

Decision of the Appeal Division

Number: 92-0743
Date: March 31, 1992
Panel: Paul Petrie, Thomas Kemsley, Cassandra Kobayashi
Subject: *The Government Employees Compensation Act, Subsection 4(1)*

INTRODUCTION

This decision concerns the interpretation of the phrase, "personal injury by an accident" in subsection 4(1) of the *Government Employees Compensation Act*, R.S.C. 1985, c. G-5 (*G.E.C.A.*). Federal employees gain entitlement to workers' compensation benefits through this legislation. Our task is to interpret this phrase as it applies to federal workers in British Columbia.

Subsection 4(1) reads as follows:

Subject to this Act, compensation shall be paid to

- (a) an employee who
 - (i) is caused personal injury by an accident arising out of and in the course of his employment, or
 - (ii) is disabled by reason of an industrial disease due to the nature of the employment; and
- (b) the dependants of an employee whose death results from such an accident or industrial disease.

Agreement Between the Federal Government and the Board

The Workers' Compensation Board of British Columbia (the W.C.B., or the Board) administers the *G.E.C.A.* in British Columbia pursuant to an agreement dated December 18, 1987. This agreement expired on December 31, 1991. The federal government and the W.C.B. are in the process of negotiating a new agreement.

The agreement dated December 18, 1987 specifies that:

Subject to the federal act, the purpose of this agreement is to ensure that employees receive the benefits and rights provided under the provincial act and are subject to the conditions and obligations imposed therein.

The W.C.B. Governors' Policy

Item #24.00 of the *Rehabilitation Services and Claims Manual* (the *Manual*) which concerns federal employees simply paraphrases the basic provisions found in subsections 4(1) and 4(2) of the *G.E.C.A.*

Subsection 4(2) of the *G.E.C.A.* states that:

- (2) The employee or the dependants referred to in subsection (1) are, notwithstanding the nature or class of the employment, entitled to receive compensation at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed respecting compensation for workmen and the dependants of deceased workmen, employed by persons other than Her Majesty, who
- (a) are caused personal injuries in that province by accidents arising out of and in the course of their employment; or
 - (b) are disabled in that province by reason of industrial diseases due to the nature of their employment.

Other references to federal employees in the *Manual* are found in item #3.00 and item #10.72. Item #3.00 specifies that the *Workers Compensation Act*, R.S.B.C. 1979, c. 437 (the *B.C. Act*) does not apply to federal employees. But it also states that, by virtue of subsection 4(2) of the *G.E.C.A.*, a federal employee who is usually employed in this province "is given the same rights to compensation as workers under the provincial *Workers Compensation Act*." It provides no reason for that conclusion. Item #10.72 defines a federal employee.

The Former Commissioners' Analysis of the G.E.C.A.'s Entitlement Provision

In an unpublished decision dated July 7, 1989, the former commissioners of the W.C.B. set out their interpretation of Section 4 of the G.E.C.A., and, in particular, the meaning of "personal injury by an accident." On the facts of the case, the worker's bursitis and tendinitis were considered to be industrial diseases.

The commissioners reasoned in *obiter* that "personal injury by an accident" did not require "a sudden traumatic event separate from and preceding the injury." They referred to the Supreme Court of Canada decision in *Workmen's Compensation Board v. Theed*, [1940] 3 D.L.R. 561 as the leading Canadian case and relied on Mr. Justice Crocket's statement that "the injury itself constitutes an accident in the sense of a mishap or untoward event not expected or designed." Therefore, according to the commissioners, compensation under the G.E.C.A. merely requires an injury arising out of and in the course of the worker's employment. We note that the commissioners described *Theed* as a case in which the worker developed a sore back over a period of time without the occurrence of any particular incident.

The commissioners also considered whether it was significant that subsection 4(1) spoke of "by an accident," whereas the legislation considered in *Theed* referred only to injury caused "by accident." Noting that the G.E.C.A. referred to both "by an accident" and "by accident," the commissioners said that no significance should be attached to the presence of the word "an" in subsection 4(1). They stated:

The intention was to provide coverage for injuries falling with [sic] the scope of the court decisions covering the term "accident", namely any employment injury which is "accidental" in the sense of being unexpected.

The commissioners concluded with a discussion of the term "accident" in the B.C. Act. They were satisfied that the term "accident" could be interpreted differently under the federal and B.C. legislation.

The Workers' Compensation Review Board's Findings on the Issue

In a number of cases, the Review Board findings have been at odds with the former commissioners' analysis. There are presently three appeals before the Appeal Division.

In two cases, panels of the Review Board found that the workers' injuries were work-related. But they denied the workers' claims on the grounds that the injuries were not caused "by an accident" in the sense of a clearly ascertainable event. Therefore, according to the Review Board, the workers' claims did not meet the test in subsection 4(1). The workers appealed the Review Board findings.

In the third case, the Review Board panel found that the worker's psychological disability arose out of and in the course of her employment. Because there was no clearly ascertainable accident, the Review Board leaned towards denying compensation. But it decided to follow what it perceived to be the Board's position as expressed in the July 7, 1989 decision of the former commissioners. The Review Board perceived this position as being that federal employees shall be treated the same as workers solely under the *B.C. Act*. On this basis the Review Board allowed the worker's appeal. The employer appealed this finding and requested an oral hearing to determine the meaning of subsection 4(1) of the *G.E.C.A.*

Decision to Hold a Public Hearing

In Decision No. 1, *Workers' Compensation Reporter (Reporter)*, Vol. 7(1): p. 10, the governors state:

The Appeal Division shall apply and interpret the *Act*, Regulations and existing Board published policy.

Decision No. 3, *Reporter*, Vol. 7(1): p. 18, states:

In the event of a conflict between the *Act* or Regulations and the published policy of the Governors, the *Act* and Regulations are paramount.

Published policy of the governors contained in the *Manual* provides general guidance on the interpretation and application of subsection 4(1) of the *G.E.C.A.* The former commissioners' decision of July 7, 1989 is not a published policy of the governors.

The conflicting interpretations of the phrase "injury by an accident" contained in the above-noted Review Board findings raise some doubt about the interpretation of subsection 4(1) of the *G.E.C.A.* Because the interpretation of subsection 4(1) of the *G.E.C.A.* has the potential to affect a large number of federal workers in B.C., the registrar decided to hold a public hearing and to consider submissions from interested parties on this general issue. A panel of three non-representational appeal commissioners was appointed by the registrar under subsection 85(8) of the *Act* and pursuant to Decision 2 of the Appeal Division. Once the panel has made a decision on the general issue, the individual appeals will be determined on the merits of each case.

On December 11, 1991 public notice was given to representatives from the workers' compensation community. A public hearing was held on February 3, 1992 and there were 34 individuals in attendance representing employers, workers and the general public. Seven oral submissions were made at the hearing and ten written submissions were provided.

SUBMISSIONS

Both the oral and written submissions cover a broad range of arguments. Many make the same points. What follows is a survey of the main arguments presented. Our survey of the submissions is not intended as an exhaustive summary of each individual submission. We have found it helpful to divide these arguments into two categories. The first category supports a broad interpretation of subsection 4(1) of the *G.E.C.A.* These arguments consider that entitlement under this provision depends solely on whether an injury was work-related, without the need for clearly ascertainable incidents. The second category views entitlement under this provision as requiring such incidents.

Before proceeding with our survey, we should like to outline the Board's position as expressed in a memorandum dated January 28, 1992 which Kenneth Dye, president of the Board, sent to Mr. Petrie, chair of this panel. Mr. Dye explains that, in adjudicating claims, the Board has always treated federal employees under the *G.E.C.A.* the same as workers under the *B.C. Act*. Since subsection 5(1) of the *B.C. Act* does not have an "accident" requirement, "the Board might be said to have ignored the phrase 'by an accident' in the federal *Act*." Mr. Dye indicates that the Board's handling of federal claims has been with the full knowledge of Labour Canada which has never objected to the Board's practice under the *G.E.C.A.*

Mr. Dye expresses some concern over the interpretation of the presumption clause in subsection 5(4) of the *B.C. Act*. He maintains that, in the case of this section, the Board cannot ignore the "accident" requirement. Mr. Dye submits that the nature of this provision and its place in the *B.C. Act* warrant a narrow interpretation of the word "accident."

