

Decision of the Appeal Division**Number: 2001-1902****Date: September 27, 2001****Panel: Laura Bradbury, Teresa White, Herb Morton****Subject: Payment of Legal Fees**

REIMBURSEMENT OF EXPENSES (FEES AND EXPENSES, LAWYERS) (RECONSIDERATION, APPEAL DIVISION) – Reconsideration of Appeal Division decision denying worker request for payment of legal fees – New evidence – Test of “flagrant abuse” not definitive – “Unique considerations” in a “truly deserving case” may constitute an exception to Board’s general policy of not paying legal costs – Totality of the circumstances warrants departure from policy – Decision to pay legal fees limited to circumstances which existed up to the time of the 1994 decision being reconsidered – Costs of the judicial review application not payable – Partial reimbursement of \$25,000 without interest.

Law: WCA (1996): s. 94, s. 96.1, s. 100**Policy:** RSCM: #96.10, #100.12, #100.40; Decisions: No. 54, 1 *Workers’ Compensation Reporter* 229; No. 69, 1 *Workers’ Compensation Reporter* 285; No. 154, 2 *Workers’ Compensation Reporter* 192; No. 208, 3 *Workers’ Compensation Reporter* 24; No. 252, 3 *Workers’ Compensation Reporter* 147**Decisions:** Canada (Attorney General) v. Albrecht, [1985] 1 F.C. 710 (F.C.A.); Suranyi v. W.C.B., [1999] B.C.J. No. 1225 (QL) (S.C.), 15 *Workers’ Compensation Reporter* 491; Van Unen v. W.C.B. (2001), 87 B.C.L.R. (3d) 277 (C.A.), 15 *Workers’ Compensation Reporter* 513; Appeal Division Decision No. 92-0144/92-0145, 8 *Workers’ Compensation Reporter* 85; Appeal Division Decision No. 93-1687, 10 *Workers’ Compensation Reporter* 211; Appeal Division Decision No. 2000-1596, 16 *Workers’ Compensation Reporter* 349; Appeal Division Decision No. 2001-1183

Payment of Legal Fees [reconsideration s. 96.1 (app. div.)]
Appeal Division Decision No. 2001-1902

17 *Workers’ Compensation Reporter* [595]

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- (1) This decision involves reconsideration of a 1994 Appeal Division decision (#94-0791) to deny the worker’s request for payment of legal fees.

Issue(s)

- (2) The issue is whether any change should be made in the 1994 decision to deny payment of legal fees incurred by the worker in pursuing his claim for workers’ compensation following his 1986 head injury.

Background

- (3) By decision dated May 31, 2000 (#00-0809), a panel of the Appeal Division found that the requirements of section 96.1 of the *Workers Compensation Act* (“the Act”) were met for obtaining

reconsideration of Appeal Division Decision #94-0791. That decision, dated June 24, 1994, denied the worker's request for payment of legal fees. In Decision #94-0791, the panel reasoned:

The Legal Cost Issue

[The worker's] file is voluminous. The correspondence section of the file contains significantly more documents than does the medical section. A large number of those documents represent correspondence between [the worker] and/or his legal counsel and the board. The main issues dealt with in that correspondence include: the compensability of [the worker's] injuries, the average earnings upon which [the worker's] compensation should be based, the degree of disability suffered by [the worker] as a result of his compensable injuries, the nature and degree of rehabilitation assistance required by [the worker] and, lastly, the method of calculation of lump sum amounts owing to [the worker], including interest payments and legal fees.

[The worker's] counsel, [Mr. T], submitted his arguments to the Appeal Division in a letter of May 16, 1994. He argued that the board is permitted to pay legal fees in an appropriate case. He submitted that in [the worker's] case, he would have been unable to pursue his claim with the board without legal advice and representation. Mr. [T] submits that failure to pay legal fees "means that [the] claimant is not receiving the full compensation to which he is entitled."

An analysis of the question of legal fees was published in Appeal Division Decision #93-1687. The panel in that decision included the chief appeal commissioner, the undersigned and a third non-representational appeal commissioner. We found that there indeed was authority for the board to pay legal fees but that lawful board policy closely circumscribed the conditions under which legal fees would be paid. In essence, we found that there would have to be an example of "flagrant abuse" of his authority by an officer of the board before legal fees will even be considered. Only where such flagrant abuse is present will "consideration of other relevant factors" take place.

In [the worker's] case, I find no evidence of "flagrant abuse" by an officer of the board. There certainly is considerable controversy reflected in the file, but that does not lead to a finding of flagrant abuse.

In [the worker's] case, even if there was flagrant abuse, the circumstances of his claim are not such that legal fees would normally be considered. Although [the worker] had brain damage as a result of his compensable injury, his reasoning power does not seem to be particularly impaired. The psychological reports on file do not suggest an impairment of reasoning power and indeed [the worker's] own correspondence both with board officials and politicians attest to his reasoning power and power of analysis.

The issues dealt with on [the worker's] claim file are largely issues of entitlement and quantum. These are not unusual matters to be dealt with by claims adjudicators and rehabilitation consultants. I find nothing in them that suggest a requirement for legal expertise.

Lastly, there are other resources available within the compensation system that [the worker] could have accessed but chose not to. That is, the Workers' Advisers office frequently represents workers with problems similar to [the worker's] at no charge. From the contents of the claim file, it would appear that, in some measure at least, [the worker] chose to obtain legal counsel on the strength of his personal acquaintance with the legal system through his wife's employment in a law firm.

In summary, I find nothing in [the worker's] file that would lead to a conclusion that his legal fees ought to be borne by the board.

- (4) In Decision #00-0809, an appeal commissioner (exercising delegated authority of the chief appeal commissioner) found that the requirements of section 96.1(3)(a) and (b) were met. The panel found that there was new evidence which was substantial and material to the 1994 decision, which "did not exist at the time of the hearing or did exist at that time but was not discovered and could not through the exercise of due diligence have been discovered." The panel noted, in this regard, a detailed report dated June 13, 1994 by a specialist in neurology and psychiatry. The panel found that although that report was provided to the 1994 Appeal Division panel, the impact of that report on the worker's entitlement to compensation was not known and could not have been known at the time of the 1994 decision. While the worker had previously been granted a 100% loss of earnings award under section 23(3) of the Act on the basis that he was unemployable, it was only later that the worker's permanent functional impairment was assessed at 100% under section 23(1) of the Act. The panel reasoned:

That report was provided to the 1994 panel on June 21, 1994, just three days before the panel issued its June 24, 1994 decision. The impact of the June 13, 1994 opinion from the neuropsychiatrist on the worker's entitlement was not known and could not have been known at the time of the 1994 Appeal Division decision. On October 16, 1996, on the basis of the medical evidence from Dr. H. and a further review by the Board's Psychology Department, the worker's permanent disability award for psychological impairment under section 23(1) of the Act was increased from 40% to 100%. In a further report of December 2, 1996, Dr. H. indicated that the October 1996 decision resolved one of the key contentious issues relating to recognition of the full extent of psychological impairment. In the 1996 report, Dr. H. noted the worker's disinhibited frontal lobe syndrome had continued to be present to varying degrees. He said:

His irritability has fluctuated in severity with angry outbursts usually linked to psychosocial stressors. His frontal lobe syndrome continues to limit his capacity to cope with even mild to moderate levels of demands.

Dr. H. also commented on the worker's outstanding debt related to losses associated with his failed vocational rehabilitation program and legal expenses. Dr. H. stated:

I strongly recommend that a fair and equitable solution be found to this outstanding issue. I have discussed various options with him. [The worker] is not capable of representing himself and I have advised him against this. One possibility is the appointment of a worker's advisor as [the worker] himself can no longer afford an independent lawyer. Unfortunately [the worker] does not trust anyone with even the remotest connection to WCB. I have therefore come to favour an independent lawyer who could represent [the worker's] interests so that the outstanding matters can be drawn to a close in a reasonable and fair manner. It would allay [the worker's] concerns significantly if he plays a role in the choice of legal counsel.

I find that the Board's October 1996 recognition of the worker's increased psychological impairment to 100% and Dr. H.'s subsequent medical opinion of December 1996 contain substantial and material new evidence not available at the time of the 1994 Appeal Division decision. I find that the requirements of section 96.1(3)(a) and (b) have been met.

