

Decision of the Appeal Division**Number: 2002-0994/0995****Date: March 19, 2002****Panel: Heather McDonald, Randy Lane, James Sheppard****Subject: Justification of Charging Average Cost to Employers
in Fatality Claims**

EXPERIENCE RATING (TRANSFER POLICY) (EMPLOYER – PAYMENTS) – The employer appealed a Board decision to charge the average cost of a fatal claim (\$109,700.00) to the employer's experience rating under section 42 – The employer also appealed a Board decision to deny a cost transfer under subsection 10(8) on the basis that actual amount of compensation paid on the claim was less than the "substantial" figure of \$34,150.90 – The Appeal Division panel held that section 10(8) was separate and distinct from section 42, and therefore the Board did not err in using of different cost values – The average cost of fatal claims was found to be an appropriate quantification of "hazard" given section 42, which entitles the Board to have regard to "hazard" of industry or plant – Associating each fatal claim with the average cost of fatal claims was found to provide a degree of fairness in an experience rating plan – The panel did not accept the employer's argument that the Board did not engage in an adequate investigation and pursue remedy from other parties – The panel found that the decision not to pursue a legal recourse was not relevant, and that no published policy provided relief on this basis – Further, the panel found that section 10(8) did not apply as it expressly made reference to "substantial" amount of compensation and the cost in this instance did not exceed the threshold required – There was a specific statutory intent regarding the need for a significant amount of compensation before the Board transfers costs to another employer – The panel concluded that the Board did not fetter its discretion or otherwise err in its interpretation of section 42 in charging the average costs of a fatal claim to the employer's experience rating.

Law: WCA (1996): s. 10(8), s. 38, s. 42, s. 96(6), s. 96(6.1)**Policy:** APM: #30:50:41; #30:50:52; RSCM: #111.25, #115.30, #115.32**Decisions:** Decision 49, 1 *Workers' Compensation Reporter* 210; Appeal Division Decision No. 93-1765 (unpublished, December 17, 1993); Appeal Division Decision No. 96-0955 (unpublished, June 15, 1996); Appeal Division Decision No. 2000-0036 (published on Board website, January 12, 2000); Appeal Division Decision No. 2001-0619 (published on Board website, March 30, 2001); Decision No. 65, 1 *Workers' Compensation Reporter* 27018 *Workers' Compensation Reporter* p. 823**Introduction**

- (1) In December of 1998, a worker (W), a resident of British Columbia and an employee of the employer, was killed during the course of his employment. W's car was struck on the highway by a semi-trailer unit driven by "X," an Alberta resident employed by an Alberta trucking company (the Trucking Company). The accident occurred in British Columbia. The employer's position is that 100% responsibility for the cause of the accident is attributable to X and/or the Trucking Company.

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- (2) The Workers' Compensation Board (the Board) accepted a claim for compensation filed on behalf of W's estate. As W had no known dependants at the time of his death, the Board paid compensation on the claim of \$3,010.33 for funeral and incidental expenses.
 - (3) The Board's Legal Services Division considered pursuing legal action against X and the Trucking Company but decided not to do so. In a memorandum dated November 16, 2000, endorsed by the vice-president, Legal Services Division, Board legal counsel gave his opinion that any legal action would be barred by section 10(1) of the *Workers Compensation Act* (the Act) and that the "limited chances of success do not justify further action."
 - (4) The employer is appealing two Board decisions resulting from this fatal claim for compensation. The first decision is dated March 16, 2001 and is a decision of the director of the Board's Assessment Department. In that decision, the director confirmed the Board's decision to charge the average cost of a fatal claim to the employer's experience rating. The employer notes that the actual costs of W's claim were small and submits that 100% of the accident is attributable to X and/or the Trucking Company. Therefore the employer challenges the Board's decision to charge it with the average cost of a fatal claim (\$109,700.00) as in its view, the resulting experience rating impact is unfair in this case. The employer submits that the Board's decision is contrary to section 42 of the Act. The employer further submits that the Board did not adequately investigate the issues involved in deciding whether or not to take legal action against X and/or the Trucking Company. The employer submits that the assumptions made by the Board regarding the status of X and the Trucking Company do not support the Board charging the average costs of a fatal claim against the employer's experience rating.
 - (5) The second decision is dated August 1, 2001 and is a decision of the director, Central Services, Compensation Services Division. In that decision the director denied the employer's request to transfer, under section 10(8) of the Act, the costs of W's claim to the industry subclass of the Trucking Company. The director determined that only the amount of compensation *paid* on a claim, not the average cost of a fatal claim, could be charged to a different subclass. Section 10(8) requires, among other things, that the Board has awarded a "substantial" amount of compensation on a claim, before the costs can be charged to another subclass. As the costs paid by the Board on W's claim were far less than the threshold for a "substantial amount" of compensation (\$34,150.90), one of the requirements in section 10(8) was not met in this case.

