

## Decision of the Appeal Division

**Number:** 00-1188, 00-1189  
**Date:** August 4, 2000  
**Panel:** John Steeves, Paul Petrie, Jill M. Callan  
**Subject:** Section 96(4) Referral - Whether disabled at the work at which employed under section 6(1)

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- (1) This is a decision with regard to two matters. The first is an appeal on behalf of the worker of the Review Board findings dated April 5, 2000. The second matter is a referral by the President of the Board pursuant to section 96(4) of the Workers Compensation Act (the Act) with regards to the same Review Board findings.
- (2) At the request of the worker, an oral hearing was held by the Appeal Division on July 27, 2000. At this hearing, both the worker and the employer were represented by counsel.

### Issue(s)

- (3) The issues in this decision include whether the worker was disabled at the work at which he was employed for the purposes of section 6(1) of the Act; whether he had a functional disability pursuant to section 23(1) of the Act and the extent of that disability; the effective date of any pension; and whether the worker is entitled to a loss of earnings pension pursuant to section 23(3) of the Act. The worker suffers from bladder cancer. With regards to the President's referral pursuant to section 96(4) of the Act the issue is whether there was an error of law or contravention of policy with regards the Review Board finding of April 5, 2000.
- (4) For the reasons given below, we do not find an error of law or contravention of published policy with respect to the section 96(4) referral. With respect to the appeal our decision is that the worker was disabled from earning full wages at the work at which he was employed, he is entitled to wage loss while totally temporarily disabled for a resection in October 1994, he has a functional disability in the amount of 7.5% of total effective October 1994 at the conclusion of wage loss and he is not entitled to a loss of earnings pension.

## Background

- (5) The worker was employed for a number of years in the aluminum industry and the employer's report of injury states that the worker's occupation was as a cathode liner. The worker is a life-time non-smoker.
- (6) In July 1994, the worker had some tests which showed an abnormal urine cytology. A cystoscopy and resection of the tumour was performed on October 12, 1994. At this time a diagnosis of bladder cancer was confirmed. On the advice of his doctors, the worker had cystoscopies every six months for two years and since June 1999 he has had one per year. Cystoscopies in March and October 1995 indicated no abnormalities. However, there was a recurrence in June 1996 and a Grade I lesion was resected.
- (7) On May 29, 1995, the worker's general physician submitted a medical report to the Board with regards to a diagnosis of bladder carcinoma. The worker completed an application for compensation dated June 19, 1995 and the employer's report of injury is dated July 14, 1995.
- (8) In July 1994 the worker considered an early retirement offer from the employer but declined this offer. A subsequent offer was made by the employer and the worker accepted this on November 30, 1994 with retirement effective February 1, 1995. Although the offer of early retirement by the employer expired November 25, 1994, it was extended in the case of this worker.

## Adjudication at the Board

- (9) In decisions dated August 1, 1996, February 7, 1997 and March 5, 1997, the Board denied the worker's claim for compensation.
- (10) In a decision dated August 1, 1996, it was acknowledged that the worker had a 2.5% level of impairment, according to the Board's Medical Advisor, with regards to his bladder cancer. However, because the worker's claim for compensation was made after his retirement, the Board concluded that he was not disabled from earning full wages at the work at which he was employed as required by section 6(1)(a) of the Act. The letter of February 7, 1997 was a managerial review of the "injury date set out in the August 1, 1996 decision. The decision informed the worker that an October 12, 1994 "injury date" was established and the worker was not entitled to wage loss payments. The decision of March 5, 1997 was similarly a manager's review and this also confirmed the original decision.

(11) The worker appealed these decisions to the Review Board.

