

**Decision of the Appeal Division****Number: 2001-0105****Date: January 16, 2001****Panel: Herb Morton****Subject: Relief of Costs — Standard of Review**

**APPEAL DIVISION (STANDARD OF REVIEW) (RELIEF OF COSTS)** – Employer argued that worker's pre-existing depression prolonged the worker's recovery – Sought relief of costs after 13 weeks – Cost relief officer granted 25% relief of costs at 13-weeks – Appeal Division determined that "correctness" standard of review was appropriate on a s. 96(6) or 96(6.1) appeal – No persuasive reason to accord deference to the cost relief officer – No error of fact or law or contravention of policy on a correctness standard – Employer appeal denied.

**Law:** WCA (1996): s. 39(1)(e), s. 85(1), s. 96(6)(6.1)**Policy:** Governors' Decisions: No. 1, 7 *Workers' Compensation Reporter* 33, No. 2, 7 *Workers' Compensation Reporter* 13, No. 75, 10 *Workers' Compensation Reporter* 753**Decisions:** Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 248; Schwartz v. Canada, [1996] 1 S.C.R. 254; Appeal Division Decision No. 93-0915; Appeal Division Decision No. 99-0734; Appeal Division Decision No. 99-1350; Appeal Division Decision No. 99-1726/1727; Appeal Division Decision No. 2000-0668

*Standard of Review on Relief of Costs Appeal* [employer appeal, s. 39(1)(e) (comp. div.)]  
*Appeal Division Decision No. 2001-0105*

17 *Workers' Compensation Reporter* 323

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- (1) The employer appeals the April 20, 2000 decision by the employer cost relief officer. That decision granted the employer's request for relief of claims costs under section 39(1)(e) of the *Workers Compensation Act*, to the extent of 25% of the wage loss and health care costs after 13 weeks of wage loss on the claim. The employer seeks relief of 100% of costs after the 13-week point. The employer's representative submits the decision "contravenes law and policy."

**Issue(s)**

- (2) A preliminary issue concerns the appropriate standard of review for applying the grounds for appeal contained in section 96(6) and (6.1) of the Act. With respect to the merits of the appeal, the issue is whether the decision to grant relief under section 39(1)(e), limited to 25% of the wage loss and health care benefits after the first 13 weeks of wage loss, involved an error of law or contravention of policy.

## **Jurisdiction – Section 96(6) and (6.1)**

(3) Sections 96(6) and (6.1) of the Act provide:

- (6) An employer who has received notice of
  - (a) an assessment under section 39 or 40,
  - (b) a classification, special rate, differential or assessment under section 42, or
  - (c) a levy under section 73 [B.C. REG 162-99, October 1 1999]

may, not more than 30 days after receiving the notice or within a longer period the chief appeal commissioner may allow, appeal the assessment, classification, special rate, differential or additional assessment, levy or contribution to the appeal division on the grounds of error of law or fact or contravention of a published policy of the governors.

- (6.1) An employer who has received a notice relating to
  - (a) an assessment, other than an assessment under section 223 [B.C. REG 162-99, October 1 1999]
  - (b) a classification,
  - (c) a monetary penalty, or
  - (d) an apportionment or shifting of cost between classes

under this Act not referred to in subsection (6) but designated in the policies of the governors, may, not more than 30 days after receiving the notice or within a longer period the chief appeal commissioner may allow, appeal the assessment, classification, monetary penalty or apportionment or shifting of cost between classes to the appeal division on the grounds of error of law or fact or contravention of a published policy of the governors.

- (4) Governors' policy at #104.40 of the Manual states that under these sections, the Appeal Division has jurisdiction to consider an appeal from a decision with respect to the application of section 39(1)(e).
- (5) Governors' policy in Decision No. 75 (Appeal Division Administration, Practice and Procedure, 10(5) *Workers' Compensation Reporter* 753), states at item 1.0 on page 753:

In appeals commenced under Sections 96(6) and 96(6.1), the appellant should be required to outline the error of law or fact or contravention of the published policy of the governors in the decision under appeal.

- (6) This confirms a policy of identical wording in governors' Decision No. 1 (Appeal Division Administration, Practice and Procedure, 7 *Workers' Compensation Reporter* 7, at item 1.0 on page 7).

- (7) Appeal Division Decision No. 1 (Practice and Procedure, 7 *Workers' Compensation Reporter* 33) states under item 7.0 concerning such appeals, at page 48:

An appellant is required to outline the error of law or fact or contravention of the published policy of the Governors in the decision under appeal.

### **Law and Policy – Section 39(1)(e)**

- (8) Decision 271 (Re Subsection 37(1)(e) – Charging of Costs for Enhanced Disabilities, 4 *Workers' Compensation Reporter* 10) and items #114.40–114.50 in the *Rehabilitation Services and Claims Manual* outline the published policy concerning section 39(1)(e) of the Act. Item #114.40 of the Manual states:

Two questions are considered when evaluating the application of Section 39(1)(e):

1. Was there a pre-existing disease, condition or disability and, if so, to what extent?
2. How severe was the incident initiating the claim in question?

Obviously, if a worker suffers an injury and there is no evidence of any pre-existing disease, condition or disability, the subsection is inapplicable. Similarly, where there is confirmation of a pre-existing disease, condition or disability of a minor degree, but the incident which precipitated the instant claim was of a severe nature, the section may be considered but will normally not be applicable. However, the section will clearly be applicable to those situations where a worker suffered a relatively minor injury at the time the instant claim was initiated, but there is evidence that the recovery period was prolonged, or a permanent disability was enhanced, by reason of a pre-existing disease, condition or disability. The fact that a disability has been prolonged or enhanced by other factors than a pre-existing condition is not a ground for relief under Section 39(1)(e).