- (5) This panel has now been assigned to reconsider, on the merits, the 1994 denial of the worker's request for reimbursement of his legal costs. Subsequent to the 1994 decision, the worker obtained new legal counsel as his previous lawyer moved to another province. Submissions requesting reconsideration of the denial of legal fees were provided by the worker's former lawyer following the 1994 decision, and by his current lawyer.
- (6) The original employer is no longer in business; therefore, the Appeal Division invited the Employers' Advisers office and the relevant industry association to participate. The Employers' Advisers office provided a submission. The submission was forwarded to counsel for the worker for reply submissions.
- (7) Comments were also invited on the recent British Columbia Court of Appeal decision in *Van Unen v. WCB* (2001), 87 B.C.L.R. (3d) 277, which concerned the issue of awarding legal costs in the workers' compensation system. The Court of Appeal upheld a decision of the British Columbia Supreme Court, which denied the worker's petition for judicial review of the denial of his request for legal fees. The British Columbia Supreme Court decision is published in the *Workers' Compensation Reporter* at Volume 15, page 513. That decision followed the reasoning expressed in a 1999 British Columbia Supreme Court decision which similarly denied a petition for judicial review of a decision to deny payment of legal fees (*Suranyi v. WCB*, published at 15 *Workers' Compensation Reporter* 491).

The Legal Framework

(8) This application for reconsideration is based on new evidence. As Appeal Division Decision #00-0809 has determined that the requirements of section 96.1 of the Act are met for obtaining reconsideration, the merits of the worker's request for payment of legal fees are now before us. Prior to addressing the evidence on the worker's claim, we consider it appropriate to establish the legal framework for this task, with the benefit of the further court decisions which have been issued since 1994. While these decisions did not provide the basis for the reconsideration application, it is appropriate to include them in our reconsideration on the merits of the decision on the worker's claim. Once it has been determined that the preliminary requirements of section 96.1 of the Act for obtaining reconsideration are met, we consider it appropriate to reexamine the matter in light of all the evidence, argument and other materials currently available (i.e. including, but not limited to, the specific evidence which gave rise to this reconsideration).

(9) Section 100 of the Act provides that the Board may award certain expenses in a contested claim:

The board may award a sum it considers reasonable to the successful party to a contested claim for compensation or to any other contested matter to meet the expenses the party has been put to by reason of or incidental to the contest, and an order of the board for the payment by an employer or by a worker of a sum so awarded, when filed in the manner provided for the filing of certificates by section 45 (2), becomes a judgment of the court in which it is filed and may be enforced accordingly.

(10) The policy of the governors of the Board (now the Panel of Administrators) is set out at #100.40 of the *Rehabilitation Services and Claims Manual* (the "Manual"). The policy prohibits payment of legal fees and expenses:

100.40 Fees and Expenses of Lawyers and Other Advocates

No expenses are payable to or for any advocate. Nor does the Board pay fees for legal advice or advocacy in connection with a claim for compensation [Note: see #48.10]. The Board will not pay the legal costs of a claimant or employer in connection with court proceedings to challenge a Board decision beyond what it may become subject to pay following the court's decision under the general law of costs.

(11) The policy at #100.40 of the Manual follows that contained in Decision No. 69, Re Legal Fees, 1 *Workers' Compensation Reporter* 285. Additional policy guidance concerning section 100 of the Act is provided at #100.72 of the Manual:

100.72 What Costs May Be Awarded?

It would not be reasonable to make an order for costs against a worker or employer in respect of an expense which the Board would not allow under the rules set out in #100.00, #100.10, #100.12, #100.13, #100.14, #100.15, #100.20,

#100.30, #100.40 #100.50. Therefore, an award of costs will not include the fees of lawyers and other persons paid to them for advice or advocacy in connection with a claim for compensation.

- (12) Decision No. 54, Re the Reimbursement of Expenses, 1 *Workers' Compensation Reporter* 229, provides for the reimbursement of a range of expenses out of the accident fund in connection with claims decisions. The policy similarly states, at page 231:

ADVOCATES

10. No expenses are payable to or for any advocate.

THE AWARDING OF COSTS

11. The above provisions relate to the payment of expenses by the Board out of the Accident Fund. An order for the payment of costs by one party to another under Section 83 is a separate matter, and is an alternative that may be considered in an appropriate case.

- (13) The policy at #100.12 concerning *Claims Inquiries, Appeals to the Workers Compensation Review Board or the Appeal Division* further provides, in part:

Where a claimant is attending on a claims inquiry, or on an appeal to the review board or to the Appeal Division, or for a decision review with a Manager, the payment of expenses is discretionary. There will be no undertaking to pay expenses and no advance.

1. Where the claims inquiry, review or appeal results in a decision for the claimant, the discretion will normally be exercised in favour of payment. But payment should be refused if it is concluded that the inquiry or appeal was brought about unnecessarily by the claimant.

Other costs in connection with attending the hearing will be determined in the normal fashion at the discretion of the panel.

- (14) The policy concludes by noting an exception to the general rules:

In the case of appeals to the Appeal Division, if an oral hearing is to be held outside the area in which a party resides, the Appeal Division may on request make provision for travel costs in advance of the oral hearing. This would include transportation and accommodation in the Board's Richmond Residence for the appellant and respondent, and would be provided without regard to the outcome of the appeal. Other costs in connection with attending the hearing will be determined in the normal fashion at the discretion of the panel.

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- (15) The policy refers to the discretion of the panel to award payment of costs out of the accident fund.
- (16) On its face, section 100 is somewhat ambiguous. The language of section 100 does not clearly convey a discretion on the Board to award costs out of the accident fund, nor does it clearly prohibit the Board from awarding legal fees out of the accident fund. One reading of section 100 is that it only contemplates the Board making an award of costs against one party to the appeal for the benefit of the other party to the appeal. This would typically involve an award to a worker or employer, to be paid by the opposing worker or employer. Policy in Decision No. 208, *Re The Awarding of Costs*, 3 *Workers' Compensation Reporter* 24, supports this interpretation. On its face, it is not evident that section 100 provides the Board with a broad discretion to award reimbursement of costs out of the accident fund in the same way, for example, section 33 does in respect of the calculation of a worker's average earnings. It is arguable whether the legal prohibition against the fettering of discretion applies, in the absence of a clear discretion contained in the statute. While the courts have upheld the Board's position that it reserves the right to award legal fees in exceptional circumstances, this might have involved the application of some degree of deference to the Board's interpretation of the *Workers Compensation Act*.
- (17) A published Appeal Division Decision (#93-1687, *Legal Fees*, November 26, 1993, 10 *Workers' Compensation Reporter* 211) considered the issue of legal fees in light of the Act and policy. In that decision, the Appeal Division panel quoted (at pages 213–214) from an unpublished decision of the former commissioners dated May 22, 1980 which set out the Board's position that the policy must be read as a general guideline which can be departed from in a particular case:

The Commissioners do not regard the policy decisions which the Board makes as being absolute, unchanging rules to be applied regardless of the circumstances of a particular case. They recognize that a policy enacted to meet a particular type of situation may require modifications or exceptions as particular situations develop. A policy applied for particular reasons may not be relevant in situations in which those reasons do not operate or there are additional distinguishing factors.

On the other hand, this does not mean that the policy will be ignored when it becomes necessary to make a judgment over a concrete situation. Regard must be had not only to the individual circumstances of the particular situation, but the possibly overriding general considerations which produced any relevant policies. A policy laid down by the Board is an indication to its staff and the outside world as to how it will treat certain situations. This means that when those situations do arise, the Board will normally act in accordance with its policy. Otherwise, there would be no point in having the policy in the first place. *However, the application of the policy in each case will be subject to arguments raised at the time and the particular circumstances of the case.* A statement to similar effect is contained in Decision No. 252 at pages 148 and 149.

The particular policy with which your letter is dealing is laid down in Decisions No. 54 and 69. These decisions state that the Board will not pay fees for legal advice or advocacy, and sets out the reasons for that policy. The Commissioners recognize that in the last paragraph of Decision No. 69, the statement is made that "For the reasons explained, this must be maintained without exception and without attempting any judgment on the legal services in the particular case". This may appear to contradict the approach outlined above. However, that is a matter of interpretation into which the Commissioners do not propose to enter. Whatever may have been intended by the Commissioners at the time Decision No. 69 was written, the approach of the Commissioners is now, and has been for some time, as stated in the previous two paragraphs.

