

Decision of the Appeal Division

Number: 92-1209
Date: June 23, 1992
Panel: Connie Munro, Sonja Hadley, Grant McRitchie
Subject: Section 39(1)(d)

This is an employer's appeal with respect to a decision of the director, Disability Awards, dated March 27, 1991. The director denied the employer's request for relief of costs under Section 39(1)(d) of the *Workers Compensation Act* (the "Act") with respect to the worker's claim for benefits for a fatal injury sustained on November 23, 1990.

The issue on this appeal is whether the employer and the class to which he belongs ought to be relieved, under s. 39(1)(d), of the costs of the fatality.

Section 39(1)(d) reads as follows:

Assessment for accident fund

39. (1) For the purpose of creating and maintaining an adequate accident fund, the board shall every year assess and levy on and collect from independent operators and employers in each class, by assessment rated on the payroll, or by assessment rated on a unit of production, or in a manner the board considers proper, sufficient funds, according to an estimate to be made by the board, but the established practice of assessment and levy shall be varied only with the approval of the Lieutenant Governor in Council to,

...

- (d) provide a reserve to be used to meet the loss arising from a disaster or other circumstance which the board considers would unfairly burden the employers in a class;

The worker was a hooktender with a logging crew. He remained in the work area during the lunch hour to reset some of the equipment. As he was engaged in this task, a torrent of several tons of water and natural debris released from the unlogged hillside above him. The worker was caught in its path and sustained fatal injuries.

In a letter dated March 15, 1991, the employer's representative submits:

The cause of the debris torrent was not the logging activity but the nature of the underlying soils in combination with the excessively heavy rains and snowmelt at that time. In the twenty four hours preceding the release of the debris torrent there had been 18.75 centimetres of rain accompanied by 35 centimetres of snowmelt, as you are no doubt aware this winter has been plagued by similar unusual occurrences. There was no visible evidence that this totally unexpected release of water and debris would occur.

In a letter dated April 8, 1991, the employer's representative states that the word "disaster" is defined as "an adverse or unfortunate event: great or sudden misfortune, calamity." He contends that the death of a human being meets the common understanding of the word "disaster." He explains that, although every fatality does not necessarily fall under Section 39(1)(d), "on the face of it this is so."

The employer's representative further contends that the event causing the worker's death was not one that the employer could have foreseen or prevented, implying that the employer cannot be faulted for having failed to provide for the worker's safety. He offers, as corroborating evidence, the fact that the Occupational Safety and Health Division did not write orders on the employer or request further safety measures in respect of the circumstances of this accident. The employer's representative characterizes this event as "completely fortuitous and unexpected . . . [falling] outside the normal hazards of the industry."

The employer's representative points out that the director's assumption that all fatal costs are equally apportioned among all employers is not accurate. He states that the Assessment Department informed him that fatal costs are apportioned in two ways. All fatal costs are applied to the appropriate class and subclass for base rate purposes. An average fatal cost is determined and that average is applied to each employer who had a fatal claim in direct proportion to the number of fatal claims. Therefore, in the absence of some form of relief, the effect on that employer's E.R.A. rate could be substantial.

As for the phrase "unfairly burden the employers in a class," the employer's representative argues that the director misread this phrase by treating it as if it meant "unfairly burden the class of employers."

The employer's representative concludes:

The effect of the E.R.A. system on the rate structure has been to eliminate to some degree the framework envisioned by the Legislature in Part Four of the *Act*. In constructing the provisions in Sec 39(1)(d) and Sec 10(8) the Legislature had in mind a system of common rates applicable to all employers within a specific class and subclass and that changes to those rates would affect all employers within that class and subclass equally. That is no longer the case, with the coming of the E.R.A. system a logging contractor can be paying the same or lesser rate than a manufacturer of concrete garden gnomes or a rate that is 100% greater than other employers in his class or subclass. It does not appear to us that policy has kept pace with the changes to the assessment system, nor that the Legislature, although it provided for forms of experience rating, had in mind the extent to which an experience rating system would be applied and the effect on individual employers assessment rates. It is important to ensure that the interpretation of the *Act* fulfills the true intent and takes into consideration non-legislative changes that have occurred in the system.

