, the Appeal Tribunal's purported intention to "assist the parties, if required, to negotiate" and "develop" a training plan as a "third party" was simply an unfortunate choice of wording regarding its decision to maintain its role as a decision-maker, rather than signalling any intention that it would act as a mediator or facilitator between the parties.

[3] The workers' advocate, on behalf of the worker, says that what the Appeal Tribunal essentially did was to make a temporary order requiring the parties to work

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[1] I use the word "parties" here loosely. It is the Board's position that it is not a party before the Appeal Tribunal upon an appeal. That is presumably due to the wording of s. 21(2)(a) of the *Workers' Compensation Act,* which states that "the worker, a dependent of a deceased worker, or the worker's employer" have the right to be heard and present evidence on appeals. On the other hand, the Board is treated in the same manner as such parties when the Appeal Tribunal is required to provide written reasons for its decisions under ss. 21(5) and 24(7) of the *Act*. Further, the Board is given standing to appear as a "party" before this Court on an application under s. 26 of the *Act*. Finally, the Board is required to provide certain evidence to the Appeal Tribunal under s. 24(4) and members or employees of the Board could theoretically be called as witnesses before the Tribunal pursuant to its inquiry powers under s. 25(8) and (10) of the *Act.* Therefore, for the purposes of this application, I will include the Board as a party.

together to develop the training plan and that the matter was then adjourned pending the receipt of further evidence and submissions from the parties respecting their efforts to agree upon such a plan. As for the Appeal Tribunal purporting to act as a "third party", the workers' advocate says it is clear that the Appeal Tribunal intended to maintain an entirely neutral adjudicative role and did not in any manner insinuate itself into the actual process of developing the training plan.

ISSUES

1. Did the Appeal Tribunal lose its independence and create a potential for a reasonable apprehension of bias in any future adjudication of this dispute by offering to act as a "third party" to assist the parties in negotiating and developing a training plan?
2. Did the Appeal Tribunal exceed its jurisdiction by purporting to remain seized of the matter with respect to the implementation of the training plan?
3. Did the Appeal Tribunal make an order for an "implementation plan" under s. 28 of the Act?
4. What can the Appeal Tribunal do upon reopening?

BACKGROUND

[4] The worker has a long-standing claim going back almost 25 years. He was employed as a construction worker when he suffered a significant work-related injury to his knee in 1980. He initially inquired about retraining in 1985 and continued to deal with the Board from 1986 to 1995 regarding his medical treatment. He was awarded a retraining allowance, but this was subsequently terminated. In 2001, the Appeal

Tribunal ordered that a vocational rehabilitation training plan be developed for him. For various reasons, no such plan was developed. In 2004, a Board adjudicator determined that the amount being paid to the worker would be reduced. The worker appealed that reduction in benefits and the Appeal Tribunal rendered its Decision #75 on July 16, 2004. The Board disagreed with that decision and, pursuant to ss. 24(8) and (10) of the *Workers' Compensation Act* (the "*Act*"), directed the Appeal Tribunal to rehear the matter. The Tribunal did so and issued its Decision #88 on January 24, 2005, confirming Decision #75.

ANALYSIS

Standard of Review

[5] It is now settled law that on applications for judicial review courts must apply the pragmatic and functional approach to determine the standard of review: *Pushpanathan* v. *Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Dr. Q* v. *Colleges of Physicians and Surgeons of British Columbia*, 2003 SCC 19; and *Law Society of New Brunswick* v. *Ryan*, 2003 SCC 20. This approach involves the consideration of four contextual factors:

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

These factors may overlap and the analysis of them should determine the degree of deference to be afforded to the tribunal below by the reviewing court. I will deal with each in turn.

1. The presence or absence of a privative clause or statutory right of appeal.

[6] This factor focuses generally on the statutory mechanism of review. A statute which affords a broad right of appeal to a superior court suggests a more searching standard of review, whereas one which contains a privative clause militates in favour of a more deferential position. In this case, s. 25(3) of the *Act* provides that, with a couple of exceptions which are not applicable here, the decisions of the Appeal Tribunal "on any matter within its jurisdiction are final and conclusive and not open to question or review in any court." Further, s. 25(4) states that no proceedings for the Appeal Tribunal shall be restrained or overturned by judicial review "in any court in respect of any act or decision of the appeal tribunal within its jurisdiction".