### **Review Board Findings of April 5, 2000**

- (12) In findings dated April 5, 2000, the Review Board allowed the worker's appeal, although there was a dissenting member of the panel.
- (13) The panel appears to be unanimous in finding that the worker was disabled from earning full wages at the work at which he was employed, although the dissent is more of an assumption of this finding than an express finding. The panel was also unanimous in finding that the worker's retirement effective February 1, 1995 was a matter of personal choice.
- (14) Where the Review Board panel members differed was on the issues of the amount of the functional pension and the effective date of the pension. The majority found that the worker was entitled to a functional pension of 7.5% based on 5% for medical disability and 2.5% for subjective complaints. The dissent concluded that the worker was entitled to only 2.5% of total. With regards to the effective date, the majority found that the worker's pension should be effective in July 1994, while the dissent thought that the pension should be effective in October 1994.
- (15) It was these findings that the worker appealed to the Appeal Division pursuant to section 91 of the Act and which the President has referred to the Appeal Division pursuant to section 96(4) of the Act.

### **Referral by the President**

- (16) In a memorandum dated May 3, 2000, the President referred the Review Board findings of April 5, 2000 to the Appeal Division pursuant to section 96(4) of the Act.
- (17) The President's memo, prepared by the client services manager, Disability Awards, noted sections 6(1), 23 and 29 of the Act as well as Item #26.30 of published policy of the Governors (now the Panel of Administrators). The memo also noted previous Appeal Division Decisions #92-1078, #92-1093, #96-0727 (12 WCR 291) and #98-0972. According to the President, the Review Board erred in law and contravened published policy by "ignoring and not applying" the requirements of section 6(1)(a) of the Act and policy item #26.30.
- (18) We set out an excerpt of the President's referral which describes the details of the President's concerns:

[The worker] met the requirements under Section 6(1) for the two periods of temporary disability prior to his retirement. However, it is submitted that before other compensation can be paid (i.e. a pension award), he must again fulfill the requirements under Section 6(1). In [the worker's] case, it is submitted that, given his retirement, he is not disabled from earning full wages at work, and therefore does not meet the requirements under Section 6(1) and is thus not eligible for a pension award.

It is submitted that the Review Board panel further erred by:

- (a) classifying future recurring treatment as a permanent disability, rather than a periodic, temporary disability;
- (b) not distinguishing between permanent impairment and permanent disability; and
- (c) failing to establish that [the worker] was permanently disabled from working due to the bladder cancer as specified by RSCM Policy item #26.30 and Section 6(1) of the *Act*.

Periodic, recurring, cystoscopies do not constitute a permanent disability. While undergoing these treatments, [the worker] would be temporarily disabled from work. Although in Appeal Division Decision #92-1093 the panel stated that requiring cystoscopies equated to a permanent impairment, they also stated that "it is disabling every time it occurs". This suggests that, during these periods of recurrent disability, the worker would be entitled to temporary benefits under Section 29 or 30 of the *Act*, and benefits would only be payable only as long as the disability lasts.

Therefore, [the worker] would only be entitled to temporary benefits while undergoing treatment that disabled him from working. However, after his retirement date, he would not be entitled to temporary wage loss benefits, as he will not incur a loss of earnings.

With respect to [the worker's] condition, it is recognized that he has a permanent impairment that occasionally disables him; however, this should be distinguished from a permanent disability. His permanent impairment cannot be classified as a permanent

disability, as it does not permanently disable him from working in the intervening time periods between cystoscopies. Aside from the annual or bi-annual cystoscopies, he would be fit to continue to work, had he not retired. It is notable that in Appeal Division Decision #92-1093, the panel stated that ongoing cystoscopies would “disable him periodically”.

Furthermore, RSCM policy item #26.30 also states that disablement for the purposes of Section 6(1) may result where the disease causes: an absence from work; inability to work full hours; exclusion from work to prevent infection; or the need to change jobs. As [the worker] has retired, the yearly medical procedure will not cause an absence from work; an inability to work full hours; a removal from his position; nor need to change job.

