

WORKERS' COMPENSATION

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Decision of the Governors

Number: 8
Date: January 6, 1992
Subject: Reopening and Reconsideration of Past Commissioners' Decisions (An Amendment to Decision of the Governors No. 1)

The Governors were asked to determine who within the Board is to exercise the statutory discretion under Section 96(2) of the *Workers Compensation Act* to reopen, rehear and redetermine the previous commissioners' decisions. Under Section 17(5) of the *Workers Compensation Amendment Act, 1989* the Appeal Division is given authority to review past commissioners' decisions "... on the same grounds and in the same manner as set out in section 96.1 ..." The Executive Committee proposed an assignment of this additional authority, with certain limitations, to the Appeal Division.

The Governors unanimously adopted the following resolution:

RESOLVED THAT the Appeal Division of the Workers' Compensation Board of British Columbia shall exercise the authority of the Workers' Compensation Board of British Columbia under section 96(2) of the *Workers Compensation Act* to reopen, rehear and redetermine any decision made by the former Commissioners prior to June 3, 1991, where the Chief Appeal Commissioner finds that the decision was based upon an error of law or involved or involves an issue under the *Canadian Charter of Rights and Freedoms*; and that the appropriate amendments be made to the *Rehabilitation Services and Claims Manual, Assessment Policy Manual and Occupational Safety & Health Division Policy and Procedure Manual*.

Decision 1, (1991)

THIS POLICY IS EFFECTIVE JANUARY 6, 1992.

This Decision amends the last paragraph of Section 6.0 in Decision 1, (1991) 7 W.C.R. 7 at 10. Although the resolution was passed on January 6, 1992 it has been included in the December 1991 edition because of its impact on Decision 1 appearing earlier in this volume.



Decision of the Appeal Division

Number: 91-0850
Date: November 22, 1991
Panel: Connie Munro, Lorna Pawluk, Thomas Kemsley
Subject: Retroactive Adjudication

The Appeal Division has before it five Review Board findings. All involve the broad issue of the legal authority of the Workers' Compensation Board ("the Board") to declare and recover overpayments from workers.

Three of the Review Board findings were referred to the prior commissioners under Section 96(2) of the *Workers Compensation Act*, R.S.B.C. 1979, c.437 (the "Act"). The Act was amended on June 3, 1991 when the *Workers Compensation Amendment Act, 1989* (Bill 27) came into force. This created the new Appeal Division, which continued the rehearing of these matters pursuant to Section 17(2) of Bill 27.

The president and chief executive officer of the Board referred the other two Review Board findings to the Appeal Division under S.96(4) of the Act, as amended.

The general authority of the Appeal Division to interpret the Act and Board policy is set out in Decision No. 1 of the Board of Governors in paragraph 5.0:

The Appeal Division shall apply and interpret the Act, Regulations and existing Board published policy.

The Review Board findings under consideration are the most recent in a long series of decisions which reveal a difference in opinion between the Review Board and the Board on this question. We considered it appropriate to examine first the general issues raised by the Review Board findings, and proceed at a later date with an adjudication of the individual claims.

The issues raised warranted, in our view, holding an oral hearing and seeking submissions from the workers' compensation community. An oral hearing was held on August 19, 1991. The community response was strong and extensive written submissions were received.

Overview of Positions

There is no dispute that the Board can change a previous decision of a Board officer and lower a worker's entitlement to benefits, to take effect immediately and for the future. (For simplicity we will use the word "worker" to refer to all claimants who receive benefits under the *Act*). However, there is a strong difference of opinion as to whether the Board has the power to change such a decision retroactively to the date of the previous decision and thereby create an overpayment owing to the Board. The Board asserts that it does have this authority.

There is much more, although not unanimous, agreement that the Board can correct "administrative" errors to the date of the error and thereby create an overpayment owing to the Board. Again, the Board asserts that it has this authority. There are differences of opinion as to what is an "administrative" error.

Finally, there are differences of opinion as to the Board's authority to collect overpayments from workers.

Many of the submissions drew distinctions between "decisional" (or adjudicative or judgmental) and "administrative" (or procedural or clerical) matters. However, not all agree on their exact meaning.

Generally, we will use the word "decisional" to refer to decisions made by a Board officer on a claim about a worker's benefits, and the word "administrative" to refer to the manner in which those decisions were implemented and benefits paid. The words "retroactive adjudication" will refer to decisional, not administrative, changes.

In examining the issues, we will consider the *Act*, decisions of the previous commissioners, Review Board findings, written and oral submissions and case law.

The Act

The sections of the *Act* most relevant to the issues are:

5. (1) Where, in an industry within the scope of this Part, personal injury or death arising out of and in the course of the employment is caused to a worker, compensation as provided by this Part shall be paid by the board out of the accident fund.

15. A sum payable as compensation or by way of commutation of a periodic payment in respect of it shall not be capable of being assigned, charged or attached, nor shall it pass by operation of

law except to a personal representative, nor shall any claim be set off against it, except for money advanced by way of financial or other social welfare assistance owing to the Province or to a municipality, or for money owing to the accident fund.

92. Where a claim is allowed following a finding by the review board, periodic payments under the finding shall commence notwithstanding that an appeal is taken under section 91, and a lump sum under section 17(13) shall be paid; and an amount so paid is not, in the absence of fraud or misrepresentation, recoverable from the worker or dependants.
96. (2) Notwithstanding subsection (1), the board may at any time at its discretion reopen, rehear and redetermine any matter which has been dealt with by it, by an officer of the board or by the review board.

As noted above, the *Act* was amended as of June 3, 1991 and Sections 92 and 96 were revised. However, all five appeals we are considering were decided under the unamended *Act* and thus we are concerned with these two sections as they were prior to the amendments. In any event, the new provisions would not change our disposition.

The Board's Position

The views of the Board are set out in several decisions of the former commissioners, several policies in the *Rehabilitation Services and Claims Manual* and a submission by the Board under the signature of Len McNeely, vice-president, Compensation Services. For the sake of brevity, we will not reproduce the relevant Board policies as contained in the *Rehabilitation Services and Claims Manual*.

The Board treats decisional and administrative errors in the same way. It claims that an "overpayment" arises when the Board decides, either by redetermination (or readjudication) or correction of an administrative error, that a worker has been paid excess benefits in the past. As noted above, the Board asserts that it has the authority to declare and collect such "overpayments." It submits that its authority is both explicit and implicit in the *Act*.

The Board submits that S.96(2) of the *Act* gives the Board full and plenary power to "reopen, rehear and redetermine" its previous decisions and there is nothing in the *Act* which suggests any restriction upon this authority. The Board argues that the wording of S.96(2) suggests the Board is put back in the position of the original decision maker.

Further, the Board submits that the authority of Board officers to change retroactively a decision or the way in which a decision was implemented stems from their obligation to determine entitlement under S.5(1) of the *Act*.

Moreover, the Board characterizes the decisions of claims adjudicators as interim because of the ongoing nature of the adjudication process.

The Board submits that if it does not have the power to retroactively lower a worker's benefits and collect any overpayment thereby arising, then it would also have no power to retroactively raise a worker's benefits where the Board wrongly disallowed a claim or paid the claimant too little in the past.

Finally, the Board interprets Section 15 of the *Act* as giving the Board the authority to recover overpayments by withholding compensation benefits. It asserts that the phrase "except for ... money owing to the accident fund" specifically gives the Board this authority.

In interpreting its authority under the *Act*, the Board relies on a number of court decisions.

With respect to the powers that are granted, either explicitly or implicitly, by the *Act*, the Board cites *C.R.T.C. v. Bell Canada* (1989), 60 D.L.R. (4th) 682 (S.C.C.).

The Board also relies on *Pickwell v. W.C.B.*, Vancouver Registry No. F810571, January 27, 1983 (B.C. County Court). The court held that, as a corporation, the Board may sue for the recovery of overpayments. The Board takes this to imply that it has the authority to declare an overpayment and set it off against compensation payable.

With respect to its authority arising from the interim nature of the decisions of Board officers, the Board first cites the British Columbia Court of Appeal decision of *Conde Michaud v. Workers' Compensation Board*, Vancouver Registry No. CA 005993, October 6, 1987 (B.C.C.A.). Justice Locke stated in that decision:

... an examination of the statute shows the process of determining compensation to be a *continuous and ongoing process*: assessments on employers may be raised or lowered, entitlement to compensation once decided can be varied or reviewed for any proper reason and the Board is expressly empowered to reconsider any matter under the Act in Section 96(2). (emphasis added)

(at 4)

The Board then cites *Bell Canada* which said:

... the power to make interim orders necessarily implies the power to revisit the period during which interim rates were enforced.

(at 707)

The Board also addresses the case of *Guadagni v. Workers' Compensation Board of British Columbia* (1988), 24 B.C.L.R. (2d) 352 (B.C.S.C.); (1989), 35 B.C.L.R. (2d) 363 (B.C.C.A.). This case concerned the interpretation of Section 92 of the *Act* and its interaction with Section 96(2). Both the Supreme Court and the Appeal Court held that the Board could not refuse to implement a finding of the Review Board which increased benefits, even if a further appeal was taken by one of the parties. Moreover, the Board could not recover any amounts paid as a result of such implementation even if the commissioners reversed the Review Board's finding. The Board distinguishes the *Guadagni* decision, arguing that it only established that the Board could not recover payments made under a Review Board finding. The Board considers that *Guadagni* does not dispute the inference in *Pickwell* that the Board can recover money paid to a worker pursuant to a decision of a claims adjudicator.

In summary, the Board argues that their authority to give retroactive effect to a new decision stems primarily from Section 96(2) of the *Act*. The Board considers that the authority is explicit in the *Act* and it is also necessarily implied. The Board views the decisions of claims adjudicators as interim. It maintains that the authority to make upward retroactive adjustments is a necessary corollary of the authority to make downward retroactive adjustments in compensation levels.

The Review Board's Position

The Review Board was invited to participate in this hearing but decided it was inappropriate to do so and, therefore, made no specific submissions. Its approach to retroactive adjudication, however, can be extracted from the five Review Board findings before us and previous Review Board findings referred to in the submissions of other participants.

The Review Board's analysis of Section 96(2) is that the power to redetermine a matter is not tantamount to the power to impose the results of such a reconsideration retroactively. There must be express language in the statute to authorize the retroactive application of a new decision. Since there is no such language in the *Act*, the Board cannot apply a new decision retroactively.

On the basis of *Employment and Immigration Commission of Canada v. MacDonald Tobacco Inc.*, [1981] 1 S.C.R. 401, the Review Board finds that a decision that is merely wrong is not void, so long as the original decision maker had the authority to make the decision. Moreover, the Review Board does not perceive decisions of claims adjudicators to be interim in nature within the meaning of “interim” as established by *Bell Canada*. According to the Review Board, to view the decisions of claims adjudicators as interim in nature would bring far too much uncertainty to a system of workers’ compensation that was designed to provide stability for workers.

The Review Board says that *Guadagni* does not deal with the issue of retroactivity generally, and to interpret it to mean that retroactive adjudication applies to the decisions of claims adjudicators would give Board officers greater authority than the commissioners. The Review Board concludes that such a result could not have been intended by the legislature.

The Review Board finds that Section 15 of the *Act* does not, in and of itself, give the Board the power to create a debt. There must be a debt in existence before the section applies to allow recovery of money owing. As well, the Review Board considers that *Pickwell* addresses only the Board’s power to collect a debt, not its power to declare a debt.

The Review Board finds that errors in implementing a decision can give rise to a collectible overpayment. In one Review Board finding (not one of the five currently under consideration), a worker continued to receive benefits specified in an earlier Review Board finding after the commissioners decided to terminate those benefits. Board officials failed to place a copy of the commissioners’ decision in the worker’s file. The Review Board characterized the error that occurred as administrative. It found that being in receipt of “money had and received,” the worker owed a debt to the Board which at law the Board has a right to collect.

On the question of retroactive upward adjustments in compensation benefits, the Review Board considers that the Board must implement such adjustments if there has been an error at the expense of a worker. The Review Board interprets Section 5(1) to mean that an injured worker has an entitlement to compensation. If the Board makes an error in the amount of compensation it pays and later corrects that error, it is required as a matter of law to pay any additional sums to which the worker is entitled.

In summary, the Review Board finds that the *Act* does not give the Board the power to create a debt through retroactive adjudication. New decisions do not result in overpayments. Administrative errors may lead to overpayments and such money is recoverable. The Board is under a statutory obligation to give retroactive effect to upward adjustments in compensation levels.

Submissions

The submissions cover a broad range of arguments. Many discuss the same points. What follows is a survey of the major arguments presented. It is not a complete summary of the individual submissions and will not repeat points unnecessarily.

a) **Against Retroactive Adjudication**

James Sayre, on behalf of the Community Legal Assistance Society, refers to a general presumption against the retroactive exercise of discretionary powers and says there is no language in the *Act* which expressly grants retroactive powers. He argues that this prevents the Board from reducing a worker's benefits retroactively but, if a worker receives less than his or her entitlement under the *Act*, the Board must pay the difference retroactively.

Mr. Sayre sets out five categories of "overpayment": fraud and misrepresentation, clerical error, mathematical errors, timing errors, and judgment errors. He says that fraud and misrepresentation give the Board cause to recover amounts improperly paid, although he says the Board should do this by legal action. With respect to clerical and mathematical errors, Mr. Sayre says that, subject to considerations of fairness, the Board can declare and collect these as they did not arise from a decision and hence there is no need to change a decision retroactively. With respect to timing errors, Mr. Sayre says that these do not give rise to an "overpayment" if the original decision was within the Board's statutory jurisdiction. Finally, with respect to judgment errors, Mr. Sayre says these are not errors, but the Board is claiming the right to "change its mind." He says the Board has no authority to do this and it would be contrary to the purpose of the *Act*. He refers to Section 99 of the *Act* and the overall scheme of the *Act* which takes a benevolent stance toward the injured worker.

Blake Williams for the Workers' Advisers Office argues that the power to make retroactive decisions is an exceptional power and cites *Canada (A.G.) v. La Forest* (1988), 62 D.L.R. (4th) 83 (F.C.A.). Neither Section 96(2) nor Section 15 of the *Act* explicitly provides the Board with this power. Moreover, this power is not implicit in the scheme of the *Act*. Mr. Williams points to various pieces of legislation (including workers' compensation legislation in other provinces) which have express provisions for the recovery of overpayments. As well, he says the collection of overpayments is contrary to the spirit of the legislation which calls for benevolence to injured workers.

In a written submission, the Ombudsman, Stephen Owen, enclosed a copy of the Board's *Assessment Policy Manual #30:20:40* which, he notes, "seems to adopt different criteria with respect to the recovery of overpayments from employers where there has been a Board error."

He also enclosed a 1981 report of then Ombudsman Karl Friedmann concerning the recovery of overpayments. That report argued that the Board had no authority to collect overpayments. First, there is no statutory right based on Section 15 of the *Act* as overpayments are not "money owing to the accident fund" but debts due to the Board. Second, Mr. Friedmann discussed *Re S & M Laboratories Ltd. and the Queen in Right of Ontario* (1979), 99 D.L.R. (3d) 160 (Ont. C.A.) which held that the general manager of the Ontario Health Insurance Plan was implicitly empowered, pursuant to his power to administer the Ontario Health Insurance Plan, to collect overpayments and deduct them from payments subsequently made to a medical laboratory. Mr. Friedmann said this applied only to situations of clerical or accounting errors. He concluded that *Re S & M Laboratories* does not support the recovery of overpayments where decisions of claims adjudicators are readjudicated. Third, Mr. Friedmann argued that the common law rule regarding the right of the Crown to recover unauthorized disbursements of public funds does not apply since money belonging to the accident fund cannot be considered "public funds." Fourth, and in the alternative, if the money constituting the accident fund is public money, the defences of mistake of law and fact as well as the principles of estoppel should apply. Fifth, aside from any legal considerations, there is a strong argument to be made that non-culpable overpayments should not be recovered. In such situations, the Board is best able to bear the burden of mistaken overpayments. The Board is responsible for making decisions and it should be responsible for the consequences. This should be an incentive for it to be more thorough in its initial investigation of claims.

Lawyer Judith Lee argues that Section 96(2) of the *Act* confers a wide discretion but not the power to declare and recover an overpayment. Only express wording in the *Act* could confer such powers. Second, workers are entitled to presume that the acts of public officials are correct. In many cases, workers who receive compensation benefits have no understanding of how the system operates and have poor English or literacy skills. They ought to be able to rely on the acts of Board officials. Third, the court's decision in *Pickwell* is wrong and Section 15 does not empower the Board to declare a debt. The Board is a body corporate created by the *Act*; it is not a corporation pursuant to the *Companies Act* and as such it is not a person empowered to create or collect a debt. Fourth, Section 99 of the *Act* and

fairness require that, where a Board error is one within the special expertise of the Board's officers, it would be both unlawful and unfair to declare and recover an overpayment.

Cathy Walker of the Confederation of Canadian Unions argues that the term "overpayment" is misleading since the amount initially paid to the worker is, in most cases, an amount that is permissible under the *Act* and Board policy. An "overpayment" is only created once a Board officer decides that another rate constitutes a better decision.

John Weir of the B.C. Federation of Labour distinguishes between different categories of overpayments, in terms of what caused the overpayment. The first category consists of situations where the Board makes a lawful decision, proceeds to pay benefits and subsequently revises the decision. Mr. Weir submits that the Board does not have the authority to declare and collect such an overpayment. The second category consists of Board decisions that were unlawful due to fraud or misrepresentation, misinterpretation of law or policy and administrative errors. These are the only situations of true overpayments.