How much disability stems from the injury and how much from the enhancement of the disease, condition or disability and, therefore, to what extent costs should be charged under Section 39(1)(e) can never be more than an estimate and will always be difficult to determine. In cases of continuing wage-loss and health care benefits, it will be appropriate for the Claims Adjudicator to determine that all of the costs of these benefits after a particular point in time should be charged under Section 39(1)(e). In some instances, it may be appropriate for the Claims Adjudicator to charge such costs on a percentage, rather than a time basis. In respect of permanent partial or permanent total disabilities, it will be necessary for the Disability Awards Officer or Adjudicator in Disability

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Awards, using her or his own best judgment and having reference to the advice of the Disability Awards Medical Advisor, to establish a percentage applicable to the pre-existing condition and to charge the relevant costs accordingly.

- (9) Item #114.40 of the Manual also provides that no consideration of relief of costs under section 39(1)(e) of the Act will begin until the worker has been temporarily disabled for a minimum of 13 weeks following the injury and that all of the costs of the claim cannot be relieved.

## **Background**

- (10) The worker was employed as a health care worker. On March 26, 1979, she was changing a patient's bedding with the patient in the bed. The patient was rolled over on his side leaning against her knee on the bed. The patient's legs started to fall off the bed and the worker leaned to the right to pull the patient's legs up onto the bed. Once the patient was settled, the worker started to walk away and felt a sharp pain through her right buttock which progressively worsened.
- (11) Lumbar spine x-rays on April 12, 1979 were reported as normal.
- (12) The worker was assessed by Dr. B, orthopaedic surgeon, on June 6, 1979. Dr. B provided local injections to three areas, resulting in some improved range of movement. Dr. B noted there was nothing to suggest a disc protrusion, disc degeneration, or any other serious problem, and indicated she could try returning to work the following week. He reassured the worker there was nothing seriously wrong with her back or hip. Dr. B noted in his report:

[The worker] confidentially told me that in fact she has had a pretty hard life of it. Her father would tend to beat her up and her last husband would beat her up, but she has never missed work like this before. Even though she has fallen down stairs attimes [sic] or with these physical abuses [sic], she has always gone to work.

- (13) On follow-up on June 13, 1979, Dr. B noted that the worker was not quite ready to go back to work, and recommended exercises for her.
- (14) The worker was assessed by Dr. S, neurologist, on August 2, 1979. Dr. S felt the worker's pain and discomfort was most likely due to ligamentous injury involving the lower lumbar spine, rather than nerve root compression. He recommended conservative management.
- (15) The worker was subsequently assessed by Dr. D, orthopaedic surgeon, on August 14, 1979. Dr. D's report is somewhat ambiguous in referring to "a rather alarming past medical history." On further reading, it is evident that the reference to the past medical history was in connection to the number of physicians seen by the worker for her March 26, 1979 injury, rather than relating to past medical treatment. Similarly, Dr. D refers to "an extremely alarming past medical history of marked depression which has necessitated the use of mood elevating

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drugs." It is not clear, in this context, whether this reference concerns the worker's course subsequent to the March 26, 1979 injury, or concerns her pre-injury history. Dr. D felt the worker probably had a mild bulging disc at L4-5 with a right L5 nerve root compression syndrome. He noted:

However, I would suggest that with her marked psychological overlay, very little improvement can be expected until this is dealt with satisfactorily.

If there were no such psychological overlay, I would suggest that if she hadn't improved after this period of time, that myelography to be followed by possible laminectomy, might even be considered. However, in view of this psychological overlay and overt depression, any form of surgical intervention in this lady, in my opinion, would be almost certain to end in failure.

I was wondering in fact, whether or not a psychiatrist might not be the man [sic] of choice here to try and get her away from these mood elevating drugs and sort her problems out.

- (16) On August 28, 1979, Dr. H, claims medical advisor, advised the claims adjudicator in memo #11:

It would appear that her psychological problem has in actual fact complicated what Dr. [D] has found which is a nerve root problem. In response to your question, is there any way that a chronic pain syndrome can be avoided, it has been my experience in the past that this kind of past history where a patient or a person has been beaten, it is very difficult to overcome this effect when they are depressed without a fairly prolonged period of assistance and I believe that Dr. [N's] assistance may be very helpful in this case and I would like to see his report.

- (17) The worker was referred to Dr. N for a psychiatric assessment on September 11, 1979. Dr. N diagnosed a mild depressive state. Dr. N advised:

[The worker's] current psychiatric symptoms are not distressing – she is unable to work on account of back pain. Psych. Condition started to improve after she decided to upgrade office skills and get a job. Also started training program in word processing.

Past [history] of depression and she indicated that her psych. Condition had improved in 1976. Onset of present psychiatric condition June 1979.

Did not suggest psychotropic meds or psych. follow up.

- (18) In a further assessment on October 11, 1979, Dr. D found that the worker "almost certainly has an L5 nerve root compression on the right side." Dr. D noted that the worker had been seen by Dr. N for a psychiatric opinion. Dr. D commented:

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[Dr. N, the psychiatrist] seems to have a rather positive attitude towards [the worker's] outlook on life which is somewhat encouraging. Nevertheless, I would feel most unhappy in subjecting this lady to open operation which is the method by which I would normally try and relieve her right L5 nerve root compression and I think she might well be an excellent candidate for a non-operative and chemical removal of the offending disc.

