

Decision of the Appeal Division**Number: 2002-2482****Date: September 25, 2002****Panel: John Steeves****Subject: Appeal Division's Authority to Review Decisions
of the Former Board of Commissioners**

RECONSIDERATION, APPEAL DIVISION (PRACTICE AND PROCEDURE) (COMMISSIONERS' DECISIONS) (NEW EVIDENCE) – A surviving granddaughter of a worker who died in 1959 requests a reconsideration of the 1959 decision by the former Board of Commissioners (the commissioners) to suspend the worker's claim for compensation for silicosis – At issue is whether the new evidence provisions of section 96.1 of the *Workers Compensation Act* (1996) (the Act) can apply by virtue of section 17(5) of the *Workers Compensation Amendment Act 1989* – The granddaughter submitted there were errors in interpreting medical evidence, and discrimination against her grandfather contrary to the anti-discrimination sections found in division 5 of the Act – The Appeal Division panel determined that section 17(5) of the *Workers Compensation Amendment Act 1989* only provides authority to reconsider the commissioners' decisions that were made under sections 91 and 96 of the Act as it read immediately before the amendments enacted came into force and the Appeal Division panel found that the 1959 decision was not made under section 91 or 96 of the former Act – The Appeal Division panel did not decide the precise date when the former Act came into force – Anti-discrimination sections of the Act were found not to apply retroactively before October 1, 1999 – The Appeal Division panel applied a standard of patently unreasonable to the 1959 decision pursuant to section 96(2) of the Act and concluded that there was no error of law going to jurisdiction – Appeal denied.

Law: WCA (1996): s. 96.1, s. 96(2); *Workers Compensation Amendment Act* (1989, Bill 27)**Policy:** RSCM: #14.10, #14.20, #17.11, #22.10, #22.11, #74.11, #84.54, #111.10; #115.30, Appeal Division Decision No. 152; Decision No. 8 of the *Governors 7 Workers' Compensation Reporter*;**Decisions:** *Atchison v. Workers' Compensation Board*, 2001 B.C.S.C. 1661, Victoria Registry, under appeal; *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848; Appeal Division Decision No. 2001-0779 (published on Board website); Appeal Division Decision No. 92-0818, 8 *Workers' Compensation Reporter* 211; Appeal Division Decision No. 93-0640, 10 *Workers' Compensation Reporter* 101; Appeal Division Decision No. 00-0668, 16 *Workers' Compensation Reporter* 28718 *Workers' Compensation Reporter* p. 881

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- (1) This decision arises from a claim for silicosis by the worker which was made in 1958.
 - (2) Ultimately the Board suspended the worker's claim for compensation and he had an untimely death in 1959.
 - (3) In October 2001 the worker's granddaughter wrote to the Board requesting information about her grandfather's death. She challenged the Board's decision to suspend the worker's claim for silicosis and the Board confirmed the original 1959 decision in a decision dated November 2, 2001.
 - (4) The worker's granddaughter now requests reconsideration of the 1959 decision of the Board.

Issue(s)

- (5) Whether the new evidence provisions of section 96.1 of the *Workers Compensation Act* apply to this application. Alternatively, whether the 1959 decision of the Board of Commissioners contains an error of law going to jurisdiction, applying authority pursuant to section 96(2) of the Act assigned to the Appeal Division.

Background

- (6) The Board file indicates that the worker was employed as a hard rock miner from 1929 to 1947. There are various what appear to be routine medical examination reports from 1941 to 1947 and 1952 which indicate that the worker's health was normal.
- (7) On August 25, 1958 the worker's union submitted an application for compensation on his behalf. This application was for work-related silicosis and the first date of disablement was listed as 1956. It appears that the worker stopped work as a miner on or about 1947.
- (8) The worker attended a medical examination at the Board on December 16, 1958. The history taken indicated that he had been short of breath for five to six years. Also, at the beginning of 1958 he had been diagnosed as having cancer of the throat and had an operation for removal of his larynx and further related surgery in November 1958. An x-ray taken December 16, 1958 showed "widespread bilateral nodal silicosis with enlargement of both hilar shadows." The recommendation of the medical examination was as follows,

This man has had extensive surgery for carcinoma of the throat. The x-rays while possibly showing some early silicotic changes, in our opinion, are more likely to be due to secondary cancer, particularly in view of the rapid progression in the last few months. In view of the fact that the man worked regularly until the beginning of the present year, we do not feel that we can determine that he had a substantially lessened capacity for work due to silicosis. We would recommend that the claim be put in suspense.

