WORKERS' COMPENSATION

REPORTER

Decision of the Appeal Division

Number: 00-1770
Date: November 9, 2000
Panel: Jane MacFadgen, Patrick L. Byrne, Teresa White
Subject: Allergic Reactivity to Chromate and Thiuram as an Occupational Disease

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(1) The worker appeals the November 27, 1998 findings of the Workers' Compensation Review Board (Review Board). The Review Board denied the worker's appeal from a January 3, 1997 decision of a claims adjudicator denying his request to be assessed for permanent functional impairment. The Review Board allowed the worker's appeal from the June 5, 1998 decision of a vocational rehabilitation consultant to the extent that it awarded retroactive job search benefits from May 16–July 1, 1998, and further rehabilitation assistance to assist him in replacing his pre-injury earnings. The Review Board denied the worker's request for wage top-up until May 15, 1998.

(2) Both the worker's and employer's representatives have provided extensive written submissions. An oral hearing was not requested, and we find that the issues raised in this appeal can be properly considered upon the basis of the evidence and submissions on file.

(3) The jurisdiction of the Appeal Division in this appeal is found in section 91 of the *Workers Compensation Act* (the Act). Under section 96(3) of the Act, the Appeal Division "may reopen, rehear and redetermine any matter that has been dealt with by the Review Board." The Appeal Division also has the discretion "to initiate and to conduct a full inquiry into all of the issues arising out of an appeal once the matter is before it" (Decision No. 75 of the governors, 10 *Workers' Compensation Reporter* 753).

Issue(s)

(4) There are two issues in this appeal: whether the worker is entitled to a pension assessment under sections 23(1) and (3) of the Act and, if so, according to what criteria; and whether the worker is entitled to vocational rehabilitation assistance in the form of a wage top-up for the period January 12–May 15, 1998.

(5) With respect to the first issue, the worker's representative submits that policies #29.20 and #30.50 of the *Rehabilitation Services and Claims Manual* (the Manual) are unlawful and contrary to section 23(1) of the Act.

Background

(6) The worker stopped working on June 14, 1996, and sought medical attention for bilateral dermatitis on his hands and forearms. He was then 33 years of age, and had been working for about six years as a machine operator for the employer, a manufacturer of concrete products.

(7) The Workers' Compensation Board (the Board) accepted his claim for bilateral hand contact dermatitis related to his exposure at work to chromate and thiuram, substances which were present in cement, rubber and leather gloves. The Board paid the worker temporary wage loss benefits for the period June 17–September 8, 1996.

(8) The worker was assessed by a dermatologist, Dr. H. His July 11, 1996 consultation report noted that it was not uncommon for an allergic contact dermatitis (A.C.D.) to develop to cement, usually after a long period of exposure. He noted that the worker had been in the cement industry for 16 years and that a change of occupation was likely necessary, if he proved to be allergic to cement. He also planned to assess the worker for A.C.D. to rubber, as the distribution of his forearm dermatitis approximated the localization of the rubber gloves which he wore at work.

(9) Dr. H reported on July 18 that the worker's patch tests were positive for a contact allergy to potassium chromate and to thiuram mix. In view of the distribution of the dermatitis and the lack of a family history of atopy, Dr. H concluded that the worker had likely developed an A.C.D. to both cement/chromate and some of the rubber constituents of gloves. Although Dr. H noted that the employer had found an occupation that would not involve exposure to cement dust or wet cement, which he hoped would avoid any further problems, he commented that "cement allergy can be very intractable and difficult to treat and sometimes leads to necessity for a change in employment." He wrote that the condition of the worker's skin had improved significantly with the ointments which he had prescribed.

(10) The worker's attending physician, Dr. B, reported on August 9 that the worker's hands were healing nicely. He noted that the worker had tried a half-day at work with careful protection of his hands and arms, and had another breakout of dermatitis on his hands. Dr. B queried whether he would be able to do this work again.

(11) A Board medical advisor examined the worker on September 4, 1996. He noted that another patch test was scheduled for September 16 because some of the initial test results were equivocal. The worker told him that he had visited the plant on several occasions since he had stopped work in mid-June, and his skin symptoms had flared up just walking back into the workplace for a very short period. He also noted that he had returned to work for a full day and had a recurrence of significant symptoms. His problem had not worsened any other times while away from work.

(12) The medical advisor found no obvious skin impairment related to his hand dermatitis, and said that there was no reason to believe that the worker was incapable of returning to his former employment. Although he recognized that the worker might have a recurrence of some

skin symptoms, he thought that the specific cause of his problems had not yet been conclusively established. He noted that most people with dermatitis problems due to factors at work were generally able to continue working with changes such as protective clothing. He referred to an excerpt from a 1992 textbook on dermatology which stated: "In men, allergy to chromate carries a worse prognosis than does sensitization to other allergens. Chronicity and frequent relapses are the rule, and are more frequent than in any other industrial dermatosis. Once established, hand dermatitis tends to continue . . . In general, changing work to avoid contact with cement does not seem to improve the prognosis greatly. Insufficient knowledge of the occurrence of chromate in the environment may account for the poor prognosis. Contributory factors may be persistence of allergen in the skin, and also ingestion of chromium in food."

(13) Based on the medical advisor's opinion, the claims adjudicator wrote the worker on September 16, 1996 that his claim was accepted for bilateral hand contact dermatitis under section 6(3) of the Act. Wage loss on his claim was concluded as of September 8, 1996, because he had recovered and was considered capable of returning to his former work. Although the worker's doctor had advised him not to return to his pre-injury employment, the claims adjudicator considered this to be on a preventative basis only. She advised that the Board's policy limited benefits to the period of exposure; benefits were not paid on a preventative basis.

(14) The worker's follow-up patch tests on September 16, 1996 were positive for thiuram mix, potassium dichromate, tetraethylthiuram disulphide and, possibly, balsam of Peru.

(15) Dr. B continued to report that the worker was not fit to return to work. He reported on October 22, 1996 that the worker had a recent flare-up of dermatitis after picking up some old coveralls which had dust on them. Dr. B wrote that the worker's skin responded to the topical medication, and his main problem was just avoidance at present. He noted that the real difficulty was that the worker would probably have to look at some new work, and he was limited by his grade 8 education.

(16) The Board medical advisor concluded that the second patch test results confirmed an allergic reaction to thiuram and potassium dichromate, which were present in varying degrees in rubber/leather gloves and cement, and which were the most likely cause of the worker's dermatitis. He wrote in memo #7 that the worker would probably continue to have reactions to these chemicals both in everyday life and in many types of work that he might choose to do. He again noted that changing work to avoid contact with cement did not seem to improve the prognosis greatly and that some people, even though they continued to be exposed to cement, could continue working. He wrote:

> You will note that at the time of my medical examination I believe he had recovered to the point where he would be physically capable of returning to his former employment. I recognize that he was at some risk for the development of a recurrence of his skin problems. Recommendations regarding the use of gloves and avoidance of cement were made. Obviously he would not be able to avoid all cement exposure.
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> . . .

