

WORKERS' COMPENSATION

REPORTER

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Decision of the Appeal Division

Number: 91-0272
Date: August 16, 1991
Panel: Connie Munro, Chief Appeal Commissioner
Subject: An Application for Reconsideration

This is a request for reconsideration of a commissioners' decision of April 23, 1991. The request is contained in a July 15, 1991 letter from counsel for the worker.

The *Workers' Compensation Act* was amended on June 3, 1991 when Bill 27 (the *Workers' Compensation Act, 1989*) came into force, creating a new Appeal Division. The jurisdiction of the Appeal Division to reconsider previous decisions is set out in the *Act* as follows:

Reconsideration by appeal division

96.1 (1) *Subject to this section and sections 58 to 66, a decision of the appeal division is final and conclusive.*

(2) *A worker, the worker's dependants, the worker's employer or the representative of any of them may apply to the chief appeal commissioner for reconsideration of a decision of the appeal division on the grounds that new evidence has arisen or has been discovered subsequent to the hearing of the matter decided by the appeal division.*

(3) *Where the chief appeal commissioner considers that the evidence referred to in subsection (2)*

- (a) is substantial and material to the decision, and*
- (b) did not exist at the time of the hearing or did exist at that time but was not discovered and could not through the exercise of due diligence have been discovered,*

he may direct that

- (c) the appeal division reconsider the matter, or*
- (d) the applicant may make a new claim to the board with respect to the matter.*

Subsection 17(5) of Bill 27 provides that:

A worker, the worker's dependants, the worker's employer or the representative of any of them may apply to the chief appeal commissioner for reconsideration of a decision made under section 91 or 96 of the former Workers' Compensation Act on the same grounds and in the same manner as that set out in section 96.1 of the new Workers' Compensation Act.

Unless all of the requirements of Section 96.1(3)(a) and (b) are met, the Appeal Division has no jurisdiction to reconsider the decision of the former commissioners on this claim.

In their April 23, 1991 decision the commissioners determined that the June 10, 1988 medical review panel certificate dealt with the question of the worker's depression. They considered that while the certificate did not specifically refer to depression, the necessary implication was that at the time of the panel's examination the worker did not have a disability from this cause related to his injury and he was not disabled for that reason for any period for which he had not already been paid by the Board.

The worker's counsel argues that the decision of the commissioners is factually incorrect in that the medical review panel did not consider any issues of psychological disability arising from the work injury. He has provided a copy of a May 30, 1991 letter from the chairman of the medical review panel that examined the worker. It states that the chairman canvassed the matter with the two other members and:

can confirm that the Panel did not address any issues relating to any alleged psychological disability of the worker in its Certificate.

The worker's counsel asks for an early acknowledgement that the Board will be making a claims level judgment in the near future about the compensability of the diagnosed depression.

The letter from the medical review panel chairman is substantial and material to the prior decision. It clearly shows that psychological issues were not considered by the Panel and that the interpretation of the certificate by the commissioners was in error. That letter did not exist at the time of the commissioners' decision.

The tests for reconsideration have been met. The statute provides two options in Section 96.1 (3) (c) and (d) referred to above. Given that no earlier decision has been rendered on the question of whether the worker has a depression related to his 1979 injury, it would be inappropriate for the Appeal Division to consider the matter at first instance. I would, therefore, direct that the worker “may make a new claim to the board with respect to the matter.” In the context of this case “a new claim” means an application, under the same claim number, for consideration of the compensability of the alleged depression. The file will be referred to the Compensation Services Division to address that matter.

THE APPLICATION FOR RECONSIDERATION IS GRANTED.

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



Decision of the Appeal Division

Number: 91-0259
Date: August 9, 1991
Panel: P. Michael O'Brien
Subject: The Application of Section 33(3)

The worker appeals the December 22, 1988 findings of the Review Board which overturned the November 20, 1987 decision of a claims adjudicator. The adjudicator had set the worker's wage rate following an 8-week review at \$24.71 per day, based on the worker's average earnings for the previous 3½ years. The Review Board found that the figure did not represent the worker's actual loss of earnings and re-set his average earnings at the rate at the time of injury, \$16,500.00 per year.

The Review Board specifically rejected the worker's contention that his earnings should be set under Section 33(3) of the *Workers' Compensation Act*. They said that Section 33(3) could not be considered for three reasons:

1. There was no formal apprenticeship program.
2. The worker was not a young man; he was 30 years of age.
3. The worker had been employed in learning the roofing trade for only five weeks at the time of his compensable injury.

The issue raised by the worker is that the Review Board failed to recognize that he would have received increments as an apprentice and, therefore, those increments should be included in the calculation of his wage rate.

Law and Policy

Section 33(3) of the *Act* reads as follows:

Where the board is satisfied that the average earnings of the worker at the time of injury by reason of his age or his being in the course of learning a trade, occupation, profession or calling do not truly represent his average yearly earnings or earnings capacity, it may, in the case of temporary disability, adjust

from time to time the payments of compensation to take into account the probable increase in average earnings and may, in the case of permanent disability, calculate the award by taking into account the probable increase in average earnings.

Evidence and Argument

The Review Board found that the worker was not an apprentice on the grounds, amongst others, that he was not young. Section 33(3) refers to youth as only one of the grounds for consideration in the application of that section. Specifically, it says, “by reason of his age or his being in the course of learning a trade” In other words, Section 33(3) can be considered where the worker is either young or is in the course of learning a trade. It may well be that the worker could not be considered “young” but that does not bar him from having his average earnings considered under Section 33(3) if he was in the course of learning a trade. Section 33(3) speaks to either youth or training status.

Included with the worker’s submission of July 7, 1989 was a letter from the injury employer which attached sections of the *Collective Agreement* covering his employees in the roofing industry. Section 9.03 of the *Collective Agreement* defines an apprentice as:

That category as defined in the Apprentice and Tradesman’s Qualification Act and its subsequent regulations relating to the roofing, damp and waterproofing trade.

Section 10.01 of that *Agreement* sets out the rates of pay for both journeymen and apprentices. In addition, Section 10.01 contains the following clause:

For each hour of employment, all apprentices shall have 76 cents (\$0.76) per hour deducted from their wages and remitted to the Trustees of the Roofer’s Apprenticeship and Training Fund in the manner provided by the unified remittance form. Such monies shall be administered for the purpose of subsidizing lost wages while apprentices are attending apprenticeship school.

Other sections of the *Collective Agreement* make provision for the number of apprentices to be employed on job sites of varying sizes.

All of this lends a flavour and character of some formality to the apprenticeship program for roofers. Therefore, I find that the Review Board’s description of the employment relationship the worker enjoyed with the accident employer as one that “was not a formal apprenticeship program ...” is in error. Indeed, there seems to be considerable formality to the program. I can think of no other term that more

adequately describes the worker's employment relationship than that of an apprentice. I find that the worker was employed as an apprentice within the meaning of Section 33(3) of the Act.

Lastly, the Review Board denied the application of Section 33(3) to the worker's case on the grounds that he had been employed only a short period of time.

Section 67.10 of the *Rehabilitation Services and Claims Manual* says, in part:

If the apprentice was fully employed with one employer during the year prior to the injury with little or no layoffs, it is considered that the ongoing adjustments under Section 33(3) are a better representation of his ongoing loss ...

If, in the year prior to the injury, the apprentice has been subject to layoffs, or has served his apprenticeship with a number of different employers, it would be more appropriate to use the annual earnings figure as a reflection of future loss rather than incremental steps under Section 33(3).

A casual reading of the first paragraph above may lead to a conclusion that the incremental increases referred to in Section 33(3) are applicable only where the apprentice has been fully employed for one year with one employer. I do not believe that is a correct reading of that paragraph. Rather, the policy appears to set up a presumption that where the apprentice was employed with one employer with no layoffs for one year, then he will **automatically** be allowed the incremental increases under Section 33(3). I see no suggestion that the absence of the one year of full employment with the same employer prohibits an apprentice from being considered under Section 33(3). Indeed, if that interpretation was applied to the policy, it would be inconsistent with the legislation.

The second paragraph quoted above provides that where the apprentice has been subject to a number of layoff periods or has moved from employer to employer, his average earnings are better calculated by using the one-year earnings figure rather than the incremental figures provided for in Section 33(3). The rationale seems to be that there is no reasonable expectation that the apprentice would have worked for sufficient hours to qualify for the increments. This paragraph refers only to those individuals who have been indentured into an apprenticeship for at least one year. This is not applicable to this worker's case. He had not worked for one year as an apprentice and, therefore, cannot be assessed under the Board policy reflected in the second paragraph above.

The worker's employer indicated in writing on several occasions that the worker would have had steady employment as a roofer apprentice but for the compensable injury. At the Review Board's oral hearing, evidence was led that the employer had been in business for many years and was a stable company. I accept the Review Board's finding that the worker was well-motivated. Lastly, the worker had made significant financial commitments as a result of finding regular, well-paying employment as a roofer. That suggests it was his intention, with the reassurances of the employer, to remain in the roofing business with his pre-injury employer.

I, therefore, accept that the worker had embarked upon a recognized apprenticeship program and likely would have remained in that program but for the compensable injury. I accept the evidence of the president of the employer company as contained in his letter of December 2, 1987 that the worker would have worked on a 40-hour-per-week basis, 32 weeks per year. He would therefore have progressed through his apprenticeship at the rate of 1,280 hours per year.

I ALLOW THE WORKER'S APPEAL. Section 33(3) of the *Act* should be applied to his wage rate and it should be adjusted according to the increments contained within the *Collective Agreement* between the employer and the worker's union.

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

Decision of the Appeal Division

Number: 91-0307
Date: August 20, 1991
Panel: Hilrie Reimer, Walter Peain, James L. Tonn
Subject: A Claim for Epicondylitis (#2)

This is an appeal from the finding of the Review Board dated March 1, 1989, which confirmed the decision of the claims adjudicator dated June 2, 1988 to disallow the worker's claim for bilateral arm symptoms.

There are two issues:

1. What is the correct diagnosis of the worker's bilateral arm condition?
2. Did the worker's employment have causative significance in the development of her bilateral arm symptoms?

Evidence and Argument

On February 26, 1988 the worker submitted an application for compensation for a gradual onset of bilateral arm complaints in January 1988, which she attributed to her work as a word processing operator since July 1, 1985. Prior to July 1985 the worker was employed for many years as a medical dicta-typist.

There is some equivocation in the Review Board decision as to whether the diagnosis in this case was tenosynovitis or tennis elbow. The adjudicator's letter of June 2, 1988 indicates that "bilateral tennis elbow" was adjudicated under Section 5 of the *Act*.

The initial diagnosis by Dr. K was tenosynovitis. In an April 26, 1988 report, Dr. B diagnosed tennis elbow which he related to the claimant's work as a stenographer. The claim was disallowed on the basis of May 5th and 24th opinions from Dr. S, a Board medical advisor, that the worker's employment was not likely the cause of her condition.

A June 16, 1988 letter was received from a manager for the employer, indicating that there had been a change in ownership of the business resulting in a change in procedures, notably an increased amount of “medical typing” for the worker. This corroborated the worker’s evidence. A subsequent letter from the general manager of the employer, contradicted the manager’s letter. It set out the hours of medical typing for the period July 1987 to June 1988, and pointed out that the hours worked were never more than 40% of a full month’s hours of work.

In a September 13, 1988 report, Dr. C expressed his disagreement with the opinion of Dr. S and, relying on the manager’s letter, related the worker’s condition to her employment. Dr. B also wrote a letter on October 13, 1988 contesting Dr. S’s opinion as did Dr. V in a February 27, 1989 letter. Both Dr. B and Dr. V related the worker’s complaints to her work.

An appeal from the Review Board findings was initiated by a June 15, 1988 letter from the workers’ adviser accompanied by Notice of Appeal and other materials from the worker, challenging the information provided by the employer’s general manager. In addition an opinion was provided from Dr. B, a rheumatologist, diagnosing tenosynovitis caused by the worker’s “extensive typing activities.”