- (19) The worker was seen by Dr. F, rheumatologist, on October 18, 1979. Dr. F suggested a myelogram be performed although he did not support a diagnosis of disc disease.
- (20) The worker was assessed by Dr. S, orthopaedic surgeon, on November 1, 1979, who suspected she may have an acute L4-5 disc protrusion. Dr. S arranged for a myelogram to be performed.
- (21) On November 5, 1979, the worker was examined at the Board by Dr. M, medical advisor. Dr. M noted:

Her interview was initiated with quite an emotional outburst involving weeping which she indicated was an exhibition of anger more or less due to the fact that she has seen so many people without definition of her problem. She points out that she has been treated for depression in the past and under this claim was taking Tofranil.

- (22) Dr. M further noted in respect of the worker's past history:

She alleges a rather emotionally traumatic childhood, being beaten regularly by her father, but never losing time from school and being beaten also by her husband, who was an alcoholic in their marriage years of 1970 to 1975, but never losing time at work as a result.

- (23) Dr. M concluded:

This lady has had mild discomfort in the right buttock region since a torsion strain to the lower lumbar region on March 26th, 1979. Mild symptoms persist but there has been no hard evidence suggestive of nerve root irritation or compression although damage to a disc has been suspected. She exhibits an anxiety state regarding the persistence of symptoms which she admits are of mild degree, her main sense of frustration and anxiety and even anger relating to the fact that she has had no satisfactory explanation of the origin of her symptoms and good advice how the symptomatology should be handled by herself. She is quite prepared to accept these if the presence can be satisfactorily explained.

She exhibits a labile emotional state and in the absence of any hard evidence that any invasive form of treatment is indicated, it would seem wise to avoid it.

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- (24) On November 26, 1979, Dr. S advised that the myelogram results were completely normal. As such, there was no evidence of disc protrusion causing the worker's back and leg pain.
- (25) Upon a further assessment on December 20, 1979, Dr. M advised concerning the diagnosis of the worker's back problems:

Probability is a chronic myofascial strain in the region of the sacroiliac joint and in the depths of the gluteal musculature and possibly also attachment of muscles to the ischial tuberosity. At any rate, there is no evidence whatever of any deep abnormality and she is well aware of this. The prospects are good for a full recovery. She wants to get into a job that will be fulfilling and will have the potential for progression. . . . At any rate, I think she should be allowed to stay with the chiropractor as she has faith in him and he has certainly a positive approach. The prospects of recovery are good and the psychotherapeutic value of the present management cannot be ignored.

- (26) In a final assessment dated February 12, 1980, Dr. M noted:

It was indicated to her that the effects of the strain will probably be gone now in about two weeks and that chiropractic will be allowed for that period of time by which time it will be considered that she has probably recovered from the effects of the twisting incident in March, 1979. . . . There is no doubt about the emotional lability and the lack of initiative here. She lacks confidence and finishing the claim at the present time, apart from being indicated from a physical functional point of view, will hopefully be in her short term and long term best interests in breaking her from a dependent pattern that could have gone on and on.

- (27) In memo #26 dated March 3, 1980, Dr. M noted that he had talked to the worker's attending physician, Dr. O. Dr. M advised:

I indicated to [the attending physician] that we probably would not be reopening her claim and would not be accepting admission to the Clinic for treatment. I indicated that I was not denying that she had some symptomatology at the back of her buttock and she possibly could have a chronic, low-grade, muscular strain in the region but that it was not considered that she had any impairment of function that should affect her employability.

- (28) Wage loss benefits were paid from March 27, 1979 until February 24, 1980 (apart from an attempt to return to work on April 9, 1979). The worker appealed the termination of wage loss benefits. In a majority decision dated August 25, 1980, the boards of review denied the worker's appeal.

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- (29) By letter dated April 11, 1980, Dr. S, orthopaedic surgeon, advised:

This patient was seen in this office on March 20, 1980 re a chronic back problem. She has been referred to the Back Programme at [S] Hospital for instruction re back exercises and proper back care, etc.

### **Submissions**

- (30) The employer's representative argues that although a more significant back injury was suspected as a result of the March 26, 1979 work incident, this was never proven. He submits that the worker essentially sustained a soft tissue injury to her back and that, as such, the payment of wage loss benefits for nearly one year was clearly extremely excessive. He argues that the medical reports indicate that the depression condition had a large part to play with regard to the prolongation of the worker's recovery from her compensable injury. He argues that without the pre-existing condition, the worker's soft tissue injury would have resolved within 13 weeks, and that relief of all costs after that point is therefore warranted.

### **Findings and Reasons**

#### **(a) Grounds for Appeal**

- (31) In this case, the employer cost relief officer issued a detailed decision letter. This decision provided a summary of the important medical and other evidence on the claim. The submissions provided on behalf of the employer do not cite any portion of that summary as being in error. No error of fact is alleged in this case.
- (32) The employer's representative alleges a contravention of law and policy, in their initial letter of appeal dated April 25, 2000. That letter provides no explanation of the basis for these allegations. The October 20, 2000 submission does not mention these grounds. The employer's representative proceeds to provide argument concerning the merits of their appeal. No attempt is made to link their arguments concerning the possible merits of the employer's appeal to the statutory grounds of an error of law or a contravention of policy. The submissions do not explain the basis on which it is alleged that the employer cost relief officer contravened the Act or the policy, apart from arguing on the merits that total relief should have been granted at the 13-week point.
- (33) One interpretation is that the submissions ignore the statutory requirement to establish grounds for the appeal. Alternatively, the employer's representative may be proceeding on the assumption that if their arguments concerning the merits are found to have substance, the Appeal Division panel will discover an error of law or a contravention of policy in the failure to grant a greater degree of relief.

