

# REPORTER

## WORKERS' COMPENSATION REPORTER

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Index of Appeal Division Decisions  
Published in the Workers' Compensation Reporter  
Volumes 13(2) to 18(2)

published by the  
WORKERS' COMPENSATION BOARD  
Province of British Columbia



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- *Creation of workplaces that are safe and secure from injury and disease*
- *Successful rehabilitation and return to work of injured workers*
- *Fair compensation for workers suffering injury or illness on the job*
- *Sound financial management to ensure a viable W.C.B. system*
- *Protection of the public interest*

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For more information about the *Workers' Compensation Reporter*, please call Sheryl Wynne at 604 279-7594.  
The *Workers' Compensation Reporter* is colour-coded in the following way:

- Blue — Decisions of the Panel of Administrators
- Green — Appeal Division Decisions
- Pink — Miscellaneous
- Purple — Review Board Findings
- Orange — Court Decisions



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**List of Abbreviations****Appeal Division Decisions  
Volumes 13(2) to 18(2)**

Law	Abbreviation
Appeal Committee (Criminal Injuries)	app. comt.
Appeal Division	app. div.
Assessment Department	assmt. dept.
<i>Assessment Policy Manual</i>	APM
<i>Canadian Charter of Rights and Freedoms</i>	Charter
Compensation Services Division	comp. div.
<i>Criminal Injury Compensation Act</i> , R.S.B.C. 1979, c. 83	CICA (1979)
<i>Criminal Injury Compensation Act</i> , R.S.B.C. 1996, c. 85	CICA (1996)
<i>Government Employees Compensation Act</i> , R.S.C. 1985, c. G-5	GECA
Industrial Health and Safety Regulations, B.C. Reg. 585/77	IHSR
Occupational Health and Safety Regulation, B.C. Reg. 296/97 (effective Apr. 15, 1998), amended by B.C. Reg. 185/99 (effective Oct. 1, 1999) and B.C. Reg. 253/2001 (effective Jan. 28, 2002)	OHS Reg.
Prevention Division	prev. div.

<b>Law</b>	<b>Abbreviation</b>
<i>Prevention Division Policy and Procedure Manual</i>	<i>PDPPM</i>
<i>Prevention Manual</i>	<i>PM</i>
<i>Rehabilitation Services and Claims Manual</i>	<i>RSCM</i>
Review Board	rev. brd.
<i>Workmen's Compensation Act, R.S.B.C. 1949, c. 370</i>	<i>WCA (1949)</i>
<i>Workers Compensation Act, S.B.C. 1968, c. 59</i>	<i>WCA (1968)</i>
<i>Workers Compensation Act, R.S.B.C. 1979, c. 437</i>	<i>WCA (1979)</i>
<i>Workers Compensation Act, R.S.B.C. 1996, c. 492</i>	<i>WCA (1996)</i>
<i>Workers Compensation Amendment Act, S.B.C. 1994, c. 24</i>	<i>WCAA (1994)</i>
<i>Workers Compensation (Occupational Health and Safety) Amendment Act, 1998, S.B.C. 1998, c. 50</i>	<i>WCAA (1998)</i>

<b>Non-abbreviated Law</b>
<i>Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3</i>
<i>Canada Labour Code, R.S.C. 1985, c. L-2</i>
<i>Criminal Code, R.S.C. 1985, c. C-46</i>
<i>Human Rights Code, R.S.B.C. 1996, c. 210</i>
<i>Motor Vehicle Act, R.S.B.C. 1979, c. 288</i>

**Keyword Guide****Appeal Division Decisions  
Volumes 13(2) to 18(2)**

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**Absence of policy**

- Reopened claims (absence of policy) (causation)

**Access**

- Medical Review Panels (access) (medical decision)

**Accident presumption**

- Personal injury (arising out of and in the course of employment) (accident presumption)

**Adequacy of reasons**

- Adequacy of reasons (practice and procedure) (appeals)
- Reconsideration, Appeal Division (adequacy of reasons) (relief of costs)

**Administrative penalties – see Sanctions****Advocates – see Fees and expenses, lawyers****Age 50**

- Widows and widowers (age 50) (*Charter of Rights and Freedoms*)

**Aggravation**

- Personal injury (aggravation) (diabetes)
- Pre-existing condition (aggravation) (nature of work activities)

**Appeal Division**

- Appeal Division (application for stay) (occupational health and safety)
- Appeal Division (practice and procedure) (appeals)
- Appeal Division (practice and procedure) (assessment appeals)
- Appeal Division (practice and procedure) (authorized representative)
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- Appeal Division (standard of review) (relief of costs)
- Appeal Division (practice and procedure) (taping hearing)
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#### **Appeal Division, jurisdiction**

- Reimbursement of expenses (Review Board) (Appeal Division, jurisdiction)

#### **Appealable decision**

- Appealable decision (Review Board) (Appeal Division)

#### **Appeals**

- Adequacy of reasons (practice and procedure) (appeals)
- Appeal Division (practice and procedure) (appeals)

#### **Appeals from Review Board findings**

- Medical Review Panels (medical decision, treatment) (appeals from Review Board findings)
- Reconsideration, Appeal Division (jurisdiction) (appeals from Review Board findings)

#### **Application for compensation**

- Application for compensation (occupational disease) (application made out of time)
- Application for compensation (occupational disease) (special circumstances)
- Application for compensation (occupational disease, silicosis) (referrals of Review Board findings)

#### **Application for stay**

- Appeal Division (application for stay) (occupational health and safety)

#### **Application made out of time**

- Application for compensation (occupational disease) (application made out of time)

#### **Apprehension of bias – see Bias**

#### **Arising out of and in the course of employment**

- Employment-related dispute (assaults) (arising out of and in the course of employment)
- Horseplay (arising out of and in the course of employment) (substantial deviation from employment)
- Personal injury (arising out of and in the course of employment) (accident presumption)
- Personal injury (arising out of and in the course of employment) (hazard, personal property)

- Personal injury (arising out of and in the course of employment) (hernia)
- Personal injury (arising out of and in the course of employment) (interpretation of policy)
- Personal injury (arising out of and in the course of employment) (recreational, exercise or sports activities)
- Personal injury (arising out of and in the course of employment) (stress)
- Personal injury (arising out of and in the course of employment) (vaccination)
- Personal injury (travelling to and from work) (arising out of and in the course of employment)
- Section 11 determination (arising out of and in the course of employment) (conduct of employer)

#### **Assaults**

- Employment-related dispute (assaults) (arising out of and in the course of employment)

#### **Assessable payroll**

- Assessments (assessable payroll) (directors' fees)
- Assessments (assessable payroll) (employee share purchase plan contributions)
- Assessments (assessable payroll) (sick leave)

#### **Assessment appeals**

- Appeal Division (practice and procedure) (assessment appeals)

#### **Assessments**

- Assessments (assessable payroll) (directors' fees)
- Assessments (assessable payroll) (employee share purchase plan contributions)
- Assessments (assessable payroll) (sick leave)

#### **Authorized representative**

- Appeal Division (practice and procedure) (authorized representative)
- Authorized representative (bankrupt employer) (standing)

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- Average earnings (fringe benefits) (referrals of Review Board findings)

#### **Bankrupt employer**

- Authorized representative (bankrupt employer) (standing)

#### **Bias**

- Bias (procedural fairness) (occupational health and safety)
- Bias (transfer of costs) (natural justice)
- Relief of costs (practice and procedure) (bias)

#### **Board error**

- Extension of time, Appeal Division (relief of costs) (Board error)

#### **Bystander**

- Criminal injuries (bystander) (nervous shock)

#### **Calculation, method of**

- Permanent disability awards (wage rate) (calculation, method of)

#### **Cancer, non-Hodgkin's lymphoma**

- Occupational disease (causation) (cancer, non-Hodgkin's lymphoma)

#### **Causation**

- Occupational disease (causation) (cancer, non-Hodgkin's lymphoma)
- Reopened claims (absence of policy) (causation)
- Section 11 determination (negligence, medical) (causation)
- *See also* Causative significance

### **Causative significance**

- Occupational disease (causative significance) (*de minimis*)
- Occupational disease (infectious diseases) (causative significance)

### **Certification to court – see Section 11 determination**

### **Charter of Rights and Freedoms**

- *Charter of Rights and Freedoms* (retrospective application) (referrals of Review Board findings)
- Criminal injuries (*Charter of Rights and Freedoms*) (retrospective application)
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- Widows and widowers (*Charter of Rights and Freedoms*) (dependant children)

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### **Claims appeals**

- Appeal Division (practice and procedure) (claims appeals)

### **Code of conduct**

- Appeal Division (practice and procedure) (code of conduct)

### **Compensable injury**

- Expert evidence (medical opinion, difference of) (compensable injury)

### **Compensation**

- Criminal injuries (compensation) (non-pecuniary loss)

### **Conduct of appeals**

- Appeal Division (practice and procedure) (conduct of appeals)

### **Conduct of employer**

- Section 11 determination (arising out of and in the course of employment) (conduct of employer)

### **Consent**

- Criminal injuries (victim of crime) (consent)

### **Consolidation**

- Appeal Division (practice and procedure) (consolidation)

### **Contact with appeal commissioners**

- Appeal Division (practice and procedure) (contact with appeal commissioners)

### **Continuity of income benefits**

- Vocational rehabilitation (continuity of income benefits) (permanent disability awards)

### **Corporate veil**

- Workers under the Act (principal of unregistered firm) (corporate veil)

### **Correctness**

- Referrals of Review Board findings (standard of review) (correctness)

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### **Credibility**

- Reconsideration, Appeal Division (jurisdictional error) (credibility)

### **Criminal injuries**

- Appeal Division (practice and procedure) (criminal injuries)
- Criminal injuries (bystander) (nervous shock)
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- Criminal injuries (compensation) (non-pecuniary loss)
- Criminal injuries (non-pecuniary loss) (immediate family member)

- Criminal injuries (victim of crime) (consent)
- Criminal injuries (victim of crime) (evidence)
- Criminal injuries (victim of crime) (motor vehicle exclusion)
- Criminal injuries (victim of crime) (sexual exploitation of young person)

#### **Cross-examination**

- Natural justice (cross-examination) (expert evidence)

#### **Date of injury**

- Wage loss benefits (date of injury) (referrals of Review Board findings)

#### **De minimis**

- Occupational disease (causative significance) (*de minimis*)

#### **Death benefits, reinstatement of**

- Widows and widowers (death benefits, reinstatement of) (Review Board, jurisdiction)

#### **Decisions**

- Appeal Division (practice and procedure) (decisions)

#### **Defamation**

- Section 11 determination (jurisdiction) (defamation)

#### **Degenerative disc disease**

- Occupational disease (whole body vibration) (degenerative disc disease)

#### **Delay**

- Transfer of costs (discretion) (delay)

#### **Delegation by acting chief appeal commissioner**

- Appeal Division (practice and procedure) (delegation by acting chief appeal commissioner)

#### **Delegation by chief appeal commissioner**

- Appeal Division (practice and procedure) (delegation by chief appeal commissioner)

#### **Dependant children**

- Widows and widowers (*Charter of Rights and Freedoms*) (dependant children)

#### **Diabetes**

- Personal injury (aggravation) (diabetes)

#### **Directors' fees**

- Assessments (assessable payroll) (directors' fees)

#### **Discretion**

- Failure to report (injury report to employer, delay) (discretion)
- Transfer of costs (discretion) (delay)

#### **Discrimination –**

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#### **Discriminatory action**

- Occupational health and safety (discriminatory action) (refusal to perform unsafe work)
- Occupational health and safety (discriminatory action) (reverse onus)

#### **Due diligence**

- Occupational health and safety (sanctions) (due diligence)

#### **Due to the nature of employment – *see* Causation**

#### **Duty of care**

- Transfer of costs (duty of care) (obligation of general contractor)
- Transfer of costs (subcontractors) (duty of care)

### **Employee share purchase plan contributions**

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- Relief of costs (pre-existing condition) (enhancement of disability)

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- Review Board (standing) (estate of worker)

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- Referrals of Review Board findings (personal optional protection) (estoppel)

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### **Failure to consider issue**

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- Occupational health and safety (jurisdiction) (federally regulated undertaking)

### **Fees and expenses, lawyers**

- Fees and expenses, lawyers (referrals of Review Board findings)
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- Occupational health and safety (sanctions) (guidelines)

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- Appeal Division (practice and procedure) (hallmarks of decision making)

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**Hazard, personal property**

- Personal injury (arising out of and in the course of employment) (hazard, personal property)

**Hearing loss**

- Occupational disease (hearing loss) (Robinson's tables)
- Permanent disability awards (hearing loss) (tinnitus)

**Hernia**

- Personal injury (arising out of and in the course of employment) (hernia)

**Horseplay**

- Horseplay (arising out of and in the course of employment) (substantial deviation from employment)

**Immediate family member**

- Criminal injuries (non-pecuniary loss) (immediate family member)

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- Implementation of Review Board findings (vocational rehabilitation) (waiver)

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- Workers under the Act (independent contractor) (personal optional protection)

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- Nature of employment relationship (workers under the Act) (independent operator)

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- Occupational disease (infectious diseases) (causative significance)

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- Vocational rehabilitation (retroactive benefits) (interest)

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- Interpretation of Act (foster parent, benefits)
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- Occupational health and safety (sanctions) (interpretation of policy)
- Personal injury (arising out of and in the course of employment) (interpretation of policy)

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- Personal optional protection (procedural fairness) (legitimate expectations)

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- Permanent disability awards (loss of function/physical impairment) (retired worker)

### **Loss of function/physical impairment, assessment**

- Permanent disability awards (loss of function/physical impairment, assessment) (published policy)

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- Medical Review Panels (access) (medical decision)

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- Medical Review Panels (medical decision, treatment) (appeals from Review Board findings)

### **Medical opinion, difference of**

- Expert evidence (medical opinion, difference of) (compensable injury)

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- Medical Review Panels (access) (medical decision)
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- Referrals of Review Board findings (personal optional protection) (minimum compensation)

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### **Nature of work activities**

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### **Negligence, medical**

- Section 11 determination (negligence, medical) (causation)

### **Nervous shock**

- Criminal injuries (bystander) (nervous shock)

### **Non-pecuniary loss**

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- Personal injury (travelling employees) (nursing, home visitation)

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- Application for compensation (occupational disease) (special circumstances)
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- Occupational disease (causative significance) (*de minimis*)
- Occupational disease (hearing loss) (Robinson's tables)
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- Permanent disability awards (occupationally-induced allergies/sensitivities) (projected loss of earnings)
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### **Oral hearings**

- Appeal Division (practice and procedure) (oral hearings)

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- Reconsideration, Appeal Division (patently unreasonable) (interpretation of Act)
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### **Payment for statutory holiday**

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### **Permanent disability awards**

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- Personal injury (aggravation) (diabetes)
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- Personal injury (arising out of and in the course of employment) (hazard, personal property)
- Personal injury (arising out of and in the course of employment) (hernia)
- Personal injury (arising out of and in the course of employment) (recreational, exercise or sports activities)
- Personal injury (arising out of and in the course of employment) (stress)
- Personal injury (arising out of and in the course of employment) (vaccination)
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- Reconsideration, Appeal Division (retroactive benefits) (vocational rehabilitation)
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### **Recreational, exercise or sports activities**

- Personal injury (arising out of and in the course of employment) (recreational, exercise or sports activities)

### **Recurrent disability**

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### **Referrals of Review Board findings**

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- Average earnings (fringe benefits) (referrals of Review Board findings)
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- Fees and expenses, lawyers (referrals of Review Board findings)
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### **Refusal to perform unsafe work**

- Occupational health and safety (discriminatory action) (refusal to perform unsafe work)

### **Reimbursement of expenses**

- Reimbursement of expenses (fees and expenses, lawyers) (reconsideration, Appeal Division)
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- Reconsideration, Appeal Division (adequacy of reasons) (relief of costs)
- Relief of costs (pre-existing condition)
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- Reopened claims (absence of policy) (causation)

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- Permanent disability awards (loss of function/physical impairment) (retired worker)
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- Reconsideration, Appeal Division (retroactive benefits) (vocational rehabilitation)
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- *Charter of Rights and Freedoms* (retrospective application) (referrals of Review Board findings)
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### **Reverse onus**

- Occupational health and safety (discriminatory action) (reverse onus)

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- Widows and widowers (death benefits, reinstatement of) (Review Board, jurisdiction)

### **Robinson's tables**

- Occupational disease (hearing loss) (Robinson's tables)

### **Sanctions**

- Occupational health and safety (sanctions) (due diligence)
- Occupational health and safety (sanctions) (guidelines)
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- Occupational health and safety (sanctions) (*res judicata*)
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### **Section 11 determination**

- Appeal Division (practice and procedure) (section 11 determination)
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- Criminal injuries (victim of crime) (sexual exploitation of young person)

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- Assessments (assessable payroll) (sick leave)
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- Application for compensation (occupational disease) (special circumstances)

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- Appeal Division (standard of review) (relief of costs)
- Permanent disability awards (lawfulness of policy) (standard of review)
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### **Standing**

- Appeal Division (practice and procedure) (standing)

- Authorized representative (bankrupt employer) (standing)
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- Personal injury (arising out of and in the course of employment) (stress)

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- Occupational health and safety (sanctions) (subcontractors)
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- Wage loss benefits (proportionate entitlement) (subjective complaints)

### **Substantial deviation from employment**

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- Appeal Division (practice and procedure) (taping hearing)

### **Temporary total disability**

- Temporary total disability (wage loss benefits) (referrals of Review Board findings)

### **Time limits for applications – see Application made out of time**

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**Law:** WCA (1996): s. 39(1)(e), s. 90(3), s. 96(6), s. 96(6.1).

**Decisions:** Norton Tool v. Tewson, [1973] 1 W.L.R. 45 (N.I.R.C.); Northwestern Utilities Ltd. and the Public Utilities Board of the Province of Alberta v. The City of Edmonton, [1979] 1 S.C.R. 684; Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311; Re R.D.R. Construction Ltd. and Rent Review Commission (1982), 139 D.L.R. (3d) 168 (N.S.C.A.); D&H Holdings v. City of Vancouver (1985), 15 Admin. L.R. 209 (B.C.S.C.); Re Pacific Western Airlines (1985), 9 Admin. L.R. 109 (C.T.C.R.C.); Kindler v. Canada (Minister of Justice), [1987] 2 F.C. 145 (F.C.T.D.); Rainbow v. School District No. 23 (Central Okanagan) (1990), 45 Admin. L.R. 273 (B.C.C.A.).

*Requirement for Reasons in Decision by Board Officer* [employer appeal (comp. div.)]  
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15 *Workers' Compensation Reporter* 591

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**Law:** WCA (1996): s. 210(1).

**Decisions:** Appeal Division Decision No. 27, 15 *Workers' Compensation Reporter* 701.

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17 *Workers' Compensation Reporter* 297

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**Law:** WCA (1996): s. 210(1).

**Decisions:** Appeal Division Decision No. 27,  
*15 Workers' Compensation Reporter* 701.

*Stay Application – Occupational Health and  
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**Law:** WCA (1996): s. 91(1), s. 96(6), s. 96(6.1).

*Appeal Division Practice and Procedure Decision*  
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*17 Workers' Compensation Reporter*

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**Law:** WCA (1996): s. 85.1, s. 96(6), s. 96(6.1).

**Policy:** APM: #10:40:00.

*Appeal Division Practice and Procedure Decision*  
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*Appeal Division Decision No. 33*

*17 Workers' Compensation Reporter*

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**Law:** WCA (1996): s. 85.1.

*Appeal Division Practice and Procedure Decision*  
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*Appeal Division Decision No. 33*

*17 Workers' Compensation Reporter*

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**Law:** WCA (1996): s. 58(5), s. 91(1), s. 91(2),  
s. 91(3), s. 95, s. 95(1.1), s. 96(2).

**Policy:** Decision No. 75, *10 Workers'*  
*Compensation Reporter* 753; RSCM: #99.30.

**Decisions:** Appeal Division Decision No. 12,  
*10 Workers' Compensation Reporter* 365.

*Appeal Division Practice and Procedure Decision*  
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15 *Workers' Compensation Reporter* 113

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**Law:** WCA (1996): s. 85(4).

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17 *Workers' Compensation Reporter*

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**Law:** WCA (1996): s. 85.1.

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15 *Workers' Compensation Reporter* 107

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**Law:** WCA (1996): s. 85.1.

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17 *Workers' Compensation Reporter*

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**Law:** WCA (1996): s. 85(7).

*Appeal Division Practice and Procedure Decision*  
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17 *Workers' Compensation Reporter*

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17 *Workers’ Compensation Reporter*

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**Law:** WCA (1996): s. 85.1.

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Delegation by acting chief appeal commissioner of certain powers and duties to appeal commissioners – Chief appeal commissioner to share powers concurrently, except in case of possible or actual conflict of interest, appearance of bias, or absence – Delegation effective August 3, 1999 until earlier of the termination of appointment as acting chief appeal commissioner or express

replacement of this decision – Delegation replaces those contained in Appeal Division Decision No. 23.

**Law:** WCA (1996): s. 85(8), s. 91(1), 96.1(3), s. 96(6); CICA (1996): s. 23(3).

**Decisions:** Appeal Division Decision No. 8, 8 *Workers’ Compensation Reporter* 331; Appeal Division Decision No. 23, 15 *Workers’ Compensation Reporter* 105; Appeal Division Decision No. 93-0740, 10 *Workers’ Compensation Reporter* 127.

*Delegation by the Acting Chief Appeal Commissioner* [practice and procedure]  
*Appeal Division Decision No. 26*

16 *Workers’ Compensation Reporter* 217

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**Law:** WCA (1996): s. 85(8), s. 91(1), s. 96(6), s. 96.1(3); CICA (1996): s. 23(3).

**Decisions:** Appeal Division Decision No. 8, 8 *Workers’ Compensation Reporter* 331; Appeal Division Decision No. 93-0740, 10 *Workers’ Compensation Reporter* 127.

*Delegation by Chief Appeal Commissioner*  
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15 *Workers’ Compensation Reporter* 105

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**Law:** WCA (1996): s. 96.1(3); CICA (1996): s. 23(3).

**Decisions:** Appeal Division Decision No. 23, 15 *Workers' Compensation Reporter* 105.

*Delegation by the Chief Appeal Commissioner*  
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16 *Workers' Compensation Reporter* 215

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**Law:** WCA (1996): s. 85(7)(b), s. 85(7)(c), s. 85(8), s. 85.2, s. 91(3), s. 96.1(3); CICA (1996): s. 22(5), s. 23(3).

**Decisions:** Appeal Division Decision No. 8, 8 *Workers' Compensation Reporter* 331; Appeal Division Decision No. 30; Appeal Division Decision No. 93-0740, 10 *Workers' Compensation Reporter* 127.

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16 *Workers' Compensation Reporter* 371

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**Law:** WCA (1996): s. 10(8), s. 47(2), s. 73, s. 96(6), s. 96(6.1), s. 96(7).

**Policy:** Decision No. 75, 10 *Workers' Compensation Reporter* 753.

*Appeal Division Practice and Procedure Decision*  
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17 *Workers' Compensation Reporter*

**APPEAL DIVISION (PRACTICE AND PROCEDURE) (EXPERT EVIDENCE)** – Decision of the chief appeal commissioner consolidating all previous practice and procedure decisions, directives and information sheets issued by the Appeal Division since 1991 – Section 8 “Expert Evidence” – Definition of expert – Oral hearings and written submissions – Costs related to expert witnesses – Rules for expert evidence.

