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Decision of the Governors

Number: 9
Date: January 7, 1992
Subject: Review and Development of Occupational Safety and Health Regulations – Strategy Document

The governors adopted the following document at their meeting on January 7, 1992.

1. Purpose

The Board of Governors of the Workers' Compensation Board are statutorily responsible for making occupational safety and health and first aid regulations and are relied upon for recommendations to the lieutenant-governor-in-council with respect to regulations under the *Workplace Act*.

The Board of Governors is responsible for making the final decisions with respect to the content of any regulations or recommendations.

There has not been a public review of occupational safety and health regulations that has been brought to a conclusion for over a decade.

The governors propose to successfully complete a review through a process that is respectful of the interests of workers, employers, the community, and the W.C.B. They propose to complete the review within a reasonable time while allowing for broad community consultation. They intend to adopt a process that recognizes the experience and expertise of the parties most directly affected.

The purpose of the process is to conduct an open, comprehensive review and revision of occupational safety and health related regulations, which the Workers' Compensation Board currently administers, and to develop new regulations in certain areas and industries currently unregulated.

2. Scope of Review

The existing regulations that are the subject of this review consist of the *Industrial Health and Safety Regulations*, *Occupational Environment Regulations*, *Industrial First Aid Regulations* and *Workplace Hazardous Materials Information System Regulations*.

The industries subject to review for the potential development of new regulations include farm and ranch, aquaculture, fishing and silviculture.

3. Some Criteria For Effective Regulations

Criteria for development of effective regulations shall include:

- (1) Regulations that are achieved through a process that respects consensus and involves and relies upon the parties with the most direct interest in the outcomes
- (2) Regulations achieved through a process that provides for the greatest possible public participation and confidence in the outcomes
- (3) Regulations that clearly address hazards in the workplace to protect the health and safety of workers
- (4) Regulations that define responsibilities and accountability
- (5) Regulations that clearly state the criteria for compliance
- (6) Regulations that are in plain language, technically competent and easily understood
- (7) Regulations that provide a mechanism for ongoing review and update in areas subject to changing knowledge and technology
- (8) Regulations that do not restrict workplace activity and conditions beyond that necessary to address the workplace hazard
- (9) Regulations that address the diverse character of workplaces in the province
- (10) Regulations that are compatible with and do not overlap related regulations from other authorities

4. Structure

The Board of Governors constitute a Committee for Regulation Review consisting of two employer, two worker, and one public interest governor and the chairman.

The Committee is delegated the responsibility to oversee the regulation review and development process; to bring it, as far as possible, to a successful conclusion by presenting to the Board of Governors recommendations based on consensus; to record and define differences; and to present a clear definition of the options where consensus has not been achieved.

All recommendations and reports related to the process will be presented to the Board of Governors prior to their publication.

The Board of Governors shall appoint a Regulation Advisory Committee to be chaired by the chairman or another governor that he designates during his temporary absence. It shall include the two worker, two employer and one public interest governor who are members of the Governors' Committee for Regulation Review plus seven persons representative of workers and seven persons representative of employers. It shall also include the coordinator of regulation review as an advisor to the Regulation Advisory Committee.

The fourteen persons representative of workers and employers are to be selected by the Board of Governors on the advice of the Governors' Committee for Regulation Review following consultation with labour and employer groups.

Employees of the Workers' Compensation Board and professionals in related fields may be appointed by the Board of Governors as advisory members of the Regulation Advisory Committee.

Specialty Subcommittees of the Regulation Advisory Committee may be appointed to address specific areas. Their composition, chairmanship and responsibilities shall be decided by the Governors' Committee for Regulation Review after consultation with the Regulation Advisory Committee.

The Regulation Advisory Committee will ensure that the Occupational Health and Safety Division of the Board is consulted on matters related to the content, structure, implementation, monitoring, and enforcement of regulations and standards.

Non-governor members of the Regulation Advisory Committee and Specialty Subcommittees shall receive reimbursement for travel and other reasonable expenses, and a per diem or other compensation determined by the governors.

It may be appropriate to proceed to public hearings on proposed additions or amendments to the regulations before the comprehensive review is complete.

The Regulation Advisory Committee will recommend a process for regulation amendment during the period of this review process.

5. Roles and Functions

(1) **Governors' Committee for Regulation Review**

- Conduct public forums to assist in identification of issues
- Establish and fill position of coordinator of regulation review
- Participate on Regulation Advisory Committee
- Appoint members of Specialty Subcommittees
- Approve general budgetary and Secretariat allocations
- Receive, review and as necessary amend the final report from the Regulation Advisory Committee
- Oversee the public hearing and gazetting process
- Evaluate the effectiveness of regulation implementation

(2) **Regulation Advisory Committee**

- Implement terms of reference for regulation review adopted by the governors
- Make recommendations to the governors on the general structure of regulations
- Review core area regulations; for example, on topics of: application of regulations, joint occupational safety and health committees, occupational safety and health programs, accident/incident investigations and general requirements in places of employment
- Direct Specialty Subcommittees as necessary
- Review and integrate reports from Specialty Subcommittees
- Members of the Regulation Advisory Committee may participate in Specialty Subcommittees and otherwise act as ex-officio members on Specialty Subcommittees where appropriate

(3) **Specialty Subcommittees**

- Implement terms of reference on specialized areas
- Liaise with other Specialty Subcommittees

(4) **Coordinator of Regulation Review**

- Responsible to the chairman and Governors' Committee for Regulation Review for overall implementation and completion of regulatory review process
- Appoint and direct research assistant and Secretariat

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- Provide liaison with all departments of W.C.B. which will be involved in regulation review process
 - Participate on Regulation Advisory Committee and Specialty Subcommittees as directed by the Governors' Committee for Regulation Review
 - Participate in drafting of final report of Advisory Committee
 - Liaise with Ministry of Labour during gazetting process

(5) Research Assistant

- Assist coordinator with technical and other advice on operation of Advisory and Specialty Committees
- Fulfill research function for regulation review process
- Assist coordinator with operation of the Secretariat
- Assist coordinator in other aspects as necessary

(6) Secretariat

- Provide legal advice on matters related to regulation to the governors, the Regulation Advisory Committee and Specialty Committees
- Provide budgetary services, administrative and secretarial support
- Develop resource information centre for regulation review process (for example: previous draft regulations, previous public comment, standards, claims statistics, regulations from other jurisdictions)

(7) OSH Division

- Provide information, consultation, advice and comments as requested by the Regulation Advisory Committee or Specialty Subcommittees through the coordinator
- Prepare manuals and explanatory literature on new regulations
- Provide education and training programs both for staff and the community to assist with implementation of new regulations

6. Public Forum

The Governors' Committee for Regulation Review shall conduct a series of public forums with interested parties.

The purpose is to provide a means for interested parties to express their views on regulation review early in the review process and to receive views on a range of strategies for the creation of a safer workplace, including non-inspectional strategies such as internal responsibility and information systems; consulting and educational services; assessment incentives; and enforcement.

7. Targeted Time Frame For Completion

The entire project from inception to gazetting of final regulations will take approximately two years to complete and consist of eight stages:

- (1) Project start-up
 - Board of Governors' decision on broad parameters of regulation review
 - Selection of coordinator and creation of Secretariat
 - Appointment of Regulation Advisory Committee
 - Organization of public forums
 - First meeting of Regulation Advisory Committee
- (2) Regulation Advisory Committee
 - Meetings to determine method of operation, general structure and style of regulations
 - Preliminary work on core area regulations
 - Creation of Specialty Subcommittees
- (3) Regulation Review – Preliminary Draft
 - Completion of review of core area regulations
 - Creation of further Specialty Subcommittees as necessary
 - Submission of Specialty Subcommittee reports to Regulation Advisory Committee
 - Preliminary draft of proposed regulations produced for consideration by Board of Governors
- (4) Finalization of Draft Regulations for Public Hearing
 - Final review of draft proposals
- (5) Public Hearings
- (6) Finalization of Regulations Based on Outcome of Public Hearings
- (7) Gazetting of Regulations
- (8) Printing and Distribution of Regulations

DATED at Richmond, British Columbia, January 10, 1992.

Decision of the Governors

Number: 10
Date: February 3, 1992
**Subject: Occupational Safety and Health Regulation Review:
Appointment of Regulation Advisory Committee Members and
Setting of Per Diem Allowance**

WHEREAS the governors of the Workers' Compensation Board have embarked upon a complete review of the *Industrial Health and Safety Regulations*, the *Occupational Environment Regulations*, the *Industrial First Aid Regulations* and the *Workplace Hazardous Materials Information System Regulations*;

AND WHEREAS the governors have adopted a process by which this review will be conducted;

AND WHEREAS this process includes the appointment of a Regulation Advisory Committee which will, under the direction of the governors, oversee the review of the Regulations;

AND WHEREAS the Regulation Advisory Committee is to consist of the chairman of the governors and two worker, two employer and one public interest governors, seven persons representative of workers and seven persons representative of employers, and the coordinator, regulation review, as an advisor to the Committee;

AND WHEREAS the governors have considered which persons should be appointed to the Regulation Advisory Committee to be representative of workers and representative of employers and what suitable per diem allowance should be paid to those persons:

NOW THEREFORE THE GOVERNORS RESOLVE THAT:

1. The following persons are appointed to the Regulation Advisory Committee to be representative of workers:

Ms. Karen Dean, Staff Representative, Hospital Employees' Union
Mr. Bill Kessel, Financial Secretary & Business Representative,
Floorlayers Union, Local 1541

Mr. Bob Patterson, Safety Director, I.W.A. – Canada, Local 1-71
Mr. Larry Stoffman, Director, Occupational Health and Safety, United
Food and Commercial Workers' Union of B.C., Local 1518
Mr. Ed Vossenaar, Staff Representative, Occupational Safety and
Health, B.C. Government Employees Union
Ms. Cathy Walker, National Representative, C.A.W.
Mr. John Weir, Director of Occupational Health & Safety, B.C.
Federation of Labour

2. The following persons are appointed to the Regulation Advisory Committee to be representative of employers:

Mr. M.W. Arbogast, Vice-President, Operations, Health Labour
Relations Association
Mr. David Bell, Occupational Hygiene Officer, Occupational Health &
Safety Department, University of British Columbia
Mr. Lance Ewing, Health & Safety Coordinator, Overwaitea Food Group
Mr. B.A. Hawrysh, Vice-President, Occupational Health & Safety,
Council of Forest Industries of B.C.
Mr. Jim Halliday, Manager, Labour Relations, Metal Industries Association
Mr. W.C. Sinclair, Director, Engineering, District of Burnaby
Mr. Dale Versfelt, Safety Director, Construction Labour Relations
Association

3. Each person so appointed shall be paid travel and other reasonable expenses and a per diem allowance of ONE HUNDRED SEVENTY FIVE DOLLARS (\$175.00) for attendance at Regulation Advisory Committee meetings.

