WCAT Decision Number: WCAT-2014-02177
WCAT Decision Date: July 21, 2014
Panel: Randy Lane, Vice Chair

Introduction

[1] This appeal to the Workers' Compensation Appeal Tribunal (WCAT) arises out of a December 20, 2013 WCAT decision (*WCAT-2013-03584*) to grant the worker's request for an extension of time to appeal the November 1, 2000 findings of a panel of the former Workers' Compensation Review Board (Review Board).

[2] The Workers' Compensation Board, now operating as WorkSafeBC (Board) accepted the worker's claim for a September 11, 1992 back injury. The Review Board relied on a June 3, 1998 certificate of a Medical Review Panel to determine the worker did not have a psychological condition as a result of that back injury.

[3] In his appeal to WCAT from the November 1, 2000 findings, the worker is assisted by a lawyer. WCAT received submissions dated March 31, 2004 and April 1, 2004. The successor to the worker's injury employer is represented by an employers' adviser, who advised in correspondence dated January 29, 2014 and April 7, 2014 that, while the successor employer supported the November 1, 2000 findings, no submission would be made. By letter of April 10, 2014 submissions were declared complete.

[4] The worker has not requested an oral hearing. The appeal concerns matters of law, policy, and medicine. There is no persuasive basis to hold an oral hearing.

Issue(s)

[5] Is the worker's generalized anxiety disorder a compensable consequence of his back injury?

Jurisdiction

[6] WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law, and discretion arising or required to be determined in an appeal before it (section 254 of the *Workers Compensation Act* (Act)). It is not bound by legal precedent (subsection 250(1) of the Act). WCAT must make its decision on the merits and justice of the case, but, in so doing, it must apply a policy of the board of directors of the Board that is applicable in the case (subsection 250(2) of the Act), save for specific circumstances set out in section 251 of the Act. Subsection 250(4) provides that in an appeal regarding the compensation of a worker WCAT must resolve the issue in a manner that favours the worker where evidence supporting different findings is evenly weighted.

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[7] This is an appeal by way of rehearing. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

Background and Evidence

[8] On September 11, 1992 the worker, a lumber grader, suffered a back injury when he felt a sharp pain in his back when he pulled on a board that had become stuck.

[9] The worker's claim was accepted by the Board.

[10] By decision of November 18, 1992 a claims adjudicator advised the worker that November 23, 1992 was his target return to work date. The claims adjudicator stated there was very little in the way of objective signs of disability. A Board medical advisor had confirmed the worker had sustained muscular injury to his right upper back. The claims adjudicator stated the worker's pain along the right side of his head and a decrease in vision in his right eye were not related to the injury sustained under the claim.

[11] The worker undertook a graduated return to work.

[12] In February 1993 the worker was admitted to the Board's Rehabilitation Centre. He was discharged on March 5, 1993 and considered capable of performing his regular job. Dr. Ortynsky, a Rehabilitation Centre physician, stated the worker had minimal findings, although he had a lot of subjective complaints.

[13] By letter of February 24, 1993 a second claims adjudicator noted the worker had asked the Board to reimburse him for his purchase of a new set of eyeglasses. The claims adjudicator noted the worker also claimed that an otolaryngological problem for which he had received treatment was related to his back injury. The claims adjudicator noted the worker had seen a physician for eye complaints and had stated his hearing had deteriorated as a result of his injuries. The claims adjudicator referred the worker to the November 18, 1992 decision.

[14] By decision of March 12, 1993 the second claims adjudicator noted the worker had been admitted to the Rehabilitation Centre for an accepted diagnosis of an upper and middle thoracic strain. She noted Dr. Ortynsky's discharge comments. She stated the worker's wage loss benefits would conclude as of March 7, 1993.

[15] In an April 21, 1993 letter referring the worker to an orthopedic surgeon, Dr. Adorjan, then the worker's family physician, noted the worker had been working full shifts since March 29, 1993. Dr. Adorjan remarked that the worker had multiple subjective complaints that he felt were related to his 1992 injury. (In a May 10, 1993 report Dr. Velazquez, an orthopedic surgeon, documented his assessment of the worker.)

[16] By decision of October 27, 1993 a third claims adjudicator noted the worker continued to have subjective complaints of pain and disability, although there were no objective findings to substantiate his complaints. The claims adjudicator stated the Board would not pay for chiropractic or medical treatment.

[17] In a January 24, 1994 report Dr. Murdoch, a physiatrist, documented his assessment of the worker.

[18] By letter of November 15, 1994 a lawyer representing the worker provided the Board with a copy of an October 28, 1994 medical-legal report from Dr. Wade, a rheumatologist, who diagnosed the worker with fibromyalgia. The worker's lawyer asked that the Board adjudicate whether fibromyalgia was a compensable injury.

[19] By decision of December 22, 1994 a fourth claims adjudicator advised the worker that fibromyalgia was not accepted as a compensable consequence of his soft tissue injury.

[20] By findings dated January 19, 1996 a Review Board panel denied the worker's appeals from the decisions of November 18, 1992, March 12, 1993, October 27, 1993, and December 22, 1994. The Review Board panel concluded, among other matters, that the worker had subjective complaints of pain that had not been consistent throughout the course of his various examinations. He presented with an array of varied symptoms with magnified pain behaviour. There was no evidence of ongoing disability related to the back injury. The worker's array of symptoms of headaches, vision problems, ear problems, and temporomandibular joint problems, which were not characteristic of fibromyalgia, did not arise out of the back injury. There was insufficient evidence to support any relationship between those conditions and the back injury. The worker was not entitled to be reimbursed for the cost of Dr. Wade's medical-legal report.

[21] By decision of August 1, 1996 a panel of the former Appeal Division of the Board confirmed all of the findings of the Review Board panel, save for concluding the worker was entitled to be reimbursed for the cost of Dr. Wade's medical-legal report.

[22] The worker appealed the Appeal Division's decision to the former Medical Review Panels.

[23] By letter of March 13, 1997 the worker's lawyer submitted to the Board a December 3, 1996 report to an insurance company from Dr. Davis, a psychiatrist, who diagnosed the worker with a panic disorder with agoraphobia and a generalized anxiety disorder. The worker's lawyer stated that Dr. Davis felt the worker's "depression"[1] was directly connected to his work injury. She asked that the worker be referred to the Board's Psychology Department for assessment of the causal relationship between his "depression" and the compensable injury.

[1] All quotations in this decision reproduced are as written, save for changes noted.

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[24] In his December 3, 1996 report Dr. Davis recorded the worker's advice that after returning to work he was still in pain and taking analgesics. He could not think well and was unable to continue his community work. He stopped all his activities other than work, which he did not perform well because of pain. He was constantly thinking of the future and how he would support his family as the sole breadwinner.

[25] Dr. Davis noted the worker went off work in February 1996. The worker indicated that the more he thought about his work and his family situation, the worse his pain became. He developed high blood pressure. He attempted to return to work at the end of May 1996 for one month at a few hours per day. His pain continued and he had not worked since July 1996.

[26] Dr. Davis noted that the worker saw Dr. Farley, a specialist in internal medicine, in February 1996 for "heart problems." The worker had seen Dr. Roy, a psychiatrist, on several occasions. As of November 1996 the worker was seeing another psychiatrist, Dr. Courtney, for major depression. He had also seen a Dr. Yeung, a cardiologist, for "heart problems."

[27] Dr. Davis noted symptoms related by the worker, including numbness of the legs suggestive of a "Glove and Stocking" distribution which might imply a conversion disorder. Dr. Davis observed that the neurovegetative symptoms of a major depressive disorder with melancholy were absent.

[28] In the clinical opinion section of his report, Dr. Davis noted that, at the time of his September 1992 work injury, the worker was "very concerned about his parents health." Dr. Davis documented the following diagnoses and comments with respect to causation:

> …This injury resulted in pain in the right shoulder and set off a chain of events with much concern about the future and his family, being the sole breadwinner. As a result, he developed a Generalized Anxiety State with numerous pains, sleep disturbance, and fears for the future with all physical investigations proving negative and with no response to the usual modes of therapy. Matters were compounded in February, 1996 when he developed what sounds like a panic attack, significantly following concerns about his mother-in-law who had suffered a heart attack. Thereafter, he has been suffering several such attacks with fears of being alone, being virtually housebound and he suffers the criteria of Panic Disorder with Agoraphobia (Axis I: 300.21).
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> Comorbidity with other Anxiety Disorders is very common in this condition with a Generalized Anxiety Disorder present in over twenty-five percent of cases and in fact there is such a Generalized Anxiety Disorder (Axis I: 300.02) which is really the primary diagnosis. This implies excessive anxiety and worry of at least six months duration with symptoms which include shakiness, fatigue, subjective concentration problems, muscle

> tension and disturbed sleep. This GAD [Generalized Anxiety Disorder] was triggered by his injury with fears for the future and has been compounded by concerns about his parents health. Many individuals with GAD also experience physical symptoms e.g. muscle pains and tension, cold, clammy hands and are particularly prone to depression but fortunately there is no evidence of a Major Depressive Disorder. Of note, most psychiatrists now believe in the Psychosocial theory of fears of separation during a stressful period as the major cause of panic attacks and both the health of his parents and the heart attack suffered by his mother-in-law are regarded as triggers to his ongoing symptoms.