In sum, the employer's representative urges us to interpret s. 39(1)(d) in light of today's broad-based E.R.A. system and not in light of the assessment system that was in force when the section was first enacted.

The panel agrees with the view expressed by the employer's representative that it is unlikely that the Legislature had the current E.R.A. system in mind when it first enacted s. 39(1)(d). Appeal Division Decision No. 91-0806 held that s. 42 of the *Act* authorizes the E.R.A. system. Nevertheless, it is possible that the expansion of this system has created anomalies or unanticipated inequities that the *Act* does not explicitly address. The question then arises as to whether there is enough latitude in the wording of the *Act* for an interpretation that would cover these situations.

The very able submissions of the employer's representative have underscored the necessity of reviewing the nature of s. 39(1)(d) and its application. This case provides an opportunity to do so. In view of the nature of this issue, a three-person non-representational panel was convened by the chief appeal commissioner. Notice was given to the workers' compensation community and written submissions were invited with respect to the proper interpretation of the words in s. 39(1)(d).

The gist of the submissions received from the employers' community is that s. 39(1)(d) must be interpreted and applied in a wide and liberal manner. First, the employers argue that the word "disaster" was intended to be given its common (dictionary) meaning and that the Appeal Division must not attempt to define what will (and will not) constitute a disaster.

Second, they argue that the phrase "other circumstance" can be viewed as having a narrow or a broad meaning. The phrase could be interpreted narrowly in light of the preceding word "disaster." According to such an interpretation, the "other circumstance" which would justify granting relief of costs to the employer(s) under s. 39(1)(d) would have to be akin to a disaster. On the other hand, a broad interpretation would attach to the phrase "other circumstance" a meaning separate and apart from that of the word "disaster." The employers submit that the broad interpretation is the better one. They reason that, since the word "disaster" lends itself to a broad interpretation, a narrow interpretation of the phrase "other circumstance" would make the phrase, in effect, redundant.

Third, the employers argue that the phrase "unfairly burden" must be given the widest possible application because the word "unfairly" has subjective connotations. It cannot be interpreted or applied in the abstract.

Fourth, the employers contend that the phrase "employers in a class" allows the Board to relieve a particular employer. It is contended that equating the phrase "employers in a class" with the concept of a "class of employers" is unwarranted.

The employers submit that the *Interpretation Act*, R.S.B.C. c. 206 supports a broad interpretation of s. 39(1)(d). More specifically, they rely on s. 8 and s. 28(3) of the *Interpretation Act*.

Section 8 of the *Interpretation Act* states:

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

Subsection 28(3) of the *Interpretation Act* states:

In an enactment words in the singular include the plural, and words in the plural include the singular.

The employers also submit that the current published policy of the governors indicates that s. 39(1)(d) will and must be applied in situations where a particular employer in a class (as opposed to the class of employers) is considered to be unfairly burdened. The employers object, however, to the fact that in practice the Board has limited the application of s. 39(1)(d) to certain specified situations. They are of the view that, by limiting the application of s. 39(1)(d) to these situations, the Board has misinterpreted and misapplied the governors' policy and has fettered its discretion.

Analysis

The specific question before us is whether s. 39(1)(d) applies to relieve an individual employer of the costs of a single fatality, taking into account the particular circumstances which led to this fatality.

As is apparent from the submissions, s. 39(1)(d) can be read in different ways. It is important, therefore, to identify at the outset the potential readings that might be given this provision.

One possible reading of s. 39(1)(d) is that it provides for a reserve to be used to meet losses arising from a disaster or some other *similar* circumstance which the Board considers would unfairly burden a class of employers.

A second possible reading of s. 39(1)(d) is that it provides for a reserve to be used to meet losses which the Board considers would unfairly burden a class of employers. These losses could be due to a disaster or *any* other circumstance.

We note that neither the first nor the second reading requires the "disaster or other circumstance" to occur to all the employers in a class. What is required, under these readings, is that the losses arising from the "disaster or other circumstance" would unfairly burden a class of employers. Conceivably, a disaster or other circumstance occurring to one employer or some employers could be of such magnitude that the class as a whole would be unfairly burdened.

We also note that both the first and the second readings point in the same direction, namely the losses involved must be substantial enough to have an effect on a class (or classes), in order to come within the meaning of s. 39(1)(d). In that sense, both readings interpret the phrase "the employers in a class" narrowly.

