

Decision of the Appeal Division**Number: 2001-2111/2112****Date: October 26, 2001****Panel: John Steeves, Paul Petrie, Jill M. Callan****Subject: President's Referral – Whether Policy in Item #39.44
Contravenes Section 23(1) of the Act**

PERMANENT DISABILITY AWARDS (LEGALITY OF POLICY) (STANDARD OF REVIEW) – Worker claimed compensation for Raynaud's Phenomenon (Vibration White Finger) – Review Board applied 1998 policy and awarded 2% disability pension – Worker appealed and president referred matter under section 96(4) – *Rehabilitation Services and Claims Manual* item #39.44 (1995), *Assessment of Pensions for Raynaud's Phenomenon*, provides that no pension is payable where the worker returns to normal or equal paying occupation – Functional impairment method under section 23(1) of the Act requires the Board to estimate impairment of earning capacity from the nature and degree of the injury without reference to actual loss of earnings – Policy requires loss of earnings whereas Act does not – Standard of review when considering legality of policy is patent unreasonableness – Paragraph 3 of item #39.44 (1995) involves patently unreasonable interpretation of section 23(1) and is not saved by consideration of section 23(2) or section 82 – Use of a loss of earnings pre-requisite is not a viable option under section 23(1) – Contravention of policy for Review Board to apply 1998 policy to 1997 decision – Worker's pension to be calculated on a functional basis – Paragraph 3 of item #39.44 (1995) is also in item #39.44 (1998) which is referred to the Panel of Administrators for review.

Law: WCA (1996): s. 6(1), s. 6(2), s. 23(1), s. 23(2), s. 23(3), s. 82, s. 91, s. 96(4)**Policy:** RSCM: #39.44; Decision No. 333, 5 *Workers' Compensation Reporter* 96**Decisions:** Appeal Division Decision No. 93-0661, 8 *Workers' Compensation Reporter* 87, Appeal Division Decision No. 97-0510, 14 *Workers' Compensation Reporter* 56, Appeal Division Decision No. 2000-0668, 16 *Workers' Compensation Reporter* 287; Canada (Director of Investigation and Research, Competition Act) v. Southam Inc., [1997] 1 S.C.R. 748**Injury:** Raynaud's Phenomenon*Percent of Impairment – Whether Wage Loss Payable* [worker appeal, (rev. brd.)]*Section 96(4) – Award Based on Contravention of Policy* [s. 96(4) referral]*Appeal Division Decision No. 2001-2111/2112*18 *Workers' Compensation Reporter* 33

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- (1) This is a decision with regards to two matters before the Appeal Division. Pursuant to section 96(4) of the *Workers Compensation Act* (the "Act") the president of the Workers' Compensation Board has referred the Review Board finding of March 6, 2000 to the Appeal Division. The president submits that the Review Board finding contains an error of law and contravention of published policy. The other matter before us is an appeal by the worker, pursuant to section 91 of the Act, with regards to the same Review Board finding of March 6, 2000.

Issue(s)

- (2) With regards to the president's referral, pursuant to section 96(4) of the Act, the issue in this decision is whether the Review Board finding to award the worker a 2% disability award is based on an error of law or a contravention of published policy. With regards to the worker's appeal, pursuant to section 91 of the Act, the issue is whether his functional impairment is greater than 2% of total and whether wage loss is payable.

Raynaud's Phenomenon

- (3) The worker's compensation claim is for Raynaud's Phenomenon. In the early 1990's, the term "hand-arm vibration syndrome" (H.A.V.S.) was introduced as having application to work-related Raynaud's Phenomenon (the term "hand-arm vibration syndrome" now appears in Schedule B of the Act and the applicable policies in the *Rehabilitation Services and Claims Manual*). Another term that is used is Vibration White Finger.
- (4) The symptoms and signs of hand-arm vibration syndrome are described in *Hand-Arm Vibration* (1992, Van Nostrand Reinhold). In describing the vascular effects, the authors state, in part (at pages 26 and 27):

After a variable period of time, depending on the intensity of the vibration received, the vibration exposure time and the susceptibility of the subject, blanching of a fingertip occurs following exposure to cold. With increasing vibration dosage, the blanching progresses to the bases of the fingers. The blanching attacks are usually precipitated by exposure to cold damp conditions, particularly in the morning and at night, when the subjects [sic] metabolic activity is low; following the handling of cold objects or immersion in water and are more common in winter than in summer, but eventually they will occur all year round. With continued exposure to vibration the blanching attacks become more frequent. Typically they last for a few minutes to one hour and terminate with reactive hyperemia and often considerable pain. *During an attack, the affected fingers feel numb as touch, pain, and temperature sensitivity are often greatly reduced, and in some subjects this may persist causing permanent impairment.*

Initially, the blanching is localized to the tips of the fingers most exposed to the vibration source, but eventually it spreads to involve all fingers as far as the metacarpo-phalangeal joints and the tips of the thumb. The palms of the hands are rarely affected. The blanching does not usually occur at work except during rest periods, but in some subjects the vibration stimulus itself will induce blanching if the fingers are cold.

These symptoms and signs are in response to pathological and physiological changes in the tissues of the fingers. . .

[emphasis added]

- (5) At page 31, the neurological symptoms and signs are described as follows:

Paresthesia directly after the use of a vibration tool and at night is common. It has to be distinguished from the sleep-disturbing paresthesia commonly found in C.T.S.

Numbness, which occurs with blanching of the fingers, may persist with decreased tactile and temperature sensitivity to a lesser or greater degree between attacks in subjects more severely affected with the neurological rather than the vascular component. Impairment of skin sensory sensitivity and increased vibration perception thresholds may reflect the functional disturbance of the peripheral nerve trunks, and/or the sensory nerve endings. In some subjects the neurological symptoms predominate. They may be the presenting symptoms and result in loss of finger coordination and loss of manipulative dexterity.

[footnotes deleted]

- (6) There may also be musculoskeletal effects, such as loss of grip strength.

Background

- (7) On February 26, 1997 the worker, a millwright welder at that time, made an application for compensation related to Raynaud's Phenomenon in his left index finger. He described the cause of his disability as the use of vibrating hand tools that damaged his hands and he reported his first exposure as being in 1973.
- (8) In a report dated April 17, 1997 a specialist in vascular diseases, Dr. L, confirmed the diagnosis of Raynaud's Phenomenon in the left index finger as a result of using vibrating tools in the course of the worker's employment. Dr. L concluded that the worker was in Stage II of the classification of Taylor and Stage I of the Stockholm Workshop Classification for sensorineural stages. The specialist also concluded that the worker was fit to continue his present work subject to trying to keep his body warm, including his hands. But with continued use of vibrating tools there would be slow aggravation of the problem and similar symptoms may develop in other fingers. Dr. L recorded that the worker referred to symptoms commencing in October 1996. The Board's internal medicine consultant, Dr. F, provided a report dated July 2, 1997.
- (9) In memo #2, April 30, 1997, the Board accepted the worker's claim for Hand-Arm Vibration Syndrome or Raynaud's Phenomenon. In memo #6 the Board began to set out its adjudication of the worker's claim and the date of injury had been set at February 21, 1997. It was acknowledged that the worker began seeking medical attention in November 1996 but the worker reported to the employer in February 1997. In memo #8 some differences were noted as between Dr. F and Dr. L but the conclusion was that they were not significant with regards to any overall diagnosis. Dr. F did conclude that the worker's symptoms were worse than Dr. L had concluded because Dr. F referred to problems affecting the hand while Dr. L referred to only the left index finger.

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- (10) Nonetheless, the worker's symptoms still fell well within Class 1 of the Laroche Classification system, according to Dr. F. On this basis the worker's condition did not create any significant evidence of direct vascular damage and there is no direct concern over his present employment. On this basis, according to the Board, policy requires that a worker is only entitled to a pension when he is physically prevented from continuing in his normal or equal paying occupation. In a decision dated July 14, 1997 the Board advised the worker of this information and the Board's conclusion that his claim was accepted but he would not receive a pension.

Review Board Finding of March 6, 2000

- (11) The worker appealed the Board's decision of July 14, 1997 to the Review Board and a hearing was held on August 4, 1999. In a memo dated August 18, 1999, subsequent to the hearing, the Review Board panel chair wrote to the Board requesting further information. The medical opinions of Dr. L and Dr. F were noted and the Review Board described the worker's evidence before the panel that he could not work during cold months and in fact did miss time from work from December 10, 1996 to February 4, 1997 because of his symptoms. The panel was unclear as to how Dr. F arrived at the worker's condition falling into Class 1 of the Laroche table and they requested a breakdown of points applied to the various elements to show how the worker's condition fell within Class 1 of the Laroche table. The panel also requested an explanation of how the Class 1 of Laroche converts to the Taylor Classification.
- (12) In memo #12 Dr. F replied as follows:

At that time using the schedule of Laroche he presently fulfilled the requirements for Class 1 Laroche. As you note in your memo #11, a new schedule has now been established which requires the grading of the symptoms within certain points relating to specific elements of (a) vascular elements, (b) sensorineural elements, and (c) musculoskeletal elements. This only became effective on September 11, 1998 and therefore to be fair to the patient and the review board, it is virtually impossible to transpose these findings to the new schedule. Therefore I believe it would be reasonable and correct to bring this man, who I believe lives in [location], to the Board for a brief review and a reassessment based upon the new schedule. I would be happy to proceed with this if you think this is reasonable. Please notify us and we will proceed.

