

Discussion of the Appeal Division

Date: November 25, 1993
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Psychological Disabilities and Workplace Stress

The following is not a decision of the Appeal Division in a specific case.

It is a discussion by the chief appeal commissioner of the current statutory framework and governors' policies regarding psychological disabilities and workplace stress. It expands on the need for a comprehensive and coherent policy regarding the compensability of psychological conditions and refers this issue to the attention of the Board of Governors.

There are currently several claims for psychological disabilities before the Appeal Division alleging that the causal factor is workplace stress. I am hearing some of these cases as a single member panel and others with representational appeal commissioners. As well, one case is before a panel of the Appeal Division chaired by the registrar.

Viewed together, these cases raise broad compensation questions involving mental (psychological/emotional) aspects of the work environment. Before looking at the facts of particular cases, it is critical to establish the legal foundations for the compensability of claims involving such aspects. This requires a detailed analysis of the *Workers Compensation Act* (herein the "Act") and of the relevant governors' policies.

Over the last decade, Canadian workers' compensation law has had to come to grips with compensation questions involving mental aspects of the work environment. Both in the American and Canadian workers' compensation contexts, claims involving those aspects have frequently been described as falling into one of three categories: "physical-mental," "mental-physical" and "mental-mental." These categories do not serve any analytical purpose but are merely descriptive.

Physical-mental claims are those where a physical injury or disability results in a mental (psychological/emotional) condition, for example, a limb amputation resulting in depression.

Mental-physical claims are those where a mental stimulus results in a physical condition, for example, witnessing a hostage-taking incident resulting in a heart attack, or stress at work resulting in ulcers. The physical condition could, therefore, result from a single traumatic mental stimulus or from mental stimuli that operate gradually over time.

Mental-mental claims are those where a mental stimulus leads to a mental (psychological/emotional) condition, for example, witnessing an industrial accident resulting in anxiety attacks, or stress at work resulting in emotional exhaustion. The mental-mental claims may be further subdivided into those caused by some specific traumatic incident and those caused by stimuli operating gradually over time. So-called “chronic stress” claims fall into the latter category.

The term “stress” has an ambiguous meaning. *Dorland’s Illustrated Medical Dictionary 27th ed.* defines stress as:

the sum of the biological reactions to any adverse stimulus, physical, mental, or emotional, internal or external, that tends to disturb the organism’s homeostasis; should these compensating reactions be inadequate or inappropriate, they may lead to disorders. The term is also used to refer to the stimuli that elicit the reactions.

Therefore, according to this definition, “stress” is an individual’s reaction to external factors but may also refer to the external factors themselves. In the worker’s compensation context, the term “stress” is used to refer to both external events and an individual’s reaction to those events.

Some types of psychological claims are compensable in all Canadian jurisdictions. Physical-mental claims, where the psychological condition results from a physical injury or disability are compensable, if the original injury or disability is compensable. Both mental-physical and mental-mental claims arising out of a single traumatic incident are also generally compensable. However, that is not the case for mental-physical and mental-mental claims where the mental stimuli operate gradually over time, such as the stress of a particular job function.

In Canada, Saskatchewan has adopted a written policy allowing for acceptance of “chronic stress” claims. The Saskatchewan Board (Order 02/92) distinguishes between the following situations:

- a) where it is *improbable* that a work injury exists — this includes cases where the worker is employed in an occupation where “burnout” is not known to be a problem;

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- b) where it is *doubtful* that a work injury exists — this includes the cases where the worker is employed in an occupation which should not, but may, cause psychological injury;
 - c) where it is *probable* that a work injury exists — this includes “stressful occupation” where “burnout” is a known problem (e.g. teachers and air traffic controllers).

Although the Saskatchewan Board policy does not explicitly state so, one would surmise that the standard of proof will likely vary depending on the category in which a claim falls. A worker employed in an occupation where “burnout” is not known to be a problem would have to produce stronger evidence as to causation than a worker employed in a “stressful” occupation.

Neither Ontario nor Quebec has a written policy regarding “chronic stress” claims. But the appeal tribunals in both provinces have accepted “chronic stress” claims. Acceptance of these claims in Quebec has been, however, more qualified than in Ontario.

In Quebec, the “Commission D’Appel” has dealt with “chronic stress” claims on a case-by-case basis, although it has not yet taken a definite stand on whether chronic stress or burnout is a scientifically acceptable diagnosis. In examining “chronic stress” claims, the “Commission D’Appel” has typically asked itself whether the stress was the result of an “industrial accident”; the Quebec legislation defines an “industrial accident” as a “sudden and unforeseen event.” Notwithstanding this seemingly narrow definition, the “Commission D’Appel” has accepted claims where the alleged causal factors operated over a relatively long period of time. It has interpreted the phrase “sudden and unforeseen event” in a flexible manner.

In Ontario, some of the Appeals Tribunal’s early decisions dealing with “chronic stress” imposed a higher standard of proof than that required in other cases. They posed the question of whether the workplace stress was unusual or predominant — see, for instance, *Decision 918* (1988), 9 W.C.A.T.R. 48. More recent decisions, however, held that it would be unlawful to create a higher standard for some types of claims than others; it would amount to replacing the “true merits and justice” standard set out in the statute with specific standards for particular types of claims. These decisions have concluded that the applicable test should be whether the evidence is persuasive on a balance of probabilities that work contributed significantly to the disability in the particular worker. This is a general test applicable to all claims (see *Decision No. 1018/87*, 10 W.C.A.T.R. 82).

In British Columbia the governors’ policies in respect of claims are contained in the *Rehabilitation Services and Claims Manual* and the *Workers’ Compensation Reporter (Reporter)*. These policies do not use the categories “physical-mental,” “mental-physical”

and “mental-mental.” Rather, in setting out a worker’s entitlement to compensation, the policies use the concept of “personal injury” and “industrial disease”; the *Act* provides that compensation is payable in respect of a “personal injury” or an “industrial disease.”

Section #31.00 of the *Manual* entitled “Psychological/Emotional Conditions” states:

The Board does accept claims for personal injury where the injury consists of a psychological condition or the psychological condition is a consequence of a physical injury. However, the Board has not recognized any psychological or emotional conditions as industrial diseases related to employment.

This section refers to Sections #22.33, #22.34 and #13.20 of the *Manual*. Section 22.33 entitled “Psychological Problems/Chronic Pain Problems” states:

Psychological problems arising from a physical or psychological injury are acceptable as compensable consequences of the injury. However, there must be evidence that the claimant is psychologically disabled. It cannot be assumed that such a disability exists simply because the claimant has unexplained subjective complaints or is having difficulty in psychologically or emotionally adjusting to any physical limitations resulting from the injury.

When the existence of a psychological disability is suspected, the worker’s claim file will normally be referred by a Board Medical Advisor or Rehabilitation Centre Physician to a Board Psychologist for evaluation. The Board Psychologist’s report will be returned to the Board Medical Advisor or Rehabilitation Centre Physician who will document their resulting recommendation on the claim file.

Because of the complexity of psychological problems in permanent disability claims, they will be referred, by the Adjudicator in the Disability Awards Section, to the Senior Disability Awards Medical Advisor for review by the Board’s Chief Psychologist. When an evaluation has been performed, the worker’s claim file will again be reviewed by the Board’s Chief Psychologist and the Senior Disability Awards Medical Advisor for confirmation of the level of functional impairment.

