

WORKERS' COMPENSATION

# REPORTER

## WORKERS' COMPENSATION REPORTER

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## Decision of the Appeal Division

**Number:** 4  
**Date:** August 8, 1991  
**Panel:** Connie Munro, Chief Appeal Commissioner  
**Subject:** Employer Appeals for Relief of Costs under Section 39

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The policies of the Board with respect to the making of decisions under Sections 39(1)(d) and (e) are made by the Governors. Decisions on individual claims under Section 39 are made by Board officers in the Compensation Services Division, with a right of appeal to the Appeal Division under Section 96(6)(a) of the *Workers' Compensation Act*.

This decision is solely concerned with the practice and procedure to be followed by the Appeal Division in the consideration of appeals from decisions made under Section 39. This has been formulated based on the requirements of the Act, and the existing policies of the Board as set out in #102.27, 104.40, and 114.30 to 114.50 of the *Rehabilitation Services and Claims Manual*.

### 1.0 Initiation of an Appeal

There is a 30-day time limit for initiating an appeal to the Appeal Division. The question arises as to the effect of this time limit with respect to Section 39 determinations which have not been communicated to the employer. Under the current policy of the Governors, as set out in #114.43 of the *Rehabilitation Services and Claims Manual*, an employer is only advised of a decision not to charge any of the costs of the claim against the reserve established under Section 39(1)(e) when and if the employer requests such relief.

Section 96(6)(a) provides the employer a right of appeal to the Appeal Division from a "notice of an assessment under section 39." Section 101 of the *Workers' Compensation Act* states:

*Every notice which the board is empowered or required to give to an employer or worker . . . shall be in writing, and may be served either personally or by mailing it to the address of the person to whom it is given. Where a notice is mailed, service of the notice shall be deemed to be effected at the time at which the letter containing the notice, and properly addressed, postage prepaid and mailed, would be delivered in the ordinary course of post.*

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In order for the time limit for an appeal concerning Section 39 to commence, notice of the assessment must be served on the employer.

To avoid any confusion as to when the 30-day time limit commences for appealing a decision regarding Section 39, the practice of the Appeal Division will be to require that the notice be in the form of a decision letter. A determination contained in a file memorandum that Section 39 would not be applicable is not appealable to the Appeal Division. If an employer has not received a decision letter from the Claims Adjudicator concerning the merits of the application of Section 39, this must be obtained prior to an appeal being commenced to the Appeal Division on this issue.

Extensions of time will be granted to allow appeals to be initiated within 30 days of a review by a Claims Manager.

Section 96(6) of the Act and the policy of the Governors require that the appellant outline the error of law or fact or contravention of the published policy of the Governors in the decision under appeal. If grounds for the appeal are not provided within 21 days following a request for these from the Appeal Division, the appeal will normally be considered to have been abandoned.

## **2.0 Applications Filed Before June 3, 1991**

Prior to June 3, 1991, there was no right of appeal provided in the *Workers' Compensation Act* with respect to decisions rendered under Section 39. Section 96(2) of the former Act, however, provided that:

*... the board may at any time at its discretion reopen, rehear and redetermine any matter which has been dealt with by it, by an officer of the board or by the review board.*

Prior to June 3, 1991, the former Commissioners had established a procedure for rehearing decisions made under Section 39 on application by an employer under Section 96(2). This procedure was administered in the same fashion as an "appeal," although there was no legal right of appeal provided in the Act. Any request for reconsideration or "notice of appeal" concerning a decision under Section 39 resulted in a reopening and rehearing of the matter under Section 96(2).

Section 17(2) of Bill 27 contains the following transitional provision:

*If an appeal or a rehearing under . . . section 91 or 96 of the former Workers' Compensation Act has been commenced but has not been completed on the date that this Act comes into force, that appeal or rehearing shall be continued by the appeal division under and in conformity with the new Workers' Compensation Act . . . , so far as it may be done consistently with that new Act.*

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Based on this provision, any rehearing pursuant to Section 96(2) of a decision under Section 39 which was commenced prior to June 3, 1991, and which was not completed by the prior Commissioners, will be continued by the Appeal Division.