[29] By decision of June 20, 1997 a fifth claims adjudicator determined the worker did not suffer a psychological condition as a result of his compensable injury.

[30] By letter of August 20, 1997 addressed to the fourth claims adjudicator, the worker's second lawyer asked that the June 20, 1997 decision be reconsidered. It does not appear the fourth claims adjudicator responded to that request.

[31] Pursuant to the worker's appeal to the Medical Review Panels from the Appeal Division's decision, the Board prepared a statement of issues to be addressed by a Medical Review Panel.

[32] The statement of issues was originally prepared on September 22, 1997. They were revised in response to an October 23, 1997 letter from the worker's second lawyer. Notably, by letter of December 2, 1997 a medical appeals officer stated he would change the reference in the statement of issues from the worker's "back problems" to "back and/or multiple pain problems."

[33] The worker's second lawyer objected to the inclusion in the statement of issues of a request that a Medical Review Panel provide a diagnosis. The medical appeals officer observed that, although subsection 61(1) of the Act did not use the word "diagnosis", it did refer to the condition of the worker. The medical appeals officer referred to policy item #103.81 of the *Rehabilitation Services and Claims Manual* (RSCM) which provided as follows:

> The Board interprets the reference to the "condition of a worker" in Section 61(1)(a) of the Act to refer to the physical or psychiatric condition related to the medical issue in dispute. It is not a reference, for example, to the economic condition of the worker. Where possible, when describing the condition of the worker, the Panel will state the medical diagnosis which accounts for the worker's condition.

[34] The medical appeals officer noted that subsection 61(3) of the Act permitted the Board to submit questions to a Medical Review Panel relating to matters enumerated in subsection 61(1) of the Act; the reference to diagnosis in the statement of issues would remain.

[35] In its June 3, 1998 certificate the Medical Review Panel composed of a chair (a general practitioner) and two rheumatologists certified with respect to the worker's physical condition and his emotional/psychological condition. The Medical Review Panel certificate with numbered clauses was provided in response to the statement of issues placed before it.

> The Medical Review Panel concluded there was "no evidence of organic pathology or disease state [clause #1 (a)]."

[36] The Medical Review Panel concluded that, historically, the worker suffered a temporary total disability associated with a mild to moderate myofascial strain of the right shoulder girdle and right paracervical soft tissue structures. The worker was not temporarily disabled for a further period of time after March 7, 1993 as a result of his compensable injury. A March 7, 1993 physical examination revealed the restoration of normal physical signs and function. He did not suffer fibromyalgia either previously or at the time of its certification.

[37] The Medical Review Panel concluded the worker's "emotional or psychological condition was considered to be poor [clause #1(b)]." He suffered a deep-seated generalized anxiety disorder, which was his primary disorder (clause #1 (d).

[38] The Medical Review Panel concluded the worker suffered ongoing disability with respect to his "multiple pain condition which relates directly and entirely to the aforementioned 'generalized anxiety disorder' [clause #2]."

[39] Issues #4(a) and #4(b) (reproduced in italics below) placed before the Medical Review Panel elicited the following responses:

> *If the worker has (or had) a disability, what is (or was) the cause(s)?*
>
> *Was the compensable injury of September 11, 1992, of causative significance in producing such a disability?*
>
> The Worker's disability secondary to his generalized anxiety disorder is functional in origin as well as being multifactorial and complex. The Panel considers that the Worker's anxiety disorder was not caused by the incident of 11 September 1992 or other activities in the workplace.

[40] The Medical Review Panel certified that the worker did not suffer from a pre-existing condition or disability (clauses #8(a) and #8(b)).

[41] Issue #9 (reproduced in italics below) placed before the Medical Review Panel elicited the following response:

> *If the worker now has a disability related to the compensable injury of September 11, 1992, has it changed to any significant extent since its commencement and, if so, what has been the nature and progress of that change? Is any significant change in the disability reasonably expected in the next 12 months?*
>
> In that the Worker does not now suffer a disability which is related to the compensable injury of 11 September 1992 #9 is not applicable.

[42] The Medical Review Panel's accompanying narrative report documented its observations with respect to the matter before it. In addition to its comments regarding fibromyalgia, the Medical Review Panel recorded its agreement with the assessment of Dr. Davis as to the worker's psychological/psychiatric state:

> … The Panel members also studied psychological and psychiatric assessments submitted on behalf of [the worker] and, as regards the functional component of this Worker's ongoing disability, the Panel concurs with the diagnosis of "a generalized anxiety disorder" as submitted by psychiatrist, Dr. H. Davis, 3 December, 1996….

[43] The Medical Review Panel documented the worker's anxiety, depression, panic attacks, and agoraphobia:

> … At history taking today Panel members also found marked evidence of excessive anxiety and worry by [the worker] with associated symptoms of shakiness, fatigue, muscle tension ("my head's in a vice"), as well as a disturbed sleep pattern, inability to concentrate, plus ongoing perception of diffuse pain and points of tenderness. The Panel found also the Worker to display moderate depression with flat affect and definite patterns of panic attacks and agoraphobia, as well as concerns about his physical health, particularly his cardiac status.…

[44] The Medical Review Panel offered the following comments with respect to the causative significance of the worker's September 11, 1992 soft tissue injury with respect to his psychological/psychiatric state:

> … Panel members find the functional components of this Worker's disability very deep seated and complex and consider further that

> **although the Worker's mild to moderate soft tissue injury may have unearthed [his] anxiety disorder it did not cause it.**
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> [emphasis added]

[45] As part of its analysis of whether the worker suffered from fibromyalgia, the Medical Review Panel noted that, in addition to the presence of tenderness at 18 specified anatomical locations associated with fibromyalgia, the worker had "innumerable other areas of tenderness of similar intensity which anatomical sites were markedly diffuse and not normally acceptable to acceptance for the condition named fibromyalgia." It observed that the degrees of tenderness at different anatomical sites were not readily reproducible by "separate examiners."

[46] The Medical Review Panel added, "Examiners considered the Worker's tender points to be more accurately described as widespread, diffuse hyperalgesia, more commonly found in generalized anxiety disorders with conversion symptoms."

[47] That Medical Review Panel concluded its narrative report by stating, "At all times during examination [the worker] was found to be genuine and cooperative and at no time was there evidence of malingering or abnormal pain magnification."

[48] In a July 23, 1998 letter to the Board the worker's second lawyer argued that the Medical Review Panel had ruled the worker had a compensable psychological disability. He asked that the Board overturn the June 20, 1997 decision. He also attached various documents, including an October 6, 1997 report from Dr. Chan, a registered psychologist, and a September 13, 1997 report from Dr. Rasiah, a psychiatrist. He argued that those reports supported the December 3, 1996 report of Dr. Davis. He argued that the Medical Review Panel had adopted Dr. Davis' analysis.

[49] The worker's second lawyer stated that that aspect of the Medical Review Panel certificate regarding the worker's fibromyalgia was conclusive and binding. He argued that, in dealing with the worker's psychological disability, the Medical Review Panel had unfortunately answered the wrong question with respect to law. He stated that the issue was not whether the worker's psychological disability was caused by the September 11, 1992 work incident or other activities in the workplace, but whether the psychological impairment arose secondary to pain which did arise as a direct result of the compensable incident.

[50] The worker's second lawyer referred to the decision of the Supreme Court of Canada in *Athey v. Leonati,* [1996] 3 S.C.R. 458. He argued that, but for the work incident and its sequelae, the worker would not be psychologically disabled.

[51] In an August 11, 1998 decision a sixth claims adjudicator found the Medical Review Panel could not relate the worker's deep-seated generalized anxiety disorder to the compensable injury for which the claim had been established. The claims adjudicator stated no further action would be undertaken.

[52] In response to the Board receiving a progress report documenting treatment on October 6, 1998 associated with diagnoses of fibromyalgia and depression/anxiety, by decision of November 4, 1998 the sixth claims adjudicator stated the Medical Review Panel could not relate those conditions to the compensable injury for which the claim was established. The claims adjudicator stated no further action would be taken by the Board, as outlined in his August 11, 1998 correspondence.

[53] By findings dated November 1, 2000, a Review Board panel denied the worker's appeals from the decisions of June 20, 1997, August 11, 1998 and November 4, 1998. The Review Board panel stated that the issue before it was whether the Board was correct in taking no further action on the worker's claim and in denying acceptance of his psychological condition on the basis the Medical Review Panel had certified he suffered no disability related to the 1992 injury.

[54] The Review Board panel noted, among other matters, the change in the description of the worker's fibromyalgia condition as recorded in the revised statement of issues. It referred to the Medical Review Panel's certificate and its narrative report.

[55] The Review Board panel recorded that the worker's second lawyer argued that the Medical Review Panel's certificate was only binding and conclusive regarding the issue of fibromyalgia. He submitted that the worker's psychological disability was compensable. He argued that the Medical Review Panel stated nothing about whether the workplace injury, combined with the resulting pain, attempts to return to work, worries about finances, *et cetera*, caused the disability. He submitted that the "but for" test had not been applied in determining the cause of the disability and that the Board had failed to fill its duty of fairness in interpreting the certificate.