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- (34) The statute requires that grounds be established for an appeal. The Appeal Division cannot grant a remedy unless it is satisfied that grounds are established. The appellant does not enhance their chances of success in the appeal, when it fails to clearly articulate the basis on which they are appealing by reference to the grounds provided in section 96(6) or (6.1) of the Act.
- (35) This is particularly evident in a case such as the present one, where the decision to grant 25% relief of costs involved a reasoned exercise of judgment by the employer cost relief officer. The policy at #114.40 of the Manual acknowledges that: "How much disability stems from the injury and how much from the enhancement of the disease, condition or disability and, therefore, to what extent costs should be charged under section 39(1)(e) can never be more than an estimate and will always be difficult to determine."
- (36) While the appellant relies solely on the grounds of error of law and contravention of policy, it may well be that the effect of their submissions is to invoke grounds of mixed fact and law, or mixed fact and policy. It is helpful to refer, in this regard, to the definitions provided in the Supreme Court of Canada decision of *Canada (Director of Investigation and Research) v. Southam Inc.* [1997] 1 S.C.R. 748 (at paragraph 35):

Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact.

- (37) Inasmuch as sections 96(6) and (6.1) provide for appeals on the grounds of error of fact or law or contravention of policy, I consider it appropriate to include in my consideration the possible grounds of mixed fact and law, as well as mixed fact and policy, in the event that this may be what is intended by the appellant in their reliance on the grounds of error of law and contravention of policy. (I note, in passing, that the analysis as to what is a question of mixed fact and law or policy may be more significant to the consideration of a president's referral under section 96(4) of the Act, where error of fact is not a ground contained in the Act.)

#### **(b) Standard of Review**

- (38) A preliminary question may be posed as to what standard of review applies, when the Appeal Division is reviewing a decision by a Board officer under section 96(6) or (6.1) of the Act. This question was addressed in an unpublished decision (#93-0915, June 25, 1993) of a former chief appeal commissioner, summarized in the *1993 Annual Report of the Appeal Division (11 Workers' Compensation Reporter 165)* at page 196.

- (39) Decision #93-0915 involved an application for reconsideration of a prior Appeal Division decision. The Appeal Division panel had applied the “patently unreasonable” test, in considering whether an assessment decision was based on an “error of law” in connection with an appeal under section 96(6) of the Act. The chief appeal commissioner noted that the “patently unreasonable test” applies in connection with the “error of law” ground for reconsideration of former commissioners’ decisions under section 96(2), based on the fact that decisions of the former commissioners were protected by the privative clause. She noted that while the phrase “error of law” appears in section 96(6) and 96(6.1), decisions of Board officers which come before the Appeal Division on appeal are not protected by the privative clause and the “patently unreasonable” test has no relevance or application to such appeals. The chief appeal commissioner found the Appeal Division decision, which applied this test in a section 96(6) appeal, must be set aside as void. The application by the Appeal Division panel of an incorrect test involved an “error of law going to jurisdiction.” In Decision #93-0915, the chief appeal commissioner reasoned as follows:

Although the phrase “error of law” appears in section 96(6) and 96(6.1), decisions by Board officers which come before the Appeal Division by way of appeal are not protected by the privative clause. The “patently unreasonable” test has, therefore, no relevance or application to the consideration of an employer’s appeal under section 96(6) or 96(6.1) of the Act. *The proper test to be applied by the Appeal Division in considering an employer’s appeal from the decision by a Board officer on the ground of “error of law” under section 96(6) or 96(6.1) is one of “correctness” of legal interpretation.*

[emphasis added]

- (40) Another Appeal Division decision (#99-0734, May 3, 1999) concerned the appropriate standard of review in considering the lawfulness of governors’ policy under the Act. The majority expressed the following reasoning:

. . . we also find the provisions of the Act and policy suggest a standard of correctness. Section 96(4) itself calls upon us to redetermine the Review Board finding on the ground of an “error of law.” We would find it difficult to determine whether there was an error by any standard other than correctness. Similarly, sections 96(6) and 96(6.1) give employers a right of appeal for certain matters on the ground of error of law. As noted above, the Governors themselves have made clear that, in the event of a conflict between the Act and the policies of the Governors, the Act must prevail, which indicates an expectation by the Governors that policies must be based on a correct interpretation of the statute. Further, as noted in part (a) above, the Governors have expressly directed the Appeal Division to “apply and interpret the Act, Regulations and existing Board published policy.” That mandate also entails a standard of correctness.

- (41) The minority opinion expressed the following view:

All of the points set out above concern the evaluation of the lawfulness of Governors' policy. I consider it important to note that a finding of an error of law for other purposes will normally be on a correctness standard. For example, one of the grounds for employer appeals under section 96(6) and (6.1) is an error of law. Although no grounds are required by the *Act* for appealing a Review Board finding, a remedy may similarly be granted in such an appeal on the basis of an error of law. In addition, a Review Board finding may be redetermined on a section 96(4) referral from the President on the basis of an error of law. I consider that a standard of correctness normally applies in these other contexts.

As this case does not involve an issue under the *Canadian Charter of Rights and Freedoms*, I have not specifically addressed the standard of review to be applied in that context. I am inclined to consider, however, that a correctness standard of review would also be warranted in evaluating the lawfulness of policy under the *Charter*. No deference would be accorded by the courts to the Board's decision or policy in that context.