- (13) For reasons that are not clear the worker was not reassessed and the Review Board did not request a further examination.
- (14) In memo #13 Dr. F reviewed the medical information and provided the following further explanation:

The story began in 1996 when he noted blanching and pallor of his left index finger. Eventually these symptoms increased and the blanching extended to the metacarpophalangeal joint. Three minutes in the outdoors during fall and the

late spring would precipitate the symptoms. While the index finger on the left hand was the main involvement, there was some pallor and blanching of the tips of the fingers of his right hand.

Based upon the conditions at that time, attempting to transpose these findings to the new schedule effective September 11, 1998, I believe in regard to the vascular elements the distal phalanges would constitute 3 points. As regards the left index finger, the middle phalange contributes a further point and the proximal phalange 2 points, making a total of 6 points as regards the vascular elements. I would be prepared to assign a further point for the sensorineural element as regards its impairment but know of no difficulty with manual dexterity. Also I do not recall any specific problem with the musculoskeletal impairment (loss of grip). Therefore the total number of points using the new system would approximate 7 which would equate to approximately 2% disability of the schedule.

I hope this is of some help but once again I'd be happy to review him independently again for the most recent findings.

- (15) In an unnumbered memo dated October 12, 1999 a Board disability awards officer wrote to the vice chair of the Review Board panel. With regards to the vice chair's request for a breakdown of the points used for Class 1 of the Laroche table and how this converts from the Taylor Classification the disability awards officer stated, "I simply do not know how to respond." A copy of the Taylor Classification was provided and the comment was that it was "nothing more than a general scale of comments." It was pointed out that the Board does not use the Taylor Classification but Dr. L commented on it.
- (16) In a finding dated March 6, 2000 the Review Board allowed the worker's appeal. The panel's reasoning and conclusions can be summarized as follows,
- (a) The issue identified by the panel was whether the worker had been left with residual functional impairment as a result of his Raynaud's Phenomenon and whether he was entitled to a pension pursuant to section 23 of the Act.
 - (b) The panel noted that, at the Review Board hearing, the worker confirmed the evidence on file and advised he was seeking wage loss benefits from December 10, 1996 to February 4, 1997.
 - (c) The panel reviewed the evidence of Dr. L and Dr. F including the Laroche and Taylor systems of classifications.
 - (d) The panel noted the difficulties converting the Laroche table to the Taylor Classification. They found that the Board's new schedule came into effect on September 11, 1998 after the Board had assessed the worker on July 2, 1997. Dr. F indicated that the same symptomatology that was present in July 2, 1997 clearly did not constitute a disability under the old schedule but it would constitute a 2% disability under the new schedule.

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- (e) Dr. F was unable to provide an actual conversion from the Laroche Table to the Taylor Classification and instead found it more effective to use the new schedule. On this basis the panel accepted that the worker most likely had a 2% disability based on the Taylor Classification. Dr. F noted that he interpreted the findings from the July 2, 1997 examination to the new schedule and he had not re-examined the worker. The panel accepted that the new schedule is a more accurate method of determining disability.
 - (f) The panel concluded that the worker was entitled to a 2% pension award effective when the worker first sought medical treatment in the spring of 1997.
 - (g) The panel made no reference in their finding to the policy requirement in item #39.44 that no pension is payable where the worker returned to his normal or to an equal paying occupation.
 - (h) The panel noted the worker's submission that he was entitled to wage loss from December 1996 to February 1997. However, the panel concluded that they did not have jurisdiction to deal with that issue since the July 14, 1997 letter strictly deals with pension entitlement. The question of entitlement to any temporary wage loss benefits was referred to the Board.
 - (i) The panel also referred the issue of whether the worker's symptoms had worsened since the July 1997 assessment to the Board.

Worker's Appeal to the Appeal Division

- (17) On April 3, 2000 the worker, represented by a worker's adviser, appealed the Review Board finding of March 6, 2000 to the Appeal Division. The worker stated that he disagreed with the Review Board finding because he believed his disability was greater than assessed and it existed earlier than the spring of 1997. The worker also requested that the appeal be registered and withdrawn pending the implementation of the Review Board findings. This request was denied by the deputy chief appeal commissioner in a letter dated April 13, 2000.
- (18) By letter dated April 19, 2000 the worker's employer was invited by the Appeal Division to participate in the worker's appeal (as well as the president's referral) but no response was received.
- (19) A submission dated November 2, 2000 from the worker's adviser set out the worker's submissions on his appeal. With regards to the amount of his pension the worker relied on item #39.44 of the *Rehabilitation Services and Claims Manual* (the "Manual") to submit that, "as it stood at the time of injury (item #39.44) states in part that where a worker falls within Class 1 of the table provided by policy, an award of 4% will be granted." The worker has also asked the Appeal Division to assume jurisdiction on the issue of his temporary disability and any entitlement to wage loss benefits. On this basis the worker submits that he is entitled to wage loss from December 5, 1996 to March 7, 1997 when he returned to work. For this reason the effective date of his pension should be March 7, 1997. In the alternative, the worker submits that the effective date should be December 6, 1996 if the Appeal Division finds that there was no temporary disability from December 1996 to March 1997.

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

President’s Referral

- (21) In a memorandum dated March 31, 2000 the president referred the Review Board finding of March 6, 2000 to the Appeal Division pursuant to section 96(4) of the Act. The president submits that the Review Board finding contains an error of law and contravention of published policy.
- (22) The president’s submission can be summarized as follows,
- (a) The former policy in item #39.44 was effective in 1995 and was applicable at the time of the July 14, 1997 decision letter of the Board. The current policy in item #39.44 was effective September 11, 1998.
 - (b) The Review Board panel considered the Laroche Table under the former policy but did not apply it. Instead they asked the Board to clarify how the worker’s condition would fall into Class 1 of the Laroche Table and how this might convert to the Taylor Classification system which is found in the current policy in #39.44.
 - (c) There is a presumption that the current policy in #39.44 cannot be applied retroactively to a decision that was made before the effective date of the new policy. The Review Board panel applied the new #39.44 to a time when it was not yet in effect and this resulted in an award that could not have been given under the former policy in #39.44.
 - (d) The Review Board ignored requirements of the Act and policy by failing to establish whether the worker was disabled from earning full wages at the work at which he was employed and whether he returned to his normal or equal paying occupation.
 - (e) As an alternative argument, the president submits that if it was open to the Review Board to apply the current policy in #39.44 the Review Board still erred in law and contravening published policy. Under either the old or the current policy in #39.44 it must be asked whether the worker was able to resume his prior job or an equal paying position. In either event the Review Board failed to address this essential issue.
- (23) In a submission dated November 2, 2000 the worker, through the offices of the workers’ advisers, provided a reply submission to the president’s referral. That submission can be summarized as follows,
- (a) The worker accepts that policy changes will not apply retroactively. He also accepts that the former policy in #39.44 of the Manual (effective 1995) was in effect at the time of the decision under review in July 1997. This would be appropriately applied provided that it is legal policy consistent with the Act.

- (b) With regards to whether policy in #39.44 is consistent with the Act the worker identified section 23(1) of the Act specifically. According to the worker, this provision of the Act states that the worker will receive a functional pension if he has a permanent partial disability and then the impairment of earning capacity must be estimated from the nature and degree of the injury.
- (c) A number of sources were identified by the worker. For example, it was noted that Mr. Justice Tysoe, in his Royal Commission Report of 1966, stated that, "A particular worker may be entitled to a pension for a specified disability even if that worker returns to work with no actual loss of earnings." The pension referred to here is a pension pursuant to section 23(1) of the Act. The worker also relied on the interpretation of section 23(1) of the Act found in Appeal Division Decision #93-0661 (8 *Workers' Compensation Reporter* 87).
- (d) The worker reviewed a number of Appeal Division decisions about the standard of review to be applied by the Appeal Division to policy decisions of the Board. According to the worker, the test that should be applied is that the Appeal Division must provide substantial reasons if it decides to defer to a governors' policy that is a strained interpretation of the Act. Similarly, the Appeal Division must provide substantial reasons if it decides the governors' policy is inconsistent with the Act.
- (e) Section 6(1)(a) of the Act has been satisfied because the worker was disabled from earning full wages at the work at which he was employed when he was disabled in 1996-1997.
- (24) Overall, the worker submits that the pre-requisite for an actual loss of earnings in policy item #39.44 is not consistent with section 23(1) of the Act and it does not apply to the worker in this case.

Appeal Division Process

- (25) As a result of inquiries from the Appeal Division, on October 19, 2000 the worker provided earnings information for the years 1994 to 1999 inclusive. These earnings are as follows:

1994	\$49,750
1995	\$52,192
1996 (date of injury: November 1996)	\$50,314
1997	\$43,503
1998	\$48,142
1999	\$56,433

- (26) On November 9, 2000 the Appeal Division held a hearing at the worker's request. The worker confirmed that his hand problems began in November 1996 and he had no symptoms prior to that date. He was off work from December 4, 1996 to March 1997. The worker's treating physician, Dr. G, provided a report indicating that the H.A.V.S. symptoms prevented him from working December 1996 to March 1997 when he was able to return to work. Dr. G indicated that Doppler ultra sonography in February 1997 showed the arterial flow in the fingers was "significantly impaired."

