

Court of King's Bench of Alberta

Citation: Fushtey v Workers' Compensation Board of Alberta, 2024 ABKB 725

Date: 20241205
Docket: 2301 05102
Registry: Calgary

Between:

Kimberley Fushtey
as Litigation Representative of the Estate of Darryl Alexander Fushtey

Applicant

- and -

Appeals Commission for the Workers' Compensation Board of Alberta, the Workers' Compensation Board of Alberta and Codeco-Vanoco Engineering Inc.

Respondents

Reasons for Decision of the Honourable Justice N. Dilts

Introduction

[1] On March 23, 2018, Darryl Fushtey, husband, father and valued colleague, was killed when the vehicle he was a passenger in was struck head on by a vehicle being driven by an employee of Mourad Group Inc and owned by Blue Chip Leasing Corporation.

[2] Immediately following the accident, Mr. Fushtey's employer, then known as Codeco Consulting (2000) Inc and now known as Codeco-Vanoco Engineering Inc ("Codeco"), notified the Workers' Compensation Board ("WCB") of Mr. Fushtey's death. Codeco reported that Mr.

Fushtey's activity at the time of the accident was for the purpose of his employment. After further inquiries of the employer, the WCB accepted that the accident that ended Mr. Fushtey's life arose out of and occurred in the course of his employment. The WCB therefore contacted Mr. Fushtey's wife to initiate available coverage.

[3] Approximately a year following Mr. Fushtey's death and after Workers' Compensation benefits were paid, counsel for the Estate of Mr. Fushtey ("Estate") contacted the WCB with instructions to investigate the WCB's decision that the accident arose out of and occurred in the course of Mr. Fushtey's employment. The Estate takes the position that Mr. Fushtey was pursuing a personal opportunity on behalf of a group of like-minded investors at the time of the accident and therefore that the accident did not occur in the course of his employment. The Estate seeks to have the WCB deny coverage as doing so would remove the statutory barrier under s 23 of the *Workers' Compensation Act*, RSA 2000, c W-15 ("Act"), leaving the Estate to pursue a civil cause of action against those persons they believe are responsible for Mr. Fushtey's death.

[4] At the request of the Estate, the WCB decision went through a process of internal reviews, including a review by the WCB's Dispute Resolution and Decision Review Body ("DRDRB"). The DRDRB upheld the WCB's decision that the accident happened while Mr. Fushtey was at work and because of work. The Estate then appealed the DRDRB decision to the Appeals Commission for Workers' Compensation ("Appeals Commission") under s 13.2 of the *Act*. The Appeals Commission has exclusive jurisdiction to examine, inquire into, hear and determine all matters and questions arising in respect of an appeal from a decision of a WCB review body.

[5] A hearing of the Appeals Commission was held on August 30, 2018. The following day, a hearing was held into claim coverage regarding a second passenger in the same vehicle as Mr. Fushtey, Jesse Hull, who suffered serious injury. All parties agreed that the evidence in both appeal hearings could be used at either hearing.

[6] On November 8, 2022, the Appeals Commission issued Decision No 2022-0365 upholding the WCB's decision that Mr. Fushtey was a worker at the time of the accident and that the accident in which he lost his life arose out of and occurred in the course of his employment with Codeco ("Appeal Decision").

[7] The Estate now brings an application in the Court of King's Bench appealing the Appeal Decision under s 13.4 of the *Act* on a question of law; it also seeks review of the Appeal Decision under Rule 3.15 of the *Alberta Rules of Court* with respect to those aspects of the Appeal Decision that do not fall within the scope of the statutory appeal.

[8] For the reasons that follow, I find that the issues raised by the Estate are issues of mixed fact and law, reviewable on a standard of reasonableness. I also find that the Estate has failed to show that the Appeal Decision is unreasonable. The Estate's applications are dismissed.

Preliminary Issue of Standing

[9] The Appeals Commission requested standing in these applications to address any questions the Court may have about the Certified Record of Proceedings (the "Record"), the Appeals Commission's procedures and processes, and the operative standards of review. None of the parties objected to the Appeals Commission's request for standing for these limited purposes.

[10] Whether the Appeals Commission is permitted standing on these applications is a matter of discretion: *Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 44 at para 57. In exercising my discretion, I am to balance the need to ensure that there can be a fully informed adjudication of the issues with maintaining and protecting the impartiality of the Appeals Commission. Protecting the impartiality of the Appeals Commission is particularly important where one possible outcome of this proceeding is to return the matter to the Appeals Commission for re-hearing.