[emphasis added]

- (18) It is evident, therefore, that at least by 1980 the position of the Board was that the seemingly mandatory language of #100.40 did not exclude the possibility of an award of legal fees in an appropriate case. Decision No. 252 (Re Scope of Employment, 3 *Workers' Compensation Reporter* 147) similarly reasoned (at page 148):

Based on their analysis of many factors, including how other jurisdictions view various aspects of compensation law and any special circumstances prevailing in this jurisdiction, the Commissioners may well establish what is generally known to be policy and, in order to depart from that policy, an adjudicator must show good reason for doing so. Nevertheless, by statute [previously s. 82, now s. 99] each claim is decided according to its own merits. . . .

- (19) That reasoning was expressed at a time when the direction provided by the former commissioners of the Workers' Compensation Board was understood as policy, although the term "policy" was not contained in the Act. However, subsequent to the 1991 changes to the Act which formally conferred policy-making authority on the governors under section 82 of the Act, and currently the Panel of Administrators under section 83.1 of the Act, the Appeal Division has applied similar reasoning in interpreting those policies.
- (20) We note that this approach to interpreting and applying policy is supported by the policy at #96.10 of the Manual entitled *Precedent and Policy*. This states in part:

The Board is not bound to follow legal precedent; its decision shall be given according to the merits and justice of the case. [Note: section 99]

In the adjudication of individual claims, the Board is not "bound" by either internal policy directives or by external authorities in the field of compensation, at least not in the sense of the word "bound" as understood at common law. However, in issuing internal directives, the Board gives general indications of how it will act when certain circumstances come before it. When these circumstances arise, the applicable directive will normally be followed. It is recognized that there is an infinite variety of circumstances that can arise and that it is not possible to lay down in advance policies to finally determine every conceivable

situation. Furthermore, there is the obligation on the Board to decide each case in accordance with its merits and justice and the right of individual persons affected under the rules of natural justice to present argument and evidence on their own behalf. Therefore, regard must always be had to the particular circumstances of each claim to determine whether an existing policy should be applied or whether there are grounds for a change in or departure from a policy. There will also be situations arising from time to time which are not covered by existing policy.

- (21) In Appeal Division Decision #93-1687, the panel found that reimbursement of legal fees might be considered on the basis of unusual or extraordinary circumstances involving flagrant abuse of a worker's rights. However, even where the test of flagrant abuse is met, the panel found that consideration would then have to be given to other relevant factors, such as the availability of free legal advice from other sources. The panel emphasized that entitlement to payment of legal fees would arise only in very unusual circumstances. The panel in Decision #93-1687 explained that the test for "flagrant abuse" is not intended to encompass cases in which Board officers merely erred or failed to exercise good judgement. It would not arise from a mere failure to investigate a matter fully. Nor would it arise from a mere error in interpreting and applying governors' policies or the Act.
- (22) In respect of the source of the Board's authority to pay legal fees in circumstances involving flagrant abuse, Decision #93-1687 discussed the difficult interpretive issues presented by this question at pages 217 to 219. Decision #93-1687 concluded, at page 219:

We find that s. 100 of the *Act* is broad enough to authorize the Board to award expenses to a successful party in an appeal or non-appeal context (for example, in the context of first instance adjudication or a referral), and it is broad enough to authorize the Board to award legal costs out of the Accident Fund or order them paid by one of the parties.

- (23) The mandatory language of the policy at #100.40 was noted by the British Columbia Supreme Court decision in the *Van Unen* case. The court commented (at paragraphs 70-71):

On their face, these policies are couched in mandatory language:

If the Appeal Division blindly applied these policies, I have no doubt that that would represent an improper fettering of the discretion to award costs found in s. 100 of the *Act*.

- (24) The court indicated that it would constitute an unlawful fettering of discretion to treat the apparently mandatory language of #100.40 as being absolutely binding regardless of the circumstances of the particular case. The court dismissed the petition for judicial review in that case, however, as the Appeal Division had not treated the policy as mandatory.

- (25) In the April 6, 2001 Court of Appeal decision in the *Van Unen* case, the Court of Appeal examined two Appeal Division decisions which denied payment of legal fees. The court's examination of these decisions was in the context of a judicial review application, and was subject to the applicable standard of review. The Court of Appeal commented (at paragraphs 28–30):

Those two sets of reasons reflect an application of the reasoning set out in the “generic” Decision No. 93-1687. In my opinion, applying the standard of correctness, coupled with appropriate deference to the Appeal Division’s expertise in relation to the objects and practical application of the legislation, *the interpretation of s. 100 which allows it to apply to claims for legal expenses, but does not require that they be paid in any case or class of cases, (with the possible exception of unusual cases where the claiming party was subjected to abuse of process or otherwise became subject to unique considerations), is an interpretation that meets the standard which I have described. It is an interpretation which rises above the **Rehabilitation Services and Claims Manual** by allowing for exceptions not indicated in the Manual.*

The interpretation I have described was actually applied in the passages from the two relevant decisions which I have quoted. In my opinion, *it leaves an ample discretion for truly deserving cases without violating the harmony of a system that the Board has decided should be conducted without any customary liability of the Board to pay legal fees from the accident fund to every successful claimant who retains a lawyer.*

In my opinion the Appeal Division did not improperly fetter its discretion in the two relevant decisions refusing the payment of legal expenses, did not act in a way that was patently unreasonable, and did not violate the principles of natural justice. I would not accede to the first ground of appeal.

[emphasis added]

- (26) A recent Appeal Division decision (#2001-1183) reviewed the law on paying legal fees, including the *Van Unen* Court of Appeal decision. The panel stated in paragraph 29:

... the “flagrant abuse” test should not be considered exhaustive. As noted by the Court of Appeal in the *Van Unen* case, consideration of reimbursement of legal fees may arise in “unusual cases where the claiming party was subjected to abuse of process or otherwise became subject to unique considerations”.

- (27) The panel concluded, after reviewing the circumstances in that case, that it was not persuaded that there were unique considerations in the worker’s case warranting reimbursement of legal fees.
- (28) On the basis of the foregoing (and noting in particular the Court of Appeal decision in *Van Unen*), we accept we have the jurisdiction to consider making an award of legal fees, as an exception to the general policy, if there are unique considerations in the worker’s case warranting reimbursement of legal fees. It is necessary, therefore, to review the evidence concerning the worker’s case, with particular regard to the new evidence cited in Appeal Division Decision #00-0809 which provided the basis for this reconsideration.

The Evidence

- (29) The worker's claim file is contained in two boxes, and we will not outline it in detail. Rather, we will provide an overview of the worker's case, focusing on points which are relevant to the issue of legal costs.
- The worker was a truck driver. On February 4, 1986 he suffered a severe closed head injury in an accident while driving the truck. The hospital report stated that the worker experienced a grand-mal seizure in the emergency room. The worker suffered multiple facial and scalp lacerations as well as amnesia. Cranial C.T. scanning subsequently demonstrated a right frontal contusion. After the accident, the worker experienced poor concentration and memory, depression, change in personality resulting in irritability and anger, headaches, numbness, tingling and reduced dexterity in his hands, dizziness, misperception of his arms, bilateral tinnitus, and stuttering.
 - The WCB initially accepted the worker's claim for compensation. The worker's employer was in receivership and the Board decided initially that the receiver/manager was the employer.
 - On July 23, 1986 the Board reversed its decision and denied the worker compensation coverage. The Board considered that the worker was an independent contractor and not an employee based on a written contract he had with the company before it went into receivership. Coverage was denied even though the receiver/manager acknowledged being the worker's employer and confirmed payment of assessments to the Board on his earnings.
 - The Board had paid the worker wage loss benefits of \$2,028.79 up to July 23, 1986. The Board wrote to the worker and requested that that amount be refunded by the worker since it was an "overpayment." The Board asked that payment be received within 30 days or interest of .85% per month would be added to the outstanding balance.
 - On September 4, 1986 the worker filed an appeal of the July 1986 decision; however, the Board pursued the outstanding overpayment. The Board wrote to the worker on September 8, 1986 and said it would send the amount to the Board's Collections Department after November 6, 1986 and that "all costs of any legal action may also be your responsibility."
 - The worker hired a lawyer to help him with his appeal. According to counsel's September 15, 2000 submission to the Appeal Division, the worker obtained the lawyer's name through a union staff representative whom the worker knew from another workplace. The staff representative recommended a lawyer who was familiar with workers' compensation matters. The lawyer was formerly a union representative himself who became a lawyer later in life. (Decision #94-0791 stated it appeared from the claim file that the worker chose to obtain legal counsel on the strength of his personal acquaintance with the legal system through his wife's employment in a law firm.)