Issue(s)

- (6) Are the issues of whether the Board properly investigated the status of X and the Trucking Company or whether the Board ought to have pursued legal action against X and/or the Trucking Company relevant in this appeal? Is the employer's lack of culpability relevant to the charging of claim costs for the purpose of experience rating? In charging the costs of W's claim to the employer's experience rating, did the Board fetter its discretion by charging the average cost of a fatal claim? Did the Board err in its application of section 42 of the Act? Did the Board err in using two different cost values for the same claim [that is, the actual cost of the fatal claim for the purposes of section 10(8) of the Act and the average fatal claim cost for the purpose of charging the employer's experience rating]? Did the director of the Assessment

Department err in fact or law, or contravene published policy, in his March 16, 2001 decision? Did the director of Central Services, Compensation Services Division, err in fact or law, or contravene published policy in his August 1, 2001 decision?

Procedural Matters

- (7) A management consultant represented the employer in these appeal proceedings. The employer requested an oral hearing, but we decided that the extensive written submissions from the consultant, as well as the other documents on file, were sufficient to enable us to decide the issues in this case. We refer to several unpublished Appeal Division decisions in our reasons. We disclosed copies of those decisions, severed for privacy reasons, to the management consultant and gave him an opportunity to make a written submission about them.
- (8) Under section 96(6) and 96(6.1) of the Act, an employer may appeal a decision relating to a shifting of costs between classes, and an experience rating decision, on the grounds of error of law or fact or contravention of a published policy of the governors. In this case, the employer is alleging errors of law, in that the Board failed to properly apply sections 10(8) and 42 of the Act. The employer also says that the Board erred in law in fettering its discretion in including W's claim in its experience rating calculation. It alleges that the Board erred in fact in finding X to be a worker under the Act (but treating him as an independent operator under section 38 of the Act) and in considering the Trucking Company to be an employer under the Act.

Relevant Statutory and Policy Provisions

- (9) Section 42 of the Act deals with classification of rates. It states as follows:

The board must establish subclassifications, differentials and proportions in the rates as between the different kinds of employment in the same class as may be considered just; and *where the board thinks a particular industry or plant is shown to be so circumstanced or conducted that the hazard or cost of compensation differs from the average of the class or subclass to which the industry or plant is assigned, the board must confer or impose on that industry or plant a special rate, differential or assessment to correspond with the relative hazard or cost of compensation or that industry or plant, and for that purpose may also adopt a system of experience rating.*

[italic emphasis added]

- (10) Section 10(8) of the Act provides that where the Board considers that (a) a substantial amount of compensation has been awarded as a result of the injury or death of a worker, and (b) the injury or death was caused or substantially contributed to by a serious breach of duty of care of an employer or an independent operator under the Act, the Board may order that the compensation be charged, in whole or in part, to the other class or subclass.