**Policy:** RSCM: #100.60.

*Appeal Division Practice and Procedure Decision*  
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17 *Workers' Compensation Reporter*

**APPEAL DIVISION (PRACTICE AND PROCEDURE) (HALLMARKS OF DECISION MAKING)** – Hallmarks of quality decisions intended to guide appeal commissioners as they seek to maintain the highest quality of decisions – Clear identification of issues at outset – Identification of relevant findings of fact – Identification of facts on which conclusion is based where there is conflicting relevant evidence – Response to relevant submissions and arguments – Identification and application of appropriate law and policy – Use of plain language where possible and use of technical and legal terminology in a manner consistent with other decisions – Clear reasoning leading to logical conclusion and resolution of the issues.

*Hallmarks of Quality Decisions* [app. div. publication]

15 *Workers' Compensation Reporter* 111

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**Law:** WCA (1996): s. 10(8), s. 11, s. 47(2), s. 90, s. 91, s. 96(4), s. 96(6), s. 96(6.1), s. 96(6)(c), s. 151, s. 152, s. 153, s. 195, s. 196, s. 196(2), s. 207; CICA (1996): s. 22.

*Appeal Division Practice and Procedure Decision* [practice and procedure]  
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17 *Workers' Compensation Reporter*

**APPEAL DIVISION (PRACTICE AND PROCEDURE) (OCCUPATIONAL HEALTH AND SAFETY)** – Bill 14, *Workers Compensation (Occupational Health and Safety) Amendment Act*, effective October 1, 1999 – Decision of the acting chief appeal commissioner concerning Appeal Division practice and procedure on occupational health and safety matters – Topics include: jurisdiction of Appeal Division, hearing panels, appeal applications, appeal process, conduct of appeals, decisions, and transitional provisions.

**Law:** WCA (1996): s. 100, s. 207, s. 208, s. 209(1), s. 209(2), s. 210, s. 211(2), s. 211(4), s. 212(1), s. 212(2), s. 212(3).

**Policy:** RSCM: #100.00–100.73.

**Decisions:** Appeal Division Decision No. 6, 8 *Workers' Compensation Reporter* 245.

*Appeal Practice and Procedure – Occupational Health and Safety Matters* [practice and procedure]  
*Appeal Division Decision No. 27*

15 *Workers' Compensation Reporter* 701

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**Law:** WCA (1996): s. 100, s. 207, s. 208, s. 209(1), s. 210, s. 211(2), s. 212, s. 221.

**Policy:** RSCM: #100.00–100.73.

*Appeal Division Practice and Procedure Decision* [practice and procedure]  
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17 *Workers' Compensation Reporter*

**APPEAL DIVISION (PRACTICE AND PROCEDURE) (ORAL HEARINGS) –**

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**Law:** WCA (1996): s. 91(3), s. 96(6), s. 96(6.1).

*Appeal Division Practice and Procedure Decision*  
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*Appeal Division Practice and Procedure Decision*  
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*17 Workers’ Compensation Reporter*

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the Appeal Division since 1991 – Section 10 “Board Policy” – Appeal Division not bound to follow legal precedent – If disputed possibilities evenly balanced, resolve in favour of worker – Appeal Division cannot create new policy – Paramourncy in conflicts.

**Law:** WCA (1996): s. 99.

**Policy:** Decision No. 75, *10 Workers’ Compensation Reporter* 753; Decision No. 86, *1 Workers’ Compensation Reporter* 781.

*Appeal Division Practice and Procedure Decision*  
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*Appeal Division Decision No. 33*

*17 Workers’ Compensation Reporter*

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**Law:** WCA (1996): s. 85.1.

*Public Access to Appeal Division Decisions*  
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*16 Workers’ Compensation Reporter* 219

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**Law:** WCA (1996): s. 96.1, s. 96.1(2), s. 96.1(3), s. 96(2), s. 211(4); CICA (1996): s. 22.

**Policy:** Decision No. 75, 10 *Workers’ Compensation Reporter* 753.

**Decisions:** Appeal Division Decision No. 93-0166/0182, 9 *Workers’ Compensation Reporter* 351; Appeal Division Decision No. 00-0796; Appeal Division Decision No. 91-0724, 7 *Workers’ Compensation Reporter* 145; Appeal Division Decision No. 92-0818, 8 *Workers’ Compensation Reporter* 21.

*Appeal Division Practice and Procedure Decision*  
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*Appeal Division Decision No. 33*

17 *Workers’ Compensation Reporter*

**APPEAL DIVISION (PRACTICE AND PROCEDURE) (RELIEF OF COSTS)** – Decision of the chief appeal commissioner consolidating all previous practice and procedure decisions, directives and information sheets issued by the Appeal Division since 1991 – Appendix “F” – Initiation of appeal – Worker’s participation in appeal or rehearing under s. 39 – Decision not to affect the worker’s entitlement – Appeals related to historical s. 39(1)(e) project – Necessity for reasons in decisions being appealed under s. 96(6) and s. 96(6.1).

**Law:** WCA (1996): s. 5(5), s. 39(1)(d), s. 39(1)(e), s. 96(6), s. 96(6)(a), s. 96(6.1), s. 96(7), s. 101.

**Policy:** RSCM: #102.27, #104.40, #114.30–#114.50, Decision No. 75, 10 *Workers’ Compensation Reporter* 753.

**Decisions:** Appeal Division Decision No. 97-0525.

*Appeal Division Practice and Procedure Decision*  
[practice and procedure]  
*Appeal Division Decision No. 33*

17 *Workers’ Compensation Reporter*

**APPEAL DIVISION (PRACTICE AND PROCEDURE) (RELIEF OF COSTS)** – Relief of costs denied but not appealed – Employer sent a form letter requesting a decision relative to all claim costs charged to the employer – Case manager enclosed the previous decision and stated that “there is no other reason to relieve costs” – Employer sought to appeal the response letter – Preliminary issue whether there was a valid appeal – Employer’s appeal denied as premature and not raising an appealable issue.

**Law:** WCA (1996): s. 39(1)(e).

**Decisions:** Appeal Division Decision No. 22, 13 *Workers’ Compensation Reporter* 95.

*Section 39(1)(e)* [employer appeal, s. 39(1)(e) (comp. div.)]  
*Appeal Division Decision No. 2000-2001*

17 *Workers’ Compensation Reporter* 317

**APPEAL DIVISION (PRACTICE AND PROCEDURE) (SECTION 11 DETERMINATION)** – Decision of the chief appeal commissioner consolidating all previous practice and procedure decisions, directives and information sheets issued by the Appeal Division since 1991 – Appendix “G” – s. 11 applications –

Standing of other persons adversely affected – Oral hearing – Prior decision by Board officer – Submissions – Use of existing WCB files – Scope of authority under s. 11 – Decisions – Effect of legal action – Related court decisions.

**Law:** WCA (1996): s. 10, s. 11, s. 85.2(6).

**Policy:** Governors' Decision No. 4, 7 *Workers' Compensation Reporter* 19.

*Appeal Division Practice and Procedure Decision* [practice and procedure]  
*Appeal Division Decision No. 33*

17 *Workers' Compensation Reporter*

**APPEAL DIVISION (PRACTICE AND PROCEDURE) (STANDING)** – Decision of the chief appeal commissioner consolidating all previous practice and procedure decisions, directives and information sheets issued by the Appeal Division since 1991 – Section 5 “Standing” – Standing of estate of deceased worker to appeal – De-registered employers – Individuals with personal optional coverage.

**Decisions:** Appeal Division Decision No. 95-0991, 11 *Workers' Compensation Reporter* 507.

*Appeal Division Practice and Procedure Decision* [practice and procedure]  
*Appeal Division Decision No. 33*

17 *Workers' Compensation Reporter*

**APPEAL DIVISION (PRACTICE AND PROCEDURE) (TAPING HEARING)** – Appeal Division panel denied request to tape oral hearing – Submission that refusal constituted breach of natural justice – Appeal Division has broad discretion as to its procedure – No breach of natural justice in the circumstances – Possibility of breach if party to appeal unable to hear proceedings.

**Policy:** Decision No. 1, 7 *Workers' Compensation Reporter* 7.

*Request to Tape Hearing* [s. 96(4) referral]  
*Appeal Division Decision No. 99-1232*

15 *Workers' Compensation Reporter* 647

**APPEAL DIVISION (STANDARD OF REVIEW) (RELIEF OF COSTS)** – Employer argued that worker's pre-existing depression prolonged the worker's recovery – Sought relief of costs after 13 weeks – Cost relief officer granted 25% relief of costs at 13 weeks – Appeal Division determined that “correctness” standard of review was appropriate on a s. 96(6) or 96(6.1) appeal – No persuasive reason to accord deference to the cost relief officer – No error of fact or law or contravention of policy on a correctness standard – Employer appeal denied.

**Law:** WCA (1996): s. 39(1)(e), s. 85(1), s. 96(6), s. 96(6.1).

**Policy:** Governors' Decisions: No. 2, 7 *Workers' Compensation Reporter* 13; No. 75, 10 *Workers' Compensation Reporter* 753.

**Decisions:** Appeal Division Decision No. 1, 7 *Workers' Compensation Reporter* 33; Appeal Division Decision No. 93-0915; Appeal Division Decision No. 99-0734; Appeal Division Decision No. 99-1350; Appeal Division Decision No. 99-1726/1727; Appeal Division Decision No. 2000-0668, 16 *Workers' Compensation Reporter* 287; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 248.

*Standard of Review on Relief of Costs Appeal* [employer appeal, s. 39(1)(e) (comp. div.)]  
*Appeal Division Decision No. 2001-0105*

17 *Workers' Compensation Reporter* 323

**APPEALABLE DECISION (REVIEW BOARD) (APPEAL DIVISION)** – Review Board permitted re-opening of worker’s claim and worker was paid wage loss benefits – Collective agreement required employer to “top up” wage loss benefits, but not rehabilitation benefits – Employer disputed nature of benefits awarded and appealed implementation decision to Review Board – Review Board denied the appeal on basis that employer had no right of appeal because implementation decision was not a decision “with respect to a worker” – Appeal Division panel found that it was and that it was properly before the Appeal Division.

**Law:** WCA (1996): s. 90(1).

**Policy:** RSCM: #102.27; Decision No. 70, 1 *Workers’ Compensation Reporter* 287.

*Whether Decision Appealable*  
[employer appeal (rev. brd.)]  
*Appeal Division Decision No. 98-0803*

15 *Workers’ Compensation Reporter* 85

**APPLICATION FOR COMPENSATION (OCCUPATIONAL DISEASE) (APPLICATION MADE OUT OF TIME)** – Worker’s widow inquired about entitlement to compensation 10 years after worker’s death from non-Hodgkin’s lymphoma – Whether claim barred under s. 55 of Act – s. 55(3.2) extends limitation period for filing application for death due to occupational disease where at time of death the Board had not previously recognized disease as occupational disease – three-year time limit begins when Board recognizes a disease as occupational disease – To date, non-Hodgkin’s lymphoma not recognized as occupational disease, therefore claim not barred.

**Law:** WCA (1996): s. 6, s. 55.

**Policy:** RSCM: #26.00, #26.01, #26.02, #26.03, #26.04, #26.22, #32.58, #93.22.

**Decisions:** Snell v. Farrell, [1990] 2 S.C.R. 311; Laferriere v. Lawson, [1991] 1 S.C.R. 541.

*Section 55 – Disease Not Recognized as an Occupational Disease*

[widow appeal (rev. brd.)]

*Appeal Division Decision No. 99-0783*

15 *Workers’ Compensation Reporter* 617

**APPLICATION FOR COMPENSATION (OCCUPATIONAL DISEASE) (SPECIAL CIRCUMSTANCES)** – 1994 amendments to s. 55 permit Board to pay compensation where advances in scientific and medical knowledge establish new linkages between occupational disease and process, trade or industry – Question of whether special circumstances precluded the filing of the application within the one-year time frame is not relevant to every claim for compensation for death or disablement from occupational disease – Nothing in wording of old or new s. 55 indicates that special circumstances which preclude filing of application on time must be related to work.

**Law:** WCA (1979), as amended by WCAA (1994): s. 55.

**Policy:** RSCM: #93.22.

*Application of Section 55*  
[reconsideration (app. div.)]  
*Appeal Division Decision No. 97-0050*

14 *Workers’ Compensation Reporter* 23

**APPLICATION FOR COMPENSATION (OCCUPATIONAL DISEASE, SILICOSIS) (REFERRALS OF REVIEW BOARD FINDINGS)** – In 1997, worker applied for compensation for silicosis – Pension granted, effective the date of application – Worker appealed – Appeal allowed in part – Review Board relied on medical evidence that the worker was symptomatic in 1994 and adjusted the effective pension date – Worker appealed amount of functional pension – Matter referred by the president to the Appeal Division under s. 96(4) – Claim not

filed within three years of medical disablement – When an application for compensation is not filed in time there can be a difference between the date of medical disablement and the date when compensation is effective – Review Board erred in law by not applying s. 55 of the Act and contravened policy by applying policy #29.42 for a purpose it was not intended.

**Law:** WCA (1996): s. 6(8), s. 23(1), s. 55(3.1), s. 91(1), s. 96(4).

**Policy:** RSCM: #29.42.

*Section 96(4) – Referral [s. 96(4) referral]  
Permanent Disability Award – Impairment  
Percentage [worker appeal (rev. brd.)]  
Appeal Division Decision No. 2001-1285/1286*

*17 Workers' Compensation Reporter 583*

**APPLICATION OF BOARD POLICY  
(INTEREST) (CONTRAVENTION OF ACT)**  
– Review Board found Manual policy #50.00, allowing Board to pay interest on retroactive payments, to contravene s. 92(3) of the Act – s. 92(3) does not limit Board's discretion to award interest to situations where compensation has been withheld by reason of an appeal or referral to the Appeal Division – Policy contained in #50.00 existed when s. 92(3) was enacted – Lack of clear statutory language circumscribing power to pay interest, and comments in legislature to opposite effect, suggest that s. 92(3) was enacted on the understanding that the policy existed – s. 92(3) recognizes Board's authority to award interest in a number of situations on a discretionary basis, while creating a statutory obligation to pay interest in one specific situation.

**Law:** WCA (1979): s. 92(3), s. 96(7).

**Policy:** RSCM: #50.00.

**Decisions:** Appeal Division Decision No. 96-0627; Decision No. 206A 9 W.C.A.T.R. 4; Thibodeau v. Quebec (1988), 21 Q.A.C. 203; Bell Canada v. Canada (CRTC) (1989),

38 Admin L.R. 1 (S.C.C.); Zaidan Group Ltd. v. London (City) (1990), 64 D.L.R. (4th) 514 (Ont. C.A.).

*Authority to Award Interest [s. 96(4) referral]  
Appeal Division Decision No. 97-0857*

*13 Workers' Compensation Reporter 443*

**ASSESSMENTS (ASSESSABLE PAYROLL)  
(DIRECTORS' FEES)** – Employer appealed decision that directors' fees paid to directors of private companies are assessable – Definition of "worker" under Act sufficiently broad to include director of company – Concept of payroll in s. 39(1) of Act sufficiently broad to include directors' fees – While risk of injury low, director entitled to benefits if injury arose out of employment as director – That fees are high relative to work performed does not make them not assessable.

**Law:** WCA (1996): s. 1, s. 39(1), s. 82, s. 83.1, s. 96(1)(j), s. 96(6), s. 96(6.1).

**Policy:** APM: #40:10:10, #40:10:30.

*Fees Paid to Directors of Private Companies –  
Assessable Payroll [employer appeal  
(assmt. dept.)]  
Appeal Division Decision No. 98-1877*

*15 Workers' Compensation Reporter 255*

**ASSESSMENTS (ASSESSABLE PAYROLL)  
(EMPLOYEE SHARE PURCHASE PLAN  
CONTRIBUTIONS)** – Employer appeal of decision to include employer's employee share purchase plan (E.S.P.P.) contributions in employer's assessable payroll – ss. 36 and 39 would allow the Board to levy assessments on an employer's E.S.P.P. contributions – However, Board policy restricts assessments to assessments on payroll – In this case, E.S.P.P. contributions are not in the nature of "earnings" or a payment for service – Director erred in fact and policy in including the employer's contributions – Employer appeal allowed.

**Law:** WCA (1996): s. 36, s. 39(1), s. 96(6).

**Policy:** APM: 40:10:10.

**Decisions:** Appeal Division Decision No. 97-0870, 14 *Workers' Compensation Reporter* 263; Appeal Division Decision No. 99-1787; Appeal Division Decision No. 00-0225.

*Assessable Payroll* [employer appeal (assmt. dept.)]

*Appeal Division Decision No. 00-1457*

16 *Workers' Compensation Reporter* 333

**ASSESSMENTS (ASSESSABLE PAYROLL) (SICK LEAVE)** – Request for reconsideration of Appeal Division decision upholding Board decision to include in assessable payroll a worker's sick leave payments — Board has broad discretion to devise assessment system “in a manner . . . it considers proper” – Decision consistent with Act and policies.

**Law:** WCA (1979): s. 39(1).

**Policy:** APM: #40:10:10; RSCM: #66.11.

*Sick Leave Payments as Assessable Payroll* [reconsideration (app. div.)]

*Appeal Division Decision No. 97-0233*

14 *Workers' Compensation Reporter* 47

**ASSESSMENTS (ASSESSABLE PAYROLL) (SICK LEAVE)** – Employer appealed decision to include sick leave payments in assessable payroll – s. 39 gives Board broad discretion to assess employers – Act provides insurance system for benefit of both workers and employers – Nothing in Act requires assessment be based on monies paid during time where worker at risk of compensable injury – Term “payroll” broad and can include sick leave payments – Right to sick leave is a pecuniary benefit bargained for between parties.

**Law:** WCA (1996): s. 39(1).

**Policy:** APM: #40:10:10; RSCM: #66.11.

*Sick Leave Payments as Assessable Payroll* [employer appeal (assmt. dept.)]

*Appeal Division Decision No. 97-0870*

14 *Workers' Compensation Reporter* 263

**ASSESSMENTS (MULTIPLE CLASSIFICATIONS) (INTERPRETATION OF POLICY)** – Appellant was contractor for bridge construction project – Assigned to building construction subclass – Assessment Department added bridge construction subclass to appellant's account – Separate classification requires operation to be “separate and distinct” from firm's primary industry – Policy #30:20:20 lists three conditions that must be met for multiple classification – Third condition that operation must generate 25% of firm's revenue is discretionary based on factors in addition to revenue – Third condition not met – Subclassification of bridge construction removed.

**Law:** WCA (1979): s. 1.

**Policy:** APM: #20:10:30, #30:20:10, #30:20:20; Decision No. 229, 3 *Workers' Compensation Reporter* 75.

*Multiple Classification* [employer appeal (assmt. dept.)]

*Appeal Division Decision No. 96-1900*

13 *Workers' Compensation Reporter* 549

**AUTHORIZED REPRESENTATIVE (BANKRUPT EMPLOYER) (STANDING)** – Whether consultant authorized to pursue appeal on behalf of bankrupt employer – Employer denied relief under s. 39(1)(e) – Authorization relied upon by consultant in excess of five years old – Consultant objected to request for new authorization – Consultant's authority to pursue an appeal arises out of agency relationship with

employer – Bankruptcy renders authorization invalid – Right to pursue appeal vests in the trustee.

**Law:** WCA (1996): s. 39(1)(e), s. 96(6); *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3: s. 71(2).

**Decisions:** In the Matter of the Bankruptcy of Robert Davis McNeill (1996), 39 C.B.R. (3d) 290 (B.C.S.C.).

*Section 39(1)(e) – Standing to Appeal* [employer appeal, s. 39(1)(e) (comp. div.)] *Appeal Division Decision No. 00-1967*

16 *Workers' Compensation Reporter* 365

#### **AVERAGE EARNINGS (FRINGE BENEFITS) (REFERRALS OF REVIEW BOARD FINDINGS)**

– Review Board included certain taxable benefits in worker's average earnings – Finding contravened policy which excluded fringe benefits from average earnings – Policy does not contravene s. 33(1) of the Act – In accordance with policy, amounts related to medical insurance and insurance excluded – In accordance with president's request, matter of inclusion of share purchase plan referred back to case manager for investigation and determination pursuant to s. 96(2) of the Act.

**Law:** WCA (1996): s. 33(1), s. 91(2), s. 96(2), s. 96(4), s. 96(5).

**Policy:** RSCM: #67.20, #67.21, #71.20, #102.50, #105.30.

*Section 96(4) – Inclusion of Taxable Benefits in Average Earnings* [s. 96(4) referral] *Appeal Division Decision No. 00-1155*

16 *Workers' Compensation Reporter* 185

#### **BIAS (PROCEDURAL FAIRNESS) (OCCUPATIONAL HEALTH AND SAFETY)**

– Corporation appealed administrative penalty and re-classification – Procedural unfairness flowing from failure of hearing officer to disclose information obtained during verbal communications with assessment officer – Information related to the Corporation's defences before the hearing officer – Reasonable apprehension of bias arising from conduct of occupational safety officer, hearing officer and assessment officer – Applied *Baker* five-part test – Overall circumstances suggested a lack of impartiality on part of the Board – Board decisions tainted by bias – Decision on re-classification to be re-determined by new decision-maker – Administrative penalty cancelled.

**Law:** WCA (1996): s. 96(6), s. 107, s. 196(6), s. 212.

**Policy:** PM: D12-196-5; APM: #20:30:31, #30:20:20.

**Decisions:** *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 (deGrandpré, J. dissent); *Kane v. University of British Columbia*, [1980] S.C.R. 1105; *Sivarguru v. Canada*, [1992] 2 F.C. 374 (F.C.A.); *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623; *Baker v. Minister of Citizenship and Immigration*, [1999] 2 S.C.R. 817.

*Appeal of Administrative Penalty and Re-classification* [employer appeal, assmt. dept./prev. div.] *Appeal Division Decision No. 2001-0934/0935*

17 *Workers' Compensation Reporter* 383

**BIAS (TRANSFER OF COSTS) (NATURAL JUSTICE)** – Company A appeal of director's decision denying s. 10(8) application for transfer of costs to Company B – Allegation that director was a personal friend of

Company B's representative – Director was under a duty of fairness – Law regarding reasonable apprehension of bias applicable – No evidence regarding nature or extent of alleged friendship – Bare allegation is insufficient – No reasonable apprehension of bias in the circumstances.

**Law:** WCA (1996): s. 10(8).

**Decisions:** Ex Parte Blume (1958), S.R. (N.S.W.) 334; Knezevic v. British Columbia (Workers' Compensation Board), [1988] B.C.J. No. 1803 (B.C.S.C.) (QL); R.D.S. v. Her Majesty the Queen, [1997] 3 S.C.R. 484.

*Section 10(8) – Reasonable Apprehension of Bias* [employer application, s. 10(8)]  
*Appeal Division Decision No. 99-1768*

16 *Workers' Compensation Reporter* 119

**CHARTER OF RIGHTS AND FREEDOMS (RETROSPECTIVE APPLICATION) (REFERRALS OF REVIEW BOARD FINDINGS)** – Review Board erred in giving retrospective effect to s. 15 of the Charter – Widow's benefits were appropriately terminated in 1979 when she remarried – She was not eligible for reinstatement as of April 1985 – Even if widow had not remarried, any entitlement would have ceased as of September 1984 when her daughter ceased to be dependent – Any pre-1985 discrimination cannot be remedied under the Charter – Widow not entitled to further benefits under s. 17.