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- The notice of appeal filed by the worker did not contain information about the Workers' Advisers office or the Employers' Advisers office. The Board initially sent the worker only the appeal forms but not the appeal pamphlet which contained information about the Workers' Advisers office. The pamphlet was not sent to the worker until after his counsel was involved in complex legal submissions to the Board about "who is the employer" in a receivership situation and the difference between employees and independent contractors. Legal submissions were also provided by counsel for the receiver and by the Employers' Advisers office.
 - The Review Board issued its decision on December 15, 1988. The Review Board found the worker's unregistered limited company was his employer and therefore he was not an employee for purposes of workers' compensation and was not entitled to compensation. The worker's lawyer applied to the B.C. Supreme Court to quash the decision under the *Judicial Review Proceedings Act*.
 - In January 1989, the Board's collections office began sending letters to the worker about the overpayment.
 - On January 25, 1989, the worker's lawyer appealed the Review Board finding to the former commissioners and informed them of the court action.
 - In June 1989, the court stated that the worker's application was premature. The worker's lawyer agreed to adjourn the court proceedings until the former commissioners of the Board heard the appeal. The Board agreed to expedite the appeal process.
 - On July 25, 1989, the former commissioners found the worker was an employee and therefore entitled to coverage. They also found that monies paid by the employer to the worker's company and to the worker directly should be considered in total as his employment earnings.
 - Between July 1989 and December 1990, there were disputes about the implementation by the Board of the former commissioners' decision. The disputes involved a period for which the worker was not paid, the Board's failure to pay interest on the monies, and the Board's interpretation of the worker's wage rate.
 - The worker's file was transferred to a different officer. On September 24, 1990, in memo #65, the new claims adjudicator wrote:

On reviewing file in some detail, I do note this worker does have some valid reasons for being upset with the way this claim has been handled. . .

- The claims adjudicator noted the claim was not accepted until July 25, 1989 and that outstanding issues remained to be determined. In memo #68, the claims adjudicator said:

On reviewing claimant's file I also note that at no point in time has anybody sat down with the claimant and his representative and gone over the normal

progression of a claims file so this worker would have some understanding of the various stages a claim must go through.

- [The worker] was assessed by a Board psychologist, Dr. B, in October 1990. In his October 16, 1990 report, Dr. B refers to “the drawn-out claims process” having a negative impact on the worker’s emotional functioning, “more so because of vulnerability to stress as a result of his head injury.”
- The October 25, 1990 report of Dr. B said that as a result of his injury, the worker could not deal with stress. The worker had irritability and loss of temper resulting in inefficiency and loss of clear thinking. Overall, the psychologist noted a decrease in the level of the worker’s adaptive functioning as a result of his brain injury. Dr. B commented that the worker’s functional level was now only “fair.”
- On October 30, 1990, Dr. B sent a memo to the claims adjudicator about the worker’s gunsmithing business as a rehabilitation measure. Dr. B wrote in paragraph 1:

... the protracted claims process has clearly contributed to his level of emotional distress, all the more so because of disinhibitory effects arising out of his brain injury.

- In paragraph 3, Dr. B wrote:

... [the worker], whether rightly or wrongly, has viewed the Board as unfair and unsympathetic to his case. Abandonment of support for his gunsmithing venture will only be perceived by him as further validation for his belief. This could very well lead to a significant increase in his emotional volatility. . . I believe it is important to note that [the worker’s] emotionally charged relationship with the Board flows out of the claims process, and were it not for these conflicts, [the worker] would likely function quite well emotionally as long as the stresses in his life are kept at a reasonable level. . . . It seems incumbent on us not to penalize [the worker] for emotional difficulties which are largely a product of the claims process itself.

- The worker’s lawyer began requesting legal fees and making submissions on this issue on March 28, 1991 and again on April 17, 1991. The lawyer commented that the worker had no alternative but to retain legal counsel to assist him since the issues to be resolved were primarily legal issues. He noted as well that the worker’s lawyer had become part of the worker’s support system. He also made the point that the money the worker spent on counsel was coming from the worker’s compensation benefits.
- The worker was assessed with a 5% permanent functional psychological impairment (P.F.I.) in 1991, effective September 1, 1989. The worker wrote to the Board objecting to the 5% rating and stated that he had never been properly assessed by a head injury team prior to the pension rate being set.

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- Following the involvement in 1993 of Dr. S, director of the Board's Psychology Department, the Board approved the referral to a neuropsychiatrist, Dr. H., on October 1, 1993.
 - Prior to the referral, Dr. S summarized the reports of the worker's treating psychologist and the rationale for increasing the worker's P.F.I. from 5% to 40%. In a memo dated June 9, 1993, Dr. S wrote:

[The worker] presents with marked emotional disturbances secondary to his frontal lobe injury; those include impulsivity, emotional lability, irritability, anger, poor frustration and stress tolerance, reduced adaptability, anxiety, suspiciousness, depressive tendencies with suicidal and aggressive ideations, and morbidity. Due to these problems, he requires ongoing assistance and monitoring from his wife on business and family matters, and from his psychologist and family physician on overall adjustment and coping matters. Without these support systems in place, [the worker] would likely have to be provided with residential treatment or even institutionalized. [The worker's] intellectual functioning in neuropsychological testing is likely to be close to the premorbid level but he is markedly emotionally compromised in his daily living, social, work and recreational activities.

Due to the combination of frontal lobe related factors with preexisting personality characteristics and ongoing stress of unresolved and contentious claim, [the worker's] emotional state is highly volatile, potentially explosive, violent and self-violent. Therefore, a prompt resolution of any outstanding claims issues, though difficult due to history of suspiciousness, distrust and confrontation, is essential from the rehabilitation perspective.

- Dr. S recognized that one of the puzzling difficulties in the worker's case was the intactness of his intellectual functioning, as measured by neuropsychiatric tests prior to 1993, vis-à-vis what appeared to be a significant behavioural dysfunction (see letter to worker, July 26, 1993).
- Dr. H saw the worker and his wife on several occasions in 1994 and he reviewed all the reports on the worker's condition. Dr. H diagnosed:
 1. Disinhibited frontal lobe syndrome with explosive outbursts. (Post-traumatic personality syndrome-explosive type)
 2. Organic mood syndrome – depressed type.
 3. Post-traumatic amnesic syndrome and impaired attention.
 4. Traumatic cervical myelopathy.
 5. Post-traumatic headaches.
 6. Paranoid state and conflict with the board.

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- Dr. H concluded that the worker was totally disabled “for any and all occupations” and said that “his combination of deficits preclude him from competitive gainful employment.” Among other recommendations, Dr. H. recommended that the worker’s WCB claim be settled expeditiously.
 - Dr. H’s December 2, 1996 report to Dr. S summarizes the worker’s condition based on Dr. H’s treatment of the worker on a regular basis (every one to three months) in 1995 and 1996. Dr. H reported that the worker had “disinhibited frontal lobe syndrome” which limited his capacity to cope with even mild to moderate levels of demands. The syndrome meant that the worker could not control his emotions and that stressors lead to angry outbursts.
 - Dr. H recommended a fair resolution to the worker’s outstanding issues with the Board. We repeat the comments here for ease of reference:

I have discussed various options with [the worker]. [The worker] is not capable of representing himself and I have advised him against this. One possibility is the appointment of a workers’ adviser as [the worker] himself can no longer afford an independent lawyer. Unfortunately [the worker] does not trust anyone with even the remotest connection to WCB. I have therefore come to favour an independent lawyer who could represent [the worker’s] interests so that the outstanding matters can be drawn to a close in a reasonable and fair manner. It would allay [the worker’s] concerns significantly if he plays a role in the choice of legal counsel.