Decision of the Governors

Number: 11
Date: February 3, 1992
Subject: Development of Occupational Safety and Health Regulations for the Farming Industry

WHEREAS on September 15, 1982, the Workers' Compensation Board determined that employers and workers in or about the industry of farming should be brought within the scope of Part 1 of the *Workers Compensation Act* effective April 4, 1983, and adopted B.C. Regulation 434/82, deposited September 21, 1982;

AND WHEREAS B.C. Regulation 434/82 defines farming to include growing or raising crops, dairying, poultry raising, egg production, raising of livestock for human consumption, breeding of beef cattle for herd improvement, horticulture, bee keeping, aquaculture, fur farming, and breeding of horses, on land with a certain minimum gross value of production and of a certain size;

AND WHEREAS on March 28, 1984, the Workers' Compensation Board amended B.C. Regulation 434/82 by B.C. Regulation 275/84, deposited August 28, 1984 and declared that:

... with the exception of the *Industrial Health and Safety Regulations*, all provisions of Part 1 of the *Workers Compensation Act* and all the Board's current practices, procedures and regulations, including those in respect of registration requirements, assessment collection and claims and rehabilitation matters will apply to employers and workers in or about the industry of farming in the same way and to the same extent that they presently apply to workers and employers in or about the other industries within the scope of Part 1 of the *Workers Compensation Act*, provided however, that the *Industrial Health and Safety Regulations* will be used as guidelines for educational and promotional programs relating to industrial health and safety in the farming industry.

The Board hereby declares that regulations relating to industrial health and safety in the farming industry will be developed with implementation and adjustment periods appropriate to that industry, and

The Board hereby declares that it will continue to administer educational and promotional programs relating to industrial health and safety in the farming industry while said regulations are being developed.;

AND WHEREAS the governors of the Workers' Compensation Board have embarked upon a process by which, with the involvement of the worker and employer communities in the province, new occupational safety and health regulations will be developed for all industries covered by Part 1 of the *Workers Compensation Act* (the "O.S.&H. Regulation Review Process");

AND WHEREAS the governors of the Workers' Compensation Board consider it appropriate that the Workers' Compensation Board develop occupational safety and health regulations to apply to employers and workers in or about the industry of farming as that industry may be defined at the time the regulations are developed;

NOW THEREFORE THE GOVERNORS RESOLVE THAT, as part of the O.S.&H. Regulation Review Process, occupational safety and health regulations will be developed by the Workers' Compensation Board to apply to employers and workers in or about the industry of farming as that industry may be defined at the time the regulations are developed.

Decision of the Governors

Number: 12

Date: February 3, 1992

Subject: Amendment to the *Fishing Industry Regulations*

WHEREAS the lieutenant-governor-in-council has made the *Fishing Industry Regulations* (B.C. Regulation 674/76) under Section 4 of the *Workers Compensation Act*;

AND WHEREAS Regulation 15 of the *Fishing Industry Regulations* authorizes the Workers' Compensation Board to add to or amend the Regulations;

AND WHEREAS the governors of the Workers' Compensation Board consider it appropriate to amend Regulation 11 of the *Fishing Industry Regulations* which refers to a "commissioner" of the Workers' Compensation Board, an office which was abolished effective June 3, 1991:

NOW THEREFORE THE GOVERNORS RESOLVE THAT, pursuant to Regulation 15 of the *Fishing Industry Regulations*, Regulation 11 of the Regulations is amended by deleting the words "commissioner or."



Decision of the Governors

Number: 13
Date: February 3, 1992
Subject: Adjustments to Payments Under Section 25 of the *Workers Compensation Act*

WHEREAS Section 25 of the *Workers Compensation Act* requires that the Workers' Compensation Board, as of January 1st and July 1st in each year, adjust the periodical payments of compensation being made under the *Act* (in respect of an injury, death or disablement from industrial disease sustained more than six months prior to the date of adjustment) by a ratio determined according to a statutory formula;

AND WHEREAS Section 25 requires that, as of those dates, most dollar amounts mentioned in the *Act* be adjusted by the same ratio;

AND WHEREAS prior to June 3, 1991, final approval of the ratio determined under Section 25 and the adjusted dollar amounts was given by the commissioners of the Workers' Compensation Board;

AND WHEREAS the governors of the Workers' Compensation Board have concluded that, on and after June 3, 1991, it would be most appropriate for final approval of the ratio and dollar amounts to be given by the president and chief executive officer of the Workers' Compensation Board and for this function to be included in the definition of his functions under Section 82(a)(i) of the *Act*:

NOW THEREFORE THE GOVERNORS RESOLVE THAT, on and after June 3, 1991, the authority for the final approval of the ratio determined under Section 25(1) for the *Workers Compensation Act* and of the adjusted dollar amounts determined under Section 25(4) and (5) of the *Act* shall be exercised by the president and chief executive officer of the Workers' Compensation Board and shall be included in the definition of his functions under Section 82(a)(i) of the *Act*;

AND THE GOVERNORS FURTHER RESOLVE THAT the president and chief executive officer shall be instructed to have the amendments to the *Rehabilitation Services and Claims Manual* required as a result of this resolution prepared and forwarded for the approval of the governors at their next regular meeting.



Decision of the Governors

Number: 14

Date: February 3, 1992

Subject: Determination of the Maximum Wage Rate Under Section 33 of the *Workers Compensation Act*

WHEREAS Section 33 of the *Workers Compensation Act* requires that the Workers' Compensation Board determine the maximum wage rate for each calendar year according to a statutory formula;

AND WHEREAS prior to June 3, 1991, final approval of the maximum wage rate determined under Section 33 was given by the commissioners of the Workers' Compensation Board;

AND WHEREAS the governors of the Workers' Compensation Board have concluded that, on and after June 3, 1991, it would be most appropriate for final approval of the maximum wage rate determined under Section 33 to be given by the president and chief executive officer of the Workers' Compensation Board and for this function to be included in the definition of his functions under Section 82(a)(i) of the *Act*;

NOW THEREFORE THE GOVERNORS RESOLVE THAT, on and after June 3, 1991, the authority for the final approval of the maximum wage rate determined under Section 33 of the *Workers Compensation Act* shall be exercised by the president and chief executive officer of the Workers' Compensation Board and shall be included in the definition of his functions under Section 82(a)(i) of the *Act*;

AND THE GOVERNORS FURTHER RESOLVE THAT the president and chief executive officer shall be instructed to have the amendments to the *Rehabilitation Services and Claims Manual* required as a result of this resolution prepared and forwarded for the approval of the governors at their next regular meeting.



Decision of the Governors

Number: 15
Date: February 3, 1992
Subject: Adjustments to Medical Review Panel Fees

WHEREAS Sections 58–66 of the *Workers Compensation Act* provide for an appeal to a medical review panel from a medical decision of the Workers' Compensation Board or a medical finding of the Workers' Compensation Review Board;

AND WHEREAS the medical review panel appeal generally consists of a physical examination of the worker by a panel composed of a chairman who is a general practitioner and two specialists in the particular class of injury or ailment in respect of which the worker has claimed compensation;

AND WHEREAS the Workers' Compensation Board pays fees to medical review panel chairmen and to the specialists for their own time, as well as a steno fee to each chairman for time spent by his or her staff typing the medical review panel certificate and accompanying narrative;

AND WHEREAS Order-in-Council 875 dated April 26, 1986, requires that fees for medical review panel chairmen be adjusted semi-annually on the same basis as adjustments under Section 25 of the *Workers Compensation Act* and the Workers' Compensation Board has generally also adjusted the fees for the specialists and the steno fees at the same time and in the same manner;

AND WHEREAS prior to June 3, 1991, final approval of medical review panel fees was given by the commissioners of the Workers' Compensation Board;

AND WHEREAS the governors of the Workers' Compensation Board have concluded that from June 3, 1991, until the medical review panel registrar has completed his review of the medical review panel system and his recommendations have been considered, it would be most appropriate for the authority for the final approval of medical review panel fees to be exercised by the chairman of the governors:

NOW THEREFORE THE GOVERNORS RESOLVE THAT from June 3, 1991, until the medical review panel registrar has completed his review of the medical review panel system and his recommendations have been considered, the authority for the final approval of medical review panel fees shall be exercised by the chairman of the governors, subject to fee schedules being presented to the governors for ratification at the next regular governors' meeting after being adjusted.

Decision of the Governors

Number: 16
Date: February 3, 1992
Subject: Disclosure of Employer Classification – Subclasses 203, 204, 411 and 430

WHEREAS the current policy of the Workers' Compensation Board is not to disclose an employer's classification for assessment purposes to other employers;

AND WHEREAS, in response to discontent in some parts of the employer community over this policy, the Assessment Department is developing a policy proposal which will address this problem;

AND WHEREAS the governors of the Workers' Compensation Board are considering how to resolve the issue of the surplus in the Silicosis Fund;

AND WHEREAS resolution of the issue of the surplus in the Silicosis Fund requires disclosure of the names of the employers in Silicosis Fund subclasses 203 and 204 and in Accident Fund subclasses 411 and 430 and cannot await completion of the work being done by the Assessment Department on its disclosure policy:

NOW THEREFORE THE GOVERNORS RESOLVE THAT the names of the employers in Silicosis Fund subclasses 203 and 204 and in Accident Fund subclasses 411 and 430 may be disclosed in connection with public consultation about the manner in which the Silicosis Fund surplus issue should be resolved.



Decision of the Governors

Number: 17
Date: March 2, 1992
Subject: Ratification of Medical Review Panel Fee Schedule Effective January 1, 1992

WHEREAS, at the governors' meeting on February 3, 1992, the governors of the Workers' Compensation Board resolved that:

... from June 3, 1991 until the medical review panel registrar has completed his review of the medical review panel system and his recommendations have been considered, the authority for the final approval of medical review panel fees shall be exercised by the chairman of the governors, subject to fee schedules being presented to the governors for ratification at the next regular governors' meeting after being adjusted;

AND WHEREAS the chairman of the governors has given final approval to the fee schedule for medical review panels held on and after January 1, 1992, and has requested ratification by the governors of the fee schedule:

NOW THEREFORE THE GOVERNORS RESOLVE THAT they ratify the following fee schedule approved by the chairman of the governors for medical review panels held on or after January 1, 1992:

The hourly rate payable to chairmen of medical review panels is \$133.40.

The flat fee payable to Panel members other than the chairmen is \$444.99, with an additional fee of \$97.86 per hour when the time taken on an appeal (including travelling time) exceeds 3½ hours up to a maximum of a further 4½ hours.

The steno fee for each appeal is \$66.80.



Decision of the Appeal Division

Number: 92-0193
Date: January 22, 1992
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Section 23(1) – Measuring Disability

This is an appeal from the Workers' Compensation Review Board decision dated March 6, 1991. The issue on this appeal is whether the worker is entitled to a permanent partial disability award pursuant to Section 23(1) of the *Act*.

The history of this case is of considerable importance to the matter currently under consideration. On January 13, 1983, the worker, then a fifty-year-old stock tester in a pulp mill, was struck by a car in the employer's parking lot. He suffered injuries to his right shoulder and left leg. He returned to work in August of 1983. The problems with respect to his left leg resolved satisfactorily; however, he was left with some complaints of problems with his right shoulder.

In light of his ongoing physical restrictions, the worker's employment in the stock tester's job was "frozen," which meant that he would not be eligible for promotion.

The worker originally pursued compensation through I.C.B.C.; however, the issuance of a Section 11 certificate by the W.C.B. finding him to be a worker in the course of his employment at the time of the injury foreclosed that possibility. As a result his claim was pursued with the W.C.B.

An examination for pension purposes was conducted January 21, 1987. The disability awards medical advisor indicated there were only minimal findings and did not recommend a permanent partial disability award. The worker appealed to the Review Board. A decision of December 18, 1987, found the worker was entitled to a permanent partial disability award in respect of his shoulder on the basis that there was demonstrable evidence of an ongoing disability affecting his earning capacity and preventing his future promotion. Pursuant to Section 96(2) of the *Act*, the commissioners issued a decision February 17, 1989, reversing the Review Board finding.