**Law:** WCA (1996): s. 17(3)(d), s. 17(4), s. 96(4).

**Decisions:** Grigg v. British Columbia (1996), 138 D.L.R. (4th) 548 (B.C.S.C.).

*Section 96(4) – Retrospective Application of the Charter* [s. 96(4) referral]  
*Appeal Division Decision No. 00-0119*

16 *Workers' Compensation Reporter* 149

**CRIMINAL INJURIES (BYSTANDER) (NERVOUS SHOCK)** – Whether applicant who witnessed his roommate shoot two intruders in self-defence and to prevent a crime is himself a victim of crime – Applicant would not be eligible for compensation at common law – No legislative intent to expand definition of victim of crime to include claims for emotional injury from witnessing the death of a stranger – To constitute “nervous shock” evidence of emotional distress must extend to substantially harmful psychopathological consequences – Applicant not a victim of crime.

**Law:** CICA (1996): s. 1, s. 2(1), s. 2(2)(a), s. 2(3), s. 2(4), s. 8(1)(a); Criminal Code, R.S.C. 1985, c.C-46: s. 27(a)(ii), s. 34(2), s. 265(1)(b).

**Policy:** Decision No. 131, 2 *Workers' Compensation Reporter* 133.

**Decisions:** Appeal Division Decision No. 99-1439, Appeal Division Decision No. 99-1396; Battista v. Cooper (1976), 114 S.A.S.R. 225, Purdy v. Woznesensky, [1937] 2 W.W.R. 116 (Sask. C.A.); Re Dixon and Criminal Injuries Compensation Board (1988), 52 D.L.R. (4th) 335 (N.S.C.A.); Rhodes Estate v. C.N.R. (1990), 50 B.C.L.R. (2d) 273 (C.A.).

*Criminal Injury Compensation Act – Status of “Bystander”* [CICA review (app. comt.)]  
*Appeal Division Decision No. 00-1422*

16 *Workers' Compensation Reporter* 321

**CRIMINAL INJURIES (CHARTER OF RIGHTS AND FREEDOMS) (RETROSPECTIVE APPLICATION)** – Constitutionality of s. 26 of the *Criminal Injuries Compensation Act* which limited application of the Act to claims arising from an act or omission occurring after July 1, 1972 – Applicant was sexually assaulted in 1969 – Application of the Charter to a current status as opposed to a past event will not offend the

presumption against retrospectivity – Appeal Committee was correct in refusing to apply the Charter to the applicant’s case – To do so would require retrospective application of the Charter to a pre-Charter event – Not necessary to consider whether s. 26 is discriminatory.

**Law:** CICA (1996): s. 26; Charter: s. 15.

**Decisions:** Appeal Division Decision No. 94-1395, 11 *Workers’ Compensation Reporter* 279; Appeal Division Decision No. 97-0880, 13 *Workers’ Compensation Reporter* 539; Appeal Division Decision No. 98-0527, 14 *Workers’ Compensation Reporter* 114; *Cooper v. Canada* (Human Rights Commission), [1996] 3 S.C.R. 854; *Benner v. Canada* (Secretary of State) (1997), 143 D.L.R. (4th) 577 (S.C.C.).

*Criminal Injury Compensation Act – Retrospective Application of the Charter* [CICA review (app. comt.)]  
*Appeal Division Decision No. 99-1281*

16 *Workers’ Compensation Reporter* 21

**CRIMINAL INJURIES (COMPENSABLE ACT OR OMISSION) (RESULTING FROM A CRIMINAL OFFENCE) –**

Appellant sexually abused by brother-in-law prior to July 1, 1972 – Plain meaning of s. 25 of *Criminal Injuries Compensation Act* gives no basis to compensate for offences occurring prior to July 1, 1972 – Commission of a further offence after July 1, 1972 generally viewed as independent from prior offences – Global approach not tenable – Eligibility determined with reference to dates of offences and/or resulting acts or omissions of the offender, not with reference to the date of the injury.

**Law:** CICA (1979): s. 2(2), s. 6, s. 12, s. 25.

**Decisions:** Appeal Division Decision No. 94-1395, 11 *Workers’ Compensation Reporter* 279; Appeal Division Decision

No. 95-1476/1477/1478, 11 *Workers’ Compensation Reporter* 575.

*Criminal Injury – Sexual Abuse Prior to July 1, 1972* [CICA review (app. comt.)]  
*Appeal Division Decision No. 97-0880*

13 *Workers’ Compensation Reporter* 539

**CRIMINAL INJURIES (COMPENSATION) (NON-PECUNIARY LOSS) –**

Extent to which civil court awards should be used to determine compensation for non-pecuniary loss (pain and suffering) under the *Criminal Injuries Compensation Act* – No requirement that awards for non-pecuniary loss be made with proportionate reference to court awards – Latitude of legislation and absence of policy means that reference to court awards is one possible approach – Preferable to rely on internal bases of comparison to achieve consistency within statutory scheme.

**Law:** CICA (1996): s. 2(4), s. 13.

**Policy:** Decision No. 16, 1 *Workers’ Compensation Reporter* 75; Decision No. 173, 2 *Workers’ Compensation Reporter* 272.

**Decisions:** Appeal Division Decision No. 95-1476, 11 *Workers’ Compensation Reporter* 575; Appeal Division Decision No. 95-1976.

*Criminal Injury Compensation Act – Award for Pain and Suffering #1* [CICA review (app. comt.)]  
*Appeal Division Decision No. 98-1429*

15 *Workers’ Compensation Reporter* 359

**CRIMINAL INJURIES (COMPENSATION) (NON-PECUNIARY LOSS) –**

Male victim suffered multiple incidents of child sexual abuse by male relative – Issue of appropriate award for pain and suffering – In absence of expert evidence, Appeal Division panel concluded that effects of prolonged childhood sexual abuse may be equally

devastating regardless of gender – Cases involving similar circumstances and victims of either gender provide appropriate comparative base.

**Decisions:** Appeal Division Decision No. 95-1476, 11 *Workers' Compensation Reporter* 575.

*Criminal Injury Compensation Act – Award for Pain and Suffering #2*  
[CICA review (app. comt.)]  
*Appeal Division Decision No. 99-0458*

15 *Workers' Compensation Reporter* 379

**CRIMINAL INJURIES (NON-PECUNIARY LOSS) (IMMEDIATE FAMILY MEMBER) –**

Mr. A's claim for compensation for fatal shooting of son denied on basis that compensation was limited to victims of crime and their dependants – Mr. A fit neither category – Act amended in 1995 retroactive to 1991 – As a result, Mr. A awarded counseling and wage loss benefits but denied compensation for non-pecuniary loss – Appeal Division majority concluded that compensation for non-pecuniary loss was available to immediate family members, regardless of whether they witnessed the crime.

**Law:** CICA (1996): s. 2(1), s. 2(2), s. 2(3), s. 2(4), s. 5(3), s. 20(1).

**Decisions:** Appeal Division Decision No. 94-1232; Appeal Division Decision No. 94-1378; *Vana v. Tosta*, [1968] S.C.R. 71; *Re Dixon and Criminal Injuries Compensation Board* (1988), 52 D.L.R. (4th) 335 (N.S.C.A.); *Rhodes v. Canadian National Railway* (1990), 50 B.C.L.R. (2d) 273 (C.A.).

*Criminal Injury Compensation Act – Non-pecuniary Loss for Immediate Family Member* [CICA review (app. comt.)]  
*Appeal Division Decision No. 99-1439*

16 *Workers' Compensation Reporter* 75

**CRIMINAL INJURIES (VICTIM OF CRIME) (CONSENT) –**

Applicant applied for compensation for a sexual assault occurring in 1978 – Accused convicted of gross indecency – Board found that applicant not entitled to compensation because gross indecency was not a compensable offence in 1978 – Went on to consider whether incident could be characterized as indecent assault which was a scheduled offence – The Appeal Committee found that the applicant was not a victim of indecent assault because there was insufficient evidence of her lack of consent – Appeal Division panel found that applicant did not consent to the sexual touching – Appeal Committee erred in finding the applicant had an onus to communicate her lack of consent – No air of reality to accused's possible defence that he had an honest but mistaken belief in the applicant's consent – Applicant entitled to \$7,000 for pain and suffering in addition to reimbursement for counseling and medication.

**Law:** CICA (1996): s. 1, s. 2, s. 3.

**Decisions:** *R. v. O'Connor*, [1998] B.C.J. No. 649 (B.C.C.A.) (QL); *R. v. Ewanchuk*, [1999] 1 S.C.R. 330.

*Criminal Injury Compensation Act – Consent*  
[CICA review (app. comt.)]  
*Appeal Division Decision No. 00-1267*

16 *Workers' Compensation Reporter* 303

**CRIMINAL INJURIES (VICTIM OF CRIME) (EVIDENCE) –**

Applicant requested compensation for sexual abuse – Board found insufficient evidence that a criminal act had occurred on basis that alleged offender had passed a polygraph test – Polygraph results no longer in police records – Appeal committee found applicant credible but relied on polygraph evidence – Whether the evidence supports a finding that the applicant was a victim of crime – Polygraph test results inadmissible in civil

and criminal courts – Applicant’s direct evidence carries more weight than suspect’s claim that he passed the polygraph test – Applicant was a victim of crime and entitled to compensation.

**Decisions:** R. v. Oickle, [2000] 2 S.C.R. 3.

*Criminal Injury Compensation Act – Use of Polygraph Evidence*  
[CICA review (app. comt.)]  
*Appeal Division Decision No. 2000-1857*

17 *Workers’ Compensation Reporter* 513

**CRIMINAL INJURIES (VICTIM OF CRIME) (MOTOR VEHICLE EXCLUSION) –**

Applicant, passenger in car involved in high-speed chase with police that ended in collision – Compensation awarded to victims injured or killed as a result of a commission of a criminal offence listed in the Schedule “except an offence arising out of the operation of a motor vehicle” – Purpose of exception to assign compensation for motor vehicle related criminal injuries to automobile insurance scheme – Applicant not a “victim of crime.”

**Law:** CICA (1996): s. 2(2)(a), s. 2(2)(b), s. 4(2); *Motor Vehicle Act*, R.S.B.C. 1979, c.288: s. 1; Criminal Code R.S.C. 1985, c.C-46: s. 214, s. 265(1)(a), s. 279(2).

**Decisions:** *Collier v. Insurance Corporation of British Columbia* (1995), 100 B.C.L.R. (2d) 201 (C.A.); *Amos v. Insurance Corporation of British Columbia*, [1995] 9 W.W.R. 305 (S.C.C.).

*Criminal Injury Compensation Act – Motor Vehicle Exclusion* [CICA review (app. comt.)]  
*Appeal Division Decision No. 99-0589*

15 *Workers’ Compensation Reporter* 609

**CRIMINAL INJURIES (VICTIM OF CRIME) (SEXUAL EXPLOITATION OF YOUNG PERSON) –**

Appeal Committee held that applicant was not victim of sexual assault but failed to address argument that applicant was victim of sexual exploitation of a young person under s. 153 of Criminal Code – Accused was applicant’s older brother – Central issue whether accused in position of trust or authority – Must examine actual nature of relationship – Appeal Division held that applicant was a victim of crime.

**Law:** Criminal Code, R.S.C. 1985, c.C-46: s. 150.1, s. 153.

**Decisions:** R. v. C.P.O., (1993) 124 N.S.R. (2d) 366 (N.S.S.C.); R. v. Galbraith (1994), 18 O.R. (3d) 247 (C.A.); R. v. Yves Audet, [1996] 2 S.C.R. 171.

*Sexual Exploitation of a Young Person*  
[CICA review (app. comt.)]  
*Appeal Division Decision No. 97-1103*

14 *Workers’ Compensation Reporter* 271

**EXPERT EVIDENCE (MEDICAL OPINION, DIFFERENCE OF) (COMPENSABLE INJURY) –**

Issue whether worker’s right elbow condition the result of his participation in a work rehabilitation program for a compensable injury – Two opposing medical opinions offered – One doctor’s opinion based on “history” while other doctor provided direct sources supporting his opinion and also supported by opinion of another specialist – The panel attributed more weight to the second expert and the worker’s appeal was denied.

*Conflicting Expert Evidence – Weight to be Given to Medical Opinions*  
[worker appeal (rev. brd.)]  
*Appeal Division Decision No. 2002-0160*

18 *Workers’ Compensation Reporter* 123

**EMPLOYERS UNDER THE ACT (LENT EMPLOYEES) (MULTIPLE CLASSIFICATIONS)** – Appellant was contractor for bridge construction project – Company A provided labour force – Assessment Department added bridge construction subclassification to appellant’s account based on fact that payroll exceeded \$200,000 – Appellant argued that workers provided by Company A were not its workers – Appeal Division held that although Company A was “employer” for labour relations purposes, appellant was “employer” for workers’ compensation purposes – Workers were lent employees.

**Law:** WCA (1979): s. 1.  
**Policy:** APM: #20:10:30, #30:20:10, #30:20:20; Decision No. 229, 3 *Workers’ Compensation Reporter* 75.

*Lent Employees* [employer appeal (assmt. dept.)]  
*Appeal Division Decision No. 96-1900*

13 *Workers’ Compensation Reporter* 549

**EMPLOYMENT RELATED DISPUTE (ASSAULTS) (ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT)** – Employment related dispute between employees led to assault – A worker, who is an aggressor, remains in course of employment if assault was impulsive reaction to workplace dispute – If workplace dispute becomes personal and results in later assault, then aggressor not in course of employment.

**Law:** WCA (1996): s. 5(1), s. 5(3), s. 10.  
**Policy:** RSCM: #14.00, #16.00, #16.20, #16.30, #16.60; Decision No. 194, 2 *Workers’ Compensation Reporter* 309.  
**Decisions:** Appeal Division Decision No. 92-1284, 9 *Workers’ Compensation Reporter* 589; Appeal Division Decision No. 94-1122, 12 *Workers’ Compensation Reporter* 785.

*Whether Altercation Between Employees Arose in Course of Employment* [s. 11 determination]  
*Appeal Division Decision No. 98-0673*

15 *Workers’ Compensation Reporter* 335

**EXTENSION OF TIME, APPEAL DIVISION (OCCUPATIONAL HEALTH AND SAFETY) (JURISDICTION)** – Employer request for extension of time to appeal administrative penalty for fall protection violation – Appeal filed outside 30-day time limit – No provision in Part 3 of the Act authorizing Appeal Division to extend time for filing an appeal on health and safety matters – Appeal Division has no jurisdiction to consider an appeal of an administrative penalty filed beyond the statutory 30-day time limit – Request denied.

**Law:** WCA (1996): s. 96(6), s. 221, Part 3; OHS Reg.: s. 20.75.  
**Decisions:** Appeal Division Decision No. 27, 15 *Workers’ Compensation Reporter* 701.

*Extension of Time to Appeal – Occupational Health and Safety Appeals* [employer application, time extension]  
*Appeal Division Decision No. 2001-0502*

17 *Workers’ Compensation Reporter* 295

**EXTENSION OF TIME, APPEAL DIVISION (RELIEF OF COSTS) (BOARD ERROR)** – Decision letter denying relief of costs provided to employer with no copy to representative despite specific request by representative – Representative sought extension of time to appeal – Panel departs from reasoning in Appeal Division Decision No. 2001-0304 – Employer bears some responsibility to preserve appeal rights by communicating with representative but this does not negate unfairness – Initial error made by Board officer in failing to provide

the representative a copy – Contravenes general intent of policies – Exceptional circumstance – Extension of time granted.

**Policy:** RSCM: #99.10, #99.20, #114.43; Governors' Decision No. 75, 10 *Workers' Compensation Reporter* 753.

**Decisions:** Appeal Division Decision No. 2001-0304; Appeal Division Decision No. 2001-0791; Appeal Division Decision No. 2000-1228; *Conde Michaud v. WCB* (6 October 1987), Vancouver CA005993 (B.C.C.A.); *Re Caputo and Workers' Compensation Board of British Columbia* (1987), 38 D.L.R. (4th) 458 (B.C.C.A.).

*Application for an Extension of Time*  
[employer application, time extension]  
*Appeal Division Decision No. 2001-1414*

17 *Workers' Compensation Reporter* 435

#### **FAILURE TO REPORT (INJURY REPORT TO EMPLOYER, DELAY) (DISCRETION) –**

Worker failed to report injuries to employer until eight months after incident – Whether worker's claim barred under s. 53(4) of the Act due to delay – Board has discretion to excuse worker's failure to provide timely report where "the board considers that the interests of justice require that the claim be allowed" – Exercise of discretion not limited to situations where the claim is allowed on the merits, but permits consideration of the claim to proceed on the merits – Interests of justice require claim be considered on the merits.

**Law:** WCA (1996): s. 53, s. 55.

**Policy:** RSCM: #93.10, #93.11, #93.12.

**Decisions:** *Caputo v. WCB* (1987), 13 B.C.L.R. 145 (C.A.).

*Injury Report to Employer – Section 53*  
[worker appeal (rev. brd.)]  
*Appeal Division Decision No. 96-1323*

15 *Workers' Compensation Reporter* 323

#### **FEES AND EXPENSES, LAWYERS (REFERRALS OF REVIEW BOARD FINDINGS) –**

Appeal Division panel finding that Review Board erred in purporting to revisit an issue decided by the former commissioners – Request for reimbursement of legal fees denied – Referral by the president to the Appeal Division not a "flagrant abuse" – Complexity alone does not warrant a departure from usual policy not to pay legal fees – Legal representation is not crucial to ensuring a fair and thorough review on a referral.

**Law:** WCA (1996): s. 100.

**Policy:** RSCM: #100.40, #100.70.

**Decisions:** Appeal Division Decision No. 93-1687, 10 *Workers' Compensation Reporter* 211.

*Section 96(4) – Reinstatement of Widows' Benefits* [s. 96(4) referral]  
*Appeal Division Decision No. 99-1909*

16 *Workers' Compensation Reporter* 125

#### **HORSEPLAY (ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT) (SUBSTANTIAL DEVIATION FROM EMPLOYMENT) –**

Worker bound and gagged by co-workers – Whether conduct of defendant co-worker constituted "substantial deviation from the course of the employment" – Binding and gagging co-worker involved complete abandonment of employment – Any action or conduct by defendant causing alleged breach of care did not arise out of and in the course of employment.

**Policy:** RSCM: #16.20; Decision No. 194, 2 *Workers' Compensation Reporter* 309.

**Decisions:** *Bridge v. Workers Compensation Board* (1985), 14 Admin. L.R. 321 (B.C.S.C.).

*Horseplay* [s. 11 determination]  
*Appeal Division Decision No. 98-0666*

15 *Workers' Compensation Reporter* 77

### **IMPLEMENTATION OF REVIEW BOARD FINDINGS (VOCATIONAL REHABILITATION) (WAIVER)**

– Worker received temporary disability benefits and rehabilitation benefits for back injury – Worker’s request for “start-up” funds for pet store business denied by vocational rehabilitation committee – Review Board February 1999 decision found that worker entitled to vocational rehabilitation assistance – Review Board October 1999 decision found that Board obliged to implement the earlier decision – Worker was entitled to \$224,225.44 in new training (less the \$113,000 already provided) – To receive the funds the worker had to waive the Board of any further vocational rehabilitation obligations – President referred the October 1999 decision to the Appeal Division – February 1999 finding not appealed or referred – Appeal Division panel confirmed the October 1999 finding – Panel emphasized that it was not affirming the merits of the February 1999 decision – A worker cannot be required to sign a waiver before being able to receive rehabilitation payments from the Board.

**Law:** WCA (1996): s. 96(4).

**Policy:** RSCM: #85.40, #85.50, #88.51, #88.60, #96.10.

*Section 96(4) – Implementation of Review Board Finding [s. 96(4) referral]*  
*Appeal Division Decision No. 00-0223*

*16 Workers’ Compensation Reporter 159*

**INTERPRETATION OF ACT (FOSTER PARENT, BENEFITS)** – Applicant was foster parent of child of deceased worker – Issue whether applicant “keeping up the household” under s. 17(3)(j) of Act – Caring and maintaining children alone is not sufficient to meet s. 17(3)(j) requirements – Applicant not entitled to benefits.

**Law:** WCA (1996): s. 17(3)(j), s. 17(17).

**Policy:** RSCM: #54.10, #57.00, #58.00, #63.40.

*Section 17(3)(j) – Foster Parents Benefits [foster parent appeal (rev. brd.)]*  
*Appeal Division Decision No. 98-1786*

*15 Workers’ Compensation Reporter 247*

### **MEDICAL REVIEW PANELS (ACCESS)**

**(MEDICAL DECISION)** – Appeal Division determined standard of proof and found sufficient evidence to relate worker’s exposure to benzene as a firefighter to his multiple myeloma – Review Board found that Appeal Division’s decision was appealable to a Medical Review Panel because the cause of the multiple myeloma was a medical question – Appeal Division decision was ultimately a decision with respect to cause of worker’s disease and the decision was a medical one, thus appealable to a Medical Review Panel – Issue raised here arises from disputed medical opinions which were central to Panel’s conclusion that exposure to benzene contributed to multiple myeloma – An appeal was not prevented from going to a Medical Review Panel on the basis that the decision consisted of non-medical as well as medical findings.

**Law:** WCA (1979): s. 58(4), s. 61, s. 64.

**Policy:** RSCM: #103.84; Decision No. 17,  
*1 Workers’ Compensation Reporter 79.*

**Decisions:** Appeal Division Decision No. 94-1296, *11 Workers’ Compensation Reporter 75*; Snell v. Farrell, [1990] S.C.R. 311; Olivier Hirschhorn v. W.C.B. (31 October 1990), Vancouver A901196 (B.C.S.C.); Laferriere v. Lawson, [1991] S.C.R. 541.

*Medical Review Panel Application – A Medical Decision [worker appeal (rev. brd.)]*  
*Appeal Division Decision No. 97-0501*

*13 Workers’ Compensation Reporter 515*

**MEDICAL REVIEW PANELS (ACCESS) (MEDICAL DECISION)** – Review Board upheld Medical Review Panel Registrar’s decision that worker not entitled to examination by M.R.P. as there was no medical issue in dispute arising from Appeal Division decision – Worker appeal denied.

**Law:** WCA (1996): s. 5(1), s. 58(3).  
**Policy:** RSCM: #22.20, #97.00, #97.10.

*Access to Medical Review Panel – Medical Issues in Dispute* [worker appeal (rev. brd.)]  
*Appeal Division Decision No. 99-0816*

15 *Workers’ Compensation Reporter* 639

**MEDICAL REVIEW PANELS (CERTIFICATE OF MEDICAL REVIEW PANEL) (PROPORTIONATE ENTITLEMENT)** – Between examination by Medical Review Panel and receipt of certificates by Board, sections in Manual containing governors’ policies regarding Medical Review Panel appeals and implementation of Medical Review Panel certificates were revised and replaced – Panel found pre-existing condition not amounting to disability – Disability awards claims adjudicator advised worker that proportional entitlement would continue to apply to worker’s functional impairment pension – Based on previous and new policy, Panel’s certificate of no pre-existing disability was binding on Board – s. 5(5) of the Act was amended in order to prevent pre-existing condition not amounting to disability from being used as basis for apportionment – Worker’s pension should not have been limited by application of proportional entitlement.