Since psychological impairment is not included in the Permanent Disability Evaluation Schedule, reference may be made to the American Medical Association Guide to the Evaluation of

Permanent Impairment to determine the appropriate percentage of disability.

For the policy of the Board when a claim is submitted for psychological problems resulting directly from the claimant's employment without the occurrence of any physical trauma, reference should be made to #13.20 and #31.00.

Section 13.20 entitled "Psychological Impairment" defines "personal injury" to include psychological impairment in the following terms:

"Personal injury" includes psychological impairment as well as physical injury. A claim for traumatically induced psychological impairment could be accepted even if unaccompanied by any physical impairment. Psychological impairment has not been deemed to be an industrial disease. Conditions of this type however may be accepted if they are a sequela to an accepted personal injury or industrial disease.

Section 22.34 entitled "Alcoholism and Drug Dependency Problems" states in part:

Where it is claimed that an alcohol problem may have arisen out of and as a result of a compensable injury, the compensability of the problem is thoroughly investigated in the same manner as followed in investigating the relationship of other problems to an injury. Because of the psychological nature of the problem, this investigation would normally include a reference to a Board Psychologist. The decision on acceptability will however be made by the Claims Adjudicator. Any pre-existing alcohol problem can be treated in the same way as any other pre-existing condition. The Claims Adjudicator will have to decide whether the claimant's problems are simply a continuation of his previous problems or have been worsened by the injury.

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The policy also has general application in the adjudication of drug dependency problems. . . .

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For the Board's policy toward applications for compensation for alcoholism as an industrial disease, reference should be made to #31.10.

According to Section 31.10 entitled “Alcoholism”:

The Board has concluded that alcoholism should not be recognized as an industrial disease.

Section 31.20 entitled “Physical and Emotional Exhaustion” which concerns what is commonly known as “chronic stress” or “burnout” states that:

Physical and mental exhaustion is not recognized by the Board as an industrial disease. In a claim made for compensation for a state of physical and emotional exhaustion alleged to have been caused by the stress of work, it was concluded that there was insufficient evidence that employment, as opposed to other factors in the claimant’s life, were of causative significance in producing this condition.

Section 22.22 on suicide provides that:

. . . death benefits are payable if it is established that the suicide resulted from a compensable injury.

Decision Nos. 1 to 423 of the Workers’ Compensation Reporter are part of the governors’ policies. Two of these decisions directly bear upon the question of entitlement to compensation for psychological/emotional conditions. They are: *Decision No. 7, Re The Determination of Disability*, (1973) *Reporter*, Vol. 1, p. 19 and *Decision No. 102, Re Disablement Through Exhaustion*, (1975) *Reporter*, Vol. 2, p. 25. Another decision, *Decision No. 348, Re Alcoholism*, (1982) *Reporter*, Vol. 5, p. 127, touches upon the issue of stress as causing a compensable condition and provides a brief analysis of *Decision 102*.

Decision No. 7 concerned a worker suffering from paranoia following a back injury. The worker became convinced that he was incapable of working. In light of the available evidence, the former commissioners were satisfied that he was not a malingerer and that his paranoia was a genuine psychological disability. The question arose, therefore, as to whether this disability was compensable. The former commissioners held that it was. They reasoned:

Under the *Workmen’s Compensation Act*, compensation is payable not for “injury”, but for “personal injury”. That is a technical term adopted by the legislature from the jargon of the common law courts. In those courts, that term includes psychological impairment as well as physical injury, and there is not ground for attaching a different meaning to the phrase in the present context.

In the workmen's compensation cases in England, it was well established that psychological harm was compensable. Moreover compensation was payable for psychological harm resulting from the employment even in the absence of traumatic experience. In the United States, the same view has been taken. The same view has been taken in British Columbia and has been recognized, though not consistently followed, by this Board. Thus Commissioner G.M. Sloan, in his first report on workmen's compensation, concluded that:

. . . disabling neurosis, whether caused directly by the accident or 'occasioned', 'excited', 'precipitated', or 'contributed to' by the accident, is a personal injury by accident within the meaning of Section 7 of the *Act* and as such is compensable.

. . . .

It is, therefore, no answer to a claim for workmen's compensation to say that the injury is psychological. If it is a disablement from work, and if its cause arose out of and in the course of the employment, it is compensable. Of course it is difficult to distinguish between a man who is suffering from a psychological impairment and one who is simply work-shy. But the difficulty of making that distinction cannot justify the refusal of compensation in a case where the psychological impairment exists.

In the present case, there was no psychological impairment from work prior to the work injury. To whatever extent the disablement from work may now be psychological, it still results, directly or indirectly, from the work injury. For these reasons, it is not necessary for us to determine exactly to what extent the disablement from work is physical and to what extent psychological. It makes no difference to the right to compensation.

Decision No. 7 suggests that, in determining a worker's entitlement to compensation, any distinction between psychological harm and physical harm is unwarranted. However, the claim in this decision was of the "physical-mental" type; the alleged cause of the worker's psychological impairment was a physical work injury. In light of its facts, the implications of *Decision No. 7* are arguably less far-reaching than might be inferred from some of its reasoning.

Decision No. 102 concerned a claim for a state of physical and emotional exhaustion allegedly caused by the stress of work. The worker had worked for six years with children with behaviour disorders. The worker reported having had to adjust to several changes in treatment methods over the six years as well as to the expansion of the program. The worker's doctor diagnosed the worker's fatigue as "physical and emotional exhaustion due to the nature of . . . work"; the doctor prescribed approximately two months off work. The worker's employer supported the worker's application. The former commissioners denied the claim, assuming the facts as stated by the worker to be correct. The former commissioners' full reasoning in that case is important because it offers a general explanation as to why such claims should be denied:

A state of physical and emotional exhaustion caused by stress over time does not come within the popular understanding of the word "injury", nor is it an "injury" as that word has been construed and understood by the Board. The question, therefore, is whether this kind of disablement should be recognized by the Board as an industrial disease.

For several reasons, we do not feel that recognition of exhaustion as an industrial disease would be practicable, or sound policy.

Almost every occupation involves some physical and emotional demands. To prevent those demands from having a debilitating effect involves a range of judgments. There are the initial judgments by employers in selecting workers for jobs and by workers in selecting employment. Then there are judgments relating to workload, working conditions, working hours, and other factors relevant to stress. There are judgments relating to overtime, and to vacations. These matters often involve judgment both by employers and by workers, though to some extent they are regulated in labour legislation. It has not traditionally been regarded as a compensable disability when a worker is engaged for a position which he subsequently finds is too much for him, or becomes run down through working excessive overtime, or for other reasons finds that the demands of the job have a debilitating effect.

Many people cope with problems of this kind by changing their employment. Others cope by taking a vacation. In other cases, unions and employers cope with the problem by negotiation or arranging for time off in lieu of overtime. In other situations, where an employer recognizes that exceptional work demands

have subjected a worker to a period of stress, sick leave may be arranged, or some other arrangement may be made by the employer for paid leave. But where an employer does not make such an arrangement, it would hardly seem fair that he should be able to pass on the costs of such leave to other employers who do.