### **Applicable Provisions of the Act and Governors’ Policy**

(19) The issue of whether the worker was disabled from earning full wages at the work at which he was employed arises from the wording of section 6(1) of the Act, which is as follows:

(1) Where

(a) a worker suffers from an occupational disease and is thereby disabled from earning full wages at the work at which the worker was employed or the death of a worker is caused by an occupational disease;

(b) the disease is due to the nature of any employment in which the worker was employed, whether under one or more employments,

compensation is payable under this Part as if the disease were a personal injury arising out of and in the course of that employment. A health care benefit may be paid although the worker is not disabled from earning full wages at the work at which he or she was employed.

[emphasis added]

(20) Pensions for workers' compensation in British Columbia are authorized by section 23(1) and 23(3) of the Act and they are as follows:

- (1) Where permanent partial disability results from the injury, the impairment of earning capacity must be estimated from the nature and degree of the injury, and the compensation must be a periodic payment to the injured worker of a sum equal to 75% of the estimated loss of average earnings resulting from the impairment, and must be payable during the lifetime of the worker or in another manner the board determines.
  - (3) Where the board considers it more equitable, it may award compensation for permanent disability having regard to the difference between the average weekly earnings of the worker before the injury and the average amount which the worker is earning or is able to earn in some suitable occupation after the injury, and the compensation must be a periodic payment of 75% of the difference, and regard must be had to the worker's fitness to continue in the occupation in which the worker was injured or to adapt to some other suitable employment or business.
- (21) The President of the Board is authorized by section 96(4) of the Act to refer a Review Board finding in certain circumstances. Section 96(5) and section 91(2) of the Act may be applicable as well. These sections are set out as follows:
- 91(2) Where an appeal is commenced under subsection (1), the appeal division may direct the review board to reconsider the matter either generally or on a particular issue, and the appeal division may withhold its decision pending the finding of the review board.
  - 96(4) The president may, not more than 30 days after a finding of the review board is sent out, refer the finding to the appeal division for redetermination on grounds of error of law or contravention of a published policy of the governors.
  - 96(5) Section 91 (2) applies to a redetermination under subsection (4).
- (22) Item #26.30 of the governors' policy, "Disabled from Earnings Full Wages at Work", is in the Rehabilitation Services and Claims Manual (the "Manual") is applicable to this case. An excerpt of that policy is as follows:

There is no definition of “disability” in the Act. The phrase “disabled from earning full wages at the work at which the worker was employed” refers to the work at which the worker was regularly employed on the date he or she was disabled by the occupational disease. This means that there must be some loss of earnings from such regular employment as a result of the disabling affects of the disease, and not just an impairment of function. For example, disablement for the purposes of Section 6(1) may result from:

- an absence from work in order to recover from the disabling affects of the disease;
- an inability to work full hours at such regular employment due to the disabling affects of the disease;
- an absence from work due to a decision of the employer to exclude the worker in order to prevent the infection of others by the disease;
- the need to change jobs due to the disabling affects of the employment.

A worker who must take time off from his or her usual employment to attend medical appointments is not considered disabled by virtue of that fact alone. However, income loss payments may be made to such a worker (see #83.13).

### **Positions of the Parties**

- (23) The worker and the employer were agreed on a number of substantial issues.
- (24) They are agreed that the worker was exposed to carcinogens at work, that he suffered from bladder cancer, that the carcinogens he was exposed to are known to be associated with bladder cancer and, therefore, the work was of causative significance in the onset of the cancer. The worker and employer are agreed that the worker was disabled from earning full wages at the work at which he was employed and they are agreed that he is entitled to a pension pursuant to section 23(1) of the Act.
- (25) The worker and employer differ on the amount of the pension. Before the Appeal Division, the worker submits that he is entitled to a pension in the amount of 15% of total and the employer submits that the pension should be 7.5% of total.