Arguments in Support of a Broad Interpretation of Subsection 4(1) of the *G.E.C.A.*

Stan Guenther, on behalf of the Canadian Union of Postal Workers, supports the interpretation of subsection 4(1) of the *G.E.C.A.* as contained in the former commissioners' decision of July 7, 1989. He questions the argument put forward by Canada Post that the objective of national consistency in the treatment of federal employees underlies subsection 4(1) of the *G.E.C.A.*

Mr. Guenther emphasizes that an accepted principle of statutory construction is that legislation dealing with workers' compensation must be construed liberally in favour of the workers. He submits further that federal statutes must be interpreted in light of the principles enunciated in the federal *Interpretation Act*, R.S.C. 1970, c. I23. One of these principles, found in Section 11, is that every enactment shall be deemed

remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. The other relevant principle, found in subsection 26(7), is that words in the singular include the plural and vice versa.

Mr. Guenther maintains that the legislative history of the *G.E.C.A.* fails to disclose an intention on the part of Parliament to deny compensation to a worker sustaining a work injury, where the injury was not caused by an ascertainable event.

In going over the legislative history of subsection 4(1) of the *G.E.C.A.*, Mr. Guenther says that the phrase “personal injury by accident” was inserted in this subsection in 1947. He reasons that therefore Parliament must have considered the interpretation placed upon this phrase by the Supreme Court of Canada in *Theed*. According to Mr. Guenther, in *Theed*, the Supreme Court of Canada equated the phrase “injury by accident” with the concept of an “accidental injury” as well as with the concept of “injury by an accident.” Mr. Guenther quotes several passages from *Theed* to support this submission.

Mr. Guenther also submits that, in 1955, the insertion of the article “an” in the phrase “personal injury by accident” could not have been intended to change an injured worker’s entitlement. If Parliament had intended to do so, one would expect it to have clarified this intention, for instance, in the definition section. Mr. Guenther concludes that it is probable that the article was inserted to align the English version with the French version of the statute, which included the indefinite article.

* * * * *

R. Warren Standerwick of the Legal Services Society of B.C. submits that the debate regarding subsection 4(1) of the *G.E.C.A.* stands or falls entirely on the question of whether “injury by an accident” has a different meaning than “injury by accident.” Mr. Standerwick’s position is that there is no significant difference between the two phrases in the context of Section 4 of the *G.E.C.A.* Mr. Standerwick notes that subsection 4(4) of the *G.E.C.A.*, which provides coverage to federal employees who work for the railways, requires “personal injury by accident” and not “personal injury by an accident.” There is no reason to believe that Parliament intended to provide broader coverage for railway workers.

If “injury by an accident” means the same as “injury by accident,” then, according to Mr. Standerwick, the Supreme Court of Canada decision in *Theed* applies. Mr. Standerwick submits that this decision is both authoritative and persuasive in its holding that, in the phrase “injury by accident,” the injury itself may be the accident; the word “accident” is not limited to a sudden traumatic event separate from and preceding the injury.

Mr. Standerwick points out that the definition of “accident” in the *G.E.C.A.* also includes “a fortuitous event occasioned by a physical or natural cause.” An accidental injury is such a fortuitous event. Mr. Standerwick concludes that the definition of “accident” in the *G.E.C.A.* is consistent with the decision in *Theed*; both an accidental result and an accidental cause are included in that definition.

Mr. Standerwick questions whether the Review Board can validly ignore a decision of the previous commissioners. He submits that “the only justification for a Review Board failing to apply the finding of such a body is if there is a sincerely held belief that those findings are illegal, and beyond the jurisdiction of the commissioners to make.”

* * * * *

John Weir, on behalf of the B.C. Federation of Labour, agrees with the gist of Mr. Standerwick’s submission. He submits that any interpretation of subsection 4(1) of the *G.E.C.A.* should take into account the historical purposes of workers’ compensation legislation. Such purposes included removing personal injury claims from the courts, improving the climate of industrial relations and providing a no-fault system of compensation. Mr. Weir argues that a narrow interpretation of the *G.E.C.A.* would be inconsistent with these purposes.

* * * * *

Jack Rudd and Bob Kingston, on behalf of the Public Service Alliance of Canada, also argue that the principle of no-fault insurance in a non-adversarial system is incompatible with a narrow interpretation of Section 4 of the *G.E.C.A.* They note that the system of workers’ compensation was based on a historic compromise that benefited both employers and employees. They submit that a narrow definition of subsection 4(1) of the *G.E.C.A.* would be costly to employers.

* * * * *

John Bowman, national representative of the Canadian Auto Workers – Canada, states that the problem of defining “an accident” for workers’ compensation purposes has been raised in many jurisdictions and that most jurisdictions no longer require that an accident, in the narrow sense, must occur before a worker can receive compensation benefits. The focus instead is on whether the injury arose out of and in the course of the employment.

Mr. Bowman reminds us that, in *Province of British Columbia, Commission of Inquiry: Workmen’s Compensation Act* (1966) (the Tysoe Report), the Honorable Mr. Justice Charles W. Tysoe mentioned, with approval, the tendency of the courts to liberalize the

interpretation of “injury by accident” to ensure that compensation will be paid for any injury that is truly work-caused. Mr. Justice Tysoe noted that this is an example of the courts keeping up with the developing social conscience.

Mr. Bowman points out that the Review Board never engaged in an analysis of the relevant jurisprudence on the question.

A worker, appellant in one of the appeals, submits that one of the purposes of the *G.E.C.A.* is to promote a safer work environment. Exclusion of injured workers through a narrow interpretation of Section 4 would defeat this purpose.

She points out that as a remedial piece of legislation, the statute should be construed liberally. The case for a liberal construction is even stronger where the words are ambiguous.

She also submits that the meaning of a word or phrase cannot be detached from the relevant social context. Old case law may not be helpful in interpreting a statute where the social context has changed. In other words, today’s interpretation of an old piece of legislation must be consonant with today’s social values and social conscience.

She concludes that the proper test under subsection 4(1) of the *G.E.C.A.* is that the injury must be caused by the worker’s employment. The words “by an accident” are redundant.

In her submissions, the worker makes a number of policy arguments that are outside the scope of this decision.

James Sayre of the Community Legal Assistance Society argues that if Parliament had intended to exclude a significant group of injured workers, much clearer language could and would have been employed. He submits that such an exclusion would be contrary to subsection 4(2) of the *G.E.C.A.* He also submits that it is absurd to suggest that Parliament intended that workers who suffered accidental injuries caused by their employment on one specific occasion should receive full compensation, while those who suffered an injury caused by two or more specific occasions would go uncompensated. Mr. Sayre notes that in Section 2 of the *G.E.C.A.*, “accident” is defined in exactly the same way as it is defined in Section 1 of the *B.C. Act*. According to him, this suggests that the purpose of the “accident” requirement in the *G.E.C.A.* was to exclude an injury which was intentionally inflicted by the worker himself.

Janice Hight, on behalf of the Ministry of Labour, Workers' Advisory Service, makes several points. First, she submits that the legislative history of the *G.E.C.A.* shows that Parliament's intention was to create a compensation system for federal government employees which would put them on the same footing as other workers within the province. She submits further that, while the *G.E.C.A.* has been amended since its original enactment, the purpose of the legislation has not changed. She points out that subsection 4(2) of the *G.E.C.A.* clearly provides that federal government employees are entitled to receive compensation at the same rate and under the same conditions as are provided under the law of the province.

Ms. Hight recognizes that there are no judicial authorities which directly consider the meaning of "an accident" in the context of the *G.E.C.A.* But, she submits that the Supreme Court of Canada decision in *Theed* applies here. In Ms. Hight's opinion, this decision leads to the conclusion that "an accident" includes any physical injury that arises out of and in the course of employment.

