Emery v. Alberta (Workers' Compensation Board), 2000 ABQB 704

Date: 20001010
Action No. 0003-04992

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

JAMES LLOYD DION EMERY

Applicant

- and -

APPEALS COMMISSION OF THE WORKERS' COMPENSATION BOARD OF ALBERTA

Respondent

REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE M. A. BINDER

APPEARANCES:

K. W. Penonzek

for the Applicant

S. R. Hermiston

for the Respondent

[1] This is an application for judicial review of a decision of the Appeals Commission ("the Commission") of the Workers' Compensation Board ("WCB"). At issue is whether the Commission's denial of the Applicant's request for an opportunity to cross- examine the Commission's medical consultant breached the Commission's duty to be fair and whether the November 18, 1999 decision of the Appeals Commission is patently unreasonable and therefore invalid.

[2] I find that the denial of the Applicant's request for an opportunity to cross-examine did breach the principles of natural justice. Given this determination, it is not necessary for me to decide whether the decision of the Commission was patently unreasonable. Nevertheless, I am of the view that the decision of the Commission cannot be said to be patently unreasonable, as there was evidence before the Commission upon which it was entitled to reach its decision.

[3] This decision, therefore, deals with the reasons for holding that the Commission breached the principles of natural justice.

FACTS

[4] The Applicant, James Lloyd Dion Emery ("Emery"), who had been employed as a trucker for his employer for approximately 10 months, was involved in an occupational accident on October 23, 1997. At the time, he was 60 years old. He was at a bulk station in Fort Smith, N.W.T. [Tab 64, p.4], and had been transferring aviation fuel (Argas) from a truck to a bulk carrier [Tab 17]. The pump- hose burst, and he was doused with 10 to 20 gallons of aviation fuel [Tab 64, p.4]. He was wearing several layers of clothing, and the outer layer, his coveralls, were soaked. He was also wearing gloves, but he is uncertain as to whether they were porous, i.e. whether there was any direct contact with his skin [Tab 54, p.3]. He did not recall any direct inhalation, ingestion, or skin contact with the fuel (except his hands) [Tab 64, p.4]. He remained in the soaked clothing for five to ten minutes [Tab 17]. After that time, he sponged himself off [Tab 5, p.3] and placed the soiled clothing in a compartment behind the driving cab [Tab 69]. He then drove for seven hours to Enterprise, N.W.T., where he finally had the opportunity to shower.

[5] Two days later, Emery began to experience sinus symptoms and diarrhea. He also felt tired and sick [Tab 4]. One week following the accident, he began to experience flu-like symptoms including a runny nose, aches and pains. In November 1997, he began to suffer from considerable cough, no sputum production, nausea, sweating, and heavy breathing. After the new year, he had a considerable headache behind his eyes, inflammation of the eyes, and his ears were blocked. He also had considerable ecchmosis, erythematous turbinates bilaterally, increased liver enzyme, and kidney problems. At the University of Alberta hospital, a diagnosis of chemical pneumonitis was contemplated [Tab 41, Tab 1]. Several other physicians whom he consulted also related his symptoms to the exposure to the aviation gas [Tabs 1, 2, 4, 8, 11, etc.]. On February 18, 1998, after many consultations with a variety of doctors, Emery was finally diagnosed with Wegener's Granulomatosis ("WG").

[6] Emery's Alberta Health Care ("AHC") records indicate that he did not seek medical attention for similar ailments before October 1997. He also claims never to have had problems with his respiratory system. Emery did not have any previous experience hauling aircraft fuel [Tab 64, p.4].

DECISIONS BELOW

The Claimant Services Department

[7] Emery filed his WCB claim on December 4, 1997. On March 13, 1998, the Claimant Services Department (the " Department") rejected his claim. The Department found that, as WG is of unknown etiology, no causal relationship between the accident and the disease could be established [Tab 44]. On March 27, 1998, Emery requested a review of

the Department's decision [Tab 46]. On April 21, 1998, the Department again rejected Emery's claim. [Tab 48 - no additional reasons given.] ***The Claims Review Committee***