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- (27) The worker said the extent of his symptoms depends on the ambient temperature. If the temperature is warm then his hand is all right. With cold he gets pain and some cramping. He has to avoid hammering-type work and he has tried to get apprentices to do these kinds of tasks. If he uses a sledgehammer after about 10 to 15 hits his hand gets really sore for 2 to 3 days. Then about November 1998 his right hand became symptomatic. After about 20 minutes with an impact gun he can't move his hands.
- (28) He changed work in July 1999 and has been working as a heavy-duty mechanic since then. He explained that he changed jobs because every year his hands got worse and he wasn't making any headway. The new job involved more indoor work. The worker estimated that his earnings in 2000 would be approximately \$90,000 and he described working "every day" with a lot of overtime. He also explained that he had symptoms even when he was away from work.
- (29) Since one of the issues before the Appeal Division on this referral and appeal relates to the validity of Board policy #39.44 the Appeal Division obtained from the Policy Bureau extensive background documents (numbering 195) with regards to that policy. These documents were disclosed to the worker and workers' adviser. We sought and obtained further information with regards to previous versions of item #39.44. However, that request did not lead to any new information and, accordingly, the request and response were not disclosed.
- (30) On March 21, 2001 the workers' adviser provided a submission with regards to the disclosed documents. His submission can be summarized as follows:
- (a) According to the workers' adviser there is little discussion in the documents going to the issue of whether policy in #39.44 is consistent with section 23(1) of the Act.
 - (b) It was noted that the Canadian Medical Association had provided a document describing some work activities. However, according to the worker, the Canadian Medical Association does not have to apply section 23(1) of the Act.
 - (c) The worker relied on Decision No. 157 (2 *Workers' Compensation Reporter* 198) re: sexual impotence. Specifically the worker relies on the statement in that decision that,

Thus as long as a disability is of a type that causes a loss of earnings in [sic] some cases, compensation is payable in all cases of that type of injury without enquiry into whether the injury has caused an actual loss of earnings in the particular case.
 - (d) The worker relies on documents from February and April 1978 with regards to the submission that the worker is entitled to a 4% pension.
 - (e) The workers' adviser notes section 23(2) of the Act which authorizes the Board to "compile a rating schedule of percentages of impairment of earning capacity for specified injuries." However, according to the workers' adviser, policy item #39.44 is not properly part of that schedule because policy item #39.10 states that scheduled awards are awards made under the permanent disability evaluation schedule set out in appendix 4 of the Manual. On this basis, it is submitted that item #39.44 does not carry the protection of section 23(2).

Relevant Provisions of the Act and Policy

(31) The provisions of the Act which are relevant to the president's referral and worker's appeal are as follows:

(32) Section 96(4):

The president may, not more than 30 days after a finding of the review board is sent out, refer the finding to the appeal division for redetermination on grounds of error of law or contravention of a published policy of the governors.

(33) Section 6(1) and 6(2):

Occupational disease

6(1) Where

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

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

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

6(2) The date of disablement must be treated as the occurrence of the injury.

(34) Section 23(1), 23(2), and 23(3):

Permanent partial disability or disfigurement

23(1) Where permanent partial disability results from the injury, the impairment of earning capacity must be estimated from the nature and degree of the injury, and the compensation must be a periodic payment to the injured worker of a sum equal to 75% of the estimated loss of average earnings resulting from the impairment, and must be payable during the lifetime of the worker or in another manner the board determines.

23(2) The board may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations which may be used as a guide in determining the compensation payable in permanent disability cases.

23(3) Where the board considers it more equitable, it may award compensation for permanent disability having regard to the difference between the average weekly earnings of the worker before the injury and the average amount which the worker is earning or is able to earn in some suitable occupation after the injury, and the compensation must be a periodic payment of 75 % of the difference, and regard must be had to the worker's fitness to continue in the occupation in which the worker was injured or to adapt to some other suitable employment or business.

(35) With regards to Board policy we set out relevant policy from 1995 and 1998:

Item #39.44 Assessment of Pensions for Raynaud's Phenomenon
(effective 1995):

To measure the extent of any permanent disability resulting from Vibration White Finger Disease, the evaluation is carried out in the following manner:

1. The Disability Awards Medical Advisor examines and classifies the worker in reference to the following table and states if the worker falls into Class 1, 2, 3, 4 or 5.
2. If the Disability Awards Medical Advisor classifies the worker in Class 1, and evidence from the Rehabilitation Consultant shows that the worker has not returned to the worker's normal or equal paying occupation, then an award of 4% of total is granted. Section 23(3) of the *Workers Compensation Act* will apply regarding the measurement of any impairment of earning capacity beyond 4%.
3. *If the Disability Awards Medical Advisor classifies the worker in Class 1 and evidence from the Rehabilitation Consultant shows that the worker has returned to the worker's normal or equal paying occupation, then no award is payable.*

[emphasis added]

4. If the Disability Awards Medical Advisor classifies the worker higher than a Class 1, there will be other medical evidence which will assist in the determination of the disability.

Item #39.44 Assessment for Pensions for Hand-Arm Vibration Syndrome
(effective September 11, 1998):

To measure the extent of any permanent disability resulting from Hand-Arm Vibration syndrome, the evaluation is carried out in the following manner:

1. The Disability Awards Medical Advisor assesses the vascular, sensorineural and musculoskeletal impairments of the worker in reference to the following table: (Table not included).
2. The adjudicator assesses the worker's disability using the Disability Awards Medical Advisor's assessment of impairment and the following table: (Table not included).
3. If evidence from the Rehabilitation Consultant shows that the worker has not returned to the worker's normal or equal paying occupation, then an award in accordance with the conversion table is granted.
4. *If evidence from the Rehabilitation Consultant shows that the worker has returned to the worker's normal or equal paying occupation, then no award is payable.*

[emphasis added]

(36) The following table describes the classes under the 1995 policy (which was based on the Laroche system):

Class	Traumatic Vasospastic Disease	Symptoms	Evidence of Vascular Damage
1	Exists alone	Moderate; short rest periods (minutes) necessary at work	<ul style="list-style-type: none"> • None from physical, radiologic or arteriographic examination • Normal findings or moderate changes demonstrated by U.V.D. or D.P.
2	Exists along with any two or more of the findings	Severe, forbidding outside work or causing abandonment of job	<ul style="list-style-type: none"> • Sclerodactyly • Fingertip scars (healed ulcers) • Bone changes and vacuoles • Arterial occlusions visualized arteriographically • Severe changes in some fingers demonstrated by U.V.D. or D.P.
3	Exists along with any two or more of the findings	Severe with work outside or inside	<ul style="list-style-type: none"> • Gangrene of one or more fingertips • Healed amputation of one or more digits of one hand • Severe changes demonstrated by U.V.D. or D.P.

Class	Traumatic Vasospastic Disease	Symptoms	Evidence of Vascular Damage
4	Exists along with one or more of the findings	Pain at rest at intervals in both hands	<ul style="list-style-type: none"> • Amputation of two or more digits of two hands • Amputation at or above one wrist with evidence of persistent vascular disease
5	Exists along with one or more of the findings	Severe, constant pain at rest in both hands	<ul style="list-style-type: none"> • Amputation of all digits of both hands • Amputation at or above the wrist of both hands with evidence of persistent vascular disease

Historical Background

- (37) Following the 1966 Royal Commission into the *Workers Compensation Act* by Mr. Justice Tysoe the legislature added item 16 – “Vascular Disturbance of the Extremities” to Schedule B of the Act which provided the benefit of the presumption for workers with prolonged exposure to excessive vibration at low temperatures.
- (38) It appears that the policy for Raynaud’s Phenomenon was initially considered in 1978. This is evident from two documents provided by the worker’s adviser.
- (39) The first document is a memorandum regarding Raynaud’s Phenomenon to the director of Claims from the then vice chairman of the Board dated February 21, 1978. We set out that memorandum in its entirety:

Our thanks to yourself and [Mr. A] for referring this interesting question.

Upon reviewing the comments and the files, we are of the opinion that the condition is indeed a “disability”, in that it has the potential to impair earning capacity. On the question of whether it is work-caused, we feel that this is answered specifically by Schedule B – as long as the claimant has been employed in a process or industry where there has been “prolonged exposure to excessive vibration at low temperatures”.

The difference between this condition and the red cedar problem is that Raynaud’s Phenomenon is indeed *caused* by the employment. It does not amount to a pre-disposition which was not caused by the work environment.

The problem of course lies partly in the fact that we are unable to apply Section 24 (1) (c) [now section 23(3)] to this type of condition. *It is perhaps difficult to see a functional impairment in Raynaud's Phenomenon claims, but there is no doubt that there is such an impairment of the circulatory system. How to measure its extent creates problems, but we feel that it is proper that we continue to accept these claims and evaluate for a pension as best we can on the information available.*

[emphasis added]

- (40) The statement concerning section 24(1)(c) related to the fact that, at the time the memo was written, the Board did not grant loss of earnings pensions for non-spinal injuries (see Decision No. 8 dated October 2, 1973 1 *Workers' Compensation Reporter* 27 and Decision 289 dated December 7, 1978 4 *Workers' Compensation Reporter* 84). In Decision No. 297 dated March 30, 1979 (5 *Workers' Compensation Reporter* 11), the former commissioners determined that, effective October 1, 1977 loss of earnings pensions could be paid for non-spinal injuries.
- (41) The other historical document is dated April 11, 1978 and it is an attempt to give effect to the vice-chairman's memo of February 21, 1978. It is from the manager, Disability Awards to all "metro" disability award officers. We set out that memo in its entirety as well:

The Vice-Chairman in his memo of February 21, 1978 on the subject of Raynaud's, indicated that as best we could on information available, we were to attempt to measure the extent of any permanent disability.

Following a meeting with members of the Medical Department, Special Unit, Rehabilitation Services, [Mr. B] and myself, it was determined that the evaluation should be carried out in the following manner.

