

Decision of the Review Board**Appeal Numbers: 963219-C, 963219-D****Date: January 19, 2001****Panel: G. Bud Gallagher, Chair; Michelle Gelfand, Vice Chair;
Iain M. Macdonald, Vice Chair****Subject: Referral under Section 91(2) re Standing of a
Deceased Worker's Estate to Appeal**

Introduction

This appeal arose from decisions of February 20, 1996 and October 21, 1997, both of which denied the worker's claim for compensation related to a respiratory condition. Sadly, on November 10, 1997, the worker passed away. An appeal from the February 20, 1996 decision was initiated by the worker; the appeal from the October 21, 1997 decision was initiated by the worker's widow, who expressed her intention to continue the original appeal, and provided evidence satisfactory to this panel that she acts as the personal representative of the worker's estate.

In findings of January 5, 2000, the majority of a prior panel of the Review Board denied the appeals on the basis that the worker's rights of appeal ended with his death, and the estate did not have standing to continue or initiate appeals related to his claim.

The worker's widow appealed the Review Board findings to the Appeal Division of the Workers' Compensation Board (the "Board"). In his decision of August 14, 2000, the chief appeal commissioner exercised the rarely used authority set out in section 91(2) of the *Workers Compensation Act* (the "Act"), and directed the Review Board to reconsider the matter generally. He pointed out that a chair's panel had earlier issued findings on the jurisdictional issue and that the expressed intended effect of that decision was to bring consistency to the Review Board's position on that issue. He concluded that issues of consistency within the Review Board are better left to the Review Board itself.

As a result of the section 91(2) referral, a chair's panel has been constituted to consider both the jurisdictional issues arising on this appeal and, depending on the outcome of that consideration, the merits of the appeals themselves. As the appellant had filed submissions on both issues prior to the release of the January 5, 2000 Review Board findings, no further submissions were invited. Our findings are based on a review of the claim file.

Jurisdiction

The jurisdictional issue arising on this appeal is whether the worker's widow, as personal representative of his estate, has the standing to continue the worker's appeal from the February 20, 1996 decision letter, and whether she has the standing to initiate an appeal from the October 21, 1997 decision letter. This jurisdictional issue was the subject of a chair's panel finding (1998(14) *Workers' Compensation Reporter* 375). A summary of that finding is attached as Appendix A. The stated purpose of that finding was to "enhance consistency" in the approach taken by Review Board panels to the jurisdictional issue. In the course of its 33 page decision, that panel comprehensively analyzed the issue from a variety of perspectives and concluded that a worker's estate has the standing to initiate and continue an appeal. The panel based its conclusion primarily on the definition of "person" in section 1 of the Act and on the definitions of "person" and "personal representative" in section 29 of the *Interpretation Act*, R.S.B.C. 1996, c. 238.

It is obvious to this panel, as it was to the prior chair's panel, that coherence and consistency in administrative decision making must be fostered. The Review Board is committed to the promotion of consistency, predictability and equality in its decisions. The outcome of appeals to the Review Board should not depend on the identity of the persons sitting as panel members. The issuing of "leading" cases is a useful strategy for providing a well reasoned analysis of a complex issue. At the same time, this panel acknowledges that it cannot bind other panels, each member of which has an ongoing responsibility to decide appeals in accordance with all relevant factors, including the merits and justice of each case and the overriding objective of consistency.

This panel concurs with and adopts the reasoning set out by the prior chair's panel. We find that the worker's widow, as personal representative of the deceased worker's estate, has standing to initiate and maintain appeals concerning his claim. The case at hand is on all fours with the case decided by the prior chair's panel. We prefer the reasoning and conclusions reached by the chair's panel to the majority's January 5, 2000 finding on these appeals, and note that the majority did not distinguish the facts before it from the facts before the chair's panel.