- Dr. H’s June 13, 1994 and December 2, 1996 evaluations of the worker were the basis for the Board’s 1996 finding that the worker was entitled to a 100% permanent functional impairment award for his psychological impairment.
- The history of the Board’s ratings of the worker’s permanent functional impairment under section 23(1) of the Act is as follows:
 - 5% in 1991, effective 1989
 - 40% in June 1993
 - 55% in September 1994
 - 100% in October 1996
- The worker’s position throughout has been consistent that given the severity of his frontal lobe injury on his emotional behaviour, it was essential for him to have legal representation. The worker agrees that he can think and reason, as the decision under reconsideration stated, but he feels that not enough significance has been given to the fact that he cannot control his emotions. On this point, we note that there are numerous letters from the worker to various people at the Board which begin reasonably, but end as angry diatribes.
- The worker has initiated appeals of various negative Board decisions on issues of entitlement, wage rate, rehabilitation, and interest on payments and has been successful in his appeals.

In Appeal Division supplemental Decision #97-0728A dated April 9, 1999, the panel made a recommendation about the Board's handling of the worker's file, at page 13:

Given the circumstances of this claim, I recommend that one individual from the Board who is fully familiar with the details of the case be assigned to co-ordinate the management of any further issues under the claim. This should be done in consultation with [the worker and his wife] and their representative to ensure a co-operative relationship and to avoid any unnecessary appeals. This management should, where possible, be carried out in consultation with a senior Board psychologist to ensure that there is appropriate communication with the worker's health care providers when required to minimize any possible adverse consequences. A copy of this decision will be provided to the director of the Clinical Services Department to facilitate consideration of this recommendation.

- Decision #97-0728A also stated:

The severity of the head injury and its sequelae were not fully recognized until a comprehensive assessment was completed by Dr. H. in 1994. This late recognition of the nature and severity of the injury and its consequences has further complicated the adjudication of this very complex claim.

- In a follow-up letter to the worker's lawyer, dated March 27, 1998, Dr. H wrote that the worker:

... is capable of advising counsel about his views and feelings. However his mental inflexibility as a result of his brain injury will prevent him from handling his disputes with the Board without legal representation. I have advised [the worker] that he should not represent himself as his interests would not be served.

Positions of the Parties

(30) The worker's lawyer provided a submission dated September 14, 2000 in support of the worker's request for legal costs. Counsel's arguments are summarized as follows:

- There was flagrant abuse by the Board when one considers the history of rejection of the various claims made by the worker and the failure to give the worker information on entitlement. Counsel noted that it is important to view the Board's actions in the overall context of the worker's injury.
- Counsel noted that none of the recommendations made by the Appeal Division in its 1997 decision or by Dr. H. to ensure cooperation between the Board and the worker have been followed up.
- The late recognition of the sequelae of the worker's brain injury and its severity has further complicated the worker's claim.

- Dr. H recommended an independent lawyer for the worker to reduce the worker's stress level.

(31) The Employers' Advisers' submissions were provided on October 13, 2000. In summary, they state:

- There was no flagrant abuse in this case when one compares the circumstances of the worker's with the circumstances in Decision #93-1687 and the two decisions cited therein.
- The Workers' Advisers office was available to the worker and the worker was informed of their availability.
- The employer never opposed the worker's claims and never appealed any of the Board's decisions.
- No consideration should be given to costs which the worker incurred in bringing a judicial review application of the Review Board findings of December 15, 1998 since the Review Board is not a "Board decision" as contemplated by policy #100.40

Analysis and Reasons

A. Payment of Legal Fees – General

- (32) In our review of the worker's reconsideration application, our primary source of guidance is the policy at #100.40 of the Manual and Decision No. 69 of the *Workers' Compensation Reporter*. The policy generally prohibits payment of legal fees. In interpreting and applying that policy, however, we are further guided by the policy at #96.10 of the Manual, together with the reasoning in Appeal Division Decision #93-1687 and the court decisions in the *Van Unen* and *Suranyi* cases. In particular, we find useful the phrasing utilized by the British Columbia Court of Appeal in the *Van Unen* case, in its summation of the Board's position, as allowing for the possibility of the payment of legal fees based on "the possible exception of unusual cases where the claiming party was subjected to abuse of process or otherwise became subject to unique considerations."
- (33) The 1994 decision under reconsideration found there would have to be flagrant abuse by a board officer of the officer's authority, before payment of legal fees could be considered. We consider, however, that to the extent the discretion to pay legal fees is exercised as a departure from the general policy due to unique considerations, the circumstances under which this might be considered cannot be defined or limited by a particular test. The flagrant abuse test is useful in identifying one situation which might qualify for such a departure, but is not definitive.

- (34) As discussed above, the source of the Board's authority under the Act to pay costs to appellants is not obvious. Decision #93-1687 found section 100 is broad enough to authorize the Board to award expenses to a successful party in an appeal or non-appeal context. Similarly, the former commissioners of the Workers' Compensation Board exercised their discretion to pay legal fees in rare cases, although it is unclear whether this was under section 100, or on the basis of some implied authority. The Board has, in the *Suranyi* and *Van Unen* cases, successfully defended the refusals to pay legal fees on the basis that these decisions were made in recognition of a discretion to pay legal fees should rare circumstances in a particular case warrant a departure from the general policy. While recognizing that the source of the authority to pay legal fees under the Act is somewhat obscure, we consider it appropriate to proceed on the basis that we have the authority, whether under section 100, or on the basis of some implied authority, to award legal fees as an exercise of discretion should there be unique circumstances warranting such a decision.
- (35) We note, as well, an additional possible footing for considering an award of legal fees in the circumstances of this case. Decision No. 154, Re Legal Services for Rehabilitation Purposes, 2 *Workers' Compensation Reporter* 192, stated that the provision of legal services might be considered in an appropriate case as part of the rehabilitation assistance offered to a worker under section 16 of the Act. We appreciate that point 7 in that decision stated:
- Legal advice is not provided in respect of any matter that the Board is or may be adjudicating. If the worker indicates he would like legal advice in respect of his claim to compensation, he may be referred to the Compensation Consultant.
- (36) Nevertheless, we note the evidence on this file suggesting that the assistance of a legal representative provided support to the worker while he was struggling with the effects of a brain injury, the effects of which were not fully recognized initially. We further note the evidence concerning the effects of the worker's brain injury involving depression, irritability, anger, paranoia, tendency to fixate on a topic, and suicidal ideation, as well as his lack of emotional control and related incidents. Thus, the provision of legal assistance in this case may be viewed as having served some rehabilitative purpose, beyond the legal service rendered.
- (37) We consider, in this regard, that the test of "flagrant abuse" enunciated in Decision #93-1687, should not be considered definitive of the circumstances under which legal fees might be payable. Rather, we read that decision as attempting to envisage the type of situation in which it might be truly said that there were unique circumstances justifying a departure from the policy at #100.40. We interpret that decision as involving an attempt to apply the policy in a meaningful way, so as meet the legal requirement of not fettering discretion. It would be ironic, however, if this terminology or test were itself to then be applied in a rigid fashion. The test of "flagrant abuse" is not contained in policy. We consider that the better approach is to rely on the general policy at #100.40, but to keep in mind that, as stated at #96.10, "regard must always be had to the particular circumstances of each claim to determine whether an existing policy should be applied or whether there are grounds for a change in or departure from a policy. There will also be situations arising from time to time which are not covered by existing policy."

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- (38) The flagrant abuse test, as described in Decision #93-1687, may be viewed as simply one means by which such circumstances might be identified. However, we are not restricted by that test. Rather, we must approach the worker's case with an open mind as to whether it involves some unique considerations which warrant a different result than the literal application of the policy at #100.40 would dictate. We consider, in this regard, that it is important to read the policy at #96.10 as tempering or mitigating the mandatory language of the policy at #100.40.
- (39) We accept the policy at #100.40 as providing very strong direction that legal costs will not be paid. Requests for reimbursement of legal fees will normally be denied based on the clear direction provided by the policy at #100.40. We further consider, however, that there is a very narrow window for considering a departure from this general policy in "a truly deserving case" where there are "unique considerations" warranting reimbursement of legal costs. There is no *entitlement* to reimbursement of legal fees, but *consideration* may be given to providing reimbursement of legal fees in very rare circumstances. The "flagrant abuse" test may assist in identifying such circumstances, but should be considered as an example of, rather than a complete definition of, the kinds of circumstances which might warrant departure from the general policy.
- (40) We note, in this regard, that Decision #2001-1183 considered first whether the circumstances substantiated the worker's claim of "flagrant abuse." The panel considered next whether the worker's specific circumstances (including a brain injury) supported a finding of "unique considerations." The panel wrote: "without attempting to define what such unique considerations might be, I consider they would have to be of similar ilk to those encompassed by the 'flagrant abuse' test, in terms of being so truly exceptional as to warrant a conclusion that they involve a situation to which the general policy could not be intended to apply."