1. The D.A.M.A. will examine and classify the worker in reference to the attached table. The D.A.M.A. will be unable to provide a percentage of disability but will state if the worker falls into Class 1, 2, or 3 etc.
2. If the D.A.M.A. classifies the worker in Class 1, as will be the case most of the time, and evidence from the Rehabilitation Consultant shows that the worker has not returned to his normal or equal occupation, then an award of 4.0% of total will be granted.
3. *If the D.A.M.A. classifies the worker in Class 1 and evidence from the Rehabilitation Consultant shows that the worker has returned to his normal or equal occupation, then no award is payable.*
4. If the D.A.M.A. classifies the worker higher than a Class 1, there will be other medical evidence which will assist in the determination of the disability.

This procedure should be followed at least until the present studies on disability evaluation methods are completed, after which further consideration will be given to this matter.

[emphasis added; otherwise reproduced as written]

- (42) The studies on disability evaluation methods were referenced in Decision No. 289 and resulted in Decision No. 297.
- (43) In June 1980 the Board amended the policy in item #23.00 of the *Claims Adjudication Manual* "Diseases Caused by Vibration" by adding a new section #23.10 dealing specifically with Raynaud's Phenomenon. That policy referred to the presumption for item 16 of Schedule B regarding vascular disturbances of the extremities. It specified that Raynaud's Phenomenon was considered to be a disease that did not have an initial period of temporary disability; ". . . The disability is permanent right from the beginning and no wage loss is payable."
- (44) Only disability awards were considered payable for Raynaud's Phenomenon cases under that policy. It did not specify a scheduled award for the disability nor did the policy include the practice contained in the disability awards manager's memo of April 11, 1978 which required a loss of earnings before a pension was payable under Class 1.
- (45) Decision No. 333 dated January 22, 1981 (*Re Certain Industrial Diseases, 5 Workers' Compensation Reporter* 96) is a policy directive in which the former commissioners stated that certain industrial diseases found in Schedule B, including Raynaud's Phenomenon raise "unusual problems." The policy directive states (at page 96):

Specifically, the problems arise because, although the diseases, in the initial stages at least, usually result in some degree of temporary disability which quickly clears when the workers are removed from the adverse working environments, permanent sensitivity remains. Although there may be other diseases or conditions which meet that description, those of primary concern to the Workers' Compensation Board and which will be dealt with specifically in the following are:

1. Traumatic vasospastic disease (vibration white finger, Raynaud's phenomenon)
2. Western red cedar dust asthma
3. Allergic contact dermatitis

All of these diseases have certain common elements. First of all, each is a reaction to one or more well-defined aspects of particular work environments. Traumatic vasospastic disease, or vibration white finger disease, arises out of the use of vibration tools usually in cold weather; western red cedar dust asthma results from exposure to wood dust in the processing of western red cedar wood; and allergic contact dermatitis arises from skin contact with substances of various kinds, such as chromates, resins and other plastics in manufacturing and other processes. *Secondly, in most cases and particularly where*

exposure has not been repeated or prolonged, the symptoms resolve completely within a short time of removal of the worker from the environment. Prolonged and continual exposure may result in permanent impairment.

Only a minority of workers suffer from these diseases because it is thought that their development depends on an innate predisposition or reactivity which is present in only a small proportion of the population, and this reactivity is “triggered” by the offending agent.

[emphasis added]

- (46) Decision No. 333 discussed prevention and established policies for providing various workers’ compensation benefits in relation to the three diseases. The policy directive allowed that each of the three diseases may result in a period of temporary disability which generally would clear when the affected worker is removed from the adverse exposure. This new policy allowed for the payment of wage loss, “. . . If earnings loss results from the attack.”
- (47) This new policy provided for vocational rehabilitation measures to return the worker to a job free from exposure of the offensive agents where a change of occupation was advisable because of the adverse effects of continued exposure. With respect to permanent disability evaluation, the policy directive in Decision No. 333 specified that, “if permanent disability results, a disability award will be established on the greater of either functional loss *or* loss of ability to earn full wages” [emphasis added].
- (48) This policy directive did not incorporate the requirement that a worker establish a loss of earnings before a pension for Raynaud’s Phenomenon could be granted under Class 1.
- (49) In 1984 the Board brought in the new *Rehabilitation Services and Claims Manual* and included in that manual a new policy item #30.10. That policy incorporated the Laroche system of classifying Raynaud’s Phenomenon into five classes. (The table reproduced in the section of this decision entitled “Relevant Provisions of the Act and Policy” is based on the Laroche system.) That policy indicated that generally wage loss was not payable for this condition but specified that wage loss could be paid for exceptional cases of Raynaud’s Phenomenon “where the worker falls within Class 2 [of the Laroche table].” It also specified that:

If the Disability Awards Medical Advisor classifies the worker in Class 1 and evidence from the Rehabilitation Consultant shows that the worker has returned to his normal or equal paying occupation, then no award is payable.


- (50) As indicated in the background papers (and illustrated in this case), one of the difficulties encountered in classifying Raynaud’s Phenomenon under the Laroche system was that the Board’s vascular consultant Dr. L did not use the Laroche classification, but rather classified Raynaud’s Phenomenon impairment using the Taylor classification system which at that time had international recognition. The Taylor classification system was significantly more sensitive to distinctions between mild and moderate symptoms and contained three categories (Stage 1–3) which did not involve a need to change jobs. Under the Taylor classification a worker would be categorized at Stage 4 where a change in occupation was required to avoid

further exposure. By comparison the Laroche system Class 1 was based on mild to moderate symptoms that only required short rest periods (minutes) at work. However, Class 2 of Laroche was generally applied where the symptoms were “severe, forbidding outside work or causing abandonment of job” associated with other evidence of significant vascular damage.

- (51) As noted by the B.C. Ombudsman officer in her correspondence with the Board’s acting chairman on May 25, 1990 the Laroche and Taylor systems use significantly different criteria and “the experts whom we consulted said that it is at best very difficult to convert from one system to the other.”
- (52) The Ombudsman officer concluded that “the two systems are therefore not compatible” and do not lend themselves to a superficial conversion. (Decision #92-0930 8 *Workers’ Compensation Reporter* 251, is a reconsideration decision of a former chief appeal commissioner concerning the Ombudsman officer’s May 25, 1990 letter.)
- (53) Interestingly, the Laroche system rated impairment for Class 1 at 0% and rated Class 2 from 5% to 15%. The gap between Class 1 and Class 2 (1-4%) corresponds with the apparent gap in severity of symptoms and impact on employment between Class 1 and Class 2 of Laroche.
- (54) The Board’s policy responded to this gap by deeming a worker in Class 1 to have an impairment of 4% if the worker was unable to return to his/her normal or equal paying occupation. If the worker was able to return to the normal or equal paying occupation then no impairment pension was payable. This limitation of the Laroche table was generally acknowledged by medical experts in the field. Dr. Laroche himself advised that the scale was developed at a time when no classification for compensation existed in the early 1970’s. In a January 8, 1996 letter Dr. Laroche stated:

This scale was used only “internally” and was never legally recognized in the province of Quebec. We soon found that it was too severe and restrictive rejecting most of the claims and therefore not fair for the workers. It was abandoned around 1985 and replaced by a new classification.

- (55) That revised classification included a more detailed distinction for workers with mild and moderate impairment and contained three stages of classification before a worker could reach stage 4 where a change of work was required.
- (56) It appears from our review of the historical development of this policy that the prerequisite to show an actual loss of earnings before recognizing a permanent impairment in Class 1 of Laroche, was adopted, at least in part, to overcome the deficiency in that impairment classification system that placed most workers in class 1 that had a 0% impairment rating. Under the 1975 Laroche system only workers with severe symptoms significantly impacting their employment and associated evidence of significant vascular damage would receive an impairment rating of 5% or greater. The 1978 disability awards manager’s practice directive adopted the loss of earnings prerequisite to provide some recognition of impairment for workers who were in the upper range of class 1.

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- (57) This approach provided benefits for workers such as loggers whose Raynaud's Phenomenon symptoms fell into Class 1 of Laroche, but who were unable to return to their pre-injury employment involving exposure to vibration from chainsaws and a cold working environment. The Board was, therefore, able to provide some compensation for those workers who had an impairment that fell into Class 1 and who also met the economic test. However, this approach did not provide the same level of compensation for other workers who had the same level of impairment but did not meet the economic test even though the nature and extent of the injury was the same. The Board's use of the economic test to overcome the deficiency in the Laroche classification thus compensated workers with the same impairment differently.
- (58) The background material provided by the Policy Bureau details the ongoing difficulties and disputes that arose from the use of the somewhat limited Laroche system from the 1970's. The Laroche classification relied primarily on vascular components of the disease and did not take into account sensorineural and musculoskeletal components of the disease. The 1998 review of the H.A.V.S. policy noted that the main weakness of the Laroche system was that almost all workers were classified into Class 1. The policy review proposed adopting a revised schedule of impairment using the concepts in the Stockholm table classification system recognized internationally since 1986. The intent of the new proposed system was to provide a method for assessing vascular, sensorineural and musculoskeletal elements of the disease and to provide a method for differentiating "the varying degrees of disability" among workers who would fall into Class 1 of the Laroche table.
- (59) Although the policy review in 1998 noted that the functional impairment method under section 23(1) required the Board to estimate the worker's impairment of earning capacity from the nature and degree of the injury, it did not provide any analysis of this issue and recommended continuing to include the requirement that precluded an award under section 23(1) where the worker had returned to his/her normal or equal paying occupation.