[56] The Review Board panel noted the second lawyer's argument in his July 23, 1998 letter that the question was whether the worker's psychological impairment arose secondary to the pain which did arise as a direct result of the compensable incident.

[57] The Review Board panel cited the provisions of section 65 of the Act regarding the conclusive and binding nature of the certificate.

[58] The Review Board panel documented the following analysis in support of its conclusion:

> … We find there was no ambiguity in the Medical Review Panel's Certificate and that the Board correctly implemented the Certificate's findings by disallowing payment of further benefits on the claim. The Medical Review Panel found that the worker was not disabled beyond

> March 17, 1993 by reason of his compensable injury. They were well aware of the worker's pain and psychological condition, and certified that the worker's disability with respect to his multiple pain condition relates directly and entirely to the generalized anxiety disorder. They certified that the injury or other activities in the workplace did not cause the generalized anxiety disorder. Finally, the Medical Review Panel certified the worker does not now suffer a disability related to the compensable injury.
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> There has been no new evidence presented to the Board or to this panel which is significantly different to the evidence before the Medical Review Panel. The Medical Review Panel is the highest level of appeal in the compensation system on medical questions and their findings are binding. Specifically, their findings regarding the cause of the worker's disability are not open to question or review.

[59] The worker's second lawyer appealed the Review Board Panel's November 1, 2000 findings to the Appeal Division, which granted extensions of time in which to provide a submission.

[60] By letter of December 5, 2001 the deputy chief appeal commissioner of the Appeal Division stated he was prepared to withdraw the worker's appeal pending the response from the Medical Review Panel to a letter from the worker's second lawyer proposing clarification. The deputy chief appeal commissioner stated that if clarification did not resolve the matter and the worker wished to proceed with the appeal, the Appeal Division would grant an extension of time to re-establish the appeal provided the worker notified the Appeal Division in writing within 30 days of the Medical Review Panel's response.

[61] By letter of December 11, 2002 addressed to the Board's Medical Review Panel Department of the Board, the worker's second lawyer argued that "[a]s far as the legal process of finding causation is concerned" the Medical Review Panel had rendered a "contradictory statement." He insisted that he be given an opportunity to make a submission to the Medical Review Panel with respect to a clarification request.

[62] In early February 2003 the worker retained a third lawyer.

[63] As of March 3, 2003, pursuant to the *Workers Compensation Amendment Act (No. 2)*, *2002*, the Review Board, Appeal Division, and Medical Review Panel ceased to exist, save for transitional matters. The Review Division of the Board and WCAT came into existence.

[64] By letter of May 30, 2003 to the Board's Medical Review Panel Department of the Board, the worker's third lawyer argued that the Medical Review Panel certificate was deficient because (i) no licensed, accredited interpreter was present and used and (ii) the Medical Review Panel expressed opinions about a psychological or psychiatric

matter for which it was not qualified. The lawyer argued that not one of the physicians on the Medical Review Panel was a psychiatrist. The May 30, 2003 letter was accompanied by an affidavit sworn by the worker.

[65] By letter of June 18, 2003 the registrar of the Medical Review Panel Department denied that the certificate was deficient. She found no evidence in the certificate or narrative report that the Medical Review Panel had any problems communicating with the worker and/or his son who was present. The registrar observed that, even if a legal interpreter had been present at the examination, it would have been up to the Medical Review Panel to decide whether and to what extent the interpreter's services were used.

[66] With respect to the argument that the Medical Review Panel addressed a psychological or psychiatric matter outside the specialty of the Medical Review Panel, the registrar noted policy item #103.52 in the RSCM to the effect that if a Medical Review Panel is properly constituted, the validity of the certificate cannot be challenged on the basis it dealt with the medical issue outside the specialty of the members.

[67] The registrar did not address the earlier December 11, 2002 letter from the worker's second lawyer.

[68] The worker's third lawyer did not pursue an appeal from the Review Board findings.

[69] In 2005, the worker's third lawyer filed a judicial review petition regarding the Medical Review Panel certificate.

[70] In *Bagri v. British Columbia (Workers' Compensation Board),* 2009 BCSC 1262, a chambers judge documented the following analysis in support of a conclusion that the Medical Review Panel's certificate was not reasonable because he was not given a fair hearing:

> [59] A review of the long history of Mr. Bagri's claim indicates that both the Board and Mr. Bagri's counsel expected the MRP [Medical Review Panel] to deal with the issue of whether Mr. Bagri suffered from fibromyalgia and whether it was compensable. This is apparent from the correspondence; the documents that were requested by the Medical Appeals Officer from three of Mr. Bagri's physicians, the submissions to the MRP, and the fact that other than the report of Dr. Davis, none of the other psychiatric and psychological reports that were available were placed before the MRP.
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> [60] The Board contends that Mr. Bagri should not be able to now rely on the psychological and psychiatric reports that were in existence at the time of the MRP and not disclosed to the Board and therefore not before the MRP. However, it is apparent that counsel for Mr. Bagri did not consider those reports relevant at the time, because the focus was on

> whether Mr. Bagri suffered from fibromyalgia. It was not, as the Board suggests, that Mr. Bagri "chose" not to provide the reports to the Board or is now trying to provide "new" evidence.
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> [61] **Mr. Bagri clearly did not expect the MRP to deal with any psychiatric explanations for his complaints. He and his counsel did not provide to the Board, and the Board in its request letter to the physicians did not seek information relating to his psychiatric or psychological condition. Therefore, it cannot be said that Mr. Bagri was given a fair opportunity to be heard or given a fair hearing. Without a fair hearing or consideration of all the relevant material, it cannot be said that the MRP Certificate was reasonable.**
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> [emphasis added]

[71] In the alternative, in the event the Medical Review Panel's certificate was not unreasonable, the chambers judge also considered the worker's argument that the Medical Review Panel erred by failing to apply the "but for" test articulated in *Athey*. In paragraph #67, the chambers judge stated the Board was bound by the finding in the Medical Review Panel certificate that the worker suffered from a generalized anxiety disorder. The chambers judge observed that the Board "must apply the law in deciding whether the injury was caused by the compensable work injury."

[72] The chambers judge then cited *Appeal Division Decision #2002-0146/0147*, 18 WCR 113 in which an Appeal Division panel set out the test in *Athey* as the appropriate test to be applied in determining causation. The chambers judge noted the Medical Review Panel's comments in its certificate and its narrative report and considered that the Medical Review Panel had concurred with Dr. Davis:

> [70] In Mr. Bagri's case, the Review Board panel proceeded on the basis that the MRP Certificate dictated the result. The MRP found that Mr. Bagri did not suffer from any pre-existing condition or disability, but that he suffers from a generalized anxiety disorder that was not caused by the incident of September 11, 1992. **However, the MRP concurred with Dr. Davis' diagnosis that while the soft tissue work injury did not cause his generalized anxiety disorder, it may have "unearthed" his disorder. The word "unearthed" is similar to the phrase used by Dr. Davis in his December 3, 1996 report that Mr. Bagri's generalized anxiety disordered was "triggered by his injury".**
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> [71] The MRP found that Mr. Bagri suffers from a generalized anxiety disorder. It went on to find that the disorder was not caused by the work injury, but "unearthed" by the work injury.
>
> [emphasis added]

[73] The chambers judge considered the decision of the Board and the findings of the Review Board failed to apply the legal test with respect to causation and were therefore unreasonable:

> [72] The MRP Certificate was binding on the Board with respect to the medical findings. **The Board was then required to determine the legal issue based on the medical evidence: did Mr. Bagri's generalized anxiety disorder arise out of his work injury?** In arriving at its finding, the Board was required to apply the law relating to causation. It is insufficient at law to say that the disorder was not caused by or solely caused the work injury and therefore compensation is not payable. **The Board was required to determine whether Mr. Bagri's disorder was caused by or arose out of his work injury, by applying the legal test for causation as set out by the Supreme Court of Canada in *Athey*.** The Board in this case simply adopted the findings as set out in the MRP Certificate that the anxiety disorder was not caused by the work injury. **It ignored the MRP's findings that it concurred with Dr. Davis' diagnosis that the work injury may have unearthed or triggered the disorder. In doing so, it failed to apply the legal test with respect to causation. The decision of the Review Board cannot be said to be within the range of possible acceptable outcomes that are defensible with respect to the facts and the law; it is unreasonable.**
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> [emphasis added]

[74] The decision of the chambers judge was set aside in *Bagri v. British Columbia (Workers' Compensation Board)*, 2011 BCCA 368. The Court of Appeal allowed the Board's appeal and dismissed the worker's judicial review petition. At the Court of Appeal, the worker was represented by a fourth lawyer.

[75] The Court of Appeal observed that the worker's judicial review petition did not refer to the Review Board findings. The Review Board had not been served with the judicial review petition.