B. Other Appeal Division Decisions

- (41) We have also looked to other Appeal Division decisions for guidance in how to apply the general test. Since Decision #93-1687 was issued, the Appeal Division has not granted any request for reimbursement of legal expenses. We agree with the Employers' Advisers' submission that a review of relevant appeal decisions may provide some guidance about what does *not* constitute grounds for granting legal costs. From there, we may be able to discern whether the circumstances of this case fall within the policy or whether this case should be treated as an exception to the general policy. The employer's adviser submitted that the facts of this case are similar to the facts before the panel in published Decision #93-1687 where legal costs were denied. The adviser asks that we apply the reasoning in that decision to deny the worker's application here.
- (42) In considering the prior Appeal Division decision(s), we note that the Hallmarks of Quality Appeal Division Decisions (currently contained at page 26 of Decision No. 33, Appeal Division Practice and Procedure, published in Volume 17 of the *Workers' Compensation Reporter*), provide as follows:

A good decision is consistent with previous published Appeal Division decisions unless the conflict is identified and the reasons for the departure are articulated in a coherent manner.

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- (43) We also note the reasoning in Appeal Division Decision #00-1596 dated October 11, 2000 (Reconsideration of an Appeal Division Decision – Consistency and “Hallmarks of Quality Decisions,” 16 *Workers’ Compensation Reporter* 349). That decision found, at page 360:

... consistency in decision-making is an important and necessary part of administrative tribunal decision-making. However, this is not always possible, and, indeed, there are important reasons for not binding quasi-judicial decision makers in these matters. At the end of the day appeal commissioners have a legal duty to make decisions on the basis of the facts and issues before them and that may require a reasoned decision that is different and inconsistent with one made previously.

- (44) We also remain mindful of the policy at #96.10 which states:

While decisions of the Courts and the Appeal Division and findings of the review board may be published in the *Workers’ Compensation Reporter Series*, their publication does not turn them into published policy of the Governors.

- (45) Thus, while we agree that it is appropriate to review the prior Appeal Division decisions, the guidance to be taken from them may be subject to certain limitations. For the reasons set out above, we consider it appropriate to consider the worker’s request for payment of legal fees on a somewhat broader basis than was expressed in Decision #93-1687. While we are guided by that decision, we do not find that our consideration is restricted to the flagrant abuse test articulated in that decision.
- (46) In Decision #93-1687 the worker died in a work accident in 1982. His widow and children received dependants’ benefits under the Act. There was considerable dispute over the years about the proper amount of that pension, focused mainly on the calculation of the worker’s average earnings at the time of his death. The worker’s widow retained counsel to assist her in appealing to the Review Board and to the former commissioners; her pension was increased on appeal. The widow requested reimbursement of legal costs she incurred in bringing the appeals due to the complexity of the case, the errors made by the Board, a lack of thorough investigation by the Board, the need for legal analysis, and the lack of available alternatives.
- (47) The panel in #93-1687 found that the adjudicator made errors of judgement in denying coverage initially, then in delaying a response on the wage rate issue but found that “poor judgement alone does not constitute evidence of flagrant abuse of the claimant’s rights.” A third error by the Board adjudicator involved a failure to implement exactly a Review Board finding. The Appeal Division panel found the adjudicator “did a thorough analysis of the facts and produced what he thought was a proper decision” in light of the Board’s assessment policies. Again, the panel found this error did not constitute flagrant abuse. The panel found the circumstances of the case did not warrant an exception to the governors’ policy that denies payment of legal fees.
- (48) In the *Van Unen* case, referred to above, the worker suffered a compensable left knee injury in 1962. The Appeal Division granted the worker’s request to reopen the 1962 claim and allowed his later knee surgery. The Appeal Division also decided the appropriate wage rate on the

reopening. The panel found the worker's situation was not "unusual" nor were the Board's errors a "flagrant abuse" of the worker's rights and therefore denied the worker's request for reimbursement of legal costs. The petition for judicial review was dismissed in the British Columbia Supreme Court, and an appeal of that decision was dismissed by the British Columbia Court of Appeal.

(49) In Decision #2001-1183, the worker had suffered a closed head injury in 1994 resulting in a post traumatic head injury syndrome. The worker did not dispute that her functional psychological impairment was 50%, as rated by the Board's psychological disability award committee in 1999. Her dispute related to the Board's calculation of her long-term wage rate by considering her earnings in the one year prior to her injury. Some of the elements in that case are similar to the circumstances of the case before us. For example, the worker's lawyer in Decision #2001-1183 referred to the late recognition of the effects of the worker's brain injury and the worker's "profound lack of trust in the Board and its decision making" as reasons for paying her legal costs. Counsel also referred to the worker's significant functional impairments as relevant to the issue of costs.

(50) The Appeal Division panel in #2001-1183 considered counsel's arguments with respect to the issue of the worker's long-term wage rate as it related to the question of legal costs. The panel wrote:

Upon careful consideration of the evidence in this case, I find that it is precisely the type of case which the panel in Decision #93-1687 described as not meeting the test of "flagrant abuse". Having regard to the successful outcome of the worker's appeal concerning her average earnings, it may fairly be asserted that the Board officer erred or failed to exercise good judgment, or failed to investigate a matter fully, or erred in interpreting and applying Governors' policies of the Act. However, those are all grounds which were identified in Decision #93-1687 as not giving rise to a finding of flagrant abuse.

(51) The panel went on to consider whether there were "unique considerations" given the worker's brain injury. The panel found the circumstances were not "so truly exceptional as to warrant a conclusion that they involve a situation to which the general policy could not be intended to apply." The panel noted that the worker had at one point pursued an appeal to the Review Board on her own and provided articulate and well-reasoned submissions. She had also, at one point, utilized the services of the Workers' Advisers office in a successful appeal to the Appeal Division on a different issue. The panel stated that "notwithstanding the medical evidence concerning the effects of the worker's head injuries, I am not persuaded that there are unique considerations in the worker's case warranting reimbursement of legal fees."

C. Factors to Consider in Applying the Test

(52) As stated earlier, "unique considerations" in a "truly deserving case" may constitute an exception to the Board's general policy of not paying legal costs.

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- (53) The determination of whether abuse of process or flagrant abuse or other unique considerations exist must be done on a case-by-case basis. Mere errors of judgement are not enough to ground such a finding. Medical complexity, factual complexity, or legal complexity in a particular case will not be sufficient to conclude that a worker requires representation by counsel. There must be other unique or exceptional considerations.
- (54) To the extent Decision #93-1687 set out a new test of “flagrant abuse,” we read this as merely representing an example, rather than constituting a comprehensive definition, as to how the policy at #96.10 tempers the application of the seemingly mandatory wording of the policy at #100.40. We prefer, in this regard, the language utilized by the Court of Appeal in the *Van Unen* case, in summarizing the Board’s position in respect of the policy at #100.40 as permitting of an “exception of unusual cases where the claiming party was subjected to abuse of process or otherwise became subject to unique considerations.”
- (55) In considering whether there are “unique considerations” it is necessary to consider all relevant factors including the availability of free advice from the Workers’ Advisers. Even if, for example, the test of flagrant abuse is met, this is not determinative. We agree with the employers’ adviser that a worker’s mistrust of the Board and Board personnel, on its own, is not sufficient to consider reimbursement of legal expenses. We agree with counsel for the worker that it is also important to consider the history and overall context of a particular case in making the determination about legal expenses.

D. Circumstances of This Case

- (56) We come then to the particular circumstances of this worker’s case.

(i) Is there evidence of “flagrant abuse”?

- (57) The panel in Decision #94-0791 found that there was considerable controversy reflected in the worker’s file but that did not constitute flagrant abuse.
- (58) The worker’s lawyer stated that flagrant abuse exists by virtue of the fact that the Board denied each of the worker’s requests in the first instance (for entitlement, for a particular wage rate, for interest on retroactive payments, for rehabilitation, etc.) but in each case the worker was successful on appeal.
- (59) We agree that the worker had to appeal most decisions made in his case and that he was generally successful on appeal. However, we are not inclined to see wrong adjudication, even where prolonged, as amounting to flagrant abuse unless there are some additional circumstances to warrant such a conclusion.