> Obviously, whether or not he should continue working in the cement plant it [sic] a matter of judgment and dependent upon any modifications that could be made at work. No doubt that if reasonable modifications are carried out and he continues to experience recurrences of this problem, he should in all likelihood change his work.
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> Based on the information in the literature, I am of the opinion that it is unlikely that this worker's problem even though he is at significant risk of a recurrence, will ever develop into a P.F.I.

(17) Based on the medical advisor's opinion, the claims adjudicator wrote the worker on January 3, 1997 that, even though he was at a significant risk of recurrence, it was unlikely that his problem would ever develop into a permanent functional impairment. This decision letter is the subject of the current appeal.

(18) The Board subsequently decided to provide the worker with vocational rehabilitation assistance on a preventative basis, given the likelihood of recurrence if he returned to his pre-injury job. The Board ultimately paid the worker vocational rehabilitation benefits from September 9, 1996 through to January 11, 1998.

(19) The vocational rehabilitation consultant (V.R.C.) noted in memo #11 that the employer had spoken very highly of the worker, and had tried to accommodate his allergic reaction by shifting his job duties, but his hands still reacted in these jobs. The employer had also tried him on a forklift but he was unsuitable for this work, because he had vision in only one eye. The V.R.C. noted that the worker left school in grade 9 but advised that he did not read or write, and had not really progressed beyond a grade 4 or 5 level. Prior to his work with the employer, he had worked for 11 years doing heavy physical labouring as well as mixing and pouring concrete. Because of the worker's educational barriers, he was given individualized job placement assistance from an external vocational consultant. The goal was to secure employment that would meet his pre-injury earnings level of approximately $823 per week.

(20) The consultant researched employment options in janitorial cleaning, meatpacking, auto wrecking/parts, food production/packaging, plastic fabrication, bottled water companies and towing companies. The Board assisted the worker in obtaining a class 3 driving licence and completing a dangerous goods transport course. It was noted that, with his vision impairment, he would not be eligible to obtain a class 1 licence, which would give him additional employment opportunities, until he had a year's experience with his class 3 licence with no infractions. The consultant explored employment opportunities as a class 3 tow truck driver, working on a commission basis. One potential employer indicated earnings potential of $1,500 to $2,000 per month for drivers operating company-owned vehicles, noting that earnings were higher during the winter months. The consultant noted that the earnings potential for class 1 drivers was higher. In a September 2, 1997 memo, the V.R.C. noted that his market research had confirmed reasonable availability of employment for class 3 drivers in tow truck driving, and driving for waste disposal companies ($15–$20/hr) and topsoil fill companies ($15–$18/hr).

(21) The Board sponsored the worker in a 12 week training-on-the-job (T.O.J.) opportunity as a tow truck driver between October 1997–January 1998. The V.R.C. confirmed in an October 29, 1997 letter that the T.O.J. employer advised that the worker could expect to earn, over the long term, an average of $1,600 gross bi-weekly or greater, as a class 3 tow truck driver with his company. The Board concluded vocational rehabilitation benefits on January 11, 1998 as the worker continued as a commission class 3 tow truck driver with the T.O.J. employer at the conclusion of the T.O.J.

(22) The towing company closed and the worker lost his job on May 15, 1998. The worker sought additional vocational rehabilitation assistance from the Board. He said that his earnings with the T.O.J. employer had never come close to the projected $1,600 bi-weekly. His pay stubs indicated gross bi-weekly earnings ranging from $302 to $618.

(23) In a June 5, 1998 decision letter, the V.R.C. denied the worker further assistance because the Board had fulfilled its vocational rehabilitation mandate by providing him with the skills/qualifications for employment in a new occupation as a class 3 truck driver. This was deemed physically suitable in light of his compensable condition and had a long term earnings potential of up to $20/hour. The letter stated that the worker's current employment situation was not for compensable reasons, but was directly related to economic factors (i.e. closure of the company).

(24) The worker appealed to the Review Board the Board's decision that he did not have a permanent functional impairment, and its denial of further vocational rehabilitation benefits. In support of his appeal the worker submitted a February 17, 1998 letter from his attending physician confirming that he suffered from A.C.D., with confirmed allergies to chromate and other chemicals. The effect of this allergy was that he developed severe contact dermatitis over his hands and face. The doctor wrote that, because chromate was a major component of concrete, it was impossible for the worker to continue working in this industry. Also, he had sensitivity to components of rubber and leather gloves which he had tried to wear to prevent some of this difficulty. He wrote that the worker had worked for 16 years in the concrete industry and it "is apparently not unusual to see this problem develop after a period of long exposure. . . . [The worker] has shown by subsequent exposure to minute amounts of concrete test that symptoms relapse very quickly. It is impossible for him to return to this sort of work."

(25) Pay stubs from the worker's current job as a tow truck driver with another company, where he had been employed since July 1, 1998, showed gross earnings between July 1–September 4, 1998 ranging from $576 to $1,108 gross bi-weekly. The worker also submitted a September 25, 1998 letter from a co-worker who stated that his take home pay from the T.O.J. employer for driving the wrecker and the deck truck from mid-December 1997 to mid-May 1998, was approximately $300–$500 twice a month.

(26) In findings dated November 27, 1998, the Review Board concluded that the medical evidence did not establish that the worker's bilateral contact dermatitis constituted a permanent functional impairment, and denied the worker's appeal on that issue. The Review Board found, however, that the rehabilitation assistance provided to the worker was insufficient to prevent

a long term loss of earnings, and directed the Board to provide him with additional rehabilitation to assist him in replacing his pre-injury earnings. The Review Board also found that the worker was entitled to retroactive job search benefits for the period May 16–July 1, 1998. The Review Board denied the worker's request for a wage top-up between January–May 15, 1998 because his low earnings in that period could have been expected in the short term, as he was still learning his trade, and lacked seniority and experience.

(27) The worker has appealed the Review Board findings. His appeal submission sought: retroactive T.O.J. top-up benefits from January 2–May 15, 1998; assessment for a permanent functional impairment by a specialist in dermatology, according to the American Medical Association (A.M.A.) Guides to the Evaluation of Permanent Impairment for skin disorders; an employability and loss of earnings assessment; and a finding that Manual items #29.20 and #30.50 were unlawful and contrary to section 23(1) of the Act. The worker did not dispute the applicable wage rate or the Review Board's recommendation that he be provided with further vocational rehabilitation assistance and/or specialized job placement assistance.