[11] Given the narrow role the Appeals Commission proposed to play in these applications, I was satisfied that permitting the Appeals Commission's participation in the applications to the limited extent proposed would not compromise its impartiality. With the agreement of the parties, the Appeals Commission was given standing in these applications.

Background

[12] At the time of his death, Mr. Fushtey was a full time employee working for Codeco. Codeco is a drilling and completions engineering firm providing services to the oil and gas industry. Mr. Fushtey's role at Codeco was as Business Development Executive. His background was in safety and emergency services.

[13] At the time of the accident, Mr. Fushtey and two others, Mr. Hood the driver of the vehicle and Mr. Hull the second passenger in the vehicle, were driving to northern Alberta. The objective of the trip was for Mr. Fushtey and Mr. Hull to conduct due diligence into the business and assets of an oilfield service company called Fire Power. Fire Power provided safety and emergency services to the oil and gas industry. Mr. Hood was an employee of Fire Power. Mr. Hull was neither an employee of Fire Power nor an employee of Codeco. At the time of the accident, Mr. Hull owned his own fire rescue company. He was participating in the evaluation of the business and assets of Fire Power as part of a group of potential investors interested in acquiring a majority interest in Fire Power.

[14] Codeco's evidence was that Mr. Fushtey's job as Business Development Executive involved the assessment and review of the business and assets of various safety companies as part of this business development strategy. Codeco's evidence was that its business strategy was to have groups of investors made up principally of Codeco employees acquire the majority shares of oilfield service companies that offered complimentary services to Codeco. For ease, I will refer to these companies as "associated" companies. After acquisition of an associated company by a group of investors, Codeco would provide office space and centralized services to the associated company and would charge out a portion of its overhead to the associated company. In addition, Codeco and the associated company would refer business to each other.

[15] It was expected that those shareholders of the associated companies who were Codeco employees would benefit from the profitability of the associated company while remaining employees of Codeco. This business development strategy was an opportunity for Codeco to present to its customers a suite of oilfield services through an association of companies while reducing Codeco's overhead, reducing the operating costs of the associated companies by eliminating duplicated services, and allowing Codeco employees who were shareholders of the associated companies to benefit. At the time of the accident and consistent with this business

development strategy, Codeco had an associated company that provided environmental services to the oil and gas industry.

[16] Codeco's evidence was that prior to his death Mr. Fushtey had conducted assessments of potential associated safety companies as part of his job duties, that he was directed by Codeco to do that work, and that his expenses of travel relating to that work were paid for by Codeco.

[17] Codeco's evidence was that Mr. Fushtey was undertaking the review of Fire Power for the same reason. Codeco's evidence was that Mr. Fushtey's investigation of Fire Power for potential acquisition by the investor group was for the benefit of and under the direction of Codeco. Codeco's evidence was that Mr. Fushtey was offered the opportunity to become an investor in the entity that would acquire Fire Power but that he would remain an employee of Codeco.

[18] In contrast, the evidence of the Estate was that Mr. Fushtey was conducting the assessment of Fire Power as a personal investment opportunity on behalf of the investor group, and not at the direction of Codeco. The Estate says that in doing so, Mr. Fushtey was acting in the capacity of a partner in a partnership and doing the work of the partnership at the time of the accident. Under s 16(1)(d) of the *Act*, an individual is not a worker when that individual is a partner in a partnership and is performing work as part of the business of the partnership.

[19] The Estate says the fact that Mr. Fushtey was not acting at the direction of Codeco at the time of the accident is supported by objective evidence including: i) that on the day of the accident, Mr. Fushtey informed his wife that the Fire Power investment could allow him the opportunity to return to leading an emergency services company; ii) that Mr. Fushtey identified Fire Power to Codeco as an opportunity for investment by the investor group; and iii) that documents regarding the potential Fire Power transaction, including due diligence, were directed to Mr. Fushtey's personal email for him to sign in his personal capacity. Moreover, Mr. Fushtey's participation in the purchase of Fire Power was expected to be a personal investment, not something Codeco could mandate. The Estate also submits that because Codeco was unable to acquire Fire Power directly, it is incongruous to conclude that Codeco controlled Mr. Fushtey's activities on the date of the accident.

[20] There is no dispute that Codeco did not intend to acquire any associated company itself, including Fire Power. Nor is there dispute over the fact that Mr. Fushtey had unique and valuable knowledge and experience regarding oilfield safety services. Nor is there any dispute that the potential acquisition of Fire Power by the investor group aligned with Mr. Fushtey's professional goals, or that Mr. Fushtey spoke of those goals to his wife on the date of the accident.