Second, Mr. Weir submits that the essence of the historic trade-off of workers' compensation legislation was that the workers gave up their right to sue in exchange for an employer-funded insurance system. Security of benefits was one of the fundamental purposes of the scheme. Retroactive adjudication as a general, open-ended principle defeats this very purpose.

Further, Mr. Weir argues that there is no statutory provision in the *Act* that allows the Board to assume the civil court's jurisdiction to declare and enforce a judgment against the worker as a creditor. Unless a worker consents, the Board cannot set-off or assign benefits without obtaining a judgment in civil court and, if necessary, an enforcement order.

b) In Support of Retroactive Adjudication

Jim Sheppard, for the Employers' Adviser, submits that overpayments may arise from an "administrative error (i.e. a double payment)" as well as from a "redetermination (i.e. re-adjudication)." He argues mainly that, under Section 96(2) of the *Act*, the Board has the power to implement a redetermination retroactively. He also argues that the presumption against retroactivity applies to the enactment of legislation but not to the Board's power of reconsideration. Mr. Sheppard refers to a distinction between retrospectivity and retroactivity and notes that the rule against retrospectivity is not a rule of law but only a rule of construction.

He submits that *Bell Canada* did not deal with the issue of retroactivity, but only retrospectivity. He also notes that *Bell Canada* said it was not necessary to have explicit language in the *Act* to give a Board the power to adjudicate retroactively. This power can be implied from the wording of the *Act*, its structure and its purpose.

Mr. Sheppard interprets the reasoning of Justice MacDonald in *Guadagni* to mean that the Board has the power to adjudicate retroactively, except as expressly limited by Section 92 of the *Act*. He interprets *Pickwell* as implying that the Board has the power to declare and collect overpayments.

Further, he says the words “reopen, rehear and redetermine” must be given separate and distinct meanings, and the ordinary meaning of the words “determine” and “redetermine” require that the effects of a redetermination can be implemented from the time of the original determination.

He cites *W.C.A.T. Decision 918/87* 8 W.C.A.T.R. 177, and *Re S & M Laboratories* for the argument that the Board has the authority to collect overpayments by virtue of its obligation to administer the accident fund.

Finally, Mr. Sheppard submits that the Board’s Assessment Policy No. 30:20:40 may be unfair as between the employers who fund the system but not as between employers and workers. The employers in the class are not necessarily relieved from paying the potential loss in revenue. If the class funds are not adequate, the basic rate may go up, or an additional assessment may be imposed on all the employers of the class.

Alan Winter, on behalf of the Business Council of British Columbia, begins by distinguishing between “procedural” errors and “judgmental” errors. He defines “procedural” errors to include clerical errors as well as errors committed by a Board officer through omission or inadvertence (for example, the failure to conduct an eight-week review of a worker’s wage rate).

He argues that the Board has the authority to declare an overpayment in the case of “procedural” errors. The Board’s authority to do this derives from its authority to correct errors prospectively. In identifying an error and in adjusting future entitlements, the Board is in effect declaring an overpayment.

He further argues that the Board’s authority to recover overpayments is ancillary to the Board’s specified powers under the legislation. To further the intent of the legislation, the Board must be in a position to recover overpayments. Under the *Act*, the Board is responsible for creating and

maintaining an adequate accident fund and for ensuring that the workers receive the compensation to which they are entitled. If the Board has no authority to recover an overpayment, a worker would receive a “windfall” at the expense of the B.C. employer community. Mr. Winter relies on the same cases as Mr. Sheppard and also argues that Section 15, Section 92 and Section 96(2) of the *Act* support the position that the Board has the authority to recover an overpayment.

Mr. Winter submits that existing Board policy, as set out in the *Rehabilitation Services and Claims Manual* starting at paragraph #48.40, does not fetter the Board’s discretion to determine whether an overpayment should be recovered in a particular case. Thus it is a valid policy.

He also says that the Board has the authority to declare that an employer’s classification has been incorrect as of a date prior to the declaration (although their policy chooses not to do so). This argument is the counterpart to the argument that the Board has the authority to declare an overpayment made to a worker.

Next, he says that the Board has the authority to collect additional assessments retroactively. Mr. Winter submits that Section 39(1), Section 39(7), Section 49(1) and Section 96(2), of the *Act* support this proposition.

Finally, Mr. Winter submits that there is no inconsistency between the Board’s policy concerning the recovery of assessments and the Board’s policy concerning the recovery of overpayments. An employer’s obligation to pay assessments and a worker’s entitlement to receive compensation are not like circumstances. In the case of an overpayment to a worker, the Board must correct the error in order to achieve what the *Act* requires, namely the worker’s proper entitlement to compensation. In the case of an underpayment by an employer, it is up to the Board to decide what steps should be taken to correct the error. From the beginning, the Board has a discretion in determining an employer’s assessment rate. There is no principle in the *Act* that an employer will be required to pay a specific assessment.

Bert Hawrysh of the Council of Forest Industries, argues that Section 96(2) of the *Act* provides the Board with wide powers to reconsider and correct decisions. Given the common understanding of the words, “reopen, rehear and redetermine,” the conclusion that the Board has the authority to recover an overpayment is implicit. The effect of Section 96(2) is to place the Board in the position of the original decision-maker. However, Mr. Hawrysh also submits that, although the Board has the power to declare and recover

overpayments, discretion should be used in recovering overpayments. The Board ought to consider the amount of the overpayment, the length of time since the error was made, the financial hardship to the worker and whether it is reasonable to expect that the worker knew that an error had been made. He distinguishes between assessments and compensation benefits and says the two cannot be compared on the issue of recovery of overpayments.

Brent Qually, from Angus Qually Consultants Ltd., takes the position that the Board has the authority to give retroactive effect to its new decisions. However, he submits that the Board of Governors should scrutinize the fairness of the Board's current policies. In many cases, the affected worker did not contribute to the error leading to the overpayment. Also, in many cases, the recovery of the overpayments puts the worker in very difficult circumstances.

John Mandryk of Mandryk and Associates, Management Consultants, argues that an important consideration is that the money spent on overpayments comes out of employers' assessments. To the extent that higher assessment costs cut into business profitability, they will tend to adversely affect workers, consumers and the economy in general.

The Problem

The problem before us concerns the authority of the governors to promulgate, in relation to claims, policies with retroactive effect, and the authority of the Board to implement those policies. The resolution of this depends on whether the statutory provisions, and the case law, explicitly or implicitly grant this authority.

Purpose of the Act

At the basis of workers' compensation legislation is an historic trade-off: workers gave up their right to sue their employer in exchange for an employer-funded insurance system and predictable no fault compensation. In describing some of the benefits of workers' compensation legislation, the Honourable Gordon McG. Sloan, then Chief Justice of British Columbia, stated in his *Report of the Commissioner relating to the Workmen's Compensation Act and Board* (Victoria, 1952):

In the case of a man totally disabled through no fault of an employer but, for example, by an accident caused by his own carelessness or that of a fellow workman, he receives his compensation granted him for life regardless of subsequent disability or sickness which would have ended his working career in early life, regardless of old age with its like result.

His pension is not subject to the exigencies of strikes, lockouts, industrial depressions, seasonal unemployment, due to, for instance, droughts such as we experienced last summer that cut deeply into the wages earned by loggers during the period when the forests were closed. His compensation continues unabated throughout all these uncertainties and vagaries which beset the industrial worker. He pays no union dues; has no expense of working clothes and equipment. His compensation is free from income tax. *He has, in some measure, security.* (emphasis added)

(at 163)

In 1966, the Honourable Justice Charles W. Tysoe stressed, in his *Commission of Inquiry, Workmen's Compensation Act*:

[The benefits under the act] are not granted as a matter of grace, *but of right.* There is no measure of charity about them. *They have been acquired by the workmen as a body in return for giving up such common-law rights as they might have against employers.* (emphasis added)

(at 19)

He concluded:

With it all, I am of the opinion that *if there is room for error, the error should be made in favour of the workmen, and if there is room for doubt, the doubt should be resolved in favour of them. I think this is in accord with the social conscience of today,* and I hope it will be reflected in the recommendations that I make. (emphasis added)

(at 20)

Commission reports may not always show the purpose or object of the legislature in enacting a statute, since it is not always known whether their recommendations were accepted. Nevertheless, in this instance, it is undeniable that the legislation was introduced to provide stability to workers as well as to employers, that compensation is a matter of right under the *Act*, and that Mr. Justice Tysoe's exhortation for benevolent interpretation underlies Section 99 of the *Act*.

Presumptions

An important tool used in interpreting statutes is the “presumption of intent.” Professor Driedger, a noted scholar on statutory interpretation, in his book *Construction of Statutes* (Toronto: Butterworths, 1983), explained:

In the course of time the courts have come to attribute intentions to Parliament in certain circumstances, in the absence of an expression of a contrary intent. These attributions are called “presumptions”,

(at 183)

Presumptions are *prima facie* rules of construction. They apply unless they are rebutted. In other words, they can be displaced.

We are concerned here with whether the Board has the authority to act retroactively. A presumption relevant to this is the “presumption against retroactivity.”

The Presumption Against Retroactivity

The presumption against retroactivity provides that no statute shall be construed to have retroactive effect unless such intent appears explicitly in the terms of the legislation or arises by necessary implication. Judicial reports provide many examples of the application of the presumption against retroactivity. (See Cote, Pierre-Andre, *The Interpretation of Legislation in Canada*, (Que: Les Editions Yvon Blais Inc., 1984) at 103.)

The presumption against retroactivity is an extremely strong presumption even though the intention to displace or rebut it need not be explicit. (Cote, *supra*, at 100)

Very broadly, the presumption is designed to protect rights. In discussing the presumption against retroactivity, Professors Dusseault and Borgeat in their treatise *Administrative Law* (Toronto: Carswell, 1985, 2nd ed, volume 1) stated:

it is based upon the desire to reserve for Parliament the exceptional power to impose new “rules of the game” upon citizens which may be unfavourable to them, insofar as past events are concerned. This rule protects the public by ensuring that the law conforms to the knowledge that they had of it at the time of their decision to act.

(at 444)

Professor Driedger distinguished between the presumption against the retroactive operation of statutes and the presumption against the retrospective operation of statutes.

According to our understanding of Professor Driedger's discussion of the two concepts, a retroactive decision is one where, by the stroke of the legal pen, the flow of time is reversed. It is a decision from which all consequences follow as if the decision had been taken some time in the past. A retrospective decision merely attaches new consequences for the future to a past transaction.

The distinction between retroactivity and retrospectivity is a fine one that not all understand or agree with. We feel the distinction has little relevance to the issue here and will consider only retroactivity. Some cases and submissions, however, mention retrospectivity.

Retroactivity Under the Act

The distinction between entitlement to benefits and the implementation of decisions is critical under the *Act*.

A worker's entitlement to benefits is a matter of right under the *Act*. It is determined in each case by a decision, or decisions, of Board officers. The officer must consider the relevant facts and sections of the *Act* and *Rehabilitation Services and Claims Manual* in making a decision. Entitlement and decision-making are central to the purpose of *Act* and must be interpreted in light of the presumption against retroactivity.

On the other hand, if an error is made in implementing a decision, it does not change the original decision. The worker is entitled to what was set out in the original decision, not what resulted from a mistake in implementing that decision. If an officer decides that a worker is to receive \$1,000.00, but a cheque for \$1,500.00 is sent by mistake, there is an overpayment. The worker is not entitled to the extra \$500.00. When the Board corrects that kind of error back to the date it was made, the Board is not redetermining the worker's benefits nor giving retroactive effect to a new decision about entitlement. It is merely making the benefits correspond with the decision. Since correction of these errors does not change a worker's entitlement to benefits, the presumption against retroactivity has no application.

Therefore, we find the Board does have the authority to declare overpayments arising by administrative error.

Retroactivity and Decisional Changes

When a Board officer decides that a prior decision awarded a claimant too large a sum of money and proceeds to recover the excess, the officer is, in effect, applying the new rate of compensation as of a past time. This is an example of retroactive adjudication.

Explicit Authority

It is argued that Section 96(2) of the *Act*, either explicitly or implicitly, gives the Board the authority to adjudicate retroactively. That section is very broadly worded in that it confers a discretionary power “to reopen, rehear and redetermine any matter.” It is clear that Section 96(2) confers upon the Board the power to reconsider decisions already taken. However, there is no clear language in the section to indicate that the legislature intended a redetermination to be implemented from the time of the original determination.

We agree with Mr. Sheppard’s statement that the words “reopen, rehear and redetermine” must be given distinct meanings as the legislature could not have intended the words to be redundant. It does not necessarily follow from this that Section 96(2) confers upon the Board the authority to implement a redetermination from the time of the original determination.

“Reopen” is defined in the *Oxford English Dictionary* (Oxford: Clarendon Press, 1989, 2nd edition) to mean “to resume the discussion of (something settled or decided).”

“Rehear” is defined in *Black’s Law Dictionary* (St. Paul: West Publishing Co., 1979, 5th edition) to mean:

Rehearing. Second consideration of cause for purpose of calling to court’s or administrative board’s attention any error, omission, or oversight in first consideration. A retrial of issues which presumes notice to parties entitled thereto and opportunity for them to be heard. (emphasis added)

“Redetermine” is defined in the *Encyclopedia of Words and Phrases Legal Maxims Canada 1825 to 1985* (ed. G.D. Sangar. Toronto: Richard De Boo, 1986, 4th edition, volume 3) to mean:

(*Can.*) Section 70(1) of the *Immigration Act, 1976*, S.C. 1976-77 provides that a person whose claim to be a “Convention refugee” has been rejected may apply to the Board for a “redetermination of his claim that he is a Convention refugee”. To “redetermine” a matter means, according to the *Living Webster Encyclopedic Dictionary of the English Language*, “... (t)o come

again to a decision; to ascertain after reinvestigation". The Board, in making a "redetermination" under the statutory scheme, is therefore required to review the Minister's decision and to come to its own opinion as to the correctness of that decision. (emphasis added)

Torres *v.* Minister of Employment and Immigration, [1983] 2 FC 81 (C.A.).

We find the words "reopen," "rehear" and "redetermine" to have distinct meanings, quite independently from whether the Board has the authority to implement a redetermination from the time of the original determination. As Justice McKenzie explained in *Kolman v. W.C.B.*, Vancouver Registry No. A870918, October 23, 1987. (B.C.S.C.):

S.96(2) [of the Act] gives the Workers' Compensation Board a broad mandate to act on its own initiative. Should it decide to do so and "reopen, rehear and redetermine any matter" it must stay within the terms of this statutory mandate *and follow its prescribed steps, one, two and three.* (emphasis added)

(at 16)

In the B.C. Supreme Court decision in *Guadagni*, Justice MacDonald stated:

I hold that the express words of s. 92 limit the board's discretion under s. 96(2) to the extent that a redetermination under the latter can have no retroactive or retrospective effect, but speaks only from the date of its pronouncement.

(at 358)

It is suggested that this statement supports the conclusion that Section 96(2) of the *Act* explicitly confers on the Board the authority to adjudicate retroactively. We do not agree. We interpret Justice MacDonald's statement to mean that when the Board reconsiders a Review Board finding, the specific language of Section 92 makes the presumption against retroactivity clearly irrebuttable. That does not mean, however, that Section 92 displaces the presumption against retroactivity in all other situations under the *Act*. We find this interpretation to be more in keeping with the intent of the legislation. There is no reason why the legislature should have intended only workers who appeal to the Review Board to be able to spend benefits received with confidence. The wording of Section 92 of the *Act* is to be understood as the double affirmation that the presumption against retroactivity applies to a special case, namely reconsideration of a Review Board finding.

The specific sense in which Justice MacDonald characterized the Board's discretionary powers under Section 96(2) of the *Act* as unfettered is that the Board's use of this power is not limited to situations where there has been a change in circumstances. This has no bearing on the question of whether this power of reconsideration can be exercised retroactively.

Implied Authority

The authority of an administrative board may be implied. As stated by Justice Gonthier of the Supreme Court of Canada in *Bell Canada*:

The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist *by necessary implication* from the wording of the Act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.
(emphasis added)

(at 706-707)

The *Act* was intended to provide income security to injured workers and must be interpreted in that light. We find that the legislative scheme here, including the reconsideration power conferred upon the Board, cannot be interpreted to displace the presumption against retroactivity and empower the Board to implement decisional changes retroactively.

This conclusion takes into account the general statutory principle that a statute must be read as a whole, which means that the substance of particular provisions must be seen in the context of the ideas expressed in the entire legislative scheme. As indicated by Mr. Sayre, the *Act* contains several express provisions which not only protect workers' interests, but also impose on the Board, as well as doctors and others, a statutory duty to advance those interests.

Case Law

The case law provides no support for rebutting the presumption against retroactivity for decisional changes under the *Act*. It supports our conclusion that only administrative errors can be corrected retroactively. Decisional errors can be corrected on a prospective basis only.

In *MacDonald Tobacco Inc.*, the Supreme Court of Canada found that the legislation did not allow retroactive changes. The case arose when an employer applied for reductions in unemployment insurance premiums for 1977. An officer of the Commission rejected that request and determined that previous reductions for the years 1974-76 were granted in error. He then informed the employer that it was necessary to make up for past underpayments.

Thus, the Court was faced with the question of whether the legislation and regulations allowed an officer of the Commission, the Review Panel or the Commission itself to undo retroactively what had been done by way of the previous erroneous reductions. The Court found that although the officer wrongly granted the initial reductions, he was properly seized of the earlier applications so that his errors were not nullities. Consequently, there was no power to retroactively make up the inadequate payments. Moreover, recovery of the erroneous reductions was not permitted as part of the tribunal's overall administrative authority and was not provided for in the *Unemployment Insurance Act* or regulations.