Ms. Hight contends, in the context of the statute as a whole, that there is no rationale for interpreting "personal injury by an accident" as creating a separate category of workers with different entitlements and rights. She notes that claims by federal government employees for industrial disease are treated, in terms of entitlement and benefits, the same as claims by workers covered by provincial compensation legislation. She also notes that subsection 4(4) of the *G.E.C.A.* covers employees of the government railways who are caused "personal injury by accident." And, Ms. Hight reasons that if compensation is payable under subsection 4(1) only where one specific accidental event occurs, then a federal government employee who is injured on the job in other circumstances may well be entitled to bring an action against his employer for damages. This, according to her, would be contrary to public policy and the fundamental principles of workers' compensation.

* * * * *

Frank Kenward, Labour Canada, manager, injury compensation, submits that the Regulations under the *G.E.C.A.* address the concerns raised by repetitive motion injuries. He refers us to a letter dated June 19, 1989 sent by Renee Godmer, the regional director for Labour Canada at the time, to Mr. Art Quinn of the B.C. Workers' Compensation Board. In this letter, Ms. Godmer pointed to Section 2 of the *Government Employees Compensation Regulations*. This section reads as follows:

2. An employee who is disabled by reason of a disease that is not an industrial disease but is *due to the nature of his employment and peculiar to or characteristic of the peculiar process, trade or occupation in which he is employed at the time the disease was contracted and*

the dependents of a deceased employee whose death is caused by reason of such a disease, are entitled to receive compensation at the same rate as they would be entitled to receive under the *Government Employees Compensation Act* if the disease were an industrial disease, and the right to and the amount of *such compensation shall be determined by the same board*, officers or authorities and in the same manner as if the disease were an industrial disease.
(Ms. Godmer's emphasis)

Ms. Godmer concluded that if claims adjudicators apply this Regulation to repetitive or occupational injuries, the intent of the federal legislation would be satisfied as well as the provincial *Act*.

Arguments in Favour of a Narrow Interpretation of Subsection 4(1) of the *G.E.C.A.*

Alan Winter, on behalf of Canada Post, takes the position that there should be national consistency in the treatment of federal employees across Canada. Mr. Winter argues further that it would be a reviewable error for the Board to determine a federal worker's entitlement to compensation solely by reference to the provincial legislation.

Relying on a well-known line of cases which includes *Ching v. C.P.R.*, [1943] S.C.R. 451 and *Attorney General of Canada and Nachbaur v. Ahenakew*, [1984] 3 W.W.R. 442 (Sask. Q.B.) (Appeal dismissed, [1986] 4 W.W.R. 230 (Sask. C.A.)), Mr. Winter notes that the *G.E.C.A.* has not incorporated the provincial legislation as a whole. Compensation in the case of a federal employee must be determined under subsection 4(1) of the *G.E.C.A.* It is only after this determination has been made that subsection 4(2) of the *G.E.C.A.* comes into play. Mr. Winter suggests that the word "conditions" in subsection 4(2) is narrower than the concept of general conditions of entitlement. As an example of what might be included under the word "conditions" within the meaning of subsection 4(2) of the *G.E.C.A.*, Mr. Winter mentions the manner of payment of compensation benefits.

Mr. Winter argues that the words "an accident" under subsection 4(1) of the *G.E.C.A.* do not include a repetitive motion injury. He submits that had Parliament intended the provincial entitlement conditions to apply to injuries under the *G.E.C.A.*, it would have made this very clear. It did so in the case of industrial diseases.

Mr. Winter invokes a line of English cases to suggest that there is a critical difference between injuries resulting from a single accident or a series of specific and ascertainable accidents and injuries resulting from a continuous process going on substantially from day to day. In the first type, the injury is injury by accident. In the

second, it is not. The decision of the House of Lords in *Roberts v. Dorothea Slate Quarries Co. Ltd.*, [1948] 2 All E.R. 201 (H.L.) exemplifies this line of cases. We note that these cases were mainly dealing with diseases.

According to Mr. Winter, the Supreme Court of Canada decision in *Theed* does not depart from this line of cases. Mr. Winter insists that, on the facts of the case, *Theed* is to be understood as a case in which there were specific and ascertainable events causing the injury. In other words, it was not a case where the injury resulted from a continuous or gradual process. It was not a repetitive motion type of case. In sum, in Mr. Winter's opinion, *Theed* does not stand for the proposition that an accident can be equated with an injury. All to the contrary, he maintains that the case is authority for the proposition that for there to be "injury by accident," some discrete event or events must cause the injury.

It is noteworthy that Mr. Winter dismisses Mr. Justice Crocket's judgment in *Theed* as being the only one that equates an accident with the injury.

Like Mr. Guenther, Mr. Winter says that it was in 1947 that Parliament inserted the phrase "personal injury by accident" in the *G.E.C.A.* entitlement provision. So he too reasons that Parliament must have intended to adopt *Theed's* approach in the *G.E.C.A.*

As for the 1955 insertion of the article "an" in the phrase "personal injury by accident," Mr. Winter contends that this was intended to reinforce the requirement that an event or a series of discrete events cause the injury. Mr. Winter cites a number of cases, including *Warner v. Couchman*, [1912] A.C. 35 (H.L.), *Glasgow Coal Company Limited v. Welsh*, [1916] 2 A.C. 1 (P.C.) and *Evans v. Yankeetown Dock Corp.* (1986), 491 N.E. 2nd 969 (Supreme Court of Indiana) which draw a distinction between the concept expressed in the phrase "personal injury by accident" and the concept expressed in the phrase "personal injury by an accident."

In expanding on the distinction drawn by *Roberts v. Dorothea Slate Quarries Co. Ltd.*, Mr. Winter suggests that the accident concept includes an element of reasonable definiteness in time, as opposed to gradual degeneration. Mr. Winter does not specify, however, whether this concept of definiteness in time is to apply to the cause or to the effect or to both.

Mr. Winter analyzes the previous commissioners' decision of July 7, 1989, offering the thought that their approach to subsection 5(4) of the *B.C. Act* should have been applied to subsection 4(1) of the *G.E.C.A.* In other words, Mr. Winter suggests that it is subsection 5(4) and not subsection 5(1) of the *B.C. Act* that is equivalent to subsection 4(1) of the *G.E.C.A.* In both subsection 5(4) of the *B.C. Act* and subsection 4(1) of the *G.E.C.A.*, "accident" is to be understood as a discrete event (or discrete events) causative of an injury.

In response to Labour Canada's submission, Mr. Winter states that Section 2 of the Regulations would not apply in B.C. He argues that under the B.C. legislation, an employee would never be disabled by a disease that is not an industrial disease, but is "due to the nature of his employment and peculiar to or characteristic of the peculiar process, trade or occupation in which the employee was employed at the time the disease was contracted." Accordingly, Mr. Winter submits that the opening requirements of Section 2 of the Regulations would not be met in B.C. Moreover, Section 2 of the Regulations applies to a "disease." Mr. Winter submits that it would be patently unreasonable to equate the concept of a "disease" with that of an "injury." Finally, Mr. Winter submits that Labour Canada does not have the legislative authority to provide a definitive interpretation of the *G.E.C.A.* provisions or of the Regulations.

Peter Howard of Angus Qually Consultants expresses the concern that a broad interpretation of subsection 4(1) of the *G.E.C.A.* would undermine the requirement that there be a causal relationship between the work activity and the personal injury suffered. Mr. Howard's submission does not address though the question of whether "by an accident" imposes a more stringent test than "by accident."

ANALYSIS

Before us is the question of whether, in the case of personal injury, entitlement to compensation under the *G.E.C.A.* requires the occurrence of ascertainable work-related incidents causative of an injury, or alternatively, whether entitlement merely requires that the injury be work-related. To answer this question we need to interpret the phrase "personal injury by an accident," as it arises in the context of subsection 4(1) of the *G.E.C.A.*

The Panel's Jurisdiction to Interpret Subsection 4(1) of the *G.E.C.A.*

Subsection 4(1) of the *G.E.C.A.* defines the circumstances which give rise to an entitlement to compensation. Subsection 4(2) incorporates part of the provincial legislation into the *G.E.C.A.* So, the substance of a federal employee's rights under the *G.E.C.A.* must be found partly in the express provisions of the statute and partly in the provisions incorporated by subsection 4(2) from the *B.C. Act*.