[76] While expressing concern as to whether the Review Board had properly applied the legal test for causation, the Court of Appeal concluded it was not open to the chambers judge to judicially review the Review Board findings:

> [27] In his factum and at the hearing of the appeal, Mr. Bagri conceded that the alternate finding of the judge that the Review Board's decision was unreasonable could not stand. **While I believe there is a serious question as to whether the Review Board properly applied the legal test for causation,** I agree with Mr. Bagri's concession. The decision of the Review Board was not challenged in the petition and neither the Review Board nor its successor, the Workers' Compensation Appeal

> Tribunal, was served with the petition as required by s. 15 of the *Judicial Review Procedure Act*. It was not open to the chambers judge to judicially review the decision of the Review Board.
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> [emphasis added]

[77] The Court of Appeal proceeded to consider whether the Medical Review Panel afforded a fair hearing to the worker.[2]

[78] The Court of Appeal reproduced the terms of subsections 58(3) and 61(1) of the Act as they existed at the time the worker initiated his appeal to the Medical Review Panel. It observed there were three decisions of British Columbia courts commenting on whether a Medical Review Panel can issue a decision that goes beyond the scope of a medical dispute certified in a physician's certificate under subsection 58(3) of the Act that initiates an appeal to the Medical Review Panels:

- *Uszkalo v. Workers' Compensation Board of British Columbia Medical Review Panel* (6 March 1984), Vancouver A840332 (B.C.S.C.);
- *Demmon v. British Columbia (Workers' Compensation Board)*, [1999] B.C.J. No. 2517 (S.C.); and
- *Kooner v. British Columbia (Workers' Compensation Board)* (1991), 78 D.L.R. (4th) 38 (B.C.C.A.).

[79] The Court of Appeal noted comments in *Uszkalo* to the effect that section 61 of the Act opened the door to a full, wide-ranging inquiry:

> [32] The issue in *Uszkalo* was whether a medical review panel should be prohibited from dealing with the applicant's claim. In the course of his reasons dismissing the application, Mr. Justice Trainor made the following observation about the breadth of s. 61:
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> > If that test can be met of a bona fide medical dispute to be resolved, then that in my view does set in motion the entire review process which is available under Section 61. In some ways one may wonder as to why that is so if there is just that dispute, and if it is particularized as is required by that sub-section of Section 58, why should the door be open to the full, wide-ranging enquiry? Well, I don't know and it is not for

[2] It did this despite the fact the Medical Review Panel was not a party to the proceeding. One must keep in mind that the Board and the Medical Review Panel are distinct legal entities; thus, the petition naming the Board did not name the Medical Review Panel.

> me to answer that question. I am satisfied that the legislation is drawn that way, so that that is the effect of it.

[80] The Court of Appeal attached significance to some of its earlier comments in *Kooner*:

> [33] In *Kooner*, the worker requested a medical review panel and submitted a certificate under s. 58(3) certifying the medical dispute to be whether the worker had a neurological disorder attributable to the accident in question. Two neurologists and a general practitioner were appointed to the panel. The panel concluded that the worker did not suffer from the neurological disorder but found that he suffered from a psychogenic movement disorder and that the accident was of "causative significance" in bringing the disorder about. The Workers' Compensation Board purported to refer the matter to a second medical review panel consisting of specialists in psychiatry.
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> [34] In confirming the decision of a chambers judge who had granted an order prohibiting the Board from establishing a new panel, Mr. Justice Taylor, on behalf of the Court, said the following at 49-50:
>
> > **The board cannot have been taken by surprise, any more than the worker and employer, when the panel explored psychiatric as well as neurological explanations for his complaint. There can be no basis for suggesting that it was not expected that the panel would consider psychiatric explanations.** The possibility of psychiatric explanation would seem to be something which would necessarily have to be considered in such a case in deciding whether or not the complaint had a neurological origin, and here there was nothing in the panel's terms of reference which restricted it to dealing with neurological matters or suggested that a psychiatric panel would later be appointed should no neurological explanation be found.
>
> While the chambers judge in the present case quoted earlier passages from *Kooner*, she did not refer to the above passage in her reasons.
>
> [emphasis added]

[81] The Court of Appeal noted that comments by the chambers judge in *Demmon* were to the effect that a Medical Review Panel composed of physicians who were not psychiatrists would be qualified to recognize a significant psychological impairment that existed:

> [35] In *Demmon*, a worker sought to have further medical assessment of his condition and argued that a previous medical review panel had been improperly constituted. Mr. Justice Lowry dismissed the worker's petition for judicial review on the basis that he failed to complain about the composition of the panel at the time it made its decision. He noted in passing that, consistent with the decision in *Kooner*, a general practitioner, a neurologist and a neurosurgeon would be qualified to recognize a significant psychological impairment if it existed.

[82] The Court of Appeal considered that *Kooner* was not distinguishable from the case before it:

> [36] **In my opinion, the decision in *Kooner* is not distinguishable in principle from the present case. While the diagnosis of fibromyalgia was the subject matter of the medical dispute certified under s. 58(3), s. 61 did not limit the Medical Review Panel's consideration of Mr. Bagri's disability to the certified dispute, and the possibility of a psychiatric or psychological explanation was something that the Panel would logically consider.** This is especially so in view of the fact that Mr. Bagri's counsel had provided the Panel with the report of Dr. Davis dated December 3, 1996 in which he diagnosed Mr. Bagri with a generalized anxiety disorder.
>
> [emphasis added]

[83] The Court of Appeal noted the worker's second lawyer did not object to the Medical Review Panel's diagnosis of a generalized anxiety disorder and observed it was only later that the worker's third lawyer took issue with the ability of the Medical Review Panel to deal with a psychiatric or psychological disability:

> [37] Mr. Bagri's counsel did not initially object to the finding of the Medical Review Panel that it concurred with Dr. Davis's diagnosis of generalized anxiety disorder. Indeed, in his letter dated July 23, 1998 to the Review Board, not only did Mr. Bagri's counsel fail to object to the finding of a generalized anxiety disorder, but he advocated that the Panel had ruled that Mr. Bagri had a compensable psychological disability. It was only after the Review Board denied Mr. Bagri's appeals that different counsel took the position on behalf of Mr. Bagri that the Panel should not have dealt with his psychiatric or psychological disability. Mr. Bagri's real complaint was the finding of the Review Panel that his generalized anxiety disorder was not caused by the injury he suffered at work on September 11, 1992. However, that issue was not properly before the court as a result of the failure of the lawyer acting for Mr. Bagri at the time of the filing of the petition to seek judicial review of the decision of the

Review Board and to serve the petition on its successor, the Workers' Compensation Appeal Tribunal.

[84] Contrary to the conclusion of the chambers judge, the Court of Appeal concluded that the worker's second lawyer knew, or reasonably should have known, that the Medical Review Panel would be making a diagnosis of the worker's physical or psychiatric condition:

> [38] In concluding that Mr. Bagri was not given a fair opportunity to be heard or given a fair hearing, the chambers judge found that Mr. Bagri did not expect the Medical Review Panel to deal with any psychiatric or psychological explanations for his complaints. When asked at the hearing of the appeal for the evidence with respect to the expectations of Mr. Bagri and his then lawyer, all counsel for Mr. Bagri could point to was the correspondence between the lawyer and the Board's representatives**. In my view, the correspondence does not support the finding made by the judge and, to the contrary, the exchange between Mr. Bagri's lawyer and the medical appeals officer with respect to the statement of issues supports the inference that Mr. Bagri's counsel knew, or should reasonably have known, that the Panel would be making a diagnosis of Mr. Bagri's physical or psychiatric condition.**
>
> [emphasis added]

[85] In providing further reasons in support of its conclusion that the worker's second lawyer would have known or reasonably should have known the Medical Review Panel would be making a diagnosis of the worker's physical psychiatric condition, the Court of Appeal noted that the worker's second lawyer had been counsel in both *Uszkalo* and *Kooner*, was aware that a Medical Review Panel was not restricted to the medical dispute identified in a certificate submitted by a physician, and the July 23, 1998 letter to the Board belied any assertion that the second lawyer was surprised that the Medical Review Panel had dealt with the worker's psychiatric or psychological condition:

> [39] It is not surprising that Mr. Bagri's lawyer would not have sworn an affidavit to the effect that he did not expect the Panel to deal with Mr. Bagri's psychiatric or psychological condition. He had been counsel in both *Uszkalo* and *Kooner*, and was well aware that the Medical Review Panel was not restricted to the medical dispute identified in the certificate under s. 58(3). In addition, the position taken by Mr. Bagri's lawyer in his July 23, 1998 letter to the Review Board belies any assertion that he was surprised that the Panel had dealt with Mr. Bagri's psychiatric or psychological condition.
>
> [40] In the absence of evidence about the expectations of Mr. Bagri and his lawyer, and in view of the jurisprudence known to Mr. Bagri's

> lawyer that the Medical Review Panel was not restricted to the dispute identified in the s. 58(3) certificate, it is my view that the chambers judge erred in concluding that the decision of the Panel was unreasonable on the basis that Mr. Bagri was not given a fair opportunity to be heard or given a fair hearing.