[8] Emery's claim was then sent to the Claims Review Committee (the "Committee"). It was heard in one hour on June 18, 1998 [Tab 50]. There does not appear to be a transcript of that hearing; however, the minutes of the hearing are provided at Tab 54. In these minutes the Committee states that it had not yet received the second report from its medical advisor, Dr. Cheng, and that, as a result, the decision would have to be delayed. Dr. Cheng was not present at the hearing [Tab 54], and Emery was not given the opportunity to cross-examine Dr. Cheng. When the second report [Tab 58] was received, a copy was provided to Emery. Emery's counsel responded in writing on August 6, 1998 [Tab 63]. On August 14, 1998, the Committee rejected Emery's claim [Tab 64]. The decision of the Committee relied heavily on both the reports provided by Dr. Cheng and the Material Safety Data Sheets issued by Petro- Canada and Canutec [provided at Tab 53]. ***The Appeals Commission***

[9] On August 25, 1998, Emery filed an appeal of the Committee's decision. An appeal hearing took place on November 12, 1998. Again, there appears to be no transcript of the proceedings.

[10] After the hearing, the Commission requested certain AHC records, and it sought the opinion of a second doctor, Dr. Hoffman, a "medical consultant" [Tab 69]. A copy of the request to Dr. Hoffman was sent to Emery. Emery's counsel objected to the request because, in his opinion, this process might taint the proceedings and deprive Emery of his right to a fair hearing. Counsel questioned Dr. Hoffman's qualifications and expertise and ability to respond to the questions outlined in the request [Tab 70]. The Commission did not accept counsel's objections [Tab 71].

[11] On February 11, 1999, Dr. Hoffman issued his opinion [Tab 72]. His opinion includes general information on aviation fuel, comments on a literature review, comments on a search conducted by the librarian at John Scott Library at the University of Alberta, and the answers to the four specific questions asked by the Commission [Tab 69]. A copy of his opinion was sent to Emery's counsel. Counsel then requested the opportunity to question Dr. Hoffman in person in relation to his "qualifications, knowledge, expertise, and the manner and facts upon which he has based his opinions". He also requested that a Court Reporter be present. In response, the Commission forwarded Dr. Hoffman's curriculum vitae, as well as information regarding the procedure for requesting a Notice to Attend [Tabs 73 and 74]. Counsel then filed a Notice to Attend. On June 1, 1999, the Commission denied the application for a Notice to Attend. The Commission determined that if counsel wanted to provide rebuttal, it should be done by way of written submissions. Written submissions were provided on July 2, 1999 [Tab 78].

[12] On November 18, 1999, the Commission issued a decision which denied responsibility for Emery's WG [Tab 79]. The decision relies heavily on the opinions of Dr. Cheng and Dr. Hoffman.

LIMITATIONS

[13] As a preliminary matter, the Commission argues that, in light of the six-month limitation dictated by Rule 753.11(1) of the ***Alberta Rules of Court*** , the Applicant should not be permitted now to seek review of the June 1, 1999 decision to refuse cross-examination. The Commission claims that, as the Respondent waited until the Commission issued its final decision in November 1999 to make an application for review, as opposed to immediately requesting a review after the June 1999 decision, the six-month limitation has passed.

[14] Rule 753.11(1) states:

Where the relief sought is an order to set aside a decision or act, the application for judicial review shall be filed and served within six months after the decision or act to which it relates.

[15] In order for this limitation to be used in the manner suggested by the Respondent, the decisions in question, the interlocutory one of June 1999 and the final one of November 1999, would have to be considered two separate decisions. In ***Friends of the Oldman River Society v. Assn. of Professional Engineers, Geologists and Geophysicists (Alberta)*** (1997), 55 Alta. L.R. (3d) (Q.B.), at 403 Cooke, J. determined that this need not be the case:

[i]f preliminary applications on procedural fairness grounds are not appropriately brought before the decision of the tribunal is rendered [...] then it may very well be that the time set out in Rule 753.11 does not begin to run until the tribunal makes its decision, notwithstanding that the "act" complained of occurred outside of the six-month time limit set out in the rule. In essence, the hearing and the later decision of the tribunal may amount to a "single transaction", and any grounds for judicial review arising from the hearing itself may be properly brought, in compliance with Rule 753.11, within six months of the rendering of decision by the tribunal.