It was determined by this panel that a clarification of medical information as it pertains to the diagnosis and symptoms of the injury under the claim and their relationship to activities performed by the worker was essential.

A memorandum was sent to Dr. N, Vice-President, Medical Services, of the Workers’ Compensation Board requesting the following clarification:

1. The medical terms “epicondylitis” and “tenosynovitis” are used, what seems, interchangeably in Dr. B’s consultation report dated October 13, 1988 and Dr. C’s report dated September 13, 1988. Does the diagnosis expressed in those two reports differ from “bilateral tennis elbow”?
2. Would you please review Dr. B’s and Dr. C’s consultation reports, cited above, together with Dr. S’s memos #2 and #4, and provide an opinion as to which is most likely correct, based on the worker’s submission that her symptoms came on gradually as a result of her having to use the keyboard in a different way and more often in her work after July 1987.

In a memo to Dr. N, Dr. J. N, a specialist in occupational medicine, provided an opinion dated July 12, 1991.

In reply to question number one, Dr. N states:

Tennis elbow is a common lay term synonymous with lateral epicondylitis. The reports by Doctors B and C indicate diagnoses of bilateral extensor tenosynovitis as well as bilateral lateral epicondylitis. They are in agreement in this regard. These diagnoses do not in essence deny the diagnosis in the adjudicator's Memo No. 5 (bilateral tennis elbow) in that they include the diagnosis of bilateral tennis elbow; however, the two physicians are diagnosing in addition, an extensor tenosynovitis of the forearm in addition to the lateral epicondylitis. These conditions involved the same muscle group and thus are closely related. Although the two physicians' diagnoses represent somewhat of a clarification, this clarification would not, in my opinion, have a direct impact on etiology considerations.

Dr. J. N's response to the panel's second question provides new information regarding the causative significance of the work. Dr. J. N states:

If this worker is performing keyboard work for the majority of her work day then I would conclude she is involved in frequently repetitious use of her forearm and wrist extensor musculature. I would conclude that the work is minimally forceful in nature.

...

If we accept that this worker did have a significant change in the amount of frequently repetitious activities prior to the onset of her symptoms, then I would conclude that the balance of probabilities in this case is that this worker's diagnosed bilateral lateral epicondylitis and extensor tenosynovitis is reasonably related to her occupational activities.

In this light therefore I agree with the conclusions reached by Doctors B and C.

Reasons and Findings

The *Rehabilitation Services and Claims Manual*, Item #13.11 states:

Claims for epicondylitis (tennis elbow) and carpal tunnel syndrome are treated as claims for "personal injury," whether they follow one specific trauma or repeated trauma ...

The panel finds that the adjudicator was correct in adjudicating the claim under Section 5(1) of the Act which deals with personal injuries; however, we draw a different conclusion when considering causative significance. We find that this worker did have

a significant change in the amount of frequently repetitious activities prior to the onset of her symptoms, as set out in her uncontested challenge to the general manager's earlier submission.

This panel relies on the opinions of Doctors B, C and J. N that the worker's diagnosed bilateral lateral epicondylitis and extensor tenosynovitis is causally related to her occupational activities.

THE APPEAL IS ALLOWED.

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

Decision of the Appeal Division

Number: 91-0325
Date: August 28, 1991
Panel: Paul Petrie
Subject: Post Surgical Wage Loss

The worker appeals from the Review Board finding of September 25, 1989, which upheld the claims adjudicator's decision of November 30, 1988 terminating wage loss on September 5, 1988 for the worker's hernia claim. The issue to be resolved in this appeal is whether the worker is entitled to wage-loss benefits until September 12, 1988.

On May 3, 1988 the worker felt a strain in his left groin when the 850-lb. dolly he was pulling stopped suddenly because of a bolt on the floor. He eventually developed a lump in the groin area and saw his doctor in early July, 1988. A left inguinal hernia was diagnosed and a surgical repair was carried out on July 25, 1988. There were no complications noted in the surgical report. The claim was reviewed by a WCB medical advisor on August 3, 1988 and the claim was accepted as compensable.

The claims adjudicator wrote to the worker on August 18, 1988 outlining Board policy for hernia claims and advising that post-operative wage loss would be limited to 42 calendar days except where there are complications which are fully explained by the attending physician. The letter advised that unless further medical evidence indicated complications, wage loss would be paid until September 5, 1988. The worker's attending physician provided two progress reports subsequent to surgery. On August 19, 1988 he stated that the incision was healing well and was still tender. He also stated that the worker had to return to heavy work so would be off another three weeks.

The report dated September 8, 1988 states that "the incision is healing and is less swollen. There is still some tenderness at the inferior end of the incision." The report indicated that the worker would be able to resume his former employment on September 12, 1988.

The Review Board denied the appeal on the grounds that there was no indication of complications in the worker's recovery from surgery. The Review Board also noted that the employer had a light duty program that could have been used if needed. The Review Board concluded that there was no basis to depart from Board policy.

The worker's representative appeals the Review Board finding on the grounds that there was no evidence that light duties would have been available to the worker. He also argued that given the heavy nature of the worker's usual employment and the fact that the doctor noted tenderness along the incision, a further week of wage-loss benefits would not be unreasonable. The representative relied on Section 5(2) of the *Act* to support his position.

It is submitted on the worker's behalf that the tenderness at the incision site is evidence of medical complications. The representative states that "the facts are that there was no light duty work available during the week in question." He argues that the policy of setting a cap on time-loss benefits for hernia claims is unfair because it does not seem to take the nature of the job into account.

Section 5(2) of the *Workers' Compensation Act* states:

Where an injury disables a worker from earning full wages at the work at which he was employed, compensation is payable under this Part from the first working day following the date of his injury; ...

Section 29(1) states:

Where temporary total disability results from the injury, the compensation shall be the same as that prescribed by section 22, but is payable only so long as the disability lasts.

Board policy in Section #15.50 of the *Rehabilitation Services and Claims Manual* states:

Post-operative wage loss will be limited to 42 calendar days unless there are complications which justify an extension of the convalescent period and which are adequately described by the attending physician.

After surgery, the operative site usually heals without difficulty. Return to work in uncomplicated cases will be governed to some degree by the nature of the work to be done but is usually possible in four weeks. Some complications may delay this return to work.

The representative argues that the Board's policy to cap post-operative wage loss is unfair and is contrary to Section 5(2) of the *Act*. A close reading of Board policy clearly shows that post-operative wage loss considers both the medical complications that may delay recovery and also the nature of the work to be done. While the policy clearly provides guidelines for adjudication of hernia claims it also provides for consideration of the merits and justice of each case both from the medical and employment dimensions of disability.

Since medical evidence indicates that recovery from hernia repairs is generally of limited duration, it is not unreasonable for the Board to establish administrative guidelines, to ensure that workers, employers, and physicians are made aware of the general approach to be followed in the adjudication of these claims. It is, however, essential to such a policy that the discretion to consider the merits of each case is an integral part of the adjudication process. The panel is, for these reasons, unable to accept the representative's argument that the Board's policy on hernia claims is contrary to the *Workers' Compensation Act*.

After reviewing the medical evidence in this case, and in light of the heavy nature of this worker's employment (as evidenced by his pre-injury duties), the attending physician's advice for a one-week delay in returning to employment seems reasonable. I therefore find that the worker was disabled from his regular duties until September 12, 1988. In making this finding, I would like to stress that it is the combination of documented symptoms and heavy work duties that satisfies the test contained in Board policy as applied to this particular case.

THE APPEAL IS THEREFORE ALLOWED.

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



Decision of the Appeal Division

Number: 91-0388
Date: September 9, 1991
Panel: Thomas Kemsley, Walter N. Peain, Alex Brokenshire
Subject: Permanent Disability Awards for Subjective Pain

This is an appeal by the worker from the findings of the Workers' Compensation Review Board dated June 16, 1989.

The issue is whether the worker's permanent partial disability pension should be greater than the 3% awarded to her.

The worker suffered injuries to her back in 1982, 1984 and 1985 in the course of her employment.

In October 1987, a medical review panel certified that she had a permanent partial disability with respect to her back that had been caused by her compensable injuries. The certificate stated that she had a lumbar disc protrusion with sciatic pain and her disability since September 22, 1985 had consisted of pain and inability to lift, dig or push.

The disability awards medical advisor examined the worker in March 1988. The disability awards medical advisor noted various observations in her report, including the worker's complaints of pain, range of movement in her back, reflexes, and measurements, and concluded that "the **objective** functional impairment of the back is assessed at 3% of total at the present time." (emphasis added)

The senior pensions adjudicator then reviewed the subjective and objective factors and concluded that the worker's total functional impairment was equal to 3%.

The Review Board denied the worker's appeal as it found that there was no new medical evidence to contradict the recommendation of the disability awards medical advisor. The Review Board was satisfied that the worker's subjective complaints regarding pain were included in the disability awards medical advisor's report and the proper process had been followed in establishing her disability pension.

This panel allows the worker's appeal. We find that the medical review panel certified that the worker's disability included pain. Complaints of pain are called subjective complaints by the Board as pain is not something that can be observed or measured. However, as set out in Section #39.01 of the *Rehabilitation Services and Claims Manual*, both objective findings and subjective complaints of pain must be considered by the disability awards officer in determining a permanent partial disability pension under Section 23(1) of the *Act*.

In this case, while the disability awards medical advisor noted the worker's subjective complaints, her recommendation was with respect to the "objective" findings. We disagree with the Review Board conclusion that the disability awards medical advisor's assessment included subjective factors. The role of the disability awards medical advisor is to assess functional impairment from objective physical findings. Thus, the recommendation of the disability awards medical advisor should not include an assessment of functional impairment from subjective factors. As set out in Section 39.01 of the *Manual*, it is the role of the disability awards officer to consider both the objective physical findings noted by the doctor and the subjective complaints of pain.

Since the disability awards medical advisor here found the objective functional assessment to be 3% and the medical review panel had already found the worker to have a disability involving pain, the total award for objective plus subjective factors had to be greater than 3%. Otherwise, the subjective factors would only be assessed at 0%, which would contradict the binding certificate of the medical review panel.

The functional assessment has to be increased due to the subjective factors. Complaints of pain will not always mean that subjective factors will increase the functional impairment assessment. It is the effect of pain and whether or not it is disabling that must be considered by the disability awards officer. It is not easy to assess and measure the effects of pain, but it must be done as Section 23(1) of the *Act* directs the Board to consider disability and impairment. This cannot be limited to objective factors. In this case, the assessment of the subjective factors was made easier by the certificate of the medical review panel.

In determining what is an appropriate figure to put on the subjective factors in this case, we are guided by Decisions No. 318 and No. 407 in the *Workers' Compensation Reporter*. Decision No. 318 noted that a figure arrived at for subjective factors "must be in some degree an arbitrary figure based on our best assessment of what the justice of the case requires." In that case an award of 2.5% was made for subjective factors which appeared to be the main cause of the worker's disability. Decision No. 407 said that a worker would not automatically receive a 2.5% "subjective" award for complaints of pain. The issue was whether or not a disability resulted.

Here, the worker's disability from pain is at least as great as the disability from pain described in Decision No. 318 where the worker's disability became noticeable after a period of activity. In the present case the worker's disability is more constant and prevents her from undertaking many activities. We find that the permanent partial disability pension should be increased by 2.75% to a total of 5.75%, effective to the date she first received her permanent partial disability pension.

THE PANEL ALLOWS THE APPEAL.

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



REPORTER

Reasons for Judgment of the Honourable Mr. Justice B.D. MacDonald

In the Supreme Court of British Columbia

Between: Surinder S. Badesha, Petitioner

And: Workers' Compensation Board of British Columbia, Respondent

The petitioner applies under the *Judicial Review Procedure Act*, RSBC 1979, c.209, for an order that certain decisions of the Board, confirmed on February 5, 1990 by the commissioners on appeal, be overturned and referred back to the Board for proper calculation. The petitioner concedes that the Board had the jurisdiction to make the two calculations in issue, but argues that the result reached by the Board in both instances is patently unreasonable.