The Appeal Division's jurisdiction to apply and interpret the express provisions of the *G.E.C.A.* was not challenged at the hearing. When the former commissioners dealt with the question of interpretation of the *G.E.C.A.*, they did not address the question of jurisdiction. The panel will proceed on the basis that it has this jurisdiction by virtue of subsection 4(3) which reads as follows:

(3) Compensation under subsection (1) shall be determined by

(a) the same board, officers or authority as is or are established by the law of the province for determining compensation for workmen and dependants of deceased workmen employed by persons other than Her Majesty; or

(b) such other board, officers or authority, or such court, as the Governor in Council may direct.

Section 97 of the *B.C. Act* allows the Board, of which the Appeal Division is a part, to exercise any power or duty conferred or imposed on the Board by or under a statute of Canada or agreement between Canada and the Province.

The Panel's General Approach to Interpreting Subsection 4(1) of the *G.E.C.A.*

We are a tribunal under the *B.C. Act* and our expertise relates to the *B.C. Act* and compensation scheme. In various cases we are required to interpret sections of the *B.C. Act* and consider the relevant legislative intent. This particular matter requires us to interpret part of the federal legislation, and we will do that in reference to its application in British Columbia. We consider interpretations from other jurisdictions to be of limited application in the B.C. context. By the same token, our interpretation may be of limited application in other provinces.

As with any question of interpretation under the *B.C. Act*, we will begin by looking at the language of the particular section of the *G.E.C.A.* and by considering the relevant legislative intent. We will also consider how court decisions assist in the interpretation of subsection 4(1) of the *G.E.C.A.* Finally, we will consider what “personal injury by an accident” means in the context of B.C.’s workers’ compensation legislation. We are interested in how those words would be interpreted if they were part of the basic entitlement provision in the *B.C. Act*. At present, this provision reads as follows:

5. (1) Where, in an industry within the scope of this Part, personal injury or death arising out of and in the course of the employment is caused to a worker, compensation as provided by this Part shall be paid by the board out of the accident fund.

We are not substituting the B.C. entitlement provision for the *G.E.C.A.*’s entitlement provision by this process. Rather, as a B.C. tribunal, we see this as a tool of analysis that is helpful and relevant. We would expect that if the *B.C. Act* and the *G.E.C.A.* had exactly the same language, they would be given the same interpretation in

B.C. While the two statutes are not identical now, prior to 1968 the basic entitlement section of the *B.C. Act* had very similar language to that found in subsection 4(1) of the *G.E.C.A.* This gives us some basis for an analysis of subsection 4(1) of the *G.E.C.A.* in the B.C. context.

Therefore, to the extent that subsection 4(3) of the *G.E.C.A.* confers upon us interpretative powers, we are carrying out the same function as when we interpret the *B.C. Act*. Our approach to the *G.E.C.A.* must be similar to and show the same degree of latitude as our approach to the *B.C. Act*. We recognize fully that subsection 4(1) of the *G.E.C.A.* must be interpreted in its own right.

Legislative Evolution of Subsection 4(1) of the *G.E.C.A.*

The legislative history of the entitlement provision of the *G.E.C.A.* is important, especially since some of the submissions were unclear on this point.

In 1918, in the Dominion of Canada, House of Commons, *Debates*, vol. 1, the resolution introducing the concept of compensation for injuries to federal government employees read in part as follows at p. 677:

Resolved, That it is expedient to provide that an employee in the service of His Majesty who is injured, and the dependents of any such employee who is killed, shall be entitled to the same compensation as the employee, or as the dependent of a deceased employee, of a person other than His Majesty would, under similar circumstances, be entitled to receive under the law of the province in which the accident occurred, and the liability for and the amount of such compensation shall be determined in the same manner and by the same Board, officers or authority, or by such other Board, officers or authority or by such Court as the Governor in Council shall direct;

The basic entitlement provision that appeared in the 1918 federal legislation replicated much of this wording. Subsection 1(1) of *An Act to provide Compensation where Employees of His Majesty are killed or suffer injuries while performing their duties*, S.C. 1918, c. 15 stated that:

1. (1) An employee in the service of His Majesty who is injured, and the dependents of any such employee who is killed, shall be entitled to the same compensation as the employee, or as the dependent of a deceased employee, of a person other than His Majesty would, under similar circumstances, be entitled to receive



under the law of the province in which the accident occurred, and the liability for and the amount of such compensation shall be determined in the same manner and by the same Board, officers or authority, as that established by the law of the province for determining compensation in similar cases, or by such other board, officers or authority or by such court as the Governor in Council shall from time to time direct.

Thus, at the beginning the federal scheme rested on the principle that compensation would be a function of the law of the province where the injury occurred. In the 1918 House of Commons Debates on the proposed legislation, Mr. Meighen, then Minister of the Interior, suggested at pp. 812-813 that the legislation, in effect, gave to the province the power to fix the principles and the law upon which the Dominion had to pay damages.

Throughout the 1920's, the basic entitlement provision remained unchanged. We note that, in 1925, *An Act to amend an Act to provide Compensation where Employees of His Majesty are killed or suffer injuries while performing their duties*, S.C. 1925, c. 37, S. 2 provided a definition of the word "compensation." "Compensation" would include medical and hospital expenses.

In 1931, *An Act to amend the Government Employees Compensation Act*, S.C. 1931, c. 9, s. 2 changed the wording of the basic entitlement provision. It incorporated into this provision the phrase "personal injury by accident arising out of and in the course of his employment." The basic entitlement provision then stated in part:

3. (1) An employee who is caused personal injury by accident arising out of and in the course of his employment, and the dependents of an employee whose death results from such an accident, shall, notwithstanding the nature or class of such employment, be entitled to receive compensation at the same rate as is provided for an employee, or a dependent of a deceased employee, of a person other than His Majesty under the law of the province in which the accident occurred for determining compensation in cases of employees (sic) other than of His Majesty, and the liability for and the amount of such compensation shall be determined subject to the above provisions under such law, and in the same manner and by the same board, officers or authority as that established by such law for determining compensation in cases of employees other than of His Majesty, or by such other board, officers or authority, or by such court as the Governor in Council shall from time to time direct . . .

Other amendments were brought forth in 1931. These included broadening the definition of “compensation” and adding a definition of “employee” to ensure that the legislation covers all federal employees. Thus, in the 1931 House of Commons, *Debates*, vol. 1, the resolution introducing the 1931 amendments specified at p. 931 that:

it is expedient to amend the *Government Employees Compensation Act* to extend the benefits of the act to all employees in the service of His Majesty excepting those for whom provision is made under other statutes, and to extend the interpretation of the term “compensation” to include any benefits, expenses or allowances that are provided for under provincial compensation acts.

We note that in the House of Commons Debates on the above amendments, there was never any discussion of why the specific requirement of “personal injury by accident arising out of and in the course of . . .” was inserted in the entitlement provision.

In 1947, *The Government Employees Compensation Act 1947* S.C. 1947, c. 18 extended the principle of compensation. For example, it provided compensation in cases of disablement by industrial disease according to the law of the province in which the disease was contracted and it provided compensation for employees who are injured or disabled while working outside of Canada.

The 1947 legislation also provided a definition for the word “accident.” It stated that an accident “includes a wilful and an intentional act, not being the act of the employee, and a fortuitous event occasioned by a physical or natural cause.”

In 1955, *An Act to amend the Government Employees Compensation Act* S.C. 1955, c. 33 brought about more changes. The most significant change was that compensation would be determined in accordance with the law of the province where the employee is usually employed. Moreover, the legislation specified that compensation would be “at the same rate and *under the same conditions* (emphasis added)” as are provided under the law of that province.

The 1955 amendments changed the wording of the basic entitlement provision to “personal injury by *an* accident arising out of and in the course of his employment (emphasis added).” Neither the Minutes of the *Standing Committee on Industrial Relations* (Ottawa, 1955) which studied Bill No. 188, *An Act to amend the Government Employees Compensation Act* nor the explanatory notes appended to Bill 188, nor the 1955 House of Commons Debates, shed any light on the insertion of the article “an” in the requirement provision.