Thirdly, claims of this kind would be extremely difficult to adjudicate. For example, how could the Board conclude that the emotional stress resulted from work without considering whether it resulted from other causes; and how could this be decided without going back perhaps as far as childhood history? The answers may be obvious in some cases, but they would not be in others. Moreover the answers could not be determined in many cases without engaging in a kind of enquiry that many people would resent. For example, how could the Board determine the emotional significance of stress at work without enquiring into the domestic affairs and other aspects of the private life of the worker concerned?

Even apart from problems of causation, there would be obvious difficulties in distinguishing between someone who is suffering from physical and emotional exhaustion, and someone who simply needs a vacation. This is in addition to the problem of justifying the distinction when made. To make these distinctions in cases where someone needs a period of rest would involve substantial administrative costs, both at the Board and elsewhere, to determine whether that rest period should be paid for out of the Accident Fund, or in other ways. Overall and in the long run, we think it in the public interest that this administrative cost should be avoided, and that rest periods of this kind should be provided for through provisions for vacations, time off for overtime worked, sick leave, or in other ways that are provided for by collective agreement, or by arrangements between employers and workers.

Section 31.20 of the *Manual* which is based on *Decision 102* states that physical and emotional exhaustion is not recognized by the Board as an industrial disease. *Decision 102* says more, namely, that a state of physical and emotional exhaustion caused by stress over time is neither recognized as an industrial disease nor as an “injury” as this concept is understood by the Board.

Interestingly, *Decision No. 348* appears to qualify *Decision No. 102*. In discussing the possible consequences of stress, the prior commissioners stated in *Decision No. 348*:

. . . Clearly, if the evidence indicates that a particular condition does result from the employment, adjudication difficulties and cost are not valid grounds for not paying compensation. However, if the difficulty in adjudication arises from the fact that there is insufficient evidence that the employment, as opposed to the other factors in the claimant's life, caused the condition, then, equally clearly, this is a reasonable ground for not recognizing the condition as an industrial disease. We consider that this was the situation in *Decision No. 102*.

I note that neither the relevant published decisions nor the *Manual* uses the word "stress" to denote an individual's reaction to external events. Rather, the policies use the word "exhaustion" to denote the individual's reaction and the word "stress" to denote the alleged causal factors at work.

Viewed as a whole, the governors' policies are ambiguous — if not inconsistent. That is not surprising. In 1991, the governors adopted as policies a body of materials consisting of guidelines and decisions formulated at different times under a different organizational system. This body of materials was not initially conceived as a self-contained, comprehensive set of policies.

The most common reading of the governors' policies as regards claims involving mental (i.e. psychological/emotional) aspects of the work environment is as follows:

1. The Board does not recognize any form of psychological impairment as an industrial disease;
2. To be compensable the psychological impairment must come within the meaning of the word "personal injury" or, alternatively, be the consequence of a compensable physical injury or industrial disease.
3. The definition of "personal injury" includes psychological impairment but the psychological impairment must be traumatically-induced to be compensable. Therefore, the stress of work could not give rise to compensable psychological impairment.
4. A state of emotional and physical exhaustion due to the stress of work over time is neither compensable as an injury

nor as an industrial disease. It is not compensable as an injury *because it is not traumatically-induced*; it is not compensable as an industrial disease because the Board does not recognize any psychological or emotional conditions as industrial diseases.

This reading of the policies confines *Decision No. 7* to its facts, namely, the cause of the worker's paranoia in that case was a compensable back injury. And it considers that the definition of personal injury in #13.20 of the *Manual* introduces a trauma requirement. More specifically, according to this reading, the purpose of the second sentence in that definition is to qualify the first sentence; so "personal injury" includes psychological impairment where the claim is for *traumatically-induced* psychological impairment. It is my understanding that this interpretation of the governors' policies is generally consistent with the Board's current practice.

In the 1984 *Rehabilitation Services and Claims Manual*, the definition of personal injury was very broad. It stated:

"Personal injury" includes psychological impairment as well as physical injury. (4) A claim for psychological impairment can be accepted even if unaccompanied by any physical impairment.

In 1986, the definition was changed to include the reference to traumatically-induced psychological impairment. The wording of the definition has remained unaltered since.

The foregoing interpretation of the governors' policies concerning psychological impairment and exhaustion caused by the stress of work is consistent with other governors' policies inasmuch as these policies would seem to bar the consideration of claims involving some physical disorders. For example, *Decision No. 99, (1975) Reporter, Vol. 2, p. 15* seems to rule out compensation for osteoarthritic degeneration of the spine on the grounds that there is no medical evidence that such degeneration is significantly advanced by any particular occupation. *Decision No. 263, (1977) Reporter, Vol. 3, p. 176* relied on the reasoning in *Decision No. 99* to deny a worker access to a Medical Review Panel; the worker suffered from a degenerative condition of the shoulder. In *Decision No. 263*, the prior commissioners specifically agreed that work may have contributed to the worker's problems with his shoulder but decided, nevertheless, to deny him access to a Medical Review Panel. The commissioners concurred with the views expressed in *Decision No. 99*, namely that:

. . . If a worker is suffering from a kind of bodily deterioration that affects the population at large, it is not compensable simply because of a possibility that his work may be one of the range of

variables influencing the pace of that degeneration. For the disability to be compensable, it must appear that the work activity brought about a disability that would probably not otherwise have occurred [sic], or that the work activity significantly advanced the development of a disability that would otherwise probably not have occurred until later.

It is significant that the existence of a disease (or its diagnosis) was not in question in the above decisions. Rather, these decisions suggested that an implicit precondition for compensation is reasonably clear procedures to establish the cause of a disability. This line of reasoning may also be found in the leading decision concerning the compensability of a state of physical and emotional exhaustion caused by the stress of work, namely *Decision 102*. As well, from this perspective, the existence of an objective, work-connected trauma provides an intuitive guarantee that some alleged psychological impairment is employment-related. This has been referred to in a leading U.S. case in the following terms:

The danger of illusionary and fictional claims is as real and present in workers' compensation as it is in the law of torts. Where a mental injury occurs rapidly and can be readily traced to a specific event, as in McLaren [McLaren v. Webber Hospital Association, Me., 386 A. 2d. 734 (1978)], there is a sufficient badge of reliability to assuage the Court's apprehension. Where however, a mental illness develops gradually and is limited to no particular incident, the risk of groundless claims looms large indeed. *Townsend v. Maine Bureau of Public Safety*, 404 Atlantic Reporter, 2d series, 1014 (1979).

It is apparent, however, that the current Board practice is not the only possible reading of the governors' policies. Another interpretation might highlight the reasoning found in *Decision No. 7* namely that, for compensation purposes, a psychological injury is no different from a physical injury; the same compensation principles must apply, therefore, to both kinds of injury. According to this reading, the reference to traumatically-induced psychological impairment in #13.20 is not limiting. Rather, this reference merely illustrates that psychological impairment is compensable as an injury. According to such alternative reading, it might be concluded that:

1. The Board does not recognize any form of psychological impairment as an industrial disease;
2. To be compensable the psychological impairment must come within the meaning of the word "injury" or, alternatively, be the consequence of a compensable physical injury or industrial disease.