Section 17(2) requires that this rehearing be under and in conformity with the new Act, so far as it may be done consistently with the new Act. This means that consideration of the appeal will be undertaken with regard to the grounds of “error of law or fact or contravention of a published policy of the governors,” as the jurisdiction of the Appeal Division is limited to considering whether the appeal should be allowed on these grounds.

It has been argued that legislative changes should not be given retrospective effect so as to impair an existing right or obligation, unless this is specifically required by the language of the new enactment. It has been suggested that applying the grounds of error of law or fact or contravention of a published policy of the Governors to a rehearing commenced prior to June 3, 1991, would deprive an employer of a pre-existing right to have the matter considered “de novo.”

This argument incorrectly equates the prior opportunity to request a review of a decision on the basis of the Board’s discretion under Section 96(2) of the Act with a statutory right of appeal. As the prior mechanism or procedure for obtaining a review of a decision made under Section 39 was based on Board policy and discretion, it was not one which gave rise to a vested right of appeal. The Governors explicitly stated in Decision No. 1 that:

*The Appeal Division shall not exercise the Board’s plenary independent power to reopen, rehear and redetermine matters under Section 96(2) of the Act.*

The plain effect of Section 17(2) is to require the Appeal Division to continue a rehearing commenced under Section 96(2) prior to June 3, 1991, “under and in conformity with the new *Workers’ Compensation Act* . . . , so far as it may be done consistently with that new Act.” The jurisdiction of the Appeal Division to address these matters is thereby limited to considering whether the decision was based on an error of law or fact or contravention of a published policy of the Governors.

In other words, effective June 3, 1991, employers were given a right of appeal under Section 96(6)(a) with respect to a notice of an assessment under Section 39 on the grounds of error of law or fact or contravention of a published policy of the Governors. Grounds must be provided in order to commence such an appeal.

If the rehearing of a decision under Section 39 was commenced prior to June 3, 1991, no grounds need be provided as a prerequisite to the Appeal Division’s consideration of the matter. Under the policy of the Board at that time, such requests automatically

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resulted in a reopening and rehearing of the matter under Section 96(2). The Appeal Division will proceed with the consideration of these matters without the necessity of any further submissions from an employer. Such consideration, however, must be with reference to the grounds specified by Section 96(6) of the Act.

It will assist the Appeal Division in its consideration of a rehearing commenced prior to June 3, 1991, if the employer provides a submission as to why the appeal should be allowed with reference to the grounds of error of law or fact or contravention of a published policy of the Governors. Each matter will be considered on its merits by the Appeal Division with reference to the grounds specified in Section 96(6), however, whether or not any further information or submission is provided by the employer.

### **3.0 Participation by the Worker in an Appeal or Rehearing of a Decision under Section 39**

The policy of the Governors, as stated in #114.41 of the *Rehabilitation Services and Claims Manual*, is that:

*Section 39(1)(e) is concerned only with the class to which the costs of the claim are to be charged and cannot affect the entitlement of the claimant.*

In #102.27 of the Manual, the jurisdiction of the Review Board under Section 90 of the Act to consider an appeal from a decision “with respect to a worker” is defined as follows:

*The limiting words ‘with respect to a worker’ mean that the decision under appeal must be a claims decision involving an issue of a kind or class that affects workers financially.*

*The review board has no jurisdiction if the issue in dispute is simply one of cost allocation among employers, or among classes of employers.*

Pursuant to the Governors’ policy, the decision under Section 39(1)(e) cannot affect the entitlement of the claimant, and the worker is therefore not a party to the appeal.

In Decision No. 1, the Governors stated that:

*Where the participation of other parties in the procedure will assist inquiry into the merits of the issues, the Appeal Division may give notice to or allow intervention by these other parties.*

*. . . in appeals commenced under Sections 96(6) and 96(6.1) the Appeal Division may give notice of the appeal to the workers or trade union representative of the workers employed by the employer who may have an interest in the appeal.*

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The participation of the worker may assist the Appeal Division in its inquiry into the merits of the issues raised on an appeal under Section 96(6)(a) concerning Section 39. The question as to whether the worker suffered from “a pre-existing disease, condition or disability” is one on which the worker’s evidence as to their prior medical and employment history may well be relevant.