Merits of the Appeals

The worker was a cameraman, who filmed in locations such as cargo holds of ships, tunnels, and pulp and paper mills. In September 1995, he applied for compensation for silicosis. He provided an employment record describing his work history beginning in 1946, including work in underwater tunnels, factories, mines, and pulp and paper mills. His work included exposure to a variety of chemicals, including silica, asbestos and potash.

At the request of the Board's Pneumoconiosis Unit, Dr. K., the worker's family physician, provided the worker's medical records, including an October 11, 1995 report from Dr. L., a specialist in respiratory medicine. She noted that the worker had been referred for assessment of his chronic interstitial lung disease. She referred to his history of exposure to sulphur and potash during the Second World War, and his many hours spent filming in tunnels during

drilling in the late forties. She confirmed that he had had silica exposure as well as minimal asbestos exposure while filming in mines in Quebec. She diagnosed interstitial pulmonary fibrosis of unknown etiology.

In a letter of November 28, 1995, Dr. Y., specialist in respiratory medicine, reviewed the worker's medical records and history. She confirmed the diagnosis of idiopathic pulmonary fibrosis and noted that the etiology of diffuse pulmonary fibrosis is unknown. She noted the worker's exposure to silica over a few years and to asbestosis for several months. She stated that, clinically, he did not present with silicosis, and that a few months of asbestos exposure was unlikely to cause interstitial fibrosis. Nor did she find evidence of pleural involvement which would be typical of asbestos-related disease.

Based on Dr. Y.'s opinion, the worker was advised in a letter of December 4, 1995 that his claim for pneumoconiosis (which includes asbestosis and silicosis) was denied. Following a conversation with Dr. K., the Manager of Disability Awards concluded in her February 20, 1996 decision that no change would be made to the prior decision. The worker appealed that decision to the Review Board, stating on his appeal form that his exposure to carbon tetrachloride, sulphur and potash, as well as his work in tunnels, may have contributed to his lung disease. In support of his appeal, the worker submitted two letters from Dr. K. In her April 30, 1996 letter, she queried whether her patient's idiopathic pulmonary fibrosis was caused at least in part by his work. She acknowledged that the exact etiology of the disease is unknown, but questioned whether chronic exposure to carbon tetrachloride, extensive work filming underwater in tunnels, and exposure to sulphur and potash could have contributed to his lung condition. In a July 26, 1996 letter, she noted that, in an article on pulmonary medicine, dust inhalation was listed as a cause of interstitial pulmonary fibrosis. She stated that, in her opinion, the worker's lung disease was more likely than not related to his dust exposure at work. She referred to the worker's long hours spent filming in tunnels, during blasting, and with no mask or oxygen, and his extensive exposure to carbon tetrachloride.

At the request of the Review Board, the Board reviewed the letter and materials provided by Dr. K. In memo #7 of August 25, 1997, Dr. D., medical advisor with the Board's Occupational Health Section, stated:

A review of the toxicology indicates to me that carbon tetrachloride has not been recognized as being capable of causing idiopathic pulmonary fibrosis.

His exposure to dust over a period of approximately 40 years appears to have been somewhat intermittent in nature. As a cameraman he has worked on a number of occasions in tunnels and filming activities which would have exposed him to some dust.

Dr. D. requested an opinion from Dr. F., internal medicine consultant, regarding the cause of the worker's lung condition. In memo #9 of October 7, 1997, Dr. F. stated as follows:

The inciting events for idiopathic pulmonary fibrosis for the variety of other fibrotic lung diseases are still unknown [sic]. Idiopathic pulmonary fibrosis (I.P.F.) continues to represent a major national health problem. . . . As the name

implies, the disease is “idiopathic” and the etiology remains unknown. It was generally agreed that the condition does not result from hitherto unstudied inorganic dusts or drugs, although the possibility that such agents could “incite” the condition in a person with the appropriate genetic or acquired “susceptibility”, could not be excluded.

