

In the Court of Appeal for British Columbia (CA026295)**Between: Jerry Van Unen** **Plaintiff (Appellant)****And: Workers' Compensation Board** **Defendant (Respondent)****Before: The Honourable Chief Justice McEachern
The Honourable Mr. Justice Lambert
The Honourable Mr. Justice Finch**

Counsel for the Appellant	C. Paterson
Counsel for the Respondent	D. Neilson, L. Courtenay
Place and Date of Hearing:	Vancouver, British Columbia, 5 March 2001
Place and Date of Judgment:	Vancouver, British Columbia, 6 April 2001

Written Reasons by: The Honourable Mr. Justice Lambert**Concurred in by:** The Honourable Chief Justice McEachern
The Honourable Mr. Justice Finch**Reasons for Judgment of the Honourable Mr. Justice Lambert:****I**

- [1] This appeal concerns the powers of the Workers' Compensation Board in relation to two matters: the awarding of legal costs, and the ordering of an oral hearing.

II

- [2] In 1962, when he was 23, Mr. Van Unen injured his left knee at work. He claimed and was granted workers' compensation. When he achieved a sufficient measure of rehabilitation, he started his own business as a residential heating and ventilation contractor. Over the years he had eight surgical operations on his left knee. He now suffers from disabilities in his lower back and right hip as well as continuing problems with his left knee.
- [3] In 1990, Mr. Van Unen retained Mr. Paterson as counsel and together they have processed a series of claims and appeals under the *Workers' Compensation Act*. Some of the claims and appeals have been successful, or partially so, and others have not. This process culminated in a petition for judicial review under the *Judicial Review Procedure Act* brought on 26 November, 1998 against six decisions of the Workers' Compensation Board Appeal Division. The issues

with respect to all six decisions related to the denial of reimbursement of legal fees, and, in relation to four of the decisions, to the denial of an oral hearing. In relation to two of the decisions the petition related to the denial of compensation.

III

[4] The petition was heard by Mr. Justice Bauman in Supreme Court chambers. The petition was dismissed on all the issues. This appeal is brought from Mr. Justice Bauman's decision. That decision can be found through Quicklaw at: [1999] B.C.J. No. 1822. I do not propose to summarize it. I will assume that anyone interested in this decision will, if they wish, have read Mr. Justice Bauman's decision.

IV

[5] The issues in this appeal are now more limited, more focused, and fewer, than the issues before Mr. Justice Bauman. We are now concerned with only two decisions of the Appeal Division. They present the basis for four grounds of appeal which the appellant has framed in this way:

- a) **The chambers judge erred in failing to find that the Appeal Division improperly fettered its discretion, was patently unreasonable and violated the principles of natural justice in its 27 June 1994 and 17 July 1998 decisions denying legal costs reimbursement.**
- b) **The chambers judge erred in failing to apply the standard of correctness to the Appeal Division's 27 June 1994 and 17 July 1998 decisions denying legal costs reimbursement.**
- c) **The chambers judge erred in failing to find that the Appeal Division lost jurisdiction in its 27 June 1994 decision because it failed to address the Review Board's jurisdiction to order legal costs reimbursement.**
- d) **The chambers judge erred in failing to find that the Appeal Division lost jurisdiction in its 17 July 1998 decision because it violated the principles of natural justice by denying the Appellant an oral hearing.**

V

Appellant's Statement of the First Issue

The chambers judge erred in failing to find that the Appeal Division improperly fettered its discretion, was patently unreasonable and violated the principles of natural justice in its 27 June 1994 and 17 July 1998 decisions denying legal costs reimbursement.

The Privative Clause

- [6] The starting point for this issue and the other three issues is to appreciate that s-s.96(1) of the *Workers' Compensation Act* establishes a complete and comprehensive privative clause; nothing is left out. The result is that if the Board and its officers act within their jurisdiction then their decisions cannot be questioned in court. It is only if they act beyond the limits of their jurisdictional envelope that their acts can be challenged under the *Judicial Review Procedure Act* or otherwise.

This First Issue

- [7] This issue raises three aspects of alleged jurisdictional error in relation to the decisions of 27 June 1994 and 17 July 1998 denying legal costs. The three aspects are: an improper fettering of discretion; acting in a patently unreasonable way; and violating the principles of natural justice. The three aspects are closely inter-related.