While it may be confusing as to why a different standard applies to the review of policy for lawfulness, as compared to the evaluation of the lawfulness of a decision by a Board officer or the Review Board, I am satisfied that this was intended by the Legislature. I am persuaded that the lawfulness of a decision, in its interpretation of the *Act* and the policies, and the application of the *Act* and policies in the context of a particular case, is generally properly determined on a correctness standard as those issues are appealable to the Appeal Division. I am also persuaded, however, that it was not the intention of the Legislature to have the lawfulness of policies appealed to the Appeal Division on the same standard. I am convinced, based on the background contained in the Munroe Committee Report and the current statutory provisions, that the Legislature intended to give pre-eminence to the Governors in the policy-making domain, and that the "lawfulness" of policies is not appealable to the Appeal Division in the same fashion. . . .

- (42) Decision #99-0734 did not concern an appeal under section 96(6) or (6.1). Thus, the comments in that decision by the majority and minority were by way of *obiter* on this point. It may be noted, however, that the panel was unanimous in considering that a correctness standard would apply in connection with the grounds for appeal in section 96(6) or (6.1).
- (43) I also note the analysis provided in Appeal Division Decision #99-1350, dated September 10, 1999, which concerned a president's referral under section 96(4) of the Act of a Review Board finding, on the ground of an error of law. This is relevant as the "error of law" test is contained in both section 96(4) and 96(6) and (6.1). The panel posed the question as to the appropriate standard of review as follows:

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... before embarking upon an examination of the merits of the president's referral, we must decide what level of scrutiny ought to be applied to the impugned findings. If all we are asking ourselves is whether the Review Board's interpretation of the *Act* is defensible, we might reach a different conclusion than if we ask ourselves whether the interpretation is correct and properly captures the meaning of the *Act*.

The phrase "error of law" is not defined in the *Act*. Because this phrase could include both simple errors and patently unreasonable errors, the absence of a limiting definition in the *Act* may be seen as signalling that a redetermination is warranted even where the error is simple; therefore, the correctness test ought to be applied. On the other hand, the Appeal Division has issued decisions which suggest that, where the governors' published policies are concerned, only patently unreasonable errors would justify declaring the policies to be inconsistent with the *Act*.

The rationale for applying the patently unreasonable test to the governors' published policies is that, by vesting the policy-making function in the governors, the legislature could not have wished their policies to be disturbed, except in extreme cases.

Can it be inferred from the *Act* and from the legislative history behind s. 96(4) that, like the governors' published policies, only patently unreasonable Review Board findings ought to be disturbed upon a president's referral? In the case of *appeals* of Review Board findings to the Appeal Division, the *Act* leaves it entirely open to the Appeal Division to interfere with the Review Board findings for whatever reason it deems appropriate (see s. 91(1)). The *Act* specifies no grounds for appeal. It limits the Appeal Division's jurisdiction to render decisions only insofar as it stipulates that the Appeal Division decision may "reopen, rehear and redetermine any matter that has been dealt with by the Review Board." . . . Hence, on a s. 91(1) appeal, the Appeal Division is at liberty to set aside Review Board findings which do not involve an error of law — whether it be a simple error or a patently unreasonable error.

That is obviously not the case in the context of presidential referrals where, on its own initiative, the Board attempts to bring about a redetermination of Review Board findings. The language of s. 96(4) clearly limits the Board's power to interfere with the Review Board findings to which its president objects. It limits it to two grounds: error of law and contravention of published policy.

(44) In Decision #99-1350, the panel ultimately concluded, at page 13:

There is no indication in the *Munroe Report* of a controversy over the fact that the Board would often assert its powers over matters of legal interpretation. In this connection, we note that the Board did not previously limit its interference with the Review Board's legal findings only where it considered that they involved patently unreasonable interpretations.

Taking into account the history behind s. 96(4), we conclude that Review Board findings may be redetermined where the Appeal Division concludes that they involve any error of law – be it a simple error or a patently unreasonable error. There is no apparent historical reason why the Appeal Division should defer to the Review Board’s legal interpretations. The *Act* itself provides no definition for the phrase “error of law.” In common usage, an error of law may be a simple error.

Thus, we reject counsel’s argument that a legal interpretation by the Review Board must be respected, unless it involves a blatant or patent error. The Appeal Division is not limited under the *Act* to intervening only in those circumstances. It may validly interfere with Review Board findings if these findings are, in its opinion, wrong in law. In other words, for the purpose of deciding whether Review Board findings involve an error of law within the meaning of s. 96(4) of the *Act*, we consider it appropriate to use a correctness standard.

- (45) A subsequent unpublished decision of the Appeal Division (#99-1726/#99-1727, November 10, 1999) provided a detailed legal analysis concerning the effect of the grounds for appeal in section 96(6) and (6.1) and concluded that the proper standard of review for this purpose was one of “unreasonableness.” On that interpretation, the proper standard of review lies somewhere between “correct” and “patently unreasonable.” The panel reasoned (at page 16):

In summary, it is appropriate to judge the original findings of fact on the basis of the “reasonableness” test. The error need not be obvious on the face of the decision, as it would be if the test was “patently unreasonable.” That is to say, unless a finding of fact is “clearly wrong,” it will not be interfered with. This means that questions involving weight of evidence or credibility of witnesses will be interfered with only if there has been a “palpable and overriding error” which affected the assessment of material facts. A “palpable and overriding error” will arise in limited circumstances, where for example, there is no rational evidence to support a material finding of fact or where cogent evidence was wrongly excluded from consideration. (The standard does not change where the Appeal Division holds an oral hearing, only the manner in which the assessment takes place – viva voce and documentary evidence rather than file material. And since an oral hearing is an opportunity for the parties to present evidence not previously considered, earlier evidentiary findings can be shown to be “unreasonable” in light of new evidence.)