It is the general consensus that individuals’ susceptibility (genetic and/or acquired) might be important in the pathogenesis, a concept supported by the presence of a familial (although infrequent) form of I.P.F. Another consideration was the possibility of “autoimmune disorder” in which chronic inflammation develops in response to injury from, for example, a viral infection or drugs. Virus infection has been discussed in detail and at present there is no clear evidence for a viral etiology and if one is implicated, it is most likely a latent, chronic, slow virus.

When last reviewed by the National Heart, Lung, and Blood Institute, National Institute of Health in Bethesda, Maryland, no evidence of an environmental cause seemed plausible.

Based on Dr. F.’s opinion, Dr. D. advised that it would be speculative at best to associate the worker’s respiratory condition with any of his work exposures. In a letter of October 21, 1997, the worker was advised again that his claim was denied.

The worker’s widow, in her appeal documents, noted that her husband had worked in the film industry for 30 to 35 years, and had been exposed to contamination and pollution.

Reasons and Findings

Section 6(1) of the Act provides for compensation where a worker suffers from an occupational disease due to the nature of the employment in which the worker was employed. Section 6(3) provides that, if a worker at or immediately before the date of disablement was employed in a process or industry in the second column of Schedule B, and the disease contracted appears opposite that process or industry in the first column of that Schedule, the disease is deemed to have been due to the nature of the employment unless the contrary is proved.

The conditions of silicosis, asbestosis and other pneumoconioses are included as pneumoconioses under Schedule B. Based on our review of all the medical evidence and, in particular, the diagnoses provided by Drs. L. and Y., this panel concludes that the worker did not suffer from silicosis, asbestosis or other forms of pneumoconiosis. In that regard, we note the undisputed evidence of Dr. Y. to the effect that the worker’s clinical presentation was not consistent with those conditions.

Item 3A of Schedule B is “[d]iffuse pleural thickening or fibrosis, whether unilateral or bilateral.” The presumption in section 6(3) applies to that disease “[w]here there is exposure to airborne asbestos dust . . .”. As the worker suffered from diffuse pleural fibrosis, we have considered

whether the presumption applies to his claim. However, as there is no evidence that the worker was exposed to airborne asbestos dust at or immediately before the date of his disablement, we find that the presumption does not apply.

We have considered whether the worker's diagnosed lung condition was due to the nature of any employment in which he was employed, pursuant to section 6(1)(b) of the Act. After carefully reviewing all of the medical evidence before us, we find that there is inadequate evidence of a causal relationship between the worker's exposure to carbon tetrachloride, potash, sulphur, or any other workplace contaminant, and his lung disease. We rely in particular on the expert opinions of Drs. L., Y., D. and F., none of whom supported a causal relationship. We note, in particular, Dr. F.'s comment that, as the name implies, the disease is "idiopathic" which refers to a condition or symptoms which occur without a known cause. While we acknowledge Dr. K.'s opinion regarding the cause of the worker's condition, we find no basis for preferring her opinion to the opinions of specialists who have been unable to support a causal connection. We feel personal sympathy for the worker's family but find that the required standard of proof has not been met, and the appeals are therefore denied.

Conclusion

For the reasons set out above, the panel finds that the worker's widow has standing to continue the appeal from a decision letter of February 20, 1996 and to initiate an appeal from the decision letter of October 21, 1997. The appeals are, however, denied on their merits.

Appendix A

SYNOPSIS OF REVIEW BOARD REASONS IN APPEAL NO. 904050-D, -E

An issue that arose in this appeal concerned the Review Board's jurisdiction to decide an appeal commenced by a worker and continued after his death by his estate. The worker filed a Notice of Appeal Part 1 to the Review Board but died prior to the filing of the Notice of Appeal Part 2. The widow, acting as personal representative of his estate, now wishes to proceed with the appeal. A chair's panel was constituted to enhance consistency to this jurisdictional question.