(28) The worker's representative stated that there was no objective evidence from the T.O.J. employer or the Board that the worker ever would or did earn $1,600 bi-weekly with the T.O.J. employer. He argued that the Review Board's conclusion that the worker's earnings were low between January–May 1998 because of his lack of experience and seniority, was inconsistent with their conclusion that he was unlikely to achieve $1,600 bi-weekly, even with experience and a new job as a class 3 tow truck driver. He also referred to the co-worker's evidence that none of the tow truck drivers working for the T.O.J. employer earned anything close to $1,600 bi-weekly. The worker's T4 earnings with his new employer were $12,302 in 1998, and $30,383 in 1999.

(29) The worker's representative submitted that the evidence from Drs. B and H confirmed that he had A.C.D. caused by exposure to chromates and thiuram in the workplace, which was permanent in nature and precluded him from returning to his pre-injury work and the many other occupations in which concrete was used. He noted that when the worker returned to work, he had an immediate flare-up of his dermatitis after a very brief exposure. He referred to the worker's evidence at the Review Board hearing that he continued to have ongoing outbreaks of contact dermatitis if he wore gloves and/or had contact with any cement products. He submitted that the evidence demonstrated that the worker had an impairment of earning capacity under section 23(1) of the Act.

(30) The representative submitted that the A.M.A. Guides should be used to assess the worker's permanent functional impairment caused by A.C.D., as the Board did not have an applicable disability evaluation schedule for that condition. He stated that his chromate A.C.D. was a chronic medical condition or susceptibility regardless of a change in occupation, and that a permanent functional impairment assessment was required to measure his impairment of earning capacity under the Act.

(31) He submitted that the Board's policy in Manual items #29.20 and #30.50 which limited a worker's entitlement to a permanent disability pension for A.C.D. were unlawful and inconsistent with the express language of section 23(1) of the Act. He argued that section 23(1) of the Act did not limit a worker's entitlement to a disability award where his impairment of earning capacity affected only a "limited number of occupations because of a remaining allergy or

sensitivity." He stated that these policies failed to recognize that an allergy, sensitivity or susceptibility could result in a profound permanent functional impairment in people like this worker. He referred to a prior unpublished Appeal Division decision (#97-0677) which stated that, in a medical sense, an allergy could remain in a worker's body, even when it was asymptomatic, in terms of the long term physical changes involved in the worker's sensitization.

(32) The worker's representative also said that A.C.D. was not simply a "sensitivity" but a "hypersensitivity"/susceptibility that medically precluded him from returning to his pre-injury employment or any other occupation where concrete was used. He stated that there was nothing in the Act which precluded regarding an allergy, sensitivity or susceptibility as a "disability" which could impair earning capacity for the purposes of sections 23(1) and (3). He argued that the A.M.A. Guides indicated medical acceptance for considering asthma and A.C.D. as impairments of differing natures and degrees. The worker had an ongoing need to control outbreaks of his A.C.D. condition by use of prescription hand cream medication and, if the outbreak was severe, his skin condition physically disabled him from working.

(33) The employer's representative submitted that the Board correctly terminated T.O.J. benefits once the worker had acquired the necessary skills to be retained by the T.O.J. employer. He referred to the V.R.C.'s research that wages for class 3 drivers could range from $15–$20/hour, and submitted that the worker could easily transfer his class 3 licence and training to a number of truck driving positions with no impairment of earning capacity. He submitted that there was no objective evidence of permanent functional impairment or impairment of earning capacity in this case. Although the worker's doctor and dermatologist confirmed that he should not work in the cement industry, they did not state that this was a permanent functional impairment.

(34) The employer's representative submitted that Manual policy #30.50 was the applicable policy for skin diseases, not the A.M.A. Guides. That policy specifically stated that no permanent disability pension was payable simply because the worker had developed a susceptibility to react to a certain substance as a result of his work, causing periods of temporary impairment when exposed to that substance, but otherwise causing no complaints. He submitted that the worker was not eligible for an employability assessment as no disability existed, and he had the education and skills for several positions in the same job category, so would not suffer a loss of earnings. Finally, he submitted that Manual policies #30.50 and 29.20 did not conflict with section 23(1) of the Act, since that section required that some disability result from an injury before a disability pension could be granted. He stated the worker did not have a disability when his condition, although still present, was dormant.

(35) The worker's representative responded that a recent change in the driving regulations for monocular drivers precluded him from upgrading to a class 1 driver's licence. He submitted a printout of the worker's gross earnings with his current employer which indicated gross bi-weekly earnings ranging from $576 to $1,565 over the period July 1998–September 1999. The worker's representative stated that none of the market data showed average earnings that would match or exceed the worker's pre-injury wage rate. There was no evidence that the higher average annual earnings canvassed were in jobs that were "reasonably available." He submitted that the most reliable evidence was what the worker was able to earn, either at the T.O.J. employer or in his current employment.

(36) To assist us in the adjudication of this appeal, the panel obtained an independent medical opinion from Dr. S, a specialist in allergy and clinical immunology, with respect to the issue of whether the worker had a permanent functional impairment related to A.C.D. or some other allergic condition/hypersensitivity acquired through workplace exposure. Following an examination of the worker and review of the claim file, Dr. S provided the panel with his opinion in letters dated April 10 and 19, 2000. He carried out lab tests for common food and environmental allergies, but he did not specifically re-test the worker for sensitivities to chromates and thiuram mix. He noted: "Once patients are sensitized to these chemicals, it is likely to be a life-long sensitivity and given the fact he has been tested twice already, there is probably not much point in repeating the test."

(37) Dr. S found no evidence of any dermatitis on the worker's hands or forearms. The worker advised that he had not had further dermatitis since his switch in occupation. Dr. S's diagnosis was A.C.D. related to chromate and thiuram sensitivities for which his workplace exposure was a significant, primary contributing factor. He based his diagnosis on the previously positive skin tests to these chemicals, and the fact that his symptoms flared up after exposure to these products yet he had no problems when he avoided them. That pattern was consistent with a specific sensitivity as opposed to non-specific irritant type eczema which would tend to flare up outside the workplace on a more random continuous basis. He wrote:

> I feel that the worker has developed permanent irreversible changes to his immune system as a result of the delayed type hypersensitivity reactions to chromate and thiuram chemicals. Any exposure to these chemicals in the future on his skin will likely trigger a flare up in his allergic contact dermatitis. Even with prolonged avoidance over the years the sensitivity is unlikely to diminish to any significant degree to allow him to return to work at some point in the future. These changes do persist, even if the worker appears to be asymptomatic by managing to avoid these chemical exposures.
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> . . . I feel that the worker does have an actual loss of body function or a physical impairment because of his hand dermatitis which would prevent him from carrying out certain occupations such as what he was engaged in previously. This prevents him from returning to work as a cement worker or as any other worker who may have exposure to these chemicals for which he is sensitive to. Even in conditions where he is not directly in a cement factory, such as doing construction work, there may be sufficient cement dust exposure that this could trigger his dermatitis again and limit his ability to work in this field.
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> . . .
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> If the worker was to continue to be exposed to chromates and thiuram chemicals it is likely that his hand and forearm eczema would worsen and continue to be a problem with continued exposure.