Re Western Decalta Petroleum Ltd. et al. and Public Utilities Board of Alberta (1978), 86 D.L.R. (3d) 600 (Alta. S.C.A.D.) reaffirmed that administrative agencies possess only those powers authorized by the statute. They cannot act retroactively unless the statute so provides, either implicitly or explicitly. Unless such power is granted, administrative decisions with retroactive effect are void.

In *Re Western Decalta Petroleum*, the appellant applied to the Public Utilities Board of Alberta for an increase in the price of gas as fixed by a previous order. The question arose whether the statute under which the Board was constituted allowed it to make a retroactive order, that is, an order that would take effect on or after the date of the application rather than on the date of the order. On the basis of the express language of the statute, the Court held that the legislature intended the order to be effective only from the date of the order (or at some future time specified in the order). It is noteworthy that the Court mentioned with approval the Board's concern for the hardship that would befall users, should the order be retroactive.

In *Nova v. Amoco Canada Petroleum Co. Ltd.*, [1981] 2 S.C.R. 437, the Supreme Court of Canada held that the Alberta Public Utilities Board had the authority to issue orders varying, at least to the date of complaint by the user, those company-imposed rates and tolls found to be "unjust and unreasonable." Thus retroactivity was allowed. However, *Nova v. Amoco* is distinguished on its facts. The legislative scheme under review was a so-called "negative disallowance scheme." It grants utility companies the right to fix rates but it also grants users the right to complain before the Public Utilities Board which has the power to vary these rates if it finds that they are not "just and reasonable." Under such a scheme, limiting the Board to prospective orders only would

unfairly hurt the users who complained. In *Bell Canada*, at page 708, Justice Gonthier reaffirmed that, in the case of “negative disallowance schemes,” it has generally been found that the administrative agency has the power to make orders which are retroactive to the date of the application by the rate payer who claims that the rates are not “just and reasonable.”

The logic underlying the *Nova v. Amoco* decision is clear. In the case of a “negative disallowance scheme,” the company sets the rates. The company knows that users might complain and that the administrative agency is under a statutory obligation to determine whether the rates set out are “just and reasonable” and, if they are not, to remedy the situation. Under those circumstances, it is both efficient and fair for the company to bear the costs of unjust and unreasonable rate setting.

In *Re S & M Laboratories*, the Ontario Court of Appeal upheld the authority of the general manager of the Ontario Health Insurance Plan to recover an overpayment made to S & M Laboratories. The lab had been submitting accounts to the general manager since 1970 and, in 1976, an audit of the lab’s account took place. Based on the audit, the general manager determined that an overpayment had been made for the period from May 1, 1974 to April 30, 1976 as a result of “overbilling or unwarranted billing” (at page 163). The Ministry of Health then began to recover this amount by deductions from monthly payments made to S & M Laboratories.

The Ontario Court of Appeal upheld the deductions, finding the general manager of the plan to be implicitly empowered to determine the amount of the overpayment and to deduct them from subsequent payments to the lab. In so doing, the court favoured a broad interpretation of the legislation, one that conferred retroactive powers on the general manager.

We agree with Mr. Friedmann’s characterization of the error made by the general manager in *Re S & M Laboratories* as an accounting (or administrative) error rather than a decisional one. The overpayment arose not as the result of a change in entitlement flowing from a redetermination, but rather as the result of an accounting error.

Thus, we do not view *Re S & M Laboratories* as suggesting that, under the *Act*, a Board official may readjudicate a claim, reverse the original decision and proceed to recover any overpayment thereby arising.

Decision No. 918/87 is a decision of the Ontario W.C.A.T. which deals with overpayment recovery in that province’s workers’ compensation system. It cannot be taken as authority for the proposition that retroactive power to adjudicate decisional errors can be inferred from general legislative provisions. The facts in *Decision No. 918/87* involved double payments promptly brought to the attention of the Board by the

recipient; however, the Board was slow to correct the error and eventually sought recovery of the overpayment. There were no express legislative provisions permitting overpayment recovery. The panel examined *Re S & M Laboratories* and found the position of the O.H.I.P. general manager to be analogous to that of the Board's obligation in administering the accident fund. In the result, it determined that the Ontario Board had the jurisdiction to recover the sums paid in error.

Decision 918/87 does not address the question of whether decisional changes can create a recoverable debt. The facts in *Decision 918/87* did not involve a change in decision on the part of the Board. It was a case of a clear administrative error.

The *Pickwell* case involved this Board's authority to recover payments made by mistake to Mr. Pickwell. The facts as found by Judge Catliff were as follows: the Board had asked Mr. Pickwell for details about his earnings for the three months and one year immediately preceding his accident. He advised the Board of his earnings for the three-month period but not for the one year. When a board officer conducted a thirteen-week review, he mistakenly assumed that Mr. Pickwell had made earnings for the whole year prior to the accident at the same rate as he did in the three-month period and confirmed the maximum rate of compensation for Mr. Pickwell. In fact, the worker's yearly rate was considerably lower than his three-month rate. Taking into account the correct figure would have meant lower benefits.

The court upheld the Board's authority to recover payments mistakenly paid to Mr. Pickwell, more specifically upholding the Board's right to sue for recovery of the overpayment. In obiter, the court referred to Section 15 of the *Act* and concluded that this section permitted the Board to set off against compensation payable, money owing to the accident fund; but the court did not explore the broad question of what constitutes money owing to the accident fund.

We find *Re S & M Laboratories*, *Decision 918/87* and *Pickwell* consistent with the conclusion that the Board has the authority to recover overpayments generated by procedural errors or misrepresentation on the part of the recipient.

The Supreme Court of Canada established in *Bell Canada* that an administrative agency may revise interim decisions retrospectively. The Supreme Court viewed the issue before it as involving a question of retrospectivity and not retroactivity because the impugned C.R.T.C. decision did not seek to establish rates to replace or be substituted for those which were previously charged. Rather, the C.R.T.C. directed Bell Canada to give a one-time credit to its customers to remedy the imposition of rates approved in the past. It, therefore, attached new consequences to a past action.

Although the Supreme Court's decision concerned a retrospective situation, it would be reasonable to suppose that its underlying reasoning would also apply in the case of retroactivity. The question arises, therefore, whether the decisions of claims adjudicators are interim in nature within the meaning of *Bell Canada*. We note that, in *Bell Canada*, the legislation explicitly granted the C.R.T.C. the power to make interim orders as well as final orders.

The Supreme Court observed in *Bell Canada* how the ongoing nature of the C.R.T.C.'s activities entails an ongoing review of its past decisions. Final decisions are not final in the sense that they may never be reconsidered. In the words of Justice Gonthier of the Supreme Court, final orders are subject to "further prospective directions." Hence, the fact that a decision is subject to further revisions is not the test of whether it is final or interim. Ongoing review of past decisions does not clothe the decisions with a provisional, tentative or interim character.

We are of the view that the reasoning of the Supreme Court in *Bell Canada* does not support the contention that the decisions of claims adjudicators are interim in nature. The Supreme Court's analysis of final decisions is more pertinent to an understanding of the nature of these decisions. The nature of workers' compensation benefits makes ongoing review of past decisions inevitable. They remain subject to further prospective directions. We, therefore, concur fully with Justice Locke's views, in *Conde Michaud*, that the process of determining compensation is continuous and ongoing. But to conclude from this that the decisions of claims adjudicators are provisional or interim in nature is unwarranted. It would inject into the decision-making process a degree of uncertainty that would undermine the purpose of the legislation.

Fraud, Misrepresentation and Misconduct

Neither the purpose of the *Act* nor the presumption against retroactivity can be interpreted to protect a person who has improperly influenced a decision about his or her entitlement to benefits. If the person was fraudulent or misrepresented relevant facts and thereby received higher benefits, the Board is entitled to redetermine the matter retroactively. This was not contested in any of the submissions. Some arguments were raised about the limits of the Board to collect overpayments in cases of misrepresentation.

Upward Retroactive Adjustments

We have considered the argument that, if the Board lacks the authority to give retroactive effect to a new decision that is detrimental to the worker, it must also lack the authority to give retroactive effect to a new decision that is beneficial to the worker. This argument misses the point, however, that the presumption against retroactivity is intended to protect rights, and not to take away existing rights.

In discussing retrospective statutes, Professor Driedger clearly stated that the presumption against retrospectivity applies only to prejudicial application of statutes. (See E. Driedger, "Statutes: Retroactive Retrospective Reflections," *Canadian Bar Review* Vol. LVI, p. 267 and p. 275.) In *Barry v. Alta Securities Comm*, 35 Adm. L.R., 1 (S.C.C.), the Supreme Court cited Professor Driedger's statement approvingly. Justice L'Heureux-Dube reaffirmed that the presumption against retrospectivity applies only to the prejudicial application of statutes. It does not apply to those which confer benefits.

Professors R. Dusseault and L. Borgeat, in *Administrative Law*, said the same thing about retroactivity:

Yet to the extent that the rules are retroactively changed in order clearly to give citizens additional rights, the rule [of non-retroactivity] no longer offers anyone protection and, in our view, no longer can be justified.

(at 444)

Under the *Act*, injured workers have a right to compensation. If it is later determined that their entitlement was greater than that provided for in an earlier decision, the presumption against retroactivity cannot take away that entitlement or right. If the Board has made a decisional error, it is under a statutory obligation to compensate the worker fully. The presumption against retroactivity does not apply.

The Eight-Week Review Error: Administrative or Decisional?

We have given much thought to the question of whether a Board officer's failure to conduct the eight-week review of a worker's wage rate ought to be treated as an administrative or decisional error. In our opinion it is decisional. This review is made when wage-loss payments based on the worker's rate of pay at the date of injury have continued for eight weeks. The review consists of an inquiry into and determination of what earnings rate best represents the long-term earnings loss suffered by the worker by reason of the injury. The general practice is that after a claim has lasted five weeks, the claims adjudicator considers whether it is likely to last for eight weeks and, if not already done, sets in motion any inquiries necessary for a possible eight-week rate review.

First, we note that the *Act* does not require the eight-week review procedure. Rather, it has been implemented as a matter of policy (namely, policy #67.20 of the *Rehabilitation Services and Claims Manual*). Second, the worker is being paid benefits pursuant to a decision. The Board's position is that the decision should have been changed at the eight-week point in time. However, that does not change the fact that the worker is being paid pursuant to a valid decision. It is not like an administrative error, where there is no decision that grants the worker the level of benefits he or she is receiving.

Since there is a decision about benefits, we find the failure to review the decision at the appropriate time more like a decisional error than an administrative error.

We find that the failure to do an eight-week review at the appropriate time is subject to the same rules as other decisional changes. The Board has no authority to conduct this review and lower the benefits retroactively, in the absence of fraud or misrepresentation on the part of the worker.

Decisions and the Act

We have determined that the Board cannot make decisional changes retroactive to the date of the original decision. Some submissions seemed to raise a point about the type of decision covered by this principle. Mr. Weir refers to “lawful” decisions while Mr. Sayre refers to “a decision within the board’s statutory jurisdiction.”

All decisions within the Board’s jurisdiction are covered. The Board’s jurisdiction is determined by the *Act*. Board policy in the *Rehabilitation Services and Claims Manual* is secondary to the *Act*. As long as a decision is consistent with the *Act*, it cannot be changed retroactively.

The *MacDonald Tobacco* case supports this position. There the Supreme Court of Canada held that a decision made by an officer that was within his jurisdiction was not a nullity simply because the decision was incorrect.

Authority to Collect Money Owing to the Board

Overpayments arise as a result of administrative error; decisions made on the basis of a worker’s misrepresentation or fraud; or decisions outside the Board’s statutory jurisdiction. We find that this is money improperly paid out of the accident fund and thus is owed to the accident fund. We agree with the submissions that in these situations the Board can use the powers contained in Section 15, permitting the Board to set off sums payable as compensation against “money owing to the accident fund.” It is not necessary for the Board to take court action to recover such money but rather it may rely on its own internal processes.

Manner of Collection

The ombudsman’s submission raised the manner in which the Board may proceed to collect money owing to the accident fund. We find that the question of whether and how the Board ought to collect overpayments is not for us to resolve. It is a matter of policy for the Board of Governors.

Retroactivity and the Board's Assessment Policy

The Board's assessment policy concerning the recovery of money is not retroactive where a Board error led to an underpayment by an employer. Assessment Policy No. 30:20:40 provides that if a change in employer's classification results in an increase in rate, the rate change is delayed until January 1 of the year following the year the error was discovered and the firm notified. The reason given is that, through no fault of its own, the firm has perhaps budgeted accordingly and should not be put in a position of paying back assessments due to a Board error. No such considerations shape the Board's policy concerning the recovery of money where a Board error led to an overpayment to a worker.

In a written response to our letter requesting an explanation of the rationale underlying the differences in the assessment and claims policies, Kenneth Dye, president and chief executive officer of the Board, frankly acknowledged the inconsistencies between the two policies. Mr. Dye is of the view that the Board should not continue to maintain different policies for two situations which are alike in nature. We are grateful for Mr. Dye's candid assessment of the policies and agree with his conclusion. As a result of Bill 27, it is now within the jurisdiction of the Board of Governors to address this situation.

We note that in defining a "Board error," Assessment Policy No. 30:20:40 appears to be aiming at "decisional" errors. To the extent that this is so, this policy is in accordance with the distinction between "administrative" and "decisional" errors. Thus, Assessment Policy No. 30:20:40 appears to be consistent with our conclusion that the Board lacks the authority to recover money from workers in the case of decisional changes.

We also note that Assessment Policy No. 30:20:40 provides that, if a change in classification results in a decrease in rate, the change may be made effective to the date of the error. The reason offered is that the firm was entitled to the proper rate and provided the information necessary to expect that rate. Again, this is consistent with our view that, in the case of an underpayment to a worker due to a decisional error, the Board must correct the situation retroactively.

Summary

We find that there is no clear language in the *Act* that gives the Board the authority to adjudicate retroactively. While arguments were made that the *Act* and case law implicitly grant the Board this authority, we do not agree. The presumption against retroactivity is supported by the purpose of the *Act* and is not rebutted from inferences drawn about the language of the *Act* or the meaning of relevant court decisions. This presumption against retroactivity protects entitlement granted by a decision made

under the *Act*. It does not apply if there was fraud or misrepresentation on the part of the worker. As well, it does not take away entitlement that should have been granted under the *Act*. That would be contrary to both the purpose of the *Act* and the reason for the presumption against retroactivity.

We concur with the views of Professor Terence Ison as expressed in *Workers' Compensation in Canada* (Toronto: Butterworths, 1989, 2nd edition):

If a board concludes on the evidence available that compensation is due, and compensation is then paid, and the decision was not induced by any wrongdoing of the worker, there is no overpayment simply because evidence subsequently becomes available that would justify a different decision.

The payment was lawfully due when made and is therefore not an overpayment.

(at 140)

We would add, however, that there is no overpayment, even if the new and the initial decision are based on the same evidence.

We hold that the following principles apply:

1. The Board has the authority to declare and collect overpayments arising through administrative error.
2. Generally, the Board does not have the authority to retroactively adjudicate a claim and thereby create a debt owed by a worker to the Board.
3. The Board does have the authority to retroactively adjudicate and create a debt owed to the Board in situations of fraud or misrepresentation by the worker or where the decision under review was not one within the statutory authority of the Board.
4. The Board must pay any additional benefits to a worker that are a result of retroactive adjudication.

We find the Board has no authority to implement policies inconsistent with these principles.

Decision of the Appeal Division

Number: 91-0806
Date: November 12, 1991
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Experience Rating

The employer has appealed the March 22, 1991 decision by the director of Assessments, concerning the application of Experience Rating to its assessments. Submissions dated June 6, July 15, and August 26, 1991 were provided in support of the appeal by the employer's lawyer. An extension of time was granted for the appeal.

The employer's counsel argues that the Board's experience rating system is not permitted by Section 42 of the *Workers Compensation Act*. This section provides:

The board shall establish subclassifications, differentials and proportions in the rates as between the different kinds of employment in the same class as may be considered just; and where the board thinks a particular industry *or plant* is shown to be so circumstanced or conducted that the hazard or cost of compensation differs from the average of the class or subclass to which the industry *or plant* is assigned, the board shall confer or impose on that industry *or plant* a special rate, differential or assessment to correspond with the relative hazard or cost of compensation of that industry *or plant*, and for that purpose may also adopt a system of *experience rating*. (emphasis added)

It is clear from the concluding phrase of Section 42 that the Board has been specifically authorized by the *Act* to establish a system of experience rating. The employer has not argued that the Board erred in the manner in which the system was applied in its case. Rather, the issue is whether the experience rating system adopted by the Board is in conformity with Section 42. The submissions on behalf of the employer state:

... the sole question on this Appeal is whether or not Section 42 permits this practice and procedure being followed by the Board of Governors. It is the Appellant's submission that it does not, that Section 42 clearly states the industry or plant must be "so circumstanced or conducted that the hazard or cost of compensation differs from the average of the class or

subclass to which the industry or plant is assigned ...” Had the legislature intended the merit or demerit system to be applied simply on the basis of claims rather than on the basis of circumstances or the manner in which it is conducted, then Section 42 would have so specified and the words “circumstanced or conducted” would be omitted entirely.

Counsel argues in his letter of June 6, 1991 that a

demerit rating assessment against [the employer], based solely upon one incident where the injury was not related to the conduct or circumstance of [the employer], is invalid and should be reversed.

He has also argued that the Board cannot impose a special rate of assessment against an individual employer, but is restricted to rendering assessments only against classes or subclasses.

It is clear that Section 42 contemplates the imposition of a special rate of assessment against an individual employer. This is borne out by the use of the term “or plant” four times within Section 42.