The Appeal Division will not, however, automatically notify the worker in each and every case that an appeal or rehearing has been commenced in relation to a decision under Section 39. The worker’s comments are not essential to the Appeal Division’s consideration of the matter, nor does natural justice require the worker’s participation as the worker will not be affected by the proceeding. The worker’s comments may be provided by the worker on their own initiative, or in response to a specific request by the panel of the Appeal Division considering the matter.

In the course of considering an appeal or rehearing a decision under Section 39, a panel of the Appeal Division may exercise its discretion to request further information from the worker to assist in its inquiry into the merits of the issues.

The current practice of the Board is to notify a worker if the employer receives disclosure of the claim file. Under the existing policy, the worker is advised of the nature of the appeal or appealable decision in connection with which the employer has been granted disclosure. In this notice, the worker will now be advised that he/she may on application be provided with copies of the documentation submitted by the employer in connection with the appeal or rehearing. While workers will be informed that the decision on the appeal cannot affect their entitlement they will be permitted, if they wish, to provide comment for the purpose of assisting in the Appeal Division’s inquiry.

#### **4.0 Decision Not to Affect the Worker’s Entitlement**

As noted above, a decision under Section 39 cannot affect the entitlement of the worker. If the worker’s entitlement could be affected, the decision would be one with respect to a worker and would be appealable to the Review Board under Section 90. It would be clearly contrary to both the intention of the legislature as evidenced in Section 90 of the Act, and the policy of the Governors, for the Appeal Division to make a decision on an appeal under Section 39 which could affect a worker.

If an employer is disputing a decision that the worker had no pre-existing disability, an appeal may be made to the Review Board concerning the application of Section 5(5) of the Act to the claim. The Appeal Division will suspend its consideration of an appeal or rehearing of a decision under Section 39(1)(e) if it is notified that the application of Section 5(5) is being considered by the Compensation Services Division or the Review Board, pending the determination of that issue on the claim.

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There is, notwithstanding the policy of the Governors, an obvious potential for a decision by the Appeal Division on an appeal under Section 39 to affect the worker's entitlement. As noted in Decision No. 271 of the *Workers' Compensation Reporter*, there may be cases where there is some interconnection between Section 39 and Section 5(5) of the Act.

The argument has been made that a decision under Section 39 is, in fact, one with respect to a worker. Certainly, the evidence to be considered in such an appeal is concerned with the particular worker's medical condition and whether any portion of their disability was enhanced by reason of a pre-existing disease, condition or disability. One of the grounds on which relief may be based, the existence of a pre-existing disability, is a ground on which a worker's entitlement may be limited under Section 5(5) of the Act.

Similarly, one of the grounds of appeal under Section 96(6)(a) is "error of fact." If the Appeal Division were to make specific factual findings in the course of providing reasons in a decision on an appeal under Section 39, these could require the worker's pension entitlement to be reconsidered under Section 5(5) of the Act. The findings of fact of the Appeal Division on a particular claim are binding on the Claims Adjudicator and the Review Board, and could affect the worker's entitlement. The effect of this would be to accomplish indirectly what the Appeal Division is prohibited from doing directly.

It has been suggested, therefore, that the policy of the Governors, which states that such matters do not involve a decision "with respect to a worker," is contrary to the *Workers' Compensation Act*. It has been argued that such a decision should be viewed as being one "with respect to a worker" which is appealable to the Review Board.

The Appeal Division will not declare a policy of the Governors to be contrary to the *Workers' Compensation Act* in the absence of compelling reasons necessitating such a conclusion. Under Section 82 of the Act, the Governors have been given the power to approve and superintend the policies and direction of the Board. If a policy of the Governors is capable of being interpreted or applied in more than one fashion, the Appeal Division will apply the policy in a manner which will uphold its validity under the *Workers' Compensation Act*.

In order to comply with the policy of the Governors, the decision of the Appeal Division on Section 39 matters *must* be rendered in a fashion which does not affect the entitlement of a worker. To comply with that requirement, if the appeal is allowed, the Appeal Division may not specifically identify whether this is being done on the basis of there being a pre-existing disease, condition or disability where, to do so, would pre-empt a decision by a Board officer or a right of appeal to the Review Board on an issue affecting the worker. Reasons will, however, be provided for every decision. The

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Appeal Division will observe the Governor's policy in a fashion consistent with the Appeal Division's primary obligation to ensure compliance with the provisions of the *Workers' Compensation Act*.