The Statutory Provision on Costs

- [8] The statutory provision governing costs, or expenses, is s.100 of the Act:

Costs

100 The board may award a sum it considers reasonable to the successful party to a contested claim for compensation or to any other contested matter to meet the expenses the party has been put to by reason of or incidental to the contest, and an order of the board for the payment by an employer or by a worker of a sum so awarded, when filed in the manner provided for the filing of certificates by section 45(2), becomes a judgment of the court in which it is filed and may be enforced accordingly.

- [9] A similar provision, with no significant changes in wording, has found a place in the Act since workers' compensation legislation was first introduced in British Columbia in 1916.

The Alternative Interpretations

- [10] There are two principal alternative interpretations of s.100.
- [11] The first interpretation is that the section applies to payment of expenses by the Board, and not only to payment by employers and workers, if there is a contested claim made against the Board, (for example, an appeal from the disallowance of a claim for compensation), and the appeal is successful.
- [12] The second interpretation is that the section applies only to authorize the Board to order the payment of expenses to the successful party where there is a contest between an employer and a worker, adjudicated by the Board, and the Board makes an order directed to requiring the

unsuccessful party to pay the expenses of the successful party, but only as between the employer and the worker.

The Leading Board Decision

- [13] We were referred to what was described as a “generic” decision of an Appeal Division of the Board comprised of Connie Munro, Thomas Kemsley and P. Michael O’Brien. The decision is numbered 93-1687. It discusses the two alternative interpretations I have mentioned and contains these conclusions:

We find that Section 100 of the Act is broad enough to authorize the Board to award expenses to a successful party in an appeal or non-appeal context (for example, in the context of first instance adjudication or a referral), and it is broad enough to authorize the Board to award legal costs out of the Accident Fund or order them paid by one of the parties.

[my emphasis]

- [14] The Appeal Division then considered the *Testa* case, to which I will come shortly, and the Board’s *Rehabilitation Services and Claims Manual*, to which I will come first, and said this:

Following *Testa* there must be a limit to #100.40 of the *Manual*. The Board has, on rare occasions, paid legal expenses and it is necessary to consider the potential exceptions to the general policy which denies payment of those expenses. The governors’ policy in #100.70 of the *Manual* regarding “The Awarding of Costs” against a party states in part:

An award under Section 100 might be made on an appeal but only in *unusual cases*. The section is limited to cases where the worker or employer *abuses his rights* under the Act.

[emphasis added by the Appeal Division]

Similarly, payment of costs by the Board would arise only in unusual or extraordinary circumstances. It would not include cases in which Board officers merely erred or failed to exercise good judgment. It would require flagrant abuse by a Board officer of a worker’s, or claimant’s, or employer’s rights under the *Act* or governors’ policy, which was clear on the face of the file. Even that would give rise only to consideration of the payment of legal expenses, as other factors might also be relevant.

Flagrant abuse would not arise from a mere failure to investigate a matter fully, as it is virtually always a judgment call as to when adequate information has been obtained. Neither would it arise from a mere error in interpreting and

applying governors' policies or the *Act*, as both are open to various interpretations and contain considerable discretion, so there is considerable scope for differences of opinion on matters of interpretation and application.

It is not possible to specify the types of situations which would justify payment of legal fees by the Board. It would require flagrant abuse as noted above, and then consideration of other relevant factors, such as the availability of free legal advice from other sources. We emphasize that entitlement to the payment of legal fees will arise only in very unusual cases.

[my emphasis]

[15] I understand that Decision #93-1687 is taken as guidance by other differently constituted Appeal Divisions. It is clear from the passage I have quoted that the Decision prefers the first of the two alternative interpretations that I have mentioned.

The Manual

[16] The Board's *Rehabilitation Services and Claims Manual* says this:

#100.40 Fees and Expenses of Lawyers and Other Advocates

No expenses are payable to or for any advocate. Nor does the Board pay fees for legal advice or advocacy in connection with a claim for compensation. The Board will not pay the legal costs of a claimant or employer in connection with court proceedings to challenge a Board decision beyond what it may become subject to pay following the court's decision under the general law of costs.

...

#100.70 The Awarding of Costs

...

An award will not likely be made under Section 100 in favour of a successful appellant. The section requires that the expenses in respect of which the award is made be "...by reason of or incidental to the contest, . . ." Since the appeal will be proceeded with and resolved whether or not it is opposed by the other party, it cannot normally be said that the expenses of the appellant are due to the other party's "contest" of the appeal. Where the appeal is not opposed by the other party, the reasons for not making an award become even stronger.