The lawyer’s argument concerning the operation of the experience rating system, with respect to specific injuries which are not due to the fault of an employer, are not new. In the 1952 *Royal Commission Report* of Chief Justice Sloan, it was noted on page 182 as follows:

Any firm may have a good or bad experience over a short period, and such experience may be the result of either good or bad fortune and in no way indicative of the manner in which the industry was “circumstanced or conducted”. But over a sufficiently long period and given an adequate payroll exposure, it may be considered that cost is an indication of the manner in which the industry is “circumstanced or conducted.”

Similarly, in Decision No. 49 of the *Workers’ Compensation Reporter*, the following reasoning was expressed:

The employer submits in the alternative that if the appeal is denied, the claim should not be counted in the records of the Board for experience rating purposes. We cannot, however, accept that view. There is no ground for it except the argument that the death resulted from the fault of the worker, or that it resulted without fault on the part of the employer. But the very purpose of workers’ compensation is to provide a system of social insurance that can operate without the enormous administrative cost that would be involved in an enquiry into fault in each case.

The system of experience rating is based to some extent on notions of fault. It reflects the view that some accidents are preventable, and that employers in whose operations injuries are more frequent or substantial should pay higher assessments than those in whose operations injuries are less frequent or less substantial. But to the extent that this system concerns itself with fault, it does so by reference to aggregated data, not by moral judgments on individual claims. To take out of this accounting a particular accident because it was adjudged not to be the fault of the particular employer would, therefore, introduce a distortion rather than an improvement in accuracy.

There may be scope for argument about what is a fair and proper formula to apply in the administration of an experience rating system. But once a formula has been adopted, fairness among employers in the class then requires that the formula must be strictly followed. To take out a particular claim on the application of a particular employer would be unfair to other employers whose experience includes similar claims, but who have not initiated similar applications ... The employer's application that the claim not be counted for experience rating purposes is denied.

The reasoning expressed by Chief Justice Sloan in 1952, and further in Decision No. 49, provides, in my opinion, a complete answer to the argument raised as to the meaning of the phrase "circumstanced or conducted." I am satisfied that the Board's experience rating system is authorized by Section 42 of the *Act*. No error of law or fact or contravention of a published policy of the governors has been established by the employer.

In conclusion, the employer's appeal is denied. The application of a demerit rating under the Board's experience rating system to this employer is in accordance with Section 42 of the *Act* and the published policy of the governors.



Decision of the Appeal Division

Number: 91-0786, 91-0787
Date: November 5, 1991
Panel: Connie Munro, Walter N. Peain, Alex Brokenshire
Subject: Section 96(4) – A Review Board Finding Referred by the President to the Appeal Division

The worker received a decision from the Workers' Compensation Review Board dated June 4, 1991. He had appealed a decision of the claims adjudicator dated August 27, 1990 which awarded a pension of 10% of total disability by reason of psychological impairment arising out of a post-traumatic stress disorder. The worker's Notice of Appeal to the Review Board stated that he believed the adjudicator's decision was wrong:

Because of the measure of lost memory, periods of depression, confusion, especially when under tension, flashbacks to the assault and having to continue on sleeping medication.

The worker argued that he was entitled to a disability award of at least 20% calculated on a functional basis. The worker was apparently unrepresented in his hearing before the Review Board which took place on March 15, 1991. In rendering their findings of June 4, 1991, the Review Board confirmed the 10% functional award, however, they went on to state:

In the one year immediately prior to his compensable injury [the worker] earned the equivalent of \$1,710.30 per month. The evidence indicates that he would have continued to do so for several years. The amount of his monthly pension, based on the functional impairment of 10% of total, was calculated to be \$128.25 per month. [The worker] was unable to continue with his former employment and now maximizes his earning capabilities at \$500.00 per month. We find that the reason for the significantly reduced monthly income is directly attributable to the post-traumatic stress disorder. Accordingly, we cannot agree with the statement of the Claims Adjudicator for Disability Awards that the functional assessment of [the worker's] disability reflects any possible long term loss in earning

capacity. We allow that aspect of the appeal. We refer the claim back to Disability Awards for calculation of the loss of earnings pension entitlement under Section 23(3) of the *Workers Compensation Act*.

On July 3, 1991, the worker was sent a letter by Kenneth M. Dye, president and chief executive officer, advising that pursuant to Section 96(4) of the *Workers Compensation Act* the finding of the Review Board was being referred to the Appeal Division for redetermination on the grounds that it contravened a published policy of the Board of Governors. The published policy alleged to have been breached was *Rehabilitation Services and Claims Manual* ("Manual") #40.20 which states:

Where an injury occurs in the age range 51-64 years, and the worker receives full wage-loss payments from the date of the injury up to his 65th birthday, a pension will be established by the physical impairment method, and that pension will be payable for life.

The effect of this policy is that no loss of earnings award is paid where the effective date of the pension follows the worker's 65th birthday. In this case the worker was injured January 19, 1989, two weeks prior to his 65th birthday and received wage-loss benefits until April 29, 1990. Following the aforementioned advice being received from Mr. Dye, the Workers' Advisers office has become involved in the case and in addition to filing submissions in respect of the referral under Section 96(4) have advanced arguments appealing the decision of the Review Board to confirm the functional award of 10%. Although the appeal was received subsequent to the 30-day time limit provided in Section 91, the chief appeal commissioner allowed an extension of time for submitting that appeal.

The issues before the panel at this time, therefore, are twofold:

1. Was the pension awarded to this worker correctly assessed at 10% of total disability, and;
2. Does the Review Board decision contravene a published policy of the governors?

The panel will first deal with the question of the quantum of the functional award.

The facts in this case are undisputed. The worker was born February 2, 1924. He had semi-retired after 43 years as a church minister and taken up employment as a desk clerk. In January 1989, the worker, who was by this time age 64, was employed as a night desk clerk at a motel in Nanaimo. He had worked as a desk clerk for approximately five years and had been with the pre-injury employer for 1½ years. On

January 19, 1989, he was assaulted by two masked and armed gunmen while he was making night rounds. He was badly beaten about the head, face and body. He received multiple injuries and, in addition, the assault caused severe emotional upset resulting from the threat to knife and shoot him.

Both the Board psychologist and the psychiatrist who have treated this worker concur in the diagnosis of post-traumatic stress disorder. Dr. F, the Board psychologist, recommended that the permanent disability in this worker's case be at the lower end of Class 2, Table 1, of the *American Medical Association's Guides to the Evaluation of Permanent Impairment (A.M.A. Guide)*. That class ranges from 10-20% and an award of 10% was made by the disability awards officer on that basis.

Medical evidence has also been provided by Dr. G, the treating psychiatrist. Dr. G agrees that the worker falls within Class 2, Table 1, of the *A.M.A. Guide*, but disagrees with the placement of the worker at the lower end, rather than the higher end, of the 10-20% range.

In the Review Board's consideration of this matter they acknowledged the opinion of Dr. G that the worker's impairment was not less than 20% of a totally disabled person. They stated, however:

In establishing that percentage Dr. G does not refer to the criteria upon which the percentage is based. On the other hand, the assessment recommended by the Board Psychologist was based on the criteria established in the combination of the D.S.M. III and Table 1 provided in the *A.M.A. Guide*.

The submission by the workers' adviser on this appeal includes a further letter from Dr. G dated August 30, 1991. He states:

In my assessment I have followed the general guidelines adopted by the W.C.B. psychologist, Dr. F. I agree with Dr. F that the residual symptoms are judged to be mild and designated as Class II with 10% to 20% permanent disability. Therefore, the point of contention is whether he should be compensated the minimum of 10% or the maximum of 20%. As his attending psychiatrist, I believe that the severity of his residual symptoms deserve the maximum of 20% compensation and that the 10% is inadequate.

He still has to struggle with a considerable level of anxiety, depression, insomnia, periodic flashbacks, apprehension, reduced level of energy, impaired memory, short attention span, tiredness, etc.

There is no doubt that Dr. G's medical reports provide considerably more detail than those of the Board psychologist relative to the effect of the disability on this individual. In general terms, however, the Board psychologist in Memo #24 agreed with Dr. G that the worker continues to be symptomatic and that ongoing treatment is warranted.

Comparing the percentage recommendations of two doctors in a case such as this is facilitated by the agreed applicability of the *A.M.A. Guide*. The criteria set out in Class 2 of Table 1 indicate that, generally, the individual would experience slight deficits or problems and that his activities of daily living would only be affected to a minor degree. Class 2 refers to a situation where rehabilitation or treatment potential is good. In reviewing the criteria listed in Class 2 and Class 3 it is apparent why Dr. G would form the opinion that the worker fit into the upper reaches of the second category. For example, Class 3, in respect of rehabilitation or treatment potential, indicates "good for partial restoration" and Class 4 indicates "condition static." It is certainly arguable that this worker is closer to a Class 3 or 4 than he is to a Class 2 in regard to the particular element of rehabilitation or treatment potential. It is agreed that the impact of this worker's permanent problems are such that he cannot return to his pre-injury employment. The effects on his functioning vis-à-vis employability, therefore, cannot be described as only mild or slight. Since a Class 3 impairment involves "moderate" deficits or problems it may well be that with respect to some aspects of the assessment Class 3 would be more appropriate.

These factors are cited not to dispute the assessment of both the psychologist and the psychiatrist that this worker, overall, is at a Class 2 level of disability, but as examples of why it appears that Dr. G may be more accurate than the Board psychologist in assessing the worker in the upper end of Class 2.

Additional support for Dr. G's position is found in a review of the current 3rd edition of the *A.M.A. Guide*, rather than the 2nd edition that was used in assessing this case. In the 3rd edition the percentage estimates are eliminated. The classes, however, are still retained. Class 2 is described as "mild impairment," while Class 3 is described as "moderate impairment." The areas of function, namely activities of daily living, social functioning, concentration, and adaptation in a Class 2 impairment are described as "Impairment levels compatible with most useful function." A Class 3 level of impairment is described as "Impairment levels compatible with some but not all useful function." Again, it appears that this worker can, in terms of his ability to function in employment situations, be described as nearing the Class 3 level.

For the foregoing reasons the panel agrees with Dr. G's analysis and allows the worker's appeal. The functional award shall be increased to 20% of total.

The second issue is the Section 96(4) referral. Does the Review Board decision contravene a published policy of the governors? *Manual #40.20* provides that a loss of earnings pension will not be applicable in the case of a worker who receives full wage-loss payments from the date of the injury up to his 65th birthday. That specific issue was not raised in either the adjudicator's decision letter, or in the Review Board decision.

The adjudicator did not deny consideration of a Section 23(3) award on the basis of the worker's age. The decision letter stated:

It is considered that the functional assessment of your disability reflects any possible long term loss of earning capacity which may occur as a result of the injury.

A review of the file memos reveals only one reference to the issue of age. Memo #29, dated May 22, 1990, states:

The worker turned 65 shortly after the injury incident, and no loss of earnings consideration will be undertaken.

Memo #38, dated June 27, 1990 said, simply, "No loss of earnings." Neither the decision letter nor the Review Board decision addressed policy #40.20 and its applicability to this case.

The findings of the Review Board, apart from their denial of the appeal on the functional award, are very limited. The paragraph quoted earlier constitutes their entire findings regarding matters relative to a projected loss of earnings assessment.

The "Outcome" of the appeal states:

We find that [the worker] is experiencing a reduction in his earning capacity greater than that reimbursed by the psychological impairment pension. That aspect of the appeal is allowed.

This finding specifically addressed the only reason stated by the adjudicator for denying a projected loss of earnings pension.

The Review Board decision effectively referred the file back to the W.C.B. for reassessment of the worker's pension or "calculation of the loss of earnings pension entitlement under Section 23(3) of the *Workers Compensation Act*." The Review Board did not undertake a re-assessment of the pension. That was left to the W.C.B. This is a common method utilized by the Review Board in dealing with pension cases.

It was not, however, the only option available to the Review Board. The Review Board, as confirmed in *Manual #102.25* "... has full jurisdiction over permanent disability awards."

A Review Board panel can make a finding that a worker is entitled to a loss of earnings pension. They can actually assess the amount of the award. They did not do so in this case. Rather the Review Board disposed of the issue in the manner described in *Manual #102.51*.

It commonly happens that, instead of reaching a specific finding on a matter, the review board will direct that the Compensation Services Division reassess or reconsider something, for example, a permanent partial disability pension. The review board finding is properly implemented if the reassessment or reconsideration is carried out even if the conclusion reached is the same as the one which was previously appealed to the review board.

...

Where, in addition to directing the reassessment or reconsideration, the review board makes some specific findings of fact, for example, that the claimant was unable to carry out certain jobs, the Compensation Services Division is bound by those findings.

Following the Review Board decision the Board was obligated to reassess the worker's pension in accordance with the findings of fact made by the Review Board and applying the statutory provision of Section 23(3). The Review Board made no findings as to the applicability of the policy set out in *Manual #40.20*.

In other words, the Review Board finding did not specifically require that a loss of earnings pension be awarded. It was, therefore, open to the disability awards claims adjudicator to consider the applicability of *Manual #40.20* in determining whether a loss of earnings pension award was payable in implementation of the Review Board finding. The referral of the Review Board finding to the Appeal Division under Section 96(4) was, in this respect, unnecessary.

The panel has some concern in arriving at this conclusion. We do not wish it to be construed that we are encouraging a very technical interpretation of Review Board findings which might be used to avoid paying benefits the Review Board intended to have paid.

We are, however, dealing with an extraordinary statutory power in reconsidering a Review Board decision pursuant to Section 96(4). An allegation that the Review Board "contravened published policy of the governors" suggests they committed a clear

jurisdictional error. It would be inappropriate for the Appeal Division to declare that the Review Board contravened a published policy of the governors unless the evidence clearly supported no other conclusion. The Review Board findings in this case raise a substantial doubt.

There is no indication that the Review Board considered the effects of the policy relative to the worker's age. Even if the policy were simply overlooked we could, assuming we found the policy lawful, find the referral justified if a pension award had been made. Intent on the part of the Review Board to contravene a published policy is not required by Section 96(4).

We are not satisfied in this instance, however, that the Review Board intended to *award* a pension as opposed to providing specific findings of fact on which the Board would act in *reassessing* the pension.

We are, therefore, not satisfied that a contravention of the governors' policy occurred.

The submission on behalf of the worker by the workers' adviser raises the issue of age discrimination and whether the governors' policy, by declaring that loss of earnings pensions are not payable to workers beyond the age of 65 years, contravenes Section 15(1) of the *Charter of Rights* and Section 8 of the *B.C. Human Rights Act*. These are questions which ought to be addressed in respect of the policy. Ideally, however, they should not receive *initial* consideration at the level of the Appeal Division.

It is unnecessary in this instance to address the question of the lawfulness of *Manual #40.20* in view of our conclusion that the policy was not contravened.

In the result:

1. the worker's functional award will be increased from 10% to 20% of total
2. the Section 96(4) referral is concluded on the basis that the Review Board decision will not be redetermined as it does not contravene a published policy of the governors.



Decision of the Appeal Division

Number: 91-0851
Date: November 25, 1991
Panel: Connie Munro, Derrick Spooner, Verna Ledger
Subject: Section 55 and Grain Dust Asthma

This is an appeal from the Workers' Compensation Review Board finding dated August 18, 1989 which confirmed the decisions of the claims adjudicator dated March 17, 1988 and January 9, 1989. The worker is a former maintenance supervisor at the Alberta Wheat Pool. He contends that he has asthma caused by his exposure to grain dust.

The claims adjudicator advised the worker on March 17, 1988 that his bronchitis and asthma had not been caused by or significantly aggravated by his employment. The January 9, 1989 decision letter advised the worker that his claim was statute barred by Section 55 of the *Workers Compensation Act* as his reasons for failing to file an application within a one-year period did not amount to "special circumstances" within the meaning of Section 55(3). The decision letter went on to state that the reasons given by the worker for not having filed a claim immediately could not be said to have actually precluded him from making a claim or that they were in any way special.

The issues to be addressed are:

1. Did there exist special circumstances which precluded the application from being filed within one year?
2. Should the Board exercise its discretion to pay compensation based on the merits of the case?

Section 55 reads as follows:

Application for compensation

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

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

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

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

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

The governors' policy (*Rehabilitation Services and Claims Manual* #93.22) establishes that the application for compensation cannot be considered on its merits if no special circumstances existed or if the Board declines to exercise its discretion in favour of the worker. The policy also prescribes that the two requirements must be considered separately.

The worker's counsel argues that special circumstances mean not only peculiar circumstances but also particular or exceptional circumstances (*Oxford English Dictionary*, 7th edition, page 1018). It is contended that the worker's circumstances were special in that he suffered from an industrial disease condition not an injury. Industrial disease claims make up only a small percentage of workers' compensation claims while respiratory irritation comprises only a very small percentage of the total number of industrial disease claims.

It is argued on the worker's behalf that "preclude" means to exclude or prevent or to make impracticable (*Oxford English Dictionary*, 7th edition, page 808). It is contended that the most liberal interpretation favorable to workers should be given to these words. Counsel's argument is based on statutory rules for construction such as the beneficial construction rule and the golden rule, on Section 8 of the *Interpretation Act* concerning remedial statutes, and on Section 99 of the *Workers Compensation Act*. The argument also invokes a line of cases which say that limitation provisions should be interpreted strictly against a defendant. It is argued on this reasoning that Section 55(3) should be interpreted liberally in favour of workers.