The worker appealed the decision with respect to the existence of a functional impairment in his shoulder to a medical review panel who issued a certificate dated March 27, 1990. That certificate stated (in part):

1. The condition of the worker is fair.
2. He now has a disability with respect to his right shoulder.
3. He has post-traumatic osteoarthritis of the right acromioclavicular joint secondary to grade I acromial clavicular separation. Pain and crepitus in the right acromioclavicular joint limit function in his right arm, particularly in adduction and with movements requiring strength or power.

The certificate went on to certify that the disability described in the right shoulder was a result of the work injury of January 13, 1983 and was not wholly or partly the result of causes other than that injury.

In a letter dated May 8, 1990, a disability awards claims adjudicator informed the worker that subsequent to the medical review panel certificate finding that he had a disability with respect to his right shoulder, the claims adjudicator had compared the findings of the medical review panel examination with the findings of the permanent partial disability examination. He concluded that the findings were so minimal as to have no effect on his earning capacity and, therefore, no permanent partial disability award would be payable. The worker's appeal to the Review Board from that decision was denied in the decision dated March 6, 1991 presently before the Appeal Division.

This appeal raises the question as to whether the May 8, 1990 decision of the disability awards claims adjudicator gave proper consideration to the binding medical review panel certificate. Section 61(1)(b) provides that the chair of a medical review panel can certify to the Board as to "the existence or non-existence of a disability." In this instance the panel certified the existence of a disability. Section 23(1) of the *Workers Compensation Act* requires that where a permanent partial disability results from the injury:

... the impairment of earning capacity shall be estimated from the nature and degree of the injury, and the compensation shall be a periodic payment to the injured worker of a sum equal to 75% of the estimated loss of average earnings resulting from the impairment ...

Workers Compensation in Canada (Second Edition), by Dr. Terence Ison, states the following with respect to the statutory language of Section 23(1):

Although that language requires the boards to achieve what is logically impossible, it is generally interpreted as a mandate to adopt a physical impairment of calculation, and that interpretation is enhanced by other statutory provisions authorizing the boards to adopt disability rating schedules. To ascertain the nature and severity of any residual disability, a board doctor usually makes a clinical examination of the worker. That may be supplemented by other evidence, including the testimony of the worker about the physical significance of a disability, but evidence of the impact on actual earnings of the worker is irrelevant.

Section 23(1) mandates the physical impairment method of pension calculation. Section 23(2) authorizes the Board to adopt a disability rating schedule. Section 23(3) provides for the payment of pensions on a projected loss of earnings basis.

The analysis advanced by Dr. Ison is reflected in the *Rehabilitation Services and Claims Manual* adopted as policy by the governors. *Rehabilitation Services and Claims Manual* #39.00 states:

The physical impairment method is the primary one used for measuring permanent disabilities. It is the method provided for in Section 23(1). In applying this method, the Board does not normally have regard to the individual worker's actual loss of earnings. It considers only the physical condition of the worker. It results in a percentage of disability being allocated to the claimant's condition.

The original pension decision in this case did not acknowledge the existence of a disability. It referred to the problems experienced by the worker as a "residual permanent condition." The Review Board decision of December 18, 1987, found both that the worker had a disability and also that he was entitled to a pension award for the disability. That Review Board decision, however, was reversed by the commissioners. Once the medical review panel certificate was issued the Board was bound by the finding that the worker had a disability. All that remained under Section 23(1) was for the Board to estimate the impairment of earning capacity from the nature and degree of the injury and to make the payment that would follow upon such calculation.

The position of the Board, expressed in the May 8, 1990 decision, varied slightly from the approach taken in their earlier denial of a pension. The disability awards claims adjudicator stated:

In your case, it is acknowledged that you have a disability in your right shoulder. However, it is not felt that your present condition, will, in the future affect your earning capacity and, therefore, no permanent partial disability award is payable on your claim.

It is *theoretically* possible to have a permanent partial disability that does not justify an award under Section 23(1). That statement, however, must be qualified by consideration of the Permanent Disability Evaluation Schedule.

There are two basic methods for assessing the percentage of a worker's permanent disability. These are the scheduled method and the non-scheduled method. Under the physical impairment method (Section 23(1)), the schedule is used to establish degrees of partial disability.

The intent of the Permanent Disability Evaluation Schedule was discussed at length in the report of the commissioner of inquiry into the *Workers Compensation Act* reporting in 1965 (the Tysoe Commission). Mr. Justice Tysoe stated (at 273):

A percentage of impairment of earning capacity allotted under the schedule or awarded in a judgement (non-scheduled) award represents an effort to state in terms of percentages, and on the average, the extent to which the particular disability will impair the workman's ability to earn. In arriving at this percentage, those preparing the schedule, or in the case of a judgement award those making the award, have had regard to the ability to the workman to do average labouring work. That is to say, regard is not had to the particular class of employment in which the particular workman has been engaged at the time of the injury.

The Tysoe Commission analysis is reflected in the policy manual excerpt that the Board does not normally have regard to the individual worker's actual loss of earnings in applying the physical impairment method of measuring a permanent disability. As Mr. Justice Tysoe stated, the functional award is an effort to state in terms of percentages and on the average the extent to which the particular disability would impair the worker's ability to earn. That principle is common to both scheduled and non-scheduled awards. There is nothing in the *Act* that would suggest scheduled awards ought to be any more or less generous to workers than non-scheduled awards.

The Permanent Disability Evaluation Schedule (Appendix 4, *Rehabilitation Services and Claims Manual*) provides for a wide range of percentage awards. For example, immobility of the great toe at the distal joint warrants an award of .5%. There are at least nineteen (19) items in the permanent disability evaluation where awards are made of less than 2% of total. This includes such disabilities as amputation of the index finger at the D.I.P. joint, the middle finger at the M.P. or D.I.P. joint, the ring finger at the P.I.P. or D.I.P. joint, amputation of the little finger at the P.I.P. or D.I.P. joint, amputation of any toe other than the great toe, shortening of the lower extremity by 2.5 centimetres and several levels of hearing loss. The schedule acknowledges a hearing loss disability as low as .2%.

It follows that, to conclude a worker is not entitled to an award, once it is established that he has a disability, his ability to do “average labouring work” must be impaired less than the lowest assessment made under the Schedule. Is the disability in this worker’s shoulder of less significance to performance of “average labouring work” than, for example, immobility of the great toe at the distal joint? In considering the minor degrees of disability acknowledged by the Permanent Disability Evaluation Schedule it is difficult to conclude that this worker is not entitled to any award whatsoever for his disability.

In reviewing the correspondence the worker has received from the Board since 1983, and in particular the decision letter of May 8, 1990, it is apparent that the Board did not examine the worker’s disability from the perspective described in the Tysoe Commission Report. Rather the award was refused on the basis that it was not felt

that your present condition will, in the future, effect *your* earning capacity. (emphasis added)

That reasoning is inconsistent with the Board policy that the individual worker’s actual loss of earnings is not the relevant consideration.

Having reviewed all of the evidence in this matter I am satisfied that this worker is entitled to receive a disability award. The worker’s counsel contends that award ought to be in the amount of 5% of total. *Rehabilitation Services and Claims Manual* #39.10 provides:

In cases where the specific impairment is not covered by the schedule, but the part of the body in question is covered, the Disability Awards Officer or Adjudicator must first determine the percentage loss of function in the damaged area. This determination is based on the findings of the Disability Awards Medical Advisor and other medical and non-medical evidence available.

The final award is arrived at by taking this percentage of the percentage allocated in the schedule to the disabled part of the body. Because the schedule is used in the calculation this type of award is still considered as a scheduled one.

Problems of immobility of the shoulder joint are covered by the following items in the schedule:

	Percentage
41. Shoulder, complete with no scapular movement (so called frozen shoulder)	35
42. Shoulder, gleno-humeral fusion, scapula free	20
43. Shoulder, limited to 90° of abduction	5

The nature of the problems experienced by this worker as described in the medical review panel certificate and other medical reports suggest that the disability on a judgment basis would be approximately 75% of item 43 or 3.75%.

I appreciate that it was argued before the Tysoe Commission that the general effect of the Permanent Disability Evaluation Schedule allows percentage awards that are too high having regard to modern technology and advances in prostheses. That may well be the case. The schedule, however, has been set as a policy of the governors and they are the body to consider amendments. It is the responsibility of Board officers to make pension awards that do not treat workers inequitably simply because their particular disability is not specifically referred to in the schedule.

THE WORKER'S APPEAL IS ALLOWED.

Decision of the Appeal Division

Number: 91-1104
Date: December 19, 1991
Panel: Thomas Kemsley, Walter N. Peain, Alex S. Brokenshire
Subject: Unemployment Insurance Benefits

This is an appeal by the worker from the findings of the Workers' Compensation Review Board dated August 21, 1989. The issue is whether the claims officer properly calculated the worker's wage rate.

The worker was employed by a food processing company when he fractured a finger at work on September 18, 1988. He was off work and initially received wage-loss benefits based on what he was earning at the time of the injury. In a letter dated December 13, 1988, the claims officer informed the worker that, as of November 24, 1988, his wage-loss benefits had been adjusted and were now based on his average earnings for the past three years. This was the "eight-week review." The new rate was lower than the initial rate, and did not take into account the unemployment insurance benefits the worker had received in the past three years, although it did include the time during which he received those benefits.

The worker's appeal of the wage rate was denied by the Review Board. On this appeal, a written submission, dated December 1, 1989, was filed by the worker's lawyer.

Counsel submitted that the average earnings figure established at the eight-week review did not best represent the worker's average earnings. Counsel submitted that it is not fair to exclude unemployment insurance benefits but include the period of time the worker was in receipt of those benefits.

Section 29 of the *Workers Compensation Act* provides for temporary wage-loss benefits and states that these are payable as in Section 22, which refers to 75% of the worker's "average earnings." Section 33 of the *Act* sets out how "average earnings" shall be determined. This refers to "daily, weekly or monthly wages or other regular remuneration." The Board excludes unemployment insurance benefits from this calculation. That is, it considers the words "earnings," "wages," and "remuneration" do not include unemployment insurance benefits.

There are different possible interpretations of the words “earnings,” “wages” and “remuneration” in the context of the *Act*. Some of these interpretations would exclude unemployment insurance benefits, others would not. The purpose expressed in Section 33 of the *Act* could support the inclusion of unemployment insurance benefits in some situations. However, this is a complex matter and the Board of Governors has the sole authority to set policy. We find that the policy which excludes unemployment insurance benefits is not contrary to Sections 22, 29 or 33 of the *Act*.

The *Act* does not say whether the time a worker was on unemployment insurance benefits should be included or excluded. The policy includes this time in the calculation of average earnings. On the other hand, paragraph 66.11 of the *Rehabilitation Services and Claims Manual* excludes time periods during which a worker was on W.C.B. wage-loss benefits or sick leave. Thus, the policy draws a distinction between unemployment insurance benefits and injury or sickness benefits. While these policies seem to conflict in the different treatment of different benefits, there may be some basis for the distinction. When on sickness or injury benefits, the worker is not able to work due to the sickness or injury. While on unemployment insurance benefits, the worker is not able to work as there is no work available. We do not know if this rationale explains the differences here.