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3. The definition of “personal injury” includes psychological impairment, irrespective of whether it is traumatically-induced.
 4. A state of emotional and physical exhaustion due to the stress of work over time is neither compensable as an injury nor as an industrial disease. It is not compensable as an injury *because it does not constitute psychological impairment*; it is not compensable as an industrial disease because the Board does not recognize any form of psychological or emotional condition as an industrial disease.

Finally, a third possible reading of the policies might not only downplay their reference to a trauma in Section 13.20 of the *Manual* but also consider that, strictly speaking, the policies bar neither the consideration of psychological impairment as an industrial disease in an individual case nor that of a state of physical and emotional exhaustion.

In the case of so-called “physical-mental” claims, according to the policies and no matter which of the above interpretations is adopted, entitlement to compensation does not depend on how long it takes for the physical cause to induce the psychological harm. This harm is compensable if the underlying physical cause is compensable. It does not matter whether the physical cause itself developed gradually or whether the resulting psychological harm developed gradually.

In the case of so-called “mental-mental” claims, under the first interpretation, the policies introduce a requirement (in the form of a trauma) that there be some definitive time when the causal mental stimulus operated. In other words, the mental stimulus would have to be a clearly ascertainable shock (or possibly a series of shocks). The word “trauma” commonly means a physical wound or injury, a physical shock following a physical wound or injury, or an emotional shock following a stressful event. So, for example, a policeman who suffers psychological depression as a result of witnessing a shooting accident would be entitled to compensation. However, a policeman who does not witness a shooting yet experiences anxiety attacks as a result of working in a very difficult and dangerous neighbourhood, would not be entitled to compensation. Neither of the latter two interpretations of the governors’ policy would make that distinction.

Except for Section 31.20 of the *Manual* and *Decision No. 102* which provide that physical exhaustion resulting from the stress of work is non-compensable, the governors’ published policies do not explicitly deal with so-called “mental-physical” claims. The *Manual* implies that claims for physical injuries or disabilities induced by a mental/emotional trauma are compensable since it recognizes psychological impairment induced by such trauma as compensable; therefore a heart attack suffered as a result of witnessing a shooting at work would be compensable. The implications of the *Manual*

for claims involving physical injuries or disabilities resulting from stress over time are, however, less clear. However, some “mental-physical” claims have been held to be compensable. One case involved a claim for a cerebral vascular accident. Under the prior commissioners, a Board of Review decision allowing this claim had been the subject of the referral mechanism whereby an adjudicator dissatisfied with the disposition of a case by the Board of Review would refer the matter to the then secretary to the Board, N.C. Attewell. Mr. Attewell would review the facts of the case and relevant Board policy and determine whether to refer the matter to the commissioners. With respect to the acceptance of the claim for cerebral vascular accident Mr. Attewell rejected the referral, stating that a physical injury such as cerebral vascular injury precipitated by work stresses is compensable. Similarly, in *Decision 91-0818*, (1991) *Reporter*, Vol. 7, p. 223, the Appeal Division held that, providing the causal link can be established, suicide resulting from work stresses is compensable.

In addition to suffering from ambiguity, the governors’ policies regarding claims involving mental aspects of the work environment are incomplete. They do not directly address the question of eligibility for compensation in the case of mental-physical claims. They do not define “psychological impairment” although they use that term. Nor do they indicate explicitly whether physical and emotional exhaustion qualify as psychological impairment. While the policies state that physical and emotional exhaustion is neither an injury nor an industrial disease, a question arises as to whether the policies intend to go as far as to preclude the consideration of physical and emotional exhaustion as an industrial disease in individual cases.

Where the governors’ policies are ambiguous or incomplete and where the statutory terms tolerate a range of interpretations, it may be proper for the Appeal Division to refer a policy matter to the governors for clarification and, if necessary, to postpone any decision-making on an appeal until the matter has been considered by the governors. Such a referral would preserve the separation provided by the *Act* between the policy-making function of the governors and the judicial function of the Appeal Division. In *Decision No. 1, Appeal Division Administration, Practice and Procedure*, *Reporter*, Vol. 7, p. 7 at 10, the governors stated:

Where the Chief Appeal Commissioner considers it necessary that the Governors address a policy issue prior to a decision being made in one or more appeals, the Chief Appeal Commissioner has the authority to bring that policy issue before the Governors for consideration and to postpone the Appeal Division’s decision in the appeal until the policy issue has been addressed by the Governors.

Although *Decision No. 1* specifically contemplates a referral prior to a decision being made, I do not read this decision as precluding the possibility of a referral of broad policy issues independently of a particular claim. It would be consistent with the spirit of *Decision No. 1* to refer a broad policy issue to the governors once it becomes clear that the adjudicative system requires the governors' guidance on such issue.

In considering the possibility of a referral to the governors, the current policies must be reviewed in light of the *Act*. Such a referral would be inappropriate if the policies found no support in the terms of the statute. In the event of a conflict between the *Act* and the published policy of the governors, the *Act* is clearly paramount.

If the terms of the *Act* were always so clear as to be amenable to only one possible interpretation, the Appeal Division would only have to ensure that the governors' policies correspond to that interpretation. But in reality there is often latitude in how statutory terms may be interpreted and, therefore, more than one interpretation may be viable. Even where the legislative intent is obvious, interpreting the terms of the *Act* may lead to more than one conclusion as to how exactly the *Act* gives effect to this intent.

The *Act* embodies a historic trade-off. It provides workers with benefits but it also bars workers from suing their employers in those situations where it entitles them to benefits. Historically, the language of the provision barring workers from suing their employers has reflected the language of the entitlement provisions. The language of the statutory bar indicates, therefore, what comes within the purview of the *Act*.

In 1916, when the legislation was first enacted, it provided compensation for "personal injury *by accident* arising out of and in the course of the employment (emphasis added)" as well as for the "industrial diseases" listed in the Schedule or regulations. It did *not* define the words "personal injury." It specified that disablement resulting from an industrial disease shall be treated as the happening of an accident. It defined "accident" to include fortuitous events caused by physical or natural causes. Consequently, the legislation barred workers from suing their employers in respect of "any *accident* which happens to him arising out of and in the course of his employment (emphasis added)."

There was an amendment to the definition of "industrial disease" in 1959. This amendment broadened the definition so as to include, in addition to the industrial diseases listed in the Schedule and regulations, diseases "otherwise" recognized by the Board.

The words "by accident" were deleted from the basic entitlement provision in 1968. The coverage formula in respect of personal injury became "personal injury arising out of and in the course of the employment." The words "personal injury" remained undefined.

The deletion of the words “by accident” goes back to the 1966 Tysoe Commission Report. Mr. Justice Tysoe specifically recommended the deletion of these words from the entitlement provision because they had become apparently redundant. The courts had so liberalized the interpretation of the words “by accident” that the entitlement test had become whether the injury was, in Mr. Justice Tysoe’s words, “truly work-caused” — that is, whether it arose out of and in the course of employment. In recommending adoption of the formula “personal injury arising out of and in the course of the employment,” Mr. Justice Tysoe explained:

. . . Labour must understand that, under this formula, to be compensable an injury or disability must result from work the man is employed to do and is doing or, in other words, must be work-caused. The question will still be “was this man’s injury caused by his work or by something else, as, for instance, the operation of natural causes such as increasing age, congenital or insidious disease, or the natural progression of some constitutional defect?”. If my recommendation is implemented, the problem cases, of which the back cases form the greatest number, will still remain cases of some difficulty. The test applicable to them will be the same as it has always been—namely, that of work connection.