- (11) Section 30:50:41 of the *Assessment Policy Manual* (the Assessment Manual) states that the concept behind the Board’s experience rating plan is to promote positive safety attitudes and provide a “degree of equity” down to the firm level. The policy states that a main feature of the experience rating (“E.R.”) plan is that:

Er adjustments are based solely on claims costs. Costs used for the purpose of experience rating are costs directly associated with compensation claims, including the capitalized value of pensions awarded. *The cost used for fatal claims will be the five-year moving Board-wide average cost of fatal claims rather than the actual cost of each claim.*

[italic emphasis added]

- (12) Section 30:50:52 of the Assessment Manual identifies several types of claims costs that are excluded from E.R. consideration. These include “costs recovered by way of a third party action” and “costs transferred to the class of another employer or independent operator” under section 10(8) of the Act. Otherwise, section 30:50:52 is clear that the Board will not consider an argument as to employer culpability in determining the inclusions/exclusions of claims and their costs for experience rating purposes. The policy notes that one of the most common requests from an employer under experience rating is to exclude claims costs on the basis that the claim was not that particular employer’s fault. The policy refers to Decision No. 49 (1 *Workers’ Compensation Reporter* 210, July 22, 1974) as explaining the basic philosophy behind the Board’s general policy not to consider employer culpability in determining claim cost inclusion/exclusion for E.R. purposes.

- (13) Decision No. 49 stated in part that:

The system of experience rating is based to some extent on notions of fault. It reflects the view that some accidents are preventable, and that employers in whose operations injuries are more frequent or substantial should pay higher assessments than those in whose operations injuries are less frequent or less substantial. *But to the extent that the system concerns itself with fault, it does so by reference to aggregated data, not by moral judgments on individual claims.* To take out of this accounting a particular incident because it was adjudged not to be the fault of the particular employer would, therefore, introduce a distortion rather than an improvement in accuracy.

There may be scope for argument about what is a fair and proper formula to apply in the administration of an experience rating system. But once a formula has been adopted, fairness among employers in the class then requires the formula must be strictly followed. To take out a particular claim on the application of the particular employer would be unfair to other employers whose experience includes similar claims, but who have not initiated similar applications.

[italic emphasis added]

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- (14) Section 115.30 of the *Rehabilitation Services and Claims Manual* (the Claims Manual) repeats the Board's policy that as a general rule, all acceptable claims coded to a particular employer are counted for experience rating purposes. It makes no difference whether the injury was or was not the employer's fault. Board policy does specify exceptions to this general rule, including costs recovered by way of a third party action, and costs transferred to the class of another employer under section 10(8) of the Act.
- (15) Section 115.32 of the Claims Manual repeats the policy that experience rating does not include the actual cost of the fatal claims experienced by an employer. Rather, it includes for each claim the average cost for all fatal claims in the year.
- (16) With respect to the exception for costs recovered by way of a third party action, section 10(6) of the Act provides:

If the worker or dependant applies to the Board claiming compensation under this Part, neither the making of the application or nor the payment of compensation under it restricts or impairs any right of action against the party liable, but as to every such claim the board is subrogated to the rights of the worker or dependant and may maintain an action in the name of the worker or dependant or in the name of the board; and if more is recovered and collected than the amount of the compensation to which the worker or dependant would be entitled under this Part, the amount of the excess, less costs and administration charges, must be paid to the worker or dependant. The board has *exclusive jurisdiction to determine whether to maintain an action or compromise the right of action, and its decision is final and conclusive.*

[italic emphasis added]

- (17) 111.25 of the Claims Manual is a relevant policy provision, reflecting the wording of section 10(6) of the Act. It states in part that:

Where the Board is subrogated to an action following a claimant's election to claim compensation, it has exclusive jurisdiction to determine whether it shall maintain or compromise the right of action, and the decision of the Board is final and conclusive. The Legal Services Division of the Board determines whether there is a cause of action against a third party, and whether it is one that is worth pursuing.

History of the Board's Experience Rating Policy

- (18) It is useful at this point to provide a brief history of the Board's policy on experience rating. The first E.R. plan, developed and put into practice at the request of employers, was adopted by the Board in 1932. It applied to all qualifying employers [employers with an assessable payroll of greater than \$20,000] in the forest industry, other than logging. In 1941, it was extended to qualifying employers in the metal-mining industry. In 1957, a second plan was implemented for the logging industry. A third plan was put into effect in 1960 for the construction industry.