- (9) This recommendation was accepted by the Board of Commissioners and communicated to the worker in a decision dated December 30, 1958.
- (10) Beginning in January 1959 the worker's attending physician wrote to the Board to suggest that there was a bona fide medical dispute over the suspension of the worker's claim. Consideration was given to referral of the worker's claim to a panel of not less than three medical specialists pursuant to the then section 54A of the *Workmen's Compensation Act*. This was considered by the former Board of Commissioners, who then had responsibility for these matters, and a memo from the Board solicitor dated March 2, 1959 is as follows,

This 64 year old workman has had extensive surgery for carcinoma of the throat. [Drs. K and M] indicate there may be some early silicosis but that the changes in the lungs are probably due to secondary cancer. They do not feel this workman has any substantially lessened capacity for work due to silicosis.

We have received a letter from [Dr. B] who *thinks* that there is a bona fide medical dispute. This workman's last employment in the mining industry was in 1947 and he did not file an application until August 1958, more than five years after leaving the industry.

QUESTION? Should this claim be allowed to proceed under Section 54A?

[emphasis in original]

- (11) There were three commissioners at the time. One answered the question posed by the solicitor as no, one answered "Discretionary No" and one answered yes.
- (12) On this basis the solicitor of the Board advised the worker in a letter dated March 19, 1959 that his case did not appear to be one which was properly reviewable under section 54A of the *Workmen's Compensation Act*.
- (13) The worker's condition deteriorated and he underwent a number of treatments including nitrogen mustard introduced into the chest cavity on several occasions. Unfortunately he died on September 12, 1959. An autopsy was performed on September 15, 1959 and widespread metastases involving several organs including the lungs was noted. The final pathological diagnoses were as follows,
 - 1. Epidermoid Carcinoma of Larynx (Removed).
 - 2. Widespread Metastases.
 - 3. Right Pleural Effusion.
 - 4. Hemorrhagic Cystitis.
 - 5. Tracheostomy.

Submissions

- (14) The granddaughter's efforts to seek information about her grandfather's compensation history began when she requested disclosure of his claim file, pursuant to freedom of information legislation, on October 9, 2001. This was provided on October 16, 2001. She then wrote to the Board on October 20, 2001 to request a review of the claim.
- (15) The application before me begins with a letter dated November 7, 2001 from the Board to the granddaughter of the worker. The letter set out some of the history of the worker's claim and it included a copy of the memo dated March 2, 1959. The Board advised the granddaughter that there was no potential claim arising from the worker's silicosis condition or death. The letter also provided incorrect information about a right of appeal to the Review Board.
- (16) On December 7, 2001 the granddaughter replied to the Board's letter. She included information she obtained from research she had done on her grandfather and she submitted he had been dismissed from his work because of his political beliefs. Division 5 of the Act, the protection against discriminatory action, was relied on. She requested that the Board "present" her

appeal to the Review Board or Appeal Division. A subsequent letter (May 6, 2002) from the Board advised the granddaughter that her grandfather's political views played no part in the decision that his cancer was not compensable.