[21] The Appeals Commission found that Mr. Fushtey was traveling under the direction and control of Codeco at the time of the accident and that the work he was doing in assessing the business and assets of Fire Power was an expected part of his duties at Codeco. It found that the primary purpose of Mr. Fushtey's travel was to investigate Fire Power as part of Codeco's business development strategy. Summarized briefly, the Appeals Commission found that:

1. It was reasonable that Codeco would call on Mr. Fushtey to assist in evaluating oilfield safety services companies given his expertise and connections in that area. Mr. Fushtey actively participated in the assessment

of a number of oilfield safety companies at the direction of Codeco prior to looking at Fire Power. There was an established pattern of work by Mr. Fushtey on behalf of Codeco to evaluate the business of potential oilfield safety companies for acquisition by investors for the benefit of Codeco. Mr. Fushtey undertook those assessments as part of Codeco's business development strategy and was reimbursed by Codeco for costs incurred in respect of that work.

2. While Mr. Fushtey's professional goal of leading an emergency services company was part of the reason Mr. Fushtey was traveling on the date of the accident, the primary purpose for his travel was the business of Codeco.
3. The possibility that Mr. Fushtey would participate in the purchase of Fire Power was incidental to Codeco's business development strategy. The acquisition of Fire Power was not a purely personal endeavor. Mr. Fushtey's primary function in traveling to the Fire Power site was for the benefit of Codeco as part of Codeco's overall business development strategy.

[22] Given its findings, the Appeals Commission concluded that the Estate was entitled to Workers' Compensation benefits under the *Act*.

Statutory Appeal

Does the Estate raise an arguable question of law that engages the statutory appeal provision in s 13.4 of the Act?

[23] The Estate has filed both a statutory appeal of the Appeal Decision and an application for judicial review. There are important distinctions between the two. In addition to procedural distinctions, they differ in the nature of the Court's inquiry and in the applicable standard of review.

[24] Under s 13.4 of the *Act*, a statutory appeal of the Appeal Decision is limited to questions of law or jurisdiction. Questions of law are reviewed on a standard of correctness: ***Housen v Nikolaisen***, 2002 SCC 33 at para 8. Given that the *Act* provides a limited right of appeal, any issue that is not a question of law or jurisdiction and instead is a question of mixed fact and law or a question of fact must be considered within the Estate's application for judicial review. The presumptive standard of review for any issues of mixed fact and law or issues of fact is reasonableness: ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 at paras 10 and 23.

[25] As a threshold question on an application such as this one, the Court is required to characterize the issues raised by the Estate on appeal to determine, issue by issue, whether the Estate raises an arguable question of law, or whether the errors complained of are errors of fact or mixed fact and law: ***Alberta (Workers' Compensation Board) v Appeals Commission***, 2005 ABCA 276 at para 17.

[26] The effort of characterizing an issue is a difficult one. To guide in that effort, the Court is to identify the "true target" of the Estate's challenge to determine whether it raises a question of law: ***Alberta (Workers' Compensation Board)*** at para 19. As a hallmark, questions of law more commonly relate to an interpretation of legislation or policy that will have broad implications for future cases: ***Canada (Director of Investigation and Research) v Southam Inc.***, [1997] 1 SCR 748

at para 36. An issue with precedential value might qualify as a question of law whereas the application of the law to particular facts or circumstances will be a question of mixed fact and law: *Alberta (Workers' Compensation Board)* at para 21.

[27] As a result, the threshold question that must be answered in this case is whether the Estate raises an arguable question of law that engages the statutory appeal provision in the *Act*.

[28] The Estate submits that the Appeals Commission committed two errors in law. First, the Estate says the Appeals Commission erred when it terminated its analysis of coverage once it concluded that the accident arose out of and occurred in the course of Mr. Fushtey's employment. It says that the Appeals Commission was obligated to continue its analysis and consider whether under s 16(1)(d) of the *Act* Mr. Fushtey was excluded from coverage because he was doing work as a partner in a partnership at the time of his death. It says the Appeals Commission had the obligation to specifically consider the exclusion in s 16(1)(d), particularly in light of the evidence that Mr. Fushtey was one of a group of potential investors in Fire Power and had expressed to his wife his personal goal of returning to leading a group of employees in an emergency services company. The Estate says this error by the Appeals Commission is not cured by the Appeals Commission's general reference in the Appeal Decision to its obligation to apply the *Act* and Policy.