The worker's counsel points out that it is much more difficult to recognize entitlement in cases of industrial diseases than in the case of work-related injuries and that the medical evidence relative to this worker's condition was initially inconclusive. Counsel suggests that because of his ill health the worker relied on his employer to guide him in his application for benefits. It is argued that on the facts of this case there is nothing to suggest that the worker's late filing has caused a difficulty or prejudice to either the Board or the employer in investigating and adjudicating the claim. Allowing the worker's application would, therefore, not defeat the rationale behind time limitations.

In dealing with the arguments on behalf of the worker the Review Board responded with a very restrictive interpretation of the word "preclude." The panel considered that nothing precluded the worker from making an application. In the opinion of the Review Board the worker had simply chosen to apply for long-term disability benefits because he was under the impression that it would be more advantageous for him to do so. In response to that particular point the worker's previous counsel had replied that he could have applied for and received both benefits and that it was the employer who had the greatest interest in having the worker apply for disability insurance benefits.

In reviewing this matter it appears that the application of Section 55(3) has been the subject of interpretation both by the previous commissioners and in earlier Review Board decisions. Decision No. 379 regarding time limits on the application for compensation expressed the policy in Section 55 cases as the two-step procedure set out as the issues to be addressed in this case.

The commissioners stated that in determining whether special circumstances existed the concern should be solely with the claimant's reasons for not submitting his application within the one-year period. In the absence of special circumstances an application would be barred from consideration on the merits even if the evidence indicated that the claimant suffered a work injury. The commissioners recognized:

It is not possible to define in advance all the possible situations that might be recognized as special circumstances which precluded the filing of an application. The particular circumstances must be considered and a judgement made. (Decision No. 379)

The commissioners indicated that the Board's discretion in allowing an application will depend on the extent to which the lapse of time since the injury had prejudiced their ability to investigate the claim. At the end of Decision No. 379 the commissioners concluded:

The exercise of the Board's discretion under Section 55(3) may, in some cases, appear in substance to be closely related to the question that would arise on the merits of the claim as to whether the injury in question

occurred and whether it caused the claimant's subsequent complaints. If there is now an inability to obtain evidence regarding the original injury, that would normally mean that the claim would be disallowed on the merits for lack of evidence to support it. On the other hand, there will be cases where, notwithstanding the Board's exercising its discretion in favour of allowing an application to be considered, the claim will nevertheless be disallowed on the merits. For the reason connected with the appeals system outlined at the beginning of this decision, it is always necessary, in any event, to separate the decision on the merits and the exercise of discretion under Section 55(3). (p. 194)

Subsequent decisions of the Review Board and of the commissioners reveal that the principles outlined in Decision No. 379 have been inconsistently applied. Decision No. 379 does not address the meaning of the word "preclude."

Two other claims involve a worker who had an accident in 1977. He mentioned the accident to an adjudicator in 1981. The argument presented on behalf of the worker was that he had no understanding of the legal implications of failing to file within one year. He presumably did not appreciate the difference between a notice to the employer and an application for compensation to the W.C.B.

The majority of the Review Board found in favour of the worker. The Review Board noted that the worker sought medical attention and notified his employer. Both the doctor and the employer had an obligation to report the injury to the Board. They did not. The majority, therefore, found that:

The worker reported the injury to both the doctor and the employer and both breached their statutory obligations to report the injury to the Board, and the worker himself suffered no income loss, in part because the employer supplied him with light employment. In light of the provisions of the manual and the decisions of the Commissioners, such circumstances must be deemed to constitute circumstances which precluded the filing of an application.

The vice-chairman of the Review Board dissented strongly. He rejected the notion that the worker's reliance on his doctor or employer amounted to special circumstances that precluded him from filing his application on time. He focused his concern on the word "preclude" and defined it to mean:

to hinder, exclude, or prevent by logical necessity; to bar from access, possession, or enjoyment; to make impossible, especially in advance ...

No source is cited for that definition. In view of the weight the vice-chairman attached to the word preclude, he found that Section 55(3) does not give the Board the jurisdiction to decide which circumstances it will consider appropriate in deciding whether to accept an application made out of time. He stated that the section is very narrow in scope and that the Board may only begin to consider whether time for filing an application should be extended where the special circumstances are such that they *precluded* the filing of an application. He concluded that the policy is contrary to the *Act* and, therefore, unlawful.

The matter was considered by the commissioners on a reconsideration pursuant to then Section 96(2). The commissioners rejected the conclusion that the policy was unlawful but overturned the majority Review Board decision based on their conclusion that the Review Board was wrong in finding that special circumstances existed. They did not deal specifically with the meaning of “preclude.” Hence, while the issue (the meaning of the word “preclude”) has been raised in the past there has been no definitive interpretation. No reference to “preclude” has been incorporated into the governors’ policy.

Another series of decisions by the commissioners dealing with the interpretation of Section 55 are the triad of cases concerning workers suffering from bladder cancer. Here the commissioners agreed that the workers could not have been expected to file an application for compensation when they were first diagnosed or even for some years after the diagnosis. The stated reason was that only recently scientific advances have established the relationship between bladder cancer and occupational exposure. The decisions in those cases did not focus on the word “preclude,” but dealt with the matter on the basis of whether or not special circumstances existed.

It is clear that the nature of the medical problem suffered by the worker in the present case was not initially apparent. While the worker indicated that his family physician, Dr. D. G, “always said that the dust was a problem” he apparently qualified his statement by saying, “he couldn’t prove it.” The worker testified that Dr. J. G, the respiratory specialist he was referred to in 1987, was “the only one who said ‘you have an industrial disease.’” As soon as that information was given to the worker he attended to filing a workers’ compensation application.

The worker had been employed in the Alberta Wheat Pool from 1952 to 1985. He became a supervisor in 1974. As management he was outside the bargaining unit so that advice on workers’ compensation matters was not readily available to him. One of the factors that impressed the panel in the course of the evidence given by the worker at the oral hearing was his apparent reliance on advice from his employer. Both the testimony of the worker and his wife were replete with references, not just asserting

their reliance on the employer, but actually demonstrating such reliance during the most recent oral hearing. We are satisfied that the worker relied completely on the advice given him by senior management when he became disabled.

The worker indicated that in approximately June 1985, during one of the periods of disability prior to him laying off work completely, he was visited by the employer's Calgary-based manager of compensation and benefits. The worker recounted that when the matter of whether the grain dust caused the worker's disability was brought up

He told me it would be very hard to prove. He suggested I go on company disability pension which I did.

The employer's representatives who attended the oral hearing in the Appeal Division indicated that particular manager's involvement with workers' compensation was largely on the assessment side. He would not have been knowledgeable about claims procedures in British Columbia and specifically the time limits involved. The worker stated that he applied for C.P.P. benefits because he was told to do so.

The worker's evidence established that he was visited by another company representative in the summer of 1986. He indicated that again the discussion centred on how difficult it was to prove a connection between respiratory problems and grain dust exposure.

When asked what eventually prompted him to make a claim to the Workers' Compensation Board the worker replied, "I was told to make it." He explained that the disability insurance company, after receipt of Dr. J. G's report in 1987 recognized that a compensation claim might succeed and requested the worker to file same. He did so forthwith. The worker testified that the employer's representative "looked after my problems." The worker's spouse reiterated similar sentiments, stating, "Alberta Wheat Pool was a very good employer. They were really concerned."

The employer does not deny the worker's evidence that they "put him on" the disability plan. When asked about their view of the causative significance of the work exposure the representative at the hearing asserted that the employer is "not convinced that asthma is related to grain dust exposure." Another representative of the employer, the assistant office manager, stated that there had not, in her recollection, been any claims for industrial diseases made out of the Alberta Wheat Pool.

The worker's counsel alleges that the employer deliberately steered the worker to the private disability plan to prevent a claim being made to the Workers' Compensation Board. We find this to be unwarranted speculation. There is no evidence on which the panel can conclude that the employer did not have the best interests of the worker in mind when they directed him to the disability insurance plan. We are satisfied that neither the worker nor the employer were aware of the one-year provision in Section 55.

If there was an "allegation of an industrial disease" the employer failed in their responsibility to report to the Board under Section 54(2). It may be more accurate, however, to say there was a suspicion that the worker had an industrial disease. In any event, both the worker and the employer appear to have acted on the assumption that neither a claim nor a report to the Workers' Compensation Board was necessary or reasonable unless they had proof establishing an industrial cause for the disability.

Had a report been made by the employer to the W.C.B. an application form would have been provided to the worker. All of the evidence suggests he would have filed same, based on his compliance with all other requests of that nature made to him. It would be fundamentally unfair if, given this set of circumstances, the only adverse consequences of the failure to report to the Board were now visited upon the disabled worker.

Given all of these circumstances we are satisfied that there existed special circumstances as to why the worker would not have applied for compensation benefits within one year.

The question we now need to address is the impact of the word "preclude" in relation to the "special circumstances." In *Caputo v. W.C.B.* (1987) 13 B.C.L.R. (2d) 145 (B.C.C.A.) Mr. Justice Anderson, discussing generally the Board's power to grant relief for non-compliance with procedural requisites, referred to Section 55(3)(a) and (b). He also referred to Section 99 of the *Act* and concluded that the sections granting the Board specific curative powers

demonstrate ... a legislative intent that the compensation scheme outlined in the *Act* be administered by the board in accordance with *practical, equitable and non-technical principles*, according to the merits and justice of (each) case. (emphasis added)

The words "special circumstances" and "preclude" are by themselves far too open-ended to lend themselves to any one particular interpretation.

“Preclude,” according to the *Concise Oxford Dictionary* means, “prevent, exclude, make impossible, remove.” “Prevent” means “to stop from happening or doing something to hinder, to make impossible,” and “hinder” means “to impede, delay or prevent.” One could conclude that this chain of definitions establishes that the word “preclude” does not have as stringent a meaning as some suggest.

There is support in the American authorities for a liberal interpretation of the word “preclude.” The *American Words and Phrases*, volume 33 tells us, on p. 385:

“Preclude” can mean prevent, but it is also used to mean “hinder”, “impede”, “deter”, and “moderate”, as well as “prevent”, “exclude”, “frustrate”, and “prohibit”. *People v. Williams*, 79 Cal. Rptr. 75, 456 P 2d 633, 71 C. 2d 614.

People v. Williams is a decision of the Supreme Court of California. The approach of the Court to the word “preclude” is interesting and of some persuasive authority. In *People v. Williams*, the Court did not face the task of interpreting statutory language. Nevertheless, the decision suggests strongly that people use and understand the word “preclude” in different ways. On p. 75, the Court said the following:

Second, Mr. Miller and Mrs. Gray, unlike the juror in *Varnum*, were not asked whether they would automatically in *all circumstances* vote against the death penalty in a “proper case”. Instead, they were asked whether they had any conscientious scruples that would “preclude” them from voting for the death penalty in a “proper case”. The word “preclude” can mean “prevent”. If the prospective jurors so interpreted the word, then they indicated that in no circumstances could they vote to impose the death penalty in a “proper case”. However, we cannot exclude the reasonable possibility that they did not so interpret “preclude”. That word is used to also mean “hinder”, “impede”, “deter”, and “moderate” as well as “prevent”, “exclude”, “frustrate”, and “prohibit”. *Although the latter group of words appears to be more frequently associated with “preclude”, it is clear that people use and understand the word in the former sense as well. Indeed, this court has interpreted “preclude” in a context closely analogous to the one before us as meaning far less than “absolutely prevent”.* Subdivision 8 of section 1074 of the Penal Code provides that in capital cases a prospective juror may be challenged for cause on the ground of implied bias if he “entertain [s] * * * such conscientious opinions as would preclude his finding the defendant guilty; * * *”. (emphasis added) This court repeatedly held that this section requires exclusion of all jurors whose determination of guilt would merely be “affected by” their views on

capital punishment. (e.g., *People v. Gonzales*, 66 Cal.2d 482, 498, 58 Cal. Rptr. 361, 426 P.2d 929, *People v. Ketchel*, 59 Cal.2d 503, 529, 30 Cal.Rptr. 538, 381 P.2d 394; *People v. Riser*, 47 Cal.2d 566, 573, 305 P.2d 1)

The use of the word “preclude”, like the phrase “proper case” cannot “taken alone * * * be seized upon as a touchstone by which to determine the quality of the juror under *Witherspoon*. (*People v. Varnum*, supra, 70 A.C.514, 528, 75 Cal.Rptr. 161, 169, 450 P.2d 553, 561). As with “proper case” the ambiguity inherent in the work “preclude” may be sufficiently resolved by the context in which it is used. (emphasis added)

The 1966 *Tysoe Report* is a source of information concerning the intention of the legislature in passing certain provisions of the *Workers Compensation Act*. The phrase “special circumstances which precluded the filing of an application ...” was added to the statute in 1968 following the completion of the Royal Commission chaired by Mr. Justice Tysoe.

There is no reference to Section 55 in the *Tysoe Report*. The only discussion which may be of some significance is that related to the worker’s notice of accident to the employer. In discussing changes to be made to this provision, Mr. Justice Tysoe stressed, on page 425:

I do not think that the section should be made any tighter than it will be if these recommendations are implemented. Nor do I think that a bona fide claim should be rejected for lack of compliance with the provisions of the section, if there has been no prejudice to the employer and if, because of *special circumstances*, the demands of justice call for the claim to be paid. *The Board should, in my opinion, be left with fairly wide discretion.* (emphasis added)

If you examine the legislative history of Section 55 it appears that the original version of the statute was changed in 1946 to allow the Board to pay compensation if the applicant filed within three years of the date of the accident for injury and if the Board deemed the claim to be a just one. In 1968 the further changes were made referring to special circumstances precluding the claimant from applying on time. The purpose of the 1968 amendments, however, do not appear to have been to provide additional restrictions to acceptance of a claim but to expand the discretion of the Board to make payments where an application is filed after three years. The statutory history, in general, indicates that the provisions have become more liberal over time and vested increasing discretion in the Board.

It seems reasonable that the spirit suffusing Mr. Justice Tysoe's remarks concerning the requirement to notify the employer of an accident apply equally to the requirement of filing an application with the Board.

Finally, in considering the statutory interpretation of the word "preclude" one can look at the analogous provisions in other jurisdictions and the extent to which they provide discretion to pay compensation. In Alberta the Board is not required to pay compensation to a worker or dependant unless a claim is made to the Board within 12 months after the date of the accident or death of the worker. If a worker or dependant does not make the claim within this time the Board may, nevertheless, pay compensation if it satisfied that there were reasonable and justifiable grounds for the claim not being made within the specified time.

In Manitoba, unless an application for compensation is filed within one year after the date upon which the injury or death occurred no compensation is payable. Where in the opinion of the Board an injustice would result unless enlargement of the time for making an application is granted the Board may enlarge the time.

In Saskatchewan a worker is required to give the employer and the Board notice of his injury as soon as possible after sustaining the injury and before he has voluntarily left his employment. Failure to do so may bar the payment of compensation, but if the Board is of the opinion that the circumstances so warrant it may pay compensation without receipt of an application for compensation.

The Ontario statute does not require that an application be filed with the Board. It requires the claimant to file only a notice of accident with the employer. Failure to make a timely claim does not bar the right to compensation if, in the opinion of the Board, the employer was not prejudiced thereby or where compensation is payable out of the accident fund if the Board is of the opinion that the claim is a just one and ought to be allowed.

In other jurisdictions it is clear that the statutes give the Board wide discretionary powers to deal with time limitations. One has to consider whether Section 55, as it reads, is in a class of its own by virtue of containing more restrictive language or if the liberality of the provisions in provinces with similar statutory schemes ought to be taken as support for the liberal approach encouraged by Mr. Justice Anderson in the *Caputo* case.

In the final analysis to interpret any statutory provisions one has to determine the substance of its words in the context of the ideas expressed in the whole act and in light of the social purpose that was a driving force behind the legislation. Considering all of these factors this panel is not satisfied that the stringent interpretation of the word

“preclude” is justified. The rigid interpretation of preclude as “absolutely prevent” is harsh and narrow. It has never been adopted by previous commissioners and finds no place in the governors’ policy. It is appropriate in our view, to adopt the liberal interpretation of Section 55(3) encouraged by Mr. Justice Anderson.

Considering all of the circumstances outlined earlier in respect of this worker’s medical problem and his failure to file an application for compensation within one year we are satisfied that special circumstances existed which precluded the filing of such application. We must now consider the merits of the case and whether the Board ought to exercise the discretion to pay compensation.

The worker has been diagnosed as having asthma, which is a disease found in the left-hand column of Schedule B. The description of the process or industry contained in the right-hand column of Schedule B is

Where there is exposure to

- (1) western red cedar dust; or
- (2) isocyanate vapours or gases; or
- (3) *the dust, fume of vapors or other chemicals or organic material known to cause asthma.* (emphasis added)

Dr. J. G’s evidence at the oral hearing was that grain dust is an organic material that is known to cause asthma. The worker is, therefore, entitled to succeed in his claim unless the presumption in Schedule B is rebutted.

The only evidence which would tend to a contrary view is the failure of the pre- and post-exposure spirometry done by Dr. N to demonstrate an asthmatic reaction to grain dust. We are satisfied, based on the evidence of both Doctors J. G and Y, that test was not reliable and not an adequate challenge. The presumption has not been rebutted.

In addition, Dr. J. G gave detailed oral testimony as to his reasoning in concluding that this worker suffers from asthma as a result of his grain dust exposure. Dr. Y, in a report dated March 28, 1989 stated:

I believe there was a relationship between his symptoms and exposure to grain dust at work based on the history given by [the worker] in 1985. Every time he attempted to return to work in 1985 he had difficulty in breathing. He tried on three occasions. Lung function test, as well as histamine challenge test showed that he had bronchial hyperreactivity

compatible with the diagnosis of asthma. [The worker] had no respiratory symptoms before he entered the grain industry. He had some cough and wheeze in 1981. He developed difficulty in breathing towards the end of 1984. After he stopped working in 1985, his symptoms improved. I think this patient, in 1985, did have asthma due to grain dust exposure.