**Law:** WCA (1979): s. 5(1), s. 5(5), s. 65, s. 82.  
**Policy:** RSCM: #15.10, #44.10, #44.50, #103.11, #103.84; Governors’ Decision No. 36, 9 *Workers’ Compensation Reporter* 147.

*Discretionary Policy Changes and Apportionment* [worker appeal (rev. brd.)]  
*Appeal Division Decision No. 96-1721*

13 *Workers’ Compensation Reporter* 353

**MEDICAL REVIEW PANELS (CERTIFICATE OF MEDICAL REVIEW PANEL) (RETROACTIVITY)** – Earlier Appeal Division decision found worker had compensable disability and was entitled to rehabilitation benefits – Worker’s benefits terminated when worker failed to successfully complete his retraining – Before Review Board could hear worker’s appeal, two Medical Review Panels determined that worker did not have compensable disability – Review Board held itself to be bound by Panels’ certificates and unable to reinstate benefits, even for time prior to certificates – Entitlement granted by prior Appeal Division decision cannot be terminated retroactively by subsequent Medical Review Panel certificate, whether or not Board actually paid worker his or her entitlement pursuant to Appeal Division decision.

**Law:** WCA (1979): s. 65, s. 96.1(1).  
**Policy:** RSCM: #103.82, #103.86, #105.40.  
**Decisions:** *Guadagni v. British Columbia (Workers’ Compensation Board)* (1988), D.L.R. (4th) 374 (B.C.S.C.).

*Retroactive Effect of Medical Review Panel Certificate Terminates Worker’s Entitlement to Benefits* [worker appeal (rev. brd.)]  
*Appeal Division Decision No. 96-1584*

13 *Workers’ Compensation Reporter* 345

**MEDICAL REVIEW PANELS (JURISDICTION) (CAUSE OF DEATH)** – Appeal Division found that deceased worker’s employment did not contribute to his colon cancer – s. 63 allows dependents of deceased worker option of requesting inquiry into cause of death of worker –

Medical Review Panel not restricted to diagnosing immediate cause of worker's death – Larger purpose of inquiry to determine, inasmuch as involves medical issues, whether worker's death was causally related to the worker's employment.

**Law:** WCA (1968): s. 55; WCA (1979): s. 63, s. 64.

**Policy:** RSCM: #103.84.

**Decisions:** Appeal Division Decision No. 93-0161.

*Medical Review Panel – Fatal Claim*  
[employer appeal (rev. brd.)]  
*Appeal Division Decision No. 97-0503*

13 *Workers' Compensation Reporter* 527

**MEDICAL REVIEW PANELS (MEDICAL DECISION, TREATMENT) (APPEALS FROM REVIEW BOARD FINDINGS) –**

Worker required sunglasses to relieve photophobia – Review Board held that issue of superiority of brand name sunglasses not a medical issue appealable to a medical review panel (M.R.P.) – Not all medical decisions are appealable to M.R.P. – Decisions pertaining to medical treatment or authorization of health care benefits are generally not appealable – Question of superiority of sunglasses' brand pertains to authorization of medical treatment and is not appealable to M.R.P.

**Law:** WCA (1996): s. 21(6), s. 58(3), s. 61(1), s. 61(2).

**Policy:** RSCM: #103.42; Decision No. 219, 3 *Workers' Compensation Reporter* 45.

**Decisions:** Appeal Division Decision No. 93-0389, 9 *Workers' Compensation Reporter* 361.

*"Medical Decisions" Appealable to a Medical Review Panel* [worker appeal (rev. brd.)]  
*Appeal Division Decision No. 98-0691*

15 *Workers' Compensation Reporter* 597

**MEDICAL REVIEW PANELS (MEDICAL DECISION, TREATMENT) (APPEALS FROM REVIEW BOARD FINDINGS) –**

Whether questions pertaining to medical treatment may be "appealed" to medical review panels (M.R.P.s) – Board practice to refuse to convene M.R.P.s on issues of medical treatment – Act is ambiguous – Looking to Act, legislative history and Board practice, correct to deny request that M.R.P. certify on issue of treatment.

**Law:** WCA (1996): s. 21(6), s. 58(3), s. 61(1), s. 61(2), s. 61(3), s. 65.

**Policy:** RSCM: #78.00, #78.10, #103.42, #103.87.

**Decisions:** Appeal Division Decision No. 93-0389, 9 *Workers' Compensation Reporter* 361; Appeal Division Decision No. 98-0691; *Nowegijick v. R.*, [1983] 1 S.C.R. 29.

*Section 96(4) Referral – Whether Questions Pertaining to Medical Treatment Can Be Appealed to a Medical Review Panel*  
[s. 96(4) referral]  
*Appeal Division Decision No. 99-1350*

15 *Workers' Compensation Reporter* 675

**NATURAL JUSTICE (CROSS-EXAMINATION) (EXPERT EVIDENCE) –**

Two medical experts reached opposing conclusions on worker's condition – Worker's representative requested cross-examination of Board orthopedic consultant – When dealing with workers' compensation benefits a high standard of justice is required, but not necessarily breach of natural justice if cross-examination request denied – Panel's task to assess weight of opinions as well as other medical evidence on file – No need for cross-examination for assessment – Ample opportunity to file written material and no breach of natural justice in Review Board's refusal or current refusal to allow the cross-examination.

**Decisions:** Appeal Division Decision No. 33, 17 *Workers' Compensation Reporter*; Kane v. University of British Columbia, [1980] 1 S.C.R. 1105; Innisfil (Township) v. Vespra (Township), [1981] 2 S.C.R. 145; Napoli v. Workers' Compensation Board, [1981] B.C.J. No. 972 (B.C.C.A.) (QL); Regier v. British Columbia (Securities Commission), [1997] B.C.J. No. 1915 (B.C.C.A.) (QL); Exchange Bank & Trust Inc. v. British Columbia (Securities Commission), [2000] B.C.J. No. 2098 (B.C.C.A.) (QL); Emery v. Alberta (Workers' Compensation Board, Appeals Commission), [2000] A.J. No. 1198 (Alta. Q.B.) (QL).

*Natural Justice – Conflicting Expert Evidence – Request for Cross-Examination of Board Witness [worker appeal (rev brd.)]*  
*Appeal Division Decision No. 2002-0160*

18 *Workers' Compensation Reporter* 123

**NATURE OF EMPLOYMENT  
RELATIONSHIP (WORKERS UNDER THE  
ACT) (INDEPENDENT OPERATOR) –** A injured by foster child – No personal optional protection or written contract with the Ministry at time of injury – At issue was whether A was a worker of the Ministry or an independent operator – Panel majority concluded that A was an independent operator – If A had an implied contract with Ministry, it was a “contract for services,” not a “contract of service” – A not a worker and therefore not entitled to benefits.

**Law:** WCA (1996): s. 1, s. 2.  
**Policy:** APM: #20:10:30, #20:30:20, #20:50:10, #20:50:40; RSCM: #7.44; Decision No. 255, 3 *Workers' Compensation Reporter* 155.

*Status of Foster Parents [s. 96(4) referral]*  
*Appeal Division Decision No. 98-0584*

15 *Workers' Compensation Reporter* 175

**OCCUPATIONAL DISEASE (CAUSATION)  
(CANCER, NON-HODGKIN'S  
LYMPHOMA) –**

Worker exposed to coal tar pitch volatiles (C.T.P.V.) during employment – Worker's death caused by non-Hodgkin's lymphoma – For purposes of adjudication, Appeal Division panel ordered that non-Hodgkin's lymphoma be designated or recognized as occupational disease – Whether occupational disease due to the nature of the worker's employment – Test is whether, on a balance of probabilities, workplace exposures were a significant contributing factor – No requirement for “conclusive evidence” of causation – Inferences of causation may be drawn in absence of scientific proof – Worker's non-Hodgkin's lymphoma due to nature of his employment.

**Law:** WCA (1996): s. 6, s. 55.

**Policy:** RSCM: #26.00, #26.01, #26.02, #26.03, #26.04, #26.22, #32.58, #93.22.

**Decisions:** Snell v. Farrell, [1990] 2 S.C.R. 311; Laferriere v. Lawson, [1991] 1 S.C.R. 541.

*Occupational Disease – Causation*  
*[widow appeal (rev. brd.)]*  
*Appeal Division Decision No. 99-0783*

15 *Workers' Compensation Reporter* 617

**OCCUPATIONAL DISEASE (CAUSATIVE  
SIGNIFICANCE) (DE MINIMIS) –** Medical Review Panel (M.R.P.) attributed 10% of worker's chronic obstructive pulmonary disease (C.O.P.D.) to exposure to asbestos dust in workplace, 90% to smoking – Review Board found 10% of worker's C.O.P.D. compensable – Worker appealed – President referred finding under s. 96(4) – Test is whether employment was of causative significance in producing disease – If employment significantly contributes to disease, then disability compensable in its entirety – Compensation is not

apportioned based on relative contribution of work-related and other contributing factors – Concept of *de minimis* can be used to establish the level of causation sufficient to establish liability – While the M.R.P. can make factual determination of causative significance, determination of whether it is *de minimis* is a question of mixed fact and law, which only the Appeal Division or Review Board can decide – No set percentage of contribution required – Appeal Division panel found the exposure to workplace dust to be *de minimis* – Worker’s appeal denied – Review Board, in apportioning compensation, adopted an approach not authorized by Act or published policy – M.R.P. certificate does not address entitlement to compensation.

**Law:** WCA (1996): s. 6(1), s. 65, s. 96(4).

**Policy:** RSCM: #26.22, #28.00, #32.20, #103.80, #103.84.

**Decisions:** Appeal Division Decision No. 98-1062; Appeal Division Decision No. 98-1122; Appeal Division Decision No. 2001-1575; *Bonnington Castings Ltd. v. Wardlaw*, [1956] 1 All E.R. 615 (H.L.); *Snell v. Farrell*, [1990] 2 S.C.R. 311; *Athey v. Leonati*, [1996] 3 S.C.R. 458.

*Section 96(4) – Referral* [s. 96(4) referral]  
*Causative Significance Test*  
*Whether Exposure to Asbestos Dust of Causative Significance – De Minimis Contribution* [worker appeal (rev. brd)]  
*Appeal Division Decision No. 2002-0146/0147*

18 *Workers’ Compensation Reporter* 113

### **OCCUPATIONAL DISEASE (FEDERAL GOVERNMENT EMPLOYEES) (SCHEDULE B PRESUMPTION) –**

Employee claims compensation for heart attack – *Government Employees Compensation Act* incorporates the presumptions set out in s. 6(3) and s. 99 of the *Workers Compensation*

*Act* – Policy #30.70’s interpretation of phrase in Schedule B “employed as a firefighter” to refer to someone directly engaged in the physical fighting of fires is a viable interpretation – Employee was not employed as a firefighter at or immediately before his heart attack – Presumption in s. 6(3) inapplicable to claim – Claim must be considered as claim for compensation for industrial disease under s. 4(1) of *GECA* – No positive medical evidence links employee’s heart attack to employment, and substantial medical evidence exists to the contrary – Alternatively, if s. 6(3) presumption applies, weight of evidence disproves causal connection between work and heart attack.

**Law:** *GECA*: s. 2, s. 4, s. 4(2), s. 4(3), s. 8(1); WCA (1979): s. 1, s. 6(1), s. 6(3), s. 96(2), Schedule B.

**Policy:** RSCM: #25.41, #26.20, #26.21, #30.70, #108.30.

**Decisions:** Appeal Division Decision No. 92-0743, 8 *Workers’ Compensation Reporter* 165; Appeal Division Decision No. 93-0502, 9 *Workers’ Compensation Reporter* 721; Appeal Division Decision No. 96-0727, 12 *Workers’ Compensation Reporter* 291; Decision No. 696/88, 10 W.C.A.T.R. 308; Decision No. 485/90, 17 W.C.A.T.R. 173; Decision No. 1004/89 (1991), 17 W.C.A.T.R. 64; Decision No. 716/91 (1992), 22 W.C.A.T.R. 181; *R v. Bender*, [1947] S.C.R. 172; *Re Evans and W.C.B.* (1982), 138 D.L.R. (3d) 346 (B.C.C.A.); *Société Canadienne Des Postes v. Quebec*, (1996) 136 D.L.R. 4th 187 (Que. C.A.).

**Worker:** chief fire inspector (federal employee).

**Industry:** firefighting.

**Injury:** heart attack.

*Federal Worker No. 2 – Firefighters*  
[worker appeal (rev. brd.)]  
*Appeal Division Decision No. 97-0213*

13 *Workers’ Compensation Reporter* 395

### **OCCUPATIONAL DISEASE (HEARING LOSS) (ROBINSON'S TABLES) –**

Robinson's Tables were used to calculate worker's occupational noise induced hearing loss – Policy #31.40 requires evidence of non-occupational cause of hearing loss before Robinson's Tables applied – Interpretation of policy to require acceptance of all hearing loss as work related unless evidence identifying non-occupational cause would create presumption of work causation and would conflict with Act – Rather, interpret policy to require "sound evidence" on non-occupational cause – Medical evidence indicates hearing loss not entirely due to occupational causes and Robinson's Tables properly applied to assess degree of loss caused by occupational exposure.

**Law:** WCA (1996): s. 7.

**Policy:** RSCM: #31.20, #31.40.

*Hearing Loss – When Robinson's Tables Applicable* [worker appeal (rev. brd.)]  
*Appeal Division Decision No. 98-1974*

15 *Workers' Compensation Reporter* 283

### **OCCUPATIONAL DISEASE (INFECTIOUS DISEASES) (CAUSATIVE SIGNIFICANCE)**

– Worker suffered from bacterial infection, causing necrotizing fasciitis – Transient nature of bacteria and likelihood to be destroyed means nearly impossible to prove existence of bacteria in workplace – Claim can be accepted where shown that employment had causative significance in producing disease – If worker rendered susceptible to infectious occupational disease as result of compensable injury, and becomes infected with disease, disease considered due to the nature of the employment – Worker's chronic eczema, coupled with daily exposure to wet cement and cement dust, supports conclusion that eczema aggravated by work activities –

Aggravation compensable as caused lesions that made worker susceptible to infection – Employment of causative significance.

**Law:** WCA (1996): s. 6(1).

**Policy:** RSCM: #13.10, #22.00, #26.03, #26.22, #32.60.

**Decisions:** Appeal Division Decision No. 93-0067/0068, 9 *Workers' Compensation Reporter* 123.

**Injury:** necrotizing fasciitis.

*Criteria for Adjudicating Infectious Disease Claims* [employer appeal (rev. brd.)]  
*Appeal Division Decision No. 2002-0558*

18 *Workers' Compensation Reporter* 175

### **OCCUPATIONAL DISEASE (RECOGNITION, SCHEDULE B)**

**(VARICOSE VEINS)** – Worker's claim for varicose veins can be made under s. 6 of Act as an occupational disease – Schedule B, Item 16 of Act lists "vascular disturbance of the extremities" as an occupational disease" – Manual policy #27.13 states that this item covers one particular condition, but policy is written in inclusive language that allows other diseases fitting description "vascular disturbance of the extremities" to be designated as occupational diseases – Varicose veins are a vascular disturbance affecting an extremity, and thus an occupational disease – Claim made within year of disablement, and thus not barred by s. 55.

**Law:** WCA (1979): s. 1, s. 55; Schedule B.

**Policy:** RSCM: #27.13.

**Injury:** varicose veins.

*Occupational Disease – Schedule B – Varicose Veins* [employer appeal (rev. brd.)]  
*Appeal Division Decision No. 97-0366*

13 *Workers' Compensation Reporter* 511

**OCCUPATIONAL DISEASE (WHOLE BODY VIBRATION) (DEGENERATIVE DISC DISEASE)** – Whether worker’s lumbar spine degeneration was caused by or aggravated by employment as a heavy equipment operator – Review Board found insufficient evidence that the degenerative changes were caused by exposure to whole body vibration – Appeal Division panel reviewed scientific literature – Positive association between whole body vibration exposure and back disorders, including degenerative disc disease – Degenerative disc disease was immediate cause of worker’s back problems – Claim adjudicated as an occupational disease – Lumbar spine degeneration significantly aggravated by employment – Worker appeal allowed – Costs for ergonomist’s reports reimbursed.

**Law:** WCA (1996): s. 6(1).

**Policy:** RSCM: #13.10, #13.12, #26.00, #26.04, #26.50.

*Whole Body Vibration*

[worker appeal (rev. brd.)]

*Appeal Division Decision No. 99-1868*

16 *Workers’ Compensation Reporter* 265

**OCCUPATIONAL HEALTH AND SAFETY (DISCRIMINATORY ACTION) (REFUSAL TO PERFORM UNSAFE WORK)** – Worker refused to wear “common boots” pending replacement of his own boots citing safety concerns regarding the boots’ cleanliness – Employer suspended worker without pay until he wore appropriate footwear – Reviewing officer denied worker’s complaint of discriminatory action – Worker appealed – Appeal Division panel found that that the worker was not exercising a right under s. 3.12 of the Regulation to refuse to perform unsafe work – Employer’s offer of common boots was not a “work process” that it was asking the worker to carry out – Worker simply refusing to comply with employer’s

policy regarding safe footwear – Even if worker was exercising a right to refuse to perform unsafe work, the employer had rebutted the presumption of unlawful discrimination – Worker appeal denied.

**Law:** WCA (1996): s. 150, s. 151, s. 152, s. 153; OHS Reg.: s. 3.12, s. 3.13, s. 8.2(1)(b), s. 8.2(4).

*Discriminatory Action*

[worker appeal (prev. div.)]

*Appeal Division Decision No. 2001-2562*

18 *Workers’ Compensation Reporter* 103

**OCCUPATIONAL HEALTH AND SAFETY (DISCRIMINATORY ACTION) (REVERSE ONUS)** – Worker filed complaint of discriminatory action alleging that employer laid him off for raising safety concerns and that he was berated publicly – Worker has burden of proving *prima facie* case of discriminatory action – Reverse onus in s. 152(3) requires employer (or union) to prove that there was no prohibited discriminatory action – Consideration of Ontario “taint theory” – Actions of employer cannot be tainted in any way by anti-safety animus – Ontario approach applicable in this province – In this case, comments by foreman constituted intimidation amounting to discriminatory action – *Prima facie* case of intimidation not rebutted by employer – Lay-off also held to be discriminatory.

**Law:** WCA (1996): s. 107, s. 150, s. 151, s. 152(3), s. 153, s. 199, s. 207, s. 212(1); *Occupational Health and Safety Act*, R.S.O. 1990, c.0.1, s. 50; OHS Reg.: s. 3.12.

**Decisions:** Appeal Division Decision No. 33, 17 *Workers’ Compensation Reporter*; *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.); *Regina v. Bushnell Communications Ltd.* (1974), 1 O.R. (2d) 442 (H.C.J.), aff’d (1974), 4 O.R. (2d) 288 (C.A.); *Westinghouse Canada Limited*, [1980] O.L.R.B. Rep. April 577 (Ont. L.R.B.); *The Barrie Examiner*, [1975]

O.L.R.B. Rep. Oct. 745 (Ont. L.R.B.); Bo Ramjit, [1990] O.L.R.B. Rep. Aug. 874 (Ont. L.R.B.); General Motors of Canada Limited, [1997] O.L.R.B. Rep. March/April 223 (Ont. L.R.B.); Ministry of Community And Social Services, [1998] O.L.R.B. Rep. Jan. 50 (Ont. L.R.B.).

*Discriminatory Action Complaint – Reverse Onus* [employer appeal (prev. div.)]  
*Appeal Division Decision No. 2002-0458*

18 *Workers' Compensation Reporter* 149

**OCCUPATIONAL HEALTH AND SAFETY (JURISDICTION) (FEDERALLY REGULATED UNDERTAKING)** – Whether Board had jurisdiction over occupational health and safety of workers constructing living units for federally regulated railway company on property owned and/or operated by the company – Construction activities of employer not an integral part of the federal undertaking – Provincial Act and Regulations applied – Administrative penalty imposed under s. 196(6) upheld.

**Law:** WCA (1996): s. 179, s. 196(6), s. 207, s. 211(2), s. 212(1); Canada Labour Code, R.S.C. 1985, c.L-2: s. 2, s. 123.

**Policy:** PDPPM: #1.4.1, #1.4.3, #1.6.5, #1.6.8, #1.6.9; PM: D12-196-1; Governors' Decision No. 86, 10 *Workers' Compensation Reporter* 781.

**Decisions:** Appeal Division Decision No. 93-1569, 10 *Workers' Compensation Reporter* 195; Appeal Division Decision No. 27, 15 *Workers' Compensation Reporter* 701; *Construction Montcalm Inc. v. Quebec (Minimum Wage Comm.)*, [1979] 1 S.C.R. 754; *Northern Telecom Ltd. v. Communication Workers of Canada*, [1980] 1 S.C.R. 115; *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)* (1988), 51 D.L.R. (4th) 161 (S.C.C.); *Northern Mountain Helicopters Inc. v. W.C.B. of B.C. et. al.*, [1999] 8 W.W.R. 674 (B.C.S.C.).

*Provincial Jurisdiction Over Federally Regulated Undertaking – Occupational HEALTH AND SAFETY* [employer appeal (prev. div.)]  
*Appeal Division Decision No. 2000-1650*

17 *Workers' Compensation Reporter* 239

**OCCUPATIONAL HEALTH AND SAFETY (SANCTIONS) (DUE DILIGENCE)** – Employer appeal of s. 196(6) administrative penalty for sloping violation – Evidence established on a balance of probabilities a violation of the Regulation – Employer rebutted presumption that violation gave rise to high risk of injury – In light of employer's due diligence and compliance history, warning letter deemed sufficient and penalty cancelled.

**Law:** WCA (1996): s. 196(6), s. 207, s. 211(2), s. 212(1); OHS Reg.: s. 20.81(1)(a).

**Policy:** PDPPM: 1.4.1; PM: D12-196-1, D12-196-2, D12-196-6, D12-196-10, D12-196-11.

**Decisions:** Appeal Division Decision No. 27, 15 *Workers' Compensation Reporter* 701.

*Section 196(6) Administrative Penalty* [employer appeal (prev. div.)]  
*Appeal Division Decision No. 2001-0295*

17 *Workers' Compensation Reporter* 257

**OCCUPATIONAL HEALTH AND SAFETY (SANCTIONS) (GUIDELINES)** – Employer appeal of s. 196(6) administrative penalty for fall protection violation – If the circumstances warrant it, the reviewing officer may depart from the recommended schedule of sanctions in Prevention Division policy 1.4.1 (for violations occurring before 1 May 2000) or the new penalty guidelines issued by the Panel of Administrators (for violations occurring on or after 1 May 2000) – Recommended penalty in this case would be \$3,500 – Reviewing officer properly considered lack of prior violations, size of

the employer's payroll, and amount needed to motivate compliance – Decision to impose a reduced administrative penalty of \$2,000 confirmed.

**Law:** WCA (1996), s. 196(1), s. 196(6), s. 207, s. 211(2), s. 212(1); OHS Reg.: s. 20.73, s. 33.2(3).

**Policy:** PDPPM: 1.4.1; PM: D12-196-1, D12-196-6, D12-196-11.

**Decisions:** Appeal Division Decision No. 27, 15 *Workers' Compensation Reporter* 701.

*Section 196(6) Administrative Penalty – Departure from Recommended Schedule [employer appeal (prev. div.)]*  
*Appeal Division Decision No. 2001-0339*

17 *Workers' Compensation Reporter* 273

**OCCUPATIONAL HEALTH AND SAFETY (SANCTIONS) (INTERPRETATION OF POLICY) –** Worker injured in fall from roof – Employer violated fall protection regulations – Employer objected to levy under both ss. 73(1) and 73(2) of Act – Additional assessment under s. 73(1) an alternative to charge under s. 73(2) – Employer entitled to relief from s. 73(2) assessment of claim costs.