[29] Second, the Estate submits that coverage should not be extended to Mr. Fushtey under the *Act* given the accepted evidence that part of the reason for Mr. Fushtey's travel on the day of the accident was in pursuit of Mr. Fushtey's professional interests and goals. The Estate argues that because Mr. Fushtey's travel was not exclusively under the direction or control of Codeco, the legal test for causation in WCB Policy 02-01 Part II, Application 1 "Employment Hazards" cannot be met. An accident arises out of employment when it is caused by an employment hazard (WCB Policy 02-01, Part I, Interpretation 2.0). In determining if an injury resulted from an employment hazard, the employment hazard must have contributed to the accident so that, *if it were not for the employment*, the accident would not have occurred at that time (WCB Policy 02-01, Part II, Application 1: Question 1) (emphasis added). The Estate submits that had the Appeals Commission applied this "but for" test to the facts it accepted, coverage would be denied as Mr. Fushtey was not exclusively working under the direction of Codeco when he was killed but was pursuing a personal investment opportunity. The Estate says that the Appeals Commission erred in law when it failed to consider and apply the facts in this case to the "but for" test.

Characterization of the Issues on Appeal

[30] Errors of law arise when an administrative tribunal incorrectly states a legal standard, fails to consider a required element of a legal test, or otherwise errs in its application of a legal test: *Alberta (Workers' Compensation Board)* at paras 22 and 29. Where the decision of a tribunal reflects a misunderstanding of governing legislation or policy, its errors are subject to correction on appeal.

[31] In comparison, the application of a legal standard to a set of facts is a mixed question of fact and law. To the extent the Estate argues that the Appeals Commission erred in its application of the *Act* or Policy to the facts, or argues that the Appeals Commission unreasonably weighed the evidence, the Appeal Decision will be reviewed to determine whether it was reasonable. A decision is reasonable if it is coherent and rational, and where the reasons given for the decision are transparent, intelligible, and justified by the surrounding facts and law: *Vavilov* at paras 85 and 99.

[32] Applying these distinctions to the issues raised by the Estate on appeal, I conclude that neither issue raised by the Estate is a question of law but that both issues engage questions of mixed fact and law.

[33] With respect to the Estate's position that the Appeals Commission was required to expressly consider the exclusion under s 16(1)(d) of the *Act*, its argument has the appearance of falling within the often cited example set out in both in *Southam* at para 39 and *Alberta (Workers' Compensation Board)* at para 22 that it is an error in law when a decision maker considers some but not all of the factors that make up a legal test. The argument is that the Appeals Commission considered factors A, B and C in determining whether coverage was to be extended to Mr. Fushtey, but failed to consider factor D, the operation of the exclusion.

[34] In my view, the Estate's argument cannot succeed. The Estate does not argue that the Appeals Commission misapprehended the legal test. Rather, the true question raised by the Estate is whether the facts required the Appeals Commission to address the exclusion in s 16(1)(d) and, ultimately, whether those facts satisfied the legal test for exclusion. An argument that an administrative tribunal either failed to consider relevant statutory provisions or did not reasonably apply them raises a question of mixed fact and law, not a question of law: *Georgopolous v Alberta (Workers' Compensation Board, Appeals Commission)*, 2022 ABKB 633 at para 29, aff'd 2023 ABCA 285. Questions of mixed fact and law include the question of whether the facts satisfied the legal test or, in this instance, engaged the exclusion: *Alberta (Workers' Compensation Board)* at para 21. That consideration requires that the facts be established before the law can be applied. As such, despite appearing to be a question of law, I conclude the first issue raised by the Estate on appeal is not a pure question of law that can be extracted and analysed distinct from the facts but is a question of mixed fact and law. How the Appeals Commission applies its interpretation of WCB Policy to the facts of a particular case is a question of mixed fact and law: *Georgopolous (KB)* at para 26.

[35] For the same reasons, I am satisfied that the Estate's second issue on appeal fails to raise a question of law that is subject to review on the standard of correctness. I will discuss elsewhere in these reasons the error that I believe is present in the Estate's analysis of the causation provisions in WCB Policy; however, in answering this preliminary question, I am satisfied that the Estate's own submissions make clear that its challenge relates to the application of the facts to the test for causation, rather than to a misapprehension by the Appeals Commission of the legal test. For the reasons already discussed, I am equally satisfied that the second issue raised by the Estate is one of mixed fact and law. The allegation that the Appeals Commission failed to properly apply WCB Policy to the facts is a question of mixed fact and law.

[36] I am therefore satisfied that the issues raised by the Estate fall outside of the scope of a statutory appeal provision under s 13.4 of the *Act*. They will therefore be considered in the context of the Estate's judicial review proceedings.