[16] This understanding of Rule 753.11 corresponds to the general principle that, due to the undesired effect of fragmenting and protracting proceedings, courts will only rarely entertain applications for judicial review of interim decisions. Specifically, courts have cautioned that they will only hear such applications in situations where the administrative action is "clearly erroneous", where the inconvenience and cost warrant intervention, or where other special circumstances exist: ***Harelkin v. University of Regina*** , [1979] 2 S.C.R. 561; ***British Columbia Government Employees' Union v. Labour Relations Board of British Columbia et al.*** (1986), 2 B.C.L.R. (2d) 66 (B.C.C.A.); ***Bayne (Rural Municipality No. 371) v. Saskatchewan Water Corp.*** (1991), 46 Admin. L.R. 23 (Sask. C.A.); ***Szczecka v. Canada (Minister of Employment and Immigration)*** (1993), 116 D.L.R. (4 th) 333 (F.C.A.); ***Stirrat Laboratories Ltd. v. Health Sciences Assn. of Alberta*** (1996), 1 Admin. L.R. (3d) 200 (Alta. Q.B.); ***Winnipeg (City Assessor) v. Canadian National Railway Co.*** (1998), 134 Man. R. (2d) 122 (Man. C.A.); ***Ipsco Inc. v. Sollac,***

Aciers d'Usinor (1999), 246 N.R. 197 (F.C.A.); and ***Houle v. Mascouche (Ville)*** (1999), 179 D.L.R. (4 th) 90 (Que. C.A.).

[17] This same approach is to be followed even when the allegation is that there has been a breach of procedural fairness: ***Howe v. Institute of Chartered Accountants (Ontario)*** (1994), 19 O.R. (3d) 483 (Ont. C.A.), leave to appeal to S.C.C. refused (1995), 21 O.R. (3d) xvi(n); ***Doman v. British Columbia (Securities Commission)*** (1995), 34 Admin. L.R. (2d) 102 (B.C.S.C.); and ***Zündel v. Citron*** (1999), 165 F.T.R. 113 (F.C.A.).

[18] In the case at bar, there are no special circumstances dictating that the decision of June 1999 should have been reviewed before the rendering of the final decision in November 1999. As a result, the two decisions are to be viewed as one, and the application for review falls within the time limitation prescribed by Rule 753.11 of the ***Alberta Rules of Court*** .

CROSS-EXAMINATION AND NATURAL JUSTICE

The Law

[19] The rules of natural justice do not require that a hearing be oral; an exchange of written materials may suffice: ***Mobil Oil Canada Ltd. v. Canada Newfoundland Offshore Petroleum Board*** (1994), 21 Admin. L.R. (2d) 248 (S.C.C.). The question as to which is required, depends on the individual facts of each case.

[20] Similarly, the specific right to cross-examine depends upon a variety of circumstances. There is no universal claim to cross-examine witnesses in oral hearings or to cross- examine on the material submitted when the hearing is conducted in writing.

[21] Clearly cross-examination may be required by the statute in question, but where the statute is silent, and the tribunal is the governor of its own procedure, the common law is generally reluctant to impose courtroom procedures and technical rules of evidence: ***University of Ceylon v. Fernando*** , [1960] 1 All E.R. 631 (P.C.).

[22] All that is required is that the parties must know the case being made by the opposing side and be given an opportunity to reply; they must be given a fair opportunity to correct or controvert any relevant and prejudicial statement: ***Strathcona (Municipality) v. MacLab Enterprises Ltd.*** , [1971] 3 W.W.R. 461 (Alta. C.A.). Therefore, a refusal to permit cross- examination does not constitute a denial of fairness, *if* equally effective methods of responding are available. See also ***Township of Innisfil v. Township of Vespra*** , [1981] S.C.R. 145.

[23] The courts will examine a refusal to allow cross-examination upon the basis of whether the procedure is fair, whether the tribunal exercises its discretion in good faith, and whether the tribunal listens to both sides: ***Lipkovits v. C.R.T.C.*** , [1983] 2 F.C. 321 (Fed. C.A.). See also ***Vide Radulesco v. Canadian Human Rights*** (1985), 55 N.R. 384; ***Syncrude Canada Ltd. v. Michetti*** (1995), 25 Alta. L.R. 54 (Alta. C.A.) (hereinafter "

Syncrude "); and ***Kullman v. Calgary (City) Police Commission*** (1995), 168 A.R. 227 (Alta. Q.B.).