**Law:** WCA (1996): s. 73(1), s. 73(2).

**Policy:** PDPPM: #1.4.2; RSCM: #115.20; Decision No. 25, 3 *Workers' Compensation Reporter* 144.

**Decisions:** Appeal Division Decision No. 98-1187, Appeal Division Decision No. 98-1554, Appeal Division Decision No. 98-1594.

*Levy of Costs of Claim or Additional Assessment [employer appeal (prev. div.)]*  
*Appeal Division Decision No. 98-1950*

15 *Workers' Compensation Reporter* 265

**OCCUPATIONAL HEALTH AND SAFETY (SANCTIONS) (JURISDICTION) –**

Prevention Division imposed \$27,000 repeat Type IV penalty for violation of fall protection regulations – Employer argued that it was denied a fair hearing in the order review process and that the sanction review officer did not have jurisdiction to consider the validity of the order – Appeal Division does not have jurisdiction under s. 96(6) to consider an appeal from a decision made under policy 1.4.5 – No relief to employer on grounds that the Prevention Division vice-president declined to hold an oral hearing – Under s. 73(1) the sanction review officer had the authority to consider the validity of the orders – Board had jurisdiction to cite the employer for a violation of the more general regulation – High risk of injury – Inappropriate for the sanction review officer to alter the amount of the proposed penalty without providing the employer notice – Penalty reduced to \$25,000.

**Law:** WCA (1996): s. 71(1), s. 71(2), s. 73(1), s. 96(6); OHS Reg.: s. 2.12(2), s. 8.18, s. 8.20, s. 14.30(2), s. 32.68(2), s. 34.01(1).

**Policy:** PDPPM: #1.4.1, #1.4.2, #1.4.4, #1.4.5.

**Decisions:** Appeal Division Decision No. 95-0247, 11 *Workers' Compensation Reporter* 315; *Weldwood of Canada Ltd. v. British Columbia (Workers' Compensation Board)* (1998), 56 B.C.L.R. (3d) 297 (S.C.).

*OSH Penalty – Repeat Fall Protection Violation [employer appeal (prev. div.)]*  
*Appeal Division Decision No. 99-0441*

17 *Workers' Compensation Reporter* 193

**OCCUPATIONAL HEALTH AND SAFETY (SANCTIONS) (POSTING REQUIREMENTS, NOTICE) –**

Employer appeal of s. 196(6) administrative penalty for fall protection violation – Inaccuracies on posting form – Appeal proceeded despite

notice irregularities – Applicable standard of proof is a balance of probabilities – Weight of the evidence established that the workers, although wearing safety harnesses, were not attached to the lines – Mere provision of safety equipment does not constitute due diligence – Recommended schedule of sanctions applicable – Type IV violation – Administrative penalty of \$7,000 confirmed – Employer appeal denied.

**Law:** WCA (1996), s. 196(6), s. 207, s. 209(2), s. 211(2), s. 212(1); OHS Reg.: s. 20.73, s. 33.2(3).

**Policy:** PDPPM: 1.4.1; PM: D12-196-1, D12-196-6, D12-196-10.

**Decisions:** Appeal Division Decision No. 27, 15 *Workers' Compensation Reporter* 701.

*Section 196(6) Administrative Penalty – Posting Requirements [employer appeal (prev. div.)]*  
*Appeal Division Decision No. 2001-0438*

17 *Workers' Compensation Reporter* 285

#### **OCCUPATIONAL HEALTH AND SAFETY (SANCTIONS) (RES JUDICATA) –**

Employer appealed imposition of administrative penalties – Board found employer in violation of fall protection and supervision requirements under the Regulation – Employer argued that Board issued duplicitous orders, contrary to *Kienapple* principle and *res judicata* – *Kienapple* principle found not to apply in workers' compensation enforcement context, as different than system of criminal justice – Predominant purpose of Regulation to educate and motivate persons to ensure safe workplaces – Useful for educational and preventative purposes to identify numerous sources of safety problem by identifying several regulatory violations on the same set of facts – s. 2.12 of Regulation ousts common law principle of *res judicata* – Board has authority to proceed with separate penalty

action for each separate regulatory violation when only one safety matter involved – Employer appeal denied.

**Law:** WCA (1996): s. 107(1), s. 107(2); OHS Reg.: s. 2.12(1), s. 3.23., 20.73.

**Policy:** PM: D12-196-1.

**Decisions:** Appeal Division Decision No. 95-0247, 11 *Workers' Compensation Reporter* 315; Appeal Division Decision No. 2001-2043; Appeal Division Decision No. 2001-0934/0935; Appeal Division Decision No. 2002-0109; *Kienapple v. The Queen* (1974), 15 C.C.C. (2d) 524 (S.C.C.).

*Prevention – Administrative Penalties – Res Judicata – Kienapple Principle Whether Kienapple Principle Applies to Prevention Matters [employer appeal (prev. div.)]*  
*Appeal Division Decision No. 2002-0636/0637*

18 *Workers' Compensation Reporter* 209

#### **OCCUPATIONAL HEALTH AND SAFETY (SANCTIONS) (SUBCONTRACTORS) –**

Penalty imposed on employer for violation of fall protection regulations – Employer had contracted Company B to deliver materials to construction sites – Workers involved in violation employed by Company B – Construction site where injury occurred not owned or controlled by employer – Appeal Division panel characterized both employer and Company B as “subcontractors” – Regulation 34.16(2) (Health and Safety Regulation for Construction) creates obligation for principal contractors and owners to ensure that Industrial Health and Safety Regulations are complied with – Regulation 36.16(2) says that subcontractors may not shirk their responsibilities to comply just because principal contractor (or owner) is also responsible for compliance – Regulation 34.16(2) itself does not create obligation for subcontractors to comply.

**Law:** IHSR: 34.16(2), 36.16(2).

*Interpretation of Regulation 34.16 of the Industrial Health and Safety Regulation [reconsideration (app. div.)]*  
*Appeal Division Decision No. 96-1629*

14 *Workers' Compensation Reporter* 17

**PERMANENT DISABILITY AWARDS (HEARING LOSS) (TINNITUS)** – Worker appealed decision denying pension for tinnitus resulting from acute acoustic trauma – Under Manual policy #31.00 tinnitus only considered a pensionable condition in combination with pensionable degree of hearing loss – Appeal Division panel held it would be unlawful to apply policy #31.00 – Policy must be read as general and exceptions permitted based on facts of case – Policy #31.00 contained in chapter on occupational disease and does not apply to acoustic trauma cases – Worker appeal allowed.

**Law:** WCA (1996): s. 5(1).

**Policy:** RSCM: #13.00, #13.10, #31.00.

**Decisions:** Appeal Division Decision No. 91-0825; Appeal Division Decision No. 96-1225; Appeal Division Decision No. 97-0044.

**Injury:** tinnitus.

*Tinnitus Arising from Acoustic Trauma*  
[worker appeal (rev. brd.)]  
*Appeal Division Decision No. 97-0803*

15 *Workers' Compensation Reporter* 55

**PERMANENT DISABILITY AWARDS (LAWFULNESS OF POLICY) (STANDARD OF REVIEW)** – Worker claimed compensation for Raynaud's Phenomenon (Vibration White Finger) – Review Board applied 1998 policy and awarded 2% disability pension – Worker appealed and president referred matter under s. 96(4) –

Manual policy #39.44 (1995), Assessment of Pensions for Raynaud's Phenomenon, provides that no pension is payable where the worker returns to normal or equal paying occupation – Functional impairment method under s. 23(1) of the Act requires the Board to estimate impairment of earning capacity from the nature and degree of the injury without reference to actual loss of earnings – Policy requires loss of earnings whereas Act does not – Standard of review when considering legality of policy is patent unreasonableness – Paragraph 3 of policy #39.44 (1995) involves patently unreasonable interpretation of s. 23(1) and is not saved by consideration of s. 23(2) or s. 82 – Use of a loss of earnings pre-requisite is not a viable option under s. 23(1) – Contravention of policy for Review Board to apply 1998 policy to 1997 decision – Worker's pension to be calculated on a functional basis – Paragraph 3 of policy #39.44 (1995) is also in policy #39.44 (1998) which is referred to the Panel of Administrators for review.

**Law:** WCA (1996): s. 6(1), s. 6(2), s. 23(1), s. 23(2), s. 23(3), s. 82, s. 91, s. 96(4).

**Policy:** RSCM: #39.44; Decision No. 333,  
5 *Workers' Compensation Reporter* 96.

**Decisions:** Appeal Division Decision No. 93-0661, 8 *Workers' Compensation Reporter* 87; Appeal Division Decision No. 97-0510, 14 *Workers' Compensation Reporter* 56; Appeal Division Decision No. 2000-0668, 16 *Workers' Compensation Reporter* 287; Canada (Director of Investigation and Research, Competition Act) v. Southam Inc., [1997] 1 S.C.R. 748.

**Injury:** Raynaud's Phenomenon.

*Percent of Impairment – Whether Wage Loss Payable* [worker appeal, (rev. brd.)]  
*Section 96(4) – Award Based on Contravention of Policy* [s. 96(4) referral]  
*Appeal Division Decision No. 2001-2111/2112*

18 *Workers' Compensation Reporter* 33

**PERMANENT DISABILITY AWARDS  
(LOSS OF FUNCTION / PHYSICAL  
IMPAIRMENT) (RETIRED WORKER) –**

Worker employed in aluminum industry and exposed to carcinogens – Abnormal urine cytology detected in July 1994 – Resection and diagnosis of bladder cancer in October 1994 – Treatment included bi-annual and then annual cystoscopies – Worker retired, effective February 1995 – Worker applied for compensation June 1995 – Board denied claim on basis that claim was made after retirement – Review Board allowed worker’s appeal and majority awarded functional pension of 7.5% effective July 1994 – Worker appealed – Findings referred to Appeal Division pursuant to s. 96(4) of the Act – Appeal Division panel found that the worker was disabled from earning full wages and was entitled to 7.5% functional pension effective October 1994 – Ongoing cystoscopies considered a permanent impairment – Worker entitled to temporary wage loss for resection and related procedures – Decision to retire was primarily a personal choice – Worker not entitled to loss of earnings pension – Worker’s legal costs not payable – Reimbursement for worker’s son to attend hearing not payable.

**Law:** WCA (1996): s. 6(1), s. 23(1), s. 23(3), s. 96(4).

**Policy:** RSCM: #26.30.

**Decisions:** Appeal Division Decision No. 92-0658/0659/0660, 8 *Workers’ Compensation Reporter* 145; Appeal Division Decision No. 92-1078; Appeal Division Decision No. 92-1093; Appeal Division Decision No. 96-0727, 12 *Workers’ Compensation Reporter* 292; Appeal Division Decision No. 98-0972.

*Section 96(4) – Disability Pension*  
[s. 96(4) referral]

*Disability Pension* [worker appeal (rev. brd.)]  
*Appeal Division Decision No. 00-1188/89*

16 *Workers’ Compensation Reporter* 197

**PERMANENT DISABILITY AWARDS  
(LOSS OF FUNCTION / PHYSICAL  
IMPAIRMENT, ASSESSMENT)**

**(PUBLISHED POLICY) –** Worker examined using ARCON system of permanent functional impairment evaluation – Whether ARCON assessment technique authorized by Board policy – Resolution of Panel of Administrators authorized use of ARCON system as exception to policy in Manual – Resolution is published policy of governors (now Panel of Administrators).

**Law:** WCA (1996): s. 82, s. 96(4).

**Policy:** RSCM: #97.40.

*Section 96(4) Referral – Board’s Use of ARCON for PFI Examinations* [s. 96(4) referral]  
*Appeal Division Decision No. 99-1252*

15 *Workers’ Compensation Reporter* 671

**PERMANENT DISABILITY AWARDS  
(LUMPS SUMS AND COMMUTATIONS)  
(PROJECTED LOSS OF EARNINGS) –**

Worker requested commutation of permanent disability pension in order to either purchase new residence or renovate apartment – Board refused on ground that no commutation will be allowed in case of pension calculated on projected loss of earnings basis – Act allows for establishment of general policy that commutations of loss-of-earnings pensions will not be allowed – Departure from general policy may be made where warranted by merits and justice of case – No departure from policy warranted in present case – No indication worker would be able to care for new apartment any more effectively without ongoing assistance from Board – Worker’s long-term interests best served by keeping pension intact to offset loss of retirement income.

**Injury:** severe brain injury.

**Policy:** RSCM: #81.00; Decision No. 67,  
1 *Workers’ Compensation Reporter* 276.

*Whether Board Should Commute Worker's Entire Disability Pension*  
[worker appeal (rev. brd.)]  
*Appeal Division Decision No. 96-1957*

13 *Workers' Compensation Reporter* 367

**PERMANENT DISABILITY AWARDS (OCCUPATIONALLY-INDUCED ALLERGIES/SENSITIVITIES) (PROJECTED LOSS OF EARNINGS)** – Worker developed allergic contact dermatitis (A.C.D.) to cement/chromate and rubber constituents of gloves – Wage loss claim accepted under s. 6(3) – Although the worker was at a significant risk of recurrence, no permanent functional impairment – Whether worker entitled to pension for occupationally-induced allergies/sensitivities – Panel found that worker suffered permanent changes to immune system – Allergic reactivity to chromate and thiuram designated under s. 6(4) as an occupational disease for purpose of the claim – Policy #30.50 not applicable – Worker suffers a pensionable degree of permanent functional impairment – Board directed to assess degree of impairment and projected loss of earnings.

**Law:** WCA (1996): s. 6(4), s. 23(1), s. 23(3).  
**Policy:** RSCM: #26.04, #29.20, #30.50.  
**Decisions:** Appeal Division Decision No. 97-0677.

*Occupationally-Induced Allergies*  
[worker appeal (rev. brd.)]  
*Appeal Division Decision No. 2000-1770*

17 *Workers' Compensation Reporter* 153

**PERMANENT DISABILITY AWARDS (WAGE RATE) (CALCULATION, METHOD OF)** – Worker submitted that his wage rate for pension purposes should have reflected his earnings at the time of his injury – Board calculated wage rate by reference to earnings

during the three years preceding worker's injury – Both Act and policies provide range of viable options for determining worker's average earnings and earning capacity – Determination must reflect what "may appear to the Board best to represent the actual loss of earnings suffered by the worker by reason of the injury" – s. 33(1) confers element of discretion – Principles guiding discretionary decision-making include: decisions should be based on evidence relevant to power to be exercised; relevant evidence should be considered and weighed; the weighing of evidence is not generally a reviewable matter.

**Law:** WCA (1979): s. 33(1).  
**Policy:** RSCM: #64.00, #66.10, #67.20.

*Calculation of Wage Rate for Pension Purposes*  
[reconsideration (app. div.)]  
*Appeal Division Decision No. 97-0510*

14 *Workers' Compensation Reporter* 55

**PERSONAL INJURY (AGGRAVATION) (DIABETES)** – Work activities adversely affected worker's control over diabetes treatment and regimen – Worsening in the worker's condition resulted from personal causes, not employment – Work activity had no causal significance – Aggravation of underlying diabetes not compensable in the circumstances – Worker appeal denied.

**Policy:** RSCM: #14.00, #14.20, #15.10, #15.30, #19.20, #19.31, #21.00, #21.10, #26.55.  
**Decisions:** Appeal Division Decision No. 92-0100, 8 *Workers' Compensation Reporter* 95; Appeal Division Decision No. 93-0067, 9 *Workers' Compensation Reporter* 123; Appeal Division Decision No. 93-0707, 12 *Workers' Compensation Reporter* 3.

**Worker:** grocery store assistant manager.  
**Injury:** renal failure (diabetes).

*Aggravation of Diabetes*  
[worker appeal (rev. brd.)]  
*Appeal Division Decision No. 2001-0756*

17 *Workers' Compensation Reporter* 373

**PERSONAL INJURY (ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT) (ACCIDENT PRESUMPTION)** – Worker fainted at work while cleaning – Whether injuries arose out of and in the course of employment – Fall constitutes accident within meaning of s. 5(4) of Act – Presumption that accident arose out of employment, unless contrary shown – If injuries resulting from “purely natural causes,” not compensable – Medical report does not rebut s. 5(4) presumption.

**Law:** WCA (1996): s. 5(1), s. 5(4).  
**Policy:** RSCM: #14.10, #14.20, #15.00, #15.10, #15.30.

*Accident Presumption – Unexplained Fall*  
[worker appeal (rev. brd.)]  
*Appeal Division Decision No. 99-0149*

15 *Workers' Compensation Reporter* 291

**PERSONAL INJURY (ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT) (ACCIDENT PRESUMPTION)** – Worker injured when food spilled on her hand after being heated in microwave – Worker in course of employment during lunch break on employer’s premises – s. 5(4) presumption – Policy #19.30 denies coverage for injuries sustained while eating own food – Logical extension of policy would deny coverage for injury while handling own food – Policy #19.31 denies compensation for injury through exposure to hazard introduced by worker – s. 5(4) presumption rebutted – Injury did not arise out of employment.

**Law:** WCA (1996): s. 5(1), s. 5(4).  
**Policy:** RSCM: #14.00, #14.10, #19.30, #19.31, #21.10.

*Accident Presumption – Burn After Use of Microwave Oven* [worker appeal (rev. brd.)]  
*Appeal Division Decision No. 99-0473*

15 *Workers' Compensation Reporter* 301

**PERSONAL INJURY (ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT) (HAZARD, PERSONAL PROPERTY)** – Worker, bus driver, opened umbrella and lacerated hand while walking from transit centre to bus – Whether injury arose out of employment – Injury falls within s. 5(4) definition of “accident” in Act – Worker injured through exposure to hazard that he introduced into the workplace – Defective personal property was intrinsically hazardous and hazard for worker’s personal use – s. 5(4) presumption rebutted.

**Law:** WCA (1996): s. 5(1), s. 5(4).  
**Policy:** RSCM: #14.10, #19.31.

*Introduction of Personal Hazard into the Workplace* [employer appeal (rev. brd.)]  
*Appeal Division Decision 2002-0520*

18 *Workers' Compensation Reporter* 171

**PERSONAL INJURY (ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT) (HERNIA)** – Worker suffered paraumbilical hernia after pulling open a trapdoor that was frozen shut – Worker’s claim denied by entitlement officer – Board’s general policy that umbilical herniae are not compensable – Review Board allowed worker’s appeal – Evidence established a causative relationship between specific work activity and appearance of hernia – Incident was an “unusual circumstance” constituting an exception to Board policy – Employer appeal denied.

**Law:** WCA (1996): s. 5(1).

**Policy:** RSCM: #15.50, #96.10.

**Injury:** umbilical hernia.

*Umbilical hernia [employer appeal (rev. brd.)]  
Appeal Division Decision No. 2001-0417*

17 *Workers' Compensation Reporter* 343

**PERSONAL INJURY (ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT) (INTERPRETATION OF POLICY)** – Worker suffered onset of neck pain while driving his truck after unloading haul of gasoline – Whether injury arose out of and in the course of employment – Review Board affirmed the Board decision to deny the claim finding the pain resulted from a deteriorating condition which became symptomatic in the absence of any exceptional strain or circumstance – Appeal Division panel reviewed in detail the Manual policy #15.20 – Motions which are incidental to the job will not result in compensation if the worker is injured while engaging in the incidental activity – Claim considered from worker's position that there was no deteriorating condition – Unlikely that the disc protrusions occurred by reason of the worker's employment activities that morning – Coincidental that the disabling pain occurred at work – Aside from timing, nothing to connect the onset of pain with the employment – Worker appeal denied.

**Law:** WCA (1996): s. 5(1).

**Policy:** RSCM: #15.20; Decision No. 115, 2 *Workers' Compensation Reporter* 97; Decision No. 145, 2 *Workers' Compensation Reporter* 171; Decision No. 286, 4 *Workers' Compensation Reporter* 60.

*Arising Out of Employment – Motions Incidental to Employment [worker appeal (rev. brd.)]  
Appeal Division Decision No. 2001-0939*

18 *Workers' Compensation Reporter* 25

**PERSONAL INJURY (ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT) (RECREATIONAL, EXERCISE OR SPORTS ACTIVITIES)** – Worker, police officer, injured while exercising during paid lunch break – Where worker injured on employer's premises, while on duty and being paid, and exercise encouraged by employer and relevant to needs of normal job, the injury arose out of and in the course of the employment.

**Law:** WCA (1996): s. 5(1).

**Policy:** RSCM: #20:20; Decision No. 343, 5 *Workers' Compensation Reporter* 117.

**Decisions:** Appeal Division Decision No. 96-1018; Appeal Division Decision No. 97-1348.

*Injury While Exercising*

[worker appeal (rev. brd.)]

*Appeal Division Decision No. 98-1477*

15 *Workers' Compensation Reporter* 237

**PERSONAL INJURY (ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT) (STRESS)** – Worker claim for workplace stress due to sexual harassment – Whether psychological condition arose out of and in the course of employment – Test applied in Decision No. 98-1855 too stringent – Sexual harassment constituted unusual stimuli, was reasonably capable of causing a psychological injury, and was of causative significance – Worker appeal allowed.

**Law:** WCA (1996): s. 5(1), s. 6(1).

**Policy:** Decision No. 102, 2 *Workers' Compensation Reporter* 25; Decision No. 348, 5 *Workers' Compensation Reporter* 127; RSCM: #13.20, #22.33, #32.10, #32.20.

**Decisions:** Appeal Division Decision No. 98-1855; *Dowling v. Prince Edward Island (Workers' Compensation Board)* (1995), 7 C.C.E.L. (2d) 157 (P.E.I.C.A.).

*Workplace Stress (No. 1)*  
[worker appeal (rev. brd.)]  
*Appeal Division Decision No. 99-1254*

17 *Workers' Compensation Reporter* 117

**PERSONAL INJURY (ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT) (STRESS)** – Worker suffered major depressive episode – Whether psychological condition arose out of and in the course of employment – Not every negative emotional experience perceived by worker constitutes a “traumatic event” – Objective assessment of causation required – Events giving rise to claim arose in “labour relations” context and did not involve unusual stimuli – Worker appeal denied.

**Law:** WCA (1996): s. 5(1), s. 6(1).

**Policy:** Decision No. 102, 2 *Workers' Compensation Reporter* 25; Decision No. 348, 5 *Workers' Compensation Reporter* 127; RSCM: #13.20, #14.20, #22.33, #32.10, #32.20.

**Decisions:** Appeal Division Decision No. 98-1855; *Dowling v. Prince Edward Island (Workers' Compensation Board)* (1995), 7 C.C.E.L. (2d) 157 (P.E.I.C.A.).

*Workplace Stress (No. 2)*  
[worker appeal (rev. brd.)]  
*Appeal Division Decision No. 2000-0073*

17 *Workers' Compensation Reporter* 129

**PERSONAL INJURY (ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT) (STRESS)** – Worker involved in a verbal altercation with co-worker – Review Board denied claim for workplace stress – Whether worker’s symptoms constituted a personal injury arising out of and in the course of employment – Worker’s feelings of anger and distress did not constitute psychological impairment – Lack of diagnosis of mental disorder or evidence to

substantiate psychological impairment – Worker appeal denied.