As stated above, the *Act* provides for the Board of Governors to set policy. The policy addresses the definition of average earnings and earning capacity. While we are uneasy about the policy that excludes the time a worker was on sickness or injury benefits but not the time a worker was on unemployment insurance benefits, we find the policy with respect to unemployment insurance benefits is not contrary to the *Act*. In this worker’s situation where he had received unemployment insurance benefits regularly in the past, if both the unemployment insurance benefits and the time during which he received those benefits were excluded from the calculation of “average earnings,” then, the average earnings figure could be highly inflated. In effect, the worker would be treated as if he worked full time for the whole year when, in fact, he spent part of every year on unemployment insurance benefits.

On the other hand, to leave unemployment insurance benefits out of the calculation, but leave the time in, means that the worker’s actual loss of “income” due to his compensable injury is undervalued. We use the word “income” here as in the Income Tax context, to include employment earnings and revenue and benefits from other sources, including unemployment insurance benefits. In cases like the one before us, the most accurate measure of the “income” the worker lost due to his compensable injury would be achieved if both his unemployment insurance benefits and the time period during which he received those benefits were included in the calculation.

However, the *Act* uses the words “earnings” and “wages,” but not “income.” We cannot find that the governors’ policy undervalues “earnings.” Thus we find the policy with respect to unemployment insurance benefits is not contrary to the *Act*.

WE DENY THE APPEAL.

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



REPORTER

Decision of the Appeal Division

Number: 92-0144, 92-0145
Date: January 21, 1992
Panel: Sonja Hadley, James Tonn, Walter N. Peain
Subject: Special Circumstances – Section 55(3)

This is an appeal from two Workers' Compensation Review Board (Review Board) findings dated March 12, 1990 and September 3, 1991.

The issues before this panel are:

1. Whether 75% of \$415.54 per week best represents the worker's actual loss of earnings by reason of his 1988 injury.
2. Whether the worker had returned to his 1988 pre-injury condition by August 7, 1989.
3. Whether there were special circumstances which precluded the worker from filing a claim for a 1982 work injury within one year of the injury.

[Editors' note: This decision is published for what it contains in respect of the 3rd issue and has been edited accordingly.]

Section 55(3) of the *Workers Compensation Act* provides:

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 three years after that date, it may pay the compensation provided by this part but not in respect of a period prior to the date the application is received by the board.

Item 93.22 of the *Rehabilitation Services and Claims Manual* states, in part:

Special circumstances 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 of each case must be considered and a judgement made. However, it should be made clear that in determining whether special circumstances existed, the concern is solely with the claimant's reasons for not submitting his application within the one-year period. No consideration is given to whether or not the claim is otherwise a valid one. If the claimant's reason for not submitting his application in time are not sufficient to amount to special circumstances, his application is barred from consideration on the merits, notwithstanding that the evidence clearly indicates that he did suffer a genuine work injury.

The evidence presented by the worker both at the Review Board hearing, and at the Appeal Division hearing, was that prior to his 1982 injury any Workers' Compensation Board claims he had were initiated by his attending physician's office or the hospital, a report being completed by the receptionist and the worker signing that form. He relied heavily on his doctors to complete the forms for him and submit them to the Board. His evidence was that he had never dealt with the Board personally and that he never appealed any prior Board decision. His experience was that his doctors took the initiative of having the forms completed, signed, filed, and "the benefits simply arrived." He never had to initiate a Workers' Compensation claim on his own. Further, the evidence is that the worker has a grade 6 education and has some difficulty reading and comprehending documents. This difficulty was evident during the oral hearing. The evidence is also that his wife prepares any written correspondence or documents which he then signs.

The worker's evidence was that he was told by his physician in January 1982 that as his employer at the time had Confederation Life coverage, they probably did not have Workers' Compensation coverage. Further, he stated that the doctor told him that it was easier for him to bill through the B.C. Medical Plan and have Confederation Life pay the worker. He stated that the doctor told him that W.C.B. involved too much paper work. The doctor was asked by the adjudicator to verify whether the information provided by the worker was accurate. In the doctor's response of July 27, 1990, he stated in part:

There was no W.C.B. file opened. I have no record of alternative insurance being discussed. However, it is possible that the patient and myself may have thought he had adequate coverage from

Confederation Life. In retrospect this patient sustained a work-related injury. It is hoped that he will still be eligible for full W.C.B. benefits at this late date.

Further evidence is that of the employer's superintendent of employee relations who, in a letter dated June 19, 1991, stated in part:

At the time of [the worker's] incident in January, 1982 he was a heavy mobile equipment operator. This was rough jarring work. Open pit mining involves operating his equipment over rough terrain which can often be hard on the machinery and operator alike. *As best I can recall there was no specific injury.* Instead [the worker] suffered a gradual onset of back and neck pain.

Specific injuries on the job were dealt with by making a claim to Workers' Compensation. *When there was no specific injury, however, it was considered that Workers' Compensation did not apply* and the company fully compensated the worker for the first 180 days after which the insurers (Confederation Life) picked up the claim. (emphasis added)

Counsel provided the Reasons for Judgment in a Federal Court of Appeal case (*Canada (A.G.) v. Albrecht*, [1985] I.F.C. 710). This decision related to Section 20(4) of the *Unemployment Insurance Act, 1971*, which provides that if a claimant delays in making a claim and shows good cause for his delay the claim may be acceptable. In its Reasons for Judgment the Federal Court of Appeal considered the meaning of "good cause." The court found:

To say, as the Applicant does in effect, that ignorance of the law excludes good cause seems to me to defeat the whole purpose of the legislation since, apart from instances of physical incapacity and leaving aside possible cases of indifference or lack of concern, ignorance of the law is necessarily involved in the failure of a claimant to exercise his rights in due time Of course, I have no doubt that it would be illusory for a claimant to cite 'good cause' if his conduct could be attributed only to indifference or lack of concern. I readily agree, too, that it is not enough for him simply to rely on his good faith and his total unfamiliarity with the law. But an obligation, with its concomitant duty of care, can be demanding only to a point at which the requirements for its fulfillment become unreasonable. In my view, when a claimant has failed to file his claim in a timely way and his ignorance of the law is ultimately the

reason for his failure, he ought to be able to satisfy the requirement of having 'good cause' when he is able to show that he did what a reasonable person in his situation would have done to satisfy himself as to his rights and obligations under the *Act*. This means that each case must be judged on its own facts and to this extent no clear and easily applicable principle exists; a partially subjective appreciation of the circumstances is involved which excludes the possibility of any exclusively objective test. I think, however, that this is what Parliament had in mind and in my opinion this is what justice requires.

The weight of the evidence supports that the worker's awareness of the compensation system was not extensive. His four previous claims with the Workers' Compensation Board had not required that he have any personal contact with the Board nor had they been contested. Each of those claims was initiated by the worker attending his doctor's office, who filled in the initiating form, which he signed. If further forms were submitted to the Board, his evidence was that they would have been completed by his wife and signed by him. In each of the previous claims, the worker relied on his doctors to initiate the claims. In the 1982 claim, his evidence was that he questioned both his attending physician and specialist regarding the possibility of a W.C.B. claim. He states in both instances the advice given to him was that the Confederation Life coverage would be preferable and it was unlikely that there was W.C.B. coverage. Although the attending physician, in his letter of July 27, 1990, did not explicitly agree with this statement, he also did not refute it. The superintendent's letter of June 19, 1991 supported both the worker's and others' testimony with respect to the understanding employees had of their coverage during that time period.

Although the worker's spouse was not present during the conversations her husband had with his doctors, her sworn evidence, which has not been contradicted, supports the worker's understanding of what he was told by his doctors at that time.

In order to determine if special circumstances existed, Board policy requires only that the worker's reasons for not claiming within the one-year time limit be considered. The panel finds the reasoning of the Federal Court of Appeal in *Canada (A.G.) v. Albrecht* helpful in considering whether the worker's "reasons" for not claiming within the one-year statutory limit constitute "special circumstances."

The panel also adopts the reasoning of the Appeal Division panel in Appeal Decision No. 91-0851 (see *Workers' Compensation Reporter* Volume 7(4), page 229) that the stringent interpretation of the word "preclude" as "absolutely prevent" is not justified, and that the liberal interpretation of Section 55(3) encouraged by Mr. Justice Anderson in *Caputo v. W.C.B.*, (1987) 13 B.C.L.R. (2d) 145 (B.C.C.A.) is appropriate. Accordingly,

in this worker's case, considering all of the circumstances, we find that his reasons for delay constituted special circumstances and effectively precluded him from applying within the one-year time limit.

The panel finds that there were special circumstances that precluded the worker from filing an application for his 1982 work injury and we direct that the 1982 claim now be considered on its merits.

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



Decision of the Appeal Division

Number: 91-0424
Date: September 17, 1991
Panel: Alison H. Narod, Alex Brokenshire, Verna Ledger
Subject: Carpal Tunnel Syndrome

The worker appeals the findings of a majority of a panel of the Review Board ("majority") dated June 19, 1989, confirming a claims adjudicator's decision, dated May 6, 1988 that denied his claim for right carpal tunnel syndrome.

The issue is whether the worker's carpal tunnel syndrome arose out of and in the course of his employment.

Facts and Evidence

When this claim was initiated, the worker was 28 years of age. He was a chef and had been employed full time for 10 or 11 years, 7 of which were with his employer.

In June 1981, he was diagnosed as having a left carpal tunnel syndrome. He had intermittent problems with the left wrist for the previous two years. The left median nerve was surgically released in September 1982. The worker presently attributes the left carpal tunnel syndrome to his work, but says he did not know it at the time and so did not file a claim. He states that the right wrist was asymptomatic until the fall of 1987, when he first experienced symptoms, such as tingling.

In the latter part of 1987, as part of his job, the worker started to butcher sides of beef on a regular basis. The worker states that although he is left-handed, his right hand is strained during the butchering as it is constantly tugging and pulling meat away from the knife and the cutting area. This meatcutting activity was particularly heavy during the Christmas period.

The worker also states that the onset of discomfort in the right hand was quite sudden and occurred in mid-January 1988, when he lifted a heavy stock pot and felt a sharp pain in his right hand. The pain and tingling worsened and it was then that he sought medical advice.

On or about January 21, 1988, the worker was diagnosed as having bilateral carpal tunnel syndrome, worse on the right. He underwent a right carpal tunnel decompression on May 18, 1988.

The worker's claim was denied on May 6, 1988. The medical reports from treating physicians did not refer to the meatcutting activities, the pot-lifting incident or to a sudden onset of discomfort in mid-January 1988. They appear to describe the onset of symptoms as gradual or as increasing and as having started (as the worker told them) about two months before mid-January 1988.

The worker told the claims adjudicator of the pot-lifting incident and the sudden onset of pain in mid-January during their first conversation. The meatcutting activities were not raised as having any significance until after the claim was denied and only at the prompting of the attending physician, Dr. R, who thought those activities were significant to the worker's case.

In any event, the claim was denied before the W.C.B. was aware that the meatcutting activities might have significance, whether or not they were "unaccustomed activities." The claims adjudicator, relying on a medical opinion of a W.C.B. medical officer, concluded it was unlikely there was a relationship between the worker's condition and his work activities, as described.