[86] As noted above, by decision of December 20, 2013, a WCAT panel granted the worker an extension of time in which to appeal the November 1, 2000 findings of the Review Board. As part of the appeal the worker is represented by his fifth lawyer. I have noted the number of lawyers, as the December 20, 2013 WCAT decision noted the roles of the various lawyers throughout the worker's claim.

Reasons and Findings

Statutory provisions

[87] At this juncture, I note that, pursuant to subsection 58(3) of the Act as it read at the time of the worker's appeal to the Medical Review Panel[3], a worker would be examined by a Medical Review Panel if certain criteria were satisfied:

> (3) A worker is entitled to be examined by a medical review panel if, not later than 90 clear days after the making of a medical finding by the review board or a medical decision by the board, the worker
>
> a) writes to the board expressing that the worker is aggrieved by the medical finding or decision, and
>
> b) sends with the writing a certificate from a physician certifying that, in the physician's opinion, there is a bona fide medical dispute to be resolved, and stating sufficient particulars to define the question in issue.

[88] Subsequent to an examination of the worker, a Medical Review Panel would issue a certificate:

> 61 (1) The decision of a majority of the panel is the decision of the panel, and within a reasonable time after the examination of the worker the chair must certify to the board as to
>
> a) the condition of the worker;
>
> b) the existence or non-existence of a disability;

[3] The astute reader will note the use of lower case in references to the board and the medical review panel in these quotations. Capitalization did not occur until amendments to the Act that took effect in June 2002.

c) if there is a disability, Its nature and extent, but not stated in terms of percentage of disability of the whole body;

d) if there is a disability, its cause and, if there is more than one cause, how much of the disability is related to one cause and how much to another; and

e) if the worker, though no longer disabled, claims that he or she had a longer period of disability, total or partial, than that allowed the worker by the board, then and in that event whether the worker was in fact disabled as a result of the happening or incident which caused the disability for a longer period than that allowed the worker by the board, and if so, for what longer period her or she was disabled and the nature and extent of the disability during the period beyond that allowed the worker by the board, but not stated in terms of percentage of disability of the whole body.

[89] The Medical Review Panel certificate is conclusive and binding:

> A certificate of a panel under sections 58 to 64 is conclusive as to the matters certified and is binding on the board. The certificate is not open to question or review in any court, and proceedings by or before the panel must not be restrained by injunction, prohibition or other process or proceeding in any court or be removable by certiorari or otherwise in any court.

[90] The ability of a Medical Review Panel to produce a narrative report was noted in subsection 61(2) as it then read:

> (2) The panel may, in addition to and separately from the certification required under subsection (1), make a report and recommendations to the board on any matter arising out of the examination and review, and the board must promptly send a copy of them to the physician whose certificate was sent to the board under section 58 (3) or (4).

[91] Thus, only the determinations in the certificate were conclusive as to the matters certified and binding on the Board.

Analysis

[92] The worker asserts that "[u]nless and until WCB [Board] issues an *initial* decision regarding [the worker's] psychological problems, no one else can resolve this issue." The submission states that the Medical Review Panel's analysis in its narrative report "still leaves outstanding a matter that WCB had not decided, but which WCB must now decide." He also asserts "there was no previous Board or appellate decision that referred in any way to a psychiatric issue."

[93] The worker queries whether WCAT has the jurisdiction to decide whether his psychological problems are compensable. He asserts that the "jurisdictionally correct outcome should be a referral to WCB with directions to carry out necessary investigations and issue an *initial* decision regarding acceptance (or denial) of the psychological problems."

[94] I find the worker's submissions appear to have overlooked the fact the Board addressed a psychological/psychiatric condition in its June 20, 1997 decision.

[95] I find the Board has made an initial adjudication regarding the worker's psychological/psychiatric condition. Given that initial adjudication, there is no persuasive basis for WCAT to, as requested by the worker, invoke subsection 246(3) of the Act and refer the matter of psychological problems to the Board for an initial adjudication on the basis "there was no Board decision regarding [the worker's] psychological problems before the subject Review Board."

[96] I further find that, in addressing the worker's appeal from the June 20, 1997 decision, the Review Board rendered a finding with respect to the worker's psychological/psychiatric condition. The appeal before me is from that Review Board findings.

[97] I find WCAT has jurisdiction to decide whether the worker's psychological problems are compensable. I find there is no persuasive basis to invoke subsection 249(6) of the Act to refer the worker to an independent health professional.

[98] The submissions to WCAT are to the effect "there was no attempt to pose a question to the MRP regarding psychological problems."

[99] While the Medical Review Panel may not have been expressly asked to provide a psychiatric diagnosis, I consider it must be kept in mind the statement of issues placed before the Medical Review Panel asked it to certify with respect to the worker's "back and/or multiple pain condition."

[100] I find that in the circumstances of the worker's claim, the fact the Medical Review Panel may not have been expressly asked to provide a psychiatric diagnosis did not preclude the Medical Review Panel from doing so.

[101] Notably, several months prior to the December 1997 revision of the issues, the Board received a copy of Dr. Davis' report in which he remarked that the worker developed a generalized anxiety state "with numerous pains." Dr. Davis remarked that many individuals with generalized anxiety disorder also experience physical symptoms, for example muscle pains.

[102] Dr. Davis' report was part of the file provided to the Medical Review Panel.

[103] In such circumstances, I do not consider it would have been surprising if, as part of addressing the worker's multiple pain condition noted in the statement of issues placed before it, the Medical Review Panel addressed the presence of any psychological/psychiatric diagnoses relevant to such a pain condition and certified with respect to their cause.

[104] That point is also made in paragraph #38 of the Court of Appeal's decision in the worker's case, in which the court stated the exchange between the worker's second lawyer and the medical appeals officer supports the inference that the worker's second lawyer knew, or should reasonably have known, that the Medical Review Panel would be making a diagnosis of the worker's physical or psychiatric condition. This is so even though the enabling certificate submitted by the worker pursuant to subsection 58(3) of the Act may not have stated he had a psychiatric condition.

[105] While the March 31, 2014 submission asserts, "The MRP's comments about a psychological disability were a surprise to [the worker]," I note that the Court of Appeal rejected the worker's assertion that he was not given a fair opportunity to be heard or given a fair hearing.

[106] The March 31, 2014 submissions assert that the decision in *Kooner* is "distinguishable." The submission asserts as follows:

> In this case, there was no previous Board or appellate decision that referred in any way to a psychiatric issue, and the referral to the MRP likewise contained no such reference. The MRP's comments about psychological disability were a surprise to [the worker.]

[107] Contrary to those assertions, as noted above, the Board's June 20, 1997 decision that pre-dated the June 3, 1998 Medical Review Panel certificate referred to a psychiatric issue.

[108] Further, the worker's arguments on this point are notable for the complete absence of any discussion of certain comments of the Court of Appeal in 2011 BCCA 368, the case concerning him.

[109] As established via excerpts from that decision noted above, the Court of Appeal stated that the decision in *Kooner* was not distinguishable in principle from the worker's case. Significantly, the March 31, 2014 submission does not expressly argue that the Court of Appeal erred in its analysis.

[110] I find no persuasive reason to disagree with the analysis of the Court of Appeal. I find that the possible presence of a psychological/psychiatric condition related to the worker's pain condition had been apparent prior to the appointment of the Medical Review Panel.

[111] I find that the fact the worker had a psychological/psychiatric condition did not come to light as a result of the Medical Review Panel's examination of the worker. That he had such a condition and that his reports of pain might be associated with it, was flagged by Dr. Davis' report received by the Board and placed on the worker's claim file over a year prior to the Medical Review Panel examining the worker on June 3, 1998.

[112] I am not persuaded that, as asserted by the worker, the Medical Review Panel, "exceeded its jurisdiction." The Medical Review Panel had jurisdiction to address his psychological/psychiatric condition, and I am not persuaded that it was unfair for the Medical Review Panel to have done so.

[113] Despite the above noted arguments made by the worker, I note that the March 31, 2014 submission to WCAT asserts that the Medical Review Panel was "entitled to list the cause or causes of the psychological problems." I agree.

[114] That assertion by the worker seems to be at odds with the contention in the April 1, 2014 submission that the Medical Review Panel "was not statutorily permitted to include their opinion that '…the Worker's anxiety disorder was not caused by the incident of 11 September 1992 or other activities in the workplace' in the *Certificate*, but only in their *Narrative Report*." As well, a contention in the March 31, 2014 submission is to the effect that "[w]hile the MRP could issue an opinion about the current disability, they could not rule on the compensation issues of what caused them."

[115] Such contentions are at odds with the terms of paragraph 61(d) of the Act, which required the Medical Review Panel to identify the cause of the worker's disability. Quite simply, that paragraph required the Medical Review Panel to certify as to the cause of the worker's disability.

[116] I find that the Medical Review Panel was within its jurisdiction to certify as to the cause of the worker's generalized anxiety disorder. I am not persuaded by the worker's argument that the Medical Review Panel "mistakenly included that opinion in the *Certificate* when they were required by law to include it only in the *Narrative Report*."