Standard of Review

- (60) Policy in item #39.44, which was applicable in 1997, states that a worker with Vibration White Finger Disease who has returned to his normal or an equal paying occupation is not entitled to a functional pension if his disability falls within Class 1 of disabilities for this medical condition. As a result of the president's referral of the Review Board finding of March 6, 2000 this is challenged by the worker as being contrary to section 23(1) of the Act. We must decide whether policy in item #39.44 is consistent with section 23(1) of the Act and it is clear that the issue of the standard of review to be applied by the Appeal Division to policy decisions of the Board of Governors or Panel of Administrators is squarely before us.
- (61) As part of the inquiry to determine the validity of Board policy it is necessary to decide what standard of review should be applied by the Appeal Division. In general terms, this is a matter of determining what level of deference the Appeal Division should apply to policy decisions of the Board of Governors or Panel of Administrators. Previous decisions of the Appeal Division have applied differing levels of deference to policy decisions of the Board of Governors or Panel of Administrators.

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- (62) One decision which considered this issue is Decision No. 00-0668 (16 *Workers' Compensation Reporter* 287). We set out a significant portion of that decision as it provides a summary of other Appeal Division decisions on the subject. It also provides an analysis of those decisions to reach the conclusion that the standard of review should be patently unreasonableness.

In decision #93-1140, the panel concluded that the policy of basing the permanent partial disability pension on corrected vision “contravenes the legislative requirements found in Section 23(1)”. The panel did not clearly articulate the test to be applied in determining whether a policy contravenes the *Act*. At page 225 the panel framed the issue as “whether it was correct to assess the permanent functional impairment in the worker’s left eye on the basis of his corrected vision alone”. This suggests that the panel may have concluded that the policy concerning the measurement of loss of visual acuity must be based on the correct interpretation of the *Act*. Accordingly, it suggests that the panel considered the governors’ policies must meet a very high standard. At page 227 the panel stated “[t]he question which must be addressed is whether measurement of loss of vision only after correction with conventional lenses is consistent with the *Act*”. This statement does not clearly reveal the standard that the panel applied.

The standard of review for determining whether policy decisions of the governors (now the panel of administrators) are in contravention of the *Act* was considered in appeal division decision #96-0333 (*Workers' Compensation Reporter* Vol. 12, p. 29), which concerned the restructuring of subclass 0621. In that case, the appellants submitted that the appeal division should adopt a “correctness” standard, which the panel described (at page 48) as involving the question of “whether the governors gave optimal effect to the legislative intent”. A group of employers who opposed the appeal argued that a “patently unreasonable” standard should be applied. The panel stated (also at page 48) that standard “would tolerate a governors’ action that reflects a *possible* interpretation of the *Act*, no matter how strained the interpretation might be” [reproduced as written]. The panel noted that this standard is frequently invoked in judicial review applications when a privative clause applies to the tribunal’s decision. The panel concluded (at pages 49 to 51):

Clearly, the legislation confers upon the Appeal Division broad and authoritative decision-making powers. There is no suggestion the Appeal Division’s powers are limited with respect to the interpretation of the *Act*. This suggests the Appeal Division’s power to review governors’ decisions is also broad and that the “patently unreasonable” test is inappropriate. From this perspective, it might be argued the Appeal Division ought to ensure a governors’ resolution gives optimal effect to the statute’s legislative intent.

Conversely, the legislation specifically assigns to the governors and not to the appeal division the power “to approve and superintend the policies and direction of the board” (s. 82). The organizational model recommended in the *Munroe Report* embraced the notion that the governors should be responsible for the board’s policies and overall direction. To harmonize their respective functions the model incorporated an internal appeal body of last resort. The alternative – namely, an external appeal body – was seen as potentially problematic, if policy was to remain in the governors’ hands. To facilitate communication with the Appeal Division the chief appeal commissioner was made, *ex officio*, a non-voting member of the Board of Governors.

The *Act* contemplates an organizational model for the Board based upon, firstly, separation between the broad policy-making function performed by the governors and the independent quasi-judicial function performed by the Appeal Division; and, secondly, respect and recognition of the complementary perspective each must bring to common issues. However, the *Act* also implicitly contemplates the Appeal Division reviewing the lawfulness of the governors’ determinations where they underlie an individual appeal.

On a continuum of possible standards of review, the patently unreasonable test and the correctness test lie at opposite ends. The patently unreasonable test gives precedence to the superintending role of the governors. Insisting on a “best fit” between the governors’ actions and the statutory terms gives precedence to the interpretive function of the Appeal Division. In our view neither test captures the legislative intent to create a workable balance between the governors’ policy-making function and the Appeal Division’s quasi-judicial function. Each entity must be free to accomplish its respective and interrelated obligations as fully as possible. In considering the lawfulness of the governors’ resolution, the Appeal Division must apply a test that reflects this balance.

We, therefore, reject the patently unreasonable test as well as the opposite test that insists on a “best fit” between a governors’ resolution and the statutory terms. We find an intermediary approach more in keeping with the organizational model contemplated by the legislation. We have concluded that the Appeal Division must provide *substantial* reasons, should it decide to defer to a governors’ policy or resolution that is a strained interpretation of the *Act*. Similarly, the Appeal Division must provide *substantial* reasons, should it decide the governors’ resolution is inconsistent with the *Act*.

Substantial reasons would not exist simply by reason that the Appeal Division would have reached a different conclusion than the governors. Substantial reasons would include an interpretation or resolution in the range of possibilities but which offend a clear purpose of the statute, as it relates to the merits and justice of the individual case. Further, substantial reasons would include the governors failing to address obligations the statute makes relevant to the matter before them. In such circumstances the Appeal Division would be compelled to conclude the interpretation or resolution is inconsistent with the *Act*. This approach recognizes the interpretive powers of the appeal division in the system created by the *Workers Compensation Amendment Act, 1989* and facilitates the Appeal Division fulfilling its statutory duty to decide appeals in accordance with the terms of the statute and the merits and justice of the individual case. But it also recognizes that the governors' function of superintending the direction and policies of the Board implicitly limits these powers since the terms of the *Act* will sometimes lend themselves to a range of possible interpretations.

The standard of review was considered by another appeal division panel in unpublished decision #99-0734.

Decision #99-0734, which involved a president's referral under section 96(4) of the *Act*, required a determination of whether item #22.14 of the *Manual* contravenes the *Act*. Although the panel ultimately unanimously determined that, by any standard, the policy does not contravene the *Act*, the panel considered the standard of review. The panel's decision concerning the standard of review was not unanimous. However, the panel was unanimous in departing from the "substantial reasons" standard articulated in decision #96-0333. The panel majority articulated a standard akin to a correctness standard while the panel minority said he "would characterize [the standard] as being towards the 'patent unreasonableness' or 'viability' end of the spectrum".

After considering court decisions involving judicial reviews of appeal division decisions the panel majority stated, in part:

The Supreme Court "defers" to the Appeal Division, in the sense that it permits the Appeal Division to exercise a jurisdiction the Court would otherwise have exercised, but for the statute. The Court does not require the decision of the Appeal Division to be "correct"; it only requires that the Appeal Division avoid being "patently unreasonable".

As workers and employers do not have access to the courts, the deference the courts accord the Appeal Division should not operate to shield Board policy from a level of scrutiny it might otherwise receive from the courts. It should not be a basis for providing to the courts a final decision of the Board that is defective. In delivering the final decision of the Board to the courts, we do so according to the substantial duty placed in us by the legislature and by the courts by virtue of the privative clause and the high degree of curial deference. We are not completing that duty if we make decisions on the rights of workers and employers which are less than correct and merely avoid being patently unreasonable. By failing to apply a standard of correctness, we would further erode rights of workers and employers that are already limited by the “historic compromise”.

Apart from the larger purposive analysis, 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.

The panel minority considered statements in the Munroe Committee Report (*Workers’ Compensation Reporter* Vol. 8, p. 231) concerning the changes to the structure of the board that resulted from the *Workers Compensation Amendment Act, 1989* (Bill 27). Previously, the commissioners of the board had exercised the appellate, policy-making and administrative functions of the board. As a result of Bill 27, those functions were respectively divided among the appeal division, the governors and the president of the board. The panel minority quoted statements from page 240 of the Munroe Committee report to the effect that only one body, the governors, should be making policy under the new structure. The panel minority stated, in part:

... I find that the following principles or points apply to the consideration by the Appeal Division of the lawfulness of policy. I acknowledge that these points contain some repetition and overlap, but find it useful to state these points in different ways.

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- 1) Under section 82, “the Governors must approve and superintend the policies and direction of the board, including policies respecting compensation, assessment, rehabilitation and occupational safety and health. . . .”
 - 2) Under section 83.1 of the *Act*, the powers, duties and functions of the Governors are currently exercised by a panel of administrators (I will refer to the Governors for simplicity).
 - 3) The legislature has vested responsibility and authority for policy-making in the Governors. The authority of the Governors is paramount in the policy-making arena.
 - 4) Many provisions in the *Act* are broad or ambiguous in their wording, or confer a broad measure of discretion on the board, thus leaving room for a broad range of options for consideration by the Governors in adopting a policy. Most, if not all, policies necessarily involve some issue or issues of statutory interpretation, as the policies are developed under the *Act* to further the consistent interpretation and application of the *Act* to individual cases. Policy-making involves consideration of a broad range of factors, of which legal interpretation of the *Act* is only one.
 - 5) Policy-making will generally involve making choices among various permissible options. It requires an evaluation of the significance and effect of the choice for the workers’ compensation system. It involves an application of values by the policy-makers in selecting the preferred policy. Policy-making requires consideration of numerous interests simultaneously, and the promulgation of solutions which balance benefits and costs for many different parties.
 - 6) The Governors may properly adopt a policy which, as a matter of bare legal interpretation alone, would not appear to most closely match the terms of the *Act*.
 - 7) The background considerations and material addressed by the Governors in making policy may not be before the Appeal Division at the time the lawfulness of a policy is being impugned. The actual reasons of the Governors for their ultimate choice will often not be in evidence before the Appeal Division.
 - 8) To the extent the Governors are making choices guided by values, and economic and systemic considerations, which involve a balancing of competing interests, a second-guessing of

their choices by the Appeal Division would involve an improper encroachment on the Governors' policy-making authority under section 82.