The worker appealed the denial and submitted a letter from the attending physician which raised the meatcutting activities. He noted that when the worker stopped working, his symptoms greatly improved. He felt strongly that the worker's right carpal tunnel syndrome was related to his work.

A majority of the Review Board upheld the denial of the claim. They concluded that the attending physician's views were not helpful because he had not expressly considered the particular motions involved in the worker's meatcutting activities and how they impacted on the worker's condition. They found that the evidence did not show the meatcutting activity would involve motions that would produce carpal tunnel syndrome. They commented that the left hand does the cutting, not the right. The fact that the condition was bilateral suggested to them that the causes were natural. They were unable to conclude that the meatcutting activity had causative significance. They did not consider the pot-lifting incident to be an "excessive pull."

The Review Board did not have before it any more recent medical evidence than the attending physician's opinion.

The panel referred the claim to Dr. N, the acting director/senior medical advisor and occupational health consultant in the Workers' Compensation Board Occupational Safety and Health Division, for his review and requested his medical opinion in respect to a number of questions. He advises that the natural course of any disease, including carpal tunnel syndrome, may vary, to a certain extent, particularly among individual patients. It is consistent with the clinical diagnosis of carpal tunnel syndrome that a worker experiencing other symptoms, such as tingling, etc., may progress to a worsening of symptoms, including pain over a two-month period, particularly if he continues to work during this period. On the basis of these comments, the panel concludes that it was consistent with the progression of this worker's carpal tunnel syndrome for him to experience tingling which worsened to include other symptoms, such as pain, over a two-month period.

Dr. N advises that a worker experiencing symptoms such as pain for two months prior to the incident of heavy pot lifting could feasibly experience an exacerbation of carpal tunnel syndrome symptoms at the time of such an incident. He states that it is certainly feasible that if a strain were to have occurred, that the associated inflammation could reasonably have further compromised the carpal tunnel, resulting in increased symptomology. He notes that it is often recognized that tenosynovitis of the flexor tendons at the wrist may be associated with the ultimate development of a carpal tunnel syndrome. As a result of these comments, we find the onset or worsening of this worker's pain when lifting the heavy pot was consistent with the development of or an exacerbation of his carpal tunnel syndrome.

On the basis of the information provided to Dr. N regarding the etiological factors affecting this worker, as well as his familiarity with the work of meatcutting and the literature with respect to meatcutting, Dr. N's opinion was that the worker's right carpal tunnel syndrome would be reasonably related to his occupation as a cook/meatcutter. He noted that the worker began meatcutting as part of his job as a cook only several months prior to the onset of his right-sided condition. He believed it reasonable that a combination of his occupational activities as a cook/meatcutter, particularly the later activities, would have had causative significance.

Dr. N was asked whether the worker's meatcutting activities were unaccustomed activities. It was his opinion that the worker was not fully accustomed to meatcutting activities. He found it significant that the worker started meatcutting prior to the onset of his right carpal tunnel syndrome.

Dr. N was also asked whether it mattered whether the worker's work activities in general or his meatcutting activities in particular were "unaccustomed" or "accustomed" activities in determining whether they produced or aggravated his right carpal tunnel syndrome. He responded as follows:

The accustomed/unaccustomed nature of a worker's occupational activities are only one criteria used in the assessment of a reasonable occupational association. Unaccustomed work activities do not in themselves preclude the possibility of a reasonable occupational association with respect to carpal tunnel syndrome. There are other factors which help establish an occupational association which must be considered and indeed there are also factors which do not favor an occupational association which also must be considered. In other words, consideration of accustomed versus unaccustomed work activities does matter but this factor in itself is not an essential pre-requisite nor does it completely preclude a reasonable occupational association.

Since Dr. N's opinion was obtained, the worker has forwarded additional information which further supports an occupational relationship. In a letter dated September 9, 1991, he states that Dr. R advised him to tell the Workers' Compensation Board about his meatcutting activities, because he believed they were a major contributor to his right carpal tunnel syndrome. He wrote that although his left hand does the cutting, his right hand must hold heavy pieces of beef hind-quarters upright. Some of these pieces weigh 80 to 100 pounds. His right hand is constantly used to tug and pull meat away from the carcass when cutting is done. He notes that his condition worsened after the heavy pot-lifting incident and the tingling and soreness in the right hand was much greater. He said he also does a lot of chopping, lifting and mixing daily. The meatcutting was a new, unaccustomed activity.

In review of the foregoing, we find that the worker's claim is acceptable under Section 5(1) of the *Workers Compensation Act* on the basis that his carpal tunnel syndrome arose out of and in the course of his employment.

THE APPEAL IS ALLOWED.

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

Decision of the Appeal Division

Number: 92-0100
Date: January 13, 1992
Panel: Lorna Pawluk
Subject: Carpal Tunnel Syndrome (#2)

The worker appeals a Review Board finding dated July 8, 1991. The issue is whether or not her carpal tunnel syndrome is the result of her employment as a grocery cashier.

The worker has been employed as a cashier for approximately 24 years. On August 14, 1990, she underwent surgery on her right hand for carpal tunnel syndrome. She says that the problem arises from her work.

In 1987, the store where the worker is employed replaced the old cash register with scanning equipment. Before 1986, this worker spent 90 per cent of her time working on the cash register, but after 1986 she spent most of her time in customer service (taking deposit returns, etc.) and as a cashier on a relief basis only. After January 1989, she spent 10-12 hours a week in the office and the rest of her time in customer service; in the fall of 1989 that changed so that she spent 60 per cent of her time as a cashier and the remaining 40 per cent in the office.

The following excerpt from the Review Board's findings describe the worker's job duties:

[The worker] described her duties as a checker, and the Panel accepts that there is a great deal of right wrist motion. She also explained that she often put paper bags inside the plastic bags, for customers that prefer this service, and then lifted the full plastic bag with her right hand, and placed it into the buggy.

She also described her office work, and the Panel understands that she was responsible for counting the morning deposit, which was a relatively small one, and the afternoon deposit which was the major one. On slow days of the week she would be counting out bundles of money containing fifty bills each, which would amount to twenty or twenty-five thousand dollars a day, but on busier days the total could be forty-five thousand dollars, and even more on

special holidays or long weekends. She described and demonstrated the counting technique, which required a flicking of her right wrist while pushing and gripping with her right thumb as she pulled each of the bills out of her left hand.

(at page 5)

According to the testimony adopted by the Review Board panel and the submissions made on the worker's behalf, symptoms in the right hand began to emerge in 1985 or 1986. She was not aware of any left hand symptoms. By the fall of 1989, however, the symptoms increased and by the end of the year she was experiencing pain that began in her thumb and index finger and then travelled up to her arm and neck. She felt a "ripping or burning" sensation in her forearm towards the end of the day and her symptoms frequently woke her during the night.

She first sought medical attention for these problems in May of 1990 and reported the problem to her employer on May 30, 1990.

In a medical report dated June 28, 1990, Dr. M, a specialist in physical medicine and rehabilitation, reported the following:

She is right-handed, and has had intermittently right-hand problems for years, but in the last eight or ten months has got worse for no apparent reason ...

I think she has carpal tunnel syndrome, but on a double crush basis with her fairly prompt thoracic outlet test, worse on the right. Her position is a little bit slumped. I could section the right carpal tunnel ligament, I wouldn't find any fault with that, but I would not be surprised if it didn't completely clear her problems.

On July 25, 1990, Dr. M stated about his patient's condition: "In my opinion, this lady does have a definitive diagnosis, clinically speaking, and her problems are of compensable origin." The carpal tunnel syndrome diagnosis was confirmed by Dr. F in a report dated July 30, 1990:

I agree with Dr. M — I believe this patient has a right carpal tunnel syndrome. In addition to the electrical study the fact that we can reproduce symptoms in the office is clear indication of the carpal tunnel. I believe rather than doing myelogram or any further exhausting study we should do a decompression of the carpal tunnel syndrome and if the patient does not improve perhaps in

that case we may have to look for other causes as well, but in my experience most of these patients get relief after decompression of the carpal tunnel.

A Board medical advisor concluded that the carpal tunnel syndrome in this case was not the consequence of the worker's work activities. Dr. S reported:

Though the work is certainly frequent and repetitive, it is by no means forceful. The condition has come on very gradually over many years. There is nothing unaccustomed in the work activity. There is no vibrating equipment involved. The worker is no longer in the younger age group, being 48 years of age.

In fact, the only element that is even remotely suggestive of an occupational origin is the fact that it seems to be involving only the dominant hand.

But there is no question that the vast majority of the evidence does not point to an occupational origin for her condition.

The claims adjudicator adopted this opinion and on September 12, 1990, wrote to the worker, informing her that the claim had been denied: The condition developed too gradually to be the result of work activities and the work activities were not unaccustomed and did not require sufficient force to give rise to carpal tunnel syndrome. The Review Board upheld the decision of the claims adjudicator. It would not accept the medical opinion of Dr. M and concluded that there was still some question about the diagnosis in this case.

The worker's counsel argued that the Review Board misinterpreted the evidence and should have concluded that scanning activities require the application of force sufficient to cause carpal tunnel syndrome. It was submitted that there was no requirement of forcefulness or unaccustomed work but only that all the activity be repetitive. In support the worker's representative submitted a medical report dated October 2, 1991, from Dr. M, who stated:

Perhaps I should mention to you that in my letter to Dr. H I said that this lady was a cashier and had been for 13 years. In clinical medicine, which is not written for the hair-splitters of the W.C.B., being a cashier in a supermarket says it all. That is far and away the largest group of females that have carpal tunnel syndrome, and indeed members of your union have shown me studies done in Japan I believe, that prove this. It's an accepted phenomenon pretty well around the world in other words.

[The worker] works the till with the right hand, and drags the food across the scanner with her left, and then lifts the bag with sometimes one hand, sometimes with both ...

As for Dr. S's opinion in Memo #11 — this seems to be to meet the criteria of the house rules of the W.C.B. — not the clinical rules of medicine. I get the feeling that these house rules look for a way to let the W.C.B. disclaim responsibility. As I said above, with supermarket cashiers, once you say supermarket cashier in my experience, it's much more likely than not that is the cause of their median nerve involvement.

Also, regarding the forceful aspect — this is not one of the criteria in most of the literature that I have reviewed.

Also submitted on behalf of the worker was an excerpt from *Cumulative trauma disorders: A manual for musculoskeletal diseases of the upper limbs* dealing with factors affecting force. Included in the list are: type of job, properties of the object being manipulated; size, shape and weight of the object; and surface friction.

For assistance in the adjudication of this claim, the panel sought additional medical evidence. On December 12, 1991, the following questions were put to Dr. N, the acting director and senior medical advisor, Occupational Health Department of the W.C.B.:

1. What is the role of force in the development of carpal tunnel syndrome? Is force a necessary prerequisite in all cases to development of the syndrome?
2. How do you define "force"?
3. Is this worker's right carpal tunnel syndrome the result of her work as a cashier?

Dr. N concluded that there was a relationship between the worker's occupational activity as a grocery cashier and the development of her carpal tunnel syndrome. He noted that the onset of symptoms coincided with her duties as cashier and that her symptoms worsened with a change in the nature of her work. He was also persuaded to his position by the fact that her work activities required actions of variable force and by the unilateral development of the syndrome in her dominant hand.