Judicial Review

[37] Having concluded that the Estate's application does not engage a question of law, the remaining issue is whether the Appeal Decision was reasonable. A reasonableness review finds its starting point in the principle of judicial restraint: *Vavilov* at para 75. A tribunal's reasons for decision, here the Appeal Decision, is the window through which a reviewing Court looks to determine whether the decision was reasonable: *Vavilov* at para 81. In undertaking a

reasonableness review, the focus is on the decision made, including the reasoning process and the outcome. A reasonable decision is one that is based on an internally coherent and rational chain of analysis that stays within the boundaries of the facts and the law: *Vavilov* at para 85.

[38] The issues raised by the Estate on judicial review of the Appeal Decision are:

1. Did the Appeals Commission err in failing to consider the exclusion in s 16(1)(d) of the *Act* that Mr. Fushtey was performing the work as a partner in a partnership at the time of the accident?
2. Did the Appeals Commission err in extending coverage to Mr. Fushtey when it accepted that part of the reason for Mr. Fushtey's travel on the date of the accident was to pursue a personal professional goal?
3. Did the Appeals Commission err by improperly or unreasonably weighing certain evidence, particularly:
 - (a) Did the Appeals Commission misstate Codeco's role in the potential acquisition of Fire Power?
 - (b) Did the Appeals Commission fail to undertake its analysis of whether the accident arose out of and occurred in the course of Mr. Fushtey's employment on a consistent set of undisputed facts to those recorded in its decision respecting Mr. Hull?
 - (c) Did the Appeals Commission fail to give sufficient weight to the evidence of Mr. Hull and Mr. Hood as to Mr. Fushtey's purpose for travel at the time of the accident?
 - (d) Did the Appeals Commission fail to give sufficient weight to the evidence of Mrs. Fushtey as to Mr. Fushtey's state of mind regarding his purpose for travel, especially given the fact that Mr. Fushtey is not present to provide that evidence himself?
4. Did the Appeals Commission fail to give due consideration to the impact of s 23 on the family of Mr. Fushtey?

[39] The parties all agree that the standard of review on the Estate's application for judicial review is reasonableness.

Did the Appeals Commission err in failing to consider the exclusion in s 16(1)(d) that Mr. Fushtey was performing the work as a partner in a partnership at the time of the accident?

[40] To address the issue of the application of the s 16(1)(d) exclusion, it is helpful to first consider the framework within which the Appeals Commission undertook its analysis of claim coverage for Mr. Fushtey.

[41] The Appeals Commission undertook its analysis within what I will call the waterfall framework in WCB Policy 02-01. WCB Policy 02-01, Part I provides that "to be considered compensable, an accident must meet two conditions: it must *arise out of* and *occur in the course of employment*" (emphasis in the original). Both conditions must be present.

[42] An accident arises out of employment when it is caused by an employment hazard (WCB Policy 02-01, Part I: Interpretation 2.0). An accident occurs in the course of employment when it

happens at a time and place consistent with the obligations and expectations of employment (WCB Policy 02-01, Part I: Interpretation 3.0). That an accident occurs at a time and place consistent with a person's employment requires that there is a "relationship" between the individual's employment expectations and the time and place the accident occurred. The factors to be considered when determining whether the time and place of injury are consistent with employment include:

- did the injury occur on the employer's premises?
- was the worker in the process of doing something for the benefit of the employer?
- did it occur during a time period for which the worker was being paid?
- was the worker in that time and place for employment reasons?

(WCB Policy 02-01, Part II, Application 2: Question 2)

[43] As Mr. Fushtey was not at his employer's place of work at the time of the accident, the Appeals Commission considered WCB Policy 02-01, Part II, Application 3 "Travel." Particularly, the Appeals Commission considered whether Mr. Fushtey's travel to northern Alberta to inspect the business and assets of Fire Power was under the direction of Codeco. To do so, the Appeals Commission looked at the purpose of travel, whether the travel was part of Mr. Fushtey's job duties, and the extent of Codeco's control over the travel (WCB Policy 02-01, Part II, Application 3, Travel, Questions 1 and 2).

[44] I am satisfied that the Appeals Commission applied the proper framework to determine whether Mr. Fushtey was killed in an accident that arose out of and occurred in the course of his employment. The travel policy was clearly applicable to the Appeals Commission's determination of whether Mr. Fushtey was a worker. In addition, the Appeals Commission referenced the evidence that supported its conclusion. Codeco's principals provided evidence as to Codeco's business development strategy of increasing Codeco's profitability by creating a network of associated companies for the benefit of Codeco. Their evidence was that Mr. Fushtey's travel to the Fire Power site was under direction of Codeco to investigate Fire Power as an associated company whose majority shareholders would be employees of Codeco.