[7] Section 24(12) of the *Act* provides that any decision of the Appeal Tribunal following a "re-hearing", pursuant to a direction of the Board under s. 24(8), "is final", unless a court determines that there is an outstanding issue about whether an applicable policy is consistent with the *Act*. In that event, pursuant to s. 26, either the Appeal Tribunal or the Board may apply to this Court for a determination of whether such a policy is consistent with the *Act*.

[8] Finally, for present purposes, s. 25(11) provides that a worker, a dependent of a deceased worker, or an employer, may make an application for judicial review of a decision of the Appeal Tribunal "if there has been an error in law or in jurisdiction." Interestingly, this subsection does not provide the Board with authority to apply for

judicial review in that event. However, none of the respondents raised this issue. Rather, they all have implicitly accepted that the Board has standing to make this application for judicial review.

[9] There is no issue on this application about whether a Board policy is consistent with the *Act*. Therefore, there is no further provision which specifically authorizes the Board to apply for judicial review in this instance. Therefore, the remaining applicable provisions, when read together, purport to prohibit the Board from making this application for judicial review and that suggests that this Court should be generally deferential to the challenged decision of the Appeal Tribunal.

2. The expertise of the Tribunal relative to that of the reviewing court on the issue in question.

[10] This second factor recognizes that legislatures will sometimes remit an issue to a decision-making body that has particular topical expertise or is adept in the determination of certain issues: *Dr. Q,* cited above, at para. 28. Where this is so, courts are to give greater deference to the decision-making body. However, the analysis under this heading has three dimensions. Not only must the court characterize the expertise of the tribunal below, but it must also consider its own expertise relative to that of the tribunal and identify the nature of the specific issue before the tribunal relative to this expertise: *Dr. Q*, cited above, at para. 28.

[11] Here, there is no evidence of the relative expertise of the members of the Appeal Tribunal. In *Workers' Compensation Act (Re) and O'Donnell,* 2004 YKSC 51, Veale J. said at para. 33:

> "… I can take judicial notice of the fact that members of the appeal tribunal representing workers and employers have backgrounds that would assist them in decision-making.

> However, the appeal tribunal members are part-time appointments as opposed to full-time with the result that they do not have the same opportunity to develop on-the-job experience as a full-time tribunal. The members, to my knowledge, have no legal expertise, although they have access to legal counsel."

Further, as I will address shortly, both issues in this case are questions of law, which this Court has more expertise to decide than the Appeal Tribunal. That, in turn, leads to a more searching and less deferential, standard of review.

3. The purposes of the legislation and the provisions in particular.

[12] The preamble of the *Act* speaks of the desire to "enable a wholistic approach to the rehabilitation of disabled workers". The objects of the *Act* relevant to this particular case include the desire to provide disabled workers with rehabilitation assistance (s. 1(b)), to "provide an appeal procedure that is simple, fair, and accessible, with minimal delays" (s. 1(e)) and to ensure that workers and employers "are treated with compassion, respect and fairness" (s. 1(h)).

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

[14] Section 24(3) of the *Act* states that the Appeal Tribunal is "bound by the *Act*, the regulations, and all policies of the board". Further, s. 32 provides that the Appeal Tribunal shall always decide matters "on the merits and justice of the case and in accordance with the *Act*, the regulations, and the policies of the board". Finally, when there is any doubt on an issue respecting an application for compensation, s. 33 of the *Act* provides that the worker is entitled to receive the benefit of the doubt.

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

[16] In this case, the Appeal Tribunal may, from time to time, be required to make policy-laden decisions, as I expect that some of the issues before it are based upon Board policies, as the *Act* seems to anticipate. On the other hand, there will likely also be occasions where the Appeal Tribunal will act more like a court in determining issues between the Board and the worker, for example, on entitlement to compensation. Therefore, this factor is largely neutral.

4. Whether the question at issue is one of law, fact, or mixed law and fact.

[17] There are two principal problems in this case. First, there is the issue of whether the Appeal Tribunal has lost its independence and given rise to a reasonable apprehension of bias, by virtue of its apparent desire to act as a mediator or facilitator in the development of a training plan. The second issue is whether the Appeal Tribunal

has the authority to retain jurisdiction over a given matter for a particular purpose. Both of these issues are questions of law, and that suggests a more searching standard of review: *Dr. Q*, cited above, at para. 34.