- (17) The granddaughter's request for an appeal ultimately was received by the Appeal Division and, in a letter dated April 19, 2002, she was advised by the Appeal Division of the remedies available to her. Since the decision she was challenging was a decision of the former Board of Commissioners she could apply for a reconsideration of that decision on the basis of new evidence pursuant to section 96.1 of the Act or on the basis of an error of law or breach of the *Canadian Charter of Rights and Freedoms*.
- (18) The granddaughter provided a submission dated May 23, 2002 to the Appeal Division. By this time she had obtained information from her grandfather's claim file as a result of a request she made pursuant to freedom of information legislation. Her submission can be summarised as follows;
- (a) She relied on sections 96(2) and 96.1 of the Act.
 - (b) She submitted that the Board applied improper procedures to her grandfather's claim for compensation and there was inconsistency of procedure and negligence.
 - (c) She submitted that the medical evidence was not properly assessed and appraised when it was looked at in 1963.
 - (d) The granddaughter pointed out that an x-ray report of December 16, 1958 described "widespread bilateral silicosis." On the basis of this report it is "questionable" and "mysterious" that the worker's claim was denied.
 - (e) The worker's union had written to the Board on July 16, 1959 to assist the worker. This was not given proper consideration, according to the granddaughter.
 - (f) The third concern of the granddaughter was that the Board's solicitor had questioned why the worker's claim had not been brought up each year since it was only suspended in 1958.
 - (g) Finally, the granddaughter relied on the autopsy report of September 15, 1959. She submits that it "neither confirms or excludes" that the cause of death was silicosis. The Board did not properly consider this report and, instead, "made up its own mind and decided to close the case."
- (19) The worker's employer at the time of his claim in 1958 is no longer registered with the Board. The Appeal Division provided notice of the granddaughter's application to an industry association and invited their participation. This was done pursuant to the published practice and procedure of the Appeal Division. The industry association retained counsel who provided a submission dated July 24, 2002.

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- (20) Counsel points out that the industry association received only three documents with the invitation to participate. These were the granddaughter's letters of December 7, 2001 and May 23, 2002 and the Board's decision of March 2, 1959. This was done because the granddaughter received only the March 2, 1959 decision from the Board when she made her initial request for a review. It is the practice of the Appeal Division to provide limited disclosure of sensitive claim files in the case of most applications for reconsideration. If grounds for reconsideration are established then the Division provides full disclosure to the parties in order to redetermine the merits of the appeal.
- (21) In this case the granddaughter was provided with the same disclosure as the employer but she was also able to get disclosure of the worker's file through freedom of information legislation. Apparently the industry association did not apply or, if they did apply, they were not entitled to disclosure on this basis. In these circumstances I considered whether to provide full disclosure to the industry association so they would have the same information as the granddaughter. However, in light of the decision I have made, I decided not to open up the appeal process again to provide disclosure and then receive submissions.
- (22) Counsel for the industry association makes a number of jurisdictional arguments as part of a general submission that the Appeal Division does not have authority to consider the granddaughter's appeal.

Appeal Division Jurisdiction on an Application for Reconsideration

- (23) The Appeal Division has the authority to reconsider previous decisions from two sources.

Section 96.1 of the Act

- (24) Section 96.1 of the Act can apply to reconsiderations in two ways. First, that provision states that the Appeal Division can reconsider its own decisions on the basis of new evidence that is material, substantial and which complies with a due diligence test. Since the matter before me is an application to reconsider a former Board of Commissioners' decision, and not a decision of the Appeal Division, section 96.1 has no application to my decision.
- (25) The legislature has also authorized the Appeal Division to reconsider former Board of Commissioners' decisions on the basis of the new evidence provisions in section 96.1. This is provided for in section 17(5) of the *Workers Compensation Amendment Act* (1989, Bill 27) in the following terms,

A worker, the worker's dependants, the worker's employer or the representative of any of them may apply to the chief appeal commissioner for reconsideration of a decision made under section 91 or 96 of the former *Workers Compensation Act* on the same grounds and in the same manner as that set out in section 96.1 of the new *Workers Compensation Act*.

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- (26) Bill 27 also defines “former *Workers Compensation Act*” to mean,
 . . . the *Workers Compensation Act* as it read immediately before the amendments enacted by this Act came into force;
- (27) As will be seen these provisions are significant for my decision.
- (28) Since this does provide authority to reconsider former Board of Commissioners’ decisions and since the granddaughter specifically relies on this provision it is clearly a matter I must consider. Counsel for the industry association submits that section 17(5) has no application.