(38) Dr. S stated that, even if the worker did not return to work with cement, he might have exposures to these substances in everyday living. The panel asked Dr. S for his opinion regarding

the percentage of the worker's permanent functional impairment, if any, with reference to the relevant A.M.A. guidelines for skin conditions. It was Dr. S's opinion that the worker had a Class 2 impairment of 25% of the whole person because:

> . . . his sensitivity to these chemicals will be life-long and even though he had no signs or symptoms of the skin disorder when seen, with future exposure to chromates or thiuram mix (particularly in rubber gloves) this would cause fairly significant exacerbation of his dermatitis. This sensitivity will likely be life-long. He is limited in his ability in the activities of daily living, in terms of being able to do maintenance chores around the home while involving cement work or cleaning of cement or wearing rubber or leather gloves to protect his hands. Intermittent treatment would be required if his hands flared-up again. Certainly he needs permanent avoidance of these chemicals to prevent his eczema from reoccurring.

(39) The parties provided further submissions in response to Dr. S's opinion. The worker's representative stated that the weight of the medical evidence supported a finding that the worker had a permanent bilateral A.C.D., for which a 25% permanent partial disability award should be granted. He submitted that the Board and the Appeal Division had the discretion to use the A.M.A. guidelines to determine the percentage of disability in assessing A.C.D. He reiterated his earlier submission that Manual policies #29.20 and #30.50 were unlawful and therefore could not be relied on to deny the worker's entitlement to a pension award under section 23(1) of the Act, given the clear medical evidence that the A.C.D. impaired the worker's earning capacity.

(40) The employer's representative submitted that the A.M.A. guidelines did not apply in this case because, if any permanent impairment existed, it would be considered a scheduled award, and therefore governed by Manual policy #39.10 which precluded the use of guidelines from other jurisdictions. He reiterated his earlier submission that Manual policy #30.50 clearly applied to this case to prohibit a permanent partial disability award, as the worker's condition caused only periods of temporary impairment following exposure to the noted substances. He noted that Dr. S found no evidence of dermatitis on his hands/forearms at the time of his examination, and he submitted that there was no medical evidence that the worker had suffered an actual loss of body function or physical impairment resulting from his dermatitis, which was the relevant test under Manual policy #30.50. The employer's representative referred to Manual policy #39.00 and stated that the effects of the condition on the worker's daily living and his occupation, referred to in the A.M.A. guidelines and Dr. S's opinion, were not helpful when measuring a permanent functional impairment.

Law and Policy

(41) Section 23(1) of the Act provides that "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 . . . equal to 75% of the estimated loss of earnings resulting from the impairment . . . ." Section 23(3) permits the compensation for permanent disability to be based on loss of earnings, where the Board considers it more equitable.

(42) The Board's published policy #29.20 of the Manual sets out the following guidelines with respect to the compensability of asthma as an occupational disease:

> Compensation is not payable because a worker develops an allergy or sensitivity to a substance or substances as a result of their employment. Compensation may be paid where a workplace exposure to the allergen or substance results in an asthmatic reaction.
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> In the case of a compensable asthma or a reaction of the respiratory tract to a substance with irritating or inflammatory properties, temporary disability benefits are payable until the temporary disability ends or until the worker's symptoms become stabilized. Where the worker's symptoms do not entirely resolve and he or she is left with a permanent impairment of the respiratory system, a disability award may be granted. However, no such award can be made when the worker's symptoms have resolved and they are simply left with the underlying allergy or sensitivity. Not only is the worker not now suffering from the occupational disease set out in Schedule B, but they are not disabled from working. The Board cannot grant a permanent disability award to a person who has the same physical capabilities as they had previous to the occurrence of the occupational disease, but who is precluded from a limited number of occupations because of a remaining allergy or sensitivity. No permanent disability award can be made to a worker with a pre-existing condition when they have returned to their pre-exposure state.

(43) Manual policy #30.50 specifically addresses contact dermatitis as follows:

> Schedule B lists "Contact dermatitis" as an occupational disease. The process or industry described opposite to it is "Where there is excessive exposure to irritants, allergens or sensitizers ordinarily causative of dermatitis."
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> The payment of temporary disability benefits and permanent disability pensions are subject to the same general principles as are set out in #29.20 in respect of asthma or a reaction of the respiratory tract to a substance with irritating or inflammatory properties. Therefore, there is no disability for the purpose of the *Workers Compensation Act* unless the worker has an actual loss of body function or physical impairment resulting from the dermatitis which causes the worker to be disabled from earning full wages at the work at which he or she was employed.
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> Temporary disability benefits are payable while the disability is a temporary one, but cease when it disappears or stabilizes or becomes permanent. If the worker's symptoms do not entirely resolve and they are left with a permanent impairment, a disability award may be granted. However, neither temporary disability benefits nor a permanent disability pension is payable simply because the worker has developed a susceptibility to react to a certain substance as a result of his or her work which causes periods of temporary

impairment if he or she is exposed to the particular substance, but otherwise causes no complaints. Rehabilitation assistance may be provided to assist the worker in obtaining alternative employment which does not expose him or her to the substance in question (see #86.30).

(44) Manual policy #86.30 states that preventative rehabilitation may be provided to workers who are medically deemed to be at increased risk of permanent disability due to vulnerability or increased permanent disability. Once eligibility for preventative assistance has been established, the general rehabilitation process set out in policy #87.00 applies.