[18] Having considered each of these factors, I must now settle upon one of the three currently recognized standards of review:

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

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

[19] In my view, notwithstanding the privative clauses in the *Act*, because these are questions of law about which the Appeal Tribunal has no special expertise, the appropriate standard of review should be one of correctness.

Issue 1: Did the Appeal Tribunal lose its independence and create a potential for a reasonable apprehension of bias in any future adjudication of this dispute by offering to act as a "third party" to assist the parties in negotiating and developing a training plan?

[20] I agree with the submissions of counsel for the Appeal Tribunal that its language in Decision #88 that it intended to "assist the parties, if required, to negotiate" and "help … develop" a training plan as a "third party" was indeed unfortunate. The same can be said of the Appeal Tribunal's intention to remain seized of the matter in "an effort to force the parties to a speedier conclusion of the claim". However, I must read the relevant portion of the decision as a whole. In doing so, I also note that at para. 22, the

Board clearly stated that it did "*not* seek to develop a training plan" for the worker (my emphasis). Rather, that the development of such a plan was for the worker and the Board to establish, since the Board "has the expertise to assess and assist the worker" in that regard. Further, the Appeal Tribunal stated at para. 20 that its intention was "to ensure the implementation of its order", which was that a training plan be developed within 60 days of its decision. Finally, the Tribunal stated at para. 23 that it would "accept submissions" from the worker and the Board on this issue and would "reconvene if necessary".

[21] At para. 27 of Decision #88, the Appeal Tribunal spoke of "ordering *the worker* to produce a viable vocational training plan within a certain time frame" (my emphasis). In reading that portion of Decision #88 as a whole, I find this to be a typographical error, as it was clearly the intention of the Tribunal that *both* the Board *and* the worker would produce such a plan.

[22] It would have been an error for the Tribunal to attempt to act as a facilitator and/or a mediator between the worker and the Board in the development of the training plan. However, the Tribunal clearly says that it did not seek to develop the training plan, but would leave that to the worker and the Board to establish. Rather, it was concerned that as "the parties have had some difficulty working together", they should have the option of making further submissions about the training plan, in the event that such a plan could not be finalized within the time frame, and that the Appeal Tribunal would reconvene to adjudicate the matter further, if necessary.

[23] I do not find, in all of the circumstances, that the Appeal Tribunal intended to descend into the arena with the parties. Rather, it was attempting to preserve the option

of making a further adjudication on the issue of the training plan, if necessary. Further, since the Tribunal was not, in fact, offering to act as a third party or as a mediator or facilitator, and had not yet done so in any event, no issue arises as to whether the Tribunal created a reasonable apprehension of bias. Therefore, these arguments in support of the Board's petition for judicial review must fail.

Issue 2: Did the Appeal Tribunal exceed its jurisdiction by purporting to remain seized of the matter with respect to the implementation of the training plan?

[24] Section 25(6) of the *Act* is of critical importance here. It states:

> "The appeal tribunal may at any time examine, inquire into, reopen, and re-hear any matter that it has dealt with previously and may rescind or vary any decision or order previously made by it."

Further, in my view, this subsection must also be read together with s. 25(1) of the *Act*, which gives the Appeal Tribunal exclusive jurisdiction to "confirm, reverse or vary", any decision appealed to it.

[25] The Board argues that Decision #88 was final in all respects, including that portion of the decision which confirmed its earlier direction to the Board and the worker to develop a training plan within 60 days of the Tribunal's decision. Therefore, having completed its decision-making function, the Board says the Appeal Tribunal is *functus officio* and has no further authority over the issue of the training plan.

[26] The principle of *functus officio* is dealt with in *Chandler* v. *Alberta Association of Architects,* [1989] 2 S.C.R. 848, where the majority of the Supreme Court of Canada discussed the general rule that a final decision of an administrative tribunal cannot be revisited because the tribunal has changed its mind, made an error within its jurisdiction or because there has been a change in circumstances. However, as Sopinka J. said at

para. 76, an administrative tribunal “can only do so if authorized by statute”. Later, at para. 78, Sopinka J. continued, “Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation.”