We are satisfied that at the time the worker left his employment for the last time, March 22, 1985, that he was disabled by reason of grain dust asthma.

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

Decision of the Appeal Division

Number: 91-0818
Date: November 12, 1991
Panel: Connie Munro, Walter N. Peain, James L. Tonn
Subject: A Claim for Suicide

This is an appeal from the findings of the Workers' Compensation Review Board dated June 6, 1991 which confirmed the decisions of March 1, 1990 and March 15, 1990, denying a claim by the dependants. The issue is whether or not the worker's suicide was causally related to his employment.

The deceased was employed in a senior management capacity in a provincial ministry. He died in the office building where he worked at approximately 10:30 p.m. on Sunday, August 20, 1989.

Rehabilitation Services and Claims Manual #22.22 states:

In a case of suicide, death benefits are payable if it is established that the suicide resulted from a compensable injury.

The policy goes on to describe a situation where a significant contributing cause of the suicide was despair or other psychological consequences produced by a compensable disability. That policy, however, is not exhaustive. It describes one cause of suicide which would be compensable. It is not so restrictive as to suggest that a suicide would not be accepted where occupational stress was a significant contributing cause of the suicide. The policy establishes that a suicide resulting from a compensable injury is, in itself, compensable.

In determining the compensability of any death the operative section of the *Act* is Section 5(1) which requires that where the death arises out of and in the course of employment compensation shall be paid by the Board. Death by suicide is, therefore, compensable if occupational stress was a significant causative factor.

Two decisions were cited by the appellant at the Review Board. One involves a case allowed at the Board of Review for the rupture of an aneurysm. The worker was a senior trade union official. The majority of the panel concluded that:

... the deceased had undergone extraordinary stress over and above the normal stresses of his job during the 7 months immediately preceding his death. The challenges to his leadership involved a serious threat to his standing within the community and fundamentally affected his self confidence and self perceptions. We are satisfied that he was a man who had devoted his life to the labour movement.

The Board of Review then went on to address the question of whether those exceptional stresses played a significant role in the rupture of the aneurysm. After considering extensive neurological evidence it was concluded that:

... the deceased's death arose out of and in the course of his employment. We are satisfied that the extreme stresses associated with the protracted challenge to his leadership produced a premature rupture (of the aneurysm).

The second case involved a claim for cerebral vascular accident. A Board of Review decision allowing the claim had been the subject of the referral mechanism whereby an adjudicator dissatisfied with the disposition of a case by the Board of Review would refer the matter to the then secretary to the Board, N.C. Attewell. Mr. Attewell would review the facts of the case and relevant Board policy and determine whether to refer the matter to the commissioners. With respect to the acceptance of the claim for cerebral vascular accident Mr. Attewell stated:

I am unable to agree that the Board of Review decision contravenes Board policy. In Decision No. 102, the Commissioners decided that a state of mental and physical exhaustion caused by stress over time is neither an injury nor an industrial disease and is therefore not compensable.

In the claim being considered at that time the worker was seeking compensation for general physical and emotional exhaustion caused by 6 years of demanding work. In the claim before the Board of Review, however, [the claimant] was seeking compensation for a specific injury, a cerebral vascular accident, precipitated to a considerable extent by a specific series of events at work. Since the Board of Review found both a specific injury and a work related cause and since there was evidence in the medical report by the neurologist that supports the Board of Review findings in this respect, I feel that the Board of Review decision was a reasonable one.

We adopt Mr. Attewell's reasoning in considering the compensability of a suicide. The death will be compensable if it is shown that occupational stress was a significant contributing cause of the suicide. The crucial element is to determine if there is a work-related cause for the death in respect of which the claim is made.

The contention on behalf of the appellant is that the evidence is overwhelming that the deceased was driven to commit suicide by work pressures. The appellant contends, and the employer is in substantial agreement, that the particular workplace was the subject of considerable disruption. The demands made upon employees, particularly senior management, were significant and many employees faced uncertainty regarding future employment. A study undertaken regarding the workplace immediately following the worker's death made several recommendations with a view to reducing the stress on employees and promoting their well being.

Evidence was given by co-workers about the disruption in the office. The employer did not dispute the evidence. None of the witnesses, however, testified that they saw evidence of stress exhibited by the deceased and no evidence was lead to address whether the work situation was causing a stress reaction in the deceased. No testimony was heard suggesting a connection between the employment situation and the worker taking his own life.

To establish the causal link the appellant relies on two pieces of documentary evidence:

1. The report of the coroner, and;
2. A report by Dr. S, psychologist.

The coroner's report concluded:

A review of the evidence in this case has lead me to conclude that [the deceased] had been unable to cope with the job related stress which existed in his work place. As a result of his inability to cope, he took his own life by going over the stair railing and falling 6 floors to his death.

That statement was contained in the report "Circumstances as a Result of the Inquiry" into the death of the deceased. It was signed by Coroner Norman M. Ellison and dated January 25, 1990.

The coroner referred to assistance being obtained from a behavioral investigator, Mr. West. The panel has reviewed the coroner's report in detail. On the causation issue, it states:

Several of the individuals interviewed by Mr. West reported that *perhaps* [the deceased] was "in over his head" in his new position as he did not feel comfortable in making decisions as well as various other top level management responsibilities. He apparently was an excellent "technical engineer", however, his recent promotion called for other levels of expertise.

Mr. West reported that this *must have troubled* [the deceased] as we need only to reflect back on his need for perfection. It was *entirely possible* that [the deceased] was experiencing feelings of unrelenting pressure and tension coupled with a significant loss of personal self confidence. It is generally perceived in much of the research that jobs perceived as highly demanding lead to both dissatisfaction and psychological anxiety. (emphasis added)

What is clear from all the evidence is that the co-workers, Mr. West and the coroner are making suppositions about the deceased's behavior. They could do little else in the absence of the deceased having left any evidentiary clues as to what motivated his actions. They are speculating that because the workplace was a potential source of stress and because the worker committed suicide that the two factors are causally linked. One cannot deny that such a linkage might have existed. It is as likely as many other speculative possibilities. To establish a causal connection, however, requires some evidence and not simply speculation.

The second piece of evidence relied upon by the appellant is the report prepared at the request of the appellant's counsel by Dr. S, Registered Psychologist. Dr. S did not personally know the deceased, neither did he conduct interviews of the deceased's family, friends and associates. He prepared his report following a review of documents provided by the appellant's counsel. Dr. S attaches a copy of his curriculum vitae. His qualifications make no reference to particular expertise in the area of suicide. Dr. S's report states:

Based on my evaluation of the records at hand, then, I would make the following conclusions:

1. It appears to me that all evidence would suggest that [the deceased's] suicide is a direct result of him feeling that he was trapped in an inescapable situation which he could not resolve without doing major damage to

his sense of self-worth or his sense of right and wrong. This perception, in turn, produced a stress reaction which impaired his judgement and further increased his impulse to somehow escape the situation.

2. All evidence at hand would suggest that the stress arose as a result of changes in his work situation in the form of greater demands on fewer resources. There is no evidence of any increasing stress in his family situation or any other sphere of his life. There is also no evidence that he had any formal psychiatric disorder, substance abuse, physical illness, or any other problem that might lead him to an act of this sort.

3. The suddenness and unexpectedness of his suicidal act would further support the above formulation. This sort of a suicide is tragic, but those who knew him can at least hopefully take some solace in the fact that it is unlikely that he gave many clues or hints prior to his suicide that such a thing might be expected.

The first proposition advanced by Dr. S would appear from a lay viewpoint to be a general formulation regarding the cause of a suicide. In the second conclusion Dr. S, like the coroner, seemingly concludes that the work stress must have been the deciding factor in the worker taking his own life in the absence of other significant stressors affecting him.

That is not to suggest that the worker's life had no other elements that could potentially be regarded as causing some stress. The worker was a 46-year-old male. He was married at the time of his death. It was his second marriage, his first wife having died of cancer, leaving him the single parent of one child. He re-married five months after the death of his first wife and had three more children. All of the evidence indicates that he was a very active and involved parent. The youngest child had suffered significant health problems as a result of being born pre-maturely; however, she was approximately 14 months at the date of her father's death and her health problems had largely resolved. The worker's mother had Alzheimer's disease (which the family, including in that term the deceased's sister and her husband, had coped with for some time) and had recently been hospitalized.

The worker had been engaging in home renovations over a period of several years. He had been able to do virtually all of the renovations himself which reportedly suited his personality. He is described as having been a "perfectionist." The time demands of his job, however, apparently, precipitated a decision by the worker and his wife, not yet acted upon at the time of death, that a contractor would be hired to finish the renovations. The worker was in a positive financial position. He had savings and only a small government second mortgage on a house in an upscale neighbourhood. To

complete the house expansion, now of some urgency after the birth of the 4th child, it had apparently been decided to spend the balance of the family savings and acquire a further mortgage. The worker's wife was not employed outside the home.

On the Sunday evening he died the worker returned to his office for the second time that day. The security log showed that he had been in the office from 0800 hours – 1140 hours. He attended the christening of a friend's child with his family in the afternoon and returned to the office at 1910 hours. The worker's wife telephoned him at the office shortly after his arrival. She estimates that they spoke on the telephone for approximately two hours. The police report states:

We feel that after speaking with his wife on the phone until 2110 hours [the worker] left his office and stood in the stairwell some time before 2130 hours as he was not seen in his office by the commissionaire doing his final rounds. The loud bang heard ... at about 2230 hours was probably [the worker's] left foot hitting the metal railing between the first and second floors.

The body was discovered and police were called at approximately 2335 hours.

The wife's account of the two-hour telephone conversation indicates the discussion concerned several personal matters. The call was initiated by the wife out of concern regarding a neighbour's complaint about a fence. The discussion continued, covering such topics as the house renovations, personal finances, and their previous weekend social activities. At one point in the discussion the worker, at his wife's request, referred to his personal banking records which he kept at the office. No reference was made by the wife to any concern being expressed in that lengthy telephone conversation over work demands or discussions about work-related problems.

The purpose of the overtime work that evening was apparently to prepare for job interviews the deceased was to be conducting in Vancouver the ensuing week. He was in the process of filling staff vacancies.

Did the aforementioned personal factors cause a stress reaction in the worker? We do not know. The appellant's counsel urges us to dismiss them as all being minor in comparison to the stressful situation in the worker's employment. With respect to both employment factors and personal factors, however, we have the same dilemma. There is simply no evidence to indicate the effect, if any, of those potential stressors on the deceased. The wife specifically denies that her husband showed any signs of depression. They had only recently returned from an apparently successful family vacation. The worker had another trip planned when he was to go hiking with his brother-in-law.

As Dr. S indicated in the third point of his analysis, the deceased simply gave no sign whatsoever that he was being affected by any stresses. It follows from that, and appears clear in the evidence, that he gave no sign of which stressors one ought to consider of more significance than others. For that reason we have difficulty accepting Dr. S's analysis in point #2.

The panel is simply not satisfied that the causal connection has been established. The fact of the matter is that we do not know why the deceased took his life. We would have no difficulty in drawing reasonable inferences from evidence if the basic requirement was met that there was some evidence linking the work and the suicide. In the absence of some evidence to suggest that the work situation was causing a stress reaction in this worker we cannot conclude that the employment drove him to commit suicide. It would be purely speculative for us to conclude that this worker's employment was a factor just as it would be to conclude that his personal circumstances were a factor. There is no evidence to support a conclusion that either played any role. Without any evidence to weigh Section 99 of the *Statute* is of no assistance to the claimant's case.

Unfortunately all we know of this tragedy is that the man took his life. He left no clues as to why, either directly prior to the event or in the previous days, weeks, or months.

THE APPEAL IS DENIED.

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



Decision of the Appeal Division

Number: 91-0431
Date: September 16, 1991
Panel: P. Michael O'Brien
Subject: Popliteal or Baker's Cyst

The worker appeals the November 28, 1989 findings of the Workers' Compensation Review Board. Those findings concur with the January 24, 1989 decision of the claims adjudicator, denying a request to reopen his compensation claim for surgery to repair a Baker's cyst in his right knee.

The issue is whether the worker's right-knee Baker's cyst was caused by his work activity as a floor layer. Work activities of a floor layer are thoroughly detailed in the worker's handwritten submission of December 6, 1988. The panel accepts that this occupation involves extensive kneeling and the use of the knee in a battering-ram fashion, specifically when laying carpet. The critical issue is whether such activity resulted in Baker's cysts in the worker's case. The major part of the evidence to be considered, therefore, is either medical or technical in nature.

An article submitted to the Review Board from the *British Medical Journal*, volume 281, 1 November 1980, contains a series of six case reports of individual popliteal or Baker's cysts. No generalizations can be drawn from a study of this limited scope.

An undated article entitled "A Valve – An Explanation of the Formation of Popliteal Cysts" from *The Annals of the Rheumatic Diseases*, concluded that a valvular opening in the posterior capsule of the knee present in 40% of normal adult knees "an explanation for the formation of Popliteal or Baker's cysts."

There are a number of opinion letters from Dr. H, the worker's orthopedic surgeon, contained in the claim file. The most definitive is contained in a letter dated April 5, 1990. Dr. H said:

[The worker] is employed as a floor layer and of course this involves a great deal of flexion and extension of his left knee. It is conceivable, in my view, that the Popliteal cyst developed in relation to the stresses placed upon the posterior capsule of his left knee as a result of his occupation. In

the old days it was well known that a Baker's cyst was common amongst gravediggers. This was directly a result of flexion extension strains on the knee and the posterior capsule when the gravedigger would be digging a grave. I think [the worker's] occupation parallels this etiology in as much as he does a great deal of bending and straining in his knee as a floor layer and it is conceivable that the etiology of the Baker's cyst is directly related to this type of employ. The repetitive use of the knee-kicker of course requires flexion and extension of his knee and a great deal of tension on the capsule of the knee joint. As you noted in the reprint regarding Baker's cysts: the etiology and the development of Popliteal cysts, although controversial, has a relationship to the intra-articular pressure of the knee joint which, when it increases by muscular contraction of the knee, can force fluid through the posterior aspect of the knee joint thus forming a Baker's cyst and certainly the use of the knee-kicker could increase intra-articular pressure and result in such a phenomenon. Therefore, I think that the mechanical stress on [the worker's] knee, resulting from his occupation, played a dominant role in the development of the Baker's cyst which has been alluded to. I would tend to favour the development of the cyst not related to a specific incident, but rather to the recurring increased pressure applied to the knee as a result of using a knee-kicker for a period of time.

The contrary opinion is expressed in several memoranda contained in the Board file, but most clearly in the January 6, 1989 memorandum, from Dr. S (Memo #11). Dr. S said that he had discussed the issue with Doctors C and R and their general consensus was:

None of us were aware of any reports in the literature describing an increased incidence of popliteal cysts in floor layers, carpet layers or tile setters. Though we recognize that these workers tend to have higher incidences of other problems such as arthritis, patellar tendonitis and chondromalacia, this is not the case with Baker's cysts. As you know, Baker's cysts seem to occur more commonly in people with chronic inflammatory knee conditions such as arthritis, but they can also occur in people with apparently completely normal knees.

So in light of this, we jointly were of the opinion that this worker's popliteal cyst cannot be directly related to his work activities as a floor layer.

The worker's representative made extensive submissions on the issue of the necessity for a specific incident. A lack of a specific incident is not a bar to compensation and the worker's total work activities must be taken into consideration in any adjudication.

Findings and Reasons

I find that in this worker's case, the weight of evidence leads to a conclusion that it is most likely that his activities as a floor layer had significance in causing his Baker's cyst. Any disability and treatment arising from the development of the Baker's cyst is therefore compensable.

The Board physicians, opinions and comments with respect to causation seem to be based primarily on a lack of statistical correlation between the occupation of floor layers and the development of popliteal cysts. That does not address the question of this worker's popliteal cyst. Statistical analysis is useful in the development of general policy within the Board but is not determinative in adjudicating specific cases. The question that has to be answered in this worker's case is whether his particular activities as a floor layer caused his popliteal cyst. I rely on Dr. H's cogent and logical explanation for the mechanics of the development of the worker's popliteal cyst in making my finding. The literature annexed to the various submissions referred to in these findings provides the scientific or technical base supporting Dr. H's position. I conclude that this worker's Baker's cyst was caused by his work activities.