Reasons and Findings

Entitlement to Pension Assessment

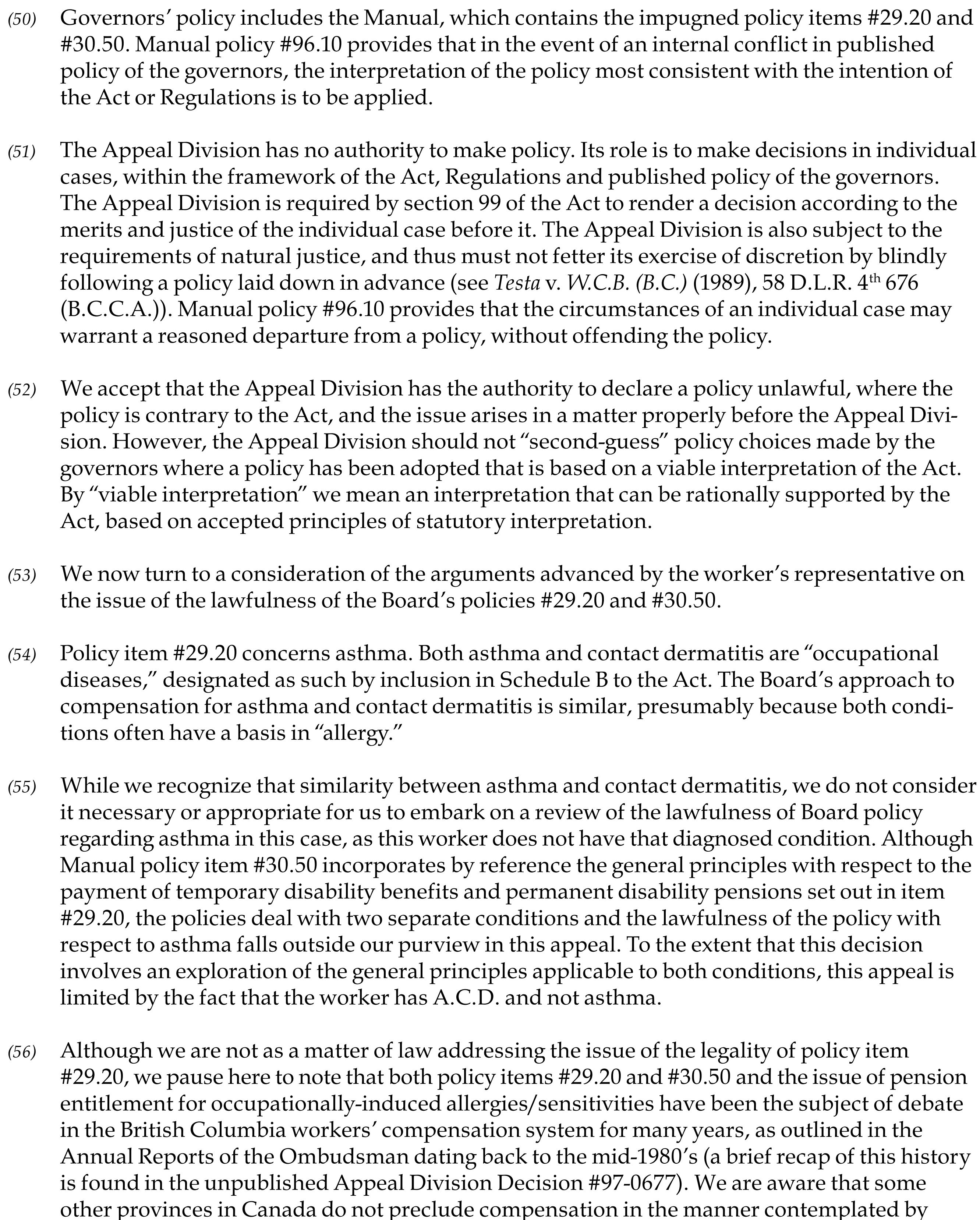
(45) The worker's representative submits that policy items #29.20 and #30.50 are contrary to section 23(1) of the Act, and thus unlawful. He submits that the offending policies use restrictive and/or limiting language that precludes access to a permanent partial disability award for an occupational disease, and that there is no rational support for the policy.

(46) The parties in this case have made no submissions regarding the role of the Appeal Division in determining the lawfulness of governors' policy, or respecting the standard of review that the Appeal Division should apply in such cases. However, we consider it necessary to place the issue arising in this case within the broader context of workers' compensation law and policy.

(47) It is well understood that the workers' compensation system in British Columbia was created by the so called "historical compromise" in which workers relinquished their common law right to sue an employer in the courts for damages for occupational injuries or diseases, and employers relinquished their right to rely on the defences to such actions. The system that resulted is a "no fault" system. The give and take reflected in that "historical compromise" involves both legislation and policy-making.

(48) Section 82 of the Act vests the responsibility and authority for policy-making with the governors. The powers and functions of the governors are currently exercised by a Panel of Administrators under section 83.1 of the Act.

(49) Many provisions of the Act are broad or ambiguous in their wording. Some provisions confer a significant measure of discretion on the Board. As a result, the governors are given the latitude to consider a broad range of factors in developing and adopting policy to guide the exercise of discretion in individual cases. We recognize that the governors' exercise of that policy-making function properly involves a consideration and balancing of numerous competing values and interests in the workers' compensation system at large. The "legal interpretation" of the Act is only one of those factors, although it is a given that the governors may not properly adopt a policy which is inconsistent with or contrary to the Act. An administrative interpretation cannot override the meaning of clear and unambiguous legislation.



(50) Governors' policy includes the Manual, which contains the impugned policy items #29.20 and #30.50. Manual policy #96.10 provides that in the event of an internal conflict in published policy of the governors, the interpretation of the policy most consistent with the intention of the Act or Regulations is to be applied.

(51) The Appeal Division has no authority to make policy. Its role is to make decisions in individual cases, within the framework of the Act, Regulations and published policy of the governors. The Appeal Division is required by section 99 of the Act to render a decision according to the merits and justice of the individual case before it. The Appeal Division is also subject to the requirements of natural justice, and thus must not fetter its exercise of discretion by blindly following a policy laid down in advance (see *Testa* v. *W.C.B. (B.C.)* (1989), 58 D.L.R. 4th 676 (B.C.C.A.)). Manual policy #96.10 provides that the circumstances of an individual case may warrant a reasoned departure from a policy, without offending the policy.

(52) We accept that the Appeal Division has the authority to declare a policy unlawful, where the policy is contrary to the Act, and the issue arises in a matter properly before the Appeal Division. However, the Appeal Division should not "second-guess" policy choices made by the governors where a policy has been adopted that is based on a viable interpretation of the Act. By "viable interpretation" we mean an interpretation that can be rationally supported by the Act, based on accepted principles of statutory interpretation.

(53) We now turn to a consideration of the arguments advanced by the worker's representative on the issue of the lawfulness of the Board's policies #29.20 and #30.50.

(54) Policy item #29.20 concerns asthma. Both asthma and contact dermatitis are "occupational diseases," designated as such by inclusion in Schedule B to the Act. The Board's approach to compensation for asthma and contact dermatitis is similar, presumably because both conditions often have a basis in "allergy."