This decision will be reviewed in December 1991, with reference to the experience of the Appeal Division in dealing with appeals in connection with Section 39. Written comments or submissions provided by interested parties will be considered at that time.



## Decision of the Appeal Division

**Number:** 91-0141  
**Date:** July 17, 1991  
**Panel:** William I. Beeby  
**Subject:** An OSH Penalty Assessment – Employer Diligence

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An electrical contracting company appealed from a penalty assessment of \$3,000 made under Section 73(1) of the *Workers' Compensation Act*. Notification of the penalty was contained in an October 18, 1990, letter from the Director, Field Services Department, Occupational Safety and Health Division.

An oral hearing was held in the Richmond offices of the Workers' Compensation Board on July 8, 1991. It was attended by the Corporate Secretary for the company and a representative of the Employers' Adviser's office presented for the employer. A worker's representative was notified of the hearing but did not attend.

### Background

The company contracted for the installation of electrical services at a Vancouver construction site.

During inspections of the work area on November 23, 1989, and January 12, 1990, an Occupational Health Officer (OHO) issued orders relative to wearing safety belts on elevated platforms, because a worker was observed on both dates on an elevated platform without a safety belt. This was in contravention of regulation 32.36(8) of the *Industrial Health and Safety Regulations* of the Workers' Compensation Board.

Following the inspection of January 12, 1990, a warning was issued by the Occupational Safety and Health Division to the company that a penalty might be applied.

During a site inspection by an OHO on April 10, 1991, a worker was again seen working on an elevated platform not wearing a safety belt. While the inspection report cites that "*workers* were observed," the panel is satisfied from subsequent correspondence between the employer and the Board that only one worker was involved.

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## Evidence and Argument

It was submitted in evidence at the oral hearing that it had been communicated to the Board that:

1. The employer (following the second inspection on January 12, 1990) had instituted a daily meeting of the crew at the start of each shift, in the lunch room, during which all the workers were instructed on safety matters – with particular emphasis on the wearing of safety belts when working on elevated platforms. Letters confirming this were submitted from supervisors at the site.
2. That written notices were placed in and around the lunch room on bulletin boards, hat racks, doors and on the worksite – specifically relating to the wearing of safety belts. Photographs of these notices were submitted at the oral hearing.
3. That the red warning signs on the man-lifts were replaced by bigger red signs, warning all operators that safety belts must be worn.
4. Additional and extra attention was paid by Head Office supervision during “site-visits” and this included special “on-site” safety checks to ensure compliance.
5. That the employer had instructed the employees regularly and had provided all the necessary safety equipment and accepted the responsibility assigned under the WCB requirements, and had a safety program in place.

In addition to the three supervisory personnel on site, there were 15 employees who were spread throughout the work area. Supervisory checks were frequent but workers were not under the constant view of supervisors at all times and could not be so supervised, given the nature of the work.

The OHO visited the site and saw a man on an elevated platform who was not wearing his safety belt. As indicated in his letter dated September 12, 1990, the site electrical foreman said that the person concerned was terminated following that incident and subsequently another worker was also terminated when he was found by a supervisor to be not wearing a safety belt. Two Assistant Foremen confirmed in writing that all workers on the site were spoken to on a continuing basis daily about safety matters – and that notices were posted at the site regarding the wearing of safety belts.

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The employer argues that they were taking every appropriate and reasonable action, trying to ensure that no further violations took place, especially in light of the warning of January 12, 1990. The employer argues that the issue is whether it is a worker or an employer failure, and the employer feels this to be a failure on the part of the worker.

It was given in evidence that there were three man-lift units in use at the site at the time of the second and third inspection reports. There were no problems seen related to the other units, so presumably safety belts were worn on these two units. In respect of the man seen without the safety belt on April 10, 1990, he was concentrating on the job in hand and had forgotten to attach his belt. In the normal course of events, supervisors correct infractions as they see them – and would have done so in this instance if the OHO had not been there.