The Issues

The petitioner was injured in a sawmill accident on April 22, 1986. His right (dominant) hand was caught in saw blade, resulting in the loss of about one-half of each of his little and ring fingers, and nerve and tendon damage to the side of his middle finger.

The Board calculated, for the purposes of initial compensation payments, and to form a base for his disability pension, that the petitioner's "average earnings and earning capacity" at the time of the injury was \$167.84 per week. The Board then fixed the petitioner's disability at 12.5% of total. Those are the two conclusions which the petitioner alleges to be patently unreasonable.

The Legislation

The *Workers' Compensation Act*, RSBC 1979, c.437 (the Act), provides for the making of those two decisions by the Board.

33. (1) *The average earnings and earning capacity of a worker shall be determined with reference to the average earnings and earning capacity at the time of the injury, and may be calculated on the daily, weekly, or monthly wages or other regular remuneration which the worker was receiving at the time of the injury, or on the average yearly earnings of the worker for one or more years prior*

to the injury, or on the probable yearly earning capacity of the worker at the time of the injury, as may appear to the board best to represent the actual loss of earnings suffered by the worker by reason of injury, but not so as in any case to exceed the maximum wage rate, except that where, owing to the shortness of time during which the worker was in the employment of his employer, or in any employment, or the casual nature of his employment, or the terms of it, it is inequitable to compute average earnings in the manner described in this subsection, regard may be had to the average daily, weekly or monthly amount which, as shown by the records of the board, was being earned during the one or more years or other period previous to the injury by a person in the same or similar grade or class of employment.

23. (1) *Where permanent partial disability results from the injury, the impairment of earning capacity shall be estimated from the nature and degree of the injury, and the compensation shall be a periodic payment to the injured worker of a sum equal to 75% of the estimated loss of average earnings resulting from the impairment, and shall be payable during the lifetime of the worker or in another manner the board determines.*

(2) *The board may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations which may be used as a guide in determining the compensation payable in permanent disability cases.*

In addition, the Act contains in S.96(1) a formidable privative clause declaring the decisions of the Board to be final and conclusive, and not open to question or review in any court. It is settled law, however, that such a clause does not insulate decisions of the Board from attack on the grounds that they are patently unreasonable.

The Petitioner's Argument

(a) Average Earning Capacity

In making its calculation of average earnings and earning capacity under S.33(1) of the Act, the Board was faced with an unusual situation insofar as the petitioner's work history was concerned. After coming to Canada from India in 1970, the petitioner obtained employment in the lumber industry with L. & K. Sawmills in North Vancouver. He worked there from 1971 to 1983, when that company went out of business due to bankruptcy or receivership. Despite being an IWA member, the petitioner (along with hundreds of other sawmill workers laid off due to the serious economic downturn which began in late 1981) was unable to find new employment.

Except for a period of 12 weeks when he worked for a pizza outlet in Delta, the petitioner was unemployed until April of 1986. Only a few days before the accident in which his hand was injured, the petitioner was hired at a non-union mill (Richmond Forest Products) at \$9.90 per hour, with no benefits, a rate of pay considerably below the then-current IWA scale. By the time the average earnings and earning capacity calculation was under consideration by the Board, some two months post-accident, Richmond Forest Products had shut down its operations due to US tariff changes.

Thus, earnings at the time of the injury were not appropriate because of the temporary nature of that work. To average the petitioner's earnings over the prior year alone would have afforded him only six or seven days out of 365 as income-producing. The Board chose to use a five-year average (he was earning \$13.33 per hour plus benefits when L. & K. Sawmills ceased operating in 1983), which included the 2½ years between 1983 and 1986 during which the petitioner was unemployed. The result was the \$167.84 per week average earnings figure.

The petitioner submits that such a conclusion is patently unreasonable. He was earning almost \$400.00 per week at the time he was injured. Evidence tendered on his appeal to the Review Board, from an IWA official, was that employment had been found by 1987 for most union sawmill workers laid off because of the economic downturn in the early 1980's. Because of his injured hand, the petitioner is now virtually unemployable as a manual labourer in the sawmill industry. It is patently unfair, he argues, to establish an earning capacity for him which takes into account an unprecedented period of mass unemployment in the industry in which he had worked since coming to Canada. That period of unemployment cannot be attributed to him.

The petitioner submits that the chances of a similar period of widespread unemployment in the industry (three out of five years) in the future is too remote to allow the five years pre-injury to form a basis for the Board's calculation. He argues that it is patently unreasonable to use a method which clearly does not represent his actual loss by reason of his injury. He suggests that the current IWA pay scale, or at the very least, the \$9.90 per hour he was earning at the time of his injury should be used. The Board's calculation fixes his earning capacity, had it not been for this injury, at approximately \$4.20 per hour.

(b) Extent of Disability

The Board “enhanced” a scheduled award (see S.23[2] of the *Act*) by some 3% to arrive at the 12.5% disability figure. Because he speaks little English, and because he is now unemployable in the sawmill industry as a manual worker, the petitioner claims that assessment to be patently unreasonable.

Discussion

Whether or not I would reach the same result as the Board, on the evidence which was before it, is not the question to be answered on this petition. The decision of the commissioners on February 5, 1990, which this petition seeks to overturn, deals with the same arguments raised here. It concludes that periods of unemployment in the sawmill industry are a fact of life and must be considered when calculating average earnings. It points out that the 12-year employment history of the petitioner with L. & K. Sawmills included some years in which his hours worked were less than 50% of others. It reflects use of the IWA wage scale due to the petitioner’s lack of a union job for three years and his non-union employment at the time of the injury. It states that the rate paid by the pre-injury employer would have been used had there been any evidence of potential long-term employment with that employer. The very purpose of using a five-year base is to take into account fluctuations in the economic cycle.

On the subject of the extent of disability, the commissioners said that whatever errors regarding the scope of their jurisdiction may have been made by the Review Board which considered this question, the sole concern of the commissioners was to determine whether a proper result had been reached.

While he may not have been obliged to do so on the authorities (see, *Farrell v. WCB* [1961] 37 WWR 39 [SCC] at p. 40), counsel for the Board on this hearing took pains to establish the evidentiary basis on which the Board reached the two conclusions under attack.

This is not one of those cases, referred to by McLachlin, J. in *Plumbers Local 740 v. W.W. Lester (1978) Ltd.* (1990) 91 CLLC 14,002 (SCC) – (judgment rendered December 7, 1990), where the evidence, viewed reasonably, is incapable of supporting the tribunal’s findings of fact.

That the Board can take economic factors such as periodic shutdowns in a particular industry into account in determining average earnings (or wage loss) seems clear. (See, *Re Prevost and WCB* [1990] 59 DLR [4th] 478.) While the exercise of the Board’s judgment and discretion must be done fairly, there is an element of discretion in the conclusions under attack here which is entitled to curial deference, particularly since these conclusions lie at the heart of the Board’s specialized jurisdiction.

In *Paccar v. CAIMAW Local 14* (1989) 40 BCLR (2d) 1 (SCC), the court outlines the following steps in determining whether an administrative tribunal has exceeded its jurisdiction by answering a question in a patently unreasonable manner:

- (a) determine the tribunal's jurisdiction (that is conceded here);
- (b) adopt a posture of deference to the decisions of the tribunal, since the court will only review such decisions in the face of a privative clause, where there has been a patently unreasonable error.

At pp. 19–21 of the *Paccar* decision, LaForest, J. states:

... does not ... allow a court to substitute its judgment for that of the board

... if the courts could intervene every time they were of the opinion that a ... decision ... did not accord with the objectives ... the notion of curial deference would be deprived of virtually all meaning.

The tribunal has a right to make errors, even serious ones, provided it does not act in a manner so patently unreasonable that its construction cannot be rationally supported ... and demands intervention by the court upon review.

The test for review is a severe test.

The courts must be careful to focus their inquiry on the existence of a rational basis for the decision ... and not on their agreement with it. The emphasis should not be so much on what result the tribunal has arrived at, but on how the tribunal arrived at that result.

The petitioner emphasizes the result for him of the combination of the two decisions of the Board which he attacks; namely, a pension of \$111.00 per month, which translates into some 70¢ per hour. However, the petitioner is not totally disabled, even though he may no longer be employable as a manual labourer in the sawmill industry. There is a serious question concerning his apparent lack of motivation to both upgrade his English skills (and thus broaden his employment opportunities) and to accept employment outside the sawmill industry (e.g. as a janitor), particularly if such employment attracts a wage little above his current Canada Pension Plan disability payments.

At the end of the day, I find myself in substantial agreement with the argument of counsel for the WCB when he submits:

Essentially, the Petitioner is seeking to appeal the decision of the Board The petition is premised on the court being invited to review the evidence ... the court is being asked to usurp the function of the Commissioners under S.33 of the Act ... and reach a conclusion different than that reached by the Board.

While some doubt is thrown upon it by the dissenting judgment in a 4–3 split, the following statement by Mr. Justice Gonthier for the majority at p. 22 in *National Corn Growers v. Canadian Import Tribunal* (SCC, November 8, 1990 – not yet reported – #21366 SCC 90 – 110) purports to define “patently unreasonable”:

... the courts, in the presence of a privative clause, will only interfere with the findings of a specialized tribunal where it is found that the decision of that tribunal cannot be sustained on any reasonable interpretation of the facts or of the law.

The statement by LaForest, J. at p. 22 of the *Paccar* case effectively summarizes my view of this case.

I do not find it necessary to conclusively determine whether the decision of the Labour Relations Board is “correct” in the sense that it is the decision I would have reached had the proceedings been before this court on their merits. It is sufficient to say that the result arrived at by the board is not patently unreasonable. Indeed, I would go so far as to say that the result reached by the board is as reasonable as the alternative. It is not necessary to go beyond that.

As occurred on this hearing, it may not be possible to determine the “patently unreasonable” issue, where the disputed decisions involve questions of fact, without a review of not only those facts on which the tribunal acted, but also those which it considered and rejected, and even those which it should have considered but did not. To that extent, the difference between an application such as the hearing of this petition and an appeal from the decisions of the Board in question may not be apparent on the surface and argument will range over much the same factual ground. But the outcome turns on a much different test than would be the case if this were an appeal. In the words of counsel for the Board, “... the petitioner has couched his petition in phraseology which is appropriate to judicial review, but he is essentially conducting an appeal.”

Judgment

THIS PETITION IS DISMISSED WITH COSTS AGAINST THE PETITIONER.

4 March 1991
Vancouver, British Columbia



Reasons for Judgment of the Honourable Mr. Justice Taylor

In the Court of Appeal for British Columbia
(Wallace, Taylor, and Proudfoot JJ.A.)

Between: Gurdev Kooner, Petitioner

And: Workers' Compensation Board of British Columbia, Respondent

This appeal is concerned with the circumstances in which the Workers' Compensation Board may submit for reconsideration to a new 'medical review panel' issues which have already been decided by such a panel in the claimant's favour on an appeal by the claimant against a decision of the Board.

(a) The Background

The respondent, Gurdev Kooner, suffered a neck injury 12 years ago when the carrier vehicle he was driving at the lumber mill where he worked went over a piece of wood, causing him to hit his forehead on the steering wheel.

Mr. Kooner's claim for compensation for this work injury of July 6, 1978, was accepted by the Board and temporary total disability benefits for wage loss were paid to him for 3½ years, from July 7, 1978 to December 27, 1981. At the end of 1981 a claims adjudicator advised Mr. Kooner the Board had decided that his medical condition had "plateaued" and that his total disability benefits would be discontinued, but that an assessment would be made to determine whether he was eligible for partial disability benefits. On February 11, 1982, a disability awards officer told him his disability had been assessed at 5 per cent and he had been awarded a pension of \$75.09 per month. On January 23, 1984, a board of review denied Mr. Kooner's appeal from these decisions and two commissioners thereafter dismissed his further appeal.

The commissioners found that certain head movements exhibited by Mr. Kooner to which his claim for total disability benefits was related were legitimate but were exaggerated as to frequency, severity and continuity, and did not, in any event, result from his July 6, 1978, accident at work.