The basic entitlement provision under today’s *G.E.C.A.* incorporates the 1955 changes.

Subsection 4(1) of the G.E.C.A. in Light of Different Approaches to Statutory Interpretation

Under a “literal” approach to statutory interpretation, only the words of the statute may be looked at and if they are clear by themselves effect must be given to them whatever the consequences; the object of the statute may be considered only if there is doubt.

The submissions made concerning a literal approach to the definition of “accident” found in Section 2 of the G.E.C.A. focused on the words “includes . . . a fortuitous event occasioned by a physical or natural cause.” Arguments were made as to whether the words “fortuitous event” refer to only the cause of the injury or to the actual injury as well. We find that the definition in Section 2 is ambiguous and does not conclusively answer that question. The word “event” could refer to a causal event or a resulting event or both. Furthermore, the definition is merely inclusive, not exhaustive, which we interpret to mean that it is not limited to the words found in the definition but can be enlarged, in accordance with its context. This makes it difficult to say precisely what the word “accident” means on the language of the G.E.C.A. alone.

Dictionary definitions are not conclusive either. For example, *Black’s Law Dictionary* (5th ed.) defines “accident” as follows:

in its most commonly accepted meaning, or in its ordinary or popular sense, the word may be defined as meaning: a fortuitous circumstance, event or happening; . . . an unusual, fortuitous, unexpected, unforeseen or unlooked for event, happening or occurrence; an unusual, or unexpected result attending the operation or performance of a usual or necessary act or event; chance or contingency; fortune; mishap; . . . any unexpected personal injury resulting from any unlooked for mishap or occurrence; any unpleasant or unfortunate occurrence, that causes injury, loss, suffering or death; some untoward occurrence aside from the usual course of events. An event that takes place without one’s foresight or expectation; an undesigned, sudden, and unexpected event.

This definition provides support to both sides of the debate as to whether the word “accident” refers to the cause of the injury or the injury itself or both.

Next, we want to consider whether the words “by an accident” convey a different meaning than the words “by accident.”

As indicated in the legislative evolution section above, the word “an” was grafted onto the requirement of “personal injury by accident” in 1955. We recognize that, in general, a change in language on re-enactment of a provision must be presumed to have some meaning. But, as pointed out by Professor Elmer Driedger in *Construction of Statutes* (Toronto, 1983) at pp. 127-128, it does not necessarily follow that a change in wording will always require a different interpretation of the law. We noted earlier that nowhere in the available parliamentary materials is there a mention, let alone a discussion, of the insertion of the word “an” in the requirement of “personal injury by accident.”

As noted by the former commissioners in their July 7, 1989 decision, the *G.E.C.A.* is not consistent in its usage. Subsection 4(4) states that “the benefits of this Act apply to an employee of the Government railways who is caused *personal injury by accident* arising out of and in the course of his employment . . . and the dependants of such an employee whose death results from *such an accident* . . . (emphasis added).” Like the former commissioners, we find it hard to accept *prima facie* that the intention was to provide workers falling under subsection 4(4) and those falling under subsection 4(1) with different coverage.

In *Larson’s Workmen’s Compensation, Desk Edition, Vol. 1* (New York, 1991), Professor Arthur Larson, an American authority on workers’ compensation, discusses the distinction between “by accident” and “by an accident.” At p. 7–53 he states:

Another result of the “accident” concept is that some jurisdictions will continue to insist on suddenness or definiteness in the time of injury. This has already been criticized as a misreading of the statute (Section 37.20), although in a few states that actually employ the noun “the accident” or “an accident” in the coverage formula, as distinguished from the adverb “accidentally” or the adverbial phrase “by accident”, the error is not quite so inexcusable.

Finding that an error is “not quite so inexcusable” does not amount to endorsing the notion that there is a clear substantive difference between the two phrases. We find Professor Larson’s discussion is helpful in arriving at our conclusion.

We are aware that some old English cases and more contemporary American cases have alluded to a distinction in meaning between the phrases “by accident” and “by an accident.” Mr. Winter referred us to some of these cases. However, as we understand it, the crux of Mr. Winter’s argument is that the phrase “personal injury by accident” itself requires the occurrence of clearly ascertainable work-related incidents causative of an injury. According to this argument, the insertion of the word “an” in this phrase merely strengthened that requirement.

We conclude that the insertion of the word “an” in subsection 4(1) of the *G.E.C.A.* was not meant to bring about a change in the substance of the law. That the definition of the word “accident” was left untouched in 1955 fortifies us in this view. Therefore, we find that, in the context of the *G.E.C.A.*, the phrase “personal injury by an accident” has the same meaning as the phrase “personal injury by accident.”

We are thus left with the task of interpreting the phrase “personal injury by accident arising out of and in the course of employment.” This phrase originated in the *British Workmen’s Compensation Act* of 1897 which influenced the workers’ compensation legislation adopted in most other parts of the British Commonwealth and in the United States. The phrase became the basic coverage formula in most English-speaking countries. It was incorporated into the *Ontario Act* in 1914, into the *B.C. Act* in 1916 and, as noted earlier, into the *G.E.C.A.* in 1931. But whereas in Great Britain the 1897 *Act* contained no definition of “accident,” both the *Ontario Act* and the *B.C. Act* did. A definition of “accident” was eventually incorporated into the *G.E.C.A.* in 1947. This definition replicated what at the time was a definition common to both the Ontario and B.C. legislation.

The phrase “personal injury by accident” has given rise to much litigation. To the extent that practically every judicial decision has turned on its own particular facts, the case law makes refinements and distinctions that are not easy to fit into a coherent framework of analysis. There is, nevertheless, a clearly distinguishable and consistent line of English cases which manifested itself early this century and which found its fullest expression in *Roberts v. Dorothea Slate and Quarries Company Ltd.* This line of cases developed a distinction between injuries resulting from accidents and incapacities arising very gradually.

In *Roberts v. Dorothea Slate Quarries Co. Ltd.*, at p. 205, Lord Porter stated:

In truth, two types of case [sic] have not always been sufficiently differentiated. In the one type, there is found a single accident followed by a resultant injury, as in *Brintons, Ltd. v. Turvey* (4), or a series of specific and ascertainable accidents followed by an injury which may be the consequence of any or all of them, as in *Burrell (Charles) & Sons, Ltd. v. Selvage* (8). In either case it is immaterial that the time at which the accident occurred cannot be located. In the other type, there is a continuous process going on substantially from day to day, though not necessarily from minute to minute or even from hour to hour, which gradually and over a period of years produces incapacity. (notes omitted).

Lord Porter stated further at p. 206 that:

Counsel for the employers formulated the proposition on which he relied by suggesting that, where a physiological condition is produced progressively by a cumulative process consisting of a series of occurrences operating over a period of time, and the microscopical character of the occurrences and the period of time involved are such that in ordinary language that process would be called a continuous process, the condition is not produced by an accident or accidents within the Acts. I do not know, however, that any explicit formula can be adopted with safety. There must, nevertheless, come a time when the indefinite number of so-called accidents and the length of time over which they occur take away the element of accident and substitute that of process.

In *Pyrah v. Doncaster Corporation*, [1949] 1 All E.R. 883 (C.A.), at p. 893, Lord Denning referred to the *Roberts v. Dorothea Slate Quarries Co. Ltd.* distinction with approval. However, on the facts of the case, he held that the tuberculosis contracted by the worker was not due to a process of work but was caused by a number of incidents that occurred when the worker was brought by chance into close contact with a patient who had been coughing.

Mr. Winter argues that the interpretation of subsection 4(1) of the *G.E.C.A.* must rest on this distinction. He argues further that the decision of the Supreme Court of Canada in *Theed* accepts this distinction. We note that the line of English cases mentioned by Mr. Winter dealt with diseases and not with injuries. In the *Roberts v. Dorothea Slate Quarries Co. Ltd.* case the disease was silicosis. In the other cases, the diseases included tuberculosis, rheumatism and blood poisoning. Mr. Winter submits that it is immaterial that diseases and not injuries were in issue in these cases. According to him, what this line of cases offers is a general methodology that sets apart injuries resulting from clearly ascertainable accidents from injuries and diseases developing gradually over an extended period of time.