To eliminate the “by accident” requirement is not to open the floodgates as is sometimes alleged. The test of medical and legal causation remains the bulwark against improper claims.

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Together with the amendment deleting the words “by accident” from the entitlement provision, there was an amendment to the statutory bar; the word “accident” was deleted from that provision too. The statutory bar became applicable “in respect of any personal injury, disablement or death arising out of and in the course of employment.”

Today’s statutory bar (Section 10(1)) is still “in respect of any personal injury, disablement or death arising out of and in the course of employment.” The language of this provision and that of the provision requiring the Board to certify to the courts the status of parties to a legal action (Section 11) suggest that the *Act* uses the phrase “disablement arising out of and in the course of employment” and “disability caused by industrial disease” interchangeably.

The legislative history of key concepts in the *Act* shows an evolution in one of its purposes: whereas at the outset the legislation specifically limited entitlement to situations in which a disability resulted either from an accident or from the industrial

diseases listed in the Schedule and regulations, the *Act* now appears to entitle workers to compensation for any “truly work-caused” disability. The *Act* does not define “disability,” although it uses the concept in many provisions. Some provisions refer to a “disability” as it results from a personal injury or an industrial disease, other provisions refer to “injuries and disabilities” (Section 58(2)). In one provision, the *Act* uses neither the concept of a “disability” nor that of an “industrial disease” and refers instead to “injuries and ailments” (Section 59(1)).

Because the basic entitlement provisions in the *Act* use the concepts of “personal injury” and “industrial disease,” it may be argued that, to be compensable, a disability must result from a “personal injury” or an “industrial disease” within the meaning of the *Act*. This view seemingly underlies the denial of the compensability of emotional exhaustion on the basis that it is neither a “personal injury” nor an “industrial disease.” But the *Act* does not define “personal injury” or “injury.” Moreover, its definition of “industrial disease” is open-ended; it allows the Board to declare a disease an industrial disease in several different ways without imposing upon the Board a definition of “disease.” Therefore, to say that, according to the *Act*, a disability must result from a “personal injury” or an “industrial disease” leaves the category of compensable disabilities open-ended.

“Personal injury”

Subsection 5(1) of the *Act* sets out the entitlement formula in respect of a personal injury. It states:

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.

Because it does not prescribe any limits upon the interpretation of the words “personal injury” and “injury,” an argument may be made that the rules of statutory interpretation require these words in remedial legislation to be interpreted liberally and in a manner consistent with the function of the *Act*.

Black’s Law Dictionary offers a broad definition of “personal injury” in the workers’ compensation context, namely:

. . . any harm or damage to the health of an employee, however caused, whether by accident, disease, or otherwise, which arises in the course of and out of his employment, and incapacitates him in whole or in part. The occurrence of disability or impairment. Such includes the aggravation of a preexisting injury.

Larson's Workmen's Compensation Law also offers a broad definition of "personal injury," namely:

. . . any harmful change in the body. It need not involve physical trauma, but may include such injuries as disease, sunstroke, nervous collapse, traumatic neurosis, hysterical paralysis, and neurasthenia.

Other Canadian jurisdictions with entitlement provisions referring merely to "personal injury" (or "injury") as opposed to "personal injury by accident" or ("injury by accident") usually define "personal injury" (or "injury") to include disablement arising out of and in the course of employment (see, for example, the Saskatchewan legislation). In jurisdictions where the entitlement provisions refer to "personal injury by accident" (or "injury by accident"), the definition of accident usually includes disablement arising out of and in the course of employment (see, for example, the Ontario legislation).

The only statutory definition of "injury" in British Columbia is found in the *Criminal Injury Compensation Act*, R.S.B.C. 1979. Section 1 of this legislation states:

"injury" and "injured" means bodily harm, and includes mental and nervous shock and pregnancy;

There is some similarity between this definition and the definition of "personal injury" in Section #13.20 of the *Manual* which includes physical injury and traumatically-induced psychological impairment. But it is worth noting that, whereas the *Criminal Injury Compensation Act* specifically defines "injury," the *Act* does not. This may suggest that the *Act* contemplates a broader meaning when it uses the term "injury."

The term "injury" has received judicial consideration. In *Parrish v. Moore et al*, (1980) 109 D.L.R. (3d) 687, the B.C. Supreme Court considered an action for damages for personal injuries. Callaghan J. held that personal injuries include nervous disorders or conditions such as psychoneurosis anxiety. The plaintiff suffered from anxiety as a result of a shipping accident. This decision implies, therefore, that the concept of "injury" includes psychological conditions that are traumatically-induced which is what Section 13.20 of the *Manual* states.

The manner in which the legislation uses the concept of "personal injury" indicates that it is broad enough to cover mental conditions. It also indicates that there are no grounds to distinguish between injuries depending on whether they result from some physical impact or, alternatively, from some psychological/emotional stimulus. For compensation purposes, a heart attack that results from falling off a ladder is the same as a heart attack that results from witnessing a fall. The basic coverage formula for

“personal injury” simply refers to injuries “arising out of and in the course of employment.” Finally, the legislation does not distinguish between injuries that result from a relatively sudden trauma and injuries that develop gradually over time. Hence, there is no difference between a back injury resulting from a single lifting accident and a back injury occurring as a result of the cumulative effect of work activities. By the same token, there is no difference between a delusional disorder associated with one shocking incident and a gradually developing delusional disorder.

“Industrial disease”

The governors’ published policies state that the *Act* authorizes the Board to recognize industrial diseases in individual cases. A statutory discretion must be exercised. The courts have held on numerous occasions that an administrative agency must not fetter its discretion by adhering too strictly to guidelines, rules and policies formulated long before an individual case comes to light. Hence, if the *Act* confers upon the Board a discretionary power to recognize industrial diseases in individual cases, an absolute bar to the recognition of a disease as an industrial disease — be it physical *or* psychological — would seem to be invalid. The existence of a statutory discretion enabling the Board to recognize industrial diseases in individual cases might, therefore, have implications for the compensability of psychological conditions including emotional exhaustion.

The definition of “industrial disease” and Section 6(4) govern the Board’s recognition of industrial diseases. According to the definition section of the *Act*:

“industrial disease” means any disease mentioned in Schedule B, and any other disease which the board, by regulation of general application or by order dealing with a specific case, may designate or recognize as an industrial disease . . .

According to Section 6(4) of the *Act*:

(4) (a) The board may, on the terms and conditions and with the limitations the board deems adequate and proper, add to or delete from Schedule B a disease which the board deems to be an industrial disease, and may in like manner add to or delete from the said Schedule a process or industry.

(b) Notwithstanding paragraph (a), the board may designate or recognize a disease as being a disease peculiar to or characteristic of a particular process, trade or occupation on the terms and conditions and with the limitations the board deems adequate and proper.