(55) While we recognize that similarity between asthma and contact dermatitis, we do not consider it necessary or appropriate for us to embark on a review of the lawfulness of Board policy regarding asthma in this case, as this worker does not have that diagnosed condition. Although Manual policy item #30.50 incorporates by reference the general principles with respect to the payment of temporary disability benefits and permanent disability pensions set out in item #29.20, the policies deal with two separate conditions and the lawfulness of the policy with respect to asthma falls outside our purview in this appeal. To the extent that this decision involves an exploration of the general principles applicable to both conditions, this appeal is limited by the fact that the worker has A.C.D. and not asthma.

(56) Although we are not as a matter of law addressing the issue of the legality of policy item #29.20, we pause here to note that both policy items #29.20 and #30.50 and the issue of pension entitlement for occupationally-induced allergies/sensitivities have been the subject of debate in the British Columbia workers' compensation system for many years, as outlined in the Annual Reports of the Ombudsman dating back to the mid-1980's (a brief recap of this history is found in the unpublished Appeal Division Decision #97-0677). We are aware that some other provinces in Canada do not preclude compensation in the manner contemplated by

policy items #29.20 and #30.50. We note that some other jurisdictions (Saskatchewan, for example) have developed policies for awarding pensions for workers who have suffered an immunologic change as a result of occupationally-induced allergies/sensitivities, despite the absence of measurable objective findings of impairment.

(57) Although amendments to British Columbia's policy were under active consideration in the late 1980's and early 1990's, no change was made in the Board's policy with respect to pensions for allergies/sensitivities when the governors approved the revised Manual Chapter 4 on compensation for occupational disease in 1994. Decision No. 77 of the governors (10 *Workers' Compensation Reporter* 761) stated that the revised Chapter 4 was the culmination of extensive public consultation with the worker and employer communities. The revised Chapter 4 included the current policies at issue in this appeal, which state that no pension award can be made where the worker's symptoms have resolved and the worker is simply left with the underlying allergy or sensitivity.

(58) The recent report of the Royal Commission on Workers' Compensation in British Columbia acknowledged the controversy surrounding the entitlement to benefits of workers who had developed work-related allergies or sensitivities as a result of exposure to certain substances in the workplace. At pages 32–33 of its Final Report (Volume 2, Chapter 4), the Royal Commission stated:

> . . . Since such workers are fully recovered while away from the triggering substance, they are not generally considered to be disabled. Nonetheless, they cannot return to their prior employment without undue risk of further health problems arising from continued exposure. The commission is of the view that in circumstances where a worker's ability to earn income is adversely affected, this should be recognized as a form of work-related disability and benefits under the Act should be available accordingly.
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> Current policy permits preventative vocational rehabilitation for a worker in such a position, in order to facilitate a transition to new employment. The commission approves of this approach as generally consistent with the overall scheme of the Act, under which other disabled workers are expected to mitigate losses by taking reasonable steps to obtain alternative employment.
>
> However, a worker who is protectively reassigned or pursues a new line of employment may end up earning less than in the previous employment to which allergies or sensitivities prevent the worker's safe return. In those circumstances, which the commission anticipates would arise relatively infrequently, the commission considers it appropriate to compensate the worker for that wage loss. This practice has been adopted in some other jurisdictions. Ontario, for example, allows compensation for a worker who "has a medical condition that in the opinion of the Board requires the worker to be removed either temporarily or permanently from exposure to a substance because the condition may be a precursor to an industrial disease."

> Such a practice results in similar treatment of workers whose earnings are affected by changes in employment which are due to existing disease on the one hand, and due to steps taken in order to avoid the onset of disease on the other. The commission considers this sound practice in terms of both compensation and prevention. If no compensation is available to workers who incur earnings loss in order to preserve their health, some workers may persist in injurious exposure until their conditions become much more severely disabling than would be the case with timely re-assignment or alternative employment. That would lead to unnecessary harm to workers and perhaps higher overall compensation costs to the system.
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> Therefore, the commission recommends that:
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> 192. the *Workers Compensation Act* be amended such that where a loss of earnings is caused by an underlying work-related sensitization or allergy which is medically diagnosed and results solely from accumulated exposure to specific workplace contaminant(s) designated by the Board pursuant to a schedule designed for that purpose, compensation for such loss is payable in the same fashion as compensation for occupational disease.

(59) It is evident from the preceding general background that deliberate policy choices by the governors underlie the Board's current policy items #29.20 and #30.50.

(60) Section 23(1) provides for compensation for permanent partial disability which results from injury. "Disability" is not defined in the Act, and its meaning is not clearly defined in the Board's published policy. In that regard, Manual policy item #103.82 notes:

> Disability is a word that can and does have many meanings, depending on the context in which it is used. In some contexts disability might refer simply to a physical or psychological impairment. In another context disability might refer simply to an economic impairment, for example impaired earning capacity. In most cases disability refers to the interaction between physical or psychological impairment, and external requirements, the most relevant in the workers' compensation context being the physical and mental requirements of a worker's occupation.

(61) We recognize that the Act does not stand alone. It is part of this province's overall legislative scheme, including the *Human Rights Code* (R.S.B.C. 1996, c.210). We are troubled by the distinction between "allergies" and other injuries/occupational diseases that may not be manifestly disabling but negatively impact a worker's ability to earn a living in the job in which he had been employed.

(62) We are further troubled by what may well be a conflict between section 23 of the Act and the impugned policies. Although we have not in this particular case engaged in an analysis of the "overall" legality of these two policy items, we do consider that the legislative framework into which the policies must be squeezed is, arguably, too narrow for the policies to fit. In our view,

the policies' automatic preclusion of a disability pension for a worker with a severe occupationally-induced allergy who *has* suffered a loss of income, just because the disability is the result of an allergy that does not cause symptoms except with exposure, is problematic and may not accord with a viable interpretation of the Act.

(63) However, we note that section 6 of the Act provides some support for the principles expressed in policy items #29.20 and #30.50, in that compensation is provided only where an worker suffers from an "occupational disease" due to the nature of his employment *and* "is thereby disabled from earning full wages at the work at which the worker was employed." Where both of these conditions are met, section 6 provides that compensation is payable under Part 1 of the Act as if the disease was a personal injury arising out of and in the course of the worker's employment.

(64) The impugned policies rely on the distinction between a worker who exhibits symptoms of asthma or contact dermatitis and one who is simply at risk for those symptoms. The nature of the process by which a disease is determined to be an occupational disease allows that distinction to exist. The "allergy" or "hypersensitivity" underlying the worker's propensity to develop symptoms of asthma or contact dermatitis is not recognized as an occupational disease, either pursuant to Schedule B or by designation pursuant to section 1 of the Act. Thus, there is some legislative support for the policy distinction at issue in this appeal.