[24] The case-law and authorities have provided some guidance with respect to the kinds of circumstances that would suggest a need to permit cross-examination. Such circumstances include:

(1) Credibility: cross-examination may be a necessary element of natural justice where important issues of credibility are raised: ***Carlin v. Registered Psychiatric Nurses' Association (Alberta)*** (1996), 39 Admin. L.R. (2d) 177 (Alta. Q.B.). See also ***Principles*** at 271;

(2) Evidence of Vital Importance to the Matter at Hand: ***Murray v. Rockyview (Municipal District No. 44)*** (1980), 12 Alta. L.R. (2d) 342 (C.A.) (hereinafter " ***Murray*** "). This case dealt with the development approval of an amusement park. Three members of the board chose to go on a fact finding mission and visited several parks similar to the one proposed. With respect to cross- examination, the Court sated:

This obligation will generally arise where the evidence is in relation to a vital issue which will have a direct bearing on the Board's decision and more particularly so, where the person giving the evidence purports to be knowledgeable in that area. [...] Where as here, some members of the Board attended at the site of similar operations, as the Chairman said to determine for themselves the effect such a development would have on a community and then put their evidence before the Board through the administrative officer who travelled with them, fairness dictated that that officer be open to rigorous cross- examination. The appellants were entitled to ask questions concerning the manner in which the persons interviewed were selected, the interests of any nature which they had which might have affected the views expressed, and generally to put to the officer any question, the answer to which might detract from the favourable impact such evidence had on the Board;

and
(3) Combinations: situations where, although the denial of cross-examination, in itself, would not have been enough to cause a breach of procedural fairness, the denial, when added to the other circumstances of the case, did result in a breach. See for example ***Syncrude*** and ***Murray*** .

Application to the Case at Bar Introduction

[25] The ***Workers' Compensation Act*** does not dictate that cross-examination must occur: see s. 7(1), which gives the Commission the right to investigate, and s. 8(5) which states only that the Commission "shall give all interested parties an opportunity to be heard and to present any new or additional evidence". Therefore, the Commission has a discretion as to whether or not to permit the cross-examination of Dr. Hoffman. However, the Commission must exercise that discretion in accordance with the principles of natural justice, as outlined above, or it will lose jurisdiction.

[26] There are several factors which indicate that Emery should have been given an opportunity to cross-examine Dr. Hoffman. ***Credibility***

[27] A particularly pertinent consideration is that Dr. Hoffman's credibility was in issue. Several factors pertaining to his credibility include:

i) was he qualified to speak on the topic;

ii) did he have any experience with WG? Given the problems of diagnosis and the rarity of the disease, this question is of all the more importance; and

iii) given Dr. Cheng's belief that the disease is immunologically related, would it not have been wiser to have sought the opinion of an immunologist?

Of particular relevance to the question of Dr. Hoffman's credibility is the fact that he had been a former employee of the WCB. Counsel for Emery did raise these issues in his written submissions, however, as they were not put to Dr. Hoffman himself, they were not addressed. In my view, the answers to such questions could have had a significant impact on the weight to be given Dr. Hoffman's evidence. ***Importance of Evidence***

[28] Equally important is the fact that Dr. Hoffman's evidence was of vital significance to the matter at hand. The Commission did not believe the opinion of Dr. Cheng to be enough, and it specifically sought out the opinion of Dr. Hoffman. The fact that the Commission relied heavily on Dr. Hoffman's evidence is clear from the decision it rendered [Tab 79, pp. 8-10]. It used Dr. Hoffman's opinion to support Dr. Cheng's, and, on the strength of the consensus, it rejected Emery's claim. Although Emery's counsel did raise issues with Dr. Hoffman's report, he could only do so in writing. As a result, Dr. Hoffman was never questioned on his statements and findings, and counsel's questions were never answered. In reviewing Dr. Hoffman's opinion, as well as the portions that the Commission chose to emphasize, several problems with Dr. Hoffman's report are apparent. These could not have been properly investigated and/or exposed except by cross-examination. These include the following.

1) The Research and Supplementary Information

[29] Some of the information provided by Dr. Hoffman stems from the Material Safety Data Sheets issued by Petro- Canada and Canutec (some of which had been provided by Emery). Given that history has shown that safety information provided by the industry in question (as opposed to by an independent study) is not always the most reliable, some cross-examination regarding the doctor's reliance on these sources, both currently and in the past, would have been in order. Similarly, Dr. Hoffman could have been questioned on the data from the U.S. Department of Health and Human Services, Public Health Services, Agency for Toxic Substance and Disease Registry ("ATSDR"), which he provided: i.e. what is this agency, how independent is it, and how accurate has its information been in the past? Other questions that could have been asked include:

i) how independent are these sources?

ii) is any of this information based on studies which tracked the health problems of persons who had been doused with Argas?