We cannot agree with the weight that Mr. Winter seeks to attach to this pre-1950's line of cases. Historically, in the field of workers' compensation, there has been a general trend in the direction of broadening the interpretation of key concepts. For example, until the turn of the century it was generally accepted that the word "accident" involved the idea of something fortuitous and unexpected. The application of this view to a case where a workman strained himself whilst carrying on his ordinary occupation, is found in *Hensey v. White*, [1890] 1 Q.B. 481. The Court of Appeal held that there was no accident, because there was an entire lack of the fortuitous element: what the man was doing he was doing deliberately. This decision was overruled by the House of

Lords in 1903. In *Fenton v. Thorley*, [1903] A.C. 443, the House of Lords came to the conclusion that the expression “accident” is used in the popular and ordinary sense of the word as denoting an “unlooked-for mishap or an untoward event which is not expected or designed.” Lord MacNaghten, giving judgment for the worker, said at p. 447:

A man injures himself suddenly and unexpectedly by throwing all his might and all his strength and all his energy into his work by doing his very best and utmost for his employer, not sparing himself or taking thought of what may come upon him, and then he is to be told that this case is outside the *Act* because he exerted himself deliberately, and there was an entire lack of the fortuitous element! I cannot think that that is right. I do think that if such were held to be the true construction of the *Act*, the result would not be for the good of the men, nor for the good of the employers either, in the long run.

The words “not expected or designed” were subsequently explained as meaning “not expected or designed by the workman himself” (*Trim Joint District School v. Kelly*, 7 Butterworths’ Workmen’s Compensation Cases 274 at p. 283).

The area of workers’ compensation has continued to develop and broaden in its coverage. Therefore, a proper inquiry into the meaning of “personal injury by (an) accident” in the modern statutory context cannot place too much weight on cases from the 1940’s and earlier. As well, while the distinction advanced above by Mr. Winter appears clearly in English cases that interpreted the English statute, the Supreme Court of Canada in *Theed* interpreted “injury by accident” in a Canadian statute. Thus, of all these cases it is *Theed* that will be the most relevant to our inquiry. Of course, *Theed* has to be considered in light of the fact that it was rendered in 1940. Nevertheless, the question arises as to whether this decision supports a possible distinction between injuries resulting from clearly ascertainable incidents and injuries resulting from a gradual process or, alternatively, whether it does not support this distinction.

On its facts, *Theed* was a case in which the work activities on two clearly ascertainable occasions caused Miss Theed’s injury. The strained back suffered by the worker was a direct result of operating an office machine for two periods of about two days each separated by an interval of about two weeks. Thus, a possible interpretation of *Theed* is that an injury arising out of an accident which occurred on a series of specific occasions instead of just on one occasion is an “injury by accident” but that this is not the same as an injury developing gradually over time. Viewed in that light, the decision in *Theed* is similar to the decision in the *Roberts v. Dorothea Slate Quarries Co. Ltd.* case, except that it deals with an injury and not a disease. Indeed, some of the statements in *Theed* are consistent with this interpretation. So, for example, Davis, J., stated at p. 573:

On the established facts in the case before us there was a definite physiological injury that can be traced without any doubt to the young woman operating by hand, in the ordinary performance of her work, a machine that was too hard for her to work. The particular days on which she worked the machine were very few and were proved with precision and the physical injuries suffered are clearly established to be the direct result of her working the machine. I can see no difficulty on the authorities in regarding this as an accidental injury within the meaning of the statute.

In a somewhat more ambiguous vein, Kerwin, J., said at p. 577:

There are subsequent decisions in the Court of Appeal, in cases where disease was involved, holding that injury by accident cannot be established unless the applicant can indicate the time, date, circumstances and place in which the accident occurred which occasioned the disease (other than an industrial disease) but the House of Lords states the rule to be that even in disease cases the injury by accident will be established if having regard to the particular injury alleged, the date and circumstances of the accident are reasonably fixed so as to connect the injury with the accident.

Hudson, J., stated at p. 582:

I think it is clear from the evidence that the injury suffered by Miss Theed was initiated by her work on the first day that she started, and that on each succeeding day that she worked at the machine the amount of the injury was increased.

Hudson, J., also stated at p. 583:

I think that the concluding words of Lord Buckmaster are directly applicable to the present case. Miss Theed suffered personal injury by accident and the accident was no less accidental because it occurred on a series of occasions instead of on one. I agree with the Court below and would dismiss the appeal with costs.

On the other hand, a number of other statements in the decision suggest that, so long as the injury arose out of and in the course of employment, it does not matter whether it resulted from clearly ascertainable incidents or whether it developed gradually over time.

Crocket, J., stated at p. 571–72:

Where it is found that such an injury as Miss Theed sustained arose out of and in the course of her employment, as the compensation board has itself specifically found, and that injury is a physiological injury, as was incontrovertibly demonstrated by the operation which it necessitated, the injury itself constitutes an accident in the sense of a mishap or untoward event not expected or designed.

Davis, J., said at p. 572:

The point in this case is that the young woman sustained a definite physiological injury as the direct result of the work in which she was engaged: that is an accidental injury in the sense of the statute.

But note how Davis, J., also added at p. 572:

We are not concerned in this appeal with the difficult questions which arise where there is a progressive disease which has not been expressly made, by statute or regulation, an industrial disease . . .

Kerwin, J., cited Lord MacNaghten in *Fenton v. Thorley and Co.* with approval at p. 576–77:

There (in Fenton’s case) the Court of Appeal had held that if a man meets with a mishap in doing the very thing he means to do the occurrence cannot be called an accident. There must be, it was said, an accident and an injury: you are not to confuse the injury with the accident. Your Lordship’s judgment, however, swept away these niceties of subtle disquisition and the endless perplexities of causation. It was held that ‘injury by accident’ meant nothing more than ‘accidental injury’ or ‘accident’ as the word is popularly used.

Kerwin, J., stated further at p. 580:

This history of the act shows that the statutes should be construed liberally in favour of all workmen within its purview. . . . It is not possible to distinguish in time between the respondent’s actions of pulling the lever and the injury she sustained, and that injury, even though arising by reason of a series of operations of the machine, should be held to have been caused by accident.

The above quotations appear to give support to either a narrower or broader interpretation of “injury by accident.” However, we find no contradiction in this language. It must be remembered that *Theed* was decided with reference to a specific set of facts. While there was no “accident” in the very narrow sense of an unexpected and unusual causal event, the injury did arise after two very short, identifiable periods of work on a particular machine. Thus, the facts in *Theed* did not involve an injury arising gradually over time or “by process.”

The Supreme Court of Canada unanimously found that Miss Theed’s injury was an “injury by accident” within the New Brunswick legislation. All of the quotations set out above were in support of that conclusion. The narrow language was all that was necessary to decide the case on its facts. The broader language gave an indication of how the Court might interpret “injury by accident” on a different set of facts where it was more difficult or not possible to identify an incident or series of incidents that caused the injury. While this may have been *obiter*, we have not found any further case where the Supreme Court of Canada was required to interpret the words “injury by accident” on a broader set of facts.

Thus, we find that the four written judgments in *Theed* give considerable support to the development of a broader interpretation of “injury by accident.” Given that some of the broader statements in *Theed* may be *obiter*, and the case involved an interpretation of the New Brunswick legislation on a relatively narrow set of facts, this case cannot completely resolve the issue before us. However, it provides considerable guidance in interpreting subsection 4(1) of the *G.E.C.A.*

Mr. Winter also cites a relatively recent Ontario Case, *Re Kuntz and Workers Compensation Board* (1986), 31 D.L.R. (4th) 630 (Ont. C.A.). In that case, Finlayson, J.A., of the Ontario Court of Appeal stated in *obiter* at p. 636:

I do not propose to attempt a definition of “accident”. It appears to me that the position that the injury itself can be the accident within the meaning of the [Ontario] *Act*, regardless of what activity the worker is engaged in at the workplace or what his underlying physiological condition is, may stretch the definition of “accident”.