Mr. Kooner appealed against this decision of the Board by requesting a 'medical review panel' and submitted a doctor's certificate, as required by Section 58(3) of the *Workers' Compensation Act*, RSBC 1979, Chapter 437, stating that a medical dispute existed. The doctor diagnosed Mr. Kooner's problem as a neurological disorder known as *spasmodic torticollis* and attributed it to the accident of seven years before. A medical review panel was accordingly established. The Board directed that it consist of two neurologists with a general practitioner as chairman. Its principal task was to decide whether the petitioner was indeed suffering from spasmodic torticollis and, if so, whether this resulted from his accident at work. But the terms of reference given to it by the Board were not limited to that question; they required the panel to report generally on Mr. Kooner's condition and on whether he was disabled and, if so, the nature, extent and cause of his disability.

On June 2, 1988, the panel gave its decision by way of a certificate and report. It found Mr. Kooner was not suffering from spasmodic torticollis but rather from a "psychogenic movement disorder." It said his condition rendered him incapable of performing manual or sedentary work, that the work injury of July 6, 1978, was of "causative significance" in bringing it about, and that the disability was "most probably permanent."

By letter of August 17, 1988, the Board appeals administrator told Mr. Kooner and his employer that the file would be referred to its claims department to "implement" the certificate of the medical review panel. On the same day the Board pensions adjudicator informed Mr. Kooner he had been granted a permanent total disability pension as a result of the decision of the medical review panel, with retroactive benefits. Ten days after this, Mr. Kooner's employer objected to the Board against the decision of the administrator on the ground that the medical review panel had exceeded its jurisdiction by making a diagnosis outside the scope of its expertise, and asserted that its decision was a nullity. On March 15, 1989, a panel of two commissioners rejected the employer's objections but expressed concern that the panel, having been composed with a view to dealing with a neurological issue, had gone on to make findings on matters not central to that expertise. The commissioners concluded that the Board should therefore refer the matter under Section 58(5) to "a second medical review panel with specialists in psychiatry."

After that decision was confirmed, on June 2, 1989, by other commissioners, Mr. Kooner brought the present proceedings to enjoin the Board from instituting the second review.

Mr. Justice A.G. MacKinnon granted the order sought under the *Judicial Review Procedure Act*, RSBC 1979, Chapter 209, prohibiting the Board from establishing the new panel. His reasons for judgment are reported at 60 DLR (4th) 434, summarized 19 ACWS (3d) 167, and I will proceed on the assumption that those interested in the present decision will have read them.

(b) The Panel's Certificate

The statutory scheme under which medical review panels are established and carry out their function is to be found in Sections 58 to 65 of the *Workers' Compensation Act*.

Section 58(3) and (4) provide that a worker or an employer may require the establishment of such a panel to review a medical decision of the Board on producing within 90 days of the decision a doctor's certificate stating that a medical dispute exists. Section 58(5) provides that the Board may establish a panel of its own motion and puts no restriction on the circumstances in which it may do so. Section 59 says that, where a panel is called for, whether under Section 58(3), (4) or (5), claimant and employer are each to select from an approved list "one specialist in the particular class of injury or ailment in respect of which the worker has claimed compensation." These specialists together with a chairman appointed on a standing basis by order-in-council constitute the medical review panel. In the present case it was because the medical certificate supplied by Mr. Kooner said he suffered from a neurological problem that the Board specified that the panel members be specialists in neurology. But the fact that the Board submitted the whole question of Mr. Kooner's condition to that panel for decision, and not merely the neurological aspect, seems to indicate that the Board was of the view that specialists in neurology would be able to decide all the medical questions which might reasonably be expected to arise.

Section 61 requires that a panel report within a reasonable time after examination of the worker and give its decision on such matters as "the condition of the worker," "the existence or non-existence of a disability," "its nature and extent," "its cause, and if there is more than one cause, how much of the disability is related to one cause and how much to another." The panel in this case was required by the Board to answer all these questions and others as well. The issues posed by the Board and the answers certified by the panel are as follows:

Medical Issue Stated by the Board

1. *What is the condition of the claimant?*

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2. *Does he now have a disability with respect to his head movements? If not, could the Panel advise the Board whether historically they believe that the claimant did, at any time, have a disability with respect to his head movements?*
 3. *If he has or had such a disability, what is its nature and extent and in what ways has it affected the body function of the claimant? In particular, in what ways has it limited his capacity for work?*
 4. *If he has or had such a disability, was his compensable injury of 6 July 1978 of causative significance and, if so, in what way?*
 5. *If he has or had such a disability, was the disability wholly or partly the result of causes other than his compensable injury of 6 July 1978? If so, what other causes were there, and how and to what extent was each cause significant?*
 6. *If there were two or more causes of the claimant's disability with respect to his head movements, could the Panel please explain:*
 - (a) *Did each cause independently result in some disability and, if so, what proportion of the disability found by the Panel?*
 - (b) *If each cause did not independently result in some disability, did two or more causes act together to produce a disability and, if so, which causes acted together to produce this disability?*
 7. *The Board has recognized that the claimant was fully disabled as a result of his compensable injury of 6 July 1978 for the period set out in non-medical fact #3 and #5 of this statement. Would the Panel please state whether they feel that the claimant was disabled for any further period or periods as a result of his compensable injury of 6 July 1978 and, if so, what the nature and extent of the disability was during this further period of time.*
 8. *Did the claimant suffer from any pre-existing condition or disability and, if so, was it activated, accelerated, or aggravated by his compensable injury of 6 July 1978?*
 9. *If the claimant now has a disability, is it permanent and, if so, when did it stabilize?*

Answer “Certified” by the Panel

1. *The claimant is now suffering from a non-organic movement disorder of the head and neck, and a chronic pain syndrome.*
2. *The claimant now has a disability with respect to his head movements.*
3. *The disability the claimant has is a psychogenic movement disorder of the head and neck and perceived neck pain, and this combination renders the claimant incapable of performing his duties as a carrier driver, or performing manual labor, or sedentary labor.*
4. *The Panel believes that the claimant’s compensable injury of July 6th, 1978, is of causative significance in producing his disability in that it triggered a series of events including: many investigations, a surgical procedure, several hospitalizations, multiple medical examinations by a variety of medical specialists with varying opinions as to the nature of the claimant’s condition, and multiple psychotropic analgesic and anti-inflammatory drug use, all of which have continued to reinforce the claimant’s perceived pain, movement disorder, restricted range of neck movement, weakness and disability*
5. *The Panel does not know the exact cause of the claimant’s chronic pain syndrome and non-organic movement disorder, but we do believe the compensable injury of July 6th, 1978, was of major significance as the initiating factor.*
6. (a) *Non-applicable.*

(b) *The Panel believes that the many events outlined in No. 4 above acted together to produce the claimant’s disability. The Panel is unable to identify the relative contribution of the various factors listed.*
7. *On a strictly medical basis the Panel believes the claimant, as a result of his compensable injury of July 6th, 1978, has been disabled for a period beyond those recognized by the Board, i.e. from July 17th, 1978 until October 1st, 1978, and from June 8th, 1979, until December 27th, 1981. The Panel believes the claimant has been fully disabled from performing manual or sedentary work from December 27th, 1981, until the present. The disability the claimant suffered during this time was the non-organic movement disorder of the head and neck and the*

chronic pain syndrome which have rendered him incapable of performing manual work or sedentary work.

The claimant did not suffer from a pre-existing condition or disability which was activated, accelerated or aggravated by his compensable injury of July 6th, 1978.

The claimant now has a disability which the Panel considers is most probably permanent. The Panel believes the disability became stabilized by December, 1981.

So the nominated specialists in neurology and the general practitioner who chaired the panel agreed that the claimant was not suffering from the specific neurological condition diagnosed by his own physician, but went on to deal, as Section 61 would seem to contemplate and their instructions from the Board clearly required, with other medical issues relevant to the question whether or not Mr. Kooner was nevertheless disabled.

In accordance with Section 65 the panel's certificate, provided it was a valid certificate – something which the Board expressly accepted in this case and the employer has not further contested – thus became “conclusive as to the matters certified” and “binding on the board”.

(c) The Issue Raised

The issue raised on this appeal has been distinctly limited by the position taken by counsel for each side.

Counsel for the Board says that the Board seeks in this case to establish a new medical review panel under Section 58(5), not with a view to reversing the decision already made on the basis of the first panel's report with respect to compensation due to Mr. Kooner for his past disability, but only for the purpose of deciding what, if any, compensation should be paid thereafter. Counsel for Mr. Kooner concedes that the Board does have jurisdiction under some circumstances to appoint a second medical review panel to review a claimant's condition for the purpose of determining entitlement to future benefits. Counsel insists, however, that the Board may do this only if there is evidence of some change in circumstances justifying a further review. It is common ground that the statement in Section 65 that the panel's certificate is “conclusive as to the matters certified” and “binding on the board” does not mean it is necessarily to be regarded as “final” – that is to say as precluding any later review of the claimant's status by another panel.

This is a point of obvious importance to the outcome of the appeal. In normal circumstances it would be difficult to conceive of a decision being “conclusive” and “binding,” and yet not “final.” But it is of the essence of the scheme established by the *Act* that decisions on compensation will be open to review in the light of changing conditions, whether the change be to rehabilitative or employment opportunities, medical knowledge or the medical status of the claimant. Decisions of the Board must be open to reconsideration where new considerations arise. It would be incongruous in such circumstances that the decision of a medical review panel on appeal from a decision of the Board could not be reconsidered. If that were so, then it would follow that a decision of the Board upheld on appeal by a panel would be immutable, whereas a decision not appealed, because the worker had accepted it, could be reconsidered.

Chief Justice Sloan, who recommended the establishment of the medical review procedure in his 1952 *Report on the Workmen’s Compensation Act and System*, said (at p. 143) that the decision of a review panel (“Medical Review Board”) should be “final and binding only at the time it is made” and “final and binding in relation to the facts and circumstances existing at the time of the decision,” and that it should remain so “unless and until there is a material change in those facts and circumstances.” No doubt because of the contradiction inherent in the concept of “qualified finality,” the word “final” is omitted from the legislative language used to create the scheme.

The issue now raised is whether the Board has unlimited discretion to order further medical review panels with respect to future benefits – so that the Board might, in theory, appoint successive panels until it obtained a result acceptable to it – and, if not, whether the facts of the present case, in which there is no suggestion of any “new circumstances,” are still such as would permit it to appoint a second panel.

In *Caputo v. British Columbia (Workers’ Compensation Board)* (1987), 29 Admin. LR 145 (BCCA), on which the Board particularly relies, this court considered a case in which the Board had submitted a dispute to a medical review panel under Section 58(5) after the employer’s request for a panel under Section 58(4) had been found defective for lack of the required doctor’s certificate. An application for an order in the nature of prohibition was dismissed in the trial court, and the appeal to this court failed. Mr. Justice Anderson giving the judgment of this court said (at p. 153) that the Section 58(5) power is broad and could be invoked to remedy a “technical defect” in an application under Section 58(3) or (4) “so as to avoid an appearance of injustice which might result from a rigid and overly technical

approach.” While the decision emphasizes the need to avoid undue rigidity in interpreting the Board’s powers, it does not seem to me helpful to the Board in the present case.

The Board has wide power to decide when to appoint a medical review panel of its own motion under Section 58(5). But its powers with respect to the appointment of panels under Section 58(3) or (4) are circumscribed. So soon as a proper request is made by claimant or employer the Board must proceed with the establishment of the panel. It must therefore be subject to rules of fairness in deciding the specialty from which nominees are to be chosen, in framing the terms of reference and generally with respect to proceedings leading to the decision and also with respect to its implementation. The panel is not, of course, an advisory body but an appellate tribunal by which a disputed decision of the Board may be reversed. The purpose of the review is to decide whether the Board has arrived at the correct decision in a medical matter. It follows that in regard to the proceedings before the medical review panel and to the manner in which the Board deals with the panel’s decision there must be careful adherence to the intent of the statute, including observance of rules of fairness. For such an independent review procedure to be effective, the broad discretionary authority which the Board normally enjoys must be qualified.