iii) has there ever been such a study?

iv) are JP-4 and JP-7 similar to Argas?

v) is there silicone in Argas?

vi) are the effects of gas on animals identical to the effect on humans?

vii) what of the animals which were effected when they inhaled large amounts for a short period to time, would that be similar in humans?

viii) what precisely is "acute exposure"?

ix) what precisely is "large amounts"?

x) what precisely is "high exposure"?

xi) could 5-10 minutes of close proximity fume inhalation amount to "acute", "large", or "high" exposure?

xii) what role do individual factors play?

xiii) what if Emery's gloves were porous?

xiv) what if Emery hadn't completely sponged off the fuel?

xiv) what if there was some airway between the can and the compartment in which the coveralls were kept? [1] and

xv) what if a person were hypersensitive to Argas?

2) The Broad Conclusions

[30] With respect to causation, Dr. Hoffman makes several very broad, non-case-specific conclusions. For example, he states that the fuel was not inhaled and that the exposure was outdoors and very low. This, however, appears to either ignore or at least greatly down-play, some of the established facts: for example, the hose exploded in close proximity to Emery; he was covered in fuel for 10 to 20 minutes (as a result of these two factors alone, it could not seriously be maintained that no fumes were inhaled); Emery's gloves may have been porous; he was wearing neither mask nor goggles; and he could not properly wash for seven hours. What are the possible effects of each of these facts?

What if, unknown to Emery, some of the fuel landed in his hair; would sitting in a truck cab for seven hours then amount to "exposure"? What if some of the fuel was under his nails? Similarly, the doctor states that if Emery had been exposed to a "significant level" of fuel, eye irritation would have developed immediately. This does not address the issue at hand: there was no direct exposure of the fuel itself to the eyes; what about exposure to the fumes - could that have resulted in a two-day delay?

[31] Furthermore, even the Commission, in its third question, specifically requested that Dr. Hoffman comment on the possibility of hypersensitivity, he does *not* address that issue. Rather, he merely reiterates the conclusion that science had not established a link between aviation fuel and WG. The need to address individual circumstances appears all the greater in light of the warning that appears on the ATSDR sheets, namely:

This information is important because these substances may harm you. The effects of exposure to any hazardous substance depend on the dose, the duration, how you are exposed, personal traits and habits, and whether other chemicals are present.

[32] There are also problems with Dr. Hoffman's assertion that science had not established a link between aviation fuel and WG:

i) has science established that there is *no* link between aviation fuel and WG?

ii) given that all of the material indicates that there is "little information" on the link between aviation fuel and WG, can it be said that, on a balance of probabilities, there is no link?

iii) is Dr. Hoffman in any position to eliminate Emery's exposure as a causative factor?

iv) would, for scientific purposes, the fact that a person developed symptoms identical to those of a particular disease almost immediately following an industrial accident, indicate that there might be causation between the accident and the disease?

[33] With respect to the issue of medical records, Dr. Hoffman stated that looking at Emery's older medical records was not necessary. Yet, in the summaries Dr. Cheng provided in his initial report [Tab 58], patients ultimately diagnosed with WG generally have a history longer than a mere few months. Given that fact, in my view, it would have been prudent to closely examine Emery's medical history. Furthermore, one doctor's chart makes reference to "burned lungs from hydras ammonia 15 years ago" [Tab 1]. In light of this fact, in my view, Emery's previous medical history was important. After all, if Mr. Emery did have previous problems with his lungs, it could indicate either that the WG did not come from the accident in question, or that, given his previous condition, the accident in question might have been enough to cause WG in this person. These matters should have been put to Dr. Hoffman. ***The Need for Cross-Examination***

[34] On their own, the above considerations need not necessarily result in a requirement for cross- examination. Cross-examination is only needed if the lack of it does not

provide a fair opportunity to controvert or if other equally effective methods of responding are not available: ***McLab*** *, supra,* and ***Innisfil*** *, supra.*

[35] Many of the considerations with respect to credibility and the importance of Dr. Hoffman's evidence were raised in the objections and submissions provided by Emery's counsel. However, the correspondence that has been provided indicates that none of these concerns or questions were raised with Dr. Hoffman himself. In fact, counsel only received a curriculum vitae and a notice that his request for Dr. Hoffman's attendance was denied.