It was submitted that the company had a safety program and that one man on a particular day had failed to wear his belt – and the company should not be held liable for this man's failure.

## **Regulations and Act**

The *Industrial Health and Safety Regulations* provide as follows:

Re: Contravention by persons subject to regulations – Regulation 2.16(1) states:

*Contravention of a regulation shall be deemed to be a contravention by the employer and shall make the employer liable for the penalty prescribed by the Workers' Compensation Act but nothing in this clause shall relieve the supervisor or the worker.*

Re: Elevating devices – Regulation 32.36(8) states as follows:

*Occupants of elevating work platforms shall wear safety belts secured to suitable and substantial anchoring points.*

The *Workers' Compensation Act* relative to levies, provides at Section 73(1):

*Where the Board considers that:*

- (a) *Sufficient precautions are not taken by an employer for the prevention of injuries and industrial disease;*
- (b) *The place of employment or working conditions are unsafe; or*

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- (c) *The employer has not complied with regulations, orders or directions made under Section 71.*

*The Board may assess and levy on the employer an additional assessment determined by the Board and may collect the additional assessment in the same way as an assessment is collected. The Board, if satisfied the fault was excusable, may relieve the employer in all or in part from the liability.*

The additional assessment (penalty) was applied under Section 73(1) of the Act.

Published policy in the *Occupational Safety and Health Policy Manual* at 1.4.1 on the application of sanctions under general guidelines at paragraph 2 provides in part as follows:

*Such a recommendation (for penalty) should be considered when the Officer is satisfied that persuasive means have failed to gain a meaningful commitment to comply, **from the employer.***

and in determining whether or not to recommend sanctions at paragraph 3:

- i) If the orders refer to items which have been overlooked by management actively pursuing a program of compliance, sanctions will not normally be considered;*
- ii) If the orders result from the independent action of workers who have been properly instructed and trained, sanctions against the employer should not normally be considered . . .*

## **Decision**

The panel finds that the employer was actively pursuing full compliance with the Board's order, with specific reference to the matter of the wearing of safety belts.

The panel finds on examination of the record of inspections for this project that, apart from one occasion when an infraction relative to the wearing of safety head gear was noted, the only other infraction involved relates to safety belts as shown earlier.

The panel accepts the employer's testimony that the workers were verbally instructed daily on safety matters and specifically relative to the wearing of safety belts. It further accepts that disciplinary action was subsequently taken as is earlier described. No evidence was available relative to any discussions with the workers concerned at the

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time they were observed by the OHO on the elevated platforms, apart from the employer's statement that the person seen by the OHO on April 12, 1990, soon afterwards had his employment terminated because of this infraction.

The panel finds that the fact the worker was not wearing a safety belt was not through lack of diligence on the part of the employer as such, but rather because of a failure on the part of the worker to obey verbal instructions, written instructions and operating procedures shown on the equipment to be required.

The employer has established that published Board policy was not followed in this case, as set out above.

For these reasons, the additional assessment of \$3,000.00 will not be applied.

THE APPEAL IS ALLOWED.

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



## Decision of the Appeal Division

**Number:** 91-0153  
**Date:** July 23, 1991  
**Panel:** P. Michael O'Brien, Sarwan Boal, James L. Tonn  
**Subject:** Application of Section 55 Time Limits

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Prior to his death, the worker appealed a June 28, 1989, finding of the Workers' Compensation Review Board (the Review Board). The Review Board had upheld a Board officer's September 27, 1988, decision that the worker's increased permanent partial disability pension would be retroactive to February 7, 1980.

The worker contended that his increased permanent partial disability pension should have been effective from March 12, 1975.

The issue is the determination of the effective date of the worker's increased permanent partial disability pension.

The worker was employed in coal mining from August 25, 1969, to March 13, 1975. He retired on that date due to health problems, having been off work since December of 1974.

The worker apparently visited the Cranbrook office of the Workers' Compensation Board in March of 1975 to make application for compensation for his pulmonary problems. Both he and his wife have testified that a Board employee at the Cranbrook office said that, as his pulmonary problems could not be proven to be caused by his work activities, no written application for compensation could be accepted. At that time, bronchitis was not recognized as an industrial disease. Decision #128 of the *Reporter Series*, published on July 15, 1975, recognized bronchitis as an industrial disease. The worker's condition had been diagnosed as bronchitis at that time.