The question here is whether, when a panel has allowed an appeal from a decision of the Board in accordance with its terms of reference, the Board may reject its report so far as future pension entitlement is concerned, and adopt instead the report of a subsequently appointed and differently constituted panel, without violating the requirement of Section 65 that the report of the first is to be considered “conclusive” and “binding on the board.” In the absence of any new evidence, or other development not known when the original panel was established, this is not, in my view, a matter in respect of which the Board’s decision can be protected by Section 96 against review by the courts, nor one in respect of which the Board can claim, as it does, the benefit of “curial deference.” Since the Board’s jurisdiction must, by Section 65, be subordinated to that of the medical review panel, the Board cannot have discretion with respect to implementation of the panel’s decision. It must be that curial deference is due in these circumstances to the decision of the panel.

Counsel for the Board says the proposed second medical review panel is required in order to “clarify ambiguity and resolve the concerns of the commissioners” with respect to the decision of the first panel. But counsel does not elaborate on the “ambiguities” and “concerns,” or why they could

not have been resolved by a request to the first panel, the course which according to the Board's published *Rehabilitation Services and Claims Manual* would normally be taken.

The decision of the commissioners recorded in the Board's letter of March 15, 1989, to the employer, says that the question whether the claimant's compensable injury "is the sole cause of his present disability" is not answered by the panel's certificate. The Board notes that the panel "does not know the exact cause of the claimant's chronic pain and movement disorder." When the panel's certificate is read as a whole it seems to me that it says quite clearly that Mr. Kooner's work injury is the sole cause of his disability in the sense that the work injury and series of medical events which occurred as a result of it acted together to bring about his disability. The panel says the work injury "triggered" the other events and was itself "of major significance as the initiating factor." The panel's inability to identify the "exact cause" of the disability, and the relative contribution of the various factors which contributed to it, must be considered in this context. The certificate leaves no doubt that the panel attributes the disability solely to the work injury and the medical events which followed as a result of it. Whether in these circumstances the work injury is properly described as "the sole cause" is, at most, a matter of semantics, and not a matter of ambiguity which another panel could resolve.

The Board does not contend that distinction should be drawn, for compensation purposes, between disability caused by a work-related injury itself and disability caused by medical attention received as a result of such an injury.

Counsel for the Board takes the position that the questions "whether there is ambiguity in a medical review panel certificate which bears upon the issue of compensability (causation)" and "whether that ambiguity requires a subsequent panel having 'specialist' qualifications not possessed by the previous panel" are matters in respect of which the Board has exclusive jurisdiction. The concerns of the commissioners to which counsel refers have to do with the fact that a panel chosen for neurological expertise diagnosed a psychiatric condition as a disability from which Mr. Kooner was suffering and attributed it to his work-related injury. It is in the end on this ground that the Board maintains that it is not necessarily bound by the panel's findings but entitled to establish another, and to prefer the decision of the second panel.

It must, however, be emphasized that the Board does not suggest that the first panel in any way exceeded its jurisdiction. It has, indeed, rejected that contention.

(d) The “Multiple-Expertise” Situation

Since the language of Sections 58 to 65 leaves without specific resolution the problems which may arise where investigation of a claimant’s condition involves more than one area of medical expertise, the Board has adopted a policy to be applied in such situations which it describes in its *Rehabilitation Services and Claims Manual*.

The *Manual*, while obviously not a binding statement of principles invariably to be applied by the Board, has been prepared on the basis of the Board’s experience and seems to deal quite appropriately with this problem. Paragraph 103.32, headed “Medical Dispute Concerns Two Specialties,” says:

Both the worker and the employer should receive the same list of specialists for nomination for service on the Medical Review Panel. In cases where more than one specialty is relevant, the worker and employer may each be provided with both lists. This would apply to cases where the medical question in dispute was in a borderline area between two specialties (i.e. orthopaedic surgery and psychiatry), a choice must be made as to which of the two specialties is of primary relevance to the matter in dispute. Disparate specialties cannot be combined on one Medical Review Panel.

In certain exceptional circumstances, this will result in a need for two Medical Review Panel appeals on a claim, in different areas of specialization. However, the need for the involvement of specialists from other areas may normally be met by a Medical Review Panel obtaining a consultation report from a specialist in another area.

Where an appeal is being taken to a Medical Review Panel, there can be a question of how to deal with psychological problems without the expense and complexity of a separate psychiatric panel. On this point, it is obviously desirable that a panel of, say, orthopaedic surgeons should not reach conclusions on a complex psychiatric problem that requires the expertise of psychiatrists. On the other hand, there is no objection to a panel of, for example, orthopaedic surgeons reaching a conclusion on the psychological aspect of the matter insofar as the ordinary psychological consequences of injury are a matter normally dealt with by orthopaedic surgeons. In other words, if the main problem is orthopaedic, one would expect a panel of orthopaedic surgeons to comment and advise on any psychological problem to the extent that orthopaedic surgeons normally

consider related psychological problems. But if it looks as if the psychological problem is the major disability, it may well be desirable that the panel should be composed from the psychiatric list in the first instance.

Substituting “neurological” for “orthopaedic” as the area of expertise concerned, the example given seems to me to describe the situation which arose in this case.

The record shows that the Board had for many years taken the position that Mr. Kooner’s problem was either neurological or psychiatric in origin or else was not medically based at all but essentially self-created for compensation purposes. When Mr. Kooner called for a medical review panel by way of appeal against the Board’s decision denying him total disability benefits, the Board knew psychological or psychiatric issues might be raised; these are mentioned both in the decision of the Board which was under appeal and in the statement of facts the Board provided to the panel. So it was open to the Board to take either of the courses described in its *Manual* – to refer the whole dispute to a panel composed of neurological experts with a view to having that panel dispose of any psychiatric issues which might arise as well as the neurological issues or, alternatively, to advise the claimant and employer that there would be two panels, the first to dispose of the neurological issues and the second to decide thereafter the psychiatric questions which might remain should the first panel find no neurological disability.

The Board knew that Mr. Kooner had long been under the care of neurologists and there can be no doubt that his condition had a neurological origin because he underwent surgery at one time for cervical discectomy and fusion to relieve nerve root entrapment. It was plainly a case in which if there were psychiatric complications they would be of a sort with which neurologists would be familiar.

It was with this knowledge that the Board made the decision to establish a single panel, consisting of neurologists and a general practitioner, to decide the whole question of the existence of any disability and its cause.

It was therefore on that basis that claimant and employer made their nominations and the appeal proceeded. The panellists, like the claimant, plainly believed that the enquiry encompassed the whole question of his medical status and the nature and cause of any disability from which he might be suffering. The Board cannot have been taken by surprise any

more than the worker and employer, when the panel explored psychiatric as well as neurological explanations for his complaint. There can be no basis for suggesting that it was not expected that the panel would consider psychiatric explanations. The possibility of a psychiatric explanation would seem to be something which would necessarily have to be considered in such a case in deciding whether or not the complaint had a neurological origin, and here there was nothing in the panel's terms of reference which restricted it to dealing with neurological matters or suggested that a psychiatric panel would later be appointed should no neurological explanation be found. Had the possibility of a psychological issue arising not been apparent prior to appointment of the panel, but only have come to light as a result of the panel's report, establishment thereafter of a panel with psychiatric expertise might, perhaps, have been a different matter, but here there was no such surprise.

According to its *Manual*, the Board in exercising discretion given to it by the *Act* to rehear and redetermine matters which have been the subject of its own decisions has adopted a policy of undertaking such review only where a change in the claimant's condition has occurred since the Board's decision, or new evidence has been produced which suggests that the original decision was wrong or that was not considered by the Board, or where it is established that an error of fact or law was committed by the Board. It is, perhaps, interesting that the *Manual* mentions as an example of error "failure to adopt a valid certificate of a Medical Review Panel." These seem to be appropriate rules for the Board to adopt in the exercise of its discretion to reconsider issues which it has previously decided itself. It seems to me that at least as high a test must be met before review of the decision of a medical review panel is ordered.

That this is so seems to me to be recognized both by Chief Justice Sloan in his 1952 report, to which I have referred, and also by Mr. Justice Tysoe in his 1965 Report on *Inquiry into the Workmen's Compensation Act* (at pages 367–394). The same view is reflected in the Board's *Manual*, which under the heading "Reconsideration of Certificate," says:

There are two types of new evidence relating to matters to which a Medical Review Panel has certified. The first type is evidence which indicates that the panel made a fundamental mistake concerning the claimant's medical condition or status at the time the certificate was issued. For example, it may become evident that the panel was provided with the wrong x-rays or examined the wrong part of the worker's body. The second type is evidence which indicates that the claimant's

condition or status may have changed since the certificate was issued, so that the compensable consequences of the certificate are no longer appropriate. For example, a partial disability may have deteriorated into total disability or a condition not previously disabling may have worsened and become disabling.

As a result of Section 65, the Board itself is unable to act on the first type of evidence. That does not necessarily mean, however, that there is nothing which can be done if it is determined that a fundamental mistake was made by a Medical Review Panel. If, within a reasonable period after a certificate is issued, perhaps one year, new evidence becomes available indicating that a fundamental mistake has been made and if it is possible for the Board to reconvene the Medical Review Panel which issued the certificate, the Board may, at its discretion, do so. Where the panel determines that, as a result of its mistake, its previous certificate was wrong, the certificate will be considered null and void and the panel will issue a new certificate to be substituted for it. Where, however, a longer period has elapsed before the mistake becomes evident or the original panel members can no longer be reconvened, the Board will, if it concludes that further action is necessary, convene a new Medical Review Panel. In this case, the certificate of the original panel would be binding up to the date of any certificate issued by the new panel.

I have already noted that counsel in this case are agreed that the panel's certificate is in some circumstances open to review.

If Mr. Kooner's disability does indeed prove not to be as the panel has diagnosed it, one would expect that to come to light in the future in the course, for instance, of treatment which Mr. Kooner may be required by the Board to take, or as a result of psychiatric or other examination which the Board may require Mr. Kooner to undergo while in receipt of disability benefits. If so, there might be new evidence available justifying further medical review. That the Board should establish a second medical panel in the present circumstances – one whose decision would receive preference over that of the first – without any new circumstance being suggested which casts doubt on the correctness of the certificate of the first, is, in my review, inconsistent with the intent of the legislative scheme. The adoption of such a procedure after the first panel has reached a decision contrary to that of the Board raises an appearance of unfairness and defeats the purpose of the independent appeal procedure.

The panel's certificate must, in my view, be accepted as "conclusive" and "binding on the Board" in the sense that the Board is required to act on it unless and until some significant new circumstance comes to light.

(e) Conclusion

In dealing with this jurisdictional question it seems to me that a balance has to be struck between, on the one hand, the need to ensure that the Board remains free to reconsider medical findings in the light of any new information which comes to light concerning a claimant's condition, and, on the other hand, the need also for proper recognition of the status of a medical review panel as an independent appellate tribunal.

It cannot be enough to entitle the Board to initiate another review that it has changed its mind, after the first panel has reversed the Board's decision, and has decided that a problem which it knew at all times might involve two specialties ought to have been submitted partly to one panel and partly to another rather than wholly to one. If the purpose of the medical review panel were advisory, the course which the Board seeks to follow might not have been objectionable. But having in mind that the panel sat on an appeal from the Board's decision, it seems to me that in this case the Board was bound by the procedure adopted in establishing the panel and its terms of reference, and that nothing has happened which would entitle the Board to reject the panel's findings in favour of those of another.

I agree with the decision of Mr. Justice MacKinnon and would dismiss this appeal.

APPEAL DISMISSED.

Decision of the Appeal Division

Number: 91-0724
Date: October 29, 1991
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Section 96.1

A letter dated August 9, 1991 has been received from the ombudsman officer, requesting reconsideration of the May 15, 1989 and November 20, 1990 decisions of the prior commissioners. The request for reconsideration by the Appeal Division concerns the refusal of the prior commissioners to award interest to the worker on his retroactive pension award.