So it seems that the preparation of the *Rehabilitation Services and Claims Manual* involved specific consideration of s.100. The *Manual* ended up drawn on the basis of a conclusion that the second of the two alternative interpretations is the correct one.

The Board's Argument

[17] Counsel for the Board said in her factum:

The WCB has discretion to award costs. The learned Chambers Judge appeared to accept that this discretion flows from Section 100 of the *W.C.A.*

[18] In the context of this case, the word “costs” in that paragraph must be taken to refer to expenses for legal services incurred by a worker or employer and paid by the Board. Decision 93-1687 says that has occurred, but only on rare occasions.

[19] However, counsel for the Board argued that the power to make a payment out of the accident fund to meet the legal expenses of a worker is not derived from s.100. She relied on *Re Milito* (7 June, 1984), Vancouver A840860, (B.C.S.C.), a decision of Mr. Justice McKay. In that case, Mr. Justice McKay said this:

Dealing first with the Workers' Compensation Board. *The Workers Compensation Act* is silent on the subject and the Board has a general policy not to pay the legal fees and costs of workers pursuing claims under the Act. Mr. Paterson was unable to point to any section of the Act which requires the exercise of a statutory discretion as to the payment of such legal fees and costs. The request here is even further removed – it is to cover legal fees at an inquest being carried on under the *Coroners Act*. Mr. Patterson stresses the fact that neither the Chairman of the Boards of Review nor the Secretary to the Workers' Compensation Board state that they have no power to authorize the payment of legal fees. I have no doubt that the legal fees of any particular claimant could be paid if those charged with the responsibility of administering the Act deemed it appropriate – but that is a far different matter from a duty imposed by statute to exercise a discretion as to payment of legal fees with respect to each and every claimant. In short, there is no exercise of a “statutory power of decision” to review. I should mention in passing that there is a Compensation Advisory Service established under the Act to give advice and assistance to workers and/or dependants with claims under the Act and to provide representation in complex cases. Currently two of the five advisors are barristers and solicitors.

[my emphasis]

[20] If Mr. Justice McKay was referred to s.100 or its predecessors, as I must suppose he was, he concluded that it did not confer a power to pay legal fees at a coroner's inquest. I am sure that is correct, because s.100 is couched in terms of contested matters under the *Workers' Compensation Act*. But Mr. Justice McKay's decision is relevant to this extent. He contemplated that there must be a more general power available to the Board to pay legal fees, derived in some way from the powers conferred under the Act, but not amounting to a “statutory power of decision” for the purposes of the *Judicial Review Procedure Act*. In the face of s.100, to which Mr. Justice McKay did not refer, I doubt if such a power could apply to contested proceedings within the Workers' Compensation Board processes themselves.

Two Decisions of this Court

- [21] That brings me to the precise authorities and the principles relevant to a question of fettering the discretion conferred on the Board to pay legal expenses.
- [22] The first case is *Alkali Lake Indian Band v. Westcoast Transmission Co.* (1984), 57 B.C.L.R. 110; (B.C.C.A.). In that case, the Indian Band intervened in a hearing by the Public Utilities Commission in a matter that gravely concerned the Band. The Commission refused to order payment of the costs of the Band. In doing so, the Commission was presumed to have followed an express direction from the Minister of Energy setting out a cabinet decision to discontinue costs awards to participants in Public Utilities Commission hearings. The Commission had followed the directive expressly in a previous decision involving the same parties. This Court decided that the statutory discretion of the Utilities Commission had been regarded as fettered by the Commission and had not been exercised as the statute required. This Court ordered that the costs of the band should be paid, but the Court left the assessment of those costs to the Commission.
- [23] The second case is *Re Testa and Workers' Compensation Board of British Columbia* (1989), 36 B.C.L.R. (2d) 129 (B.C.C.A.). Mr. Testa was injured in early 1983. He received compensation benefits. They were terminated later in the year. He returned to work in 1984. He was injured again. After an appeal, he was awarded compensation for the 1984 injury, but the compensation was to be calculated, in accordance with the Board's general policy, on the basis of Mr. Testa's earnings for the year before, namely 1983. That was the year in which Mr. Testa had not been able to work because of the previous injury. This Court decided that the decision of the Board was patently unreasonable. It had been reached by "blindly" following a policy laid down in advance which was entirely inappropriate on the facts of the particular case. This Court decided that the discretion in relation to the determination of the amount of compensation had been improperly fettered and had not been exercised within jurisdiction.
- [24] I am sure that the two cases which I have mentioned were correctly decided. But the *Alkali Lake* case refers to outside interference with a statutory discretion and, in the *Testa* case, the application of an arbitrary policy was patently unreasonable. I do not regard either case as preventing an administrative tribunal from establishing non-binding guidelines to set out its general policy and to draw attention to relevant considerations in carrying out the judicial, quasi-judicial and non-judicial functions of the tribunal. In this case it was the very body which issued the *Rehabilitation Services and Claims Manual* that was the body on whose behalf the Appeal Division's decisions under s.100 were made.