[27] That is precisely the situation before me. The *Act* clearly indicates in s. 25(6) that the Appeal Tribunal may “at any time … reopen … any matter that it has dealt with previously”. Further, on doing so, the Tribunal may confirm, reverse, rescind, or vary its previous order. Thus, in my respectful opinion, the principle of *functus officio* has been displaced by the legislation of this case and the Board’s argument on this point must also fail.

[28] While the Board recognized the Tribunal’s authority under s. 25(6), it says that there is nothing on the record to suggest that the Appeal Tribunal was in fact purporting to examine, enquire into, reopen or re-hear the matter of the training plan in Decision #88. Technically speaking, that is correct. Nowhere in this portion of the decision, does the Board specifically state that it is relying upon, or may rely in the future upon, s. 25(6) of the *Act*. The Board also argues that the Appeal Tribunal has not “taken the required steps” to exercise its statutory jurisdiction to reconsider the issue of the training plan under s. 25(6). At the hearing, the Board’s counsel suggested the minimum required steps would include finding a reason to reopen and providing notice to the parties. Here, the Tribunal has not yet taken either step, but then the parties have not yet been given an opportunity to comply with the decision. In any event, that is not the end of the matter.

[29] Given that the Tribunal has the unquestioned right to reopen any matter at any time, then whether or not it had purported to remain seized and retain jurisdiction over the issue of the training plan in Decision #88, it would have had that authority in any event. In other words, had the Appeal Tribunal said nothing at all about the possibility of revisiting the training plan, it would nevertheless have the authority to do so, on its own motion or upon application, at any time. Therefore, the fact that it expressly purported to remain seized of the matter for that purpose can hardly be said to be in excess of its jurisdiction.

Issue 3: Did the Appeal Tribunal make an order for an "implementation plan" under s. 28 of the Act?

[30] A subtle but important distinction has to be made between the Appeal Tribunal's direction to the Board and the worker to develop a vocational rehabilitation "training plan" within 60 days of its decision and the requirement under s. 28 of the *Act* that the Board either "implement any decision of … the appeal tribunal" or "provide the appeal tribunal [and] the worker … with an implementation plan" for the Appeal Tribunal's decision within 30 days of the date of the decision, subject to the stated exceptions under ss. 24(8), (10) and (13). There may have been some confusion on this point on the part of the Board's counsel, since the Petition seeks a declaration that the Appeal Tribunal exceeded its jurisdiction by overseeing or imposing time limits on the Board "for an implementation plan". Further, in his outline of argument he questioned whether the Tribunal was purporting to oversee or be part of an implementation plan under s. 28. In fact, the Appeal Tribunal made no mention in the relevant portion of Decision #88 to "an implementation plan", as contemplated under s. 28 of the *Act.* Rather, it stated it is

concerned about the “implementation” of the training plan and its intention to remain seized to ensure that is done.

[31] Given that the Appeal Tribunal is “bound by the *Act*” under s. 24(3), and must, pursuant to s. 32 of the *Act*, make all its decisions “in accordance with the *Act*”, it would not be open to it to ignore or depart from the 30 day time requirement in s. 28 of the *Act*. While the Appeal Tribunal has the jurisdiction to extend the time for rendering its own decisions under ss. 21(3) to (5), it does not appear to have the jurisdiction to vary the requirement that the Board either implement the Tribunal’s decisions or provide an implementation plan for such decisions within 30 days of the date they are made. Thus, s. 28 would apply to Decision #88 regardless of whether the Appeal Tribunal had given the parties a deadline of 60 days to develop a training plan. To put it another way, I do not understand the Appeal Tribunal to have ordered the Board and the worker to develop and provide an “implementation plan” for the vocational rehabilitation of the worker within 60 days of its decision. Rather, I find that the Appeal Tribunal was specifically addressing itself to the development of a “training plan” within 60 days of its decision and that s. 28 of the *Act* would apply to that decision, as with any other decision on an appeal.