Concerning the role of "force" in development of the syndrome, Dr. N found that it was not essential in all cases. Specifically, he concluded:

Force is not an absolute prerequisite in all cases to the development of carpal tunnel syndrome. As related above, the risk factors for the development of a carpal tunnel syndrome which are occupationally related are several and force is only one factor to be considered. Repetitious use of the wrist involved would certainly be considered a prerequisite to establishing an occupational relationship for carpal tunnel syndrome. This is present in this case. Force is also an important factor to consider such that all other things being equal, for workers involved in frequently repetitious activities, one minimally forceful and one quite forceful, the latter worker would, in general, be at a greater risk for the development of a carpal tunnel syndrome. However, one must consider that there are individual variations in all cases.

Dr. N also pointed out that it is difficult to establish a hard and fast standard for force:

Force is difficult to define with any precision. There is obviously a continuum from minimally forceful to very forceful work activities with a gray zone in between of moderately forceful activities. One would consider the force required to move papers or make digital entries into an electronic keyboard as requiring minimal force whereas the force required to manipulate a sledge hammer would be quite forceful. One might consider the frequent lifting or carrying of less than 5 kilos to be light work whereas the frequent lifting of between 15 to 25 kilos to require moderate to heavy force.

This appeal is allowed. The evidence convinces me of a causal link between the work activity and her carpal tunnel syndrome.

Carpal tunnel syndrome is a repetitive stress injury which develops as a consequence of compression of the median nerve in the wrist. It arises in conjunction with certain physical conditions such as pregnancy or diabetes or as a result of certain repetitive hand motions and flexion activities. It is clear from the literature submitted by the union on behalf of the worker that carpal tunnel syndrome does arise in grocery checkers (Scott Barnhart and Linda Rosenstock, "Carpal Tunnel Syndrome in Grocery Checkers: A Cluster of Work-Related Illness" *The Western Journal of Medicine* (July, 1987) 39). However, general observations concerning the prevalence of a condition are of limited assistance in determining causation in a particular case. Whereas the general observations depict conditions for groups, individual determination of cause depends on specific circumstances that are not dependent upon membership in the larger group. Thus, the fact that grocery store checkers are prone to carpal tunnel syndrome is of limited assistance in determining causation of this worker's wrist problem. This

limitation was noted by the union in its submissions which provided general industry information for background purposes only.

Dr. M goes into some detail about carpal tunnel syndrome and the worker's job duties, but concentrates primarily upon prevalence of the condition in persons who work as grocery cashiers and does not concentrate on the specifics of the condition in this worker; therefore, my decision is based on the analysis of Dr. N in his December 16, 1991 memo which clearly links the worker's job activities with the development of her symptoms. I also find Dr. N's comments on "force" to be very useful and I adopt his comments in total. I also note that his comments support submissions made on the worker's behalf that forcefulness is an important factor in the development of carpal tunnel syndrome but not always as important as repetitiveness. (See Barbara A. Silverstein, Lawrence J. Fine and Thomas J. Armstrong, "Occupational Factors and Carpal Tunnel Syndrome," *American Journal of Industrial Medicine* (1987) 11:343-358.)

Finally, I prefer the comments of Dr. N to those made by Dr. S who did not find the worker's activities forceful and thus capable of producing carpal tunnel syndrome. In particular, I disagree with Dr. S's view that this worker did not engage in forceful activity. At a minimum, much of her daily work required a range of force, from light to medium. This fulfilled the requirements set out by Dr. N, and those set out by Dr. S as well.

Dr. S was also concerned that because the worker had been performing these activities for a number of years, the requirement of unaccustomed activity was not present. Even if the work must be unaccustomed — and I specifically decline to address this issue — I disagree with Dr. S's characterization of the actions as customary. I find they are unaccustomed. A few months prior to the worsening of symptoms, the worker had resumed her cashiering activities but on a much more frequent basis. Prior to that, she had been involved with the cashiering responsibilities on a fairly limited basis and thus the move to the scanner was new or unaccustomed. Finally, I note that the question of "unaccustomed activity" is not a medical issue so that it may be resolved without reference to a medical opinion.

To summarize, the evidence establishes a causal link between the worker's activities as a grocery clerk, in particular her duties as a cashier using the grocery scanner. I find that this activity is not only repetitive, but it is forceful as well. Without specifically dealing with the question of whether the activity must be unaccustomed, I conclude that the scanning activity was unaccustomed in the sense that the worker had been previously involved with other aspects of the grocery business and had done relief cashiering only. This combined with no evidence of a non-work cause and the medical opinions on file convinces me to allow the appeal.

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

Decision of the Appeal Division

Number: 92-0541
Date: February 27, 1992
Panel: Hilrie Reimer
Subject: Asymmetrical Hearing Loss

The worker appeals from Review Board findings dated January 29, 1991. The issue is whether the hearing loss suffered by the worker in both ears is the result of industrial noise exposure and whether he is entitled to a pension. Also at issue is whether any award should include the condition of tinnitus.

The worker's union representative submits that the Review Board was in error by finding that the hearing loss of 25 dB in the right ear, accepted by the Workers' Compensation Board (W.C.B.) best represents the loss of hearing in both ears attributable to noise exposure. He further submits that the W.C.B. should accept not only the 25 dB in the worker's right ear but the 40 dB loss in the left as noise-induced hearing loss.

In summary, the representative states that it is reasonable in the circumstances that the full loss in both ears as a result of industrial noise should be accepted and a pension should be provided on this basis. Further, the pension should include the condition of tinnitus.

The representative makes reference to the material on file that indicates only where there arises a 20 to 25 dB difference between the two ears should some suspicion arise. In this case, the worker's hearing in his left ear is only 15 dB worse than his right and on only one scale, i.e. 1,000 Hz, is there a difference of over 25 dB. The representative points out that the Board's reference material states that a suspicion is only raised if the difference is over 20 to 25 dB; it does not categorically state that the noise cannot be the cause of the difference.

The representative also makes reference to the literature and the Review Board finding that noise-induced hearing loss is "almost always bilateral." The literature does not state that in all cases it is or must be equal bilaterally. He further submits that there is no other rationale to explain the additional hearing loss in the left ear as opposed to the right ear, other than the effects of industrial noise exposure. He cites Dr. S's letter of April 2, 1990 which states:

... He gave a fairly long history of noise exposure including ten years of working in [a sawmill] on a planer machine and 25 years in construction as well as other jobs logging, trucking, and in construction. He had worn ear protection only in the last five years, in the form of Class A ear plugs. There was no other history of relevance to his ears.

This panel of the Appeal Division found the representative's arguments extremely compelling but considered further medical information necessary. Copies of all medical reports and medical history forms and industrial audiometric summaries on file were referred to Dr. G for an opinion. Dr. G has more than ten years' experience in assessing hearing loss claims and was the former director of the Workers' Compensation Board's hearing branch. The panel enquired of Dr. G:

1. In your opinion does the 40 db best represent this worker's industrial hearing loss?
2. Can the tinnitus be related to industrial hearing loss and does it in any way enhance the 40 db hearing loss of the left ear?

Dr. G reviewed all of the documents and in a report dated January 24, 1992 stated in part:

All of the audiograms including his industrial audiogram are consistent one with the others and they all show a hearing loss which increases gradually from the low frequencies with the maximum hearing loss at 4 KHz. in both ears. The hearing loss in the left ear is somewhat greater than that in the right ear particularly at 1,000 Hz. by about 30-35 Db. *If the audiograms from each ear are considered independently they show a configuration that is typical of a noise-induced hearing loss consistent with his occupational noise exposure history despite the differences between the two ears. (emphasis added)*

Although there is no obvious reason for this asymmetry which can be found in the audiometric evidence, such as differences in the acoustic reflexes or the medical examination of the ears, which might influence the susceptibility of the two ears, there is nothing in the medical or audiometric information in the file to suggest any other cause for this difference.

Therefore, in view of the fact that the audiograms in both the right and the left ears are consistent with a noise-induced hearing loss, despite the differences, and in the absence of any medical or audiometric evidence to the contrary, it would be my conclusion that the hearing loss in both ears was caused by his occupational noise exposure. I do not believe that in this case the differences between the ears, by itself, can be considered as valid evidence for any other cause.

As far as his tinnitus is concerned it should be noted that this complaint is an exceedingly common accompaniment of noise-induced hearing loss. I do not think that the report that this preceded his complaint of hearing loss is a valid reason to suspect any other explanation. I do not believe that the tinnitus enhances or can be considered as a cause of the additional hearing loss in the left ear.

In summary, it is my opinion that all of this man's hearing loss is consistent with his occupational noise exposure, there being no other evidence, other than the asymmetry itself, to suggest any other cause. I also think that the tinnitus is an accompaniment of his hearing loss and not due to any other medical cause.

This panel has reviewed all the information on file and finds the overwhelming weight of evidence supports the worker's appeal. The Board's rationale for denying the acceptance of hearing loss in the right ear because there is an asymmetry with the left is outweighed by the other evidence on file. Moreover, the literature on file does not rule out the acceptance of asymmetry in hearing loss claims.

I also accept that in this case the tinnitus is an accompaniment of the industrially induced hearing loss.

THE WORKER'S APPEAL IS ALLOWED.

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



Decision of the Appeal Division

Number: 92-0293
Date: January 28, 1992
Panel: Hilrie Reimer
Subject: Asymmetrical Hearing Loss (#2)

The worker appeals a Review Board finding dated October 16, 1990. The issue is whether he is entitled to receive a pension award in respect to his hearing loss from long-term industrial noise exposure.

On September 21, 1989, the worker made application for compensation for hearing loss. His hearing loss was accepted as compensable and the Workers' Compensation Board provided him with hearing aids.

In a letter dated January 29, 1990, a claims adjudicator advised that he was not entitled to a pension under the provisions of Schedule D of the *Workers Compensation Act*. He was advised that to be eligible for a pension award, the worker must have an average loss of hearing of 28 dB or more, on an average at the frequency of 500 Hz, 1,000 Hz, and 2,000 Hz. The loss accepted on this claim was the average loss of 27 dB in the worker's left ear. This was less than the threshold level of 28 dB, and as a result he was not entitled to a pension.

The worker appealed to the Review Board, stating that the additional loss of hearing in his right ear should be accepted as a result of industrial noise exposure. He argued that the reason for the hearing loss being higher in his right ear than in his left was his use over a period of 15 years of a chain saw which had a muffler on the right side which would always be closer to his right ear than his left. The result of that additional noise, he submitted, would account for the higher hearing loss in his right ear.

The Review Board considered Section 7 of the *Workers Compensation Act*, which specifically sets out the requirements that the hearing loss for *pension purposes* must be greater than 27 dB as set out in Schedule D of the *Workers Compensation Act*. The Review Board also requested a further medical opinion from Dr. W regarding the acceptance of the additional hearing loss in the right ear as noise-induced hearing loss, particularly noting that the difference in hearing loss between left and right ear is only 3 dB. The Review Board received a reply from Dr. W which stated in part:

... although there may only be a 3 dB difference when the average loss at 500, 1000 and 2000 Hz is measured for each ear, it certainly exceeded 25 dB in 1978 and the difference is reduced as the left ear became more deaf due to occupational noise exposure.

... The progression in the left ear is typical of a noise-induced hearing loss whereas that in the right ear is not.

Recommendation

I respectfully suggest that the left ear best represents the hearing loss caused by excessive noise.

The Review Board accepted the opinion of Dr. W and accordingly denied the worker's appeal.