**Law:** WCA (1996): s. 5(1).

**Policy:** RSCM: #13.20.

*Workplace Stress (No. 3)*  
[worker appeal (rev. brd.)]  
*Appeal Division Decision No. 2000-1682*

17 *Workers' Compensation Reporter* 147

**PERSONAL INJURY (ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT) (STRESS)** – Worker’s claim for workplace stress denied – Review Board denied worker’s appeal finding insufficient medical evidence to establish causal relationship between disability and worker’s employment – Appeal Division adopted approach developed in previous decisions to determine whether worker suffered a traumatically induced psychological impairment – Negative emotional responses to workplace stress do not fall within the meaning of “psychological impairment” – Physician’s diagnosis should be based on objective psychological or psychiatric assessment founded on recognized diagnostic criteria – Medical evidence in this case insufficient to support finding of psychological impairment – Worker appeal denied.

**Law:** WCA (1996): s. 5(1).

**Policy:** Decision No. 102, 2 *Workers' Compensation Reporter* 25; RSCM: #13.20, #22.33, #32.10, #32.20.

**Decisions:** *Dowling v. Prince Edward Island (Workers' Compensation Board)* (1995), 7 C.C.E.L. (2d) 157 (P.E.I.C.A.).

**Worker:** manager.

*Workplace Stress (No. 4)*  
[worker appeal (rev. brd.)]  
*Appeal Division Decision No. 2001-0574*

17 *Workers' Compensation Reporter* 347

**PERSONAL INJURY (ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT) (VACCINATION)** – Worker, a radiation therapy technologist, had adverse reaction to flu vaccination received at work – Facts of case warrant departure from policy against compensating for injuries arising from voluntary inoculation program – Employer encouraged, but did not require or direct employee participation in program – Worker felt professionally and ethically obliged to have inoculation due to new job duties involving direct contact with cancer patients – Direct benefit to employer from worker’s participation – Worker sustained personal injury arising out of and in the course of employment when her skin was pierced with injection – Further issues relating to compensability of adverse consequences require investigation and adjudication by the Board.

**Law:** WCA (1996): s. 5(1), s. 5(4), s. 99.

**Policy:** RSCM: #13.00, #14.00, #19.00, #19.40, #19.41, #96.10, #97.10.

*Adverse Reaction to Workplace Flu Vaccination*  
[worker appeal (rev. brd.)]  
*Appeal Division Decision No. 99-0554*

15 *Workers’ Compensation Reporter* 385

**PERSONAL INJURY (FEDERAL GOVERNMENT EMPLOYEES) (HERNIA)** – Board denied federal employee compensation for inguinal hernia on grounds that application was made outside of one-year period in s. 55 of *Workers Compensation Act* – s. 55 applies to federal government employees covered under *Government Employees Compensation Act* – Manual policy #15.50 implicitly sets out a relatively narrow criterion for entitlement for compensation for inguinal herniae, namely, that they be related to some discrete and clearly identifiable episode or incidents at work – There can be no absolute bar under

provincial or federal Act to compensation for herniae that develop gradually – Possible causal relationship between such herniae and the employment has to be considered in the particular case – Where herniae develop gradually, the relevant date for the purposes of s. 55 may not be the date the hernia was first diagnosed – Employee’s claim not statute-barred under s. 55 – No specific incidents at work to which employee’s hernia can be related – Claim does not fall within ambit of Policy #15.50 – Insufficient medical evidence to find hernia compensable as injury that arose gradually out of and in the course of employment.

**Law:** GECA: s. 1, s. 4(2), s. 4(3); WCA (1979): s. 55.

**Policy:** RSCM: #13.10, #14.20, #15.50; Decision No. 316, 5 *Workers’ Compensation Reporter* 43; Decision No. 282, 4 *Workers’ Compensation Reporter* 52.

**Decisions:** Appeal Division Decision No. 92-0743, 8 *Workers’ Compensation Reporter* 165; Decision No. 696/88 (1989), 10 W.C.A.T.R. 308; Decision No. 1004/89 (1991), 17 W.C.A.T.R. 64; Decision No. 485/90 (1991), 17 W.C.A.T.R. 173; Decision No. 716/91 (1992), 22 W.C.A.T.R. 181; *Société Canadienne Des Postes v. Quebec* (1996), 136 D.L.R. (4th) 187 (Que. C.A.).

**Injury:** hernia (inguinal).

*Federal Worker (No. 3) – Hernias*  
[worker appeal (rev. brd.)]  
*Appeal Division No. 97-0231*

13 *Workers’ Compensation Reporter* 423

**PERSONAL INJURY (FEDERAL GOVERNMENT EMPLOYEES) (SPECIFIC INCIDENT)** – Federal employee suffered allergic reaction to wasp sting while working – Review Board held that sting did not arise out of and in course of employment – Wording of s. 4(2) of *Government Employees*

*Compensation Act* suggests that any provision of provincial legislation, and any related policy, which can be termed relevant to entitlement to compensation benefits is also relevant to the adjudication of a claim under *GECA* – When injury caused by “accident” in narrow sense of clearly ascertained incident, compensation shall be paid in accordance with specific terms of s. 4(1), i.e., if the “accident” arose “out of and in the course of” the employment – Claim involved “accident” in narrow sense – Presumption in s. 5(4) of the *Workers Compensation Act* can be integrated with s. 4(1) of *GECA* despite discrepancy in use of terms “occurring” and “arising” – Evidence fails to rebut presumption – Employee was caused personal injury by accident arising out of and in the course of employment.

**Law:** *GECA*: s. 2, s. 4(1), s. 4(2), s. 4(3); *WCA* (1979): s. 5(1), s. 5(4).

**Policy:** *RSCM*: #14.10, #17.00, #17.10, #24.00.

**Decisions:** Appeal Division Decision No. 92-0743, 8 *Workers’ Compensation Reporter* 165; Decision No. 696/88 (1989), 10 *W.C.A.T.R.* 308; Decision No. 1004/89 (1991), 17 *W.C.A.T.R.* 64; Decision No. 485/90 (1991), 17 *W.C.A.T.R.* 173; Decision No. 716/91 (1992), 22 *W.C.A.T.R.* 181; *Société Canadienne Des Postes v. Quebec* (1996), 136 *D.L.R.* (4th) 187 (Que. C.A.).

**Injury:** wasp sting.

*Federal Worker (No. 1) – Insect Stings*  
[worker appeal (rev. brd.)]  
*Appeal Division Decision No. 97-0208*

13 *Workers’ Compensation Reporter* 379

**PERSONAL INJURY (TRAVELLING EMPLOYEES) (NURSING, HOME VISITATION)** – Home care worker injured in car accident on way home during split shift – Nature of job to provide service in various homes means she is “travelling

worker” – Not routine or normal commute – Ownership of vehicle or payment of mileage has no effect on characterization of work – Travelling worker covered while travelling.

**Law:** *WCA* (1996): s. 5(1).

**Policy:** *RSCM*: #18.00, #18.22, #18.40.

**Decisions:** Appeal Division Decision No. 97-0191, 15 *Workers’ Compensation Reporter* 199.

*Travelling Workers*

[employer appeal (rev. brd.)]

*Appeal Division Decision No. 98-1256*

15 *Workers’ Compensation Reporter* 231

**PERSONAL INJURY (TRAVELLING TO AND FROM WORK) (ARISING OUT OF AND IN COURSE OF EMPLOYMENT)** –

s. 11 determination – Defendant driver struck Plaintiff – Defendant was a home-care worker on route to first client – Defendant’s travel to same client on regular basis at same time each day for seven months is “routine commuting to a normal place of employment,” outside the scope of her employment – Client’s home was a regular starting point – Accidents in course of travel from worker’s home to normal place of employment are outside course of employment and not compensable – Defendant was a “worker,” but her action or conduct which caused the alleged breach of duty of care did not arise out of and in the course of employment.

**Law:** *WCA* (1996): s. 10, s. 11.

**Policy:** *RSCM*: #18.00, #18.20, #18.22, #18.30, #18.32, #18.40; Decision No. 50, 1 *Workers’ Compensation Reporter* 212; Decision No. 182, 2 *Workers’ Compensation Reporter* 284; Decision No. 190, 2 *Workers’ Compensation Reporter* 299.

**Decisions:** Appeal Division Decision No. 92-1910, 9 *Workers’ Compensation Reporter* 659; Appeal Division Decision No. 93-0103,

9 *Workers' Compensation Reporter* 685; Appeal Division Decision No. 94-0025; Appeal Division Decision No. 94-1511; Appeal Division Decision No. 95-0255, Appeal Division Decision No. 95-0993.

*Travel to Regular Starting Point*

[s. 11 determination]

*Appeal Division Decision No. 97-0191*

15 *Workers' Compensation Reporter* 145

**PERSONAL INJURY (TRAVELLING TO AND FROM WORK) (IRREGULAR STARTING POINT)** – s. 11 determination – Plaintiff was on way to new work site and parked near the site to check address – Defendant collided with plaintiff's car – Whether injuries arose out of and in course of employment – Policy #18.32 does not extend coverage to all workers travelling to different starting points on general basis – Increased risk of driving to new location not enough to bring within coverage – Searching for address or street sign common on any unfamiliar trip and not distinguishable from risks encountered by the driving public.

**Law:** WCA (1996): s. 10.

**Policy:** RSCM: #14.00, #18.00, #18.12, #18.22, #18.30; #18.32, #18.40; Decision No. 182, 2 *Workers' Compensation Reporter* 284; Decision No. 50, 1 *Workers' Compensation Reporter* 212.

**Decisions:** Appeal Division Decision No. 95-0255.

*Irregular Starting Points* [s. 11 determination]

*Appeal Division Decision No. 98-0869*

15 *Workers' Compensation Reporter* 205

**PERSONAL OPTIONAL PROTECTION (PROCEDURAL FAIRNESS) (LEGITIMATE EXPECTATIONS)** – “X” was a self-employed roofing contractor who suffered serious head injury at work – X lacked personal optional

protection (“P.O.P.”) coverage at time of accident but was unaware that coverage cancelled due to non-payment – X requested decision to cancel P.O.P. be overturned on basis of doctrine of legitimate expectations and Board's failure to comply with *Assessment Policy Manual* #20:50:50 requirements – Appeal Division panel held that Assessment Department failed to follow requirements but breaches were technical and do not give rise to remedy – No denial of natural justice – Requirements directory, not mandatory, and failure to follow does not nullify P.O.P. cancellation – Consequence of non-remittance stated on P.O.P. application form and two written warnings in advance of cancellation fulfill duty of fairness – Manager's “rubber stamp” approval and post-cancellation registered mail notification make no substantive difference – Board's history of fairness to X does not create estoppel or other legal barrier to Board's right to cancel P.O.P. – Doctrine of legitimate expectations does not arise because X was not aware of requirements in policy #20:50:50 and nothing in conduct or words of collections officer could have given rise to expectation – Inconsistency between policy #20:50:50 and practice inappropriate and should be amended by Panel of Administrators.

**Policy:** APM: #20:50:50.

**Decisions:** *Teskey v. Law Society of British Columbia* (1990), 71 D.L.R. (4th) 531 (B.C.S.C.); *Leprette v. Canada*, [1992] F.C.J. No. 1023 (F.C.T.D.) (QL); *Furey v. Conception Bay Centre, Roman Catholic School Board* (1993), 104 D.L.R. (4th) 455 (Nfld. C.A.); *Baker v. Canada* (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817.

*Cancellation of P.O.P. Coverage – Notification Requirements* [assmt. dept.]

*Appeal Division Decision No. 2001-2434*

18 *Workers' Compensation Reporter* 87

**PRE-EXISTING CONDITION (AGGRAVATION) (NATURE OF WORK ACTIVITIES)** – Whether worker’s pre-existing eczema condition was aggravated by work activities – Requirement of prolonged walking and standing during 12-hour shifts – Test in Policy #26.55 is whether the disability would have occurred but for employment – In this case, disease would not have been disabling in absence of work activity – Worker’s job activities were not the same as activities of everyday life – Required job activities aggravated the eczema to point of disability.

**Policy:** RSCM: #26.55.

*Aggravation of Pre-Existing Condition – Policy #26.55 [worker appeal (rev. brd.)]*  
*Appeal Division Decision No. 2002-0230*

18 *Workers’ Compensation Reporter* 145

**RECONSIDERATION, APPEAL DIVISION (ADEQUACY OF REASONS) (RELIEF OF COSTS)** – Reconsideration of Appeal Division decision denying relief of costs – Employer argued that the panel failed to provide sufficient reasons in response to issues raised on behalf of employer – Whether a decision can be set aside because it is too short – Issue better stated as whether the decision provides adequate reasons – A short decision may be adequate – In this case the reasons were clear and intelligible – Application for reconsideration denied.

**Decisions:** Appeal Division Decision No. 97-0083, 14 *Workers’ Compensation Reporter* 37; Appeal Division Decision No. 97-0510, 14 *Workers’ Compensation Reporter* 55; Hebert v. Comstock Canada & Lundrigans Ltd. (1997), 25 C.C.E.L. (2d) 125 (Man. C.A.); Sangha v. Dhaliwal (11 February 1998), Vancouver B952733 (B.C.S.C.).

*Reconsideration – Short Decisions*  
[reconsideration, app. div.]  
*Appeal Division Decision No. 2001-1794*

17 *Workers’ Compensation Reporter* 453

**RECONSIDERATION, APPEAL DIVISION (ERROR OF LAW) (INCONSISTENCY)** – Employer operated a prefabricated log home building industry – Request for reclassification denied – Appeal denied (Appeal Division Decision No. 00-0459) – Application for reconsideration – Appeal Division panel acknowledged inconsistency between Appeal Division Decision No. 00-0459 and Appeal Division Decision No. 00-0136 – Breach of the “Hallmarks of Quality Decisions” does not give rise to an error of law going to jurisdiction – Application for reconsideration denied.

**Policy:** APM: #30:10:00, #30:20:10.

**Decisions:** Appeal Division Decision No. 00-0136; Appeal Division Decision No. 00-0459; Hallmarks of Quality Decisions, 15 *Workers’ Compensation Reporter* 111; Pacific Press Ltd. v. New Westminster Newspaper Guild Local 115 Newspaper Guild et al. (1988), 26 B.C.L.R. (2d) 223 (S.C.); Domtar Inc. v. Quebec (Commission d’appel en matière de lésions professionnelles), [1993] S.C.J. No. 75 (S.C.C.) (QL).

*Reconsideration – Hallmarks of Quality Decisions* [reconsideration (app. div.)]  
*Appeal Division Decision No. 00-1596*

16 *Workers’ Compensation Reporter* 349

**RECONSIDERATION, APPEAL DIVISION (FAILURE TO CONSIDER ISSUE) (JURISDICTIONAL ERROR)** – Appeal Division panel neglected to address issue before it and within its jurisdiction – Error of law going to jurisdiction – Remedy not to invalidate the whole decision but to remit missed issue to panel – Remitting missed

issue to a panel to complete its consideration has no effect on issues already decided by the panel.

*Failure to Consider Issue*  
[reconsideration (app. div.)]  
*Appeal Division Decision No. 97-1032*

14 *Workers' Compensation Reporter* 93

**RECONSIDERATION, APPEAL DIVISION (JURISDICTION) (APPEALS FROM REVIEW BOARD FINDINGS) –**

Reconsideration of Appeal Division decision that panel could not, in the absence of an employer appeal, review an issue raised by the employer, but not raised by the worker on appeal – Whether panel made a jurisdictional error in deciding that it had no authority to review a matter dealt with by the Review Board unless it was specifically appealed – Appeal Division has broad jurisdiction under s. 96(3) to conduct a full inquiry into all of the issues arising out of an appeal – Objective is to facilitate participation of unrepresented parties – Jurisdictional issue relates to both the scope of the panel's authority and to issues of access to the Appeal Division – Previous panel misapprehended its jurisdiction and failed to identify that it had a discretion to exercise.

**Law:** WCA (1996): s. 96(3).

**Policy:** Governors' Decision No. 75, 10 *Workers' Compensation Reporter* 753; RSCM: #98.20.

**Decisions:** Appeal Division Decision No. 92-0634, 8 *Workers' Compensation Reporter* 151; Appeal Division Decision No. 97-0835/0841, 14 *Workers' Compensation Reporter* 83; Appeal Division Decision No. 2001-1794, 17 *Workers' Compensation Reporter* 453.

*Jurisdiction To Review Matters Not Appealed*  
[reconsideration (app. div.)]  
*Appeal Division Decision No. 2002-0207*

18 *Workers' Compensation Reporter* 135

**RECONSIDERATION, APPEAL DIVISION (JURISDICTIONAL ERROR)**

**(CREDIBILITY)** – Worker requested reconsideration of Appeal Division decision on basis that appeal commissioner's focus on credibility and failure to exercise investigative powers amounted to error of law – Decision on causes of a worker's disability may involve three different questions: whether a specific incident occurred; if so, whether it caused worker's disability; if not, whether regular work activities caused disability – Credibility most pertinent to inquiry into whether specific incident occurred – Impugned decision intending to address only whether specific injury at work caused injury – Focus on credibility justifiable – No error of law going to jurisdiction.

**Policy:** RSCM: #14.20.

*Role of Credibility Considerations in Analyzing the Causes of a Worker's Disability*  
[reconsideration (app. div.)]  
*Appeal Division Decision No. 96-1628*

14 *Workers' Compensation Reporter* 9

**RECONSIDERATION, APPEAL DIVISION (NATURAL JUSTICE) (JURISDICTIONAL ERROR)**

– Employer requested reconsideration of Appeal Division decision to uphold penalty on basis that natural justice was denied – Unclear whether penalty imposed for repeat or single violation – If imposed for repeat violations, panel failed to address employer's submissions on point – Panel not obliged to address every point raised, but affected parties must be given opportunity to be heard – Denial of oral hearing request created particular obligation to satisfy employer that arguments were considered – On its face, impugned decision does not indicate that employer was heard – Appearance of injustice – Breach of natural justice – Decision set aside on basis of error of law going to jurisdiction.

**Policy:** PDPPM: #1.4.1; Governors' Decision No. 1, 7 *Workers' Compensation Reporter* 7.

*Opportunity to Be Heard*

[reconsideration (app. div.)]

*Appeal Division Decision No. 97-0083*

14 *Workers' Compensation Reporter* 37

**RECONSIDERATION, APPEAL DIVISION (NATURAL JUSTICE) (NOTICE) –**

Reconsideration of earlier reconsideration decision – Worker appealed Review Board finding that claim was out of time – Original Appeal Division panel concluded that claim was filed in time and went on to consider the merits, ultimately denying the claim – Worker requested first reconsideration alleging a breach of natural justice stemming from absence of notice that the panel would consider the merits – First reconsideration panel found no breach of natural justice – Focus of inquiry on second reconsideration application relying on common law reconsideration grounds will be whether first reconsideration panel fell into jurisdictional error – Original decision only of tangential significance – Exception arises where original panel breached rules of natural justice and breach not cured or made irrelevant by reconsideration – Natural justice does not require notice for each consequential question, so long as notice is provided when the consequential question raises issue of a fundamentally different character – It was incumbent upon original panel to inform parties that it would be dealing with the merits of the claim.

**Law:** WCA (1979): s. 96(3).

**Policy:** Governors' Decision No. 75, 10 *Workers' Compensation Reporter* 753.

**Decisions:** *Murphy v. Newfoundland (Workers' Compensation Commission)* (1995), 136 Nfld. & P.E.I.R. 135 (Nfld. T.D.).

*Reconsideration of an Earlier Reconsideration Decision* [reconsideration (app. div.)]  
*Appeal Division Decision No. 97-0835/0841*

14 *Workers' Compensation Reporter* 83

**RECONSIDERATION, APPEAL DIVISION (OCCUPATIONAL HEALTH AND SAFETY) (SANCTIONS) –**

Employer sought reconsideration of Appeal Division Decision No. 99-0441 which denied the employer's appeal of the Board's decision to levy a repeat fall protection penalty under s. 73(1) – Non-claims matters can only be reconsidered on common-law grounds – No patently unreasonable error of law or fact or combination of law and fact, including breaches of natural justice – Application for reconsideration denied.

**Law:** WCA (1996): s. 71(1), s. 71(2), s. 73(1), s. 96(6); IHSR: s. 2.08, s. 2.12(2), s. 8.18, s. 14.30(2), s. 32.68(2), s. 34.01(1).

**Decisions:** Appeal Division Decision No. 93-0166; Appeal Division Decision No. 93-0182, 9 *Workers' Compensation Reporter* 351; Appeal Division Decision No. 93-0740, 10 *Workers' Compensation Reporter* 127; Appeal Division Decision No. 97-0510, 14 *Workers' Compensation Reporter* 56; Appeal Division Decision No. 99-0441, 17 *Workers' Compensation Reporter* 193; *Canada, (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748.

*Reconsideration of Repeat Fall Protection Violation* [reconsideration (app. div.)]  
*Appeal Division Decision No. 2000-1143*

17 *Workers' Compensation Reporter* 215

**RECONSIDERATION, APPEAL DIVISION (PATENTLY UNREASONABLE) (INTERPRETATION OF ACT) –**

Employer requested reconsideration of Appeal Division decision confirming denial of relief of costs – A patently unreasonable interpretation (or

application) of the Act amounts to an “error of law going to jurisdiction” – Decision set aside – s. 39(1)(e) of the Act allows relief to be granted where there is a pre-existing condition, not only where there is a pre-existing disability or a pre-existing disease – No requirement that there be evidence of a previously reduced capacity to work and/or evidence of prior medical treatment – Where it is argued that relief be granted because of a pre-existing condition, it is patently unreasonable to highlight considerations relevant only to whether a worker suffered from a pre-existing disability.

**Law:** WCA (1979): s. 39(1)(e).

**Policy:** RSCM: # 44.10.

*Application of Section 39(1)(e)*  
[reconsideration (app. div.)]  
*Appeal Division Decision No. 96-1627*

14 *Workers’ Compensation Reporter* 5

**RECONSIDERATION, APPEAL DIVISION  
(PATENTLY UNREASONABLE)**

**(INTERPRETATION OF ACT)** – Worker requested reconsideration of Appeal Division decision that claim was barred by s. 55 – 1994 amendments to s. 55 affecting Board’s discretion to pay compensation for late applications in case of occupational disease – Failure to consider amendments constitutes an error of law going to jurisdiction – In the alternative, panel’s application of the phrase “special circumstances which precluded the filing of an application” was patently unreasonable.

**Law:** WCA (1979), as amended by WCAA (1994): s. 55.

**Policy:** RSCM: #93.22.

*Application of Section 55*  
[reconsideration (app. div.)]  
*Appeal Division Decision No. 97-0050*

14 *Workers’ Compensation Reporter* 23

**RECONSIDERATION, APPEAL DIVISION  
(PATENTLY UNREASONABLE)**

**(INTERPRETATION OF REGULATION)** – Employer requested reconsideration of Appeal Division decision upholding penalty based on Regulation 34.16(2) (Health and Safety Regulation for Construction) – Employer characterized as “subcontractor” or “primary subcontractor,” not “principal contractor” – Regulation 34.16(2) creates obligation for “principal contractors” and owners to ensure that Industrial Health and Safety Regulations are complied with, but does not create obligation for subcontractors to comply – Patently unreasonable to justify levy of a penalty on subcontractor in terms of Regulation 34.16(2) – Error of law going to jurisdiction.