The Common Law

- (29) There is common law authority for the Appeal Division to reconsider its own decision if that decision is a nullity (*Atchison v. Workers’ Compensation Board*, 2001 B.C.S.C. 1661, Victoria Registry, under appeal; *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848). Where a tribunal has made an error of jurisdiction, it is entitled to correct that error. Again, the application before me does not involve a request to reconsider an Appeal Division decision.
- (30) Section 96(2) of the Act gives the Board a broad power to, at any time and at its discretion, reopen, rehear and redetermine any matter which has been dealt with by the Board or by an officer of the Board.
- (31) In Decision No. 8 of the governors (7 *Workers’ Compensation Reporter* 171) the governing body of the Board assigned to the Appeal Division the authority to reopen, rehear and redetermine previous decisions of the Board of Commissioners. It is in the following terms,

RESOLVED THAT the Appeal Division of the Workers’ Compensation Board of British Columbia shall exercise the authority of the Workers’ Compensation Board of British Columbia under section 96(2) of the *Workers Compensation Act* to reopen, rehear and redetermine any decision made by the former Commissioners prior to June 3, 1991, where the Chief Appeal Commissioner finds that the decision was based upon an error of law or involved or involves an issue under the *Canadian Charter of Rights and Freedoms*; and that the appropriate amendments be made to the *Rehabilitation Services and Claims Manual*, *Assessment Policy Manual* and *Occupational Safety & Health Division Policy and Procedure Manual*.

- (32) In Decision #93-0640 (10 *Workers’ Compensation Reporter* 101 at 108) a former chief appeal commissioner considered the assignment from the governors and whether the Appeal Division had the authority, at common law, to reconsider a previous decision of the Board of Commissioners or the Appeal Division. Her conclusion was that the Appeal Division had the authority to review prior decisions on the basis of an error of law going to jurisdiction, including breaches of the rules of natural justice or for clerical mistakes or omissions and fraud. Further, when the Appeal Division applies the “error of law” review to a decision protected by a privative clause

the patently unreasonableness test is used, unless the issue is one involving issues of natural justice in which case the test is a broader one of correctness (Decision #92-0818, 8 *Workers' Compensation Reporter* 211 at 217).

- (33) The result is that the Appeal Division can reconsider a former Board of Commissioners' decision on the basis of an error of law, error of law going to jurisdiction including breaches of natural justice, clerical mistakes, omissions, fraud or an issue involving the *Charter*. This authority is specifically relied on by the granddaughter in the case before me. Counsel for the industry association submits there was no error of law or violation of the *Charter* in the 1959 decision of the Board.
- (34) I note that the *Canadian Charter of Rights and Freedoms* came into force in 1982 and 1985. For this reason the *Charter* has no application to the matter before me.

Decision and Reasons

- (35) As above I am required to consider the application before me on the basis of new evidence that complies with section 96.1 of the Act (on the basis of section 17(5) of the *Workers Compensation Amendment Act 1989*) and on the basis of the section 96(2) reconsideration power assigned to the Appeal Division by the former Board of Governors.

Reconsideration on the Basis of New Evidence

- (36) Again, the facts before me are that the worker's application for compensation was suspended in a decision of the former Board of Commissioners from March 1959. I am authorized by the legislature (pursuant to section 17 of the 1989 legislation) to reconsider a decision of the former Board of Commissioners on the basis of new evidence as long as the decision of the commissioners was made under "section 91 or 96 of the former *Workers Compensation Act*."
- (37) A threshold question arises as to whether the application before me raises a "decision made under section 91 or 96 of the former *Workers Compensation Act*." The key phrase here is "former" and the obvious intent of section 17(5) was to provide authority for decisions made by the Board of Commissioners under the former Act, rather than all previous Acts.
- (38) As counsel for the industry association points out a similar situation was considered in a previous decision of the Appeal Division, #2001-0779. The estate of the widow of a worker requested reconsideration of a 1956 decision of the former Board of Commissioners. In Decision #99-1606 a panel found that grounds for reconsideration existed on the basis of new medical evidence and applying section 96.1 of the current legislation and section 17(5) of the 1989 legislation. However a subsequent panel in Decision #2001-0779 found that Decision #99-1606 was tainted by an error of law going to jurisdiction and that it should be reconsidered by the Appeal Division.

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- (39) The reasoning of the panel in Decision #2001-0779 relied on the phrase “former *Workers Compensation Act*” from section 17 of the 1989 legislation. The summary of the panel’s decision includes the following,

I have determined that the 1956 and 1957 decisions of the Board were made by the commissioners of the Board. They were, however, not decisions “made under Section 91 or 96 of the former *Workers Compensation Act*” is (sic) defined in Section 17(1) as “the *Workers Compensation Act* as it read immediately before the amendments enacted by this Act came into force”. On a purposive analysis, this does not include decisions made under other similar sections of the Act, which over time became Sections 91 or 96. (Paragraph 77).