The issue of whether the right of appeal to the Review Board survives the death of a worker for the benefit of the estate can arise in three distinct circumstances:

- (1) The worker dies after filing a claim for compensation, but before commencing an appeal to the Review Board;
- (2) The worker dies after commencing an appeal to the Review Board but before the oral hearing or before the appeal has been distributed to a read and review panel; or
- (3) The worker dies after the hearing or distribution but before the finding is issued.

As a result, the broader issue addressed by the chair's panel is whether the estate of a deceased worker has jurisdiction to commence and/or continue an appeal to the Review Board. The merits of the substantive issue will be the subject of a supplementary finding.

Both parties agreed that workers' dependants in their capacity as dependants do not have standing and that the reference to them in s. 90(1) only conferred standing on them to appeal decisions regarding their own entitlement to benefits. The panel agrees with this analysis.

Section 90(1) of the *Workers Compensation Act* gives the Review Board authority to consider appeals from decisions of Board officers made with respect to workers. The section also sets out those who have standing to initiate appeals: ". . . *the worker, or, if deceased, the worker's dependants, or the worker's employer, or a person acting on behalf of the worker, the dependants or employer . . .*" (emphasis added)

Section 1 of the Act defines "person" as follows:

"person" includes, for the purpose of section 10, his or her personal representative;

"Person" is also defined in s. 29 of the *Interpretation Act*:

"person" includes a corporation, partnership or party, and the personal or other legal representative of a person to whom the context can apply according to law;

Thus, while s. 1 of the *Workers Compensation Act* provides a definition of “person,” a much broader definition of “person” is contained in s. 29 of the *Interpretation Act*. As the definition of “person” in the *Workers Compensation Act* is introduced by the word “includes,” the ordinary meaning of the word continues to apply unless its context demonstrates to the contrary. “Includes” enlarges the meaning of specific words in interpretation clauses; hence other matters which are not specifically set out in the definition can also fall within the meaning of the word in the statute. In contrast, a definition introduced by the word “means” is exhaustive; it limits the meaning of the word to what is set out in the definition. By virtue of s. 2(1) of the *Interpretation Act*, the definitions in that enactment apply to the *Workers Compensation Act*, unless the context demonstrates to the contrary. The *Interpretation Act* also defines “personal representative” as including an executor and administrator.

On the clear and unambiguous wording contained in the interpretation section, the definition of “person” in s. 1 is not exhaustive and does not exclude the *Interpretation Act* definition. This broad construction of “person” in s. 90(1) is supported by the immediate context of the word in that provision, the distinctive use of the terms “means” and “includes” in other s. 1 definitions, and the definition of “person” in s. 19; it is also consistent with the wording of s. 15. Moreover, the panel notes that an “appellant” is the party who brings an appeal; hence the persons who may be considered “appellants” for the purposes of s. 90(3) of the *Workers Compensation Act* and s. 5(2)(a) of the Regulations is determined by s. 90(1). Thus, following the judgement of the British Columbia Human Rights Council in *Allum v. Hollyburn Properties Management Inc.* [1992] 15 C.H.R.R. D/171, the word “person” in s. 90(1) of the *Workers Compensation Act* ought to be given the extended meaning set out in the *Interpretation Act* and should thereby apply to personal representatives of deceased workers.

The panel disagrees with the respondent’s submission that, by virtue of the maxim *expressio unius est exclusio alterius* (to express one thing is to exclude another), because s. 103 of the *Workers Compensation Act* expressly refers to the “legal personal representatives of the worker,” “person” in s. 1 cannot be interpreted as including a personal representative. The maxim is a rule of statutory interpretation, not a rule of law; hence, it can be overcome by a strong indication of contrary legislative intent. In the panel’s opinion, the maxim is rebutted in this case because it would make the word “includes” in the s. 1 definition of “person” meaningless.