A third reading of s. 39(1)(d), which is the one urged upon us by the employer, is that it provides a reserve to be used to meet losses which the Board considers would unfairly burden an individual employer, some employers, or a class of employers.

These losses could be due to a disaster or any other circumstance. Unlike the first and second readings, this reading assigns to the required reserve, a very broad equitable function that includes meeting whatever substantial losses would unfairly burden a class as well as the more minor losses which would unfairly burden individual employers.

Because the wording of s. 39(1)(d) leaves room for some ambiguity, we cannot look only at the words of the statute and give effect to them. We must take into account the history of this provision, the statutory context in which it arises, relevant rules of statutory interpretation and, if available, cases on point.

The substance of s. 39(1)(d) originated in 1916. In the *Workmen's Compensation Act*, S.B.C. 1916, c. 77, what was then s. 29(1)(e) read in part as follows:

- (e) To provide a reserve fund to be used to meet the loss arising from any disaster or other circumstance which, in the opinion of the Board, would unfairly burden the employers in *any* class.

(emphasis added)

The change in wording from “unfairly burden the employers in *any* class” to the present wording of “unfairly burden the employers in *a* class” occurred in 1979 when the *Workers Compensation Act* R.S.B.C. 1979, c. 437 replaced the *Workmen's Compensation Act* R.S.B.C. 1968, c. 59. A change in wording does not necessarily imply that a change in substance was intended. The legislative history of s. 39(1)(d) fails to disclose any intention on the part of the Legislature to alter the meaning of the provision by this slight change in wording.

Although it is only in 1932 that the Board introduced its first experience rating plan, the statutory provision authorizing experience rating was enacted in 1916. Hence, the argument cannot be made that the legislative scheme in 1916 contemplated only collective liability and that, therefore, s. 29(1)(e) of the *Workmen's Compensation Act* [today's s. 39(1)(d)] must have been intended to provide relief of costs only in cases of losses affecting a class of employers. Had the provision authorizing experience rating been introduced subsequent to the provision requiring the reserve specified under s. 29(1)(e), such an inference would have been logical. However, the two provisions were introduced simultaneously. The sequence of legislative events, therefore, provides us with no clues as to the intent behind s. 29(1)(e).

To our knowledge, there is no judicial interpretation of the words “disaster or other circumstance which the board considers would unfairly burden the employers in a class” or, for that matter, of the words “disaster or other circumstance which the board considers would unfairly burden the employers in any class,” as these words

have appeared in the B.C. workers' compensation legislation. The few decisions that discuss the application of s. 39(1)(d) do not specifically interpret these words.

We note, however, that both the phrases "in any class" and "in a class" would be redundant, if the intention was to authorize the Board to provide relief to individual employers quite apart from what happens to a class. Under the 1916 *Workmen's Compensation Act*, all employers belonged to a class for assessment purposes. The same applies to employers under the *Act*. Hence, specifying "the employers in any class" or "the employers in a class" adds no meaning to the provision, if it is to be understood as providing individual relief in addition to class relief. Had the legislative drafters omitted these phrases and simply ended the provision with the words "which the board considers would unfairly burden employers," they would have covered unambiguously both grounds. *Prima facie* then, the phrases "in any class" and "in a class" suggest a restrictive meaning, namely, that the contemplated losses would unfairly burden a class (or classes) of employers. As stated by Viscount Simon in *Hill v. William Hill (Park Lane Ltd.)*, [1954] S.C. 530 at pp. 546–47:

The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which would not be there if the words were left out.

Commission Reports can be of great help in interpreting a statute beyond its verbal context. They generally outline the background against which legislation was enacted, thereby giving the relevant facts and surrounding circumstances.

In Mr. Justice Tysoe's 1966 *Report of the Commission of Inquiry into the Workmen's Compensation Act*, there is at pp. 60–61 a brief discussion of the concept of a "disaster" as it appears in s. 39(1)(d). This discussion suggests that this provision was enacted to address situations such as coal mine accidents. In response to Mr. Justice Tysoe's questioning, Mr. King, then comptroller of the Board, referred to the fund authorized by s. 39(1)(d) as a disaster fund. Mr. King expressed the opinion that a disaster would be any event that would increase the rate approximately two to three times in one year on a particular rating group. He also stated that he knew of two instances which were submitted to the Board as disasters — the Second Narrows Bridge collapse and an instance involving a rash of boat fatalities in one year. To his knowledge, the Board decided that neither instance constituted a disaster in relation to the figures for that year.