[117] Owing to the terms of the Act, the Medical Review Panel was charged with reaching conclusions as to diagnosis and causation. I find it was completely open to the Medical Review Panel to reach its own conclusions with respect to diagnosis and causation. While it was certainly open to the Medical Review Panel to accept the opinions of other physicians who had assessed the worker, it was also open to it to reach its own conclusions on such matters.

[118] The submission to WCAT attaches significance to the use of the word "considered" in the narrative report and "considers" in clause #4. The worker seemingly seeks to establish that the determination by the Medical Review Panel in clause #4 is not really a binding determination:

> …the MRP panel has not provided an opinion, but only their consideration. In both quoted passages, they "consider" without deciding or offering a medical opinion, and moreover merely adopt Dr. Wade's[4] opinion, although they reject his opinion regarding causation.

[119] I find that the fact the Medical Review Panel used the word "considers" does not make its determination in clause #4 any less of a medical certification by the Medical Review Panel. I find that the Medical Review Panel was not required to use such language as "finds," "concludes" or "certifies" in order for its conclusions in its certificate to be considered binding and conclusive. I find that "considers" does not establish the Medical Review Panel's response to the statement of issues was non-responsive, ambiguous or, in some fashion, inadequate.

[120] The March 31, 2014 submission to WCAT asserts that the Medical Review Panel's statement about causation "fails to apply the correct causation test, and as Madam Justice Loo [the chambers judge] and the psychiatrists found, it fails to consider the claims history that informed in the opinions of the psychiatrists."

[121] Regarding the "causation test", the March 31, 2014 submission to WCAT cites a number of court decisions. Yet, not one of those decisions addresses the test for causation to be applied by a Medical Review Panel.

[122] Some of the court decisions concern failures by WCAT panels to accept uncontradicted medical opinions.

[123] The assertion in the March 31, 2014 submission that the Medical Review Panel's conclusion was patently unreasonable for not having accepted an uncontradicted medical opinion fails to acknowledge the fact the Medical Review Panel was composed of physicians. The court decisions cited by the worker are relevant to challenging the conclusions of decision-makers who are not medical experts, but I do not consider they have relevance to the conclusions of decision-makers who are themselves medical experts.

[124] I find that the fact the worker may consider the Medical Review Panel disagreed with Dr. Davis' opinion with respect to causation does not make the conclusion of the Medical Review Panel patently unreasonable.

[125] Further, I do not interpret the chambers judge as having concluded the Medical Review Panel applied the wrong causation test. Notably, the assertion by the chambers judge as to there having been a failure to apply the legal test for causation was laid at the feet of the Board and the Review Board.

[4] I believe that the reference should be to the opinion of Dr. Davis.

[126] The March 31, 2014 submission asserts that the Medical Review Panel "had no jurisdiction to decide the *compensation* issue that arises from that medical finding." I agree.

[127] I further find that the Medical Review Panel did not purport to decide such a "compensation issue." I find that the "compensation issue" is very different from the issue of causation that the Medical Review Panel was charged with addressing.

[128] In reaching that conclusion, I find that the "compensation issue" concerns the manner in which non-medical decision-makers apply the relevant law and policy to the medical findings of the Medical Review Panel.

[129] That the Medical Review Panel made a medical finding as to causation that was potentially different from a Board decision as to causation, is illustrated by the following excerpt from policy item #103.84 of the RSCM as of 1998 when the Medical Review Panel certificate was issued:

> Section 61(1)(d) of the Act requires the Panel to certify as to the cause of the disability. Cause is a word much like disability in that it has different meanings, depending on the context in which it is used. Sometimes it can refer to matters of natural science, sometimes to moral value judgements, and sometimes to questions of law. The purpose of the Medical Review Panel is to provide an appeal from "a medical decision of the Board" and it is in that context that the word "cause" must be interpreted. The Board interprets the word cause in Section 61(1) of the Act to refer to the etiology of a physical or psychological disability. It means cause insofar as it is a matter of medical science, but not cause insofar as it is a matter of moral value judgements, or law, or non-medical fact. (23)

[130] Footnote #23 is a reference to Decision No. 17 (Re: Disablement Following Unauthorized Surgery), 1 WCR 78.

[131] Following the issuance of the Medical Review Panel certificate on the worker's claim, it fell to non-medical decision-makers to determine whether the worker's generalized anxiety disorder was one for which benefits should be paid on the basis it was a personal injury arising out of and in the course of his employment or a compensable consequence of his earlier back injury accepted by the Board.

[132] I find no indication in the certificate or narrative report that the Medical Review Panel addressed whether the worker was entitled to compensation benefits or addressed whether any generalized anxiety disorder was an injury arising out of and in the course of the worker's employment or was a compensable consequence of the accepted injury.

[133] I further find no basis for the assertions in the April 1, 2014 submission that the Medical Review Panel "had no jurisdiction to include that opinion [as to the compensability of the

worker's psychological condition] in the *Certificate*, so the opinion is *void ab initio*, and is severable from the rest of the *Certificate*." I find there is no basis for the assertion for the simple reason that the Medical Review Panel did not "opine about the compensability of [the worker's] psychological problems."

[134] I find that the Medical Review Panel addressed causation as a matter of medicine. The issue before me is causation as a matter of law. That matter of law is (i) associated with adjudicating the "compensation issue" referred to in the worker's submissions and (ii) involves the application of law and policy to the Medical Review Panel's medical conclusions.

[135] Notably, both the chambers judge and the Court of Appeal appear to have considered the issue of causation addressed by the Review Board was to be decided by reference to common law cases concerning causation. (Further, in focusing on the comments found in the narrative report, it appears that both courts overlooked the fact that only the Medical Review Panel's certificate is binding and conclusive.)

[136] I find the courts' comments regarding the application of common law cases regarding causation seemingly overlooked the decision in *Kovach v. British Columbia (Workers' Compensation Board)*, [2000], 1 S.C.R. 55.

[137] The *Kovach* decision concerned a determination by the Appeal Division of the Board in a lawsuit between Ms. Kovach and Dr. Singh, as to whether any injury that occurred as part of surgery arose out of and in the course of the worker's employment as a compensable consequence of the worker's claim accepted by the Board.

[138] As noted in the initial judicial review decision ([1995] B.C.J. No 425, (Quiklaw)), the Appeal Division concluded that both Ms. Kovach and Dr. Singh were workers under the Act at the time of the cause of action arose. It further concluded that any injury suffered by Ms. Kovach arose out of and in the course of employment under the Act, and that any action or conduct of Dr. Singh which allegedly caused a breach of duty of care arose out of and in the course of his employment under the Act.

[139] The matter proceeded to the Court of Appeal ([1996] 84 B.C.A.C. 176) and then to the Supreme Court of Canada, which remitted the matter to the Court of Appeal ([1997] S.C.C.A. No. 126).

[140] Upon rehearing, the Court of Appeal set aside the Appeal Division's decision on the basis it was patently reasonable ((1998), 52 B.C.L.R. (3d) 98). The dissenting reasons provided by Mr. Justice Donald documented the following notable observation that the Board was not bound to apply common law principles of causation:

> [27] Was the result illogical? If the plaintiff had not been injured at work she would not have been treated by Dr. Singh. That fact forms a causal link connecting the employment related injury to the negligence alleged

against Dr. Singh. In my view, the causation finding would only be illogical if there were no connection. Whether the law should treat the connection as remote or proximate is a separate issue.

[28] **The Board was not bound to apply common law principles of causation, such as novus actus interveniens, in deciding the matter. No single theory of causation can be said to be infallible or universally applicable. What works for a tort based system may be unsuitable for a no fault scheme. It all depends on the policy goals of the system.** The Board may decide that in order to encourage workers to undergo treatment for their industrial injuries, it must cover mistakes made during treatment. It may decide that it is unfair to deny coverage in such circumstances or inconsistent with a broadly inclusive policy of worker protection.

[29] Different considerations arise when, instead of a collective fund, the purse of an individual defendant is put at risk. There it is important to determine whether an intervening act has broken the chain of causation. That is not an exercise of pure logic but a matter of justice in allocating responsibility between initial and subsequent tortfeasors.

[30] The onus of proof in each system is different. Under the WCB scheme if the probabilities are evenly balanced the claimant succeeds in obtaining compensation. In tort law, the defendant wins.

[31] Requiring the Board to apply the doctrine of novus actus interveniens creates the potential of confusion and delay for the injured worker. This is the consequence of mixing incompatible systems of compensation. For example, assume that the WCB ruled that the chain of causation was broken by medical negligence and a court later found that all or most of the worker's problems were caused by the industrial injury. Neither the Board nor the court is bound by the findings of the other. The worker falls between two systems.

[emphasis added]

[141] Significantly, in its 2000 decision cited above, the Supreme Court of Canada allowed the Board's appeal on the following basis:

1 The Chief Justice — We are all of the view, substantially for the reasons of Donald J.A. in the British Columbia Court of Appeal, to allow the appeal, set aside the judgment of the Court of Appeal, and restore the s. 11 certificate order of the Workers' Compensation Board, with costs to the appellant Dr. Singh here and in the courts below.

[142] I find that the Supreme Court of Canada approved of the analysis of Mr. Justice Donald.