The Standard of Review

- [25] In my opinion, the standard of review by this Court with respect to the interpretation and application of s.100 by the Workers' Compensation Board is correctness coupled with an appropriate measure of deference on questions of statutory interpretation that depend on an assessment and understanding of the objects of the legislation and the scheme of the legislation as a whole. See *Northwood Inc. v. Forest Practices Board* (28 February 2001) CA026606 (B.C.C.A.).

The Board cannot give itself a jurisdiction it does not possess, or deny a jurisdiction given to it by the Legislature, by misinterpreting its constating statute. So correctness is the central element of the standard of review. But that standard does not exclude an appropriate measure of deference flowing from an appreciation of the expertise of the Board that comes from its intimate familiarity with the concepts of the legislation and the practices that have been adopted to carry it into effect. So appropriate deference must be given, within the standard of correctness, to the opinions of the Board and the Appeal Division in relation to their expertise and familiarity with the legislation.

This Case

[26] In the appeal decision of 27 June, 1994, the Appeal Division, in its reasons, said this:

This panel denies the worker's request for reimbursement of his legal fees and accountant's fees. While item 100.50 and the previous Appeal Division decision were cited, this panel does not find the worker's situation either "unusual", nor do we find the board's errors "flagrant abuse" of the worker's rights.

...

We deny the request for reimbursement of legal fees. We do not accept that the worker necessarily required "legal" assistance because he was a small business man and not a member of a union; the worker could have contacted Compensation Advisory Services (Workers' Advisors' offices).

[27] In the appeal decision of 17 July 1998, the Appeal Division, consisting of a single member of the division, said this:

I have considered the worker's request for reimbursement of legal fees. While I appreciate that the issues in his claim have been medically complex, I can find no substantial reason in this case to deviate from governors' policy in item #100.40 of the *Rehabilitation Services and Claims Manual*.

[28] Those two sets of reasons reflect an application of the reasoning set out in the "generic" decision No. 93-1687. In my opinion, applying the standard of correctness, coupled with appropriate deference to the Appeal Division's expertise in relation to the objects and practical application of the legislation, the interpretation of s.100 which allows it to apply to claims for legal expenses, but does not require that they be paid in any case or class of cases, (with the possible exception of unusual cases where the claiming party was subjected to abuse of process or otherwise became subject to unique considerations), is an interpretation that meets the standard which I have described. It is an interpretation which rises above the *Rehabilitation Services and Claims Manual* by allowing for exceptions not indicated in the Manual.

[29] The interpretation I have described was actually applied in the passages from the two relevant decisions which I have quoted. In my opinion, it leaves an ample discretion for truly deserving cases without violating the harmony of a system that the Board has decided should be conducted without any customary liability of the Board to pay legal fees from the accident fund to every successful claimant who retains a lawyer.

[30] In my opinion the Appeal Division did not improperly fetter its discretion in the two relevant decisions refusing the payment of legal expenses, did not act in a way that was patently unreasonable, and did not violate the principles of natural justice. I would not accede to the first ground of appeal.

VI

Appellant's Statement of the Second Issue

The chambers judge erred in failing to apply the standard of correctness to the Appeal Division's 27 June 1994 and 17 July 1998 decisions denying legal costs reimbursement.

[31] I have already said under Part V, sub-part "Standard of Review," that I think that the standard of review applicable to an Appeal Division decision with respect to legal costs, (a jurisdictional issue with respect to the constating statute under a privative clause), is a standard of correctness, coupled with appropriate deference to the expertise of the Appeal Division in relation to the objects of the Act and the practical considerations involved in carrying its provisions into effect. I do not understand that the chambers judge's reasons applied a different standard on such a question. See particularly paras. 41, 42 and 43 of those reasons.

[32] I would not accede to this ground of appeal.

VII

Appellant's Statement of the Third Issue

The chambers judge erred in failing to find that the Appeal Division lost jurisdiction in its 27 June 1994 decision because it failed to address the Review Board's jurisdiction to order legal costs reimbursement.