**Law:** IHSR: 34.16(2), 36.16(2).

*Interpretation of Regulation 34.16 of the Health and Safety Regulation for Construction*  
[reconsideration (app. div.)]  
*Appeal Division Decision No. 96-1629*

14 *Workers’ Compensation Reporter* 17

**RECONSIDERATION, APPEAL DIVISION  
(RETROACTIVE BENEFITS)**

**(VOCATIONAL REHABILITATION)** – Appeal Division found worker entitled to retroactive vocational rehabilitation benefits – Reconsideration request by employer on basis that Appeal Division failed to relate payment of benefits to criteria in s. 16 – s. 16 confers broad discretion on Board – Range of viable interpretations as to Board’s authority to make retroactive payments to meet its obligation to provide vocational rehabilitation benefits – Board has authority to pay retroactive benefits regardless of whether worker engaged in rehabilitation process during time benefits payable – Decision not patently unreasonable.

**Law:** WCA (1996): s. 16, s. 21.

**Policy:** RSCM: #86.30.

*Retroactive Rehabilitation Benefits*  
[reconsideration (app. div.)]  
*Appeal Division Decision No. 98-1112*

15 *Workers' Compensation Reporter* 349

**REFERRALS OF REVIEW BOARD FINDINGS (PERSONAL OPTIONAL PROTECTION) (ESTOPPEL)** – A was injured by foster child – A had requested personal optional protection (P.O.P.) as independent contractor prior to injury but was refused – Review Board found that A was entitled to P.O.P. and that the Board was estopped from relying on a strict application of the Act so as to deny A coverage either as an employee or independent operator – President referred case to Appeal Division on ground of error of law – Appeal Division panel found no evidence A had applied for P.O.P. coverage and set aside the Review Board finding – Generally, no estoppel against Crown or Crown agencies.

**Law:** WCA (1996): s. 1, s. 2(2), s. 96(4).  
**Policy:** APM: #20:10:30, #20:30:20, #20:50:10, #20:50:40; RSCM: #7.44; Decision No. 255, 3 *Workers' Compensation Reporter* 155.

*Estoppel* [s. 96(4) referral]  
*Appeal Division Decision No. 98-0584*

15 *Workers' Compensation Reporter* 175

**REFERRALS OF REVIEW BOARD FINDINGS (PERSONAL OPTIONAL PROTECTION) (MINIMUM COMPENSATION)** – Self-employed operator purchased minimum P.O.P. available which permitted compensation on basis of wage rate of \$1,000 per month – Operator became permanently totally disabled as result of compensable accident – Review Board majority found that operator was entitled to the minimum compensation levels prescribed in ss. 22 and 29 of Act,

regardless of whether he was entitled to those levels under P.O.P. – Review Board findings contravened published policy and were based on error of law

**Law:** WCA (1979): s. 1(f), s. 3, s. 22, s. 29; WCA (1996): s. 96(4).

**Policy:** RSCM: #37.21, #40.11, #66.20, #96.10; APM: #20:50:20, #40:10:10; Governors' Decision No. 1, 7 *Workers' Compensation Reporter* 7; Governors' Decision No. 86, 10 *Workers' Compensation Reporter* 781.

**Decisions:** Appeal Division Decision No. 96-0333, 12 *Workers' Compensation Reporter* 29; *Caputo v. Workers' Compensation Board of British Columbia* (1987), 145 B.C.L.R. (2d) 145 (C.A.); *Isaac v. Workers' Compensation Board of British Columbia* (1994), 93 B.C.L.R. (2d) 273 (C.A.); *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1995] 7 W.W.R. 1 (Sask. CA).

*Section 96(4) Referral – Whether Personal Optional Protection (P.O.P.) Entitles Operator to Minimum Compensation Under Sections 22 and 29* [s. 96(4) referral]  
*Appeal Division Decision No. 99-1232*

15 *Workers' Compensation Reporter* 647

**REFERRALS OF REVIEW BOARD FINDINGS (STANDARD OF REVIEW) (CORRECTNESS)** – Discussion of appropriate standard of review of impugned Review Board findings on s. 96(4) referral – Whether redetermination warranted in case of simple error (correctness standard) or where error is blatant (patently unreasonable standard) – Appeal Division panel concluded that findings may be redetermined if they involve any error of law – No historical reason why Appeal Division should defer to Review Board's legal interpretation – Correctness standard applicable.

**Law:** WCA (1996): s. 96(4).  
**Policy:** Decision No. 403, 6 *Workers' Compensation Reporter* 50.

*Section 96(4) Referral – Standard of Review*  
[s. 96(4) referral]  
*Appeal Division Decision No. 99-1350*

15 *Workers' Compensation Reporter* 675

**REFERRALS OF REVIEW BOARD FINDINGS (WAGE LOSS BENEFITS) (PAYMENT FOR STATUTORY HOLIDAY) –**

Review Board held that worker not entitled to wage loss benefits for statutory holiday during a temporary disability – Referred to the Appeal Division for redetermination – s. 96(4) grounds established on basis that Review Board findings contravened policy – Purpose of s. 34 is to prevent double liability and double compensation – No mandatory requirement that statutory holiday pay be deducted – Policies #34.40 and #34.41 lawful under the Act – Worker entitled to wage loss benefits for statutory holiday and employer not eligible for reimbursement.

**Law:** WCA (1996): s. 34, s. 96(4).

**Policy:** RSCM: #34.40, #34.41; Decision No. 107, 2 *Workers' Compensation Reporter* 42.

**Decisions:** Appeal Division Decision No. 95-0165, 11 *Workers' Compensation Reporter* 13; Appeal Division Decision No. 2000-0668, 16 *Workers' Compensation Reporter* 287; Appeal Division Decision No. 2000-0730.

*Section 96(4) – Referral* [s. 96(4) referral]  
*Appeal Division Decision No. 2001-0897*

17 *Workers' Compensation Reporter* 519

**REIMBURSEMENT OF EXPENSES (FEES AND EXPENSES, LAWYERS) (RECONSIDERATION, APPEAL DIVISION) –** Reconsideration of Appeal Division decision denying worker request for payment of legal fees – New evidence – Test of “flagrant abuse” not definitive – “Unique considerations” in a “truly deserving case” may constitute an exception to Board’s general policy of not paying legal costs –

Totality of the circumstances warrants departure from policy – Decision to pay legal fees limited to circumstances which existed up to the time of the 1994 decision being reconsidered – Costs of the judicial review application not payable – Partial reimbursement of \$25,000 without interest.

**Law:** WCA (1996): s. 94, s. 96.1, s. 100.

**Policy:** RSCM: #96.10, #100.12, #100.40; Decision No. 54, 1 *Workers' Compensation Reporter* 229; Decision No. 69, 1 *Workers' Compensation Reporter* 285; Decision No. 154, 2 *Workers' Compensation Reporter* 192; Decision No. 208, 3 *Workers' Compensation Reporter* 24; Decision No. 252, 3 *Workers' Compensation Reporter* 147.

**Decisions:** Appeal Division Decision No. 92-0144/0145, 8 *Workers' Compensation Reporter* 85; Appeal Division Decision No. 93-1687, 10 *Workers' Compensation Reporter* 211; Appeal Division Decision No. 2000-1596, 16 *Workers' Compensation Reporter* 349; Appeal Division Decision No. 2001-1183; *Canada (Attorney General) v. Albrecht*, [1985] 1 F.C. 710 (F.C.A.); *Suranyi v. W.C.B.*, [1999] B.C.J. No. 1225 (B.C.S.C.) (QL), 15 *Workers' Compensation Reporter* 491; *Van Unen v. W.C.B.* (2001), 87 B.C.L.R. (3d) 277 (C.A.), 15 *Workers' Compensation Reporter* 513.

*Payment of Legal Fees* [reconsideration s. 96.1 (app. div.)]

*Appeal Division Decision No. 2001-1902*

17 *Workers' Compensation Reporter* 595

**REIMBURSEMENT OF EXPENSES (REVIEW BOARD) (APPEAL DIVISION, JURISDICTION) –** Whether the Appeal Division may provide reimbursement for the expense of attending a Review Board hearing – s. 7 of the Review Board Regulation does not preclude the Appeal Division from reimbursing expenses incurred in Review Board appeal – Underlying purpose of Review Board practice is to favour

reimbursement of appellants with meritorious appeals – Broad mandate to rehear under ss. 91 and 96(3) of the Act gives Appeal Division authority to deal with ancillary issues arising from the merits of appeals.

**Law:** WCA (1996): s. 89(5), s. 89(6).

**Policy:** RSCM: #100.00, #100.12, #100.14, #100.50, #100.60, #102.46.

*Reimbursement of Expenses for Attending Review Board Hearing* [worker appeal (rev. brd.)]

*Appeal Division Decision No. 2000-0848A*

17 *Workers' Compensation Reporter* 503

**RELIEF OF COSTS (PRACTICE AND PROCEDURE) (BIAS)** – Whether Board officer in considering request for relief of costs was bound by Appeal Division decision on termination of worker's wage loss benefits – Questionable whether response letter sent by Board amounted to a fresh appealable decision – Board officers not obliged to reconsider on demand – Appeal Division approval of request for withdrawal pending readjudication does not create right to readjudication – Allegations of bias not to be made lightly or without supporting extrinsic evidence – Complaints to senior management of the Board not a separate avenue of appeal – Employer appeal denied.

**Law:** WCA (1996): s. 39(1)(e), s. 96(2), s. 96(6), s. 96(6.1).

**Policy:** RSCM: #106.10.

**Decisions:** *Adams v. British Columbia* (W.C.B.) (1989), 42 B.C.L.R. (2d) 228 (C.A.).

*Section 39(1)(e)* [employer appeal, s. 39(1)(e) (comp. div.)]

*Appeal Division Decision No. 2001-0635*

17 *Workers' Compensation Reporter* 359

**RELIEF OF COSTS (PRE-EXISTING CONDITION)** – s. 39(1)(e) of the Act allows relief to be granted where there is a pre-existing condition, not only where there is a pre-existing disability or a pre-existing disease – No requirement that there be evidence of a previously reduced capacity to work and/or evidence of prior medical treatment – Where it is argued that relief be granted because of a pre-existing condition, it is patently unreasonable to highlight considerations relevant only to whether a worker suffered from a pre-existing disability.

**Law:** WCA (1979): s. 39(1)(e).

**Policy:** RSCM: # 44.10.

*Application of Section 39(1)(e)*

[reconsideration (app. div.)]

*Appeal Division Decision No. 96-1627*

14 *Workers' Compensation Reporter* 5

**RELIEF OF COSTS (PRE-EXISTING CONDITION) (ENHANCEMENT OF DISABILITY)** – Work injury aggravated piece of glass in worker's wrist from earlier non-work accident – Employer denied relief of costs – Appeal Division panel held legislative intent of s. 39(1)(e) best interpreted as rehabilitation measure – Relief not dependent on finding that injury would not have occurred but for the pre-existing condition – Where injury would not have been as serious but for pre-existing condition there are strong grounds for relief – Ultimate issue whether disability resulting from injury enhanced because of pre-existing condition – Employer entitled to relief of costs.

**Law:** WCA (1996): s. 5(5), s. 39(1)(e).

**Policy:** RSCM: #114.40, #114.41; Decision No. 271, 4 *Workers' Compensation Reporter* 10.

**Decisions:** Appeal Division Decision No. 4, 7 *Workers' Compensation Reporter* 79; Appeal Division Decision No. 94-1061, 10 *Workers'*

*Compensation Reporter* 695; Appeal Division Decision No. 97-0683; Appeal Division Decision No. 98-0064; Appeal Division Decision No. 97-0986.

*Section 39(1)(e)* [employer appeal, s. 39(1)(e) (comp. div.)]  
*Appeal Division Decision No. 98-0833*

15 *Workers' Compensation Reporter* 91

**REOPENED CLAIMS (ABSENCE OF POLICY) (CAUSATION)** – Worker requested re-opening of claim – Two-year gap between compensable accident and shoulder problems – No policy on re-opening requests – Appeal Division panel considered medical evidence, continuity of symptoms, employment history, and intervening factors – More likely than not that problems related to earlier accident.

**Law:** WCA (1996): s. 5(1).

**Policy:** RSCM: #13.00.

*Request for Re-opening a Claim – Factors for Consideration* [worker appeal (rev. brd.)]  
*Appeal Division Decision No. 98-1053*

15 *Workers' Compensation Reporter* 221

**REVIEW BOARD (STANDING) (ESTATE OF WORKER)** – Review Board majority found that worker's estate did not have standing to carry on an appeal filed and then suspended before the worker's death – Issue considered previously in leading Review Board decision with opposite result – Issues of consistency within the Review Board better left to Review Board – Pursuant to s. 91(2), Review Board directed to reconsider the finding generally.

**Law:** WCA (1996): s. 91(2).

*Section 91(2) – Standing of Deceased Worker's Estate to Continue Appeal* [widow appeal (rev. brd.)]

*Appeal Division Decision No. 2000-1241*

17 *Workers' Compensation Reporter* 235

**SECTION 11 DETERMINATION (ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT) (CONDUCT OF EMPLOYER)**

– Plaintiff struck by taxi while working at the airport as a “taxi-host” – Plaintiff's injuries arose out of and in the course of his employment – At issue was the status of the defendant taxi driver and whether his conduct arose out of and in the course of employment – Defendant employed spare drivers but was not registered with the Board and had no personal optional protection (“P.O.P.”) – Plaintiff argued that even if the defendant was an employer for some purposes he was not acting in capacity of an employer at time of the accident and should not receive protection from suit under s. 10(1) – Appeal Division panel found that the defendant was an employer – Failure to obtain P.O.P. did not affect defendant's status as an employer – Alleged action and conduct arose out of and in the course of “employment,” which includes “business or trade.”

**Law:** WCA (1996): s. 1 (“employment”), s. 2(2), s. 10(1), s. 11, s. 47.

**Policy:** RSCM: #14.00; Decision No. 116, 2 *Workers' Compensation Reporter* 98; Decision No. 169, 2 *Workers' Compensation Reporter* 262; Decision No. 335, 5 *Workers' Compensation Reporter* 101.

**Decisions:** Appeal Division Decision No. 93-0670, 9 *Workers' Compensation Reporter* 731; Appeal Division Decision No. 2000-0684, 17 *Workers' Compensation Reporter* 475; Fry v. Kelly, [1994] N.J. No. 373 (Nfld. S.C.T.D.) (QL).

*Employer Conduct* [s. 11 determination]  
*Appeal Division Decision No. 2001-2240*

18 *Workers' Compensation Reporter* 71

**SECTION 11 DETERMINATION (JURISDICTION) (DEFAMATION) –**

Plaintiff alleged defamation based on damage to reputation – Purpose of Act to compensate workers for medical conditions arising out of and in the course of employment – Incongruous to interpret “personal injury” in s. 11 to include damage to reputation – Because action not based on disability caused by occupational disease, personal injury or death, Board lacks authority to proceed with s. 11 determination.

**Law:** WCA (1996): s. 11.

**Policy:** Governors’ Decision No. 4, 7 *Workers’ Compensation Reporter* 19.

*Defamation Action – Lack of Jurisdiction*  
[s. 11 determination]

*Appeal Division Decision No. 97-0829*

15 *Workers’ Compensation Reporter* 165

**SECTION 11 DETERMINATION (NEGLIGENCE, MEDICAL) (CAUSATION) –**

Plaintiff’s back injury claim accepted by Board – Plaintiff commenced action alleging medical negligence in relation to treatment for compensable injury – Whether plaintiff was a worker at the time of the surgery and whether the injury caused by the surgery arose out of and in the course of employment – Consideration of Appeal Division approach in light of *Kovach* decision and approaches taken in other jurisdictions – Ultimately, the panel found it appropriate to follow the analysis in prior Appeal Division decisions – Any subsequent injury due to medical treatment is a direct consequence of the original work injury and therefore arises out of and in the course of employment – No break in the chain of causation – Plaintiff was a worker under the Act and his injuries arose out of and in the course of his employment.

**Law:** WCA (1996): s. 10, s. 11.

**Decisions:** Appeal Division Decision No. 92-1899, 9 *Workers’ Compensation Reporter* 653; Appeal Division Decision No. 93-1399, 10 *Workers’ Compensation Reporter* 603; Appeal Division Decision No. 2000-1587; Appeal Division Decision No. 2002-0003; *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (C.A.); *Kovach v. Singh* (1995), 5 B.C.L.R. (3d) 142 (S.C.), (1999), 52 B.C.L.R. (3d) 98 (C.A.), [2000] 1 S.C.R. 55; *Lindsay v. Workers’ Compensation Board of Saskatchewan*, [2000] 1 S.C.R. 59; *Essex County Roman Catholic School Board v. Ontario English Catholic Teachers’ Association* (2001), 205 D.L.R. (4th) 700 (Ont. C.A.); *Queen Elizabeth II Health Sciences Centre v. Nova Scotia (Workers’ Compensation Appeals Tribunal)*, [2001] N.S.J. No. 166 (N.S.C.A.) (QL); Decision No. 24/91, [1991] O.W.C.A.T.D. No. 805 (Ont. W.C.A.T.) (QL); Decision No. 1434/97, [1999] O.W.S.I.A.T.D. No. 328 (Ont. W.S.I.A.T.) (QL); *Mahoney v. J. Kruschich (Demolitions) Pty. Ltd.*, (1985) 156 C.L.R. 522 (Aus. H.C.).

*Medical Malpractice in Treatment of Compensable Injury – Section 11 Determination*  
[s. 11 determination]

*Appeal Division Decision No. 2002-0607*

18 *Workers’ Compensation Reporter* 185

**STANDARD OF REVIEW (LAWFULNESS OF POLICY) (VISUAL ACUITY, LOSS OF) –**

Appeal Division panel considered legality of policy which measured impairment for loss of visual acuity on basis of corrected vision – Whether policy #39.42 contravened s. 23(1) – Standard of review is whether the policy is viable under the Act – To the extent that a loss of visual acuity can be corrected it does not amount to a disability – Provided the occupation does not require perfect uncorrected vision, there is no change in the worker’s ability to work – Panel departs from analysis in Decision No. 93-1140 which applied an overly onerous standard of review

– The policy of usually basing measurement of impairment on corrected vision is viable under the Act.

**Law:** WCA (1996): s. 23(1).

**Policy:** RSCM: #39.42

**Decisions:** Appeal Division Decision No. 93-1140, 10 *Workers' Compensation Reporter* 225; Appeal Division Decision No. 96-0333, 12 *Workers' Compensation Reporter* 29; Appeal Division Decision No. 99-0734.

*Loss of Visual Acuity (No. 2)*

[worker appeal (rev. brd.)]

*Appeal Division Decision No. 00-0668*

16 *Workers' Compensation Reporter* 287

**TEMPORARY TOTAL DISABILITY (WAGE LOSS BENEFITS) (REFERRALS OF REVIEW BOARD FINDINGS)** – Review Board's finding of entitlement to benefits for the 10 months prior to the effective date of pension violates Manual policy #33.00 – Worker was not disabled from working in the 10-month period – No entitlement to temporary disability benefits for 10-month period – Circumstances do not justify a departure from policy.

**Law:** WCA (1996): s. 96(4).

**Policy:** RSCM: #32.60, #33.00, #34.12, #34.51.

*Section 96(4) – Temporary Disability Benefits*  
[s. 96(4) referral]

*Appeal Division Decision No. 00-0307*

16 *Workers' Compensation Reporter* 175

**TRANSFER OF COSTS (DISCRETION) (DELAY)** – Worker was injured in a collision with a logging truck belonging to X Ltd. – s. 10(8) application denied on basis that it was made 18 years after the accident – While there is no statutory time limit on requests for s. 10(8) cost transfers, the Board is not obliged to consider any application,

whenever submitted – s. 10(8) is a discretionary power – Director did not consider irrelevant factors or refuse to exercise his discretion – Difficulty of investigation is a valid consideration – No obligation on the Board to have investigated the 1980 accident with a view to whether s. 10(8) applied – Employer appeal denied.

**Law:** WCA (1996): s. 10(8), 96(6.1).

**Policy:** Decision No. 65, 1 *Workers' Compensation Reporter* 270.

*Section 10(8) – Effect of Delay in Making Application* [employer application, s. 10(8)]  
*Appeal Division Decision No. 99-1033*

16 *Workers' Compensation Reporter* 15

**TRANSFER OF COSTS (DUTY OF CARE) (OBLIGATION OF GENERAL CONTRACTOR)** – Worker, employed by Company A, was injured when an unsecured load slipped off a truck owned and operated by an employee of Company B – Company C was general contractor – Company A's application for transfer of costs to either Company B or Company C was denied – Director found that Company B had satisfied its duty to provide its employee with adequate training and that the duty of Company C did not extend to supervising the work of employees of Company B – Appeal Division panel distinguished *Chappell's* case – The general contractor has a statutory obligation to provide safe working conditions for all workers involved – A mere breach of the Regulation is not a serious breach of the duty of care but some breaches may constitute serious breach – Panel found that labour foreman did not commit a serious breach of the duty of care – Errors of law not material to the outcome – Appeal denied.

**Law:** WCA (1996): s. 10(8), s. 96(6.1); IHSR: s. 4.02(4), s. 34.16, s. 34.16(2).

**Policy:** RSCM: #114.12; Decision No. 65, 1 *Workers' Compensation Reporter* 270; Decision No. 114, 2 *Workers' Compensation Reporter* 85.

**Decisions:** Hill and Another v. Granby Consolidated Mines, Ltd., [1906] 12 B.C.R. 118 (B.C.S.C.); Chappell's Ltd. v. Cape Breton (County), [1963] S.C.R. 340; Anns v. Merton London Borough Council, [1978] A.C. 728 (H.L.); Lewis (Guardian ad litem of) v. British Columbia, [1997] 3 S.C.R. 1145.

*Section 10(8) – Serious Breach of Duty of Care* [employer application, s. 10(8)]  
*Appeal Division Decision No. 99-1385*

16 *Workers' Compensation Reporter* 31

#### **TRANSFER OF COSTS (SUBCONTRACTORS) (DUTY OF CARE) –**

An electrician employed by X Ltd. was seriously injured when assisting a framer employed by Y Ltd. – X Ltd. appealed a decision of the director denying a transfer of costs to Y Ltd. and/or the general contractor, Z Ltd. – Panel found that the director erred in law and contravened policy – The director limited his consideration to the common law duty of care and failed to consider the regulatory framework – The director also failed to consider the general contractor's responsibility when the actions of one subcontractor's workers endangered the workers of another subcontractor – To the extent that Board procedure required the applicant employer to make a prima facie case, it contravened policy – Matter returned to the Board for re-investigation.

**Law:** WCA (1996): s. 10(8), 96(6.1).

**Policy:** RSCM: #114.12; Decision No. 65, 1 *Workers' Compensation Reporter* 270; PDPPM: #6.10(2).

**Decisions:** Chappell's Ltd. v. Cape Breton (County), [1963] S.C.R. 340; Ontario (Ministry of Community and Social Services) v. O.P.S.E.U. (1993), 10 Admin. L.R. (2d) 59 (Ont. C.A.).

*Section 10(8) – Obligations on General Contractor* [employer application, s. 10(8)]  
*Appeal Division Decision No. 99-0992*

16 *Workers' Compensation Reporter* 1

**VOCATIONAL REHABILITATION (CONTINUITY OF INCOME BENEFITS) (PERMANENT DISABILITY AWARDS) –** Rehabilitation consultant reduced continuity of income benefits paid to worker – Reduction contravened Policy #89.12 – Employability assessment not received 30 days in advance of reduction – Evidence does not support finding that worker unwilling to consider employment opportunities – Worker entitled to reinstatement of continuity of income benefits until date of pension decision.