(ii) Did the issues suggest a requirement for legal expertise?

- (60) Decision #94-0791 found the issues were largely issues of entitlement and quantum which are usual issues for the Board and concluded that nothing in those issues “suggest a requirement for legal expertise.”

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- (61) Our review of the file, particularly for the period between 1986 and 1989 when the worker was appealing the denial of compensation, suggests that, in fact, the issues were legally very complicated. The determination of the worker's status required a knowledge of legal principles which went beyond the bounds of workers' compensation entitlement issues, including bankruptcy law and labour relations law. Counsel for the worker had to review case law in those areas in order to make appropriate submissions to the Board on the worker's appeal concerning his status as a worker under Part 1 of the Act.
- (62) In our view, the worker's appeal was assisted by having a lawyer argue his position at all levels of the appeal process. His entitlement appeal succeeded eventually on the basis of the lawyer's legal arguments. Nevertheless, there is nothing unique about these circumstances. It is not uncommon for legally complex issues to arise for consideration, whether in appeals of Review Board findings or in section 11 determinations for court actions. The Board functions on an inquiry basis. It is not possible to anticipate whether the former commissioners would have reached the same conclusion concerning the worker's status, for example, even if the worker had not been legally represented. At most, this can be considered as one relevant consideration.

(iii) Could the worker have accessed other resources in the compensation system?

- (63) As the employer's adviser points out and as the panel in Decision #94-0791 stated, the Workers' Advisers office is available for unrepresented workers specifically so that workers can have access to free assistance in workers' compensation matters including appeals. Generally, workers are advised of the availability of the Workers' Advisers by way of the appeal pamphlet or by discussions with Board personnel.
- (64) This worker's case is unusual, however, for a number of reasons. First, the correspondence between the worker and the Board indicates that the worker was sent only the appeal form and not the appeal pamphlet when he decided to appeal the July 1986 cancellation of benefits. The appeal form in 1986, which we reviewed, did not contain information about the Workers' Advisers or Employers' Advisers offices so the worker did not have notice of the availability of the Workers' Advisers when he initiated his appeal.
- (65) By the time the appeal pamphlet (with information about the Workers' Advisers office) was sent to the worker he had retained counsel and counsel was involved in the complex legal issues we commented on earlier. The worker's lawyer felt that the issues were too complex for a workers' adviser, some of whom are legally trained and some of whom are not. In addition, counsel felt that the Workers' Advisers office could not take on a case like the worker's which required so much time and individual attention. While we cannot comment on the truth of this statement about the Workers' Advisers, it is clear to us that the worker's case was unusual and complex and required a great deal of his representative's time.
- (66) As the claim's adjudicator wrote in 1989 in memo #68, no one at the Board sat down with the worker to explain the process a claim goes through and we assume this includes a discussion about the availability of the Workers' Advisers.

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- (67) The Workers' Advisory Services are created by section 94 of the Act. It may be suggested that the failure to access the services of the Workers' Advisers involved ignorance of the law, which is generally not considered a valid excuse. We note, however, the reasons given in the case of *Canada (Attorney General) v. Albrecht*, [1985] 1 F.C. 710. These reasons were quoted in Appeal Division Decision #92-0144/92-0145, published at 8 *Workers' Compensation Reporter* 85, in relation to delay with respect to the filing of an application for compensation. The Federal Court of Appeal considered what constitutes "good cause" in a delay in making an application for unemployment insurance benefits:

To say, as the Applicant does in effect, that ignorance of the law excludes good cause seems to me to defeat the whole purpose of the legislation since, apart from instances of physical incapacity and leaving aside possible cases of indifference or lack of concern, ignorance of the law is necessarily involved in the failure of a claimant to exercise his rights in due time. . . Of course, I have no doubt that it would be illusory for a claimant to cite "good cause" if his conduct could be attributed only to indifference or lack of concern. I readily agree, too, that it is not enough for him simply to rely on his good faith and his total unfamiliarity with the law. But an obligation, with its concomitant duty of care, can be demanding only to a point at which the requirements for its fulfillment become unreasonable. In my view, when a claimant has failed to file his claim in a timely way and his ignorance of the law is ultimately the reason for his failure, he ought to be able to satisfy the requirement of having "good cause" when he is able to show that he did what a reasonable person in his situation would have done to satisfy himself as to his rights and obligations under the Act. *This means that each case must be judged on its own facts and to this extent no clear and easily applicable principle exists; a partially subjective appreciation of the circumstances is involved which excludes the possibility of any exclusively objective test. I think, however, that this is what Parliament had in mind and in my opinion this is what justice requires.*

[emphasis added]

- (68) We must also consider the impact of the worker's brain injury and its effect on his need for a lawyer. Dr. H. said the worker was incapable of representing himself. In 1996 Dr. H. recommended an independent lawyer, rather than a workers' adviser, since by then the worker did not trust anyone "with even the remotest connection to the WCB." As we commented earlier, mistrust of the WCB would not usually be a determinative factor, but in this worker's case it takes on more significance given his psychological condition which we discuss in more detail below.

(iv) Declaration of an Overpayment

- (69) The worker's initial appeal must also be seen in the context of the Board's declaration of an "overpayment" which resulted when the Board found, in July 1986, that the worker had no entitlement to compensation. While the Board's practice in 1986 was to collect payments made in error, policy in the Manual provided that the Board generally did not pursue collection when an appeal was instituted. The worker was told, however, that the Board would add


interest to the unpaid balance and that the Board might add its legal costs of collection to the unpaid balance. This was the case even after the worker wrote the Board on October 30, 1986 stating he had not paid since the claims adjudicator told him he did not have to pay if the matter was under appeal. We recognize, in this regard, that policy at #48.41 in the *Rehabilitation Services and Claims Manual*, as it existed at that time, generally required that an overpayment be declared and recovered when it was found that money had been paid to which someone was not entitled by law or policy. #48.42 set out specific steps for pursuing such recovery. However, #48.46 of the Manual further stated:

Our policy requires that if an overpayment is being appealed, procedures to recover the overpayment from the worker will be suspended pending the decision on the appeal.

- (70) It may be that the collection letters sent to the worker requesting reimbursement of the overpayment, and advising of interest charges, were merely form letters to provide him with full notice of the legal effect of the decisions which had been rendered. They were likely intended to better inform him of the legal effect of the decisions to deny his claim and to allow him the opportunity to challenge these decisions on appeal. The fact that the worker was verbally advised by telephone that he did not have to pay if the matter was under appeal suggests that the procedures established in the Manual were being followed. To the extent these may be viewed as "routine" procedures, they cannot be described as flagrant abuse. We note this evidence as simply constituting a relevant consideration, in contemplating how this situation would have been experienced by the worker (who was suffering from a brain injury the effects of which had not been recognized).
- (71) We note that the worker, who was suffering from a severe brain injury, was in the situation of not only being denied any future compensation, but was being asked to repay the compensation previously awarded. The reversal of the Board's decision to pay compensation related to the legally complex issue as to whether he was a worker within the meaning of Part 1 of the Act. Given the complex legal nature of the issue in dispute, we can understand that the worker would be unwilling and unable to argue the case on his own. We are also mindful of the significance of the issues which were at stake for the worker, and the emotional response which the reversal of the decision to accept his claim would have produced (bearing in mind the significance of the worker's brain injury, as it was ultimately diagnosed, to the worker's emotional functioning).

(v) Did the worker have sufficient reasoning power to deal with the various issues in his case?

- (72) The panel in Decision #94-0791 felt the worker's reasoning power was not impaired by his compensable injury; therefore, he could deal with the various issues in his case, without counsel. The comment is somewhat similar to the comment in Decision #2001-1183 where the panel noted that the head-injured worker was articulate and had in fact represented herself well before the Review Board. We consider, however, that the circumstances of this case are distinguishable from the circumstances of the worker in Decision #2001-1183. Among other things, the worker in this case is 100% permanently functionally psychologically impaired whereas the worker in Decision #2001-1183 was 50% psychologically impaired.