[143] In such circumstances, with the greatest of respect, I question the persuasiveness of any comments by the chambers judge and the Court of Appeal in the case before me as to causation tests to be applied to adjudication in the worker's claim.

[144] I find that the starting point for considering the causation test involves examining the test for compensable consequences as articulated in RSCM II prior to the July 1, 2010 amendments.

[145] I make that finding for the following reasons. Between 1992 when the worker was injured and 2000 when the Review Board issued its November 1, 2000 findings, Board policy was found in the RSCM; volumes I and volume II did not exist . Volumes I and II emerged as a result of legislative changes that took place in 2002. The RSCM I is the successor to the RSCM in effect as of mid-2002.

[146] Even though I am adjudicating this appeal in July 2014, well after the June 30, 2002 transition date, the RSCM II is not directly applicable because the worker's initial injury occurred before June 30, 2002.

[147] However, I find that the RSCM II is relevant by adoption owing to the terms of policy item #22.00 of the RSCM I dealing with compensable consequences. That item provides that for all decisions, including appellate decisions, on or after February 1, 2004, decision-makers are to refer to policy item #22.00 of the RSCM II, regardless of the date of the original work injury or the further injury.

[148] RSCM II provided as follows at policy item #22.00 regarding compensable consequences:

> Once it is established that an injury arose out of and in the course of employment, the question arises as to what consequences of that injury are compensable. **The minimum requirement before one event can be considered as the consequence of another is that it would not have happened but for the other.**
>
> Not all consequences of work injuries are compensable. A claim will not be reopened merely because a later injury would not have occurred but for the original injury. **Looking at the matter broadly and from a "common sense" point of view, it should be considered whether the work injury was a significant cause of the later injury. If the work injury was a significant cause of the further injury, then the further injury is sufficiently connected to the work injury so that it forms an**

> **inseparable part of the work injury.** The further injury is therefore considered to arise out of and in the course of employment and is compensable.
>
> [emphasis added]

[149] The above version of policy item #22.00 is relevant rather than policy item #C3-22.00, which exists in the RSCM II as of the date of the issuance of my decision. This is so because policy item #C3-22.00 is declared to apply to all claims for injuries occurring on or after July 1, 2010. The worker's injury occurred well before July 1, 2010. Thus, I have reproduced the version of RSCM II policy item #22.00 that was in effect immediately before July 1, 2010.

[150] The expression "significant cause" in policy item #22.00 of the RSCM II may be contrasted with the expression "causative significance."

[151] In previous cases, I have considered whether the difference in wording means that "significant cause" involves something different from "causative significance."

[152] In *WCAT-2009-02345* I noted as a member of a three-person panel that I was persuaded by the analysis in *WCAT-2005-01084* that, by using different language in policy item #22.00, the Board intended to establish a different test for causation in relation to compensable consequences than for causation in relation to the original work injury. Contribution that was more than *de minimis*[5] was not necessarily sufficient.

[153] *WCAT-2005-01084* was set aside on judicial review (*Schulmeister v. British Columbia (Workers' Compensation Appeal Tribunal*), 2007 BCSC 1580) but the court did not find fault with the panel's determination that the "significant cause" test in policy item #22.00 modified the tort approach and was different, and stricter, than both the test for causation at common law and the test for causation normally applied in the workers' compensation system. The court determined that the panel's failure to restrict its analysis to the question of whether the worker's compensable injuries were a significant cause of his death amounted to a failure to take policy item #22.00 into account. The court declared that Board policy did not require that an event be the most significant cause of the injury or death or that other factors cannot play a greater role than the compensable injuries.

[154] *WCAT-2009-02345* was the subject of a reconsideration application. That application was denied in *WCAT-2013-00739*.

[155] Notably, the reconsideration panel in *WCAT-2013-00739* conducted a detailed review of the origins of policy item #22.00 in a much earlier decision of the former commissioners of the Board regarding a situation involving a subsequent event or accident. The

[5] Negligible, of trifling consequence or importance, too insignificant to be worthy of concern.

reconsideration panel contrasted the decision in *WCAT-2005-01084* with a decision in *WCAT-2006-02616*, which appeared to amount to the second panel having "read down" policy item #22.00 when applying that policy to causation issues, not involving consideration as to the causes of a second accident but involving consideration to the acceptability of additional medical conditions.

[156] The reconsideration panel added that an alternative approach might be to consider that policy item #22.00 was simply inapplicable to adjudication where no new or secondary accident had occurred (paragraph #98).

[157] The reconsideration panel stated it was understandable that decision-makers had viewed policy at policy item #22.00 concerning compensable consequences as applying to claims regarding the acceptability of additional medical conditions (paragraph #101).

[158] The reconsideration panel questioned whether the test for causation in policy item #22.00 was intended to apply to the adjudication of whether a worker's psychological condition resulted from a work injury. It remarked that such a question was moot if the language in policy item #22.00 was read down; however, to the extent the language in policy item #22.00 was read as establishing a higher test for causation, such an issue became an important matter (paragraph #105).

[159] The reconsideration panel considered there had been an unfortunate and erroneous tendency to read policy item #22.00 as being intended to apply to any adjudication, as a new issue, of a claim for the acceptability of further injury or disease arising as a consequence of a work injury (paragraph #106).

[160] The reconsideration panel read the former policy item #22.00 as being restricted to situations involving a new external event or accident (paragraph #108).

[161] The reconsideration panel concluded that if the issue is only one of medical causation, such as whether a worker's depression is causally related to his compensable injury and permanent physical disability, the "causative significance" test applies. Material contribution is sufficient to establish compensability; such a contribution is a "significant cause" for that purpose. In situations involving a subsequent accident, policy item #22.00 concerning compensable consequences requires a more stringent test. The reconsideration panel observed it was problematic to try to interpret the same language in policy item #22.00 as having two meanings (paragraph #109).

[162] The reconsideration panel concluded that the better approach would be to view policy item #22.00 as only having application in cases involving the causes of secondary accidents (paragraph #109).

[163] Ultimately, having regard to the ambiguity of the wording in policy item #22.00 and the high standard of deference required under the patently unreasonable standard, the reconsideration panel was not persuaded that *WCAT-2009-02345* was patently unreasonable (paragraph #120).

[164] In *WCAT-2013-01561*, the panel that issued *WCAT-2006-02616,* had occasion to review *WCAT-2013-00739*. In *WCAT-2013-01561* the panel stated that the test of material contribution or causative significance would apply to the causation issue under appeal. Notably, in *WCAT-2013-01561* the panel addressed whether a worker's psychological condition was a compensable consequence of accepted work injuries.

[165] *WCAT-2013-00739* was the subject of discussion in *WCAT-2013-02409:*

> …For that reason, and because previous WCAT decisions are not binding, the decision in *WCAT-2013-00739* does not definitively establish the meaning of "significant cause" in policy #22.00. However, the analysis strongly supports the conclusion that when considering whether a worker's psychological condition is causally related to her compensable work injury, the material contribution (more than trivial) test should be used. I conclude that is the proper test to use in this appeal.
>
> [paragraph number omitted]

[166] I note the panel that issued *WCAT-2013-02409* was one of the members of the three-person panel that issued *WCAT-2009-02345*. While the panel that issued *WCAT-2013-02409* did not expressly resile from the analysis found in *WCAT-2009-02345*, its apparent adoption of the analysis found in *WCAT-2013-00739* seemingly amounts to it having resiled from that earlier analysis*.*

[167] By decisions dated February 14, 2014 (*WCAT-2014-00465*) and February 27, 2014 (*WCAT-2014-00612*), I noted the comments found in *WCAT-2013-00739.* In those decisions, I observed it was not necessary for me to categorically resolve the concerns raised by *WCAT-2013-00739* as to the interpretation of policy item #22.00. This was so because I noted in those two decisions that, if I were to have applied the test of "causative significance" rather than the higher test of "significant cause," the outcome would not have changed.

[168] I note that all of the cases referred to above would have been available for review on WCAT's website prior to the worker's March 31, 2014 submission.

[169] After having further reviewed the matter, and for the reasons set out in *WCAT-2013-00739*, I find that the preferable interpretation of policy item #22.00 is that it does not apply to the type of case before me.

[170] Notably, in the case before me, there is no assertion in connection with the worker's generalized anxiety disorder that he suffered a later accident. The case before me concerns whether the worker's generalized anxiety disorder is a compensable consequence of his earlier back injury.

[171] Thus, the applicable test is that of "causative significance."

[172] I am aware that the test of causative significance does not involve an examination of whether an injury is the most significant cause or the only cause of a later injury.

[173] While this case does not involve a worker who links a condition directly to his employment, I consider that, as discussed below, the issue before me involves an examination of whether there is sufficient positive evidence of a causal link.

[174] As in the case of a worker who seeks to link a disease to employment, the issue is not whether the evidence establishes that a worker's disease did not arise out of his employment. That point is clearly made in *Appeal Division Decision #92-0473* (8 *W.C.R.* 115), which declared there must be evidence linking the disease to employment:

> All decisions on causation within the workers' compensation system must consider what evidence supports a work relationship as opposed to what evidence supports a non-work relationship. To satisfy the requirements of the Act there must be some positive evidence to show that the work activity played a significant role in causing the injury. It is not enough to say that if we do not know what caused it, then it must be the work. That is speculation, not evidence.