Another way to rebut an implied exclusion argument is to explain why legislature expressly mentioned some things and was silent with respect to others. In this instance, it may be that the definition of “person” was inserted in s. 1 of the *Workers Compensation Act* *ex abundanti cautela*, out of an abundance of caution, to reduce the possibility of future misunderstanding or mistake as to whether a personal representative has rights under s. 10. Pursuant to ss. 10(2) and 10(6), where a worker’s injury or death was caused by someone other than a worker or employer within the scope of Part 1 and the worker elects to claim compensation, the Board becomes subrogated to (that is, stands in the place of) his or her cause of action for personal injury against that other person, the tortfeasor. Section 66(4) of the *Estate Administrator Act* states that when the person alleged to be at fault dies, the “person wronged” may continue the action against the estate. It is unclear from a plain reading of this provision in the *Estate Administration Act* whether an insurer who is subrogated to the insured’s position with respect to a deceased third party tortfeasor can be considered a “person wronged” under s. 66(4), and

hence make a claim for rights provided thereunder. The definition in s. 1 of the *Workers Compensation Act* may have been inserted in anticipation of any potential misunderstanding or problem in the application of s. 10 of the *Workers Compensation Act*, so to ensure that the Board, as insurer, may commence and continue a subrogated action against the estate of the person alleged to have caused the worker's injury. Thus, the panel finds *ex abundanti cautela* to be more persuasive that *expressio unius est exclusio alterius* in understanding the definition of "person" contained in the *Workers Compensation Act*.

Regardless of whether the definition in the *Workers Compensation Act* was inserted *ex abundanti cautela*, i.e. for greater certainty, or as a result of careless drafting, it does not provide a sufficiently clear reference to any Parliamentary intention to limit the scope of the meaning of the word "person" for the purposes of provisions other than s. 10.

A previous Review Board panel applied agency law to interpret the phrase "person acting on behalf of the worker." The panel reasoned that because agency terminates on the death of the principal (i.e. the worker), a "person acting on behalf of the worker" cannot include a personal representative because personal representatives come into existence after the worker dies. The panel rejects the reasoning and decision of the previous panel because it is premised on the assumption that agency law governs the relationship between the worker and the "person acting on behalf of the worker." In the panel's view, agency law cannot govern the relationship because "person" is defined in the *Interpretation Act* as including a personal representative, and agency relationships terminate by operation of the law as a result of the death of the principal. The previous panel reached its finding without considering the definition of "person" in the *Interpretation Act*.

Moreover, the panel notes that the phrases "sum payable" in s. 15 and "owing and accrued" in s. 35(4) are not determinative of whether an estate can commence or continue an appeal before the Review Board. If, pursuant to s. 90(1) and the *Interpretation Act*, it is clear that the personal representative has standing to appeal, these sections do not override that intent.

In view of the foregoing, the panel finds no indication in the working of the *Act* to demonstrate that the *Interpretation Act* definition of "person" ought not to apply to s. 90(1). In its view, a more restricted interpretation of "person" in s. 90(1) which excludes personal representatives would be contrary to the ordinary rules of statutory interpretation.

In conclusion, the panel finds that by virtue of the definition of "person" in the *Workers Compensation Act* and *Interpretation Act*, the wife of the deceased worker, acting in her capacity as the executrix or administrator of the worker's estate, has standing as a "person acting on behalf of the worker" in s. 90(1) of the *Workers Compensation Act* to continue the appeal to the Review Board. Although this case concerns the authority of an estate to continue an appeal already commenced by a worker, the panel nevertheless finds that the same result would have been reached had the worker died after making a claim for compensation but before filing an appeal, or, alternatively, after the Review Board hearing but before issuance of the decision.

As for the *Estate Administration Act*, s. 66(2) does not apply to proceedings before the Review Board. The panel finds the judgement of the British Columbia Supreme Court in *Vancouver (City) v. Reid* (1996), 25 B.C.L.R. (3d) 162, strongly persuasive and concludes that the word “action” in s. 66(2) means court proceedings, not proceedings before a tribunal. Hence, jurisdiction to commence and/or maintain a Review Board appeal cannot be sought from this provision.