[45] The Appeal Decision makes clear that the Appeals Commission understood that Mr. Fushtey was one of a group of potential investors in Fire Power, that his investment, if it came to be, would be a personal investment, and that Codeco would not acquire Fire Power itself. Those particulars of the potential transaction are reflected throughout the Appeal Decision. The Appeals Commission's decision rested not on how the transaction might be undertaken, but on how the work formed part of Codeco's business development strategy.

[46] I am also satisfied that Appeal Decision reflects that the Appeals Commission understood the Estate's argument regarding Mr. Fushtey's participation in a partnership and the evidence upon which that position was based. The Appeals Commission dedicated over three pages of its decision to setting out the Estate's position and the evidence on which that position was based, including Mr. Fushtey's unique skills, the communications regarding the Fire Power opportunity and Mr. Fushtey's conversation with his wife. The Appeals Commission also referenced the evidence of Mr. Hull and Mr. Hood regarding their understanding of the purpose of Mr. Fushtey's travel. The Estate's position was noted, considered and rejected.

[47] It is well understood that on a reasonableness review, the reviewing Court is not to reassess or reweigh the evidence before the Appeals Commission. Absent exceptional circumstances, a reviewing Court is not to interfere with the factual findings made by an administrative tribunal: *Vavilov* at para 125. Moreover, the fact that a decision may not include all “arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred” is not a basis to set aside a decision: *Vavilov* at para 91.

[48] The Estate argued that the Appeal Commission was required to continue its analysis of coverage by considering the exclusion in s 16(1)(d) of the *Act* before concluding that Mr. Fushtey was killed in an accident that arose out of and occurred in the course of his employment. The Estate’s position is that the Appeals Commission erred in their findings about Mr. Fushtey’s work patterns with Codeco given the evidence that Mr. Fushtey was pursuing his own personal interest on the day of the accident. The Estate submits that Mr. Fushtey’s travel on the day of the accident was in relation to duties on behalf of the group of like-minded investors, not Codeco.

[49] In its written submissions on this application, counsel for the WCB submitted that implicit in the Appeals Commission’s finding that Mr. Fushtey was a worker is the finding that he was not a partner in a partnership. I agree. The Appeals Commission found that Mr. Fushtey’s travel was undertaken at the direction of his employer and for the primary benefit of his employer. While there was a personal interest component to the trip, that did not displace the primary purpose for the trip. Having concluded that Mr. Fushtey was working under the direction of Codeco when traveling to assess the business and assets of Fire Power, and therefore that the accident arose out of and in the course of his employment, the Appeals Commission was not required to consider the exclusion. The Appeals Commission’s findings themselves make the exclusion unavailable and therefore constitute a complete analysis.

[50] Finally, it bears noting that at the time of the accident, the Fire Power deal was uncertain, Mr. Fushtey’s investment or level of investment was uncertain, and the opportunity for Mr. Fushtey to lead the business was not discussed with the Codeco executive. WCB Policy 06-01 provides that in general, a partnership consists of two or more people joined together in a common business in which they have made a substantial capital investment and where the partnership conducts its business in the name of the partnership (WCB Policy 06-01, Part II, Application 2, Question 10). There was no evidence that the investor group had made a substantial capital investment in a venture. Even had the Appeals Commission been required to consider whether Mr. Fushtey was a partner engaged in the work of a partnership, given the definition of partnership in WCB Policy the evidence could not support the conclusion sought by the Estate.

Did the Appeals Commission err in extending coverage to Mr. Fushtey when it accepted that part of the reason for Mr. Fushtey’s travel on the date of the accident was to pursue a personal professional goal?

[51] The Estate argues that having accepted that Mr. Fushtey had a personal reason for making the trip to the Fire Power site, it could not extend coverage to him as WCB Policy requires that the *sole* reason for Mr. Fushtey’s travel had to be his employment with Codeco. To support its argument, the Estate points to the language regarding causation and the “but for” test in Policy 02-01, Part II. Under WCB Policy 02-01, the worker’s employment must have contributed to the accident, meaning that if it were not for the employment the accident would not have occurred.

The Estate argues that this test for causation requires that employment be the *sole* reason a worker undertook his activities at the time of the accident.