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- (19) In 1966, the *Tysoe* report discussed experience rating. The sample plan at page 102 of the *Tysoe* report sets out the experience rating system for the forest products industries for 1963. Item 6 states that: "The calculated cost of each fatal accident shall be the average cost of all fatal accidents under the Act for each of the years 1959, 1960 and 1961."
- (20) The ability of the experience rating system to motivate safe work practices has been the subject of debate and criticism, dating from the *Sloan* report in 1952. The *Tysoe* report notes that experience rating plans were introduced "to offer an incentive to industry to adopt and maintain safe work practices so as to obtain a reduction in assessments or at worst to avoid a penalty." However, the *Tysoe* report refers to two main disadvantages: (1) the deviation from the principle of collective responsibility underlying the insurance scheme on which workers' compensation is based and (2) the unfairness flowing from the fact that an employer may be penalized for something he cannot control. Notwithstanding those criticisms, experience rating plans have remained in effect.
- (21) In charging a claim to an employer's experience rating, the Board has consistently used an average fatal cost rather than the actual cost of the individual fatal claim. This principle was continued when the Board redesigned its 1986 plan. From 1986 to 1995, the average fatal cost for each year was used for the experience rating. In the autumn of 1995, the Panel of Administrators, in an effort to avoid year to year fluctuations, amended the experience rating policy (effective November 1, 1995) to use a five year moving average rather than a one-year average.

Relevant Case Law

- (22) We have earlier referred to Decision No. 49, in which the former commissioners of the Board ruled that the employer's lack of culpability in the worker's death was not a consideration in charging the claim to the employer's experience rating.
- (23) In Appeal Division Decision No. 93-1765 (unpublished, December 17, 1993), the employer argued that the actual cost of the fatal claim, rather than the Board-wide average cost, ought to have been used for the purposes of calculating the employer's experience rated assessment. The employer observed that section 42 of the Act did not use the phrase "average cost of compensation," but rather the wording "cost of compensation."
- (24) The panel in that case adopted the rationale of the then director of the Assessment Department to explain why the actual cost of a fatal claim is not an appropriate basis to reflect the "hazard" of an industry or plant:

We use an average cost for fatal claims for experience rating purposes so as to treat the significance of the fatality identically from employer to employer. As illustrated by your example, the cost of a fatal claim can range from being very minimal to very significant. To a large extent the cost is contingent upon dependents and other factors unrelated to the severity of the injury. With other types of claims the cost is largely influenced by the severity of the injury but that is not always the case with fatal claims as can be seen in your example.

As a result, it has long been our policy to ensure fatalities are accorded universal recognition and significance rather than the significance being minimized by costs which are unrelated to severity.

(25) The panel stated that the Board, in a practical sense, gave the “hazard” associated with a fatal claim a dollar figure (the average cost of a fatal claim) for inclusion in the experience rating system. The panel noted that section 42 permits comparison between industries or plants based on “hazard” as well as the “cost of compensation.” The panel also noted that the effect of including the Board-wide average cost of a fatal claim was to alter the employer’s merit/demerit rating, not to assess the employer to pay the average cost of a fatal claim. The panel found no reasons to vary from published Board policy and grant the employer’s request to exclude the average cost of a fatal claim from the employer’s experience rating.

(26) In Appeal Division Decision No. 96-0955, (unpublished, June 14, 1996), an employer appealed a decision of an assessment manager charging \$194,900.00 (the average cost of a fatal claim) against the employer’s experience rating, when the actual cost paid by the Board on the claim was \$4,644.51. The panel quoted from the justification provided by the then director of the Assessment Department:

... depending on the marital status of the deceased and other factors, the cost of an individual fatal claim can range from a few thousand dollars to several hundred thousand dollars. In view of this the Board has always used the average cost of all fatal claims in any accident year regardless of industry.