9) The role of the Appeal Division is to make decisions in individual cases, and in so doing to provide interpretive guidance to the workers' compensation system.

10) The Appeal Division must apply and interpret the *Act*, Regulations, and existing published policy of the Governors. The Appeal Division has no authority to make policy.

11) The Appeal Division is required by section 99 of the *Act* to give its decision according to the merits and justice of the case. The Appeal Division is also subject to the requirements of natural justice, and cannot fetter its exercise of discretion or apply policy blindly.

12) The circumstances of an individual case may warrant a reasoned departure from a policy, without offending the policy.

13) Where the issue arises in a matter properly before the Appeal Division, the Appeal Division has authority to declare a policy unlawful. The Appeal Division has an obligation to declare policy unlawful where the policy is contrary to the *Act*.

14) To the extent a policy decision of the Governors involves a selection from a range of viable policy options, the authority of the Governors to make that policy choice resides with them alone under section 82 of the *Act*. It is not for the Appeal Division to call a policy unlawful on the basis that some other interpretation might "better" fulfill the objectives of the *Act*. The Appeal Division has no authority to apply a "best-fit" approach (i.e. to require the policy-makers to select the policy which the Appeal Division considers most closely fits the terms of the *Act*).

15) A policy which appears to involve a strained interpretation of the *Act* may nevertheless be lawful.

16) Where a policy involves an interpretation of the *Act* which is so patently unreasonable that its construction could not be rationally supported by the *Act*, that policy must be found unlawful. Such concerns should be addressed within the workers' compensation system, to avoid the necessity for intervention by the courts.

17) The Appeal Division should apply the same standard of review, in determining the lawfulness of policy, whether the matter comes before it on appeal or on a referral by the President under section 96(4) of the *Act*.

18) The Appeal Division's consideration as to the lawfulness of policy must reflect the panel's conviction that the reasons for finding the policy contrary to the *Act* are so compelling under the *Act* they must override any systemic justifications for the policy choice of the Governors. The evaluation of competing systemic considerations is a function best performed by the Governors.

19) If the policy is based on a viable interpretation of the *Act*, that is, one that is supportable according to accepted principles of statutory interpretation, then the policy would not be based on an error of law.

I view these points as being inter-linked as part of a cohesive package, rather than as disparate or unconnected in nature. I have refrained thus far in these reasons from attaching a label to the standard of review which emerges. Labels mean different things to different people – I consider it more meaningful to attempt to articulate what the standard of review involves, rather than focussing upon the name to give to it. . . .

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. As noted above, I consider that the same standard of review applies to the evaluation of the lawfulness of policy in the case of an appeal by a worker or an employer, or on a section 96(4) referral by the President. While

this does not shield the policies from review by the Appeal Division completely, it does justify applying a different standard of review.

We adopt the standard of review articulated by the panel minority in decision #99-0734. We find it significant that, by virtue of section 82 the governors (now the panel of administrators) have been assigned the policy making authority under the *Act* and we conclude that the legislature intended that the appeal division defer to that authority. We accept that a number of factors must be taken into account in approving and superintending the policies and that the interpretation of the *Act* is only one of these factors. We agree that there are characteristics which are unique to the policy making process and that the application of a “best fit” standard or standard of correctness in determining the lawfulness of a policy requires the Appeal Division to engage in a form of decision making that is akin to making policy. We are satisfied that the question to be answered when the appeal division considers the legality of a policy is whether that policy is viable under the *Act*.

Decision and Reasons

Standard of Review

- (63) With regards to the standard of review that we should apply to the question of the validity of policy item #39.44 we have carefully reviewed the previous decisions of the Appeal Division and we have come to the conclusion that the standard of review should be one of patent unreasonableness for the reasons given in Decision No. 00-0668.
- (64) The development of policy options currently rests with a separate agency within the workers’ compensation system, currently the Policy Bureau. This agency has established expertise and credibility in the area of policy development. Further, the development of policy is more than the adjudication of legal rights in individual cases such as is the case before the Appeal Division. Always bearing in mind that policy has to be consistent with the Act (and other legislation such as the *Canadian Charter of Rights and Freedoms*) the development of policy often involves consultation with the employer and worker communities. This consultation can involve controversy between employer and worker interests and the resolution of that controversy can sometimes require unpopular decisions. By the time policy issues come before the governing body of the Board, such as the Panel of Administrators, they have often been widely discussed and judgments have been made about how to make policy consistent with the legislation and to accommodate the interests of workers and employers. The final decision of the Panel of Administrators on a policy issue frequently involves a choice between various options that arise out of a complex policy development process.

- (65) To more fully understand the requirements of this standard of review we have looked at other decisions of the Appeal Division and court authorities. The Appeal Division reconsiders its own decisions on the basis of a standard of patent unreasonableness. In Decision No. 97-0510 (14 *Workers' Compensation Reporter* 56) an Appeal Division panel stated the following:

A patently unreasonable application (or interpretation) of the *Act* would amount to an “error of law going to jurisdiction”. The phrase “patently unreasonable” indicates the degree of magnitude of the error before a decision may be set aside. An application (or interpretation) of a statutory provision is not patently unreasonable simply because there are other possible applications (or interpretations). *It is “patently unreasonable”, if it is not viable, in light of the legislative text and intent.*

[emphasis added]

- (66) It is worth emphasizing the term “patently” as it applies to unreasonable. The Supreme Court of Canada has discussed the difference between a test based on patent unreasonableness versus mere unreasonableness. We adopt the following discussion:

I conclude that the third standard should be whether the decision of the Tribunal is unreasonable. This test is to be distinguished from the most deferential standard of review, which requires courts to consider whether a tribunal’s decision is patently unreasonable. An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference.

The difference between “unreasonable” and “patently unreasonable” lies in the immediacy or obviousness of the defect. *If the defect is apparent on the face of the tribunal’s reasons, then the tribunal’s decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.* As Cory J. observed in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at p. 963, “[i]n the Shorter Oxford English Dictionary ‘patently’, an adverb, is defined as ‘openly, evidently, clearly’”. This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem. See *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at p. 1370, per Gonthier J.; see also *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R.

487, at para. 47, per Cory J. But once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident. [emphasis added]

Canada (Director of Investigation and Research, Competition Act) v. Southam Inc., [1997] 1 S.C.R. 748, para. 56 and 57

- (67) In summary, we conclude that a standard of patent unreasonableness is an appropriate standard for the Appeal Division to apply to its review of policy decisions of the governing body of the Board. A policy provision will be patently unreasonable if it is not viable in light of the relevant legislation (constitutional legislation may pose different considerations). If it requires some significant searching or testing to find the defect then it may be merely unreasonable and valid. But if the defect is apparent on the face of the policy then it is patently unreasonable and invalid.

Analysis of the Development of Board Policy on Raynaud's Phenomenon

- (68) As can be seen from the above section on the historical development of Board policy regarding Raynaud's Phenomenon, its origin appears to be in two memos from 1978. The February 21, 1978 memo from the Board's then vice chairman on behalf of the commissioners who were then responsible for policy determination stated in part:

Upon reviewing the comments and the files, we are of the opinion that the condition is indeed a "disability", in that it has the potential to impair earning capacity. . . .

The problem of course lies partly in the fact that we are unable to apply Section 24(1)(c) [now section 23(3)] to this type of condition. It is perhaps difficult to see a functional impairment in Raynaud's Phenomenon claims, but there is no doubt that there is such an impairment of the circulatory system. How to measure its extent creates problems, but we feel that it is proper that we continue to accept these claims and evaluate for a pension as best we can on the information available.

- (69) Then in the April 11, 1978 memo from the disability awards manager included the following prerequisite for recognizing where a permanent disability existed:

3. If the D.A.M.A. classifies the worker in Class 1 and evidence from the Rehabilitation Consultant shows that the worker has returned to his normal or equal occupation, then no award is payable.

- (70) These historical documents are of relevance to the decision before us because the above quoted paragraph from the disability awards manager's April 11, 1978 memo has evolved into the policy that is at issue in the appeal and referral now before us. As is evident from the above section on relevant policy, that paragraph is virtually identical to paragraph 3 contained in the policies of November 1984, 1995, and 1998.

- (71) While various issues have been considered with respect to this policy over the ensuing years (for example, the use of the tables from Taylor or Laroche) it is not evident to us that any analysis has been provided regarding the viability of applying the economic test from section 23(3) of the Act as a prerequisite to entitlement under section 23(1). Indeed, the original paragraph 3 from April 1978 appears to have been adopted without question as Board policy in 1984 and then repeated, again without question, in subsequent reviews of this policy. However, the context in which Raynaud's Phenomenon was considered in 1978 was significantly different than the context in 1984 because in 1978 loss of earnings pensions were not granted for non-spinal injuries (in 1979 the policy was changed and the effective date was October 1, 1977). We have had the benefit of reviewing background documents related to item #39.44 provided by the Policy Bureau and there is little assistance in those documents regarding the application of the economic test under section 23(1).

Is Paragraph 3 of Item #39.44 Consistent with Section 23(1) of the Act?