This panel of the Appeal Division requested a further medical opinion from Dr. G. Dr. G, who is a consultant in hearing claims, wrote in part, as follows:

... [the worker] has bilateral sensori-neural hearing loss but some asymmetry is noted. The left ear shows a notch type hearing loss with the maximum hearing loss at 3,000 Hz. The right ear shows a more U-shaped hearing loss with the maximum loss at 1,000 Hz.

With regard to the question as to how much of his hearing loss has been caused by long term industrial noise exposure I think the most significant information is to be found by a study of the industrial audiometric tests, which document the changes in his hearing from 1978 to 1987. Although these may not have been performed under ideal laboratory conditions, I believe they represent a consistent record of the changes in hearing between 1978 and 1987.

The 1978 audiogram shows considerable asymmetry between the two ears ... The left ear shows a typical noise-induced hearing loss consistent with his noise exposure between 1960 and 1978. The left ear shows a completely different configuration, not at all typical of a noise-induced hearing loss, with maximum hearing loss at 1,000 Hz which is almost certainly a combination of noise exposure and some other cause. Since noise would have affected both ears to a similar if not quite identical degree it can reasonably be assumed that the amount of hearing loss in the left ear represents the noise-induced hearing loss in both ears at this time. If this hearing loss is

subtracted from the total hearing loss in the right ear the residual non-noise hearing loss shows a single frequency hearing loss of 30 db at 1,000 Hz ... Such sharply notched hearing loss at a single frequency is not rare in otherwise normal individuals and is usually considered to have been present since birth or infancy and is not noticed by the patient until their first hearing test. This 1,000 Hz. loss shows no significant change between 1978 and 1987, which again rules very strongly against it having been caused by industrial noise exposure. (I regard the zero at this frequency in 1979 as most likely a recording or computer error in reading the test results, because every other audiogram shows a consistent loss with no significant change at 1000 hz.)

If the progression of the hearing loss between 1978 and 1987 is examined it shows a steady significant increase in severity at 2000, 3000 and 4000 Hz. in both ears which would be entirely typical of industrial noise exposure. The differences between ears at these frequencies would be no more than usually found in most noise exposed workers. Again it is noted that there is no significant change at 1,000 Hz.

Based on this evidence, my conclusion is that the hearing loss in the left ear best represents the extent of the noise-induced hearing loss in both ears. The additional loss at 1,000 Hz in the right ear can be said, *with a very high degree of certainty*, to be due to *other causes* for the reasons outlined above (emphasis added)

This panel accepted Dr. G's opinion which concurs with Dr. W's view that the loss in the left ear best represents the worker's noise-induced hearing loss. No pension is payable because the loss in the left ear is below the minimum hearing loss standard of 28 dB required by law, before a pension can be provided. The worker is nevertheless entitled to hearing aids.

THE APPEAL IS DENIED.

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



Decision of the Appeal Division

Number: 92-0500
Date: February 26, 1992
Panel: Hilrie Reimer, Verna Ledger, Derrick Spooner
Subject: An Award for Female Sexual Dysfunction

The employer appeals from Review Board findings dated July 18, 1989.

[This decision has been edited to focus on the issue of the granting of an award for female sexual dysfunction.]

The worker demonstrated symptoms of cervical myelopathy and her award of 5% of total disability was to compensate for altered station and gait.

The worker appealed the decision to the Review Board, maintaining that her functional impairment was greater than that assessed by the Workers' Compensation Board.

Prior to making a final decision, the Review Board, following receipt of a consultation report from the attending physician, referred the matter back to the disability awards medical advisor. The attending physician noted complaints of sexual and bladder dysfunction and complaints of upper limb as well as lower limb problems. Based on the A.M.A. guide, the attending physician assessed the worker's overall disability at 35% of total.

The worker was reassessed by Doctors T and G. P who found, based on the A.M.A. guide, the worker's upper and lower limb impairment could be assessed at 10% of total disability. No recommendation was made in relation to the bladder and sexual dysfunction. It was suggested by Dr. G. P that the worker undergo M.R.I. and urodynamic studies.

The Review Board agreed with Dr. T and Dr. G. P that the worker's upper and lower limb impairment was 10% of total disability. In addition, the Review Board applied their judgment, with reference to Dr. A. P's findings and the A.M.A. guide, that impairment for bladder should be assessed at 10% of total disability and sexual dysfunction at 5% of total disability.

Doctors T and G. P, whose assessment is not being challenged by the employer, recommended that further investigation be undertaken to assess the worker's bladder and sexual dysfunction. These studies were not undertaken by either the Board or the Review Board. In order to consider the accuracy relating to the percentages applied for bladder and sexual dysfunction, the panel requested the vice-president of Medical Services to arrange the appropriate referral.

The worker's sexual functioning status was evaluated by Dr. S on November 4, 1991. Dr. S has been a full professor in the division of sexual medicine, Department of Psychiatry at U.B.C. since 1978. He is also the director of the Inpatient Services of the Sexual Medicine Unit, University Hospital – Shaughnessy site and consultant in sexual medicine at the G.F. Strong and Pearson centres of the B.C. Rehabilitation Society. His teaching, research and clinical work is focused on disorders of sexual functioning which occur following injuries of the spinal cord, and in association with medical and surgical conditions. Dr. S notes that the attending physician had stated that his evaluation of the worker's sexual function as "mild impairment," rated 5 to 10%, was "on the low side."

After extensive investigation, Dr. S's diagnosis as stated in his report is as follows:

It is my opinion that ... [the worker] is suffering from certain sexual impairments, sexual disabilities and sexual handicaps. In these terms ... [the worker's] documented sexual impairment and disabilities have resulted in 100% sexual handicap.

Dr. S explains the diagnosis in part as follows:

Sexual impairments refer to structural or functional changes in sexual physiology and anatomy.

... [the worker's] genital structures are normal, but the physical examination results suggest that she has lost her capacity for orgasmic reactions. The critical pathways for orgasmic experiences include the lateral spinothalamic tracts (conducting the pain, heat and cold sensations) and the corticospinal tracts (conducting motor commands). In her case both of these *nerve pathways have been at least partially affected.* (emphasis added)

The employer has questioned the validity of an award for sexual impairment on the basis that reports on file indicate that subsequent to the injury the worker still had sex once a week. Dr. S explains that, because of the worker's physical impairment, the sexual "interaction" became reduced over the 2 years following the injury to about 1 per 4-6 weeks until the husband left for another partner some time in 1988/89. Dr. S describes a crisis situation:

She desperately wanted some feeling of intimacy. Intercourse was their way to communicate these feelings. They attempted intercourse. During their attempted embrace she again could not tolerate the irritating burning sensations on her body, had urinary urgency, had to leave the bed; he became frustrated with her and they ended up saying "forget it" meaning that "sex" just did not work for them anymore ...

Dr. S emphasized that:

Her history suggests that a degree of sexual arousal might be still possible, but even this will be interrupted by strange sensations arising from her body, *urinary urgency and hyperreflexia* in the extremities. (emphasis added)

The prognosis for improvement is less than hopeful. Dr. S states:

Assuming that ... [the worker's] spinal cord dysfunction will remain unimproved, her sexual impairment and *her sexual disability described above will remain. As things are now ... her sexual handicap will lead to a lonely and embittered existence.* (emphasis added)

Reasons and Findings

This panel of the Appeal Division has reviewed the findings of the Review Board with reference to law and policy.

In comparing Dr. S's evaluation with previous assessments on file, the panel was guided by Board policy as outlined in the *Rehabilitation Services and Claims Manual* ("Manual"), #39.43. The principles outlined in this item, however, relate only to male workers. Although the governors have not established a schedule on which to base an award for female sexual disability, they have accepted in principle that an award is payable where an injury causes damage to the sexual organs of a female. [Editors' note: See Decision No. 157, *Workers' Compensation Reporter*.] The *Manual* lists three categories in which cases involving male impotence are considered:

-
1. Impotence resulting from paraplegia, quadriplegia, or similar disabilities;
 2. Where a physical injury results in psychological disturbance, and the impotence is a symptom or consequence of the psychological disorder;
 3. Where a compensable injury or industrial disease has caused permanent damage to the genital organs resulting in impotence.

Dr. S found the worker has permanent nerve damage to the genital organs, resulting in loss of sensation and orgasmic ability. He concludes that her impairment is total and permanent. This panel accepts Dr. S's expert evidence. We find that the worker's sexual impairment is most appropriately compared to cases considered in category 3. The worker is therefore entitled to a permanent partial disability award.

Item #39.43 of the *Manual* further provides:

As with other kinds of physical impairment, a standard percentage rate is established.

The age adaptability factor that is used with regard to other disabilities is not used with regard to impotence. Instead there is a scale to provide percentages of total disability that are higher for a younger worker, and that decrease according to age at the time of injury.

The worker was under 45 years of age at time of injury, and therefore, according to this section of the *Manual* is entitled to 15% of total disability for sexual dysfunction.

The *Manual* stipulates that:

Once the percentage rate has been established in respect of the injury to a particular worker, then of course that percentage rate remains constant for that injury to that worker unless there is a subsequent change in the condition of the injury.

The percentages mentioned above relate to cases of complete impotence, but uncomplicated by other factors. If there are additional injuries or problems, such as *urinary dysfunction*, additional consideration must be given to the additional problems. (emphasis added)

This panel accepts the Review Board's finding of 10% of total for the worker's functional impairment as a result of her bladder problem, which is consistent with Dr. S's report and the guidelines provided in the A.M.A. guide. This panel also accepts the 10% awarded for upper and lower extremity impairment (although this was not challenged by the employer) as assessed by Doctors T and G. P and accepted by the Review Board.

As a result of the further medical investigations undertaken, this panel finds that the worker is entitled to an increase in her disability award from 25% to 35% of total.

Conclusion

The employer's appeal is denied. The file is returned to the Compensation Services Department for the appropriate adjustments to the worker's disability award.

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



Decision of the Appeal Division

Number: 92-0473
Date: February 21, 1992
Panel: Connie Munro, Walter N. Peain, Derrick Spooner
Subject: A Claim for Epicondylitis (#3)

This is an appeal from the decision of the Workers' Compensation Review Board dated September 6, 1991, which upheld the claims adjudicator's decision of May 23, 1990. The Review Board rejected the compensability of the worker's lateral epicondylitis of the right elbow.

The worker is a 46-year-old butcher, more particularly described as a ham boner. His job duties involve repetitive cutting of large pieces of meat with a 10-inch knife at the rate of approximately one ham per minute. The worker is said to hold the knife with his right hand with a fist-type grip and pull the knife toward his body in an "S" shape following along the contour of the bone. The motion involves a twisting movement of the arm, particularly the lower arm.

While the worker was deboning a ham on April 2, 1990, he felt a pain on the lateral side of his right elbow. Thereafter, the symptoms worsened and extended from his elbow into his lower arm. This worsening was felt primarily at work while performing his regular work activities and eased when he was away from work. By April 6, 1990 the pain was more constant and the worker reported to the first aid attendant. The report of the first aid attendant describes the worker as suffering from weakness, pain and some swelling of his right arm.

A co-worker of the appellant provided testimony at the Review Board hearing describing the duties of a ham boner and stating that the worker was the "fastest ham boner he knows." The Review Board accepted the evidence with regard to the speed with which the worker boned hams and the fact that the job duties placed great stress on the wrist and elbow.