The impact of a fatality is so severe that all fatalities are treated as equally significant for experience rating purposes.

The average fatal cost is used only for experience rating purposes and is not reflected on the Claims Cost Statement as it refers only to the actual amount paid on any particular claim.

(27) The employer argued that Board policy in section 30:50:41 of the Assessment Manual, using for experience rating purposes the average cost of fatal claims rather than the actual cost, was “illogical, unwarranted and unfair.” The employer submitted that this introduction of “an artificial component into the formula” skewed the experience rating system for “no apparent reason.”

(28) The panel dismissed the employer’s appeal. It found that section 42 of the Act permitted the Board to devise an experience rating system which the Board had established in its policy. The panel found no error of fact or law or contravention of policy in the decision under appeal. The panel stated that the employer’s submissions essentially raised policy issues, not within the ambit of appeal under section 96 of the Act.

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- (29) In Appeal Division Decision No. 2000-0036 (published on Board website; January 12, 2000), the employer appealed a case manager’s decision denying it cost relief under section 42 of the Act. The panel referred to section 115.30 of the Claims Manual’s policy that generally all acceptable claims coded to a particular employer are counted for experience rating purposes. With respect to the exception for “costs recovered by way of a third party action,” the panel stated:

I consider that exclusion #1 is triggered when the Board actually recovers monies. Where there is recovery by the Board it seems reasonable that the Board relieves an employer of costs. With recovery the Board has not in the end incurred costs so why should the employer be charged? However where there is no recovery by the Board there is no basis to relieve the employer of costs. The general guideline in item #115.30 would be applicable. Thus on the plain wording of the policy no exclusion of costs is possible in this case.

[underline emphasis in original]

- (30) In that case, the employer argued that the Board should have pursued third party action. The panel responded in part as follows:

I appreciate that Mr. H considers that Board policy was not followed and the Board should have pursued a legal action on behalf of the worker against Dr. P and asserted a claim to the monies recovered. I stress that the decision of the Board not to pursue the action is not before me as the appeal is from the decision of the case manager. I strongly question whether a decision to pursue a legal action would be within the Appeal Division’s jurisdiction . . .

I do not consider costs can be removed from an employer’s claims cost statement simply on the basis of an argument that had the Board recovered monies by way of a third party action then the Board could have relieved costs. *There is no provision in published policy of the Governors to provide some sort of equitable relief on the basis that had something been done, monies would have been recovered, and monies could have been credited to a claims cost statement . . .*

[italic emphasis added]

- (31) The panel in that case commented that the Board’s policy rules regarding the charging of costs were constructed with a particular purpose in mind, and are interlinked with each other. The panel said that to grant exclusion of costs in cases other than those covered by the policies would amount to “tinkering” with the cost charging system. It considered that to do so would be appropriate only in very compelling circumstances, which did not exist in that case. The panel did not elaborate on what type of circumstances might be considered sufficiently compelling to tinker with the cost charging system.
- (32) Reasons similar to those expressed in Decision No. 2000-0036 were given in Appeal Division Decision No. 2001-0619 (March 30, 2001, published on the Board website).