[32] Nevertheless, the interplay between the portion of Decision #88 respecting the training plan and s. 28 of the *Act* does give rise to some potential confusion. Obviously, it would be inconsistent and illogical to expect the Board to implement that aspect of the decision within 30 days, if in fact the Tribunal had allowed the Board and the worker 60 days to develop and provide such a plan. On the other hand, it is conceivable that the Board could provide an “implementation plan” which sets out how it intends to

develop the “training plan” with the worker. The implementation plan then could be provided within 30 days from the Tribunal’s decision, notwithstanding that the anticipated completion of the training plan would follow within a further period of 30 days.

[33] Therefore, I find the Appeal Tribunal did not make an order for an “implementation plan” under s. 28 of the *Act*. However, in the future it would be helpful for the Tribunal to avoid imposing time lines for doing things which appear to be at odds with the 30 day time limit in that section.

Issue 4: What can the Appeal Tribunal do upon reopening?

[34] Having decided that the Appeal Tribunal has the authority to revisit and reopen the issue of the training plan at any time, a more interesting question arises about what remedies it might impose upon doing so. There would be little point in retaining jurisdiction over a matter unless the Tribunal could do something substantive upon reopening it. It is clear that the Appeal Tribunal has no power to enforce its own decisions, having neither the inherent nor the statutory jurisdiction to do so. It does not have the power of finding the parties in contempt of its decisions. Rather, it is limited to confirming, rescinding, reversing or varying its previous decisions or orders.

[35] In this case, the Tribunal originally ordered in Decision #75 that the parties develop a training plan within 60 days of that decision. The Board then directed the Appeal Tribunal, pursuant to s. 24(8) of the *Act*, to re-hear the appeal. The Tribunal did so and rendered Decision #88 which confirmed its original decision (notwithstanding that it did not expressly re-address the 60 day time line in Decision #88, this was generally agreed upon by the parties).

[36] Obviously, if the parties are successful in developing a training plan within the 60 day time period, then, for present purposes, that would be the end of the matter, as the Appeal Tribunal would not likely hear any further submissions from either the worker or the Board on the issue.

[37] On the other hand, if the parties are unable to develop such a plan within 60 days, then presumably either the worker or the Board, or both, would make further submissions to the Tribunal about the issue, as they were invited to do in both Decisions #75 and #88. Alternatively, the Tribunal could reopen the matter on its own motion after the expiration of the 60 day period, provide notice to the parties and direct them to provide such submissions. It would then be open to the Appeal Tribunal to either confirm its original order, rescind or reverse it, or vary the order. Obviously, the choice of remedy would depend upon the submissions of the parties.

[38] It is also possible that either or both parties could make submissions to the Tribunal within, or immediately after, the 60 day time period requesting additional time to complete the plan. While such an application might be refused, it could also result in a variation of the Board's original decision by an extension of the time line.

[39] Here, it is important to remember that s. 44 of the *Act* provides that if a worker, as a result of a work-related disability, requires assistance to minimize the effect of a handicap, or experiences a long-term disability:

> "… the board shall pay the cost of rehabilitation assistance, including vocational or academic training, *considered appropriate by the board in consultation with the worker*."
>
> (emphasis added)

Thus, the Board is statutorily required to consult with the worker in the development of any training plan. However, the requirement that the Board consult does not mean that the only way in which a training plan can be developed is through successful negotiation leading to the express agreement of the worker. Rather, I take the term "consultation" to mean that the Board is obliged to communicate with the worker about the issue, to give the worker a reasonable opportunity to provide input on the training plan or to provide responses to any specific proposals by the Board and for the Board to consider the worker's submissions in good faith. If the Board does so, then presumably it will have fulfilled its requirement to consult. If the worker is less than diligent in participating in or responding to the consultation, the Board nevertheless has the authority under s. 44 to complete and pay the cost of a training plan it considers "appropriate". In other words, the Board cannot act unilaterally in developing a training plan, but once it has fulfilled its obligation to consult, it may finalize the plan, even in the absence of the worker's participation or agreement.

[40] Accordingly, the Board may submit that it has made every effort to complete the plan, but has been frustrated by the lack of cooperation of the worker. Such a submission could result in the Tribunal rescinding or reversing its original order for the development of a training plan. That, in turn, could give rise to the worker's future earning capacity being "deemed" under Board Policy CS–08 entitled, "*Fitness for Employment, Suitable Occupation, Deeming*". The Tribunal described portions of this policy in Decision #75 at paras. 70 and 71:

> "Pol. CS-08 4. "DEEMING" "Deeming" means the board's determination of a worker's earning capacity..