However, we note that Finlayson, J.A., also stated at p. 637:

There is much to be said for the submissions of counsel for the respondent Kuntz [namely, that the “accident” means accidental result as well as accidental cause] but, speaking for myself, I believe that the interpretations of the definition of “accident” made by the appeal boards in both cases [namely, that “accident” means a

specific work-related chance-event] is within the range of possible interpretations of accidents and I am not persuaded that their interpretations of s. 1(1)(a) are so patently unreasonable that their construction cannot be rationally supported.

The central issue in *Kuntz* was whether or not judicial review was available from a decision of the Ontario Workers' Compensation Board which is protected by a privative clause. It is in that context that Finlayson, J.A., concluded that the Board's conclusion (similar to that advanced by Canada Post here) was not so patently unreasonable that it should be disturbed on judicial review. In light of this, and of the substance of the above quoted statements, the case provides us with little assistance. It is interesting that the Ontario Court of Appeal does not refer to *Theed* in this decision.

Neither a literal approach to statutory interpretation nor the judicial consideration of the phrase "injury by accident" settles the issue before us. We now turn to the workers' compensation legislation in B.C. to consider how it assists in the interpretation of "personal injury by (an) accident." Our object is to determine whether these words would be viewed as restrictive or, on the contrary, as inconsequential, were they a part of the basic entitlement provision in workers' compensation legislation in B.C. If there is evidence suggesting that they would be perceived as restrictive, this would support a narrow interpretation of subsection 4(1) of the *G.E.C.A.* On the other hand, if there is evidence suggesting that they would be perceived as inconsequential, this would support a broad interpretation of subsection 4(1) of the *G.E.C.A.*

The word "accident" still appears in a number of sections in the *B.C. Act*. Its meaning has to be interpreted in the context of each particular section. For example, subsection 5(4) of the *B.C. Act* uses the phrase "where the injury is caused by accident" to establish a presumption when "the accident" occurs in the course of the employment or when it arises out of the employment. Subsection 5(4) does not define basic entitlement benefits, as a worker can receive compensation benefits under subsection 5(1) of the *B.C. Act*, irrespective of whether subsection 5(4) applies. An entitlement provision is not analogous to a provision containing a presumption clause. Thus, we think that the interpretation given to "accident" in subsection 5(4) does not assist us with the interpretation of "accident" when it is found in a basic entitlement section that all workers must satisfy. A contextual approach to statutory interpretation makes it inappropriate to inject into an entitlement provision the meaning of a word appearing in a presumption clause. Mr. Justice Tysoe's discussion brings this out. In the Tysoe Report, Mr. Justice Tysoe considered the meaning of the term "accident" in the presumption section. He concluded at p. 188 that the legislative intent was to retain the narrow definition of accident in the presumption clause. He reached a significantly different conclusion on the definition of accident in the entitlement section.

Therefore, we will not examine or apply the definition of “accident” as used in subsection 5(4) of the *B.C. Act* in interpreting subsection 4(1) of the *G.E.C.A.* Similarly, we do not find it helpful to consider the meaning put on “accident” in other sections of the *B.C. Act*, as these sections are not dealing with basic entitlement to benefits.

As the words “injury by accident” were found in the basic entitlement provision of the *B.C. Act* from 1916 until 1968, we think it is helpful to consider what these words meant in B.C. before their removal and why they were removed. In his report, Mr. Justice Tysoe examined the development of the requirement of “injury by accident” in workers’ compensation schemes and the effect of the decision of the Supreme Court of Canada in *Theed*. Mr. Justice Tysoe also examined the 1959 amendment that was made to the definition of “accident” in B.C. Under this amendment, disablement arising out of and in the course of the employment was included in the definition of accident. Mr. Justice Tysoe’s detailed analysis led him to recommend that the words “by accident” in the basic entitlement provision of the *B.C. Act* be struck out and that the 1959 amendment to the definition of “accident” be withdrawn. Mr. Justice Tysoe did not consider this to be a significant change in the B.C. compensation scheme; rather, it was a matter of eliminating confusion around those words and concepts.

Of special interest to us is Mr. Justice Tysoe’s reasoning in reaching his conclusions. He stated at p. 176:

Nevertheless, in my opinion there has been a continuing tendency on the part of the Courts to so liberalize the interpretation of the famous phrase and particularly the words “injury by accident” as to assure that any injury that arises out of and in the course of employment — that is truly work-caused — will be compensated for. No longer is “accident” limited to a sudden smash or bang or to a single fortuitous event. It has been held by the highest authorities that a series of events, small in themselves but cumulative in effect, can, in given circumstances, collectively constitute an accident. I think that all this is an example of the Courts keeping up with the developing social conscience, and that to provide compensation for all work-caused injuries and disabilities is in accord with that conscience as it is today.

He stated further at p. 179:

It appears to me that the intention behind the change in the definition of “accident” made by the Legislature in 1959 must have been to confer on a workman a right to compensation in cases where, although there be nothing in the nature of an accident in the

narrow sense, he suffers disablement in the course of his employment and that disablement arises out of his employment, or, in other words, if the disablement is truly work-caused.

He concluded at p. 187:

It seems to me that under our legislation as it now stands, “accident” is no longer an essential element of the right to compensation and that the test is simply “was the workman’s disability truly work-caused?”. It further appears to me that the retention of “accident” in the basic coverage formula has made for confusion in the administration of the *Act*. I am unable to see that such retention serves any useful purpose. *Even if I disregard the 1959 amendment to the definition of “accident” and direct my attention only to the trend of jurisprudence, I must come to the conclusion that the time has gone by when a workman’s right to compensation should be limited to “injury by accident” in the narrow sense of that term.* (emphasis added)

Although not apparent from the above quotations, when read as a whole, Mr. Justice Tysoe’s discussion suggests that injury encompasses disablement. This is partly why he recommended that the 1959 amendment to the definition of “accident” be withdrawn.

To recapitulate, in 1966 it was Mr. Justice Tysoe’s opinion that the words “by accident” served no useful purpose in the context of the basic entitlement provision of the B.C. *Act*. It was also his opinion that the concept of injury subsumes that of disablement. We recognize that Mr. Justice Tysoe’s recommendations were based on both the existing state of the law as well as policy considerations. But what Mr. Justice Tysoe’s discussion tells us is that, by 1966, a narrow interpretation of “by accident” had become obsolete in B.C. To the extent that the retention of the words allowed for such an interpretation, it created the possibility of injustice — hence, his recommendations, which were adopted. The gist of his discussion is that, although these words should have been of no consequence whatsoever, they could easily be and were sometimes misinterpreted and misapplied.

Our analysis of Mr. Justice Tysoe’s discussion leads us to conclude that if, hypothetically, the words “by accident” were found today in the basic entitlement provision of the B.C. *Act*, then, regardless of whether “disablement” was found in the definition of “accident,” the words “by accident” would add nothing to the requirement that the worker’s injury arose out of and in the course of the employment. Since the concept of injury encompasses that of disablement, there would not be any distinction

between injuries resulting from clearly ascertainable incidents and those resulting gradually over time. All injuries would be compensable so long as they were work-related. Under this hypothetical provision, the test for entitlement would be no different than the test for entitlement under the present subsection 5(1) of the *B.C. Act*.

The application of the above analysis to subsection 4(1) of the *G.E.C.A.* is legitimate when one considers the legislative intent.

Viewed in its own right, the history of the *G.E.C.A.* shows, over time, a gradual broadening of entitlement to compensation. As indicated earlier, the 1920's amendments to the legislation broadened the definition of "compensation" and of "employee." In 1947, the legislation extended the principle of compensation to provide compensation in the case of industrial disease and to provide compensation to employees who are injured or disabled while working outside of Canada. To interpret the words "by accident" narrowly in the current *G.E.C.A.* would be contrary to this very discernible trend, in the statute's history, towards extending the principle of compensation. While it is possible to argue that *Theed* did not eliminate any distinction between injuries arising by accident in the narrow sense and injuries arising by process, we accept and agree with the views of Mr. Justice Tysoe that, in the aftermath of *Theed*, the words "by accident" would be interpreted broadly and would effectively become redundant in the basic entitlement provisions of workers' compensation legislation. In *Workers' Compensation in Canada* Second edition (Toronto and Vancouver, 1989), Professor Terence G. Ison confirms this when he states, at p. 24, that "although the phrase 'by accident' still appears in most of the Acts, it is now redundant as a general requirement of eligibility for compensation."