On February 7, 1980, at the suggestion of the Ombudsman's Office, the worker submitted an Application for Compensation (Form 6). In various correspondence he describes this as his second application for compensation.

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The worker's application was initially rejected by the Board but, after traversing the appeal system, a Commissioner's decision of September 8, 1986, confirmed acceptance of his pneumoconiosis as being due to his occupational exposure to coal dust. His bronchitis problems were not accepted as compensable. A 25% permanent partial disability pension was implemented retroactive to 1980.

A Medical Review panel certificate of June 10, 1988, certified that the worker's bronchitis was secondary to his pneumoconiosis and, therefore, all of his pulmonary problems were compensable. The worker's permanent partial disability pension was increased to 100% retroactive to February 7, 1980.

The worker appealed that decision, submitting that his disability pension should be retroactive to the date of his retirement in 1975. He said that his retirement was solely due to the effects of his industrial disease. A Review Board finding of June 28, 1989, concluded that the worker had not met the requirements of Section 55 of the *Workers' Compensation Act* (the Act) and, therefore, the panel was barred from making his compensation retroactive to 1975.

## Law and Policy

Section 55 of the Act reads as follows:

55. (1) *An application for compensation shall be made on the form prescribed by the Board or the regulations and shall be signed by the worker or dependant; but, where the Board is satisfied that compensation is payable, it may be paid without an application.*

(2) *Unless an application is filed, or an adjudication made, within one year after the date of injury, death or disablement from industrial disease, no compensation is payable, except as provided in subsection (3).*

(3) *Where the Board is satisfied that there existed special circumstances which precluded the filing of an application within one year after the date referred to in subsection (2), and*

- (a) *where an application is filed within 3 years after that date, it may pay the compensation provided by this Part; or*
- (b) *where the application is filed after 3 years after that date, it may pay the compensation provided by this Part but not in respect of a period prior to the date the application is received by the Board.*

(4) *This section applies to an injury or death occurring on or after January 1, 1974 and to an industrial disease in respect of which exposure to the cause of the industrial disease in the Province did not terminate prior to that date.*

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The Medical Review panel certificate of June 10, 1988, certified:

4. *His (the worker's) small airways disease has developed concomitantly with the pneumoconiotic process. Thus the pneumoconiosis was of causative significance.*
5. *His disability is not wholly or partly the result of causes other than his pneumoconiosis. There is only slight indication from history and documentation that he suffered from any reversible disease.*

It is uncontested that the worker's retirement in 1975 was due to the disabling effects of his pulmonary problems.

The Review Board found that the effective date of the worker's Application for Compensation was February 7, 1980. They also found that the worker was precluded from filing an Application for Compensation in 1975.

Clearly the evidence which was accepted, both by the Review Board and by this panel, was that the worker went to the Cranbrook office of the Workers' Compensation Board in 1975 to apply for compensation benefits for his disabling pulmonary problems and was advised that his condition was not compensable.

A later Medical Review Panel certified that his condition was compensable. The worker became permanently disabled in 1975 but was denied the opportunity to apply for compensation by the advice given by a Board employee. In the worker's mind, that was a Board decision.

It is possible to interpret the facts in this case to lead to a conclusion that the test of Section 55(2) of the Act has been met by an adjudication being made. The panel has not done so. We accept that the worker was given advice that effectively precluded him from applying for compensation but that is not tantamount to an adjudication.

The Board is bound by Section 55(3)(b) which permits it to only make awards retroactive to the date of application. In this case the Board is only entitled to make an award retroactive to February 7, 1980.

THE PANEL UNANIMOUSLY DENIES THE APPEAL.

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



## Decision of the Appeal Division

**Number:** 91-0195  
**Date:** August 1, 1991  
**Panel:** P. Michael O'Brien, Verna Ledger, Derrick Spooner  
**Subject:** Payment for Medication

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The worker appealed the August 3, 1989, finding of the Workers' Compensation Review Board. That finding upheld the decision of a Claims Adjudicator contained in a letter of January 22, 1988. The Adjudicator determined, on the advice of a Board Medical Advisor, that no further payment would be made for narcotic drugs or benzodiazepines prescribed by the worker's physician.