- (26) As background, as above, the Review Board majority found that the worker was entitled to a 7.5% pension and the majority and the dissent thought the pension should be 2.5% of total. Further, the Board medical advisor's opinion was that the worker was entitled to 2.5% of total, but the Board's position in the decisions appealed to the Review Board and in the referral to the Appeal Division is that the worker should not receive a pension because of the wording of section 6(1) of the Act.
- (27) The worker and employer also disagree on the question of whether the worker is entitled to a loss of earnings pension pursuant to section 23(3) of the Act. The worker submits that he is unemployable and is entitled to a 100% loss of earnings pension and the employer submits that, because of the retirement of the worker, no loss of earnings pension is payable.
- (28) Finally, there is an issue of the effective date of any pension. The worker takes the position that any pension should be effective in July 1994, the date of the first abnormal urine cytology. The employer did not take a firm position on this issue but suggested that the Appeal Division consider an effective date of October 1994 when the resection and diagnosis occurred. The Review Board majority thought the effective date was July 1994 and the dissenting Vice Chair concluded the effective date should be October 1994. Because of the President's position that no pension is payable, he has not stated a position on the effective date.

### **Decision and Reasons**

- (29) Our decisions and reasons are as follows:
- a) Was the worker disabled from earning full wages at the work at which he was employed?
- (30) We have little difficulty in answering this question in the affirmative.
- (31) On the facts of this case, the worker retired effective February 1, 1995 and his claim was made in May 1995. However, his first symptoms were previous to these events. Specifically, he had a finding of abnormal urine cytology in July 1994 and a resection and diagnosis of bladder cancer in October 1994. At the oral hearing before the Appeal Division, the worker confirmed the information on file that he was working in July and October 1994. For the resection in October 1994, he was in the hospital over night and he was given a general anaesthetic. He experienced pain and bleeding with his urine for three or four days after the procedure. Most important for our purposes is that he missed work as a result of undergoing this procedure and recovering from it.

- (32) As above, governors' policy in Item #26.30 states that a worker is disabled from earning full wages at the work at which he was employed when he is regularly employed on the date he was disabled by the disease. The worker in this case was clearly disabled within this meaning in October 1994. We note that the policy excludes time off from work to attend "medical appointments", but we do not think that the procedure in October 1994 can be characterized as a medical appointment and no one has made that argument to us. In short, paraphrasing governors' policy, the worker was absent from work in order to recover from the disabling effects of his disease in October 1994 while he was still working.
- (33) This alone is sufficient to dispose of this issue. However, we wish to address some other matters.
- (34) The President refers to four previous decisions of the Appeal Division with regards to bladder cancer and all, except one, involving the same employer as in this case. In two of these Decisions (#96-0727, #98-0972), the facts are significantly different than this case. In #96-0727, for example, the worker retired in 1970, but his diagnosis was in 1989.
- (35) Similarly, in Decision #98-0972, there is no work missed as a result of the occupational disease before the retirement. It should be immediately obvious that these two decisions have very different facts from the case before us in this appeal and referral. These decisions have no bearing on the issues before us.
- (36) Perhaps more significantly, the President's referral does not mention all of the decisions on this issue. For example, there is the reported Decision of #92-0658/0659/0660 (8 WCR 145). This decision is important because it is a previous referral from the President of the Board and it relates to the same employer, same cancer and very similar facts to this case. The worker was diagnosed as having bladder cancer in 1986 and he retired in 1988. In between his diagnosis and retirement, he had to undergo regular cystoscopies but had no recurrence since 1986. At page 147, the panel in this decision stated as follows:

According to the worker's evidence, prior to his retirement, he was off work at least seven times due to his compensable industrial disease and received temporary disability benefits for at least 14 days. As well, if he had continued to work, he would have lost occasional days from work for his ongoing cystoscopies. Therefore, the worker's industrial disease did disable him from earning full wages as of 1986.

(37) The difference between the facts of this decision and the facts of the case before us is that the former included a claim and temporary total disability benefits paid before the worker's retirement. In the case before us, there was no claim made until after the retirement. However, on the basis of Board policy, we view this as a difference with little significance. Policy in item #26.30 does not require a claim to be filed prior to retirement. All it requires is disability and the worker in this case had that in October 1994 as above.