- (40) The panel also determined that the 1956 and 1957 decisions at issue were not made under section 91 or 96 as those provisions existed at the material times.
- (41) This decision was the subject of an unsuccessful judicial review before the Supreme Court of B.C. This is the *Atchison*, supra, matter which upheld Decision #2001-0779 on judicial review and which is currently on appeal.
- (42) The learned chambers judge in that decision concluded that the standard of correctness was appropriate because the issue before him went to the central question of jurisdiction (paragraph 20). He also concluded that Decision #2001-0779 was correct for the following reasons,
- (a) There is no mention of any power to review decisions of the Commissioners in s. 96.1. That power is derived from the transitional provision.
 - (b) The definition of “former *Workers Compensation Act*” is express and narrow. It is specifically limited to the Act “as it read immediately before the amendments enacted by this Act came into force”.
 - (c) Had the legislature intended “former *Workers Compensation Act*” to mean all predecessor statutes to the *Workers Compensation Act* it would have been a simple matter to say so.
 - (d) The Board’s power to reopen matters (s. 96(2)) was preserved by the 1983 amendments so there was no need to expand the ability of the Appeal Division to review Commissioners’ decisions.

I conclude that the traditional (sic) provisions were directed to deal with those cases ongoing at the time of transition. Accordingly, the Appeal Division lacked jurisdiction to review a decision of the Commissioners made in 1956 and 1957. (Paragraph 24).

- (43) I agree with the reasoning and conclusion of the panel in Decision #2001-0779. In the case before me I am satisfied that section 17(5) does not apply. For the purposes of this application the legal circumstances were the same in 1959 as they were in 1956 and 1957. The 1959 decision was not one made under section 91 or 96 of the former *Workers Compensation Act*. Between

1959 and 1989 there were numerous changes to workers' compensation legislation in this province. The "former *Workers Compensation Act*" was not the legislation that was in place when the Board of Commissioners made their decision in this case on March 19, 1959.

- (44) I read Decision #2001-0779 as seeking to avoid making a specific finding of when 17(5) applies. It seems carefully written to address only the narrow issue that was necessary to decide the matter before her – whether the "former" legislation existed in 1956/57. The conclusion was it did not exist then but it does not give a specific date when it did exist. I adopt the same approach on the basis that it is more appropriate for another case with a particular set of facts to decide the precise date when the "former *Workers Compensation Act*" came into force.
- (45) Counsel for the industry association relies on the summary of Decision #2001-0779 and the subsequent judicial review judgement. In this regard I note paragraph 23 of the judicial review judgement in *Atchison*. The learned chambers judge concluded that,

In the decision under review, the Appeal Division concluded that it was apparent from the wording of section 17 that the provision was intended to provide only for transition in respect of matters that were recently decided by the Board.

- (46) With respect, I cannot find that statement in Decision #2001-0779 nor does it follow from the reasoning of the panel. The same paragraph of the judgement then says "more specifically, the summary of the decision reads as follows" and then cites the Appeal Division's summary paragraph, also cited above. Again, I am unable to find anything in the summary paragraph of the panel that supports the conclusion that the transition provisions of the 1989 legislation were "intended to provide only for transition in respect of matters that were recently decided by the Board." A similar problem arises with the court's statement that the "traditional (sic) provisions were directed to deal with those cases ongoing at the time of transition" (paragraph 24). I cannot find where the panel in Decision #2001-0779 reached that conclusion, expressly or by inference.
- (47) This is an important matter of jurisdiction and the court is entitled to reach a conclusion that is different from Decision #2001-0779, even when the application before it is denied. It may be that the court merely intended to confirm the plain meaning of section 17 of the 1989 legislation. However, counsel for the industry association suggests that I adopt the court's interpretation of section 17 in a different way and I have considered that suggestion.
- (48) I have some concerns that the court's conclusion is not correct. It seems to me that the phrase "ongoing at the time" in the *Atchison* judgement does not mean the same as the phrase in section 17 that the former Act is the *Workers Compensation Act* "as it read immediately before" the 1989 amendments. "Ongoing" appears to refer to applications or "cases" (as the court put it) while "read immediately before" seems to refer to legislation that is to be read. Further, the use of the word "ongoing" by the court suggests that only applications that were filed with the Appeal Division at the time of the 1989 legislation can be decided by the Appeal Division. But the 1989 legislation refers to the former Act "as it read immediately before" the 1989 legislation. The moment in time when the 1989 legislation became effective is not the same as the duration in time when the former Act was in force.