[52] The words in the WCB Policy are to be given their ordinary and grammatical meaning. The language in WCB Policy 02-01 does not require that an individual's employment be the sole reason for travel, nor does it provide that if a worker had multiple reasons for doing the work that would preclude a finding that the work was "for the benefit of the employer."

[53] The Appeal Commission considered Mr. Fushtey's potential for personal involvement in Fire Power; it ultimately found that any future goals Mr. Fushtey may have had in relation to the Fire Power opportunity did not displace the primary reason for his travel on the date of the accident. The evidence supports the Appeals Commission's findings and cannot be interfered with on review.

[54] In addition, I am concerned that the Estate misconstrues the purpose of Policy 02-01, Part II. The "but for" test referred to by the Estate is to be used in determining causation where there may be several causes of injury (WCB Policy 02-01, Part II, Application 7). The "but for" test is to assist in determining the connection between the injury and the work. It does not, as suggested by the Estate, create a requirement that a worker's employment be the sole reason they were undertaking their activities at the time of an accident. The Appeals Commission was not required to determine that the sole reason for Mr. Fushtey's travel was to benefit his employer. Based on the evidence, the Appeals Commission concluded that the primary reason for his travel at the time of the accident was for the benefit of Codeco. The Estate cannot overcome that conclusion because there was evidence that Mr. Fushtey had personal thoughts that the Fire Power opportunity might put him on the pathway to realizing a professional goal.

[55] I am satisfied that the Appeal Decision demonstrates a rational chain of analysis that links the facts in this case to the outcome.

Did the Appeals Commission err by undervaluing or overvaluing evidence and by failing to assign the appropriate weight to the evidence?

[56] The Estate argues that the Appeals Commission's analysis of whether Mr. Fushtey's travel was for work lacks integrity as the Appeals Commission mischaracterized Codeco's role in the acquisition of Fire Power.

[57] To further this argument, the Estate points to paragraph 36.9 of the Appeal Decision as an example of where the Appeals Commission misapprehended or misstated Codeco's role in the proposed Fire Power transaction. In paragraph 36.9, the Appeals Commission says: "We consider [Mr. Fushtey's] involvement in becoming a shareholder was incidental to [Codeco's] strategy to purchase shares in a fire safety company ultimately for [Codeco's] benefit" (emphasis added).

[58] The Supreme Court of Canada in *Vavilov* at para 91 states that an administrative tribunal's reasons for its decision are not to be "assessed against a standard of perfection." Rather, the reviewing Court is to consider whether the administrative tribunal "meaningfully" grappled with key issues or arguments: *Vavilov* at para 128.

[59] While the excerpt from paragraph 36.9 of the Appeal Decision may itself be inexact, looking at the decision as a whole, there is no doubt that the Appeals Commission reached its conclusion that Codeco directed Mr. Fushtey's work understanding that Codeco would not acquire Fire Power or any associated company directly. That is evident looking at the final sentence in

paragraph 36.9 and elsewhere. There is no foundation for the suggestion that the reasoning of the Appeals Commission is undermined in any way by what is at best a minor mischaracterization.

[60] Even were I to agree with the Estate's position that the sentence in paragraph 36.9 is an error and constitutes a flaw in the reasoning of the Appeals Commission, I am satisfied that the flaw is not material and that it is corrected elsewhere. The Appeals Commission's language in this single instance is certainly not sufficient to render the decision unreasonable. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision under review: *Vavilov* at para 100. A reviewing Court is not to overturn a tribunal's decision because of what is at best a "minor misstep" in characterizing Codeco's role in the potential Fire Power transaction: *Vavilov* at para 100. The Appeals Commission demonstrated its understanding that Codeco could not acquire Fire Power. That formed an essential component of Codeco's business development strategy.

Did the Appeals Commission err by improperly and unreasonably weighing certain evidence as to Mr. Fushtey's reasons for travel?

[61] The Estate argues that the Appeals Commission overvalued the evidence from Codeco regarding Mr. Fushtey's participation in the assessment of potential associated companies, particularly in concluding that there was an established pattern of work where Mr. Fushtey evaluated the business of potential associated companies under the direction of Codeco. It argues that the Appeals Commission failed to inquire into the distinctions between the other opportunities that were investigated and the Fire Power opportunity itself. In this regard, the Estate's position is misguided. The relevance of the pattern of Mr. Fushtey's work does not lie in the details as to the potential associated companies, how they came to be identified to Codeco, or the structure of any possible transactions. The relevance is that the opportunities were investigated by Mr. Fushtey under Codeco's direction and as part of his role at Codeco in advancing Codeco's business development strategy. There was adequate reliable evidence on which the Appeals Commission concluded that the investigation of safety companies had become a part of Mr. Fushtey's work with Codeco.