(38) The Client Services memo attached to the President's referral raises concerns about the "economic test" discussed by Prof. Ison in his text Workers' Compensation in Canada. That test is described in the following quote from Prof. Ison's book:

In some jurisdictions . . . entitlement to periodic payments of compensation depends upon the claimant being disabled by the disease from earning full wages at the work at which he was employed. In these jurisdictions, disablement from disease is an economic rather than a physical concept. Though there may be physical impairment, pension benefits are not payable unless the impact of the disease requires the worker to withdraw from employment, or to take a lower paying job.

(39) The simple response to this is that the economic test as posed by Prof. Ison has been met in this case. The worker was disabled from earning full wages at the work in which he was employed within the meaning of governors' policy and within the meaning of Prof. Ison's analysis.

(40) As the result of our review of this file and the President's referral, we wish to make one further comment on this issue. Both the worker and employer pointed out to the Appeal Division at the oral hearing that they believed that a President's referral is a significant event and their submissions responded to their perception of this importance. This is supported by the history to section 96(4) referrals, which indicates they were one of the reasons for an Advisory Committee looking into the workers' compensation system in 1988. ("Report and Recommendations to the Minister of Labour and Consumer Services by the Advisory Committee on the Structures of the Workers' Compensation System of British Columbia", 8 WCR 231).

(41) Referrals by the President involve the decisions of three tribunals; the Board, the Review Board and the Appeal Division. All of these bodies are subject to the general principles of administrative law and they apply the Act and governors' policy. In our view, as a matter of administrative fairness, it is important for a

referral from the President to be presented in an impartial and non-partisan manner. That is, when the Board makes a referral to the Appeal Division pursuant to section 96(4) of the Act, it is acting within the mandate of its quasi judicial functions in the same way as it operates when making original decisions and the Board is not in the position of a party advocating one side or another of a claim, appeal or referral. It is a referral and not a partisan argument. When the President makes a referral to the Appeal Division we believe it should include a complete and fair presentation of the case that is being made. This applies generally but, specifically in this case, the absence in the referring memorandum of any reference or discussion of a previously reported Appeal Division decision on a previous President's referral, which decided issues very similar to the ones raised by this referral, is of concern.

(42) We acknowledge the constraints placed on the President by the requirement to file referrals within 30 days of the Review Board findings. If this is an obstacle to receiving fully researched referrals then the Appeal Division would be receptive to a request from the President to develop ways to ensure the Act is complied with but also ensuring there is time to fully research a referral.

(43) We do not find an error of law or contravention of published policy on this issue and we find no grounds pursuant to section 96(4) to set aside the Review Board finding on this issue.

b) Is the worker entitled to a pension pursuant to section 23(1) of the Act, and, if so, what should his pension be?

(44) In our view, the worker is entitled to and should be paid a functional pension.

(45) We reached this conclusion on the basis of the previous decisions involving the same employer and the same occupational disease, bladder cancer. For example, in Decision #92-0793, the worker's ongoing cystoscopies were considered to be a permanent impairment on the following basis:

It is a regular, physical invasion of his body that is disabling every time it occurs. It requires a general or a spinal anaesthetic and physically disabled him for several days each time. This would interfere with his earning capacity . . . [he] will need to have these cystoscopies for the rest of his life, this is a permanent condition.

(46) Other decisions in similar circumstances are to the same effect.