(65) The briefing paper which the Board prepared for the Royal Commission on "Medical and legal issues related to the recognition of occupational disease"[1] discusses the intersection between section 6 and the Board's policies regarding compensation for allergies and sensitivities:

> The Board's interpretation of the "disabled from earning full wages" requirement [in section 6] is reflected in its policies dealing with the payment of compensation for allergies and sensitivities. According to these policies, allergic reactions that may appear as dermatitis . . . or asthma . . . are compensable as occupational diseases. However, the underlying sensitivities that cause these conditions do not, in themselves produce entitlement to some benefits. The policies state that, when the worker's symptoms have resolved, he or she is no longer suffering from an occupational disease. Neither is the worker considered to be disabled from working at his or her regular employment.
>
> However, the fact is that a worker who suffers from asthma, caused by occupational exposure to red cedar dust, is incapable of working at his or her regular employment. As a result, this policy had been contentious. Application of the policy means that such a worker will not receive consideration for a permanent disability pension unless his or her symptoms do not entirely resolve or the worker is left with a permanent impairment of the respiratory system.

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[1] Published at www.worksafebc.com/policy/royalcommission/brief4.asp

(66) For reasons that we discuss below, we have concluded that it is not necessary for us to decide in this case whether legislative support for policy items #29.20 and #30.50 can be found in section 6 of the Act, based on a viable interpretation of the Act which is consistent with accepted principles of statutory interpretation.

(67) Nevertheless, we have serious reservations concerning the statement in Manual policy #29.20 (which policy #30.50 applies to the adjudication of contact dermatitis) that a worker suffering from an allergy is no longer suffering from an occupational disease or is no longer disabled once his symptoms have resolved following removal from exposure. We concur with the panel's statement in Decision #97-0677 (which accords with the expert opinion provided by Dr. S in this case) that, in a medical sense, the allergy remains present in the worker's body even when it is asymptomatic, in terms of the long term or permanent physical changes involved in the worker's sensitization. In Decision #97-0677 the panel recognized the worker's latex and gluteraldehyde sensitivities as occupational diseases for the purposes of that particular claim.

(68) The panel in Decision #97-0677 quoted excerpts from Decision No. 333 of the former commissioners (5 *Workers' Compensation Reporter* 96). Decision No. 333 discussed three occupational diseases whose symptoms would resolve (at least in the initial stages) when the worker was removed from the adverse working environment, although permanent sensitivity remained and prolonged and continual exposure to the precipitating factors in the workplace could result in permanent impairment. Those diseases were vibration white finger (Raynaud's Phenomenon), western red cedar dust asthma, and A.C.D.

(69) The panel in Decision #97-0677 noted that, despite this recognition of certain features common to all three occupational diseases, the Board's policies reflected two fundamentally different approaches to the consideration of a worker's eligibility to a loss of earnings pension award in circumstances where the worker was forced to abandon his or her employment as a result of one of these diseases. We concur with the following observations in Decision #97-0677 (at pp. 22–23) regarding the differential treatment which the Board's policies accord to workers with these conditions:

> . . . the analytical basis for the distinction in the treatment of workers with Raynaud's phenomenon (who may be able to prevent symptoms by avoiding cold and vibration but may be assessed for a loss of earnings pension award), and workers with red cedar asthma (who may be able to prevent symptoms by avoiding cedar exposure, but may not be assessed for a loss of earnings pension award) is not clear.
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> A faller may abandon this occupation, to avoid the vibration and cold associated with work using a chainsaw outdoors. A sawmill worker may abandon employment in a sawmill to avoid further exposure to western red cedar dust. Both workers may be largely asymptomatic so long as they avoid further exposure to the causes of their symptoms, and both may face difficulties in obtaining alternative employment. However, according to the policies, only the former would be eligible for consideration of a loss of earnings pension award

(unless there was measurable impairment even after removal from exposure to the causes of the worker's symptoms). The rationale for distinguishing between these two categories is not evident from the policies, particularly in view of the fact that Decision No. 333 recognized that these diseases share certain common features.

(70) Noting the contradictory positions taken with respect to pension assessment for these conditions, the panel in that case suggested that it might be appropriate for the Board to develop a policy which specifically dealt with latex allergy. The then chief appeal commissioner referred this decision to the Panel of Administrators for consideration of whether policy clarification was necessary (see the 1997 Annual Report of the Appeal Division).

(71) To date, the Panel of Administrators has not amended its policies with respect to A.C.D. or pension entitlement for occupationally-induced allergies/sensitivities. We have outlined above our concerns regarding the lawfulness of these policies. We are not as a matter of law, however, determining in this case whether or not the policy is lawful. Because, for the reasons set out below, we find that policy #30.50 should not or does not apply to the worker's circumstances, it is not necessary for us to make such a determination in order to decide the merits of this case.

(72) The Board's designation of a disease as an "occupational disease" can occur in three ways. The first is by recognition by inclusion in Schedule B. Policy item #26.01 states that where the Board is satisfied from the expert medical and scientific advice it receives that there is a substantially greater incidence of a specific disease in a particular employment than in the general population, then that disease may be designated as an occupational disease. Schedule B then defines the particular population.

(73) The second method is through regulation pursuant to section 1 of the Act. Policy item #26.03 lists the diseases that have been recognized in that fashion. Designation or recognition in this manner occurs where the disease is "sometimes due to the nature of a particular employment" but it "does not appear that the disease is more likely to occur in connection with that employment than elsewhere." An example is carpal tunnel syndrome.

(74) The third method is by order dealing with a specific case. Policy item #26.04 provides, in part, that: "If the merits and justice of an individual claim for such a disease warrant its recognition as an occupational disease, the Board may do so 'by order dealing with a specific case' (Section 1)." The same policy item further states that "[a]s the Board repeatedly encounters such claims for a particular disease, it may determine that a higher level of designation or recognition is warranted for that disease."

(75) In this case, we have expert medical opinion, which we accept, that the worker has a life-long allergic reactivity caused by a specific immune reaction to chromate and thiuram chemicals that is likely to be worsened with continued exposure. The allergic reactivity developed, at least to a significant degree, because of the nature of his employment in the cement/concrete industry. We find that the worker has permanent, irreversible changes to his immune system. Any exposure to the chemicals to which he is allergic will cause a reaction which takes the

form of dermatitis. The chemicals are not limited to a particular worksite or worksites. They are present throughout the environment. Even if the worker does not return to working with cement, he may have reoccurrence of dermatitis through exposures in everyday living. If he does, it is likely that his dermatitis will worsen.