- (46) The Appeal Division panel noted that it accepted the approach outlined by the Supreme Court of Canada in the case of *Canada (Director of Investigation and Research) v. Southam Inc.* [1997] 1 S.C.R. 748. That case involved an appeal to the Federal Court from a decision by the Competition Tribunal under the *Competition Act*. The court expressed its rationale for developing this intermediate standard as follows (in paragraph 55):

... appeal from a decision of an expert tribunal is not exactly like appeal from a decision of a trial court. Presumably if Parliament entrusts a certain matter to a tribunal and not (initially at least) to the courts, it is because the tribunal enjoys

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some advantage that judges do not. For that reason alone, review of the decision of a tribunal should often be on a standard more deferential than correctness. Accordingly, a third standard is needed.

(47) That finding flows from the court's earlier statement, in paragraph 50, that:

Expertise, which in this case overlaps with the purpose of the statute that the tribunal administers, is the most important of the factors that a court must consider in settling on a standard of review.

(48) The last paragraph from the minority opinion in #99-0734 was quoted with approval in Appeal Division Decision #00-0668 dated May 10, 2000. Again, that would be by way of *obiter* as that decision involved an appeal of a Review Board finding rather than an appeal under section 96(6) or (6.1) of the Act.

(49) While the determination of the proper standard of review under section 96(6) and (6.1) should not be examined in isolation, it is not determinative of the appropriate standard of review for other purposes. Differing questions as to the proper standard of review may arise in relation to a variety of matters including:

- employer appeals under section 96(6) or (6.1);
- appeals of Review Board findings under section 91;
- referrals of Review Board findings by the president under section 96(4);
- applications for reconsideration of decisions of the former commissioners or of the Appeal Division;
- review of the lawfulness of governors' policy under the Act;
- review under the *Charter* of the lawfulness of statutory or policy provisions; and,
- consideration as to whether the section 5(4) accident presumption, or section 6(3) Schedule B presumption, has been rebutted (see *City of Vancouver v. WCB of B.C. and Mowat*, B.C. Court of Appeal, [1995] 4 W.W.R. 744).

(50) In reviewing the various approaches and reasons outlined above, I consider it particularly significant that the primary rationale provided by the court in the *Southam* case for developing the "reasonableness" test concerned the fact that initial decision-making authority had been entrusted by Parliament to an expert tribunal. The court noted that "Presumably if Parliament entrusts a certain matter to a tribunal and not (initially at least) to the courts, it is because the tribunal enjoys some advantage that judges do not." The court found that expertise is the most important of the factors that a court must consider in settling on a standard of review.

- (51) Section 85 of the Act states that “There must be an appeal division of the board.” The Appeal Division is an internal appeal body. Under section 85.2(6), “a decision of the appeal division or of a panel is deemed to be a decision of the board.”
- (52) The rationale stated by the court for developing the “reasonableness” standard does not apply in terms of the relationship between Board officers and the Appeal Division. This is not a situation where the Board officer is part of the expert administrative tribunal, and the Appeal Division is not. Rather, on issues as to the interpretation of law and policy (as opposed to the creation of policy), the Appeal Division is entrusted with final responsibility for adjudicating these issues in individual cases. As the final level of appeal for the workers’ compensation system (apart from medical decisions which may be appealed to a Medical Review Panel), the Appeal Division is expected to apply the expertise of a specialized administrative tribunal to the cases coming before it for decision.
- (53) I note, in this latter regard, that under section 85(1) of the Act the power to appoint appeal commissioners rests with the chief appeal commissioner, but that this selection must be “in accordance with the policies established by the governors.” Governors’ Decision No. 2 provides such policy (*Policy for Selection of Appeal Commissioners*, 7 *Workers’ Compensation Reporter* 13).
- (54) In Decision #99-1726/#99-1727, the Appeal Division panel acknowledged this point at pages 10–11, in stating:
- Concerning the fourth factor or expertise, the Appeal Division, as an internal appellate body, also possesses expertise in the area of workers compensation law and policy which distinguishes its role from that of the courts in appeal matters. Thus, the Appeal Division is in almost the same position as the Board to make determinations under the *Act*. Moreover, the Appeal Division may hold an oral hearing and call for additional evidence where if it felt this is necessary for a proper determination of the case. This points toward the low end of the deference spectrum, to the standard of “correctness.”
- (55) The panel proceeded to adopt the “unreasonableness” standard of review. However, upon my reading of the decision I am unable to discern any clear or compelling rationale for adopting this higher standard, in light of the difference between the role of a court hearing an appeal from an administrative tribunal and the role of the Appeal Division as an appeal body which is part of the specialized administrative tribunal.
- (56) I note that appeal courts traditionally defer to the findings of fact of trial judges. The reason for this is obvious, inasmuch as a trial judge has the benefit of hearing the oral testimony of witnesses, and of observing the witnesses under cross-examination, while the appeal court does not. No clear parallel exists between those roles, however, and the roles of the Board officer and the Appeal Division. In the present case, for example, the decision of the Board officer and the Appeal Division is based on the same body of written evidence, except that additional argument has been provided in the appeal. The appeal process involves the appellant responding to an adverse decision – that decision may serve to define the issues in

dispute, identify the relevant policies, and flag points on which additional evidence may be required. The end result may well be that the Appeal Division is in a better position, rather than a worse position, to weigh the evidence in the case. In the present case, the Appeal Division is in no worse a position than the Board officer to consider the evidence. Again, this context does not support showing deference to the initial decision-maker apart from the requirement to evaluate the decision against the grounds of error of fact or law or contravention of policy.