In his 1952 *Report of the Commissioner relating to the Workmen's Compensation Act and Board*, Mr. Justice Sloan reminds us, at page R149, that the B.C. *Act* was based on the Ontario *Act*, which, in turn, was drawn largely from the English and Washington Statutes.

In Ontario, *An Act to Amend the Workmen's Compensation Act* S.O. 1915, c. 24, s. 26 amended *The Workmen's Compensation Act* S.O. 1914, c. 25, s. 88 by adding the following subsection:

- (2) The Board may where it deems proper add to the assessment for any class or classes or for all the classes in Schedule 1 a percentage or sum for the purpose of raising a special fund to be laid aside and used to meet the loss arising from any disaster or other circumstance which in the opinion of the Board would unfairly burden the employers in any class.

In 1915, the B.C. attorney-general, Hon. W.J. Bowser, K.C., appointed a Committee of Investigation on Workmen's Compensation Laws. This Committee visited many American centres and gathered much data which were submitted to the attorney-general together with the Pineo Report. In view of this history, American sources are relevant and may shed some light on the intent behind s. 39(1)(d). Special funds for a variety of purposes have long since been established under American workmen's compensation legislation.

In an early American text on workers' compensation insurance, *Workmen's Compensation Insurance* by G.F. Michelbacher and Thomas M. Nial (New York, 1925), the authors associate the concept of a "catastrophe" with that of a "shock" loss. At p. 336, they describe a "shock" loss as a type of loss which occurs infrequently but is also of considerable magnitude. At p. 337, they define the word "catastrophe" as follows:

The term "catastrophe" may be defined as an accident which involves at least five deaths or permanent total disability cases. *Catastrophes are presumed to result in shock losses. Shock losses may originate in other ways, however, as for example, where a verdict for injury to one individual exceeds \$50,000, or where, under a workmen's compensation law with liberal benefits, the compensation allowed on account of injury to a single employee exceeds \$25,000. There are many cases where the loss from an accident involving less than five persons reaches a sum which is substantial enough to warrant the use of the term "shock loss".*

(emphasis added)

Further, at p. 337, the authors explain how "shock" losses could disrupt an insurance scheme unless there are built-in safeguards such as reserves and/or reinsurance arrangements.

According to *Words and Phrases*, Permanent Edition, Volume 6, St. Paul, Minn. West Publishing Co., at p. 512:

A “catastrophe” is a final event, usually of a calamitous or disastrous nature; a sudden calamity; a great misfortune. *It is synonymous with “disaster”*; it means a notable disaster, a more serious calamity than might ordinarily be understood from the term “casualty” (emphasis added). *W.A. Woodward Lumber Co. v. Unemployment Compensation Commission*, 145 P.2d 477, 479, 173 Or. 333.

Of course, these American sources are by no means conclusive. Nevertheless, it is noteworthy that around the time our special fund provision was first enacted, some relevant discussions of workers’ compensation insurance stressed the need to accumulate reserves to absorb the risks posed by contingencies occurring infrequently and causing losses of considerable magnitude. These discussions recognized that contingencies of this kind need not fall in the category of a “disaster” and they focused on the concept of “shock” losses. By definition, the impact of such losses must be on a group, a class or a substantial segment of the insurance system. Applying this reasoning, a cogent argument would be that the reserve under s. 39(1)(d) was intended to absorb “shock” losses — be they caused by a disaster or any other circumstance.

An elementary rule of statutory interpretation is that every provision of a statute should be construed with reference to its immediate context and the other provisions of the statute. Subsection 39(1) enumerates quite specifically the uses to which various reserves are to be put. Leaving aside s. 39(1)(d), each provision under s. 39(1) has a single, well-defined purpose. Therefore, an interpretation that ascribes to s. 39(1)(d) a twofold purpose such as providing a disaster reserve in addition to wide-ranging equitable relief (or a reserve to meet substantial, highly improbable losses as well as smaller more likely losses) is incongruous with the rest of s. 39(1). So is an interpretation that ascribes to s. 39(1)(d) an extremely broad subjective purpose, that is, equitable relief as the Board deems fit. The rest of s. 39(1) deals only with clearly ascertainable, objective situations.