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- (49) With the introduction of new legislation one might expect what is often called a transitional provision. This type of provision would typically end old legislation in an orderly fashion by, for example, stating that only applications ongoing as of a specific date carry on under the new legislation. In my view section 17 of the 1989 legislation reflects a different legislative intent. A plain reading of this provision supports the view that the legislature intended the reconsideration provisions of the 1989 legislation to apply to a decision made under section 91 or 96 of the former legislation. This evidences an intent to apply the 1989 reconsideration authority retroactively, although for a finite period of time.
- (50) I conclude that a correct reading of the 1989 transition provisions requires a focus on the legislation that existed “immediately” before the 1989 transition provisions. The use of “immediately” leads to a conclusion that the intent was to refer only to the legislation before 1989 and not all previous legislation; the intent was to provide for a specific and finite period of time immediately before the 1989 legislation came into force. The interpretative issue relates to how long that previous legislation existed before the 1989 legislation. Decisions made during this period under section 91 and 96 of the Act by the former commissioners and pursuant to the former Act can be reconsidered by the Appeal Division. A similar analysis can be applied to the court’s statement that the 1989 transition provisions were “intended to provide only for transition in respect of matters that were recently decided by the Board.”
- (51) With regard to the application for reconsideration before me I conclude that I am not authorized by the legislature to apply the new evidence provisions of the Act in the matter before me. The legislature has not authorized the Appeal Division to consider the granddaughter’s application for reconsideration of the commissioners’ decision of 1959. The application is, therefore, denied on that issue.
- (52) In the event that I am not correct on this jurisdictional issue I note that the granddaughter has provided some new evidence in the form of a copy of a “Report of Employee Leaving Service” from the worker’s employer and dated June 23, 1947.
- (53) The granddaughter relies on Division 5 of the Act in her application. This provides for protection against discriminatory action in the context of occupational health and safety. The granddaughter submits that her grandfather was discriminated against on the basis of his political beliefs when he was dismissed by the employer. The 1947 form provided by the granddaughter describes the worker as being “very casual” about observing safety rules. Further, his “strong communistic leanings [illegible] was continually crabbing about conditions in general.”
- (54) From a workers’ compensation point of view the protection against discriminatory action in the Act came into force on October 1, 1999. For this reason these protections are not available for the granddaughter.
- (55) For this reason I must conclude that the new evidence submitted is not material since I do not have the authority to apply retroactively protections available only in 1999.

Reconsideration Based on Error of Law Going to Jurisdiction

- (56) Section 96(2) of the Act gives the Board broad power to, at any time at its discretion, reopen, rehear and redetermine any matter which has been dealt with by the Board or by an officer of the Board. The former Board of Governors assigned this authority to the Appeal Division with regard to applications for reconsideration based on allegations that former commissioners' decisions contain errors of law or violations of the *Charter*.
- (57) It may seem anomalous that there is authority to reconsider decisions that were made more than 40 years ago. However, that decision was made by the legislature and the former Board of Governors and it is not something the Appeal Division has control over. Presumably a policy decision was made that there should be some opportunity to reconsider old decisions of the Board, not on a substitutional basis, but on the serious grounds of error of law and breach of the *Charter*. The limited scope of section 17(5) of the 1989 legislation has no application to this aspect of the reconsideration authority of the Appeal Division because that legislation relates only to applications to reconsider on the basis of new evidence.
- (58) A worthwhile starting point is to review what the actual decision was on March 19, 1959.
- (59) I note that it was a letter from Dr. B, dated January 5, 1959, which initiated that decision. Dr. B stated that the worker's "story and findings" were consistent with a diagnosis of silicosis and he thought that "a bona fide medical dispute" over the suspension of the worker's claim was "tenable." Dr. B acknowledged that he did not have "x-rays to go on." A consultation with a specialist was requested by Dr. B in order to determine the extent the worker's chest was hindering his ability to work and to determine the "exact pathology." A Request for Examination by a specialist dated January 8, 1959 was signed by the worker and the Board processed this request.
- (60) The Board wrote to Dr. B on January 23, 1959 and stated, "It may be that you are unable to certify that there is a bona fide dispute as we note you have not seen the x-rays in this case. . . . You are no doubt aware of another condition from which this workman suffers." Dr. B replied on February 18, 1959. He attempted to contact the worker but was unable to do so and also said,