[175] An occupational cause is not established if the evidence fails to establish a non-occupational cause. That there must be positive evidence linking a disease to employment is clearly set out in policy item #26.22 of the RSCM I:

> If the Board has no or insufficient positive evidence before it that tends to establish that the disease is due to the nature of the worker's employment, the Board's only possible decision is to deny the claim.

[176] Thus, the question is whether there is sufficient positive evidence to establish a link between (i) the worker's injury and (ii) his generalized anxiety disorder. The question is not whether there is sufficient positive evidence to link the worker's generalized anxiety disorder to some other cause.

[177] That examination of whether there is sufficient positive evidence must take into account the conclusions of the Medical Review Panel. In saying that, I appreciate that the conclusions of the Medical Review Panel are not evidence *per se*, but rather the conclusions of an appellate decision-maker.

[178] In conducting my examination, I am not persuaded that, as asserted in the March 31, 2014 submission, "[t]he only correct interpretation of their [the Medical Review Panel's comments] rega[r]ding psychological problems is to find that they are recommendations only, and not binding decisions." Further, I am not persuaded that, as argued by the worker, it fell to the Review Board to weigh the opinions of Drs. David, Rasiah, and Chan "against the recommendation of the MRP panel."

[179] The March 31, 2014 submission to WCAT asserts that the Medical Review Panel's statement about causation in the certificate contradicts the statement in the narrative report. I am not persuaded that is necessarily the case.

[180] In that regard, I return to policy item #103.84 and Decision No. 17, and comments regarding causation found therein.

[181] I find that Decision No. 17 is relevant to the appeal before me. This is so even though it was retired effective February 24, 2004 (See *Resolution 2004/02/24-02* of the Board's board of directors). Significantly, that resolution provides that the decisions retired by it may continue to be applicable to historical issues:

> As of the retirement date, the listed Decisions are no longer "policy" under the Board of Directors' By-law re: Policies of the Board of Directors. However, the status of the listed Decisions as "policy" prior to the retirement date remains unaffected by this Resolution. The listed Decisions remain applicable in decision-making on historical issues to the extent they were applicable prior to the retirement date.

[182] Thus, I find that Decision No. 17 was applicable to the Board's and the Review Board's interpretation of the Medical Review Panel's certificate.

[183] Decision No. 17 involved a case in which the Board denied authorization for surgery for a compensable injury on the basis the worker would be unlikely to benefit from the proposed surgery. The worker then underwent the surgery and experienced a post-operative infection. The Board denied payment of benefits.

[184] A Medical Review Panel concluded in its certificate that the worker's disability was not due to the June 30, 1971 accident. Significantly, the panel remarked that the cause of the worker's disability was a post-operative infection.

[185] The commissioners stated that the word "cause" in subparagraph 55(9)(a)(iv) of the Act (equivalent to paragraph 61(1)(d) of the Act at the time of the issuance of the Medical Review Panel's certificate in the case before me), was an ambiguous word, referring sometimes to matters of natural science, sometimes to moral value judgments, and sometimes to questions of law. The commissioners stated that the purpose of the Medical Review Panel was to provide an appeal from a medical decision. That was the context in which the word "cause" must be interpreted. Therefore, "cause" referred to

the etiology of the condition, that is, "cause" insofar as it relates to the matter of medical science. It did not concern "cause" in so far as it was a matter of moral judgment, of law or of non-medical fact.

[186] The commissioners considered the Medical Review Panel's statement that the worker's disability was not due to the June 30, 1971 accident indicated a possibility that the Medical Review Panel had extended itself beyond matters of medical science to resolve a legal question of entitlement to compensation. The commissioners considered the occurrence of such an extension beyond medical science was confirmed by the Medical Review Panel's narrative report which asserted that the Board was not responsible because the disability was due to the effects of the unauthorized surgery.

[187] The commissioners stated that subsection 79(1) of the Act (equivalent to subsection 96(1) of the Act at the time the certificate was issued in the case before me) establishes that the Board has exclusive jurisdiction to determine all matters of fact and law under Part I of the Act. The authority conferred on Medical Review Panels to review the Board's medical decisions was an exception carved out of the Board's general jurisdiction. The commissioners considered that the Board was left with an overall residual jurisdiction, which included authority to determine the jurisdiction of other tribunals established under Part I.

[188] The commissioners considered the conclusion of the Medical Review Panel that the worker's disability was not due to the accident was a conclusion of law, not one of medical science. Therefore, it was an excess of jurisdiction by the Medical Review Panel. To the extent that the document included the Medical Review Panel's certification that the worker's present disability was not due to the June 30, 1971 accident, the document was not a certificate. Therefore, it was not binding on the Board and was not of any persuasive value.

[189] The commissioners noted that in another clause in the certificate the Medical Review Panel concluded the disability from which the worker was then suffering was caused by the operation. The commissioners considered that was a conclusion of medical science. To that extent, the document was a valid certificate and the conclusion was binding on the Board.

[190] I appreciate the case before me does not involve unauthorized surgery.

[191] Yet, I find the discussion in Decision No. 17 has some application to the matter before me.

[192] I interpret the Medical Review Panel's comments in clauses #4(a)/#4(b) of the certificate to be to the effect that the worker's generalized anxiety disorder was not caused by the September 11, 1992 work activities. Further, I interpret the comments in clause #9 to be to the effect that the generalized anxiety disorder was not related to the worker's back injury associated with his September 11, 1992 work activities. Thus, the Medical

Review Panel addressed any causal link between the generalized anxiety disorder and the work activities, as well as any causal link between the generalized anxiety disorder and the back strain accepted by the Board.

[193] I find that the Medical Review Panel's responses to issues #4(a)/#4(b) and #9 reflect the Medical Review Panel's certification as a matter of medical science. That the Medical Review Panel provided the responses to those issues means it concluded that (as noted in the narrative report) the unearthing of the worker's generalized anxiety disorder by the mild to moderate soft tissue injury did not amount to the soft tissue injury having caused the generalized anxiety disorder.

[194] Yet, policy item #103.84 and Decision No. 17 illustrate that it falls to non-medical decision-makers in the workers' compensation system to assess causation as a matter of law and policy.

[195] The Medical Review Panel concluded that the worker's injury may have unearthed his generalized anxiety disorder. I do not interpret the comments in the narrative report to mean it was merely possible that the back injury unearthed the generalized anxiety disorder (as opposed to it being more likely than not, or at least as likely as not, that the back injury unearthed the generalized anxiety disorder).

[196] In the context of the discussion in the narrative report, I interpret that conclusion by the Medical Review Panel to mean the worker's back injury did indeed unearth the generalized anxiety disorder but, as a matter of medical science, did not cause it.

[197] Notably, the Medical Review Panel concluded the worker did not suffer a pre-existing condition or disability. I interpret that certification to mean the worker did not suffer a generalized anxiety disorder prior to his September 11, 1992 work activities and experiencing a back injury due to those work activities. The certificate establishes that the worker suffered a generalized anxiety disorder subsequent to the September 11, 1992 work activities and the back injury related to those activities.

[198] I find the Medical Review Panel's analysis in its narrative is imported into its certificate. By that, I mean, I interpret the Medical Review Panel to having concluded in the certificate that while the worker's injury unearthed his generalized anxiety disorder, it did not cause it. I have no persuasive reason to conclude the certificate does not reflect the Medical Review Panel's conclusion in the narrative report that the worker's back injury unearthed his generalized anxiety disorder.

[199] Given such medical analysis by the Medical Review Panel, I find as a matter of law that, the worker's generalized anxiety disorder would not have happened "but for" his work-related back injury. The back injury was more than a trivial cause of his generalized anxiety disorder. Such circumstances establish that the worker's back injury was of causative significance regarding his generalized anxiety disorder. My finding that the worker's injury was of causative significance is consistent with the

remarks of the chambers judge and the Court of Appeal, who referred to the legal test for causation. I do not consider that the test for causation applicable to this worker's case in the workers' compensation system is significantly different from the test referred to by the chambers judge and the Court of Appeal.

[200] After having reviewed the matter, and for the reasons outlined above, I allow the worker's appeal. I find that his generalized anxiety disorder is a compensable consequence of his compensable back injury.

[201] While the issue of causation is before me as part of this appeal, the nature and extent of any benefits payable for the effects of the worker's generalized anxiety disorder are not before me for decision. Thus, while the March 31, 2014 submission seeks a finding that the worker is unemployable and entitled to a full loss of earnings pension, such matters are not before me. It falls to the Board to address entitlement as part of implementing my decision that the worker's generalized anxiety disorder is a compensable consequence of his back injury.

Conclusion

[202] I allow the worker's appeal. I vary the November 1, 2000 Review Board findings. I find that the worker's generalized anxiety disorder is a compensable consequence of his back injury.

[203] There has been no request for reimbursement of appeal expenses. Therefore, I make no order in that regard.

Randy Lane
Vice Chair

RL/cv