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



REPORTER

Consumer Price Index

Date: December 2, 1991

WHEREAS Section 25 of the *Workers Compensation Act* requires the Board to determine as of January 1, 1992, a ratio by comparing the Consumer Price Index for October 1991 with the Consumer Price Index for April 1991, and by applying that ratio to adjust those periodical payments of compensation referred to in subsection (2), and to adjust each dollar amount mentioned in the *Act*, except those referred to in subsection (5);

AND WHEREAS the Board is advised that the Consumer Price Index for October 1991 was 126.5 and for April 1991 was 125.5, giving a ratio of 1.00796813;

THE BOARD HEREBY DETERMINES that the ratio applicable under Section 25(1) is 1.00796813;

AND THAT all periodical payments of compensation described in Section 25(2) shall be adjusted by applying that ratio as of the 1st day of January 1992;

AND THAT the British Columbia Regulation numbered 189/91 be repealed as of the 1st day of January 1992;

AND THAT all dollar amounts referred to in all sections of the *Act* described in Section 25(4) shall be adjusted as follows:

Section No.	July 1, 1991 Dollar Amount	Change To	January 1, 1992 New Dollar Amount
3(5)(c)	85.10		85.78
13(2)	17,022.88		17,158.52
	3,404.61		3,431.74
17(2)	2,042.68		2,058.96
	680.90		686.33
	680.90		686.33
17(3)(a)(ii)	221.22		222.98
17(3)(c)	714.83		720.53
17(3)(d)	34,045.59		34,316.87

Section No.	July 1, 1991 Dollar Amount	Change To	January 1, 1992 New Dollar Amount
	3,404.61		3,431.74
	30,640.98		30,885.13
17(3)(e)	714.83		720.53
17(3)(f)(iii)(B)	221.22		222.98
17(3)(g)	23,831.95		24,021.85
17(3)(h)(i)	391.50		394.62
17(3)(h)(ii)	391.50		394.62
17(3)(i)(ii)	391.50		394.62
17(13)	1,702.36		1,715.92
18(1)	296.23		298.59
	91.93		92.66
22(2)	1,106.54		1,115.36
29(2)	255.34		257.37
33(5)	1,106.54		1,115.36
35(5)	152.57		153.79
71(8)	17,022.88		17,158.52
73(2)	34,045.59		34,316.87
74(3)	170,228.09		171,584.49
75(2)	34,045.59		34,316.87
75(3)	3,404.61		3,431.74
77(2)	3,404.61		3,431.74
Schedule C	714.83		720.53

And pursuant to Section 25(4), all sections containing such dollar amounts are deemed to be amended accordingly.

In the Supreme Court of British Columbia

Between: Privest Properties Ltd. et al.
And: The Foundation Company of Canada Limited et al.
And: Lordina Limited
And: Workers' Compensation Board et al.

Ruling of The Honourable Mr. Justice Drost (November 13, 1991)

The Application

This is an application by the Workers' Compensation Board (the "W.C.B.", or, the "Board"), pursuant to Rule 19(24)(a) of the Rules of Court, for the following Orders:

- (a) that the Third Party Notices issued by the defendants W.R. Grace & Co. of Canada Ltd. ("Grace Canada"), W.R. Grace & Co. – Conn. ("Grace Conn") (collectively, the "Grace Defendants"), Eng & Wright Partners, Architects ("Eng & Wright"), and The Foundation Company of Canada ("Foundation"), be struck out on the grounds that they disclose no reasonable cause of action against the W.C.B.;
- (b) that all actions against the W.C.B. be dismissed and judgment be entered in its favour; and
- (c) that the W.C.B. recover special costs as against the said defendants, or, in the alternative, costs assessed on Scale 4.

Background

In the underlying action the plaintiffs are seeking damages to compensate them for loss, damage, expense and inconvenience allegedly suffered as a consequence of the application to their building (the "Building") of an asbestos-containing spray fireproofing material known as Monokote 3 ("MK-3").

They allege that the MK-3 was manufactured and distributed by Grace Canada under the direction and control of Grace Conn.; that it was applied during the years 1973 to 1975 in the course of a major construction and renovation project (the “Project”) for which Foundation had been engaged as head contractor and Eng & Wright to provide architectural and supervisory services.

The plaintiffs allege that at all relevant times the defendants were aware that MK-3 contained asbestos, a substance which they knew or ought to have known is hazardous to health.

After completion of the Project, the Building was occupied by tenants and operated normally until March 1987. Then, in the course of further renovations, it was discovered (allegedly for the first time) that the said spray-fireproofing material contained asbestos. The W.C.B. thereupon issued a Cease Work Order which, the plaintiffs say, prevented them from completing the renovations until the MK-3 had been removed and replaced, and precipitated the loss, damage, expense and inconvenience for which they claim damages.

The Test

When deciding whether a pleading should be struck on the ground that it discloses no reasonable claim or defence, the test to be applied was defined by the British Columbia Court of Appeal in *Minnes v. Minnes* (1962), 39 W.W.R. 112. It is that:

So long as the pleading, as it stands or as it may be amended, discloses a question fit to be tried, the mere fact that the case is weak or not likely to succeed is no ground for striking it out. If the action involves investigation of serious questions of law or questions of general importance, or if facts are to be known before rights are definitely decided, the rule ought not to be applied.

That test was approved recently by the Supreme Court of Canada in *Carey Canada Inc. et al. v. Hunt et al.* (1990), 74 D.L.R. (4th) 321. In doing so the court stated that:

Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. *Only if the action is certain to fail because it contains a radical defect* ranking with the others listed in Rule 19(24) of the *British Columbia Rules of Court* should the relevant portion of a [pleading] be struck out under Rule 19(24)(a). (Emphasis added)

In order to succeed on this application, the W.C.B. must meet that test. If it is unable to do so, the impugned pleadings will not be struck; if it is partly successful, the offending part or parts of the pleadings will be struck.

The Allegations of Fact

On an application of this nature every allegation of fact contained in the pleadings is taken to be true, and it is to be assumed that the plaintiff will be successful against each of the defendants (*McNaughton & McNaughton v. Baker et al.*, (1988) 25 B.C.L.R. (2d) 17 (B.C.C.A.)).

The following is a summary of the relevant allegations made, firstly, by the plaintiffs and secondly, by each of the defendants named in this application.

1. The Allegations Made by the Plaintiffs

A. Regarding the Grace Defendants

They allege that the Grace Defendants:

- a) negligently manufactured and sold the MK-3;
- b) negligently recommended the use of MK-3 when there were other asbestos-free products available which were suitable to the purpose;
- c) knew or ought to have known that the use of MK-3 could cause physical injury to persons and damage to property during the construction period or afterwards; and
- d) knowing that MK-3 would be used in the renovation of the Building (the “project”), failed to warn the plaintiffs that it contained asbestos, or that its use could pose a hazard to human health and safety.

B. Regarding Eng & Wright

The plaintiffs allege that Eng & Wright, negligently and in breach of contract:

- a) failed to take sufficient care in drafting specifications, in particular by failing to specify that the spray-fireproofing material used was to be asbestos-free;

-
- b) failed to inspect the improvements that were made as part of the Project so as to ensure that asbestos was not contained in the material used;
 - c) failed to ascertain the presence of asbestos in the material; and
 - d) failed to warn the plaintiffs that an asbestos-containing material was being used and of the dangers involved in such use.

C. Regarding Foundation

The plaintiffs allege that Foundation, negligently and in breach of contract:

- a) failed to ascertain the presence of asbestos in the spray-fireproofing material;
- a) failed to ensure that the spray-fireproofing material used was asbestos-free, when asbestos-free alternatives were available;
- b) failed to warn that MK-3 contained asbestos and could pose a threat to human health and safety and cause damage to property; and
- c) failed to ensure that the building would be fit for human occupation, and for allowing its sub-contractor, Donalco, to use an inherently dangerous product.

2. The Allegations Made Regarding the W.C.B.

A. By the Grace Defendants

They allege that:

- a) at all relevant times the W.C.B. had statutory and regulatory powers to:
 - i) inspect manufacturing plants, construction sites and buildings in British Columbia; and
 - ii) identify, advise, and warn of and to order the remedying, removal or replacement of construction methods, building conditions, building products and components which are hazardous to human health and workers' safety;

-
- b) the W.C.B. had a duty to exercise its powers with reasonable skill and care;
 - c) at all relevant times the W.C.B. and its employees regularly inspected the plant where the Grace Defendants manufactured spray-fireproofing products and knew, or ought to have known, that some of them contained asbestos;
 - d) the W.C.B. and its employees regularly inspected the project during construction and knew or ought to have known that some of the spray-fireproofing material supplied for installation in the project was manufactured by the Grace Defendants and contained asbestos;
 - e) at all relevant times the W.C.B. and its employees owed to all of the parties involved in the Project (the “Participants”) statutory, regulatory and common law duties to know about asbestos and asbestos-containing products and the health and medical concerns related to them; and especially to know that at high levels of exposure over extended periods of time asbestos may be hazardous to human health and workers’ safety;
 - f) prior to the commencement of or completion of the project the W.C.B. had issued cease-work orders, warnings, directions and other orders regarding the installation of asbestos-containing spray-fireproofing material in other construction projects in Vancouver, and elsewhere in British Columbia, and that the Participants reasonably relied on the W.C.B. and its employees to issue such orders, warnings and directions regarding this project had it been necessary;
 - g) the W.C.B. negligently breached the duties it owed to the Participants by:
 - i) failing to provide adequate notice to them of the results of its inspections of the Project and the fireproofing being applied;
 - ii) failing to warn them of the possible dangers of inhaling airborne asbestos fibres; and
 - iii) failing to warn them that products supplied for use in the Project contained asbestos.

The Grace Defendants further allege, in the alternative, that:

- h) in or about 1987 and onwards, the W.C.B. and its employees conducted inspections of the Project;
- i) the W.C.B. and its employees owed the Participants statutory, regulatory and common law duties not to give incorrect or unnecessary advice, directions or orders regarding, amongst other things, the removal of building products or components from the Building;
- j) the W.C.B. and its employees knew or ought to have known that the Participants relied upon the advice, directions and orders of the W.C.B.;
- k) it was not necessary that the plaintiffs remove or incur any expense in respect of the fireproofing material and the W.C.B. negligently breached its statutory, regulatory and common law duties when it ordered them to do so;
- l) the W.C.B. caused the loss and damage to the plaintiffs by ordering the removal of the asbestos from the project when other less costly and intrusive remedies were available;
- m) the breach of the statutory, regulatory and common law duties of care owed by the W.C.B. to the participants caused or contributed to the loss, damage and expense allegedly suffered by the plaintiffs; and
- n) it was reasonably foreseeable that those breaches would cause the plaintiffs to commence legal proceedings against the Grace Defendants, thereby causing them to suffer loss, damage and expense.

The Grace Defendants claim against the W.C.B. for:

- a) a declaration that any loss, damage or expense suffered by the plaintiffs was caused or contributed to by the negligent breach of statutory, regulatory and common law duties or other fault of the W.C.B. and its employees for whose acts and omissions it is vicariously liable;

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- b) contribution and indemnification from the W.C.B. for any liability that they may have to the plaintiffs;
 - c) damages for negligent breach of statutory, regulatory or common law duties; and
 - d) indemnification for legal expenses and disbursements incurred by them or paid to other parties.

B. By Eng & Wright

Eng & Wright claim that the W.C.B. owed to them statutory and common law duties of care, including a duty to:

- a) take such reasonable and proper steps as may have been necessary to ensure that no hazardous or potentially hazardous materials were offered for sale or use in British Columbia or were specified or employed in the construction of the project;
- b) take those reasonable and proper steps which may have been necessary to ensure that if asbestos is a hazardous or potentially hazardous material, it was not present in any spray fireproofing specified or employed at the project;
- c) warn it that:
 - i) MK-3 contained a certain amount of asbestos as an ingredient;
 - ii) there was a potential danger in the use of MK-3;
 - iii) there might be an increased risk and/or cost associated with renovations to or removal of materials sprayed with MK-3 in the future because of the *Workers Compensation Act* and other health or safety regulations of which the W.C.B. was or ought to have been aware; and
 - iv) alternative spray-fireproofing products were available which did not contain asbestos.

The Defendants Eng & Wright further allege that:

- a) the W.C.B. failed in the above noted duties, causing it to allow the use of MK-3 on the project which may have had the result of causing the plaintiffs harm;
- b) the W.C.B. knew or ought to have known that Eng & Wright relied on it to exercise its statutory and common law duties of care to take such reasonable and proper steps necessary to ensure that no hazardous or potentially hazardous materials were offered for sale or use in British Columbia or were specified or employed in the construction of the project.
- c) the W.C.B. knew or ought to have known that Eng & Wright also relied on it to take those reasonable and proper steps necessary to ensure that if asbestos was a hazardous or potentially hazardous material that it was not present in any spray fireproofing specified or employed at the project.

Eng & Wright claim against the W.C.B. for:

- a) contribution and indemnity for any liability it may have to the plaintiffs;
- b) contribution and indemnity for any liability it may have to the Grace Defendants;
- c) indemnity for the full legal costs for the defence of the actions brought by the plaintiffs and other parties against it; and
- d) damages for negligence and breach of duty to warn.

B. By Foundation

Foundation claims that the W.C.B. owed to it and to its co-defendants and the plaintiffs, statutory and common law duties of care, including a duty to:

- a) take such reasonable and proper steps as were necessary to ensure that no hazardous or potentially hazardous materials which the W.C.B. knew or ought to have known were

hazardous or unsafe were offered for sale or use in British Columbia or were specified or employed in the construction of the project;

- b) take those reasonable and proper steps necessary to ensure that if asbestos is a hazardous or potentially hazardous material that it was not present in any spray fireproofing specified or employed at the project;
- c) warn them that MK-3 contained asbestos, that there was a potential danger in the use of MK-3, and that there was an increased risk or cost that might be associated with renovations to or removal of material sprayed with MK-3 in the future, arising out of the *Workers Compensation Act* and other health or safety regulations of which the W.C.B. was or ought to have been aware; and
- d) advise of the availability of alternative spray fireproofing products which did not contain asbestos.

Foundation further alleges that:

- a) The W.C.B. failed in the above noted duties of care and this failure may have had the result of causing the plaintiffs harm, loss or damage;
- b) That the Defendant Foundation reasonably relied on the W.C.B. to exercise its statutory and common law duties to take reasonable and proper steps to ensure no hazardous workplace was created and to warn of the possible dangers of the use of an asbestos-containing product.

Foundation claims against the W.C.B. for:

- a) contribution and indemnity for any liability of the Defendant Foundation to any of the plaintiffs;
- b) contribution and indemnity for any liability of the Defendant Foundation to the Grace Defendants;

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- c) indemnity for the full legal costs of the defence of the actions of the plaintiffs and other parties against the Defendant Foundation; and
 - d) damages for negligence and breach of duty to warn.

The Law

Counsel agrees that, for the purposes of this application, the distinction between “policy” and “operational” matters is not in issue, and that I should assume that all of the allegations directed against the W.C.B. relate to operational matters. I will, therefore, concern myself only with the question of whether or not a duty of care was owed by the W.C.B. to the third party claimants.

The leading Canadian authority in this area of the law is *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, where the Supreme Court of Canada adopted the “two-stage test” first prescribed by the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728. This test requires that, for the purpose of determining whether or not a public authority owes a duty of care, the following two questions be asked:

- (1) is there a sufficiently close relationship between the parties so that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to that person? If so,
- (2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

In two recent decisions, *Just v. Her Majesty the Queen in Right of the Province of British Columbia*, [1989] 2 S.C.R. 1228 and *Rothfield et al. v. Manolakos et al.*, (1989), 63 D.L.R. (4th) 449, the Supreme Court of Canada has affirmed the use of that test. Although in *Manolakos*, Cory J. noted that “critical comments have been made with regards to the *Anns* case,” he nevertheless went on to say that:

... the approach set forward in the *Anns* case which has been confirmed and approved by this court in the *City of Kamloops v. Nielsen*, *supra*, is sound. It can be applied effectively and should be applied in any case where negligence or misconduct has been alleged against a government agency.

These and many other authorities show that the key question to be asked when determining whether or not a public authority owes a duty of care to a claimant is “what is the purpose of the legislation?” If a duty is found to exist, it then becomes necessary to examine the scope of that duty in order to determine whether or not the type of loss claimed falls within the ambit of the legislative intent.

The Statutory Scheme

The W.C.B. is a statutory body whose authority is presently established and governed by the *Workers Compensation Act*, R.S.B.C. 1979, c.437 as amended and the Regulations enacted thereunder. It is of interest to note that the original *Workmen’s Compensation Act*, enacted in 1916, stated in its preamble that it was “An Act to provide for compensation to the workmen for injuries sustained and industrial diseases contracted in their course of employment.”

The W.C.B. asserts that the “duty premise” of the third party claims is not only outside the purpose of the statute, but that it is completely at odds with that purpose. It says that the statutory and regulatory scheme of the Act is entirely oriented towards compensating and promoting the safety and health of workers and that there is nothing in the Act or regulations from which one might conclude that the Legislature intended that it should protect the property or economic interests of building owners, product manufacturers and supplies, building contractors or architects and engineers.

The Board maintains that it is duty-bound to protect the interests of workers even where those interests collide or conflict with the economic or property interests of persons such as the defendants. It says that the defendants do not fit within the purpose and scope of the legislation and that there is no provision in the legislation or regulations which could be interpreted as creating a duty to warn the defendants of the dangers of asbestos, prohibit its use or take their interests into account when regulating asbestos use for the protection of workers. Simply stated, it says: “The third party claimants in this case are not within the class of persons which are intended to benefit from the statutory and regulatory scheme.”

The W.C.B. further argues that the third party notices served upon it expressly claim for damages resulting from the cost of removing the asbestos-containing fire-proofing from the project. The type of harm contemplated by the Act and regulations, it says, is harm to the health of workers. It says that the loss pleaded in this case is not traceable to any sort of personal injury; rather that it arose out of damage or injury to property interests.

In that regard it must be remembered that although the plaintiffs do not allege that any individual has yet been injured by the presence of MK-3 in the Building, they do seek from each of the defendants indemnification for any present or future damage, loss or expense which has been or may be incurred by reason of the plaintiffs' liability to tenants and occupiers of the building, both past and future.

The position taken by the defendants is that the W.C.B. had statutory, regulatory and common law duties which they exercised negligently. The defendants say that the W.C.B. knew of the hazards said to be associated with the use of asbestos; that they were in a proximate relationship to the W.C.B.; that it was in negligent breach of its statutory, regulatory and common law duties and is therefore liable to all those who it was reasonable to conclude might suffer loss through that negligence.