(76) We consider that the worker has a unique meritorious and individual disease claim. The worker's case is not one where he must merely avoid one or even a few types of workplaces. The worker must avoid the substances because of the risk of recurring and increasingly severe allergic contact dermatitis. The substances are widespread in workplaces, and particularly in the type of workplaces where one is likely to find a worker with the worker's knowledge, training and experience.

(77) Accordingly, pursuant to section 6(4) of the Act, we designate and recognize the worker's allergic reactivity to chromate and thiuram as an occupational disease for the purposes of this particular claim.

(78) Once it is established that the worker suffers from the occupational disease of allergic reactivity to chromate and thiuram, we do not consider that policy item #30.50 precludes a finding of disability with respect to that particular occupational disease. We find that, in the worker's case, his underlying allergic reactivity is an occupational disease. Furthermore, we accept the opinion of Dr. S that the worker suffers from a degree of permanent functional impairment as a result of his allergic reactivity.

(79) Even if we did not find that the worker suffered from the occupational disease of allergic reactivity to chromate and thiuram, we consider that the merits and justice in this particular case would require us to deviate from a strict application of policy #30.50. It is a well established principle of administrative law that an administrative tribunal must not blindly apply policy. We consider the worker's case to be one where the impact of his allergic condition is substantial. There is no dispute whatsoever that the worker's condition resulted from long term and heavy workplace exposure to the substances to which he is now allergic. The worker's allergy is significant, and further exposures will likely make it worse. It is not likely to diminish to any significant degree so that he may be able to return to his pre-claim work.

(80) The worker worked in the concrete industry for in excess of eleven years. We are satisfied that, but for his occupationally caused allergies to chromate and thiuram, the worker would likely have continued to work in the concrete industry earning wages at least equivalent to his pre-claim income level. The worker's lack of success in replacing his lost income through the vocational rehabilitation process is significant evidence that, in the worker's case, the economic impact of his allergies on his earning capacity is substantial. We are satisfied that the worker has a disability for the purposes of section 23(1) of the Act in that he has an actual physical impairment resulting from his allergies to chromate and thiuram which causes him to be disabled from earning full wages at the work at which he was employed.

(81) The Board medical advisor and Dr. S both expressed the opinion that it is likely the worker will continue to experience reactions both at work and in everyday life. It is apparent that workplace modifications would not protect this worker. Given the severity of the reaction, we do not accept

the Board medical advisor's opinion that whether or not the worker should continue working in a cement plant is simply a matter of "judgment." We consider that a decision by the worker to return to cement work would have to be taken in opposition to the weight of medical advice. We do not consider the worker's failure to return to concrete work to be a matter within his discretion, or a decision made on his own accord. He had little, if any, choice.

(82) As a result, the merits and justice of the worker's case require that policy item #30.50 should not be applied to preclude the worker's entitlement to a permanent partial disability pension, given our finding that the worker has an actual physical impairment resulting from his allergic contact dermatitis which causes him to be disabled from earning full wages at the work at which he was employed. Determination of the worker's entitlement to temporary and permanent disability benefits must be made in accordance with the general principles applied to compensable injuries and occupational diseases, and not in accordance with the policy concerning contact dermatitis.

(83) In summary, we allow the worker's appeal to the extent that we designate and recognize the worker's allergic reactivity to chromate and thiuram as an occupational disease for the purposes of his particular claim pursuant to section 6(4) of the Act. We find that the worker suffers from a pensionable degree of permanent functional impairment as a result of this occupational disease and direct the Board to assess his pension entitlement under sections 23(1) and (3) of the Act. The evidence before us indicates that the worker has sustained a loss of earnings as a result of his occupational disease.

(84) We do not accept the argument by the employer's representative that any award would be considered a scheduled award, and therefore governed by Manual policy #39.10. The worker's allergic reactivity to chromate and thiuram is not one to which the schedule applies, either directly or indirectly.

(85) The worker's representative invited us to find that the worker was entitled to a 25% permanent functional impairment award under section 23(1) of the Act, in light of Dr. S's assessment applying the A.M.A. Guidelines for skin conditions.

(86) We do not consider it appropriate, however, to simply adopt Dr. S's opinion on the appropriate percentage of permanent functional impairment arising from his occupational disease with reference to the A.M.A. Guidelines regarding skin conditions, as his assessment reflected its effect on the worker's activities of daily living. We recognize that the focus of section 23(1) is to estimate "the impairment of earning capacity" based on the worker's physical condition resulting from the injury or occupational disease. We also note that the A.M.A. Guides caution that impairment percentages derived according to the guides' criteria should not be used to make direct financial awards or direct estimates of disabilities.

(87) We leave it to the discretion of the Disability Awards Department to determine the appropriate degree of permanent functional impairment arising from the worker's occupational disease under section 23(1) and his projected loss of earnings under section 23(3). Clearly, Dr. S's expert opinion would form part of the information which the department considers in making that determination.

Vocational Rehabilitation Assistance

(88) The Board has already implemented the Review Board finding with respect to the worker's entitlement to retroactive job search benefits for the period May 16–July 1, 1998. The Review Board also found that the rehabilitation assistance provided to the worker was insufficient to prevent a long term loss of earnings, and directed the Board to provide the worker with additional vocational rehabilitation to assist him in replacing his pre-injury earnings. We agree with the Review Board's finding on this issue and direct the Board to provide the worker with further vocational rehabilitation assistance.

(89) The Review Board denied the worker's request for a wage top-up between January 12–May 15, 1998, on the basis that his low earnings in that period could have been expected in the short term, as he was still learning his trade, and lacked seniority and experience. We have come to a different conclusion based on our review of all of the evidence on file regarding the worker's earnings. We are persuaded by the worker's argument that this is an appropriate case for the Board to top-up the worker's earnings from the T.O.J. employer to his pre-injury wage rate over the January 12–May 15, 1998 period. We accordingly allow the worker's appeal on this issue.

Conclusion

(90) The worker's appeal with respect to his entitlement to be assessed for a pension under sections 23(1) and (3) of the Act is allowed in part. We designate and recognize the worker's allergic reactivity to chromate and thiuram as an occupational disease for the purposes of his particular claim pursuant to section 6(4) of the Act. We find that the worker suffers from a pensionable degree of permanent functional impairment as a result of this occupational disease and direct the Board to assess his pension entitlement under sections 23(1) and (3) of the Act.

(91) We uphold the Review Board finding which directs the Board to provide the worker with further vocational rehabilitation assistance.

(92) We allow the worker's appeal with respect to further vocational rehabilitation assistance in the form of a wage top-up for the January 12–May 15, 1998 period.

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.*