**Law:** WCA (1996): s. 16.

**Policy:** RSCM: #89.11, #89.12; Decision No. 320, 5 *Workers' Compensation Reporter* 58.

*Continuity of Income Benefits* [worker appeal (rev. brd.)]  
*Appeal Division Decision No. 98-1883*

15 *Workers' Compensation Reporter* 371

**VOCATIONAL REHABILITATION (OCCUPATIONALLY-INDUCED ALLERGIES/SENSITIVITIES) (WAGE RATE) –** Worker developed allergic contact dermatitis (A.C.D.) to cement/chromate and rubber constituents of gloves – Worker provided with vocational rehabilitation assistance and obtained Class 3 drivers licence – Request for additional vocational assistance denied – Review Board found that assistance was insufficient to prevent a long term loss of earnings and directed Board to provide worker with additional rehabilitation to assist in replacing pre-injury earnings, but denied request for wage top-up – Panel topped-up worker's earnings from the training on the job employer to pre-injury wage rate.

**Law:** WCA (1996): s. 6(4), s. 23(1), s. 23(3).

**Policy:** RSCM: #26.04, #29.20, #30.50.

**Decisions:** Appeal Division Decision No. 97-0677.

*Occupationally-Induced Allergies – Vocational Rehabilitation* [worker appeal (rev. brd.)]  
*Appeal Division Decision No. 2000-1770*

17 *Workers' Compensation Reporter* 153

### **VOCATIONAL REHABILITATION (PROGRAMS AND SERVICES) (AGE) –**

Worker, age 16, was denied rehabilitation benefits based on his failure to pursue employment opportunities – Rehabilitation assistance failed to take adequate account of worker's young age – Age of injured minor is factor which may be taken into account in considering "the unique needs of each individual" when deciding appropriate approach to vocational rehabilitation – Unjust and punitive to deny rehabilitation assistance to worker with significant permanent disability, where worker may not have had maturity to avail self of such assistance as a minor.

**Policy:** RSCM: #85.30.

*Rehabilitation Assistance to a Young Worker* [worker appeal (rev. brd.)]  
*Appeal Division Decision No. 96-1571*

13 *Workers' Compensation Reporter* 333

### **VOCATIONAL REHABILITATION (RETROACTIVE BENEFITS) (INTEREST) –**

No statutory entitlement to interest on retroactive benefits except in limited situations expressly addressed in the Act – Interest payment policy (#50.00) covers wage loss and pension benefits, but excludes rehabilitation benefits – Any change in circumstances under which interest is payable requires statutory or policy change – Under applicable general policies, no interest payable to worker – Worker appeal denied.

**Law:** WCA (1996): s. 16, s. 82, s. 91(1).

**Policy:** RSCM: #50.00, #50.10, #85.30, #102.26; Decision No. 384, 5 *Workers' Compensation Reporter* 206; Decision No. 369, 5 *Workers' Compensation Reporter* 169; APM: #40:70:40.

**Decisions:** Appeal Division Decision No. 95-0668, 12 *Workers' Compensation Reporter* 221; Appeal Division Decision No. 97-0857, 13 *Workers' Compensation Reporter* 443; Appeal Division Decision No. 98-1112, 15 *Workers' Compensation Reporter* 349; Appeal Division Decision No. 2000-0482; Appeal Division Decision No. 2000-1551.

*Interest on Retroactive Rehabilitation Benefits* [worker appeal (rev. brd.)]  
*Appeal Division Decision No. 2001-0972*

17 *Workers' Compensation Reporter* 547

### **WAGE LOSS BENEFITS (EMPLOYER CONTRIBUTION) (SICK LEAVE) –**

Worker paid from sick leave allotment during work absence due to disability – When claim accepted, Board forwarded wage loss benefits to employer under s. 34 of Act – Worker appealed – Not a prerequisite to s. 34 that benefits paid "wholly at the expense of the employer" – Application of s. 34 discretionary and subject to policy direction by governors – Clear policy guidelines support payment of wage loss benefits to employer where worker received benefit from employer during disability.

**Law:** WCA (1979): s. 34.

**Policy:** RSCM: #34.40, #34.42; Decision No. 107, 2 *Workers' Compensation Reporter* 42.

**Decisions:** Appeal Division Decision No. 92-0922, 9 *Workers' Compensation Reporter* 39; Appeal Division Decision No. 92-1717, 8 *Workers' Compensation Reporter* 715; Appeal Division Decision No. 95-0165, 11 *Workers' Compensation Reporter* 13; *Ratych v. Bloomer* (1990), 69 D.L.R. (4th) 25 (S.C.C.); *Cunningham v. Wheeler*; *Cooper v. Miller*; *Shanks v. McNee*, [1994] 1 S.C.R. 359.

*Section 34 – Payment of Benefits to Employer*  
[worker appeal (rev. brd.)]  
*Appeal Division Decision No. 98-0496*

15 *Workers' Compensation Reporter* 67

**WAGE LOSS BENEFITS (DATE OF INJURY) (REFERRALS OF REVIEW BOARD FINDINGS)** – Review Board concluded that worker entitled to wage loss for day of injury – Likely a drafting error – No comment on intention to depart from s. 5(2) or policy – Compensation other than health care is payable from the first working day following the injury date – Worker not entitled to wage loss benefits for day of injury.

**Law:** WCA (1996): s. 5(2), s. 96(4).

**Policy:** RSCM: #34.30, #108.

*Section 96(4) – Wage Loss for Date of Injury*  
[s. 96(4) referral]  
*Appeal Division Decision No. 99-1746*

16 *Workers' Compensation Reporter* 115

**WAGE LOSS BENEFITS (PROPORTIONATE ENTITLEMENT) (SUBJECTIVE COMPLAINTS)** – Medical Review Panel certified that degenerative disc disease was major cause of worker's disability and that worker's lifting strains at work accounted for approximately one-third – Board apportioned worker's wage loss benefits – Review Board denied worker's appeal on apportionment of wage loss benefits and request for increase in pension award for subjective complaints – Worker appeal allowed on proportionate entitlement issue – Board not obliged to apply proportionate entitlement to wage loss benefits in implementation of the Medical Review Panel certificate – Merits and justice do not warrant a departure from general policy – Worker appeal denied on issue of pension increase – Panel notes four interpretations of policy #39.01 (subjective complaints) –

Subjective complaints not of a nature and extent beyond what would normally be associated with assessed impairment.

**Law:** WCA (1996): s. 5(5), s. 65.

**Policy:** RSCM: #39.01, #44.10, #44.20; Governors' Decision No. 86, 10 *Workers' Compensation Reporter* 781; Decision No. 17, 1 *Workers' Compensation Reporter* 78; Decision No. 318, 5 *Workers' Compensation Reporter* 55; Decision No. 407, 6 *Workers' Compensation Reporter* 61.

**Decisions:** Appeal Division Decision No. 91-0388, 7 *Workers' Compensation Reporter* 119; Appeal Division Decision No. 93-0329, 9 *Workers' Compensation Reporter* 389; Appeal Division Decision No. 93-0277, 9 *Workers' Compensation Reporter* 259; Appeal Division Decision No. 93-0740, 10 *Workers' Compensation Reporter* 127; Appeal Division Decision No. 96-1721, 13 *Workers' Compensation Reporter* 353; Sebastian v. Saskatchewan (Workers' Compensation Board) (1994), 7 C.C.E.L. (2d) 270 (Sask. C.A.).

*Implementation of Medical Review Panel Certificate* [worker appeal (rev. brd.)]  
*Appeal Division Decision No. 2001-0916*

17 *Workers' Compensation Reporter* 533

**WAGE LOSS BENEFITS (RECURRENT DISABILITY) (RETIRED WORKER)** – Wage rate for pension purposes should not be equated automatically with wage rate for calculation of wage loss benefits – Depends on when worker's permanent disability deteriorated – Policy #70.20.2(a) understood as drawing distinction between being unemployed "due to the effects of the injury" and being temporarily disabled from work as a result of injury – Panel's failure to provide a clear finding as to whether the worker could have continued working when he retired is sufficient reason to set aside decision.

**Law:** WCA (1979): s. 32.

**Policy:** RSCM: #70.20.2(a).

*Recurrent Disability – Retired Worker*  
[reconsideration (app. div.)]  
*Appeal Division Decision No. 97-0743*

14 *Workers' Compensation Reporter* 61

**WIDOWS AND WIDOWERS (AGE 50)  
(CHARTER OF RIGHTS AND FREEDOMS)**

–Appeal Division considered appeals of 17 spouses of workers who died as a result of their employment – Spouses all under age 50 and claimed s. 17 (3)(c)–(e) of Act breached s. 15 of the Charter by providing higher benefits to spouses aged 50 and older – Panel concluded it had jurisdiction to consider the constitutional validity of its enabling statute – Purpose of scheme to compensate dependent spouses for loss of income due to work-related death of spouse – Scheme does involve denial of equal benefits but does not involve discrimination – Scheme amenable to stereotypes that dependent spouses under 50 more likely to find work and may be viewed as more capable of working – Lower benefits not affront to dignity as defined by Supreme Court of Canada and provisions consistent with concept of substantive equality – Panel's conclusions conflict with prior panel decisions – While consistency important, serious enough gaps to justify departure from prior decisions – Finding does not indicate scheme most desirable – Changes should be addressed by Royal Commission and legislature.

**Law:** Charter: s. 15; WCA (1996): s. 17(3)(c)–(e), s. 96(1), s. 96(4), s. 96(6), s. 96(6.1), s. 99.

**Policy:** RSCM: #91.00–#91.13.

**Decisions:** Appeal Division Decision No. 93-1222, 10 *Workers' Compensation Reporter* 53; Appeal Division Decision No. 94-0433, 10 *Workers' Compensation Reporter* 617; Appeal Division Decision No. 95-1062, 11 *Workers' Compensation Reporter* 533; Hoffmann-La Roche & Co AG v. Secretary of State for Trade and Industry, [1975] A.C. 295;

Hunter v. Southam, [1984] 6 W.W.R. 577 (S.C.C.); R. v. Big M Drug Mart Ltd, [1985] 1 S.C.R. 295; R. v. Oakes, [1986] 1 S.C.R. 103; R. v. Jones, [1986] 2 S.C.R. 284; R.W.D.S.U. v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573; R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713; Wilson v. B.C. (Medical Services Commission), [1989] 2 W.W.R. 1 (B.C.C.A.); Andrews v. Law Society of British Columbia (1989), 56 D.L.R. (4th) 1 (S.C.C.); R. v. Turpin, [1989] 1 S.C.R. 1296; McKinney v. University of Guelph (1990), 76 D.L.R. (4th) 545 (S.C.C.); Douglas/Kwantlen Faculty Assn. v. Douglas College (1990), 77 D.L.R. (4th) 94 (S.C.C.); Stoffman v. General Hospital, [1990] 3 S.C.R. 483; Canadian Civil Liberties Assn. v. Ontario (Minister of Education) (1990), 65 D.L.R. (4th) 1 (Ont. C.A.); Austin v. B.C. (Minister of Municipal Affairs, Recreation and Culture, Personal Services Branch) (1990), 42 B.C.L.R. (2d) 388 (S.C.); Harrison v. University of British Columbia (1990), [1991] W.W.R. 681 (S.C.C.); Cuddy Chicks Ltd. v. Ontario (Labour Relations Board) (1991), 81 D.L.R. (4th) 121 (S.C.C.); Tétreault-Gadoury v. Canada (Employment and Immigration Commission) (1991), 81 D.L.R. (4th) 358 (S.C.C.); Ontario (Human Rights Commission) v. Ontario (Ministry of Health) (1991), 14 C.H.R.R. D/1; Knodel v. British Columbia (Medical Services Commission) (1991), 58 B.C.L.R. (2d) 356 (S.C.); R. v. Butler, [1992] 1 S.C.R. 452; Schacter v. Canada (1992), 93 D.L.R. (4th) 1 (S.C.C.); Weatherall v. Canada (Attorney General), [1993] 2 S.C.R. 872; Moge v. Moge (1993), 99 D.L.R. (4th) 456 (S.C.C.); Symes v. Canada, [1993] 4 S.C.R. 695; Schachtschneider v. Canada, [1994] 1 F.C. 40 (F.C.A.); R.J.R. MacDonald Inc. v. Canada (Attorney General) (1995), 127 D.L.R. (4th) 1 (S.C.C.); Miron v. Trudel, [1995] 2 S.C.R. 418; Thibaudeau v. Canada (Minister of National Revenue), [1995] 2 S.C.R. 627; Egan v. Canada, [1995] 2 S.C.R. 513; Cooper v. Canada (Human Rights Commission), [1996]

3 S.C.R. 854; *Grigg v. British Columbia* (1996), 138 D.L.R. (4th) 548 (B.C.S.C.); *Benner v. Canada* (Secretary of State), [1997] 1 S.C.R. 358; *Eldridge v. British Columbia* (Attorney General) [1997] 3 S.C.R. 624.

*Sections 17(3)(c)–(e) of the Workers Compensation Act and Section 15 of the Charter of Rights and Freedoms* [widow appeal (rev. brd.)]  
*Appeal Division Decision No. 98-0527*

14 *Workers' Compensation Reporter* 113

**WIDOWS AND WIDOWERS (CHARTER OF RIGHTS AND FREEDOMS) (DEPENDANT CHILDREN)** – Whether benefit scheme for dependent widows and widowers set out in ss. 17(3)(c)–(e) offends s. 15 of the Charter because it gives higher benefits to surviving spouses who are over 50 at the date of the death of the worker – Supreme Court of Canada decision in *Nancy Law* case did not undermine the reasoning which led panel in Appeal Division Decision No. 98-0527 to conclude that the scheme was not discriminatory – Employability of surviving spouse, not “remarriage stereotype,” was central consideration behind the scheme – Any failure of the Board to apply the statutory provisions and policies on vocational assistance is separate from the constitutional issue – Widow appeal denied.

**Law:** WCA (1996): s. 16, ss. 17(3)(c)–(e); Charter: s. 1, s. 15.

**Decisions:** Appeal Division Decision No. 93-1222, 10 *Workers' Compensation Reporter* 53; Appeal Decision No. 94-0433, 10 *Workers' Compensation Reporter* 617; Appeal Division Decision No. 95-1062, 11 *Workers' Compensation Reporter* 533; Appeal Division Decision No. 98-0527, 14 *Workers' Compensation Reporter* 114; *Law v. Canada* (Minister of Employment and

Immigration) (1999), 170 D.L.R. (4th) 1 (S.C.C.); *Cooper v. Canada* (Human Rights Commission), [1996] 3 S.C.R. 854.

*Sections 17(3)(c)–(e) and the Charter (No. 2)* [widow appeal (rev. brd.)]  
*Appeal Division Decision No. 99-1427*

16 *Workers' Compensation Reporter* 59

**WIDOWS AND WIDOWERS (DEATH BENEFITS, REINSTATEMENT OF) (REVIEW BOARD, JURISDICTION)** –

Review Board erred by assuming jurisdiction over the 1958 decision of the former commissioners – Review Board finding which purports to address whether Mrs. X should have been compensated as a common-law wife rather than as a foster-mother is a nullity – Authority to reconsider decisions of the former commissioner resides with the Appeal Division – *Grigg* case not applicable to Mrs. X's status as a foster-mother – Decision of claims co-ordinator to deny reinstatement of benefits was correct.

**Law:** WCA (1948): s. 18(2)(g), s. 65, s. 74(1), s. 76(2); WCA (1996): s. 90(1), s. 96(4).

**Policy:** Governors' Decision No. 8, 7 *Workers' Compensation Reporter* 171; Decision No. 87, 1 *Workers' Compensation Reporter* 319.

**Decisions:** *Grigg v. British Columbia* (1996), 138 D.L.R. (4th) 548 (B.C.S.C.).

*Section 96(4) – Reinstatement of Widows' Benefits* [s. 96(4) referral]  
*Appeal Division Decision No. 99-1909*

16 *Workers' Compensation Reporter* 125

**WIDOWS AND WIDOWERS (NON-DEPENDENT PARENT) (PECUNIARY BENEFIT)** –

Mother of deceased worker entitled to monthly award – Phrase “reasonable expectation of pecuniary benefit from the continuation of the life of the worker” in s. 17(3)(i) of the Act means something tangible in the evidence that

makes the expectation reasonable, and more than the mere speculative possibility of pecuniary gain – Son would have readily assisted mother as she grew older.

**Law:** WCA (1979): s. 17(3)(i), s. 17(17).

**Policy:** RSCM: #61.00.

**Decisions:** West v. Werseen (1958), 26 W.W.R. 707 (B.C.S.C.); Courtemanche v. McElwain (1962), 37 (2d) 595 (Ont. C.A.); French v. Blake (1971), 19 D.L.R. (3d) 244 (B.C.C.A.); Paruk v. Nygren (1972), 25 D.L.R. (3d) 377 (B.C.C.A.); Lai v. Gill (1978), 28 B.C.L.R. 11 (S.C.); Louis v. Esslinger (1981), 121 D.L.R. (3d) 17 (B.C.S.C.); Lian v. Money (1994), 93 B.C.L.R. (2d) 16 (S.C.); Fong Estate v. Gin Brothers Enterprise Ltd. (May 18, 1990), Vancouver B890132 (B.C.S.C.); Cox v. Fleming (1995), 15 B.C.L.R. (3d) 201 (C.A.).

*Section 17(3)(i) – Reasonable Expectation of Pecuniary Benefit [widow appeal (rev. brd.)] Appeal Division Decision No. 96-1421*

13 *Workers' Compensation Reporter* 321

#### **WORKERS UNDER THE ACT (INDEPENDENT CONTRACTOR) (PERSONAL OPTIONAL PROTECTION) –**

A, proprietor of independent firm without personal optional protection (P.O.P.), was injured working on contract for Company B – Whether A was a “worker” under the Act – No legal separation between proprietor and unincorporated firm – A could not contract with himself, therefore not a “worker” in relation to firm – A elected not to apply for P.O.P. coverage, so was not “an independent operator admitted by the Board” – Even if A was a “labour contractor” he did not come within provisions that consider some unregistered labour contractors to be workers of their prime contractor – A was not a worker under Act and not entitled to compensation.

**Law:** WCA (1996): s. 1, s. 2, s. 3(5), s. 99.

**Policy:** RSCM: #7.40, #7.42, #7.42, #7.44, #10.40.

**Decisions:** Isaac v. British Columbia (Workers' Compensation Board), [1994] B.C.J. No.1615 (B.C.C.A.) (QL), Appeal Division Decision No. 94-0455, 10 *Workers' Compensation Reporter* 589, Appeal Division Decision No. 92-1672, 9 *Workers' Compensation Reporter* 627.

*Proprietor Registered Without Personal Optional Protection – Coverage Denied [independent contractor (rev. brd.)] Appeal Division Decision No. 95-0185*

15 *Workers' Compensation Reporter* 133

#### **WORKERS UNDER THE ACT (PRINCIPAL OF UNREGISTERED FIRM) (CORPORATE VEIL) –**

Plaintiff, principal of an unregistered company, was in a motor vehicle accident – Defendants pled s. 10 of the Act and took position that plaintiff was a worker in the course of employment – Majority interpreted Decision No. 335 as affecting status of a principal of an unregistered company under ss. 10 and 11 of the Act – Piercing of the corporate veil is triggered when the principal is injured, not when claim is made – Held that the plaintiff was not a worker – Dissent interpreted Decision No. 335 as providing guidelines for piercing the corporate veil – Allowing plaintiff to sue because of failure to meet obligations under the Act is contrary to justice and merits – Practical effect of majority reasons is to allow principals to opt out of the Act – Dissent would refer matter to Panel of Administrators for policy clarification – In absence of referral, dissent would find plaintiff was a worker.

**Law:** WCA (1996): s. 1, s. 2(2), s. 5(1), s. 10(1), s. 11, s. 47(2), s. 52(2), s. 99.

**Policy:** [Cited by MAJORITY] APM: #20:30:30; Decisions No. 106, 2 *Workers' Compensation Reporter* 41; Decision No. 141, 2 *Workers' Compensation Reporter* 156; Decision No. 264, 3 *Workers' Compensation Reporter* 182; Decision No. 335, 5 *Workers'*

*Compensation Reporter* 101; [Cited by **DISSENT**] APM: #20:10:20; #20:10:30, #20:30:30; RSCM: #5.00, #48.48, #96.10, #111.30; Decision No. 169, 2 *Workers' Compensation Reporter* 266; Decision No. 330, 5 *Workers' Compensation Reporter* 88; Decision No. 335, 5 *Workers' Compensation Reporter* 101.

**Decisions:** [Cited by **MAJORITY**] Appeal Division Decision No. 92-1606, 9 *Workers' Compensation Reporter* 621; Appeal Division Decision No. 94-0872, 10 *Workers' Compensation Reporter* 801; [Cited by **DISSENT**] Appeal Division Decision No. 95-0320, 11 *Workers' Compensation Reporter* 327; Appeal Division Decision No. 94-0872, 10 *Workers' Compensation Reporter* 801.

*Status of Principals of Unregistered Companies (No. 1)* [s. 11 determination]  
*Appeal Division Decision No. 2000-0684*

17 *Workers' Compensation Reporter* 475

**WORKERS UNDER THE ACT (PRINCIPAL OF UNREGISTERED FIRM) (LAWFULNESS OF POLICY)** – Plaintiff, principal of company not registered with the Board at the time of the accident – Panel adopts approach of majority in Appeal Division Decision No. 2000-0684 – Decision No. 335 concerns the status of persons under Part 1 of the Act and is not limited to eligibility for compensation – Lawfulness of policy stated in Decision No. 335 – Whether policy offends general legal principles against piercing the corporate veil or offends provisions of the Act concerning compulsory provision of compensation coverage for workers – Policy is viable under the Act – No exceptional circumstances warranting a departure from policy – While policy not so strained to be unlawful, panel notes inherent difficulties and recommends that the Panel of Administrators review the policy – Plaintiff was not a worker.

**Law:** WCA (1996): s. 11, s. 47(2), s. 47(3).

**Policy:** APM: #20:30:30, #40:10:30; RSCM: #48.40; Decision No. 335, 5 *Workers' Compensation Reporter* 101.

**Decisions:** Appeal Division Decision No. 93-0336, 9 *Workers' Compensation Reporter* 705; Appeal Division Decision No. 94-0872, 10 *Workers' Compensation Reporter* 801; Appeal Division Decision No. 95-0320, 11 *Workers' Compensation Reporter* 327; Appeal Division Decision No. 2000-0684, 17 *Workers' Compensation Reporter* 475; B.G. Preeco I (Pacific Coast) v. Bon Street Holdings Ltd. (1989), 37 B.C.L.R. (2d) 258 (C.A.); Isaac v. W.C.B., [1994] 9 W.W.R. 245 (B.C.C.A.); Villetard's Eggs Ltd. v. Canada (Egg Marketing Agency), [1995] F.C.J. No. 598 (F.C.A.) (QL); Mantei v. Morris, [1997] 9 W.W.R. 203 (Sask. Q.B.), aff'd, [1998] 10 W.W.R. 741 (Sask. C.A.).

*Status of Principals of Unregistered Companies (No. 2)* [section 11 determination]  
*Appeal Division Decision No. 2001-1217*

17 *Workers' Compensation Reporter* 559



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