In this regard, Mr. Hayley, counsel for the Grace Defendants, cited the words of Mr. Justice LaForest in *Manolakos (supra)* at p. 454:

... the city, once it made the policy decision to inspect building plans in constructions, owed a duty of care to *all who it is reasonable to conclude might be injured by the negligent exercise of those powers.* (emphasis added)

In addition, the Grace Defendants argue that they were proximate to the W.C.B. because their plants were subject to W.C.B. inspections and they allege that the W.C.B. knew that their products included asbestos-containing fireproofing.

Contrary to the position taken by the W.C.B., the defendants submit that the scheme of the Act also contemplates the protection of the economic interests of employers. Insuring that workers are healthy and productive because they work in a non-hazardous workplace is, they say, of economic benefit to the employers through reduced wage costs and employee turnover and increased productivity.

In this regard, Mr. Hayley referred to the observation of Madam Justice Wilson, in *Kamloops (supra)* at pp. 679-80, that:

It is noted that in the *Dutton* case [*Dutton v. Bognor Regis United Building Co. Ltd.*, [1972] 1 All E.R. 462] Sachs. L.J. put great emphasis on the fact that the defendant was a public authority and stated that the type of loss recoverable was the type of loss the private law duty arising under the statute was designed to prevent. If economic loss was within the purview of the statute, then it should be recoverable for breach of the private law duty arising under the statute whether or not it is recoverable for breach of a duty at common law.

He also cited *Rivtow Marine Ltd. v. Washington Iron Works* (1973), 40 D.L.R. (3d) 530 (S.C.C.) as authority for the proposition while there may be no recovery for economic loss directly flowing from the Board's negligence, there is recovery for additional damage flowing from its failure to warn.

Whether or not the Third Party Notices should be struck turns on the question of the characterization of the *Workers Compensation Act*. If, as Mr. Walsh suggests on behalf of the Board, it is merely directed toward protection and compensation of workers, and has no wider legislative intent, then they should be struck. If, on the other hand, it is possible that the intent of the legislation is broader than that and encompasses more than simply the protection of workers, i.e., that it also affords benefits to employers and ensures protection not only of workers but of other persons as well, then there may be a duty owed to these Third Party claimants and to the plaintiff.

A brief reference to the relevant statutory and regulatory provisions is therefore necessary in order to determine whether or not it may be validly argued that the W.C.B. owed a duty of care to the defendants and/or the plaintiffs to:

- a) prevent physical injury to persons; and/or
- b) prevent economic loss.

The Act governing the duties and responsibilities of the W.C.B. when the MK-3 was specified and installed in the Building was the Workmen's Compensation Act 1968 S.B.C. 1968, c.59 as amended. Part 1 of the 1968 Act provided, in S.60(1), that the W.C.B. might:

... make regulations, whether of general or special application, and which may apply to both employers and workmen, for the prevention of injuries and industrial diseases in employments and places of employment ...

Section 60(2) provided that:

The Board may issue orders and directions specifying the means or requirements to be adopted in any or all employments or places of employment for the prevention of injuries and industrial diseases.

Section 60(3) clothed the Board with statutory powers to inspect the place of employment of any workmen coming within the scope of Part 1.

In 1974 the *Workmen's Compensation Amendment Act* was passed. In addition to changing the name of the statute to the *Workers Compensation Act*, it amended S.60(1) by striking out the words "both employers and workmen," and substituting the words "employers, workers and all other persons working in or contributing to the production of any industry within the scope of this part" (emphasis added). As well, it amended the definition of "industrial disease," which, in the 1968 Act read "any of the diseases mentioned in Schedule 'B' and any other disease which the Board may by regulation or otherwise designate or recognize as an industrial disease" to include "any disablement resulting from exposure to contamination."

Thus, it may be argued that in 1974 it was the intent of the Legislature to broaden significantly the scope of the Act.

So far as the regulations enacted by the Board are concerned, it is interesting to observe that as early as the 1940's asbestosis, asthma, and respiratory irritation were recognized by the W.C.B. as industrial diseases arising from processes where there was exposure to fibres or other contaminants. In 1959, the W.C.B. promulgated a regulation entitled "Re Asbestosis" which set out detailed procedures regarding the mandatory medical examination of persons employed in asbestos mines. In 1966, Regulation 43/66 was enacted and it empowered the Board to determine the nature of hazardous work, and to insist that means be provided to reduce the hazard to levels satisfactory to the Board.

B.C. Regulation 64/72, enacted in 1972, included an omnibus provision entitled "Health Hazards in Harmful Substances" which demonstrated a growing particularization with respect to asbestos hazards. That regulation contained a section dealing with the "Control of Hazards", which confirmed the Board's authority to require the reduction of contaminants to or below a threshold level determined by the W.C.B. Section 12.30 of the regulation specifically addressed the hazards of asbestos, and stated that "... means shall be provided to control asbestos dust at or below threshold levels"

Finally, and perhaps most significantly, S.12.32 of Regulation 64/72 provided that, subject to certain express exceptions, "no person shall remain in any place where the work atmosphere contains asbestos dust in harmful concentration." That section is of particular relevance in this application in that it applies not just to workmen and employers, but arguably confers an obligation and a corresponding benefit to other persons.

There are a number of other regulations which, Mr. Hayley argues, support the existence of statutory and regulatory duties of care on the part of the W.C.B. toward the Third Party claimants and plaintiffs. I do not propose to refer to them other than to note that several relate to the powers of the Board to inspect, undertake investigation, conduct research, and obtain further information regarding the hazards of such materials as asbestos, and to compel employers to comply with W.C.B. recommendations and orders.

The defendants base their arguments on the fact that at all relevant times the W.C.B. had statutory and regulatory powers to inspect manufacturing plants, construction sites and buildings in British Columbia. Those powers, they submit, are the source of the W.C.B.'s authority to direct that remedial action be taken so as to ensure that "workplaces" are safe places. They allege that a broad range of "workplaces" fell within the scope of the 1968 Act, and within what they describe as the W.C.B.'s "safe workplaces mandate." They plead that, in breach of duties owed to them and to other persons connected with the project, the W.C.B. failed to exercise its "safe workplaces" powers with respect to the project, thereby causing harm to those participants, including the plaintiffs and the Grace defendants. They argue that such a plea, coupled with the allegation of reasonable reliance, supports, for the purposes of this application, their claims for contribution, indemnity and damages.

They argue that the existence of the W.C.B.'s "safe workplaces" mandate was recently acknowledged by our Court of Appeal in *Hunt v. T&N plc et al.* (1991) 77 D.L.R. (4th) 375, when Lambert J.A. (Carrothers and Proudfoot JJ.A. concurring) said:

The Workers' Compensation Board also has a capacity to carry out functions to improve the safety of every workplace in the province of every employer covered by the Act.

The defendants submit that, because the Legislature saw fit to cast this part of the W.C.B.'s mandate in terms of improving the safety of the "workplace," the duties of the Board are not narrowly restricted to the protection of workers. They argue that, when exercising its powers, the Board must act reasonably so as to protect *any persons* who are in sufficient proximity to it from harm that may result from the existence of unsafe workplaces. They argue that third parties benefit in ways that are specific to their particular status. For example, owners benefit by having their buildings constructed with a minimum of health and safety related delays and by taking delivery of buildings, at the end of construction, that are safe places for potential occupiers, including tenants and workers.

The defendants emphasize the fact that the W.C.B. had both specific and implied powers to inspect the building during the course of its renovation during the 1970's and, under S.72(1) of the 1968 Act, the power to "order the employer to close down forthwith the full or any part of the employment or place of employment and the industry carried on therein" whenever the Board, or one of its officers, determined that "conditions of immediate danger exist ... which would likely result in serious injury or death to any of the workmen employed therein."

The defendants point to the fact that nowhere in the 1968 Act, or any of the successor Acts, is the W.C.B. expressly exempted from liability for its actions. The only provision of that nature is found in S.79, which states that no action shall be maintained or brought against any “members of the Board in respect of any act, omission, or decision done or made in the *bona fide* belief that the same was within the jurisdiction of the Board.” It is submitted that, because the section only provided protection to “members of the Board,” it must be assumed that the Legislature contemplated the possibility of actions being brought against the W.C.B. itself for its negligent acts or omissions.

Finally, the defendants submitted that the questions of reliance and proximity should be determined at trial (*Wilson v. Robertson* (1991), 43 C.L.R. 117 (B.C.S.C.), and that claims for pure economic loss should go to trial where the claim is that a private common law duty of care for economic loss arises from statutory duties and powers (*Sergius v. Janex Design & Drafting Services Ltd.* (1991), 55 B.C.L.R. (2d) 107 (S.C.)).

Conclusion

In *Hunt v. T&N plc et al.* (1990) 72 D.L.R. (4th) 567 (B.C.S.C.) (leave to appeal denied) (1990, 75 D.L.R. (4th) 349; review denied (1991), 77 D.L.R. (4th) 375), Chief Justice Esson examined the overall purpose and scope of the B.C. Workers’ Compensation legislation. He quotes with approval the following passage taken from the 1967 Royal Commission Report of Mr. Justice Tysoe:

The prime mission of those who administer Workmen’s Compensation and the prime purpose of the Act is not to furnish financial benefits, but to promote and encourage measures for the prevention of injury to workmen in the course of their work and, should any be so unfortunate as to become disabled as a result of such injury means for their rehabilitation and return to useful employment as soon as possible. To keep work-connected injuries to a minimum is the first object.

Nonetheless, the Chief Justice rejected the application made by the W.C.B. to strike out the third party claims brought against it in that case, and in doing so he said:

Having in mind the important policy considerations lying at the root of the Board’s duty to protect *workers* against injury or disease, it seems arguable to allow an action against the Board for injuries suffered from its failure to carry out those duties would not be contrary to the overall purpose of the Act. (emphasis added)

I have concluded, firstly, that while it seems clear that the primary purpose of the legislation is to protect workers from the risk of injury and industrial diseases, it may be that the relevant Act and regulations also imposed a duty upon the Board to protect other persons from such risks. That duty may be found to exist in section 12.32 of Regulation 64/72 which purports to prohibit “other persons” from remaining in an area contaminated by asbestos dust.

Mr. Walsh suggested that, because the plaintiffs’ claim for a declaration of indemnity specifically mentioned “tenants or other occupiers” and did not include “workers,” the W.C.B. could not be held liable to the defendants. I do not agree. The references to “other persons” in the amended S.60(1) and in Regulation 64/72 clearly provide a basis for the defendants’ submission that a duty was owed by the Board to tenants or occupiers of the Building. Therefore it can reasonably be argued that, if the plaintiffs should be found liable for physical injury to tenants or other occupiers and, by means of a declaration of indemnification, the defendants are found liable to the plaintiffs for such injury, the W.C.B. should share that responsibility. Thus, a triable issue has been raised.

Secondly, while I think it a far less likely proposition, I find that the defendants have raised a triable issue as to whether the Board may have had a duty to keep the defendants safe, if not from pure economic loss, then from the consequences of a failure to warn them and the other Participants of the presence of asbestos in the Building and the dangers associated with its use, at the time of its application, and later, of the risks and costs associated with its removal.

Whether or not these issues are weak or unlikely to succeed, they are complex and novel and this court should allow them to be pursued to trial.

For those reasons the applications are dismissed. Costs shall be in the cause.

Editors’ note: This ruling has been transcribed unedited.



In the Court of Appeal for British Columbia

Between: George Ernest Hunt
And: T&N, plc et al.
And: Workers' Compensation Board
And: Henfrey Samson Belair Limited, Receiver-Manager for Victoria
Machinery Depot Company Limited

Reasons for Judgment of The Honourable Mr. Justice Lambert (Carrothers and Proudfoot, J.J.A. concurring) (January 29, 1991)

This is an application for a review of an order made by Mr. Justice Gibbs in chambers.

The application that was brought before Mr. Justice Gibbs was an application for leave to appeal from a decision of Chief Justice Esson. Before describing the reasons of Chief Justice Esson I should indicate the nature of these legal proceedings.

The plaintiff is George Ernest Hunt. He is said to have suffered from the effects of working with asbestos, I believe at a shipyard in Vancouver where he worked with asbestos supplied by a number of mining companies and, perhaps also, manufacturers. He applied for Workers' Compensation and was granted Workers' Compensation. The effect of the grant of Workers' Compensation was to cause the Workers' Compensation Board to be subrogated to his legal rights, if any, against the mines, manufacturers and suppliers of the asbestos.

The Workers' Compensation Board, in the name of Mr. Hunt as plaintiff, brought this action against the defendants, who are involved with manufacture, production and distribution of asbestos products. Some of the defendants joined the Workers' Compensation Board as a third party. The basis of that joining is an allegation that the Workers' Compensation Board was in breach of its alleged duty of care to workers in the Province through an alleged failure to inspect the nature of the working premises of people who work with asbestos products, failure to warn workers of the danger of the asbestos products, and similar failures in relation to carrying out its statutory functions in relation to promoting safety in the work place.

It was in those proceedings that counsel for the Workers' Compensation Board, as third party, brought on the application before Chief Justice Esson, essentially to have the third party proceedings struck out as having been improperly brought.

Chief Justice Esson dealt with the applicability of Rule 19(24)(a) to (d) and he decided that none of those paragraphs was applicable. That Rule relates to striking out a pleading on the ground that it is scandalous, frivolous, or vexatious.

Chief Justice Esson went on to deal with the application as an application for summary judgment by a defendant, that is, in this case, the third party, under Rule 18(6). The test of the applicability of Rule 18 and sub-rule (6) of Rule 18 is that the proceedings will not be struck out unless they are bound to fail. Chief Justice Esson decided that the proceedings in this case were not bound to fail.

The essence of the argument that was put to Chief Justice Esson depends on subsection 10(7) of the *Workers Compensation Act*, R.S.B.C. 1979, c.437. I will set it out:

10. (7) If, in an action brought by a worker or dependant of the worker or by the Board, it is found that the injury, disablement or death, as the case may be, was due partly to a breach of duty of care of one or more employers or workers under this Part, no damages, contributions or indemnity are recoverable for the portion of the loss or damage caused by the negligence of that employer or worker; but the portion of the loss of damage caused by that negligence shall be determined although the employer or worker is not a party to the action.

The argument that was made in support of the application before Chief Justice Esson was that subsection 10(7) had the effect of taking away any right of action against the Workers' Compensation Board on the part of Mr. Hunt and that it followed that any right to third party proceedings was also taken away. The argument rests on what is said to be a straightforward interpretation of what is said to be a clear provision in the Statute.

The difficulty arises because, of course, the Workers' Compensation Board has a group of functions in which it is itself an employer of workers and from which a right of action, but for the Statute, could rest in the employees against the Workers' Compensation Board, an employer, for its own unsafe work place.

The Workers' Compensation Board also has a capacity to carry out functions to improve the safety of every work place in the Province of every employer covered by the Act.

The question is whether the right of action that is taken away against the Workers' Compensation Board as an employer is also taken away against the Workers' Compensation Board in carrying out its other functions, because it is indeed still an employer when it carries out those functions.

There are authorities in this Court, and in Courts of Appeal of other provinces, which tend to support the application that was made before Chief Justice Esson. Notable among them is *Virk v. Bannister* (1989), 58 D.L.R. (4th) 53.

It was also argued by counsel for the Board, in this hearing, that the effect of subsection 10(7) was not only to take away the right to recover damages, or contribution, or indemnity from an employer or workers under the relevant part of the *Workers Compensation Act*, but also to take away entirely the right to bring an action at all. In my opinion, that submission is not borne out by the way the subsection is framed, because on its face it takes away only the right to damages, contribution, or indemnity, and there may well be circumstances where it is appropriate to bring the action even though the outcome against that particular defendant cannot be an award of damages, contributions, or indemnity. At the very least it is arguable that the subsection does not take away the right of action but only certain remedies. If it does not take away the right of action then the point that the applicant wishes to have decided in the action it is entitled to bring is a question of law about the interpretation of subsection 10(7) of the *Workers Compensation Act*.

If the question of law is not so clear cut that the proceedings are bound to fail then the proper Rules to apply are the Rules relating to a point of law, namely, Rule 33, dealing with a special case, and Rule 34, dealing with proceedings on a point of law. Both of these Rules contemplate either the concurrence of all the parties or, alternatively, an application to the Court, before a point of law is separated from the rest of a law suit. In determining such an application, the question that is proper for the Court to consider is whether there will be a saving of expense to the parties, and a saving of time of the Court itself, in separating out the question of law; or whether the question of law ought properly to be determined in the main proceedings.

Chief Justice Esson decided that the third party proceedings against the Workers' Compensation Board were not bound to fail. In my opinion, that was a correct decision on a question of law. It was not an exercise of his discretion. If he had decided that they were bound to fail he might nonetheless have permitted them to go ahead. In those circumstances what he would have done would have been, in my opinion, an exercise of discretion. However, that was not what he did in this case.

On the application before Mr. Justice Gibbs for leave to appeal from the order of Chief Justice Esson, Mr. Justice Gibbs referred to the decision as being on an interlocutory matter and being one of discretion. In my opinion, when Mr. Justice Gibbs referred to it as a matter of discretion he was thinking in the context of a question of law being separated out, and he treated such an issue as a matter of discretion.

Nothing that has been said this morning has persuaded me that the third party proceedings against the Workers' Compensation Board are bound to fail. Accordingly, I agree with the decision made by Chief Justice Esson, and I agree with the decision of Mr. Justice Gibbs refusing the application for leave to appeal from that decision.

I would dismiss this application for a review of the order of Mr. Justice Gibbs.

CARROTHERS, J.A.: I agree.

PROUDFOOT, J.A.: I agree.

CARROTHERS, J.A.: The order granting leave to appeal is refused.

Editors' note: These reasons for judgment have been transcribed unedited.