The worker suffered a work injury to his left eye on July 8, 1952. He underwent surgery on July 9, 1952. Subsequent to July 29, 1955, no further medical reports were received by the Board until 1986. In a decision dated September 29, 1987, the disability awards officer granted the worker a pension award retroactive to July 11, 1955. It was accepted that the worker had suffered some loss in visual acuity in his left eye effective from July 11, 1955, which deteriorated to his present disability of an industrially blind left eye. No interest was paid on the retroactive award. By decision of June 14, 1988, the Review Board denied the worker's appeal with respect to his claim for interest.

The worker appealed to the commissioners, and in a decision dated May 15, 1989 the commissioners found:

Interest

As outlined by the Review Board, the Board policy with respect to the payment of interest is set out in the Workers' Compensation Reporter, Decision #384. Where entitlement to a permanent partial disability was overlooked or it was previously decided by the Board that such a disability award was not to be paid there is entitlement to interest. The Commissioners note that the only evidence on the claim at the time benefits were terminated in 1955 which might suggest that you had a permanent disability was the statement in Dr. Smith's report of July 8, 1955 that you were discharged from hospital with a vision of 20/40-1 uncorrected. The Board's present Permanent Disability Evaluation Schedule provides an award of 1% for a visual loss of this degree after correction. However,

this schedule has only been in effect since 1961. Prior to that time, the schedule referred only to blindness in one eye, enucleation and total blindness. No award was specified for a loss of 20/40. The Commissioners are therefore unable to conclude that your condition was overlooked ...

By a further letter of November 20, 1990, in response to letters from the ombudsman officer, the commissioners confirmed their decision as follows:

The Concise Oxford Dictionary defines 'overlook' as 'fail to observe; take no notice of.' The Commissioners view paragraph 2 in Decision No. 384 as covering situations where there was evidence of a permanent disability or other compensable condition on the claim file, but the Board simply failed to observe or notice it. As stated in the passage quoted above, the Board's Permanent Disability Evaluation Schedule did not recognize [the worker's] vision as it existed in 1955 as being a permanent disability. There was therefore no permanent disability or other compensable condition to overlook. The fact that the Board has retroactively 'deemed' a permanent disability of 1% does not change the situation as it existed in 1955.

The ombudsman officer subsequently contacted K.A. Sullivan, Manager, Compensation Services Division, for further historical information concerning the granting of pension awards. In a memorandum dated February 18, 1991, Mr. Sullivan advised as follows:

... I was asked if awards were granted prior to 1961 for partial loss of visual acuity. Pre 1961 schedules suggested awards were granted only for total blindness, blindness in one eye or enucleation.

A check of old PPD records indicated that awards for partial loss of visual acuity were granted as far back as 1917 ...

... it can definitely be concluded a procedure did exist pre 1961 ... From the history outlined above, had the claim been referred to Disability Awards in 1955, an award would have been granted.

The ombudsman officer expresses some concerns with respect to the assessment of the worker's pension award, but advises that the ombudsman's office is only pursuing a proposal that the worker be granted interest on his pension.

The *Workers' Compensation Act* was amended on June 3, 1991 when Bill 27 (the *Workers' Compensation Amendment Act, 1989*) came into force, creating the new Appeal Division. The jurisdiction of the Appeal Division to reconsider previous decisions is set out in Section 96.1 of the *Act* and Section 17(5) of Bill 27. These provide:

Section 96.1 (1) Subject of this section and sections 58 to 66, a decision of the appeal division is final and conclusive.

(2) A worker, the worker's dependants, the worker's employer or the representative of any of them may apply to the chief appeal commissioner for reconsideration of a decision of the appeal division on the grounds that new evidence has arisen or has been discovered subsequent to the hearing of the matter decided by the appeal division.

(3) Where the chief appeal commissioner considers that the evidence referred to in subsection (2)

- (a) is substantial and material to the decision, and*
- (b) did not exist at the time of the hearing or did exist at that time but was not discovered and could not through the exercise of due diligence have been discovered,*

he may direct that

- (c) the appeal division reconsider the matter, or*
- (d) the applicant may make a new claim to the board with respect to the matter.*

Section 17 (5) A worker, the worker's dependants, the worker's employer or the representative of any of them may apply to the chief appeal commissioner for reconsideration of a decision made under section 91 or 96 of the former Workers' Compensation Act on the same grounds and in the same manner as that set out in section 96.1 of the new Workers' Compensation Act.

I have, therefore, examined Mr. Sullivan's memorandum with reference to the requirements of Section 96.1 of the *Act*.

I find that Mr. Sullivan's memo, together with the information on which it is based, constitutes new evidence which was discovered subsequent to the commissioners' decision. For the purpose of being considered "new," it suffices that the evidence was not previously included in the commissioners' consideration. This new evidence is

substantial and material to the decision, as it clearly indicates that the commissioners' decision was based on a factual misunderstanding as to the Board's past practice in granting pension awards of this nature.

The final requirement is that the evidence:

did not exist at the time of the hearing or did exist at that time but was not discovered and could not through the exercise of due diligence have been discovered.

Mr. Sullivan's memo, dated February 18, 1991, did not exist at the time of the commissioners' hearing. However, this alone would seem insufficient to meet the test that it "did not exist at the time of the hearing" as the evidence upon which the memo was based did exist. A recent or new report concerning evidence which previously existed will normally not be accepted as constituting evidence "which did not exist at the time of the hearing."

The new evidence provided by Mr. Sullivan was not discovered until after the commissioners' decision, in response to the further inquiry of the ombudsman officer. The question to be addressed is thus whether this new evidence could through the exercise of due diligence have been discovered. Presumably, the evidence would have been available to the commissioners had they fully investigated the matter. The commissioners could have directed an inquiry to Mr. Sullivan, as was later done by the ombudsman officer. It may similarly be suggested that the worker should have pursued such inquiries with the Board.

I find, first of all, that the test of "due diligence" applies to the person requesting reconsideration rather than to the decision-maker. The most reasonable interpretation of Section 96.1 is that it constitutes a bar to reconsideration to an applicant, where the basis for their request is that the prior commissioners or the Appeal Division did not consider evidence which the applicant could through the exercise of due diligence have obtained and submitted prior to the making of the impugned decision.

The effect of this provision is to place some onus on an appellant for ensuring that the Appeal Division is in possession of the information necessary to the proper consideration of their appeal in the first instance. While the Appeal Division functions on an inquiry basis, and may itself seek out additional information, an appellant should be aware of the ramifications of Section 96.1 if they proceed with their appeal without taking reasonable steps to ensure that the evidence on file is complete.

It is important to note, however, that the test of “due diligence” includes a concept of reasonableness as to the nature and scope of the inquiries an appellant is expected to have pursued. The fact that information previously existed and could have been obtained upon inquiry is not conclusive as to whether it could through the exercise of “due diligence” have been discovered. The circumstances of the particular case must also be considered, with regard to the extent of the inquiries which due diligence would have required.

The question is not simply whether the appellant could have obtained the particular information if they had made diligent inquiries for the purpose of obtaining it. The requirement of “due diligence” is more properly interpreted as referring to the degree of care which a prudent and reasonable appellant would have exercised in ensuring that the Appeal Division had all relevant information necessary to the proper consideration of their appeal. If, for example, certain information existed, but it was not reasonably foreseeable that it would be germane to the Appeal Division’s consideration, “due diligence” would not have required the appellant to search it out. To interpret the requirement of “due diligence” otherwise would be to create an artificial and unrealistic legal barrier to reconsideration which, in my view, was not intended by the statute. The requirements of Section 96.1 of the *Act* must be interpreted in a fair and meaningful fashion, with regard to the realities of the appeal process.

Having regard to the context of the worker’s dealings with the Board, and the general supervisory jurisdiction of the prior commissioners, I do not consider that due diligence would have required the worker to make inquiries with Board officers as to the past practices of the Board. The new evidence could not, therefore, through the exercise of due diligence have been discovered by the worker. The test is not whether the evidence could have been obtained if all possible inquiries had been pursued no matter how remote or how unlikely it was that the inquiry was necessary or that it would provide useful information. It was in the circumstances of this case entirely reasonable for the worker to expect that the decision of the commissioners would be based on correct information as to the past practices of the Board. While the information was available to be discovered, as later events showed, it would be setting too high a standard to expect a worker to have foreseen that it would be necessary to seek out information concerning the Board’s historical practices. It would be unreasonable to expect the worker to have anticipated that this information concerning the Board’s past practices, although in the Board’s possession, was not known to or obtained by the prior commissioners in considering his appeal and in responding to the ombudsman’s prior complaint.

I have concluded that the reconsideration requirements of Section 96.1 of the *Act* are satisfied. Mr. Sullivan's memo leaves no doubt concerning the fact that the commissioners' decision was based on a material error, in stating that the Board would not have recognized the worker's vision as it existed in 1955 as being a permanent disability and that there was therefore no permanent disability or other compensable condition to overlook.

Consideration of the worker's permanent disability was overlooked. The requirements of the Board's policy concerning the payment of interest are therefore satisfied.

In conclusion, (pursuant to Section 96.1[3][c]) the panel has reconsidered the May 15, 1989 and November 20, 1990 decisions of the prior commissioners and found that interest is payable to the worker on his pension award. The proposal of the ombudsman officer is accepted.

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

Bylaw No. 2*

Statement of Roles and Responsibilities of the Voting Governors of the Workers' Compensation Board

As made by the Governors of the Workers' Compensation Board of British Columbia, the STATEMENT OF ROLES AND RESPONSIBILITIES OF THE VOTING GOVERNORS OF THE WORKERS' COMPENSATION BOARD dated October 7, 1991, which follows, is enacted as bylaw.

The existing voting Governors have signed the last page of the STATEMENT to certify that they have read and understood the STATEMENT and that, as a condition of their appointment, they will observe the STATEMENT.

BYLAW NO. 2 has been passed by the Governors at a meeting of the Governors duly called for that purpose on October 7, 1991.

Date: October 7, 1991

James E. Dorsey
Chairman of the Governors

* Bylaw No. 1 is currently under review by the Governors and will be published at a later date.

October 7, 1991

**STATEMENT OF ROLES AND RESPONSIBILITIES OF THE
VOTING GOVERNORS OF THE WORKERS' COMPENSATION BOARD**

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1. Preamble

On June 3, 1991, the *Workers' Compensation Act* was amended to provide for a new governing body for the Workers' Compensation Board. This body, the "Board of Governors," is now responsible for approving and superintending the policies and direction of the WCB and planning for its future. The Board of Governors also selects and defines the functions of the president and the chief appeal commissioner.

As a result, the Board of Governors has, subject to the statutory enactments of the Legislative Assembly, complete and final responsibility for the policies, direction and future of the entire provincial workers' compensation system.

The governors have decided that, in order to carry out their duties and responsibilities in the manner intended by the *Workers' Compensation Act*, they must subscribe to a common expression of their roles and responsibilities, including standards by which governors shall conduct themselves as governors. The purpose of this document is to set out this common expression.

2. Representative Nature of the Governors

The Board of Governors is the body through which workers – the beneficiaries of the compensation, rehabilitation and occupational safety and health principles fundamental to the workers' compensation system, and employers – who fund the system, are able to participate effectively in the initiation, development and approval of the policies, programs and procedures of the Workers' Compensation Board. Through the governors' proper stewardship of the WCB, workers and employers will share ownership of the workers' compensation system.

Because the exercise of the statutory authority of the WCB will profoundly affect individual workers and employers, they have the predominant positions on the Board of Governors. However, the Board of Governors is also the guardian of important social policies reflected in the *Workers' Compensation Act*, *Workplace Act* and *Criminal Injury Compensation Act*. Society as a whole therefore has an interest in the stewardship of these policies and, through the governors representative of the public interest, is able to express this interest.

The chairman is not a representative governor in any capacity – of neither workers, nor employers, nor the government.

3. Legislative Role of the Governors

The Board of Governors is composed of thirteen voting members – the chairman, five members representative of workers, five members representative of employers and two members representative of the public interest – and two non-voting governors – the president and the chief appeal commissioner of the WCB.