> Pol. CS-08 D "DEEMING" "Deeming" shall also occur when no further medical or vocational rehabilitation plan is necessary or feasible.
>
> Or when all of the following criteria are met: (only 3 of 12 will be mentioned)
>
> 1. no further intervention by the Worker's Compensation Health and Safety Board will assist a worker;
>
> 3. every reasonable effort has been undertaken to assist a worker in his/her recovery and return to work;
>
> 7. the vocational rehabilitation plan is terminated;"

Thus, "deeming" could occur if the Tribunal was satisfied that the Board had made every effort to assist the worker and that the training plan had been terminated.

[41] Alternatively, the Tribunal might conclude that the Board has appropriately consulted with the worker and has developed an appropriate training plan notwithstanding his lack of participation. In that event, the Appeal Tribunal might vary its previous order to recognize and approve of the training plan.

[42] The scenarios which could give rise to the most difficulty would be those where both parties do nothing to develop the training plan, or in particular the Board does nothing, notwithstanding reasonable efforts by the worker. In either event, I suppose it might be open to the Tribunal to make a finding whether both parties or the Board were at fault, but beyond that it could do nothing to specifically enforce its order. Having said that, if both parties were in fact at fault for not completing the training program, then one could logically presume that neither would attempt to obtain a remedy against the other, since both would equally to blame. On the other hand, if the Board was at fault for not complying with its part of the order, when the worker had been duly diligent, and the Tribunal acknowledged this in its decision upon reopening, it might be possible for the

aggrieved worker to apply to this Court for an order in the nature of *mandamus* to compel the Board to act appropriately. However, as I have not been provided with any argument on this point, I will refrain from any further comment about such an option.

The Remaining Arguments of the Board

[43] The Board's counsel argued that the Appeal Tribunal did not "make" the training plan and therefore could not rely upon the arbitral jurisprudence which authorizes arbitrators in the labour relations field to retain jurisdiction in certain circumstances, to ensure that their awards are properly understood and implemented by the parties. I agree that the anticipated training plan is not the equivalent of an award by an arbitrator and, in any event, the Tribunal did not intend to make the plan itself. Rather, it expected that the parties would do so. However, in my view, given that the Appeal Tribunal has the authority to reopen any matter at any time under s. 25(6) of the *Act*, the arbitral jurisprudence referred to is not necessary to support the conclusion that the Appeal Tribunal effectively retains jurisdiction over all of its decisions.

[44] The Board also argued that the Appeal Tribunal made a decision outside of the authority granted to it under s. 24(3) of the *Act*, which provides that it is "bound by the *Act*, the regulations and all policies of the board". Here, the Board's counsel suggests that the Tribunal ignored the *Act's* mandatory requirements, but failed to specify which requirements he was referring to. In any event, s. 25(6) is part of the *Act* by which the Appeal Tribunal is bound and, as I have found, it allows the Tribunal to retain jurisdiction over any matters previously decided by it.

[45] Finally, the Board argued that s. 28 of the *Act* does not permit the Appeal Tribunal to oversee or be part of either an implementation or an implementation plan. Rather, its

role is limited to being the recipient of such a plan. I agree, subject to the following clarifications. First, the Appeal Tribunal did not, as I have found, purport to involve itself in an implementation plan under s. 28. Second, in the event that s. 28 is not complied with by virtue of either the Appeal Tribunal's decision not being implemented within 30 days, or by the Board's failure to provide the Tribunal with an implementation plan within 30 days, then in my view, the Tribunal would have the authority under s. 25(6) to reopen the matter upon notice to the parties. Indeed, it could theoretically do so even if provided with an implementation plan within the stated time limit, if for some reason it felt that plan was defective. On the other hand, as I have also concluded, it would clearly be inappropriate for the Appeal Tribunal to act as a mediator, facilitator or "third party" in the creation of a training plan and the same could be said about the Tribunal's participation in an implementation plan under s. 28. However, providing that the Tribunal restricts its role to that of an independent adjudicator, then in that sense it is authorized to "oversee" the development of such plans by reopening matters and providing remedies of the type I have just discussed.

CONCLUSION

[46] The petition is dismissed. None of the parties sought costs and none are awarded.

GOWER J.