- (57) I also note that under section 96(2), the Board has jurisdiction to “reopen, rehear and redetermine any matter” which has been dealt with by it (except a decision of the Appeal Division). Section 96(3) similarly authorizes the Appeal Division, in considering an appeal of a Review Board finding under section 91(1), to “reopen, rehear and redetermine any matter” that has been dealt with by the Review Board. Similar language is not contained in section 96(6) or (6.1) of the Act. As well, in the context of a president’s referral of a Review Board finding, section 96(4) limits the Appeal Division to a “redetermination on grounds of error of law or contravention of a published policy of the governors.”
- (58) The authority to reopen may be read as dealing with the scope of the issues which may be addressed. The authority to rehear permits a rehearing and reweighing of the case on the merits. That broad language is obviously distinguishable from the wording of section 96(6) and (6.1), which contain threshold or preliminary requirements. I do not consider, however, that this difference has any necessary implication as to the appropriate standard of review in ascertaining whether one of these threshold tests is met. However, it is also clear that the absence of the phrase “reopen, rehear and redetermine any matter” from section 96(6) and (6.1) limits the Appeal Division from addressing matters which may be related to the decision under appeal but which were the subject of a prior unappealed decision.
- (59) I further note the provisions of section 99 of the Act:

The board is not bound to follow legal precedent. Its decision must be given according to the merits and justice of the case and, where there is doubt on an issue and the disputed possibilities are evenly balanced, the issue must be resolved in accordance with that possibility which is favourable to the worker.

- (60) The clause concerning the resolution of disputed possibilities in favour of the worker is not relevant to the determination of employer appeals under section 96(6) and (6.1) which do not affect the worker. However, I would read the first sentence as being generally applicable under Part 1 of the Act. As the Board is not bound to follow legal precedent, the Appeal Division is not bound to follow the approaches developed in the common law. It need not follow the approaches developed by the courts. The Appeal Division is free to consider whether the underlying rationale or reasons for those approaches support their application within this context. On my reading of the court decisions, there are three main reasons given for an appeal court to show deference to the initial decision maker. These reasons concern:

- the signal advantage enjoyed by the primary finder of fact;

- the expertise of the administrative tribunal; and,
- the desire to conserve resources.

- (61) For the reasons set out above, I am not persuaded that either of the first two reasons apply so as to cause the Appeal Division to show deference to the decision of a Board officer. Firstly, to paraphrase the reasoning expressed by the court in paragraph 37 of *Schwartz v. Canada*, [1996] 1 S.C.R. 254, concerning the relationship between two appellate court decisions, there is “no reason to impose any duty of deference on a second court of appeal” where the “first appellate court is not in a more advantageous or privileged position than the second court of appeal in assessing the evidence.” As the Board officer had no more advantageous or privileged position in assessing the evidence than the Appeal Division in this case, there is no reason to accord deference to their decision on that basis alone. Secondly, there is no reason to accord deference to the decision of the Board officer on the basis of expertise. The Appeal Division is part of the administrative tribunal with specialized expertise. The third reason gives me some pause for concern. On balance, however, I consider that to the extent the legislature wished to conserve resources, this was accomplished by the requirement that an appeal of a decision of the type covered by sections 96(6) and (6.1) be on the basis of the grounds specified in these provisions. I am not, on the basis of the materials currently before me, persuaded that the legislature also intended to require that these grounds be met on some higher standard than would ordinarily apply under the Act. I consider it appropriate, in considering an employer’s appeal under section 96(6) or (6.1) of the Act, to remaining open to persuasion, on a correctness standard (i.e. as to a simple error of law or policy, on an interpretive issue) or on the balance of probabilities (on an evidentiary issue), that grounds for the appeal are established.
- (62) I see no basis for distinguishing between, or applying a different standard of review to, the “error of law” test in the context of a section 96(4) referral, and a section 96(6) employer’s appeal (except that only the latter may also involve consideration of errors of fact). Nor can I find any compelling reason or rationale for showing deference to the decision of the Board officer on one of the grounds for appeal specified under section 96(6) or (6.1), but not on the other grounds. If deference is not required in relation to issues concerning the interpretation of law and policy, what strong reason is there to show deference on the third ground of error of fact?
- (63) An application for reconsideration of Appeal Division Decision #99-1726/#99-1727 was unsuccessful (Appeal Division Decision #00-1840, November 21, 2000). I note, however, that the issue of the standard of review in an appeal under section 96(6) and (6.1) does not appear to have been raised as an issue in that application. Decision #00-1840 was stated to concern whether Decision #99-1726/#99-1727 was tainted by a patently unreasonable interpretation of section 39(1)(e) of the Act. In the context of an application for reconsideration of an Appeal Division decision, a range of interpretations or approaches may be considered “viable” under the Act. The fact that a decision is held to be viable does not necessarily amount to confirmation of the approach set out in the decision. I note, in this regard, the analysis provided by the chief appeal commissioner in Appeal Division Decision #00-1596, dated October 11, 2000, in which it was found that inconsistent decisions could nevertheless be viable under the Act. The

chief appeal commissioner explained in that case, in relation to the conflict between two Appeal Division decisions, that a decision on an application for reconsideration cannot be taken as deciding that either of the previous decisions was correct or not (in view of the high test applied in an application for reconsideration of an Appeal Division decision on the common law ground of error of law going to jurisdiction).

- (64) Having regard to the role of the Appeal Division to provide interpretive guidance to the workers' compensation system, I would take the general view that deference need not be shown by the Appeal Division in evaluating a decision under section 96(6) or (6.1) for an error of fact or a contravention of law or policy. While not relevant to this case, I would temper this by reference to a concern flagged in Decision #99-1350, at page 8:

It is arguable that our role differs from that of the courts because we are seen as having specialized knowledge of the *Act*. Hence, in our case, deference to a practice may be unwarranted. This argument has some merit. However, stability and predictability are also important considerations. Therefore, where the legislative text is unclear, we cannot ignore the interpretations on which long-standing practices are based.