In this connection, it is noted that in 1966 Mr. Justice Tysoe recommended the enactment of an express provision allowing the Board to set up and operate a second injury fund precisely because there were doubts as to whether the Board had the power to do so utilizing s. 39(1)(d). That resulted in s. 39(1)(e) being passed by the Legislature.

In Ontario, however, the Workers' Compensation Board has established a Second Injury and Enhancement Fund under a special fund provision which is analogous to our s. 39(1)(d). This special fund provision, today's s. 120(2) of the *Workers Compensation Act*, R.S.O. 1990, c. W.11, states:

(2) *Special fund.* The Board, where it considers proper, may add to the assessment for any class or classes or for all the classes in Schedule 1 a percentage or sum for the purpose of raising a special fund to be laid aside and used to meet the loss arising from any disaster or other circumstance that, in the opinion of the Board, would unfairly burden the employers in any class.

However, it is under a different, much more general provision, today's s. 65(3) of the *Workers Compensation Act*, R.S.O. 1990, c. W.11, that the Ontario Board has also established an Administrative Fund to be used when an employer is unjustly or incorrectly charged with the costs of a claim. This provision reads in part as follows:

(3) *Powers of Board.* The Board has power to,

- (a) establish the assessment policies of the Board;
- (b) review this *Act* and the regulations and recommend amendments or revisions thereof;
- (c) consider and approve annual operating and capital budgets;
- (d) review and approve investment policies of the Board;
- (e) review and approve major changes in programs of the Board;

.....

The Administrative Fund set up by the Ontario Board is not specified in the legislation as it was created under this general provision. It is to be used, for instance:

- (a) after unsuccessful attempts to recover an overpayment;
- (b) for costs resulting from an accident out of treatment;
- (c) where there is no record of a firm and rate number for the employer;
- (d) where an Appeals decision so directs.

Aside from the way in which the Second Injury and Enhancement Fund was created in Ontario, the above considerations point in the direction of an interpretation which acknowledges that the words "the employers in a class" restrict the meaning of

s. 39(1)(d). The above considerations do not necessarily suggest that the only purpose of the reserve required under s. 39(1)(d) is to serve as a fund for major disasters. Rather, they suggest that the purpose of this reserve is to meet losses that would unfairly burden a class (or classes) of employers, irrespective of whether a disaster or other circumstances caused these losses.

As against these considerations one must weigh an interpretation of s. 39(1)(d) that would allow the Board to relieve individual employers in whatever circumstances it considers just.

In their submissions, several employers have impressed on us that such an interpretation would be consistent with the provisions of the *Interpretation Act*. They have referred us to s. 8 and s. 28(3) of this legislation. S. 8 specifies that every enactment “shall be given such fair, large and liberal construction and interpretation *as best ensures the attainment of its objects* (emphasis added).” We are of the view, however, that where the object of a provision is precisely in doubt, s. 8 cannot be of much assistance.

S. 28(3) of the *Interpretation Act* provides that “In an enactment words in the singular include the plural, and words in the plural include the singular.” As a rule of construction, s. 28(3) provides some guidance as long as its application is consistent with the intent behind the enactment. Therefore, on its own, the application of this rule cannot settle the question of the intent underlying s. 39(1)(d). Of course, it is obvious that, where only one employer constitutes the class, s. 39(1)(d) empowers the Board to relieve the employer.

The employers have also stressed that, because of experience rating, it is possible for an individual employer — and not the class — to be unfairly burdened by the cost of a claim in situations other than those specified under s. 10(8) and s. 39(1)(e). They argue, therefore, that there is a need for an interpretation of s. 39(1)(d) that would allow the Board to grant equitable relief to individual employers.