[33] The Review Board's jurisdiction in relation to costs is set out in s.7 of the *Workers' Compensation Act (Review Board) Regulation*. That section reads:

Expenses

7. (1) The review board may order the board to reimburse a person for the cost incurred in

(a) attending an oral hearing,

(b) obtaining a medical report submitted to the review board, or

(c) attending an examination required under section 6(4).

(2) The amount of costs authorized under subsection (1) shall not exceed the rates paid by the board for similar services.

[34] There is no possibility of a judicially considered interpretation of that provision leading to the conclusion that the Review Board has a jurisdiction to compensate a party for legal expenses incurred in relation to a Review Board proceeding. The argument has so little merit that in my opinion there was no obligation on the Appeal Division to give reasons about why the Review Board did not err in refusing to order the payment of legal expenses from the accident fund.

[35] I would not accede to this third ground of appeal.

VIII

Appellant's Statement of the Fourth Issue

The chambers judge erred in failing to find that the Appeal Division lost jurisdiction in its 17 July 1998 decision because it violated the principles of natural justice by denying the Appellant an oral hearing.

[36] The issues in the hearing of 17 July, 1998 included important questions about Mr. Van Unen's capacity to work full time at any job for which he had the necessary strength and skills, and about the likelihood of Mr. Van Unen obtaining employment at such a job.

[37] Before the Review Board, Mr. Van Unen had an oral hearing. I understand he was represented by counsel. He was in a position to lead oral evidence and the Review Board had an opportunity to evaluate all the evidence led, most particularly, to assess Mr. Van Unen's demeanour and to assess the other evidence in relation to the important questions I have described.

[38] In the end, the Review Board decided, on the evidence, that Mr. Van Unen could work full time over a reasonable period into the future in occupations such as lottery ticket salesperson, parking lot attendant, dispatcher and others. The Review Board received evidence on those questions.

[39] The Review Board decision was appealed to the Appeal Division. The Chief Appeal Commissioner received an application on behalf of Mr. Van Unen to order that an oral hearing be held. The Chief Appeal Commissioner declined the request for an oral hearing and the appeal was conducted by a single member of the Appeal Division. That member reviewed the entire evidence at the Review Board hearing. I understand that he did so by listening to the tape rather than by reading a transcript. He received written submissions from Mr. Van Unen's counsel. He searched back through the Board files on Mr. Van Unen's long history, and upon

unearthing a relevant report of which Mr. Van Unen was unaware, the Appeal Division member provided Mr. Van Unen with a copy of the report and said he was prepared to consider additional written submissions.

[40] Section 90 of the *Workers' Compensation Act* deals with appeals from an officer of the Workers' Compensation Board to the Review Board. Section 91 deals with appeals from the Review Board to the Appeal Division. There is nothing in s.91 to indicate that what is contemplated is something other than a true appeal. A hearing *de novo* is not specifically required by the statute. In the absence of such a requirement, and in circumstances where oral evidence is given before the Review Board, and in circumstances where it is possible for a member of the Appeal Division to review that evidence, and in circumstances where the Review Board made findings of fact on the very issue raised by the worker, it is my opinion that it is not a breach of natural justice for the findings of fact based on credibility, veracity of testimony, and expert opinion, to be assessed by the Appeal Division without the requirement of an oral hearing.

[41] We were told, during the course of argument, by counsel for the Board that, for example, decisions were issued by the Appeal Division in 1,768 cases in 1997 of which 130 were issued after oral hearings. There is no question before this Court about the circumstances in which an oral hearing ought to be ordered by the Chief Appeal Commissioner. We are required only to decide whether, in the very circumstances of this case, it was a breach of the rules of natural justice to refuse an oral hearing when one was requested. It is clearly not intended to be the function of the Appeal Division to repeat precisely the work of the Review Board. Instead, the Appeal Division is required to assess the correctness of that work and to decide whether it is flawed. That determination must be conducted in the usual way of a true appeal. But, of course, the Appeal Division may choose to hear oral evidence if it seems to it to be right and fair to do so. The Appeal Division decided not to do so in this case. In my opinion it was not in breach of natural justice in reaching that decision, in the circumstances that I have described.

[42] For those reasons I would not accede to the fourth issue.

IX

[43] I would reject each of the arguments raised on behalf of Mr. Van Unen. It follows that I would dismiss the appeal. If the Board demands costs of the appeal I would order that it is entitled to them.