- (65) The legislature has established a requirement that grounds of error of fact or law or contravention policy be established, if an appeal is to succeed under section 96(6) or (6.1). On the basis of the materials currently before me, I am not persuaded that the legislature intended that a further restriction be applied, so that the establishment of such an error would need to be on a higher standard than one of correctness. I consider it clear, in this regard, that the patently unreasonable standard does not apply. I do not consider it appropriate to apply the reasonableness standard, as the rationale stated by the court for applying that standard (involving deference to the specialized expertise of the administrative tribunal) does not apply. I have difficulty conceiving of an alternative standard which would fall somewhere between the standards of correctness and reasonableness.
- (66) For the purposes of this decision, I will proceed on the basis that the appropriate standard to apply is one of correctness, in terms of my consideration of the employer's appeal with respect to the allegations of a contravention of law and policy. A simple error of law or contravention of policy would be sufficient, for the purposes of section 96(6) or (6.1) of the Act. To the extent the appeal may involve a question of mixed fact and law or mixed fact and policy, I will consider the issue on a correctness standard, to be established on a balance of probabilities.
- (67) While I have not followed the conclusion reached in Appeal Division Decision #99-1726/ #99-1727 as to the proper standard of review, I consider that the decision provides a useful review of the legal authorities which contributes to the analysis in this area. While I found it necessary to differ from the conclusion reached in that decision, I accept that such differences are sometimes necessary for the reasons set out by the chief appeal commissioner in Decision #00-1596 (at paragraph 36):

Implicit in this analysis and the Hallmarks themselves is that there will be debates, even vigorous ones, about the application and interpretation of the *Act*

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and Board policy. From time to time, appeals before the Appeal Division are an opportunity for differing circumstances and interpretations to be expressed, considered and decided. These debates require a framework in which to take place and the Hallmarks provide that framework. Further, they guide the debate to a point where conflicts are expected to be resolved over the longer term. The community benefits from this because it can see a process which acknowledges periods of development but focuses on moving through those periods with quality decisions based on law, medicine, science and the interpretation of legislation, regulations and policy. Aspiring for consistency is very important but failing to be consistent can be a necessary part of developing interpretations of law and policy that respond to changes in the circumstances of matters within the jurisdiction of the Appeal Division.

- (68) As I am proceeding on the basis of the lower standard (of correctness), which is most advantageous to the employer, I did not consider it necessary to disclose the unpublished decisions cited above for the purpose of inviting submissions concerning the standard of review. While natural justice would normally require disclosure for submissions of any unpublished decision cited in a decision, in these circumstances there is no prejudice to the employer. I consider it appropriate to proceed with a decision on the employer's appeal without delay.

**(c) Decision on the Employer's Appeal**

- (69) The key paragraph in the reasons provided in the employer cost relief officer's decision was as follows:

I have considered the objective medical findings regarding the worker's back, the varied medical opinions on file concerning the overlay of her depression and the length of her period of disability under this claim. It is my opinion that the worker's disability arising from the March 26, 1979 injury was partially enhanced and prolonged as a result of her pre-existing depression.

- (70) No error of fact is alleged in this decision. Rather, it is asserted the decision contravenes law and policy.
- (71) I find that the decision by the employer cost relief officer is consistent with law and policy. Obviously, it involved an exercise of judgment. Sections 96(6) and (6.1) do not permit me to simply substitute my own exercise of judgment for that of the employer cost relief officer. I am satisfied that there was a pre-existing condition, as evidenced by the reference in Dr. N's report to a history of depression with improvement in 1976. The initial incident giving rise to the claim was a seemingly minor one, but I am cognizant that a twisting injury such as occurred in this case can result on back problems of more than short-term duration. I am persuaded by the evidence on file that psychological factors related to this pre-existing condition played a role in prolonging the worker's recovery under this claim. I find it significant, however, that while the psychiatrist's report provided by Dr. N diagnosed a mild depressive state, this was not seen as being of sufficient significance to warrant further psychological treatment or follow-up.

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- (72) The judgment of the employer cost relief officer represents a sound application of law and policy in the circumstances of this case. I am not persuaded there was any error of fact or law or contravention of policy in the judgment by the employer cost relief officer to grant 25% relief of costs at the “13 weeks” point on this claim. In reaching this conclusion, I have included in my consideration the possibility that in relying on the grounds of error of law and contravention of policy, the employer’s representative intended to refer to the grounds of mixed fact and law or mixed fact and policy. To this end, I examined the relevant evidence on the claim even though no error of fact was alleged. I am satisfied that no error of mixed fact and law, or mixed fact and policy, occurred in this case.
- (73) As no error of fact was alleged or found in this case, my reasoning concerning the ground of error of fact is *obiter* in this case. Furthermore, as I find no error of fact or law or contravention of policy on a correctness standard, my conclusion would be the same on any higher standard of review.

### **Conclusion**

- (74) The employer’s appeal is denied. On the preliminary issue, I find that the appropriate standard of review is one of correctness, for a simple error of law or policy. On the merits of the appeal, I find no error of law or fact, or contravention of policy, in the decision to grant relief under section 39(1)(e) of the Act, limited to 25% of the wage loss and health care costs after the first 13 weeks of wage loss.

*Editors’ Note: The names of the parties have been removed for privacy considerations. The text of the decision is otherwise unchanged.*