In *Decision No. 19, Industrial Diseases Standing Committee Charter, Workers' Compensation Board of British Columbia, (1992) Reporter, Vol. 8, p. 135*, the governors have characterized industrial disease determinations with respect to individual claims as "an administrative function in accordance with Section 25.24 of the *Rehabilitation Services and Claims Manual*." Section 25.24 of the *Manual*, however, does not use those terms in describing the process whereby the Board recognizes industrial diseases in individual cases. Therefore, I question whether the word "administrative" as used in *Decision No. 19* is intended in a legal or technical sense. Also it is noted that *Decision No. 19* has not been designated as governors' policy.

The governors' policies contain inconsistent interpretations as to the source of the Board's power to recognize industrial diseases in individual cases. At the outset, therefore, it would be helpful to determine which of the interpretations found in the policies is most consistent with the language and intent of the *Act*.

Decision No. 3 of the governors provides that:

In the event of internal conflict in published policy of the Governors, the interpretation of the policy most consistent with the intention of the *Act* or Regulations is to be applied.

Section 25.20 of the *Manual* states:

There are *four* ways by which the Board may recognize a disease to be an industrial disease. It may do so by including the disease in Schedule B in reference to a particular process or industry. It may designate or recognize a disease to be peculiar or characteristic of a particular process, trade or occupation, but without including it in Schedule B. It may declare a disease to be an industrial disease by regulation, or it may recognize a disease to be an industrial disease in an individual case, where the facts warrant it.

(emphasis added)

This interpretation suggests that both the Board's power to recognize industrial diseases in individual cases and its power to designate industrial diseases by regulation reside in the definition section. It also suggests that Sections 6(4)(a) and (b) provide additional powers to the Board.

This interpretation has particular implications. If the Board's power to designate industrial diseases by regulation and its power to recognize them in individual cases reside in the definition section, the Board need not designate these diseases or recognize

them with reference to “a particular process, trade or occupation.” This phrase does not appear in the definition section. It only appears in Section 6(4)(b).

The interpretation found in Section 25.20 suffers from an obvious weakness. That interpretation would require the definition of “industrial disease” in Section 1 to be inclusive. The definition is exhaustive. It begins with the words “‘industrial disease’ means. . . .” Use of the word “means” indicates that the definition is intended to cover *all* the means by which industrial diseases may be recognized in accordance with the *Act*, including those described under Sections 6(4)(a) and (b). From this perspective, the Board’s exercise of the discretionary powers granted by Sections 6(4)(a) and (b) must fall under the definition of “industrial disease.”

The connection between the definition of “industrial disease” and Section 6(4)(a) is clear. The definition covers the industrial diseases listed in Schedule B. Workers suffering from those diseases enjoy the benefit of a statutory presumption. Subsection 6(4)(a) specifically permits the Board to add (or delete) industrial diseases to (from) Schedule B of the *Act*.

The connection between the definition of “industrial disease” and Section 6(4)(b) dates from 1959 when the definition of “industrial disease” was broadened and the provision was enacted. Prior to 1959, the definition stated:

“industrial disease” shall mean any of the diseases mentioned in the Schedule, and any other disease which by the regulations is added as an industrial disease.

Following the 1959 amendment to the definition, “industrial disease” would mean:

any of the diseases mentioned in the Schedule, and any other disease which the Board by regulation or *otherwise* may designate or recognize as an industrial disease.

(emphasis added)

Mr. Justice Tysoe’s 1966 *Report on the W.C.B.* discussed the changes made in 1959, explaining the enactment of Section 6(4)(b) [then Section 8(3)(c)] as follows:

. . . The Board found that it was running into cases of diseases which, in the circumstances existing in individual cases, ought, in justice to the workmen who had contracted them, to be regarded as having been caused by the nature of the employment and so be compensable. The Board could not establish sufficient incidents so as to justify the application of the

presumption provided in subsection (2) of section 8 and hence scheduling under subsection (3) (a) of section 4; yet it considered that a particular claim should be allowed and that a particular workman ought to receive compensation. It drew the attention of the Government to this situation and, as a result, subsection (3) (c) of section 8 was enacted in 1959. Mr. Eades gave an example as follows:—

MR. EADES: I think we allowed a case of measles, not very long ago, in a hospital employee. Well now, we wouldn't schedule measles among hospital employees as an occupational disease. In that particular case there had been contact within the incubation period, and so we were satisfied that that should be allowed, but there is — I mean, measles is a common contagious disease.

pp. 228–29

It appears then that Section 6(4)(b) was intended to allow the Board to focus on the merits of individual cases where workers contract employment-related diseases that are not included in Schedule B. The 1959 broadening of the definition of “industrial disease” was consistent with that intent.

In a 1983 amendment to the definition of “industrial disease” (the most recent, after the 1959 amendment) as part of a general clarification of the Board’s regulation-making powers, the words “by regulation of general application or by order dealing with a specific case” replaced the phrase “by regulation or otherwise” (see the *Regulations Act*, S.B.C. 1983 c. 31, s. 21). This most recent amendment is also consistent with the apparent intent behind Section 6(4)(b) — namely, to allow the Board to recognize industrial diseases in individual cases.

In light of the above considerations, I have concluded that the interpretation found in Section #25.20 of the *Manual* is seriously flawed. Both the wording of the definition of “industrial disease” and the history behind Section 6(4)(b) indicate that this provision *must* be read with reference to the definition and is, therefore, the source of the Board’s power to recognize an industrial disease in an individual case.

Decision No. 238, (1977) Reporter, Vol. 3, p. 104, also part of the governors’ published policies, is based on the premise that the *Act* provides only *three* ways in which the Board may recognize an industrial disease: through additions to Schedule B, by regulation or under Section 6(4)(b). According to this decision, while the source of the Board’s power to designate an industrial disease by regulation resides in the definition section, the source of its power to recognize an industrial disease in an individual case resides in Section 6(4)(b).

The interpretation found in *Decision No. 238* implies that the Board may designate an industrial disease by regulation without reference to any process, trade or occupation; however, the recognition of an industrial disease by order dealing with a specific case would have to be with reference to a “particular process, trade or occupation” as specified under Section 6(4)(b).

I note here *Decision No. 231, Re Osteoarthritis of the First Carpo-Metacarpal Joint*, (1977) *Reporter*, Vol. 3, p. 87 in which the prior commissioners invoked Section 7(5)(b) [now Section 6(4)(b)] in order to recognize osteoarthritis of the first carpo-metacarpal joint of both thumbs as being a disease “peculiar to or characteristic of the claimant’s occupation as a physiotherapist”; they qualified this recognition by specifying that “recognition of this disease is limited to factual situations which are substantially the same as this claim.” It appears, therefore, that the prior commissioners recognized an industrial disease with reference to “a particular process, trade or occupation” in dealing with a specific case but they also tied this recognition to the circumstances of that case. This amounts to recognizing an industrial disease for the purpose of an individual claim under Section 6(4)(b) which is consistent with the interpretation found in *Decision No. 238*.

Inasmuch as the interpretation found in *Decision No. 238* traces the Board’s powers to recognize industrial diseases in individual cases to Section 6(4)(b) of the *Act*, it reflects the legislative history of this provision. The question arises, however, as to whether the power to designate an industrial disease by regulation may validly be traced to the definition section. Although it is uncommon for a statute to confer powers in a definition, a B.C. Court of Appeal decision supports the proposition that a definition may be the source of a substantive power [see *A/G of B.C. vs Craig Prov. J.* (1987), 13 B.C.L.R. (2d) 227 (B.C.C.A.)]. Use of the word “may” in the definition is significant. Section 29 of the B.C. *Interpretation Act* defines the word “may” as “permissive and empowering.” The definition of “industrial disease” in the *Act* refers to any diseases “which the board, by regulation of general application or by order dealing with a specific case, *may* designate or recognize as an industrial disease (emphasis added).”