The Section 42 (Experience Rating) Issue

- (33) The employer provided an extensive submission in support of its position that the Board's Legal Services Division was wrong in not pursuing legal action against the Trucking Company and/or X to recover costs of the worker's claim. The employer has argued that the Board did not conduct a timely investigation to determine the status of X and the Trucking Company under the Act to protect the employer's interests, and this lack of adequate investigation amounts to an error of law. The employer submits that the Board erred in its application of section 42, as the fatal injury to the worker was "clearly the fault of a third party" according to the employer. The employer submits that because it was not responsible for the worker's death, there is no support for the Board's decision to charge the average cost of a fatality to the employer's experience rating. The employer says that under section 42 of the Act, it was not "so circumstanced or conducted that the hazard or cost of compensation differs from the average of the class or subclass" to which the employer is assigned.
- (34) We have given serious consideration to the employer's arguments on these matters. We have decided, however, that the issue of whether the Board "properly" investigated the legal status under the Act of X and the Trucking Company, and the issue of whether the Board ought to have pursued legal action against them, are not relevant in these proceedings.
- (35) Board policies to which we have earlier referred are clear that employer culpability with respect to a particular claim injury or fatality is not a relevant concern in the experience rating system. All claims accepted by the Board are coded to the accident employer and counted for experience rating purposes, whether or not they were the employer's fault. There are only specified exceptions to this rule, one of which is the exception for costs "recovered" by way of third party action. We agree with Decision No. 2000-0036 that that exception only comes into play when monies are actually recovered through third party action. This policy exception does not create a type of equitable relief for an employer on the ground that there was the potential for a successful legal action and possible cost recovery in the future.
- (36) The Board's decisions regarding how much time to spend in investigating the legal status of X and the Trucking Company, and the ultimate decision not to pursue third party action, have an important administrative component beyond law and policy. For example, decisions regarding the cost of pursuit must be made, whatever the legal status under the Act of the potential third parties. In any event, the Legal Services Division's decision is not one of the appealable decisions in these proceedings. Section 10(6) of the Act and section 111.25 of the Claims Manual emphasize that the Board has exclusive jurisdiction to determine whether to maintain an action or compromise the right of action, and its decision in that regard is final and conclusive. Such a decision is not within the types of appealable decisions specified in section 96(6) or 96(6.1) of the Act. Our view is that we do not have jurisdiction to review and intervene in the Board's decision not to pursue third party action in this case based on its investigations and conclusion regarding the section 10(1) bar and the "limited chances of success" of such legal action.
- (37) We disagree with the employer's submissions that the Board erred in its interpretation and application of section 42 of the Act, fettering its discretion by including the average cost of a fatal claim without consideration to relevant matters. Section 42 does not require that in the

case of each claim to which experience rating applies, the Board must inquire regarding the culpability of the employer. Neither does it require the Board to examine other facts specific to the claim injury and accident, before the average costs of a fatal claim can be charged to the employer's experience rating. Section 42 entitles the Board to have regard to the "hazard" of a particular industry or plant. We find that an appropriate quantification of "hazard" with respect to fatal claims is to associate each claim with the average cost of fatal claims. This provides a degree of fairness in an experience rating plan. This is because it recognizes, on a systemic basis, that the cost of a fatal claim in a particular case is largely a matter of chance that has nothing to do with the severity of the worker's injury.

- (38) In a fatal claim, the injuries are equally severe — they are all fatal — yet the costs on each claim will differ widely depending on, for example, whether or not the worker had dependants and/or whether the death occurred immediately or sometime after the claim accident. We do not agree that by applying an experience rating plan which takes into account the equal severity of fatal claims and treats all such "hazards" as having an equal compensation cost to be charged against employers, that the Board has fettered its discretion in this case by abandoning that important element of the plan and considering the culpability of the employer for the worker's accident.
- (39) What the employer proposes we do in this case is what many employers would request: that the Board make exceptions, contrary to published policy and the basic structure of the experience rating plan, on an individual basis with reference to the "fault" of various parties to a fatal claim accident. We agree with the panel in Decision No. 2000-0036 that only in the most compelling of circumstances, none of which exist in this case, should such distortion at the individual claim level be undertaken by the Board. Like the panel in Decision No. 2000-0036, we do not find it necessary to describe the type of circumstances that might qualify as sufficiently compelling to justify making such an exception to general policy and the basic rules on experience rating.
- (40) The employer has argued that the Board is not entitled to use the average cost of a fatal claim for section 42 experience rating purposes, and use a different cost value for the same claim for purposes of section 10(8) transfer of costs to a different subclass. We disagree with the employer's position. Section 10(8) expressly refers to the requirement of a "substantial amount of compensation" having "been awarded." Thus there is a specific statutory intent regarding the need for a significant amount of compensation to be awarded before the Board may charge costs to another employer. In Decision No. 65 (1 *Workers' Compensation Reporter* 270, November 12, 1974), the former commissioners discussed the significance of the word "substantial" in section 10(8):