The Board of Governors is not a typical “corporate board of directors.” Rather, the representative governors' primary duty and responsibility is to represent the interests of their constituencies. Representation is a personal obligation and is not transferable.

The governors are “legislators.” They are policy-makers vested with broad discretion in many areas. The constituencies of the representative governors are broadly based.

As with any body of “legislators” representing diverse, and often conflicting, interests, the representative governors may be partisan. Debate among the governors during meetings may therefore be vigorous. This situation was intended and will be healthy for the workers’ compensation system.

Partisanship may also engender external debate in the community. This situation, too, was intended and will be healthy for the workers’ compensation system. Each governor will encourage this debate and support the rights of the parties of interest to participate and to make their views known on particular issues.

It is the role of the governors to debate questions within the Board of Governors before decisions are made. Once the Board of Governors has made a decision, it is the duty of any governor who may disagree with the decision to notify the Board of Governors before publicly expressing disagreement with the decision.

It is the role and duty of each representative governor to seek to know and to understand the general, broad interests of the constituency he or she is intended to represent. It is also the role and duty of each representative governor to seek to know and to understand the general, broad interests of other constituencies and individuals upon whom the exercise of the statutory authority of the WCB impacts.

4. Role of the Chairman

The chairman is selected after consultation with the governors’ representative of workers and employees. The chairman is consulted on the appointment of governors representative of the public interest.

The chairman is not a representative governor. Rather, it is the role and duty of the chairman to both serve and lead the Board of Governors in the productive discharge of its duties and responsibilities.

The chairman presides at all meetings, which the chairman calls to be held at any place in British Columbia the chairman decides after consultation with the governors.

The chairman may designate a governor representative of the public interest to act in the chairman's place during the chairman's temporary absence. While so acting the designated governor has the power and authority of the chairman.

The chairman is responsible for facilitating the making and for monitoring the implementation of decisions of the Board of Governors by the WCB.

The chairman is a public spokesperson on broad policy matters within the authority of the WCB and affecting the operation of the workers' compensation system.

The chairman maintains liaison with the minister of labour and other members of the Legislative Assembly on behalf of the Board of Governors and the WCB.

The chairman manages the Office of the Board of Governors within the WCB.

Not later than March 31st of each year, the chairman shall publish a comprehensive written report on the activities of the chairman and Board of Governors in the preceding year. The report shall contain a review of the operation of the Board of Governors and its accomplishments and identify any issues that arose in relation to this Statement of Roles and Responsibilities of the Voting Governors.

5. Governors' Duties Conducting Corporation Business

The Workers' Compensation Board is a corporation. A role of the governors will be to perform certain "business functions" necessarily incidental to the statutory mandate of the WCB. For example, the Board of Governors is empowered to authorize the WCB to acquire and dispose of land and buildings. In performing such "business functions," governors have the same duties and responsibilities towards the WCB that a "corporate director" normally has towards his or her corporation. These are:

- (a) Duty of Honesty – to act honestly and in good faith.
- (b) Duty of Loyalty – to give his or her undivided loyalty to the corporation.
- (c) Duty of Care – to act in a prudent and diligent manner, keeping himself or herself informed as to the policies, business and affairs of the corporation.

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- (d) Duty of Diligence – to make those inquiries which a person of ordinary care in his or her position or in managing his or her own affairs would make.
 - (e) Duty of Skill – to exercise the degree of skill to be reasonably expected from a person of his or her knowledge and experience.
 - (f) Duty of Prudence – to act carefully, deliberately and cautiously, trying to foresee the probable consequences of each proposed course of action.

The governors occupy a position of trust. The highest personal fiduciary standards will apply to their conduct.

On appointment to office, and thereafter, governors shall arrange their private affairs in a manner that will prevent Real, Potential or Apparent Conflicts of Interest from arising. If such a conflict arises between the private interests of a governor and the duties and responsibilities of that governor, the governor will resolve the conflict in favour of his or her duties and responsibilities as a governor.

For this purpose:

- (a) A “Real Conflict of Interest” occurs when a governor has knowledge of a private interest that is sufficient to influence the exercise of his or her duties and responsibilities as a governor.
- (b) A “Potential Conflict of Interest” occurs when there exists some private interest that could influence the exercise of a governor’s duty or responsibility, provided that he or she has not yet exercised that duty or responsibility.
- (c) An “Apparent Conflict of Interest” exists when there is a reasonable apprehension which reasonably well-informed persons could properly have that a Real Conflict of Interest exists on the part of a governor.

A “Conflict of Interest” may be economic or otherwise. A “Conflict of Interest” may be either “direct,” i.e., pertaining to the governor personally, or “indirect,” i.e., pertaining to the governor’s family, dependants, associates or employer.

However, a governor’s inherent representative capacity does not constitute a Real, Potential or Apparent Conflict of Interest.

When a governor considers that he or she has a Real, Potential or Apparent Conflict of Interest with respect to a particular issue, that governor will advise the chairman prior to discussion or decision on the issue by the governors and will absent himself or herself during the discussion and decision.

A governor who identifies a possible Real, Potential or Apparent Conflict of Interest on the part of another governor will advise the chairman and the governor perceived as having the Conflict of Interest immediately.

In the case of a difference over the presence of a Real, Potential or Apparent Conflict of Interest, the chairman shall determine where such a Conflict of Interest exists. In the case of the chairman, the two governors representative of the public interest shall jointly decide.

On any policy question where a governor's personal circumstance may be a Real, Potential or Apparent Conflict of Interest, the governor shall disclose the circumstance to the Board of Governors and it shall decide, on a case-by-case basis, whether such a Conflict of Interest exists.

6. Other Ethical Considerations

Other types of conduct by governors, listed below, are considered to be inappropriate:

- (a) interfering with the day-to-day administration of the WCB by the president, by contacting individual WCB officers and employees in order to influence their conduct, decisions, etc., with respect to individual matters or otherwise.
- (b) interfering with the exercise of the quasi-judicial decision-making authority of the WCB, by contacting the chief appeal commissioner or individual appeal commissioners to influence their decisions or personally making representations to the Appeal Division or an officer of the WCB.
- (c) accepting transfers of economic benefits, except compensation authorized by law, that are connected directly or indirectly with the performance of a governor's duties and responsibilities as a governor, other than customary hospitality or other benefits normally and legitimately received as an incident of the protocol or social obligations accompanying those duties and responsibilities.

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- (d) stepping out of a governor's role as a governor to assist private entities or persons in their dealings with the WCB where this would result in preferential treatment to any person.
 - (e) knowingly benefiting from information that is obtained in the course of a governor's duties and responsibilities as a governor and that is not generally available to the public.
 - (f) disclosing any matter or thing that comes to a governor's knowledge by reason of his or her appointment which the Board of Governors has decided should remain confidential.
 - (g) disclosing information contained in individual claim files or pertaining to the claim of an injured or disabled worker, except as authorized by law.
 - (h) using a governor's office as governor to seek to influence a decision, to be made by another person, to further his or her private interest.
 - (i) engaging in personal conduct which exploits for personal gain a governor's position of authority.
 - (j) remaining a governor after having been elected as a member of the House of Commons or of the Legislative Assembly of the Province of British Columbia.

7. Post-Appointment Conduct

Governors shall not act, subsequent to their appointment as governors, in such a manner as to take improper advantage of their appointment. The highest standards will apply to their conduct in relation to the Workers' Compensation Board.

A governor shall not, for a period of six months for each year of appointment as a governor to a maximum of eighteen months after ceasing to be a governor, directly or through any other person or persons communicate with a governor, voting or non-voting, or with an officer or employee of the WCB for the purpose of influencing, for personal gain, the Board of Governors or the WCB on any matter that was part of the governor's duties and responsibilities or is part of the duties and responsibilities of a governor. This prohibition does not, however, extend to a former governor acting in the course of his or her responsibilities and duties as an official of a recognized worker or employer organization.

For the same period of time, the governors shall not conduct official business with a former governor acting on behalf of himself or herself, or on behalf of another person or entity, except as an official of a recognized worker or employer organization.

8. Implementation of Statement of Roles and Responsibilities

Existing governors will sign a document certifying that they have read and understood this Statement of Roles and Responsibilities and that, as a condition of their appointment, they will observe the Statement.

Future governors will, before or on assuming their official duties and responsibilities, sign a document certifying that they have read and understood this Statement and that, as a condition of their appointment, they will observe the Statement.

All governors will subscribe to the following oath upon their appointment:

I, _____, sincerely promise and swear (or affirm) that I will diligently and honestly perform all of the duties of a Governor of the Workers' Compensation Board. In carrying out the duties imposed upon me by this office, I will at all times use the best of my judgement, skill and ability, and conduct myself with integrity. I will not disclose any matter or thing that comes to my knowledge by reason of my office except as required for the proper discharge of my duties.

(Signature of Deponent)

It is the responsibility of all governors to review their obligations under this Statement at least once a year.

Conforming to this Statement will not absolve a governor of the responsibility to take such additional action as might be necessary to prevent Real, Potential or Apparent Conflicts of Interest.

Conforming to this Statement will not absolve a governor from conforming to any specific references to conduct contained in the *Workers' Compensation Act* or to the relevant provisions of legislation of more general application such as the *Criminal Code*.

This Statement applies to the exercise of the Governors' duties and responsibilities under the *Criminal Injury Compensation Act*, the *Workplace Act* and any other legislation which the Workers' Compensation Board may be charged with responsibility for superintending and directing.

We, the undersigned, hereby certify that we have read and understood the foregoing Statement of Roles and Responsibilities and that, as a condition of our appointment, we will observe the Statement.

Robert Hugh Buckley

James Matkin

Peter Cameron

John St. C. Ross



James E. Dorsey

Angela Schira

Murray Farmer

Stanley Shewaga

Leif Hansen

Mark Thompson

Bonnie Hayes

Len Werden

Elyne Johnson

Bylaw No. 3

Board of Governors Procedural Bylaw

As made by the governors of the Workers' Compensation Board of British Columbia, a bylaw relating to the procedure for meetings of the Board of Governors and other matters is enacted as follows:

Section 1 – Interpretation

- 1.1 **Definitions** – In this Bylaw, unless the context otherwise requires:
- (a) “Act” means the *Workers' Compensation Act*, RSBC 1979, c.437, as amended;
 - (b) “Board of Governors” means the governors;
 - (c) “Governor” means any one of the individuals appointed by the lieutenant governor in council under Section 81(1) of the *Act*, the president appointed under Section 84(1) and the chief appeal commissioner appointed under Section 85(1)(a);
 - (d) “this Bylaw” means this BYLAW NO. 3;
 - (e) “Voting Governors” means all of the governors other than the president and the chief appeal commissioner; and
 - (f) “Conflict of Interest” means any one of a Real Conflict of Interest, a Potential Conflict of Interest or an Apparent Conflict of Interest, all as described and defined in the Statement of Roles and Responsibilities of the Voting Governors of the Workers' Compensation Board.
- 1.2 **Definitions in Act to apply** – Unless otherwise indicated, all terms contained in this Bylaw which are defined in the *Act* shall have the meanings given to such terms in the *Act*.

Section 2 – Meetings of the Board of Governors

- 2.1 **Regular meetings** – Regular meetings of the Board of Governors shall be held not less than ten (10) times in each calendar year, at the call of the chairman, at any place in British Columbia that the chairman decides after consultation with the governors, except that in no case shall more than two (2) months elapse between regular meetings.
- 2.2 **Annual meeting** – One (1) of the regular meetings each year shall be designated the Annual Meeting and shall be held on such day in February or March of the year that the chairman decides after consultation with the governors. The Annual Meeting shall deal with, among other matters which may be presented, the review and approval of the annual report (including the annual financial statements) which is required to be made by March 25 each year.
- 2.3 **Notice of regular meetings** – To ensure the availability of the governors, the chairman shall, at least fourteen (14) days prior to each regular meeting, deliver a copy of the agenda for the meeting to each governor. The agenda so delivered shall constitute notice of the meeting, except that failure to deliver the agenda within the time specified shall not invalidate the meeting provided the agenda is delivered at least seven (7) days prior to the meeting.
- 2.4 **Agenda and supporting materials** – The agenda for a regular meeting shall, subject to Section 2.5, be set by the chairman, and:
- (a) shall describe the date, time and place of the regular meeting;
 - (b) shall be sufficiently descriptive of the matters to be decided that the governors will be able to identify the matters without disclosing any information which, for reasons of confidentiality, is not to be disclosed to persons other than the governors;
 - (c) shall be accompanied by supporting materials relating to the matters set out in the agenda whenever possible; and
 - (d) shall contain the proposed schedule of regular meetings for the following six (6) months.
- 2.5 **Request of Governors** – Upon the written request of five (5) voting governors received at least fourteen (14) days prior to a regular meeting, the chairman shall place a matter on the agenda for the regular meeting.