This argument is compelling. Its underlying premise is that statutory interpretation involves taking into account changes in the circumstances surrounding the legislation. However, we are of the view that, should there be a clear gap in the legislation, it is not incumbent upon the Appeal Division to remedy a deficiency by stretching the interpretation of the legislation. The Appeal Division can only alert the governors to the existence of such a deficiency. It would then be within the discretion of the governors to report the matter to the Legislature. The Appeal Division’s duty is to interpret the existing legislation including its limitations. The existence of a legislative gap does not give the Appeal Division a license to tailor the interpretation to solve an acknowledged problem irrespective of the provision’s probable purpose.

That experience rating may penalize an employer for something he cannot control was discussed by both Mr. Justice Sloan and Mr. Justice Tysoe. In his 1952 *Report of the Commissioner*, Mr. Justice Sloan described a disadvantage of experience rating as follows:

It places a premium on a good or bad fortune which may attend an employer's operations. In many cases an employer may have a carefully conducted operation and, through no fault of his, one or more workmen may sustain costly injuries which result in the employer being assessed a demerit rate, while, on the other hand, another employer may conduct a careless or neglectful type of operation and, just because he happens to be lucky, may obtain a merit reduction in his rate. (p. R184).

In his 1966 *Commission of Inquiry*, Mr. Justice Tysoe stated how, under experience rating, an employer is frequently penalized for something he cannot control (p. 108).

We note that neither Mr. Justice Sloan nor Mr. Justice Tysoe mentioned any provision in the *Act* — let alone the predecessor of our s. 39(1)(d) — as a possible remedy for this disadvantage of experience rating.

The employers contend that the existing governors' policy supports a broad interpretation of s. 39(1)(d). The governors' policy with respect to the application of section 39(1)(d) is set out primarily in:

1. *Rehabilitation Services and Claims Manual* #114.30 and, in particular, #114.31 and #114.32.
2. *Workers' Compensation Reporter*, 1975, Vol. 2: p. 11, Decision No. 97.

Reference to the application of s. 39(1)(d) also appears in the *Workers' Compensation Reporter*, 1977, Vol. 3: p. 100, Item No. 236, the *Workers' Compensation Reporter*, 1977, Vol. 3: p. 109, Item No. 239 and the *Rehabilitation Services and Claims Manual* #105.10 and 105.20.

The employer whose appeal is under consideration does not contend that existing governors' policy applies to his case. Indeed, the express words of this policy do not cover a single fatality, unless this fatality occurs in the course of treatment or rehabilitation subsequent to a compensable injury. The worker's death, in the appeal before us, does not meet this criterion.

Whether the governors' policy can be interpreted to cover more than its express terms is a function of the meaning of s. 39(1)(d). It is only if it is accepted that an expansive interpretation of s. 39(1)(d) is proper that the policy can be regarded as inclusive and not exhaustive. Certainly, the policy itself cannot guide the task of statutory interpretation.

Having weighed the different considerations entering into the interpretation of s. 39(1)(d), we find no reason to displace Viscount Simon's presumption that words in the statute "add something which would not be there if the words were left out." The words "in a class" in s. 39(1)(d) cannot be ignored. They restrict the meaning of this provision. Hence, in order for this provision to apply, the losses resulting from a "disaster or other circumstance" must be substantial enough to affect potentially a class. Since losses of this magnitude remain a possibility, experience rating has not rendered such a provision meaningless. According to our interpretation of s. 39(1)(d), it is immaterial whether the "other circumstance" is akin to a disaster. What matters is that it results in losses that would have an effect on a class.

We recognize that experience rating has created a gap in the legislation to the extent that our current legislation provides only very limited relief to individual employers who are unjustly or incorrectly charged with the costs of a claim. It is within our jurisdiction to identify this problem but not to correct it. As indicated earlier, should the governors consider it desirable, they could draw the attention of the Legislature to this problem, or, alternatively, consider whether an existing legislative provision other than s. 39(1)(d) empowers the Board to create a fund akin to the Ontario Administrative Fund.

In the case before us, however tragic, the worker's death did not result in the type of losses contemplated by s. 39(1)(d).

Because the facts involving the worker's death bear no relationship to the situations contemplated by the governors' policy, we do not make any specific finding as to the lawfulness of the policy. The governors may, however, wish to review the policy and the Board's practice in light of our conclusions respecting the proper interpretation of s. 39(1)(d).

THE APPEAL IS DENIED.

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