[62] The Estate suggests that the Appeals Commission placed insufficient weight on Mr. Fushtey's personal motives for travel. The Estate argues that the Appeals Commission failed to give due consideration to the evidence of Mr. Fushtey's state of mind and his role in bringing Fire Power to the attention of Codeco. It says the Appeals Commission gave no consideration to the understanding of Mr. Hood and Mr. Hull as to Mr. Fushtey's purpose for travel on the day of the accident. The Estate says that in circumstances such as this where Mr. Fushtey is not able to speak for himself, the Appeals Commission had to look at all available evidence as to his frame of mind at the time of the accident.

[63] As already stated, on a reasonableness review, the reviewing Court is not to reassess or reweigh the evidence before the Appeals Commission: *Vavilov* at para 125. The Appeals Commissions made its findings relying on the evidence of the employer regarding the purpose of Mr. Fushtey's travel and role with the company rather than the anecdotal understanding of Mr. Hull and Mr. Hood, neither of whom were employees of Codeco. It was entitled to do so. Similarly, the fact that the Appeals Commission may not have referred to a piece of evidence in the proceedings regarding Mr. Hull does not mean that the Appeals Commission did not consider it:

Zarooben v Workers' Compensation Board, 2021 ABQB 232 at paras 111-112, aff'd 2022 ABCA 50.

[64] The Estate also suggests that the Appeal Decision contains material inconsistencies that renders it unreasonable. Particularly, it points to para 28.4 of the Appeal Decision referencing the WCB's investigator's interview of Codeco principals on April 16, 2019. It argues that the Appeals Commission or the WCB Investigator characterized Codeco as a "merely" an interested party to the proposed transaction with Fire Power. The Estate maintains that the Appeals Commission cannot conclude that Codeco was controlling the work if it was "merely" an interested party in the potential Fire Power transaction. It argues that a decision in which those inconsistent conclusions are reached must be unreasonable.

[65] I have examined the interview notes of the WCB Investigator from April 16, 2019. The interview itself is recorded in the Investigation Report at tab 43 of the Record. The notes do not contain the language that appears in para 28.4 of the Appeal Decision. Moreover, it is clear in the Appeal Decision that para 28.4 is a summary of the submissions of the Estate, not a record of the WCB Investigator's findings regarding Codeco's role in directing the activities of Mr. Fushtey. The Appeals Commission did not misapprehend the evidence or fail to account for the evidence, including the evidence as to Mr. Fushtey's reasons for travel.

[66] Regarding the Estate's arguments that the Appeals Commission failed to assign the appropriate weight to the evidence it received, I am satisfied that the Appeals Commission considered the evidence in its Appeal Decision, including the evidence of Mr. Hull and Mr. Hood and the evidence from Mrs. Fushtey. The Appeals Commission explained its reasons for relying on Codeco's evidence in concluding that the accident arose out of and occurred in the course of Mr. Fushtey's employment. Under the reasonableness standard, deference is extended to the Appeals Commission's findings of fact: *Vavilov* at para 125.

Did the Appeals Commission err by failing to consider the outcome of its decision on the interests of the Fushtey family?

[67] The Appeals Commission was live to the impact of its decision on the Estate's right to pursue a civil claim. It was the very foundation of the Estate's position.

[68] The Appeals Commission attached Appendices I and II to the Appeal Decision which included s 23 of the *Act* and a statement as to its effect. The Appeals Commission undertook its analysis of the issues understanding the Estate's concerns and delivered a reasonable decision reflecting the law and the facts.

Conclusion

[69] The Appeal Commission’s decision is rational and logical. There is a clear path of reasoning following the *Act* and WCB Policy that leads from the evidence to the conclusions reached. The Estate’s applications are dismissed.

Heard on the 13th day of November, 2024.

Dated at the City of Calgary, Alberta this 5th day of December, 2024.

N.F. Dilts
J.C.K.B.A.

Appearances:

Michael Vogel and Leslie Taylor
Vogel LLP
for the Applicant/Appellant

Bryanna White
Workers’ Compensation Board of Alberta
for the Respondent, Workers’ Compensation Board of Alberta

Mohammad Ahmad
for Respondent, Codeco-Vanoco Engineering

Blake Hasfo
McLennan Ross LLP
for Interested Parties, Mourad Group Inc. & Blue Chip Leasing Corporation

Christie Webber
for WCB Appeals Commission