- (72) The main issue before us relates to the interpretation of section 23(1) of the Act, which provides that when there is a permanent partial disability "the impairment of earning capacity must be estimated from the nature and degree of the injury."
- (73) The president submits in his referral that the Review Board finding of March 6, 2000 contains an error of law or contravention of policy because the finding is contrary to policy in paragraph 3 of item #39.44. Implicit in the submission of the president is that paragraph 3, item #39.44 is valid policy because there is authority to deny a functional pension to the worker because he has no loss of earnings. This assumption is challenged by the worker in response to the president's referral. Since section 23(1) is the provision of the Act that authorizes the payment of a pension it is logical to consider that the authority for item #39.44 lies in that provision (although, as set out below we have also considered other provisions of the Act). On the other hand the submission made on behalf of the worker is that paragraph 3, item #39.44 is inconsistent with section 23(1) of the Act and it is, therefore, not a viable interpretation of the Act.
- (74) We set out section 23(1) and (3) of the Act once more,

23(1) Where permanent partial disability results from the injury, the *impairment of earning capacity must be estimated from the nature and degree of the injury*, and the compensation must be a periodic payment to the injured worker of a sum equal to 75% of the estimated loss of average earnings resulting from the impairment, and must be payable during the lifetime of the worker or in another manner the board determines.

[emphasis added]

(3) Where the board considers it more equitable, it may award compensation for permanent disability having regard to the difference between the average weekly earnings of the worker before the injury and the average amount which the worker is earning or is able to earn in some suitable occupation after the injury, and the compensation must be a periodic payment of 75% of the

difference, and regard must be had to the worker's fitness to continue in the occupation in which the worker was injured or to adapt to some other suitable employment or business.

- (75) The usual way that sections 23(1) and (3) are described is that the former relates to loss of function or functional impairment pensions and the latter relates to loss of earnings or wage loss pensions. We have highlighted the phrase "impairment of earning capacity" since it is one of the important distinctions between section 23(1) and section 23(3); loss of earnings pensions are not subject to a review of the worker's "earning capacity." Under section 23(1) the impairment of earning capacity must be estimated from the nature and degree of the injury without reference to actual or projected loss of earnings in the individual case.
- (76) The history of section 23 of the Act seems to begin with the 1942 Royal Commission on workers' compensation. The report from that commission, by Mr. Justice Sloan, provided an analysis of various theories which evaluated permanent incapacity. At that time, 1942, the Act authorized only pensions on a loss of earnings basis but the commissioner found that the Board was, in fact, calculating pensions on the basis of the loss of function method. Pensions were calculated "without any direct estimate of the personal capacity of the individual to earn a wage in some employment suitable to his disability" (*Report of the Commissioner Relating to the Workmen's Compensation Board*, Mr. Justice Sloan, 1942, page 119). The recommendation in 1942 was to validate the Board's approach and amend the legislation to calculate pensions on the basis of the loss of function or physical impairment method.
- (77) In 1943 the legislature enacted the following amendment:

But where the Board has deemed or deems it more equitable the impairment of earning capacity may be estimated from the nature and degree of the injury having regard to the workman's fitness to continue in the employment in which he was injured or to adapt himself to some other suitable employment or business.

- (78) In 1952, as part of a second Royal Commission report, Mr. Justice Sloan found that the 1943 amendment:

It is a mixture of two alternative and mutually exclusive theories and does not therefore implement the recommendations I made.

(p. 153)

- (79) He recommended that the Act again be amended to evaluate permanent disability ". . . solely on the basis of physical loss of function." Mr. Justice Sloan considered and rejected representations that would allow payment of an impairment pension only where an actual loss of earnings could be demonstrated. He detailed the specific provisions that very closely resemble the current sections 23(1), (2), and (3). The Act was amended to incorporate these recommended changes in 1954.

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- (80) The 1952 Sloan Report is also instructive because it provides some information about the nature of loss of function pensions. We note that Mr. Justice Sloan used the term “physical loss of *capacity*” to describe the loss of function method and this is reflected in his drafting of what became section 23(1). He went on to describe the difference between a loss of earnings pension and a loss of function pension. In a discussion about loss of function pensions he stated they are to “evaluate compensation on loss of physical capacity solely, *without any reference to the actual or potential future earnings of an individual claimant*” [underlining in original and italics added, *supra*, page 155].
- (81) The significance of referring to an individual claimant was to distinguish between a loss of function or physical impairment pension and a loss of earnings or wage loss pension:

The wage-loss theory deals with the actual experience of an *individual*. It endeavors to measure not only his physical disability, but his mental attitudes, his educational background, his ambitions, initiative and other intangibles in an effort to ascertain his future earning ability on a labour market theoretically ready to absorb him at a wage commensurate with his residue of physical ability and his degree of mental acumen and adaptability.

The physical-impairment theory based on loss of function alone does not concern itself with the individual as such. For instance, it makes no distinction in evaluating loss of function between the amputation of a hand of a labourer and that of a linotype operator. Both are rated as suffering from the same degree of loss of function, although the occupational incapacity in the one case bears no relation to the other.

The physical-impairment theory is based upon mass values and mass averages. Some injured men under this method get relatively more than they would under an individual valuation basis; others get less. Collectively, the long term average takes care of the differences, and in the main the result is that the average injured workman receives just recompense for loss of wages, real or potential, over a period of years.

Then, too, if an individual injured man suffers no actual wage-loss for many years of his working-life, it cannot, in my view, be said that he thereby has lost nothing and is being paid compensation unjustly.

Assuming a young man loses an arm, but is re-employed at his pre-accident wage: on the wage-loss theory he receives no compensation. This method ignores the fact that his physical impairment has lost him not only his arm, but the prospect of promotion in his own job. He is restricted in his field of future employment. He is handicapped in any new position he might take in relation to future promotions in that new field. He is handicapped in the open labour market, resulting in loss of time between jobs and is not able to compete in that market with other normal workmen with two arms and two hands (*supra*, page 155-6).

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- (82) This approach to the two kinds of pensions was carried through to the next Royal Commission, *Commission of Inquiry Workmen's Compensation Act, 1966*, Mr. Justice Tysoe.
- (83) In that report Justice Tysoe described the application of the loss of function or physical capacity method of estimating permanent disability adopted by Justice Sloan in the following terms:

The percentage of impairment of earning capacity allotted under the schedule or awarded in a judgment award represents an effort to state in terms of percentages, and on the average, the extent to which the particular disability will impair the workman's ability to earn. In arriving at this percentage, those preparing the schedule, or in the case of a judgment award those making the award, have had regard to the ability of the workman to do average labouring work. That is to say, regard is not had to the particular class of employment in which the particular workmen has been engaged at the time of the injury (supra, page 273).

- (84) Mr. Justice Tysoe gave careful consideration to further representations made to him that a worker should receive no pension for a permanent disability where the evidence indicates he is suffering no loss of earnings. The commissioner noted that the Board at the time of his inquiry was not using the loss of earnings provision in subsection 22(1)(c) (now section 23(3)) and therefore he did not find it necessary to make a finding on that matter. However, Mr. Justice Tysoe did indicate that a change in the legislation may be required if the Board considered it appropriate to apply the loss of earnings method to deny a pension entitlement under what is now section 23(1) of the Act when he stated:

I suggest that if in the future the Board should find it proper in certain circumstances to apply the loss-of-earnings method so as to deny any pension for a permanent partial disability and it considered there was doubt about its right to do so under the Act, it could make representations to the appropriate authorities for an amendment.

(p. 307)

- (85) We take this conclusion of Mr. Justice Tysoe to reinforce the "mutually exclusive" nature of loss of function and loss of earnings pensions.
- (86) From these first discussions of loss of function versus loss of earnings pensions in B.C. we take it that the purpose of the loss of function method in section 23(1) of the Act is to compensate an injured worker "solely" on the basis of the loss of function without reference to whether he has an "immediate wage loss." This is to compensate the worker for his "physical loss of capacity" to earn what he might earn in the future without his disability. In practice this may mean that some workers will get more than they would if they underwent an individual evaluation and others will get less. A loss of function pension is calculated on the basis of "mass values and mass averages" and "without any reference to the actual or potential future earnings of an individual claimant." As Mr. Justice Sloan said in his 1952 report which describes a worker's receipt of a loss of function pension,

His future earnings do not affect his pension, notwithstanding the fact that he might receive a higher wage after the accident than he was receiving at the time of the accident. In other words, under this method of calculating the amount of the award an individual claimant, in many instances, is paid compensation when he has no immediate wage-loss (supra, page 151).

- (87) This approach to loss of function pensions is confirmed by Terence Ison. He notes language equivalent to section 23(1) and states,

Although that language requires the boards to achieve what is logically impossible, it is generally interpreted as a mandate to adopt a physical impairment method of calculation, and that interpretation is enhanced by other statutory provisions authorizing the boards to adopt disability rating schedules. To ascertain the nature and severity of any residual disability, a board doctor usually makes a clinical examination of the worker. That may be supplemented by other evidence, including testimony of the worker about the physical significance of the disability, *but evidence of the impact on actual earnings of the worker is irrelevant* (emphasis added, Terence Ison, *Workers' Compensation in Canada*, (2nd ed.), page 94-5).

- (88) In light of the above discussion the purpose of section 23(1) is clear; a worker does not require a loss of earnings in order to be entitled to a pension pursuant to that provision. The documentary evidence from the Board does not provide a different interpretation of section 23(1) and we are not aware of another interpretation from the literature or from other sources.

- (89) On the other hand we have policy in item #39.44 (1995) and we cite that policy again,

Item #39.44 Assessment of Pensions for Raynaud's Phenomenon
(effective 1995):

To measure the extent of any permanent disability resulting from Vibration White Finger Disease, the evaluation is carried out in the following manner:

1. The Disability Awards Medical Advisor examines and classifies the worker in reference to the following table and states if the worker falls into Class 1, 2, 3, 4 or 5
2. If the Disability Awards Medical Advisor classifies the worker in Class 1, and evidence from the Rehabilitation Consultant shows that the worker has not returned to the worker's normal or equal paying occupation, then an award of 4% of total is granted. Section 23(3) of the Workers' Compensation Act will apply regarding the measurement of any impairment of earning capacity beyond 4%.