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- 2.6 **Distribution of supporting materials** – If it has not been possible to distribute all of the supporting materials with an agenda for a regular meeting, all such supporting materials shall be distributed to each governor at least twenty-four (24) hours prior to the regular meeting unless all voting governors present at such meeting consent to the distribution of particular material at the meeting.
- 2.7 **Special meetings** – The chairman may call a special meeting of the Board of Governors at any place in British Columbia that the chairman decides, by delivering written notice to each governor at least twenty-four (24) hours prior to the special meeting; and the written notice shall include the date, time, place and purpose of the special meeting.
- 2.8 **Request of Governors** – Upon the written request of five (5) voting governors, the chairman shall forthwith call a special meeting at any place in British Columbia that the chairman decides, by delivering written notice to each governor at least fourteen (14) days prior to the special meeting; and the notice shall include the date, time, place and purpose of the special meeting.
- 2.9 **Postponement or cancellation** – Subject to Section 2.1, the chairman may, after consultation with the governors, postpone or cancel a meeting of the Board of Governors, except a special meeting called under Section 2.8, by delivering written notice to each governor of the postponement or cancellation at least twenty-four (24) hours prior to the scheduled time for the meeting.

Section 3 – Quorum

- 3.1 **Quorum** – A majority of the voting governors then in office shall constitute a quorum at a meeting of the Board of Governors and no business shall be conducted unless a quorum is present in the meeting.
- 3.2 **Participation by telephone** – A governor may participate in a meeting of the Board of Governors by means of such telephone or other communications facilities as permit all persons participating in the meeting to hear each other, and a governor participating in a meeting by such means is deemed to be present at the meeting and shall be counted in the quorum.

Section 4 – Conduct of Meetings

- 4.1 **Chairman to preside** – The chairman shall preside at all meetings of the Board of Governors and, subject to this Bylaw, shall decide the procedure to be followed, with due regard for the views of the other governors.
- 4.2 **Robert’s Rules of Order** – The chairman may, in resolving procedural disputes, if necessary, refer to *Robert’s Rules of Order*, 1990 Edition which shall govern where applicable and not inconsistent with the *Act* or this Bylaw. The chairman’s decision on the interpretation of such Rules of Order shall govern.
- 4.3 **Matters to be decided** – Unless otherwise agreed by all voting governors present, only matters set out in the agenda for a regular meeting shall be decided at that regular meeting and only matters set out in the notice for a special meeting shall be decided at that special meeting.
- 4.4 **New business** – A governor may raise, as “new business,” a matter not set out in the agenda for a regular meeting and the chairman shall place the matter on the agenda for the next or a subsequent regular meeting.
- 4.5 **Vacancy** – A vacancy in the membership of the governors does not impair the right of the other governors to act.

Section 5 – Resolutions and Voting

- 5.1 **How matters to be decided** – At meetings of the Board of Governors, every matter shall be decided by resolution duly moved, seconded and carried by a majority of the votes cast by voting governors present and entitled to vote.
- 5.2 **Personal vote only** – No governor may vote on behalf of any other governor.
- 5.3 **Unequal representation** – In the event that the number of governors representative of workers and the number of governors representative of employers present at a regular meeting or at a special meeting of the Board of Governors are unequal, the representative group having the lesser number of governors present may, provided that all governors of that group who are present agree, require that voting on a particular matter be postponed until either the next regular meeting or, with the consent of all voting governors present, a special meeting duly called for this purpose, in

which case the chairman shall place the matter on the agenda for the next regular meeting, or call the special meeting, as the case may be, and, subject to Section 5.4, the matter may be dealt with at that next regular meeting or at the special meeting, even if the number of governors representative of workers and the number of governors representative of employers present at that regular meeting or at the special meeting are unequal.

- 5.4 **Other representative group** – If voting on a particular matter is postponed by the requirement of one representative group under Section 5.3, but at the next regular meeting or at the special meeting the other representative group has the lesser number of governors present, that other representative group may, provided that all governors of that group who are present agree, require that voting on the matter be further postponed until either the next regular meeting or, with the consent of all voting governors present, a special meeting duly called for this purpose, in which case the chairman shall place the matter on the agenda for the next regular meeting, or call the special meeting, as the case may be, and the matter may be dealt with at that next regular meeting or at the special meeting, even if the number of governors representative of workers and the number of governors representative of employers present at that regular meeting or at the special meeting are unequal.
- 5.5 **Restriction on postponement** – A representative group may only exercise its right to postpone voting under either Section 5.3 or Section 5.4 once with respect to a particular matter.
- 5.6 **Absence of representative group** – In the event that either all governors representative of workers or all governors representative of employers are absent from a regular meeting or a special meeting of the Board of Governors, the chairman shall adjourn the meeting and call a special meeting to be held not earlier than five (5) business days and not later than fifteen (15) business days after the date of the meeting being adjourned and, at that special meeting, provided a quorum is present, all matters on the agenda to be decided at the adjourned regular meeting or special meeting may be dealt with, even if all governors from the representative group which was absent from the adjourned regular meeting or special meeting are also absent from the special meeting.
- 5.7 **Voting** – Voting shall be by show of hands on the resolution. The chairman shall declare to the meeting the decision on every matter in accordance with the results of the show of hands and that decision shall be entered in the minutes of the meeting.

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- 5.8 **When chairman to vote** – The chairman may only vote in the case of an equality of votes and then the chairman shall have a single casting vote.
- 5.9 **Recording of votes** – A governor who is present at a meeting of the Board of Governors, including a governor deemed to be present under Section 3.2, shall be deemed to have consented to any resolution passed or action taken at that meeting unless the governor dissented on the matter and requests that a written record of his or her dissent be entered into the minutes of the meeting either at the meeting or by written notice to the chairman within two (2) business days after the meeting.

Section 6 – Conflicts of Interest

- 6.1 **Conflict of Interest of a Governor** – Where a governor considers that he or she has a Conflict of Interest with respect to a particular matter, that governor shall advise the chairman prior to discussion or decision on the matter by the governors and shall withdraw from the meeting during the discussion and decision on the matter.
- 6.2 **Possible Conflict of Interest of another Governor** – A governor who identifies a possible Conflict of Interest on the part of another governor with respect to a particular matter shall advise the chairman and the governor perceived as having the Conflict of Interest immediately, and, except in the case described in Section 6.3, if the governor perceived as having the Conflict of Interest agrees or, in the case of a disagreement, if the chairman decides that there is a Conflict of Interest, the governor perceived as having the Conflict of Interest shall withdraw from the meeting during the discussion and decision on the matter.
- 6.3 **Conflict of Interest of the Chairman** – In case of a difference over the presence of a Conflict of Interest on the part of the chairman, the two governors representative of the public interest (or one of such governors if only one is present at the meeting) shall decide whether such a Conflict of Interest exists. If it is decided that a Conflict of Interest exists, the chairman shall designate an acting chairman under Section 9.1 for, and shall withdraw from the meeting during, discussion and decision on the matter. The acting chairman may vote on the matter.

Section 7 – Minutes

- 7.1 **Minutes to be taken** – Minutes shall be recorded of each meeting of the Board of Governors evidencing the decisions taken and shall be presented for the approval of the governors at the next or a subsequent meeting.

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- 7.2 **Signature of chairman** – Upon approval by the governors with or without amendment, the minutes shall be signed by the chairman and the minutes, if purported to be signed by the chairman, shall be evidence of the proceedings which were taken at the meeting.
- 7.3 **Effect of chairman’s signature** – Where minutes of a meeting have been entered and signed in accordance with Sections 7.1 and 7.2, the meeting shall be deemed to have been duly held and convened and all proceedings at the meeting shall be deemed to have been duly taken until the contrary is proved.
- 7.4 **Preservation of minutes** – Minutes of all meetings of the Board of Governors and copies of all supporting materials relating to the matters dealt with at the meetings shall be retained by the Office of the Board of Governors in the manner directed by the chairman.

Section 8 – Committees

- 8.1 **Committees** – The Board of Governors may, from time to time by resolution, constitute, dissolve or reconstitute standing committees and special committees consisting of such governors and having such procedures as the Board of Governors may decide, provided that:
- (a) the chairman shall be an ex officio member of all committees;
 - (b) the Board of Governors may appoint a chairman of each committee or may direct the committee members to appoint a chairman from among the committee members;
 - (c) the composition of all standing committees shall reflect the worker, employer and public interest representative composition of the Board of Governors; and
 - (d) minutes shall be taken of all meetings of standing committees, with original copies of the minutes retained by the Office of the Board of Governors in the manner directed by the chairman and photocopies of the minutes sent to all governors.
- 8.2 **Authority of committees** – Every committee so constituted shall have the authorities, powers and discretions which are delegated to it by resolution of the Board of Governors and shall act in accordance with the directions, including the procedures to be followed, which the Board of Governors imposes on it.

Section 9 – Chairman Designate

- 9.1 **Chairman may designate** – The chairman may designate a governor representative of the public interest to act in the chairman’s place during the chairman’s temporary absence, and while so acting the designated governor shall have the power and authority of the chairman.

Section 10 – Delivery

- 10.1 **Method of delivery** – All agendas, supporting materials for meetings, notices, statements and other documents in writing required or permitted under this Bylaw to be delivered to governors may be mailed, postage prepaid, addressed to a governor or may be delivered to a governor either personally or by leaving it at his or her usual place of business or residential address, or may be sent by telegram, telex, facsimile or other method of transmitting visually recorded messages.

Section 11 – Remuneration of the Governors

- 11.1 **Governors’ remuneration.** – In consideration of carrying out their responsibilities under the *Act*, the voting governors shall be paid out of the accident fund:
- (a) remuneration in an amount determined by the lieutenant governor in council, and
 - (b) reasonable and actual travelling and out-of-pocket expenses necessarily incurred by them in discharging their duties.
- 11.2 **Calculation of per diem** – Where the remuneration determined by the lieutenant governor in council is in whole or in part a per diem rate, then, unless otherwise fixed by the lieutenant governor in council, the amount to be paid in respect of the per diem rate to a voting governor shall be calculated as follows:
- (a) for less than four (4) hours of work in a day, a governor shall be entitled to one-half of the per diem rate;
 - (b) for more than four (4) hours of work in a day, a governor shall be entitled to the full per diem rate;
 - (c) only one full per diem payment shall be made to a governor for each twenty-four (24) hour day;

(d) preparation time of up to one (1) day per regular meeting, special meeting, committee meeting or other meeting of the Board of Governors shall be remunerated; and

(e) reasonable travel time shall be included in qualifying time.

11.3 **Time for claiming** – A governor shall only be paid remuneration under Section 11.1(a) or be reimbursed for expenses under Section 11.1(b) where the governor has submitted a claim for such remuneration or expenses within three (3) months of the meeting of the Board of Governors in respect of which the remuneration is to be paid or the expenses were incurred.

Section 12 – Annual Review

12.1 **Annual review** – This BYLAW NO. 3 shall be reviewed by the Board of Governors within one (1) year of being passed by the Board of Governors and thereafter annually.

This BYLAW NO. 3 has been passed by the governors at a meeting of the governors duly called for that purpose on October 7, 1991.

Date: October 7, 1991

James E. Dorsey
Chairman of the Governors