A primary goal in our system of workers' compensation is to provide for automatic compensation in cases of industrial injury or death without enquiry into fault, either on the part of a worker or an employer. The adoption of this system not only reflected a moral judgment that compensation should be paid regardless of fault, but also a desire to avoid the enormous administrative expense that would be incurred by enquiring into fault as a normal routine. Thus it is only in exceptional circumstances that the Act makes reference to fault, and it is

only in very exceptional circumstances that an enquiry into fault should be undertaken. *The word “substantial” should, therefore, be construed as indicating a level of compensation payments sufficiently high that an enquiry into fault is worthwhile.* In a case of this kind, making dependable judgments on fault could involve an administrative cost easily in excess of \$1,000.00. It would seem out of proportion that expenditures of this order should be incurred to determine whether costs as low as this case should be borne by one class or another.

[italic emphasis added]

- (41) We agree with the interpretation of the director of Central Services, Compensation Services Division, that the phrase “substantial amount of compensation” in section 10(8) refers to the actual cost of compensation paid on the claim. Section 10(8) pre-dates the experience rating system and the statutory provision is separate and distinct from the purposes and objects of section 42. Although it is true that claims involving significant compensation awards fulfill a section 10(8) requirement whereas claims involving less significant awards do not, nevertheless section 10(8) treats employers in like situations the same way. We find no error in the Board’s use of two different cost values for the same claim, with respect to the two different statutory provisions in sections 10(8) and 42.
- (42) For the foregoing reasons, we have found no error in fact or law, or contravention of published policy, in the March 16, 2001 decision of the director, Assessment Department.

The Section 10(8) (Transfer of Costs) Issue

- (43) In his August 1, 2001 decision, the director, Central Services, Compensation Services Division, noted that two criteria must be met in section 10(8) before the Board will transfer costs to another class or subclass. The first is that the Board must have awarded a “substantial” amount of compensation on the claim. He noted that the Board has interpreted “substantial” as claims costs in excess of a certain monetary amount as adjusted in accordance with the Consumer Price Index Adjustment Formula. The claims cost threshold for 1998 was \$34,150.90. Given that the Board had paid only a little over \$3,000.00 on the worker’s claim in this case, the director found that the first criteria was not met for the Board to charge the claim costs to the Trucking Company in the different industry subclass.
- (44) For the same reasons we have provided earlier in this decision with respect to the section 42 issue, we agree with the director’s interpretation of section 10(8) as not referring to the average cost of fatal claims, but rather the amount of compensation actually paid by the Board on a claim. We agree with his decision that the claims cost threshold of “substantial” was not met in this case, and that section 10(8) does not apply.
- (45) We have found no error of fact or law, or contravention of published policy in the director’s August 1, 2001 decision denying the employer’s request to apply section 10(8) to charge the compensation awarded on the worker’s claim to the Trucking Company’s industry subclass.

Conclusion

- (46) We deny the employer's appeal of the March 16, 2001 decision of the director, Assessment Department to charge the worker's claim to the employer's experience rating. We deny the employer's appeal of the August 1, 2001 decision of the director, Central Services, Compensation Services Division, not to apply section 10(8) in this case.
- (47) We have found:
- The issues of the adequacy of the Board's investigation into the viability of third party action, and its decision not to take third party action, are not relevant in these appeal proceedings;
 - The employer's lack of culpability is not relevant in this case to the charging of claims costs for the purpose of experience rating;
 - The Board did not fetter its discretion or otherwise err in its interpretation and application of section 42 of the Act in charging the average costs of a fatal claim to the employer's experience rating;
 - The Board did not err in using two different compensation cost values in interpreting sections 10(8) and 42 of the Act;
 - We find no errors in fact or law, or contraventions of published policy in either of the Board's March 16, 2001 or August 1, 2001 decisions.

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