Viewed in a slightly different light, the history of the *G.E.C.A.* reveals a parliamentary intent to offer a federal compensation scheme that would parallel provincial schemes. In introducing the 1918 draft of the proposed federal scheme, the Honorable J.D. Reid, then Minister of Railways and Canals, stated at p. 667 of the 1918 House of Commons Debates, "The Bill will provide that the compensation is to be the same as under the law of the province where the accident occurred." In fact, the very early debates of the proposed scheme suggest that one of the concerns motivating the federal government to legislate in this field was the potential loss of federal railway employees to provincial railway companies. The provinces had compensation schemes. This supports our view that Parliament's intent was to offer a compensation scheme that would match those of the provinces.

The subsequent legislative evolution of the *G.E.C.A.* is consistent with this view. Parliament added the words "by accident" to the *G.E.C.A.* in 1931, when the same words were found in British Columbia and other provincial workers' compensation acts. In 1947 a definition of "accident" was added to the *G.E.C.A.* that was, as pointed

out above, virtually identical to that found in the B.C. *Act* at that time. As well, in 1947, Parliament expanded coverage in subsection 4(1) to include “an employee who is disabled by reason of an industrial disease due to the nature of the employment.” Again, this paralleled the British Columbia and other provincial schemes. While Parliament did not amend the definition of “accident” as did British Columbia in 1959 nor delete the words “by accident” as did British Columbia in 1968, for reasons set out earlier, we do not find that those were significant changes in basic entitlement under the B.C. *Act*.

Recapitulating, the words “by accident” or “by an accident” would have no effect if found in the basic entitlement test of the B.C. *Act*. We are satisfied that the federal legislative intent was and is to have the same interpretation for the federal legislation, as would be put on the provincial legislation, if the wording was the same. We have concluded this, taking into account the fact that nothing in the parliamentary materials available ever suggests that, in inserting first the words “by accident” then the word “an” into the entitlement provision, Parliament intended to limit entitlement to compensation or to depart from the provincial schemes. The argument that the addition of “an” in 1955 intended to demarcate the federal scheme from the provincial ones is hardly tenable since, at the same time, the words “under the same conditions as are provided under the law of the province” were added to subsection 4(2) of the G.E.C.A. Admittedly, the proper meaning of “conditions” under subsection 4(2) of the G.E.C.A. is not before us. Our point is simply that the addition of a word that is bound to be confusing makes little sense, if the legislative drafters clearly intended to differentiate the federal entitlement test from the provincial ones.

Additional material relevant to parliamentary intent may be found outside a statute, in interpretation acts. The federal *Interpretation Act* contains a provision that supports our conclusion. This provision states:

11. Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

We heard the argument that the objective of consistent treatment of federal workers across Canada underlies subsection 4(1) of the G.E.C.A. Even if this argument were correct, it does not in and of itself resolve the issue of a broad versus a narrow interpretation of the words “by an accident” in subsection 4(1). Conceivably, a broad interpretation would be consistent with such an objective. Moreover, no evidence was adduced to buttress this argument. While subsection (2) of the G.E.C.A. explicitly emphasizes consistency within a province, no section in the G.E.C.A. explicitly emphasizes consistency for federal workers across Canada. This reinforces our view on legislative intent, namely, that Parliament intended to match the provincial schemes and provincial interpretation of “by (an) accident.”

Having come to this conclusion, we do not need to deal with the submission that the regulations pursuant to the *G.E.C.A.* answer the problem posed by repetitive or occupational types of injuries. A principle of statutory interpretation is that regulations cannot broaden the scope of a statute. The very existence of these regulations indicates, nevertheless, an intent to provide compensation for all injuries that are work-caused regardless of whether there is an accident in the narrow sense of the term.

An issue that is not before us concerns the incorporation of provincial legislation into the *G.E.C.A.* Where the *G.E.C.A.* has its own substantive provisions, it clearly does not incorporate the analogous provincial provisions. But does this imply that it incorporates all other provincial provisions such as our presumption provision, our limitation provision, or our Section 99? Although we do not purport to answer this question, we find the views and reasoning of the Ontario Appeals Tribunal on this question helpful. In *Decision No. 485/90*, 17 W.C.A.T. Reporter 173, the Ontario Appeals Tribunal stated at p. 185:

This section of the *G.E.C.A.* [namely section 4] must be interpreted with a view to considering whether the compensation system established by the incorporation can function as a coherent whole. When there is a question as to whether a particular provincial provision ought to be included in the incorporation set out in s. 4, the decision as to whether the provision is reasonably incidental to the rates and conditions of compensation must be made with a view to considering whether the resulting compensation system can function as a fair, comprehensive, functional and balanced whole without it.

The question of what provisions are reasonably incidental to “the rates and conditions” of compensation cannot be fully answered without an analysis of the meaning of “conditions.” However, we can offer the view that the incorporation of provisions such as our presumption clause (subsection 5(4)), our limitation conditions (Section 55), our medical examination requirements (Section 57) and Section 99 of our *Act*, would result *prima facie* in a workable system. The fact that the meaning of the word “accident” as it appears in our subsection 5(4) is narrow should pose no problem. A broad interpretation of “accident,” when it appears in an entitlement provision, can be easily reconciled with a narrow interpretation of this word when it appears in a presumption provision. The B.C. legislation prior to the Tysoe recommendations attests to this.

CONCLUSION

Through a somewhat different analysis, we have reached the same conclusion that the former commissioners reached in their July 7, 1989 decision. Subsection 4(1) of the *G.E.C.A.* defines the circumstances which give rise to an entitlement to compensation. On close analysis, this subsection provides a test for entitlement to compensation that is, in effect, the same as the test provided by subsection 5(1) of the *B.C. Act*. The basic test for entitlement is whether an injury arose out of and in the course of the employment. The words “by an accident” do not modify this basic test.

We reached this conclusion, after having considered a number of arguments and approaches to statutory interpretation. The strongest argument against this conclusion is the distinction drawn by the English line of cases between injuries resulting from clearly ascertainable incidents and injuries resulting gradually over time. Expressed somewhat differently, this distinction suggests that the concept of accident includes an element of definiteness in time. We recognize that an interpretation of *Theed* along the lines of this distinction is plausible but that is not how we interpret the direction given in *Theed*. As well, we find that an interpretation of the *G.E.C.A.* according to its object and intent leaves no room for this distinction. In reading the whole text of the statute, in considering its purpose as is apparent from its legislative evolution and in taking into account the context and principles of workers’ compensation legislation, we find a broad interpretation of the words “by an accident” in the *G.E.C.A.*’s entitlement provision to be correct. The federal *Interpretation Act* supports this conclusion.

Our conclusion is consistent with the governors’ policy and Board practice with respect to entitlement for federal workers. But this is not to say that it is lawful for the Board to disregard the express provisions of the *G.E.C.A.* and to rely solely on the *B.C.* provisions. As we indicated earlier, where the *G.E.C.A.* has express provisions, it does not incorporate the provincial statute. Moreover, even where the *G.E.C.A.* is silent, it is not yet entirely clear how much of the provincial statute it incorporates.

To conclude, we find that “by an accident” in subsection 4(1) of the *G.E.C.A.* does not require that there be a clearly ascertainable incident or series of incidents which caused the injury. Injuries that arise gradually over time or “by process” are not excluded by this subsection. The injury itself can be the “accident” for the purposes of subsection 4(1). Thus, the test for federal employees in *B.C.* under subsection 4(1) of the *G.E.C.A.* is, in effect, the same as the test for other workers in *B.C.* under subsection 5(1) of the *B.C. Act*.

Editors’ note: This decision has been edited for publication.