It is also noteworthy that Section 1 of the *Regulations Act* now defines “regulation” to include:

Regulations or rules under the *Workers Compensation Act* made by the Workers Compensation Board

- (a) designating or recognizing a disease as an industrial disease under the definition of “industrial disease” in section 1, . . .

There seems to be, therefore, some foundation for concluding that the Board's power to designate an industrial disease by regulation is separate from its power to recognize an industrial disease under Section 6(4)(b) and flows from the definition section. Consequently, the Board need not refer to "a particular process, trade or occupation" in exercising this power. In *Decision No. 93*, (1975) *Reporter*, Vol. 2, p. 4, this interpretation prevailed. The Board promulgated a regulation recognizing a number of diseases as industrial diseases. Included in the list of diseases thus recognized were chicken pox, food poisoning, infectious hepatitis, meningitis, mononucleosis, etc. without any reference to "a particular process, trade or occupation." The explanatory note appended to this list of diseases states in part:

It is important to distinguish between recognition of an industrial disease under Section 2, and the addition of an industrial disease to Schedule B. pursuant to Section 7(5).

Where it appears to the Board that a disease is more likely to occur in a particular process or industry than elsewhere, it may be added to Schedule B. The consequence of that for claims decisions is that no evidence is then required initially on each claim to establish that the disease was due to the nature of that employment. It is deemed to have been due to the nature of employment indicated in the Schedule unless the contrary is proved.

Where it appears to the Board that a disease is sometimes due to the nature of an employment covered by the *Act*, but it does not appear that the disease is more likely to occur in a particular industry or process than elsewhere, the Board may designate or recognize the disease under Section 2. The consequence of this for claims purposes is that a disablement resulting from the disease is compensable, but only if it appears from evidence in the particular case that the disease is due to the nature of any employment in which the worker was employed.

The question may be raised, however, as to whether such a recognition is of any value. The *Act* provides the Board with a power to recognize industrial diseases in individual cases. As indicated, the governors' policies may not fetter the Board's discretion to do so by erecting an absolute bar to the recognition of a disease as an industrial disease. In light of that and of the fact that cases still have to be adjudicated on their own merits, from a legal perspective, a regulation such as the one promulgated in *Decision No. 93* would appear to be superfluous.

Although not in the policies, there is yet another possible interpretation of the scope of the Board's power to recognize an industrial disease under the *Act*. The starting point of that interpretation is that the definition section may not confer upon the Board any additional powers to those specified in Sections 6(4)(a) and (b). Rather, Sections 6(4)(a) and (b) could be read to contain the full range of the Board's powers to recognize an industrial disease. Subsection 6(4)(a) empowers the Board to add a disease to Schedule B; Section 6(4)(b) empowers the Board to designate a disease as an industrial disease by regulation *or* recognize it by order dealing with a specific case. This interpretation implies that the designation of an industrial disease by regulation or its recognition "by order dealing with a specific case" must be with reference to "a particular process, trade or occupation" since both fall under Section 6(4)(b).

A similarity between the wording of the definition of "industrial disease" and that of Section 6(4)(b) suggests that the designation of an industrial disease by regulation may well fall under that provision. The definition refers to diseases "which the board, by regulation of general application or by order dealing with a specific case, *may designate or recognize* as an industrial disease . . . (emphasis added)." Similarly, Section 6(4)(b) provides that the "board *may designate or recognize* a disease as being a disease peculiar to or characteristic of a particular process . . . (emphasis added)." Thus, the *Act* uses two different words in describing how the Board may declare an industrial disease, namely, "designate" and "recognize." Grammatically, the definition of "industrial disease" may be read as using the word "designate" in relation to "regulation(s) of general application" and the word "recognize" in relation to "order(s) dealing with a specific case." That reading makes sense inasmuch as the word "designate" connotes making something public while the word "recognize" suggests accepting something. From this perspective, the word "designate" in Section 6(4)(b) relates to "regulations(s) of general application"; the word "recognize" relates to "order(s) dealing with a specific case."

A particular model flows from interpreting Section 6(4)(b) as containing *all* of the Board's powers to designate or recognize industrial diseases other than through additions to Schedule B. According to this model, the lowest level of recognition is in the individual case where, although the Board recognizes a disease as "peculiar to or characteristic of a particular process, trade or occupation," the evidence linking the disease with the "process, trade or occupation" is weak. Where the evidence is stronger yet not conclusive enough to justify the application of the presumption in Section 6(3), designation by means of a regulation provides an intermediate level of recognition. Where the evidence is so strong as to warrant the application of the presumption, the disease is added to Schedule B.

It could be questioned as to why a provision supposed to empower the Board to recognize industrial diseases in individual cases would include a reference to the disease "as being a disease peculiar to or characteristic of a particular process, trade or

occupation.” The existence of that phrase in Section 6(4)(b) would suggest a process of recognition with broader implications. However, because Section 6(4)(b) allows the Board to specify “the terms and conditions and . . . limitations” it deems fit, in effect it empowers the Board to limit the recognition of an industrial disease “as being a disease peculiar to or characteristic of a particular process, trade or occupation” to certain factual situations or even to an individual claim. Read in its entirety, Section 6(4)(b) is a versatile provision which gives the Board substantial flexibility. While it is true that by itself the phrase “peculiar to or characteristic of a particular process, trade or occupation” suggests broad recognition of an industrial disease extending to future claims, the qualifying clause that allows the Board to specify *terms, conditions and limitations* is consistent with some narrower form of recognition, including recognition limited to an individual claim.

The presence of the phrase “peculiar to or characteristic of a particular process, trade or occupation” is also consistent with the notion of a three-tiered model for recognizing industrial diseases: recognition in an individual case as the weakest level of recognition based on weak evidence of a linkage between a disease and a particular process, trade or occupation, recognition by regulation as an intermediary level of recognition, and recognition by addition to Schedule B as the highest level of recognition based on a strong statistical relationship. Recognition of an industrial disease in an individual claim or by way of regulation simply advises the working community that the Board is aware that the disease may arise as a result of particular employment environments.

This third and new interpretation as to the Board’s powers to recognize industrial diseases is internally consistent as well as consistent with the language and intent of the *Act*.

Regardless of the nature of the Board’s power to recognize industrial diseases by way of regulation, I conclude that the *Act* confers upon the Board the power to recognize industrial diseases in individual cases. The most cogent interpretation traces this power to Section 6(4)(b) of the *Act*.

The above analysis strongly suggests that the *Act’s* usage of the terms “personal injury” and “industrial disease” is consistent with a general intent to compensate workers for any “truly work-caused” disability. The fact that the *Act* does not define “personal injury,” “injury” or “disease” and that it specifically contemplates recognition by the Board of industrial diseases in individual cases substantiates this. It is also significant that the *Act* does not distinguish between psychological/emotional harm and physical harm. Furthermore, the *Act* blurs, to some extent, the concepts of “injury” and “disease.” It is true that the language of the section dealing with personal injury is more suggestive of disorders resulting from a particular incident (or a series of incidents) than gradually developing disorders because it refers to the day of the injury.