In the event that the panel is wrong in its interpretation of “person” in s. 90(1) of the *Workers Compensation Act* and its conclusion regarding the meaning of “action” in s. 66(2), it is necessary to consider whether the worker’s rights are affected by the common law doctrine that personal actions die with the person: *actio personalis moritur cum persona*. Legislation is paramount over the common law. However, where common law principles are not expressly affirmed or denied in a statute, the extent to which the common law is altered is left to implication.

The extent to which the maxim applies to compensation matters has long since been addressed. Both English cases on point have held that it does not apply to rights for workers’ compensation benefits: *Darlington v. Roscoe & Sons*, [1907] 1 K.B. 219 (C.A.) and *United Collieries Ltd. v. Simpson*, [1909] A.C. 383 (H.L.). The key Canadian case on point is *Retailer’s Trust Co. Ltd. v. Regush and Regush* (No. 2), [1958] 26 W.W.R. 381, a decision of the Saskatchewan Queen’s Bench. The court there held that the maxim *actio personalis moritur cum persona* does not apply to workers’ compensation claims because the right to compensation under the province’s *Workers Compensation Act* was a statutory right in the nature of a debt.

The panel finds the Saskatchewan judgement strongly persuasive and concludes that appeals respecting workers’ compensation benefits are not affected by the maxim. Moreover, it finds that regardless of whether the statutory right in question constitutes a debt, the maxim has no relevance to workers’ compensation claims because the right to compensation is vested by statute and the courts are very clear that the maxim does not apply to statutory rights.

Previous Review Board panels relied on the distinction between “in rem” and “in personam,” but in the panels’ opinion the distinction cannot assist in the resolution of the issue for two reasons: one, it is based on the common law doctrine that personal actions die with the party, and the maxim does not apply to workers’ compensation claims; and secondly, even if it were to be taken as having some applicability to such claims, the common law concept no longer has any application in British Columbia because survival of such rights has been abrogated by statute since 1934. Survival of such actions is now governed by ss. 66(2) and 66(4) of the *Estate Administration Act*.

Previous Review Board panels also addressed the applicability of the *nunc pro tunc* principle, a common law concept adopted in civil courts, to the standing of an estate to continue a Review Board appeal. Virtually all of the cases which permitted judgement to be entered *nunc pro tunc*, arose in the context of an application to the court for such an order. To date, only one tribunal, the Ontario Commercial Registration Appeal Tribunal in *Re Bilodeau*, [1994] O.C.R.A.T.D. No. 90, has found it has the power to make an order *nunc pro tunc* under its enabling statute. The British Columbia Labour Relations Board has suggested it as a possibility in another decision. The panel concurs with the two tribunals, and finds that the *nunc pro tunc* principle

applies to Review Board appeals in certain narrow circumstances: when the oral hearing has been held or the read and review distributed, the investigations have been completed, and all that remains is for the panel to make the decision and issue a finding. A tribunal's need to be expeditious and accessible demands such an application of this principle. Given the limited scope of its application, the panel finds that the principle does not apply in the circumstances of this case.

In conclusion, the panel finds that by virtue of the definition of "person" in the *Interpretation Act* and the word "includes" in the s. 1 definition of the term in the *Workers Compensation Act*, "person" in s. 90(1) includes the personal representative of the deceased worker. Hence, the right of the estate to commence and/or continue an appeal to the Review Board is authorized by s. 90(1), and the worker's widow, in her capacity as administrator or executrix of the estate, has standing to proceed with the appeal. In the event that the panel is wrong in this conclusion, it finds that the common law applies and that the worker's rights are not affected by the maxim *actio personalis moritur cum persona*. The panel therefore allows the appeal on the preliminary question of the Review Board's jurisdiction to decide an appeal commenced or continued by a deceased worker's estate. However, before the widow can act in her capacity as administrator or executrix for the purposes of this appeal, she must provide proof to the Review Board of her appointment as such, in the form of a grant of probate, letters of administration, letters of administration with will annexed, or in an alternative manner satisfactory to the Review Board.