- (47) In this case, the worker had the initial abnormal urine cytology in July 1994 and then the resection in October 1994. In order to follow medical advice, he is required to have regular cystoscopies at different intervals depending on the results of the cystoscopies. Further, this is a permanent condition in the sense that he will require them for the rest of his life.
- (48) On this basis, we agree with the worker, the employer and the unanimous Review Board finding that the worker has a permanent disability. Although the Board may well agree that the worker has a permanent disability that is a result of his work; they pose an application of the Act that prevents the worker from receiving a pension.
- (49) An issue raised by the President's referral is the number of times section 6(1) must be applied in a specific case. The memorandum by the Client Services manager attached to the memorandum from the President accepts that the worker "met the requirements under Section 6(1) for the two periods of temporary disability prior to his retirement". However, the submission goes on to state that the worker "must again fulfill the requirements under Section 6(1)" before a pension can be paid. Both the worker and employer in this case disagreed with this interpretation of the Act and this panel also disagrees. Section 6(1) can be seen as something of a "gateway" for entitlement to compensation because it provides a threshold test for entitlement to compensation. Put another way, compensation is not defined in section 6(1) and it is very broadly defined in section 1 of the Act to mean "includes health care". Where it is defined is in sections such as section 23 or section 16 of the Act, which deal with pensions and rehabilitation, respectively.
- (50) Once a worker has demonstrated entitlement to compensation for an occupational disease under Section 6(1), there is no requirement in the Act or anywhere else for the worker to go back through section 6(1) in order to obtain a pension, for example. Once the basic entitlement has been established, a claim for compensation is adjudicated for wage loss, rehabilitation matters, pensions and other kinds of compensation under the Act. In this regard we do not see why an application for an occupational disease should be treated any differently than an application for a personal injury (which, incidentally, includes the language at issue in this case in section 5(2)). This analogy to entitlement to personal injury claims is expressly set in section 6(1) of the Act. The memo attached to the submission on behalf of the President accepts that the first two periods of temporary disability prior to the worker's retirement in this case satisfy the requirements of section 6(1). In our view there is no further application of section 6(1) once its requirements have been met. The next legal

step is to consider what form of compensation is payable and there is no requirement or need to re-determine entitlement pursuant to section 6(1).

- (51) The Case Manager's memorandum attached to the President's referral also raises the issue of whether the worker is entitled to a pension when he is not disabled from working "in the intervening periods between cystoscopies" (page 8). We question whether this raises an issue of interpretation of the governors' policy rather than a specific contravention; if it is an interpretation then that is not a matter for redetermination pursuant to section 96 (4) of the Act (Decision 92-1313, 9 WCR 269). We are not aware of governors' policy which specifically addresses the issue of a permanent disability in the case of bladder cancer or cancers generally. Pension decisions for occupational diseases such as cancer are non-scheduled awards as discussed in Item #39.50 of the Manual. The practice is to use the AMA Guides and they, as noted by the Board Medical Advisor, recognize a permanent disability in cases such as this worker. In these circumstances what is done is an interpretation or application of section 23(1) of the Act and, in this case as well as in the case of most permanent disabilities arising from occupational cancers, it is reasonable and even necessary to use established work such as the AMA Guides. We can see no error of law here. Further, in the case of a worker with a resection such as this worker we believe a permanent disability has been established and the fact of being able to continue work is not determinative of this issue.
- (52) We do not find an error of law or contravention of published policy with the Review Board finding that the worker is entitled and should be paid a pension pursuant to section 23(1) of the Act.
- (53) Where there is more disagreement is the extent of the worker's permanent disability. The Board medical advisor thought that the worker had a 2.5% disability, as did the dissenting member of the Review Board panel. The Review Board majority thought that the worker's permanent disability was 7.5% of total and this is the employer's submission as well. The worker's submission is that he is entitled to a permanent functional pension of 15%.
- (54) Class I of the AMA Guides related to impairment of the bladder is, in part, as follows:

**Class I: Impairment of the Whole Person, 0% to 15%**

A patient belongs in class I when the patient has symptoms and signs of bladder disorder requiring intermittent treatment and normal functioning between the episodes of malfunctioning.