I cannot claim to be a radiologist, and hence my opinions on the films would be of little value from the legal aspects involved. Thus when I felt that a definite dispute existed, it was my opinion previously that specialist referral was the obvious way to assess this problem satisfactorily. As I am unable to contact [the worker] again, I cannot carry this solution any further, but when he again contacts me, my opinion re said bona fide dispute still pertains to his claim.

- (61) The commissioners then made their decision as recorded in the memo dated March 2, 1959 and the decision letter dated March 19, 1959. A majority of commissioners denied the request for a referral to a specialist. Apart from an inquiry about possible payment there was no further communication from Dr. B's office. The next event was the letter from the union representative, July 16, 1959, and then the unfortunate death of the worker in September 1959.

- (62) As above, the standard I must apply is one of patently unreasonableness and a decision can be set aside because of a patently unreasonable finding of fact. There is some earlier authority to the effect that a decision could not be set aside if there was *some* evidence or even “a scintilla” of evidence to support the finding. A more appropriate approach is to apply a reasonableness standard of review to determine whether there is evidence that is reasonably capable of supporting the finding (Donald Brown, John Evans, *Judicial Review of Administrative Action in Canada*, (Canvassback: Toronto, 1998), 15:2142).
- (63) I have some difficulty finding an error of law going to jurisdiction with the commissioners’ decision. There is the x-ray report of December 16, 1958 which is supportive of a finding of silicosis and the granddaughter obviously urges me to place great weight on that report. Then Dr. B thought the worker’s condition was consistent with a diagnosis of silicosis but he did not have the x-rays and he acknowledged his lack of expertise in radiology. He also did not address the Board’s suggestion that there may be “another condition,” obviously meaning the throat cancer that had been operated on earlier in the same year. The commissioners did have the benefit of a review by two doctors (including physical examination and review of the x-rays). These doctors considered the x-ray report as well as the other medical conditions of the worker, especially the non-compensable throat cancer. The commissioners preferred the opinion of these doctors and concluded a referral to a specialist was not warranted. The fact that the commissioners were exercising discretion rather than a duty is also a factor which requires some deference to their decisions. Overall, I conclude that the facts are reasonably capable of supporting their decision.
- (64) The granddaughter also challenges the Board’s handling of her grandfather’s claim in 1963, after his union had written on July 16, 1959. This involves two events on the file. First, on behalf of the worker the union representative stated that the purpose of the letter was “not to quarrel with the original decision of the Board that [the worker] was not disabled, but to quarrel with the argument that the man is not entitled to appeal under section 54A because the Board has discretionary powers.” The Board replied to the union on July 29, 1959 by advising that it would be discussed with the Board and “if any change is agreed upon you will be so advised.” The file is silent about any further reply to the union (except for the worker’s death in September 1959).
- (65) In the context of the level of service that is expected from the Board now I can accept that the Board’s response to the union in 1959 was not responsive and perhaps officious. However, I cannot find that these circumstances amount to an error of law going to jurisdiction.
- (66) The second event was an inquiry on August 21, 1963, by the Board’s solicitor, about the status of the suspended claim. It was also questioned why the claim had not been “brought up each year.” The earlier death of the worker was noted and it was noted that “nothing further to be done.” The circumstances of this case are that the worker filed an application for compensation in 1958, it was suspended the same year and then the worker died the next year. The death of the worker somehow was lost on the Board until 1963 and the granddaughter is concerned about a lack of sensitivity to her grandfather’s death. I appreciate that concern but the rapid developments in the worker’s medical condition did not permit a yearly review in any case. I cannot find this gives rise to an error of law going to jurisdiction.

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- (67) For all of these reasons the granddaughter's application for reconsideration of the Board of Commissioners' decision of March 19, 1959 is denied.

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