[36] As a result, although written submissions can in certain instances suffice, this is not such a case. There are too many topics that were left unexplored, and too many questions that were left unanswered. This is of particular importance in light of the WCB's Occupational Disease and Worker Benefit of Doubt Policy [Tabs 64, 79 and 84] which states: "if all the evidence for and against a decision on a claim is equally balanced, the benefit of the doubt goes to the injured worker". "Benefit of the doubt" is then further defined as follows:
A worker is not required to provide proof beyond a reasonable doubt in support of a claim for compensation. Adjudication is determined on the balance of probabilities, based on all the facts. If, however, there is any doubt on any issue because the evidence equally supports one or more decisions, the WCB will resolve the issue in the worker's favour.

Given this policy, the answers to questions such as "has science established that there is *no* link between aviation fuel and WG?" and "are you in any position to eliminate Emery's exposure as a causative factor?" were essential in order to give Emery a fair opportunity to correct or controvert Dr. Hoffman's prejudicial statements. Raising these queries in written submissions did not provide Emery an equally effective means of meeting the case against him, as he never received a response to these questions.

[37] It should be noted, however, that it is not with the answers to such questions that this Court need concern itself. Courts have clearly indicated that the issue of whether or not the answers obtained in the cross-examination would or would not have resulted in a different outcome is irrelevant to the consideration of whether or not fairness was accorded. The question of fairness is distinct from the question of the potential outcome. As was stated by the Supreme Court of Canada in ***Innisfil*** :

It must be emphasized that if the appellant has here the right to cross-examine the representative of the Ministry, as I believe he does, it is not for the appellate court to withhold such right because in its judgment it is doubtful, or even impossible, in the view of the Court for the appellant to advance its case by such cross-examination. The decision to exercise the right is solely that of the holder of the right. Combinations

[38] Even if I were to decide that the lack of cross-examination of Dr. Hoffman did not result in a breach of the Commission's duty of fairness, the lack of cross-examination, when combined with other factors, did result in such a breach. Of particular importance is

the analysis of the combined effect is the evidence of Dr. Cheng, upon which the Commission also placed significant emphasis.

[39] Firstly, the reports of Dr. Cheng present many of the same problems seen in the opinions of Dr. Hoffman. For example:

i) Dr. Cheng, in describing the results of exposure to aviation fuel, lists many of the symptoms seen in Emery [Tab 58];

ii) Dr. Cheng checked for a link between WG and organic solvents in general, not specifically aviation fuel;

iii) Dr. Cheng stated in his second opinion that one report, the MSDS, was missing and that it has also been missing at the time he did his original report - what is the effect of this missing report?;

iv) the information he provides from his on-line search seem to pertain to treatment of the disease and problems of diagnosis, rather than etiology. Only one seems to deal with etiology - it pertains to a study that found that the "inhalation of silicon-containing compounds gave a nearly seven-fold risk for WG". Despite this fact, Dr. Cheng does not disclose whether or not Argas contains silicone;

v) Dr. Cheng states that it is " difficult to state whether the condition came on before or after the exposure" - he does not state that, on a balance of probabilities, the condition must have come before the exposure;

vi) although he states that science has not found a link between aviation fuel and WG, he does not state that science has determined that there is *no* link; and

vii) Dr. Cheng was asked to comment on the statistical improbability of Emery suffering from WG almost immediately after the aviation fuel exposure. Dr. Cheng does not address this point.

Secondly, Emery was never given the opportunity to cross-examine Dr. Cheng.

CONCLUSION

[40] Although there is no universal claim to cross-examine, in this case, the denial of Emery's request to cross-examine Dr. Hoffman did result in a breach of the Commission's duty to be fair, and therefore, in a breach of the principles of natural justice. Dr. Hoffman's credibility was in issue, and Dr. Hoffman's evidence was of vital importance to the matters at hand. Given the WCB's Benefit of the Doubt policy, the procedure of written submissions did not provide Emery with a fair opportunity to controvert, nor was it as effective as cross- examination would have been.

DISPOSITION

[41] The appeal is allowed. The decision of the Appeals Commission is set aside, and the matter is returned to the Appeals Commission for a re-hearing.

[42] The Applicant shall have costs.

HEARD on the 12th day of September, 2000.

DATED at Edmonton, Alberta this 10th day of October, 2000.

_____

J.C.Q.B.A.

[1] This question could have been raised in conjunction with material provided by Dr. Cheng, namely Tab 53, p. 13, wherein there is a reference to an acute case of a pilot who was exposed to a certain concentration in the cabin.