- (55) There is agreement, beginning with Memo 4 from the Board Medical Advisor, that the worker's medical situation is within Class I of the AMA Guides.
- (56) We have reviewed the previous decisions, which again relate to the same cancer and in the same industry. In Decision #92-0658/59/60, the worker received 7.5% functional disability in similar circumstances to the worker in this case. Our reading of the previous decisions indicates that 2.5% would not properly compensate the worker and something more than 7.5% would not be consistent with the other decisions on this issue. We view the recurrence in June 1996 as significant and we note that the worker has symptoms and signs of bladder disorder "requiring intermittent treatment" with normal functioning "between episodes of malfunctioning".
- (57) On this basis, we conclude that the worker is entitled to a pension pursuant to section 23(1) of the Act in the amount of 7.5% of total. This figure is composed of 5% for medical disability and 2.5% for subjective complaints. The worker's appeal is denied on this issue.

c) Temporary Total Disability

- (58) The worker first lost time from work when he had his resection in October 1994. On the evidence it appears he lost two days' work. We do not have a full record of the specific days absent from work in October. In our view wage loss is payable to the worker for the resection and related procedures, and recovery from it, and we refer the details of this to Compensation Services for a decision on the amount of wage loss. We reach a different result than the Review Board to this extent and our authority for this follows from the appeal filed pursuant to section 91 of the Act, Decision 75 (10 WCR 753) and section 96(3).

d) Effective date of pension

- (59) The majority of the Review Board panel found that the effective date of the worker's pension should be July 1994, the date of the initial finding of abnormal cytology. The dissenting member thought the effective date should be October 1994, the date of the resection. As above, the worker submits that the date should be July 1994. The employer suggests that October 1994 would be appropriate, but they do not take a firm position on that date.
- (60) We are inclined to the view that the worker's disability began in October 1994. We recognize that there was the urine test in July 1994 but there was no diagnosis at that point and, more importantly, no evidence of time away from work. As well, if permanent disabilities in these kind of cases are based on

ongoing cystoscopies it is logical to commence a pension at the same time, making allowances for periods of temporary total disability. And we are concerned about making a pension effective as of the date of the first medical test, albeit a medical test that showed abnormal results.

- (61) In our view, the effective date of the pension should be the day after the end of payment of wage loss in October 1994. We find that this is the date on which the worker's condition stabilized within the meaning of Item #34.54 of the Manual. This would make the effective date of the pension October 14, 1994. We reach a different result than the Review Board to this extent and our authority for this follows from the appeal filed pursuant to section 91 of the Act, Decision 75 (10 WCR 753) and section 96(3).
- e) Is the worker entitled to a loss of earnings pension pursuant to section 23(3) of the Act?
- (62) This issue arises from the worker's appeal and it raises what is perhaps the one factual dispute in this case. The factual issue arises from a disagreement about why the worker retired.
- (63) The worker submits that he retired effective February 1, 1995 because of his occupational cancer. He points out that he was offered an early retirement package in April 1994 and on the advice of his son (who has some expertise in financial planning) decided not to retire. The worker's bladder cancer was diagnosed in October 1994 and a month later, he decided to take a second offer from the employer of early retirement. According to the worker, if he had not suffered from the cancer, he would have worked until age 65. Since he could not work to age 65, he has suffered a loss of earnings as of his date of retirement.
- (64) The employer disputes this account of why the worker retired. The employer accepts that the occupational cancer was undoubtedly a factor in the decision to retire. However, the employer submits that there is no medical evidence to indicate that the worker was disabled from his work as a cathode liner. The Review Board panel was unanimous in finding that the worker retired as a matter of personal choice, although they too recognized that the occupational cancer was a factor.
- (65) We have reviewed the medical evidence on this issue in some detail and we are inclined to the view of the employer and the Review Board panel. There are a number of references to the worker's ability to work past February 1, 1995, but the worker's attending physician's report of May 21, 1995 captures the point when the following statement was made, "workman retired on 'Early retirement'

Basis + not because of CA. of Bladder". (reproduced as written) The reference to "CA." is shorthand for cancer.