However, Schedule B of the *Act* includes harm that develops gradually over time as well as harm that develops more suddenly as a result of specific incidents. Schedule B includes, for example, tenosynovitis, an infection caused by the Hepatitis B virus and heart injury.

The *Manual*, which attempts to distinguish between “injury” and “disease” in Section 13.10, does not provide an obvious demarcation line. Under “injury,” it includes sprains or strains caused by activity over time as well as fractures; under “disease,” it includes disabilities caused by the gradual absorption of a chemical through the skin as well as allergic reactions. Section 13.11 of the *Manual* includes both epicondylitis and carpal tunnel syndrome under the category of “injury.” Hence, neither the *Act* nor the policies necessarily characterize a harm as an “injury” or “disease” in accordance with whether it developed gradually or relatively suddenly. The deletion of the words “by accident” from the entitlement provision concerning injuries has contributed to obliterating the distinction between the two concepts. That is consistent, however, with the intent behind the deletion — namely, to focus on causality as determinative of a worker’s entitlement to compensation.

The statement that the *Act* intends to compensate workers for any “truly work-caused disability” stands in need of qualification. An extreme example assists in illustrating this point. Workers who perform day after day tasks requiring only certain skills could lose in the long-run some of their other skills; this could make it harder for them to find alternative employment, should that become necessary. Conceivably then, the loss of these other skills could impair the workers’ earning capacity and be characterized as “disabling.” Obviously, however, that is not a meaning intended by the *Act* which covers disabilities that relate to “injuries” and “diseases.” Although the concepts of “injury” and “disease” are very flexible under the *Act*, there is a point beyond which they cannot be stretched. Therefore, a pragmatic qualification to the statement that the *Act* intends to compensate workers for any “truly work-caused” disability would be that *the disability must be an incapacity related to a set of recognized disease entities and injuries.*

It may be suggested, for instance, that only those psychological claims based on a diagnosis appearing in the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders DSM-III-R* should be deemed to be compensable and this may exclude compensation for diffuse conditions like “exhaustion,” “stress” or “burnout” (although admittedly other diagnoses appearing in the *DSM-III-R* overlap with these conditions). I recognize that limiting diagnoses to the *DMS-III-R* is somewhat artificial. It also raises the question of whether psychiatrists — not psychologists or the worker’s physician — should be the only sources of medical evidence in respect of such claims. The point is, however, that even medically there is a grey area in which it is unclear whether a diagnosis constitutes either a disease entity or an injury.

In the absence of a generally accepted diagnosis for emotional and physical exhaustion, there are some grounds to distinguish between disabilities alleged to result from such exhaustion and those alleged to result from injuries and diseases with clearly established diagnoses. It is arguable that the compensation principles set out in the *Act* apply only to the latter. From this perspective, a disability resulting from an injury or disease caused by work stresses would be compensable, as long as the injury or disease had a clearly established diagnosis. That is, a psychological disorder with a clearly established diagnosis which resulted from work stresses would be compensable, but work-related “exhaustion” or “burnout” would not necessarily be compensable.

I have considered whether compensation for a recognized psychological disorder may be lawfully barred because of the difficulties in determining causality. The broader question is whether disabilities — be they psychological or physical — are not compensable, if the alleged causal mechanisms are, in a general sense, poorly understood.

The subject of work stress and its effects is an area in which causality remains very unsettled. Stress at work exists to some degree or another in all employment. The interaction between stress at work and at home is not clearly understood. The distinction between so-called positive stress factors and negative stress factors has not been clearly drawn. Nevertheless, I am of the opinion that difficulties in sorting out causal relationships cannot bar the consideration of claims. There are many areas in which claims are routinely considered, despite such difficulties. For example, post-traumatic stress is a difficult area; the existence of a trauma represents only a minimal guarantee that the stress is employment-related and yet the Board considers post-traumatic stress claims compensable. Claims for cancer, especially where they are not associated with a process or industry listed in Schedule B, have posed vexing evidentiary problems but have been viewed as compensable. While conditions with controversial diagnoses may fall outside of the scope of the *Act*, recognized disease entities and injuries cannot be barred from consideration on the basis of evidentiary problems.

In sum, the *Act* places no apparent limitations on the compensability of “physical-mental,” “mental-physical” and “mental-mental” claims. Both mental and physical conditions come within the purview of the *Act*. Both physical impact and mental stimuli may give rise to compensable conditions under the *Act*, irrespective of whether they happen suddenly or operate gradually. There is, however, some question as to whether controversial diagnoses fall within the set of injuries and diseases covered by the *Act*. In light of this and the ambiguity in the current governors’ policies concerning the compensability of claims involving mental aspects of the work environment, I have concluded that this is an appropriate issue to refer to the governors’ attention. Some questions the governors may wish to address include:

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1. Does policy item #13.20 of the *Manual* intend to exclude psychological impairment that is not traumatically induced from the definition of “personal injury”? If so, *Decision No. 7* would have to be read narrowly and confined to its facts.
 2. Does *Decision No. 102* in conjunction with policy item #31.20 of the *Manual* intend to preclude compensation for a state of physical and emotional exhaustion alleged to result from the stress of work, including barring the consideration of such claims in individual cases?
 3. Does policy item #31.00 of the *Manual* intend to bar the consideration of *any* form of psychological or emotional condition as “industrial diseases” in individual cases?
 4. When using the term “psychological impairment”, what kinds of disorders do the policies contemplate? For example, is a state of emotional exhaustion subsumed under the term “psychological impairment” within the meaning of the policies? If not, on what basis do the policies distinguish between “emotional exhaustion” and “psychological impairment”?

Should the governors wish to provide any further directives pertaining to the compensation of claims involving mental aspects of the work environment, this would certainly assist the Appeal Division in its decision-making as well as providing ongoing assistance to the Compensation Services Division staff. For example, the governors might wish to formulate policies on the compensability of so-called mental-physical claims in addition to clarifying its existing policies on so-called “mental-mental” claims. Although the categories of “physical-mental” claims, “mental-mental” claims and “mental-physical” claims are practical for descriptive purposes, the governors need not, of course, be limited to them in the formulation of their policies.

Other appeals involving these issues will undoubtedly continue to come before the Appeal Division. Subsection 91(3) requires the Appeal Division to make its decision “as soon as practicable and in any case within 90 days of the date on which the appeal is commenced. . . .” While I, as chief appeal commissioner, have a discretion under Section 91(3)(c) to designate a longer period for the making of a decision based on the complexity of the matter under appeal, I feel that it would be contrary to the legislative intent evident in this provision to suspend the consideration of such appeals indefinitely. Pending the provision of policy by the governors, the Appeal Division will decide, on a case-by-case basis, how to proceed in the context of each appeal which

comes before it. For reasons which are evident from the foregoing analysis, however, it may be very difficult for the Appeal Division to deal consistently with such appeals without the benefit of policy clarification from the governors.

More importantly, a thorough coherent policy is required to assist all participants in the system called upon to adjudicate the merits of such claims. There is, therefore, some urgency in the need for the governors to address these issues.