3. *If the Disability Awards Medical Advisor classifies the worker in Class 1 and evidence from the Rehabilitation Consultant shows that the worker has returned to the worker's normal or equal paying occupation, then no award is payable.*

[emphasis added]

4. If the Disability Awards Medical Advisor classifies the worker higher than a Class 1, there will be other medical evidence which will assist in the determination of the disability.

- (90) Is paragraph 3 of item #39.44 (1995) viable in light of the legislative context? We take it as axiomatic that a statutory provision is paramount when there is a conflict between that provision and a policy. On its own the policy is clear in what it says and the meaning of section 23(1) is also clear. It does not take some significant searching or testing of the policy or section 23(1) to find the inconsistency or defect. The fact is that one is the opposite of the other; the Act provides a worker will be paid a pension without a loss of earnings and the policy requires such a loss or the worker will not be paid. The stark difference between the policy and the provision of the Act means that the defect in the policy is obvious and immediate. It does not take significant searching or testing to find the defect and, therefore, paragraph 3 of item #39.44 is not just unreasonable it also involves a patently unreasonable interpretation of section 23(1) of the Act.
- (91) There is no doubt that some workers who have Raynaud's Phenomenon develop a permanent impairment of the circulatory system and the purpose of section 23(1) is to compensate for this impairment by estimating the impairment of earning capacity *from the nature and degree of the injury*. We note that this conclusion accords with a previous Appeal Division decision, #93-0661 (8 *Workers' Compensation Reporter* 87), which found a decision of the former Board of Commissioners patently unreasonable. This decision was based, in part, on the grounds that a pension based on section 23(1) of the Act does not require a reduction in the worker's actual earnings. We note this issue was also discussed in Appeal Division Decision #00-0797. We depart from that decision for the reasons contained in the more detailed analysis here.
- (92) We have considered section 23(2) of the Act as part of this decision. That provision is as follows,
- 23(2) The board may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations which may be used as a guide in determining the compensation payable in permanent disability cases.
- (93) Does this authorize the Board to make policy such as in paragraph 3 of item #39.44? The argument for the affirmative answer to this question is that by authorizing the Board to compile a schedule of percentages of impairment of earning capacity the Board can create a schedule, such as in item #39.44, which results in no pension for a worker. The first problem with this argument is that the language in section 23(2) does not expressly state that the schedule compiled by the Board can apply differently to different workers depending upon whether there is an actual loss of earnings. In our view if the legislature intended to provide the Board with authority to treat two workers with the same level of functional impairment differently

then the legislature would have stated that expressly. The second problem with the argument is a related one. As set out above in some detail the meaning of section 23(1) is clear that a loss of function pension is to be payable even if there is no loss of earnings. To interpret section 23(2) as authorizing the Board to compile a schedule that would eliminate a pension because there was no loss of earnings would be contrary to this well established and uncontradicted interpretation of section 23(1). For these reasons we are not of the view that section 23(2) can support policy in paragraph 3, item #39.44.

- (94) We have also considered section 82 of the Act. We do not read the general policy making authority given to the Board by the legislature to be as specific as to render paragraph 3 of item #39.44 lawful. Section 82 does not authorize the governing Panel of Administrators to create policy that would have the effect of denying entitlement pursuant to a provision of the legislation.
- (95) In the course of our consideration of paragraph 3 of item #39.44, we have noted that the motivation for the enactment of the policy may have flowed from certain difficulties in developing compensation policies related to Raynaud's Phenomenon. While it is clear that Raynaud's Phenomenon can result in permanent functional impairment, there are also cases in which the condition does not result in ongoing impairment once the worker ceases to work in the conditions and with the equipment that have caused the disease. In those latter cases, the worker may change to a lower paying occupation to prevent further development of Raynaud's Phenomenon. One possible effect of paragraph 3 of item #39.44 is to make such workers eligible for a pension where there is no ongoing physical impairment. We note that this approach contrasts with that taken in items #29.20 and #30.50 concerning asthma and contact dermatitis. Those policies provide that a permanent disability pension will not be granted where there is no ongoing physical impairment, although vocational rehabilitation assistance may be provided on a preventative basis.

Section 96(4) Redetermination

- (96) The grounds for referral under section 96(4) are whether the Review Board finding is based on an error of law or a contravention of published policy. We find no error of law with respect to section 6(1) of the Act. The Board accepted that the Raynaud's Phenomenon was due to the nature of the worker's employment. The evidence shows that the worker was disabled from earning full wages at the work at which he was employed starting in December 1996. The requirements of section 6(1) have been met in this case.
- (97) It is common ground between the president and the worker that the applicable policy in this case is item #39.44, dated in 1995, rather than the current policy which is dated September 1998.
- (98) The Review Board panel relied on the policy criteria effective September 11, 1998 in considering a decision made on July 14, 1997. The 2% pension awarded by the Review Board was based on the policy criteria adopted in 1998 rather than the Laroche assessment criteria in effect in 1997. The 1995 policy (which was in effect in 1997) did not provide for an impairment pension of 2% for impairment rated as Class 1 as was the case here. We find that the Review

Board contravened published policy by failing to rely on the policy in effect at the time of the July 14, 1997 decision. Instead they applied the new policy to a decision that pre-dated the application of that policy. We also note that the Review Board did not discuss the validity of that policy or provide a reasoned departure from it.

- (99) Having found that the Review Board finding contravened published policy, section 96(4) of the Act requires us next to redetermine the Review Board finding of March 6, 2000.
- (100) The 1995 H.A.V.S. policy attempted to overcome the inherent weakness in the Laroche table for the cases that had a significant impairment of function, but did not meet the very stringent criteria in Class 2, by providing a 4% impairment pension where there was a demonstrated loss of earnings. We appreciate that the intent of this policy was to provide a method for recognizing disability entitlement under section 23(1) in the most severe cases in Class 1. However, the use of a loss of earnings pre-requisite is not a viable option under section 23(1). The use of a loss of earnings pre-requisite had the effect of denying some workers with a significant loss of function entitlement otherwise provided under section 23(1).
- (101) We also appreciate that the Review Board's efforts to have the medical findings converted to an impairment rating was an attempt on their part to give effect to the worker's entitlement for impairment of function under section 23(1). We find from the evidence in this case that the nature and degree of the injury is sufficient to constitute a disability under section 23(1). There is, however, a vacuum in policy under the 1995 policy to determine the percent of impairment. While it is tempting to identify a percent of impairment on a judgment basis, we are reluctant to do so. That determination could have implications for other similar cases. We find that the disability in this case falls between 1-4%. We leave it to the Board to determine the applicable percent in this case.

The Worker's Appeal

- (102) This is also a decision with regards to the worker's appeal of the Review Board finding of March 6, 2000, pursuant to section 91 of the Act.
- (103) It is submitted on behalf of the worker that his permanent disability is greater than the 2% awarded by the Review Board. It is submitted that an award of 4% should be made. However, there is no medical opinion or other evidence which supports this submission. As noted above, we find that the worker does have a permanent disability. The appropriate percent of impairment is left to the Board to determine.
- (104) The worker also submits that the Appeal Division should take jurisdiction over the issue of the worker's entitlement to wage loss from December 5, 1996 to March 1997. The Review Board panel declined to decide this issue because it was not part of the decision appealed to them. We agree with this conclusion and decline to decide this issue since no decision has been made on this issue at the adjudication level. We note that policy item #27.13, in effect at the time this claim was accepted, stated:

Temporary disability benefits may be payable for vibration-induced Raynaud's phenomenon in the exceptional cases where the worker's condition falls within Class 2 or above as described in the table for assessing pensions for Raynaud's phenomenon (see Chapter 6).

- (105) Based on the medical evidence, we have found that the worker was disabled from earning full wages at the work at which he was employed for purposes of section 6(1) of the Act. We leave it to the case manager to determine the extent and duration of any entitlement to wage-loss under this claim in accordance with the terms of the Act, applicable published policy and relevant evidence. The effective date of the pension will depend on the Board's decision with respect to wage-loss.

Summary

- (106) In summary our decision is as follows,
- (a) It was a contravention of policy for the Review Board finding of March 6, 2000 to adopt and rely on item #39.44, effective November 1998. The applicable policy was the policy dated 1995.
 - (b) The president's referral to the Appeal Division raises the issue of whether paragraph 3 of item #39.44 (1995) is consistent with section 23(1) of the Act.
 - (c) We conclude that the standard of review to be applied by the Appeal Division when considering the legality of policy is whether the policy involves a patently unreasonable interpretation of the Act.
 - (d) We find that paragraph 3 of item #39.44 (1995) involves a patently unreasonable interpretation of section 23(1) of the Act and it is not saved by other provisions of the Act such as sections 23(2) and 82. We note this same paragraph is in item #39.44 (1998). That policy is not before us and is referred to the governing Panel of Administrators for review.
 - (e) We find from the evidence that the worker does have a permanent disability. The percent of impairment is left to the Board to determine. The worker's pension should be calculated on a functional basis and without consideration of whether he has had a loss of earnings or not.
 - (f) The worker's appeal of the Review Board finding of March 6, 2000 is denied. The evidence indicates the worker was disabled from the work at which he was employed. We leave it to the case manager to determine the extent and duration of any entitlement to wage loss under this claim. The effective date of the pension will depend on the Board's decision with respect to wage loss.

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