(66) We recognize the worker's concern that whether a person can work or not is not entirely a medical issue, since it requires consideration of matters such as the "worker's fitness to continue" to work as set out in section 23(3) of the Act. However, the medical evidence is very relevant to the issue of fitness to work and we find the medical evidence determinative on this issue. Moreover, the non-medical evidence is that the worker was able to and did continue to work at his regular position for approximately three months from the date he agreed to retire until the effective date of the retirement, November 1994 to February 1995. We recognize that the worker's cancer was an important event in his decision to retire

(67) On this basis, our decision is that the worker is not entitled to a loss of earnings pension pursuant to section 23(3) of the Act. The worker's appeal is denied on this issue. Counsel for the worker urged us to obtain all documents from the employer relating to the employer's retirement proposal to the worker. Since we conclude the retirement was primarily a matter of personal choice we do not think this is necessary.

f) Is the worker entitled to re-imbursement for legal costs for this appeal and President's referral before the Appeal Division?

(68) Counsel for the worker submits that legal costs for the worker should be reimbursed pursuant to section 100 of the Act. In our view legal costs are an unusual remedy and their need has not been demonstrated in this case. While the worker could not control the initiation of the President's referral he did commence an appeal pursuant to section 91 of the Act and has had, as above limited success with that appeal. Also, we cannot find any unusual conduct on the part of the employer in this case and, indeed, they have assisted the worker to the extent that there was agreement by the worker and the employer on various issues. In these circumstances, we find there is no basis on which to depart from the governors' policy in Item #100.40 of the Manual.

g) Is the worker's son entitled to reimbursement for two days holidays to attend the worker's hearing and give evidence?

(69) Policy on this issue is contained in Item #100.12 of the Manual as follows:

In the case of appeals to the Appeal Division, if an oral hearing is to be held outside the area in which a party resides, the Appeal Division may on request make provision for travel costs in advance

of the oral hearing. This would include transportation and accommodation in the Board's Richmond Residence for the appellant and respondent, and would be provided without regard to the outcome of the appeal. Other costs in connection with attending the hearing will be determined in the normal fashion at the discretion of the panel. (emphasis added).

- (70) This policy specifically covers the parties to an appeal and the worker's son in this appeal is not a party. The Appeal Division is also given a general discretion by this policy and the question is whether we should exercise it in this case.
- (71) The Appeal Division provided an interpreter for the worker so his son's attendance was not necessary for that purpose. We appreciate the emotional support provided by his son but we cannot reimburse costs on that basis. While the hearing was not held in the worker's home town, this was, after discussions with the worker's counsel and the Appeal Division, paid the expenses of the worker to attend the hearing in Richmond. His son also gave evidence that was of some assistance to the panel although, strictly speaking, this could also have been given in writing. For similar reasons, we do not think the son's attendance was required or necessary as described in item #100.30 of the Manual.
- (72) In these circumstances we cannot reimburse the son for his two days' holidays.

### **Summary**

- (73) We make the following findings:
- a) There is no error of law or contravention of published policy in the Review Board majority finding of April 5, 2000 and we have not redetermined any portion of that finding pursuant to section 96(4) of the Act.
  - b) The worker was exposed to occupational carcinogens which were of causative significance for his bladder cancer. He is a life time non-smoker.
  - c) The worker was disabled from earning full wages at the work at which the worker was employed for the purposes of section 6(1)(a) of the Act.
  - d) The worker is entitled to wage loss payments for time loss associated with his resection, any other related procedures and recovery in October 1994. This is referred to Compensation Services for investigation and a decision.

- e) The worker is entitled to and should be paid a pension pursuant to section 23(1) of the Act on the basis of 5% for medical impairment and 2.5% for subjective complaints. Any age adaptability entitlement will be calculated by the Board.
  - f) The effective date of the pension is the day after the last day of wage loss in October 1994.
  - g) The worker is not entitled to a loss of earnings' pension pursuant to section 23(3) of the Act.
  - h) The worker's legal costs are not payable.
  - i) Reimbursement for two days holidays for the worker's son to attend the worker's hearing is not payable.
- (74) As a final matter, we wish to thank counsel for their assistance on this matter.

*Editor's Note: This decision has been edited for publication and for the purposes of complying with the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165.*