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- (73) The worker in this case suffers from frontal lobe syndrome which both Dr. H. and the Board psychologist agree allows him to function at an average intellectual level but severely impairs his emotional behaviour. As a result of the injury, this worker becomes angry and hostile in reaction to stress and his workers' compensation case is a major stressor. We were struck by Dr. S's statement that the worker would likely have required residential treatment or even have been institutionalized were it not for the support of his wife, his psychologist, and his family doctor. This factor, in combination with the worker's other circumstances, suggest to us that the worker's case involves "unique considerations." We consider, in this regard, that no one factor is determinative, and that our decision must be based on a weighing of all the circumstances of the case in combination.
- (74) It is clear from the worker's file that until 1993 when Dr. S, the Board's director of psychology, became involved in the worker's case, the prevailing view at the Board was that the worker's condition was primarily an exacerbation of his pre-existing personality. The worker had been assessed as having only a 5% permanent psychological impairment at that point. Based on the expert advice provided by Dr. S and Dr. H, the worker was eventually granted a 100% permanent psychological functional impairment award in 1996. But, at least until 1993 or 1994, there was no clear understanding on the part of Board personnel that the worker's angry and hostile behaviour was as a result of his injury. It is fair to say that the medical and psychological professions have come a long way in their understanding and treatment of closed head injury cases in the last ten years. This worker's case, at least until 1993 or 1994, reflects some of the prior misunderstandings of the effects of closed head injuries that occurred in the past. While the worker's permanent functional impairment pension award was not increased to 100% until October, 1996, we consider it significant that this increase was based on the medical evidence originally provided in June, 1994.

(vi) Is there evidence of abuse of process?

- (75) We are not persuaded that the circumstances of this case involved flagrant abuse of the worker or other abuse of process. We note, however, the presence on file of various suggestions and recommendations aimed at reducing the stress of the claims process on this worker, which were not acted upon. We also take note of the difficulties which would have been experienced by the worker in dealing with the stresses associated with appealing decisions on his claim, while he was suffering from his particular brain injury. We further take note of the additional stresses which would have been experienced by the worker due to the long delay before the full extent of his brain injury was diagnosed and accepted. The delay in fully recognizing the nature and extent of the worker's injury would likely have caused a corresponding lack of appropriate support to the worker, with enhanced stress on his functioning.
- (76) In 1990, Board psychologist, Dr. B, wrote that were it not for conflicts with the Board, the worker could function emotionally quite well. Dr. B, Dr. S, and Dr. H, all recommended a speedy, fair resolution of the worker's claims to reduce the negative effects on the worker's functioning as a result of his brain injury. The worker's claim took many years to resolve and there is ample evidence that the process exacerbated his inability to cope. While we are not persuaded this amounted to "flagrant abuse," we consider that the negative effects of such delay, particularly in the context of the worker's particular brain injury, must be seen as a

relevant consideration. The combination of delayed medical recognition of the worker's brain injury, and the delays in finally adjudicating both the acceptability of the worker's claim and his compensation entitlement, must be viewed as significant. We are cognizant that delay in the decision-making process has been identified as a system failure in other contexts. Unfortunately, such delay is not unique, and does not by itself warrant payment of legal fees. Again, however, it is a relevant consideration in this worker's case.

(77) In summary, the combination of factors in this worker's case includes:

- the lack of information provided to the worker initially about the availability of the Workers' Advisers office;
- a severe brain injury, which was ultimately recognized as producing a 100% permanent psychological functional impairment;
- the initial acceptance of the worker's claim, followed by a reversal of the decision, with a demand for repayment of the compensation paid to him;
- the legal complexity of the entitlement issue, with respect to whether he was a worker within the meaning of Part 1 of the Act;
- the significance of the claim to the worker, involving both a denial of any entitlement and a claim for recovery of the compensation already paid to him;
- the delays in recognizing the nature and extent of the worker's brain injury, combined with the prolonged delays in achieving resolution of important issues on the adjudication of the acceptability of his claim and the assessment of his permanent disability;
- the lack of support provided to the worker, in respect of the delayed recognition of the full nature and extent of his particular brain injury; and,
- the effects of the worker's brain injury on his ability to represent himself and on his inability to cope with the claims process.

(78) In consideration of the totality of circumstances of the worker's claim, we find there were unique considerations warranting reimbursement of legal fees. While no one factor is determinative, we find that the combined effect of all the factors listed above leads us to this conclusion. We find, therefore, that a departure from the general policy at #100.40 is warranted, as contemplated by the policy at #96.10 of the Manual and the reasoning expressed by the British Columbia Court of Appeal in the *Van Unen* case. In other words, this is a "truly deserving" case where an exception should be made to the Board's general policy against reimbursement for legal expenses.

E. Extent of Reimbursement

- (79) Once the decision to pay legal fees has been made, the question arises as to the basis for calculating such an award. As the policy prohibits payment of legal fees, it does not offer guidance as to how such an award should be calculated in the rare circumstance that an award is found to be warranted.
- (80) Section 100 provides the “board may award a sum it considers reasonable. . . .” Awards of legal costs in court actions are commonly made pursuant to certain scales (such as party and party, special costs (formerly solicitor and own client), and increased costs).
- (81) To begin, we find that our decision to pay legal fees must be subject to certain limits. First, our decision involves reconsideration of a 1994 decision to deny payment of legal fees. The circumstances which existed prior to the 1994 decision, are different than the circumstances which followed the 1994 decision. At least by the time of the 1994 decision, the worker clearly had specific notice of the availability of the Workers’ Advisers office. The legally complex issue of his status as a worker under the Act had been previously resolved. In addition, the lawyer who was initially assisting the worker, left British Columbia to practice in another province. As a result, the worker had to obtain a new representative, so there was no question of interrupting an established and supportive solicitor-client relationship. The combination of circumstances which lead us to conclude there were unique circumstances in this case no longer existed after the 1994 decision. The remaining issues on the claim concerned the amount of compensation payable to the worker; his eligibility for compensation was no longer in issue; and it was necessary for the worker to obtain new representation in any event. We specify, therefore, that our decision to pay legal fees is limited to the circumstances which existed up to the time of the 1994 decision which we are reconsidering.
- (82) Second, we also deny payment of any legal fees associated with the judicial review application. That application was brought after the Review Board issued its December 15, 1988 finding. At that point, the worker had a further avenue of appeal open to him to the former commissioners. In that context, we consider that the judicial review application was brought prematurely as the worker had not availed himself of the remedies available to him under the Act. No legal fees are payable which relate to any part of the judicial review application.
- (83) Finally, we must consider whether the worker should be granted full or partial reimbursement of the legal fees. What degree of detail should be provided by the worker, to justify the expenditures made by the worker for legal fees? What evidence is available concerning the reasonableness of these fees? Even if reasonable, should the full cost of those fees be paid or should reimbursement be made on the basis of some tariff?
- (84) We could provide a general direction that the worker be granted reimbursement for the fees that a reasonable client would have paid to a reasonably qualified solicitor to perform the legal services reasonably necessary in the context of the claim. Alternatively, we could award costs on a particular scale, and leave the amount to be determined. We could remit the matter to a board officer for implementation pursuant to such a general direction.

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- (85) We consider it preferable, however, to provide a final decision on the worker's request, notwithstanding the difficulties in determining the appropriate amount. Inasmuch as the decision to pay legal fees is discretionary, we find it appropriate in exercising this discretion to also address the amount of the payment.
- (86) By letter of October 15, 1993, the worker's lawyer advised the worker's legal expenses exceeded \$35,000.00 at that point. A submission on August 17, 1994 advised that the worker's legal fees exceeded \$40,000.00. The worker's lawyer advised:
- . . . the amount of legal fees involved exceeds \$40,000.00. The fees are not excessive. The claimant's wife is an Office Manager in a law firm and she is capable of recognizing an unreasonable account when she sees one. She and the claimant are both aware of the procedures open to them to tax a lawyer's bill when it should be taxed. . . . So the \$40,000.00 bill is a cost the claimant has had to bear spread over the 8 years of his claim.
- (87) The worker's lawyer explained that the worker's legal bills had been paid by the worker out of his compensation benefits and represented a reduction from his compensation.
- (88) Upon consideration of this matter, and in light of our finding that the costs of the judicial review application should not be reimbursed, we have decided to grant partial reimbursement in the amount of \$25,000.00, as a discretionary payment based on the worker's unique circumstances. We do not award interest on this discretionary payment.

Conclusion

- (89) Upon reconsideration of Appeal Division Decision #94-0791, the worker's request for reimbursement of legal fees is granted to the extent outlined above. The sum of \$25,000.00 is awarded to the worker. In implementing this decision, it is open to the Board to consider the application of section 35 of the Act concerning the manner of payment of compensation.

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