A hearing was held on the 26th of July 1991. The worker was represented by his union.

### Law and Policy

Section 21(6) of the *Workers' Compensation Act* (the Act) provides that Medical Aid "shall at all times be subject to the direction, supervision and control of the Board . . . ."

Section 77.30 of the *Rehabilitation Services and Claims Manual* (the Manual) provides that:

*Board responsibility for narcotic analgesics, hypnotic-sedatives and tranquilizers (see examples in Table 1) will be limited to a post-injury or post-surgery period of eight weeks. An extension of this eight-week period may be considered, however, where there are special or extenuating circumstances; for example where a worker has received, or will receive a permanent disability pension and requires regular, intermittent and limited narcotic preparation for the relief of pain.*

The above-noted policy is dated June 1991 and is identical to the policy implemented in December of 1989. Prior to December 1989 there was no such policy in the Manual although there were several memoranda in existence dealing with the subject of control of drug usage.

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Section 78.10 of the Manual sets out the general Board policy with respect to the direction, supervision and control of treatment. The third paragraph of that policy reads:

*The Board uses its control over treatment to promote recovery and to exclude choices by patients or doctors that will delay recovery, or create an unwarranted risk of further injury. The control of treatment by the Board is not intended to exclude patient choices. If there are reasonable choices of treatment, or reasonable differences of opinion among the medical profession with regard to the preferable treatment, or choices to be made, which depend on personal preferences, the matter should be regarded as one of patient choice.*

## **History and Evidence**

On March 22, 1986, the worker suffered serious compensable crush injuries to his left groin and leg.

As a result of those injuries, he suffers unremitting pain which is exacerbated by activity, including sitting. A review of the contents of the claim file leads to the conclusion that none of the medical practitioners, either external or within the Board, who have examined the worker doubt that he has serious and intractable pain. In order to control the pain, his physicians have prescribed various drugs including Tylenol 3, Percocet, Talwin and Halcion. For some years now, the worker has taken a maximum of three Percocet and 1/4 tablet of Halcion daily. In addition to medication, the worker has attempted the use of a TNS machine on several occasions. On the first occasion, it was moderately helpful in reducing the pain but not to a significant extent. On the second occasion, it in fact amplified the pain. The worker's physicians have declined to perform further surgery designed for pain relief. The worker was considered for a course at the Columbia Centre designed for pain control. This did not take place as he was not considered to be a good candidate for this form of treatment. He has also had anesthetic injections in an attempt to reduce his pain. The only treatment that has been at all successful in keeping the pain within manageable limits has been the use of prescribed medication as presented by his specialist.

The Board's Medical Advisor to Medical Aid recommended the termination of use of narcotic medications and benzodiazepines in a memorandum of January 7, 1988. He said that these medications should be avoided at all costs "because of the inevitable development of increasing tolerance and chemical dependency."

Another Board Medical Advisor said, in his memorandum of October 16, 1990, that Percocet "with its serious side effects, is not indicated, as almost all authorities will agree, especially the B.C. College of Physicians and Surgeons which is trying its best to control over-medication of narcotics by doctors in B.C."

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The worker's physicians have commented on the appropriateness of the drug therapy prescribed for him. His specialist, in a letter of August 18, 1989, said that he was concerned with the Board's treatment of the worker as:

*Their attitude of limiting the treatment we can apply by not funding appropriate analgesic medication upsets me no end in that they are telling us that it is their viewpoint that we are making this gentleman a drug addict so to speak . . . he utilizes Percocet for pain relief, taking a total of 100 every six weeks. He is not increasing his usage of this medication. You [the worker's General Practitioner] are carefully monitoring his usage as I am too.*

The general practitioner's opinion is summarized in his letter of August 20, 1989:

*All the modalities of treatment have been tried . . . and despite this, he still requires some narcotic medication for control of his pain. I feel that the physicians who are directly involved in his care know what is appropriate far more than physicians or Adjudicators who have never even seen him.*

Lastly, Dr. Bart Jessup, a psychologist who had examined the worker to determine his suitability for admission to the Columbia Centre, said in his letter of July 7, 1989, that:

*Although of course medications are primarily a medical concern, speaking as a psychologist, I am less concerned than usual about medical use in this worker's case (as his psychological features are not characteristic of drug abusers). . . . this worker may prove to be a reminder to us that overall group outcome research data can sometimes obscure the importance of individual differences within group averages.*

At the oral hearing, the worker said that prior to his compensable injury he had not, to his recollection, ever had prescription medication. He said that he occasionally took an aspirin but this was very infrequent. The worker also said that he enjoyed a drink of alcohol from time to time but had never had a drinking problem nor had he drunk regularly. He said that his medication intake, specifically Percocet, had not changed for several years and that he rigidly controls his intake as he understands that if it increases it could lead to worse problems. The worker said that he has not noticed any effect, either physical or psychological, from his long-term use of Percocet and other narcotic medication. He said that there has been no change in degree of control over his pain that a Percocet tablet has and that it is the same now as it was when he first took them.

## **Findings and Reasons**

The panel finds that, in this worker's case, the Board should continue to be responsible for payment for narcotic and benzodiazepine medication, subject to ongoing monitoring and periodic review.

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The panel is particularly convinced by Dr. Jessup's comments with respect to individual cases. This is entirely consistent with the direction given in Section 99 of the Act to decide issues "according to the merits and justice of the case . . . ."

At the oral hearing the worker appeared as an honest, straightforward and cooperative man who is keenly aware of the dangers inherent in long-term narcotic usage. Despite the Board's denial of payment for narcotics, the worker's physicians have continued to prescribe them and he has continued to take them. He has, however, clearly demonstrated his commitment to and capability of controlling the utilization of medications. His rate of usage has not varied for approximately three years. A brief exploration of the worker's past history confirms Dr. Jessup's professional opinion that he does not have an addictive personality and therefore stands at a lesser risk of running into problems with his narcotic usage.

In addition, the panel notes the ongoing collaboration and discussion between the specialist and the general practitioner. These two professionals are clearly aware of the potential dangers of over-use of narcotics and remain in close contact to ensure that does not happen in this case. This is not a situation of an over-worked general practitioner inadvertently over-medicating one of his patients. The specialist and general practitioner are closely monitoring the worker's progress and his drug usage and providing support to each other in that process.

Although the Board policy contained in Section 77.30 of the Manual was not in effect at the time that the decision appealed was made, even if it were, the panel would come to the same conclusion that it has. That policy provides for control of narcotic drugs to an eight-week post-surgical period except where there are special or extenuating circumstances. This worker's case clearly fits into that exception as he has genuine chronic pain, the guidance of both a specialist and a general practitioner, and demonstrated ability to control his drug usage.

Lastly, in this worker's case there is clearly a difference of opinion between the Board doctors and his doctors as to the appropriate treatment for control of his chronic pain. Board policy in Section 78.10 suggests that where these differences of opinion exist, and are considered to be "reasonable," then the choice of what advice to follow should be the patient's. The worker has clearly made that choice and has done so, the panel believes, for perfectly valid reasons.

THE PANEL UNANIMOUSLY ALLOWS THE APPEAL.

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

# REPORTER

## Maximum Wage Rate Adjustments

Date: August 6, 1991

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WHEREAS Section 33 of the *Workers' Compensation Act* requires the Board to determine the maximum wage rate to be applicable for the following calendar year in the manner therein prescribed;

AND WHEREAS the Board is of the opinion that the sum of forty-eight thousand thirty-four dollars and eighty-two cents (\$48,034.82) represents the same relationship to the sum of forty thousand dollars (\$40,000.00) as the annual average of wages and salaries in the Province of British Columbia for the year 1990 bears to the annual average of wages and salaries in the said Province for the year 1984;

THE BOARD HEREBY DETERMINES that the maximum wage rate to be applicable for the year 1992 under Section 33 of the *Workers' Compensation Act* is forty-eight thousand dollars (\$48,000.00);

AND THAT in subsection (6) of the said section, the sum of forty-five thousand eight hundred dollars (\$45,800.00) appearing therein will be changed as at the first day of January 1992, to read forty-eight thousand dollars (\$48,000.00).