There was no evidence of any non-work activity thought to be causative of epicondylitis. The Review Board had evidence before them from the attending physician, Dr. N, which stated:

The patient presented in my office initially with radial epicondylitis, which can be classified either as an occupational disease if there is a sustained stressing of the right forearm, or following an acute injury. The patient required physiotherapy, anti-inflammatory medication and was eventually able to return back to work. There was nothing in the patient's history to suggest that this was not a work related injury.

There was a further medical report on the file from an orthopedic specialist. It also related the worker's right elbow problem to his employment, however, described an incident where the worker had "... hit the back of his right elbow against a bone machine."

The report of the specialist did not state an opinion as to whether the epicondylitis in this case was related to repetitive stress. No medical evidence was on file from a Board doctor. The only medical evidence before the Review Board was supportive of the causative significance of the worker's employment to his epicondylitis. Nonetheless, that evidence was rejected by the Review Board panel who stated:

We cannot agree with Dr. N that epicondylitis necessarily arises as a result of acute injury or 'repetitive stress' in or out of the work place.

The Review Board panel based that conclusion largely on their interpretation of medical journal articles submitted by the worker's counsel.

To assist the Appeal Division in considering this case, an opinion was sought from Dr. J. N, B.Sc., M.D., M.H.Sc., F.R.C.P.C. (Occupational Medicine), acting director and senior medical advisor to the W.C.B.'s Occupational Health Department. The panel asked Dr. J. N to provide:

... an opinion as to the causative significance of this worker's activities as a ham boner in the development of his epicondylitis.

Dr. J. N's opinion is contained in a memo dated January 22, 1992 which states, in part:

For a lateral epicondylitis to be occupationally related, I would expect there to be a history of frequent repetitive movements of the involved musculature, particularly the extensors of the forearm/wrist and/or the supinators/pronators of the hand. The degree of

force involved in the work activities must be carefully considered. Unaccustomed work activities and/or a history of sudden strain may also be relevant.

...

The process of ham deboning would involve frequently repetitious and forceful use of the worker's extensor musculature, particularly of his dominant hand. Though I would not conclude that the work is entirely unaccustomed to this worker, I note that there was some question of 'heavier' hams being manipulated on the day of the onset of the symptoms. Regardless, I would not conclude that the relatively accustomed nature of his work activities would preclude a reasonable occupational association.

In consideration of the risk factors for the development of a right lateral epicondylitis, I must conclude that this worker's medical diagnosis of right lateral epicondylitis would be reasonably related to his occupational activities as described.

This panel prefers the medical opinions of Doctors N and J. N to the analysis provided in the Review Board findings. In the circumstances we have no difficulty finding that the worker's right epicondylitis was a consequence of his work activities.

The foregoing reasons are clearly sufficient to dispose of this appeal. Much of Review Board findings, however, were devoted to a critical analysis of a previously published Appeal Division Decision No. 91-0014 regarding epicondylitis [(1991) W.C.R. 1, p. 57]. Further comment is, therefore, necessary.

The Review Board panel has misconstrued Decision No. 91-0014. The epicondylitis decision raised two general matters. The first relates to the burden of proof and the second concerns the adjudication of epicondylitis as an example of a repetitive stress injury. Decision No. 91-0014 stated:

... it is undisputed that this worker performs forcible, frequent and repetitive movements of the forearms and wrist in the course of her employment. There has not been any non-occupational activity by this worker implicated as a likely cause of epicondylitis.

The Review Board findings interpreted this statement as creating a general presumption in favour of a claim.

They allege that the published decision stands for the proposition that if a worker performs forcible, frequent and repetitive movements of the forearm and wrist that this evidence is sufficient to find that the epicondylitis is work related unless there is evidence which implicates some non-work activity. It would seem obvious, however, that the mere fact that the decision makes the point that there was no evidence of a non-work cause does not mean that there was reliance on a general presumption in favour of the claim. An absence of evidence of non-work factors is always a relevant factor to be considered. On the issue of burden of proof the published decision ought simply to be regarded as a judgment on the facts of the claim under consideration.

With regard to epicondylitis generally the published decision makes the point that the governors' policy recognizes that a claim is acceptable if the condition is due either to repetitive stress or a single traumatic event. In addition, the prerequisite that the work activity be "unaccustomed" found in Schedule B with reference to other repetitive stress injuries (tendinitis, tenosynovitis) is not applicable to epicondylitis.

The Review Board panel interprets those statements in Decision No. 91-0014 to mean that no regard at all should be had to whether there has been any change in the work activity prior to the onset of the epicondylitis. This is an inaccurate representation of the published decision. Whether the work activity is unaccustomed is simply one factor to be weighed.

Clearly any person judging a case, whether in Compensation Services, the Review Board, or the Appeal Division, ought to consider all available evidence that may be relevant to an issue under consideration. Counsel's submission to the Review Board correctly characterized the interpretation that ought to be given to the term "unaccustomed" as discussed in the published decision when she stated:

As pointed out in decision #91-0014 of the Appeal Division, there is *no requirement* to show unaccustomed activity. (emphasis added)

The adjudication of causation issues addresses the relationship between the employment exposure and a worker's disability. Mr. Justice Sopinka in *Snell v. Farrell* (1990) 72 D.L.R. (4th) 289 (S.C.C.) explained the concept of causation in the following terms:

Causation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former. (p. 298)

All decisions on causation within the workers' compensation system must consider what evidence supports a work relationship as opposed to what evidence supports a non-work relationship. To satisfy the requirements of the *Act* there must be some positive evidence to show that the work activity played a significant role in causing the injury. It is not enough to say that if we do not know what caused it, then it must be the work. That is speculation, not evidence.

The Review Board findings stated:

The difficulty is that experts have not agreed that epicondylitis necessarily arises from external trauma. Many epicondylitis cannot be traced to any external cause whatever.

The Review Board panel contends that because differing medical opinions exist regarding the causes of epicondylitis:

... anyone who supports with confidence any particular theory of a general cause or precipitating factor in the onset of epicondylitis, is merely advancing a personal preference, not reaching a conclusion based on evidence.

The governors' policy with respect to the standard of proof required in claims decisions is set out in *Reporter Decision No. 52*. There is no burden of proof on the worker to prove a claim nor is there any presumption in the worker's favour. The claims adjudicator, in the first instance, collects information and examines it to see whether it is sufficiently complete and reliable to arrive at "a sound conclusion with confidence." If, on weighing the available evidence, there is a preponderance in favour of one view or the other that is the conclusion that must be reached.

There may, however, be situations where gaps exist in medical knowledge. For example, in some instances the evidence may strongly suggest that a condition is caused by a work activity and no available evidence point to an alternative possibility. In other instances, however, the condition might arise without apparent cause. Medical research may not have identified precisely all of the relevant causal factors. The reasoning of the Review Board panel would reject the claims first described as speculative.

It is quite possible, however, in many instances, to reach "a sound conclusion with confidence" without applying scientific standards of proof requiring the negation of all other rational possibilities. If the Board was to insist on conclusive medical evidence in every case requiring medical expertise they would, in effect, be placing a burden of proof on the worker. Either that or they would be applying a higher standard of proof than the balance of probabilities.

The 1987 Ombudsman's *Workers Compensation System Study* discussed this issue. Two of the Ombudsman's recommendations were:

That the standard of proof used by the W.C.B. in deciding claims be clarified to require the recognition of the best available hypothesis supported by the evidence.

and

That the W.C.B. clarify its policy regarding the interpretation of Section 99 of the *Act* to provide that, on an issue where there is more than one hypothesis supported by evidence with roughly equal weight, the issue shall be resolved in accordance with that hypothesis which is favourable to the worker.

These recommendations did not propose a change in current policy. Neither do they suggest there is an onus on the Board to prove that a condition is not work related before it can reject a claim. Further, they do not suggest that a possibility or hypothesis in favour of the worker should be accepted if there is no evidence to support it or if there is stronger evidence supporting a contrary hypothesis. The recommendations do, however, urge a realistic assessment of the available medical evidence and expertise. They are completely consistent with *Reporter Decision No. 52* and the terms of the *Act*. Moreover, this approach to adjudicating questions of causation is in accord with the standard expressed by the Supreme Court of Canada in *Snell v. Farrell*, where Mr. Justice Sopinka said:

Causation need not be determined by scientific precision. It is, as stated by Lord Salmon in *Alphacel Ltd. v. Woodward*, [1972] 2 All E.R. 475 (H.L.), at p. 490 '... essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory.'

It is clear that in the present case the worker's epicondylitis is compensable.

THE APPEAL IS ALLOWED.

Decision of the Appeal Division

Number: 92-0070
Date: January 10, 1992
Panel: Alison H. Narod
Subject: A Claim for Lyme Disease

The worker, a self-employed miner, appeals Review Board findings dated December 11, 1990. The issue is whether his chronic borreliosis, a variant of Lyme Disease, arose out of and in the course of his employment.

The Review Board found that there was insufficient evidence to conclude that there was a relationship between the worker's condition and his employment. It acknowledged that his employment might place him at greater risk than the public at large, but it concluded that it would be speculative to find that the worker contracted Lyme Disease while in the course of his employment.

The worker appeals the Review Board's findings. He believes that the Review Board failed to take important pieces of information into proper consideration. He says that, on two separate occasions in 1985, he noticed bites of unidentified arthropods and also a feeding tick while at the cabin at his place of work. He also says that he did not hunt or fish in the area in 1984-85. Rather he stayed and worked his claim, except when he went out for supplies. He did not have much time for extracurricular activities.

He supplied a number of letters from individuals supporting his contention that he was not known as a hunter or fisherman and did not take holidays. Additionally, he supplied a letter dated March 18, 1991, from his attending physician, certifying that the worker has a lesion on his right upper lip. The doctor wrote that he cannot prove the cause of the lesion.

The worker submits that the probability of contracting chronic borreliosis due to the nature of his job is more likely than not. He also says that at the very least the issues are evenly balanced and that Section 99 of the *Workers Compensation Act* should be applied in his favour.

Decision and Reasons

There is no doubt that the worker has chronic borreliosis. The issue is whether the worker's acquisition of this disease arose out of and in the course of his employment. The difficulty in this case is that the evidence is insufficient to conclude, with confidence, where or when the insect bite that transmitted the disease occurred.

An article titled "Lyme disease in Canada" states that it is usually transmitted to humans by infected ticks, although in endemic areas biting flies and mosquitoes have been implicated. Ticks also infect numerous types of domestic and wild animals. Ticks pass the infection during the warm months, May to August. Another article, titled "Imported Case of Bannwarth's Syndrome (Chronic Lymphocytic Meningoradiculitis or Lyme Meningitis)," states that the tick, *Ixodes dammini*, feeds during the summer on mice or larger mammals such as dogs, deer or human beings.

According to the worker's written submission to the Review Board, ticks can be found on grasses, branches and leaves. They wait for a host to pass by and they attach themselves to that host in order to advance to their next stage. Most ticks need a blood meal to proceed from larva to nymph, nymph to adult, and the adult needs a blood meal before laying eggs. These ticks are called "3 host ticks." In the United States, it is the nymph that does the most infecting as the larva has picked up infection from the mouse which is thought to be the principal reservoir of infection in wildlife. An article titled "Lyme Disease A summary of the Occupational Health Concern" confirms that ticks have more than one host and can spread the disease throughout their life cycle.

The worker first inquired about making a claim in November of 1988. He related onset of his condition to 1985. However, he thought he was bitten by something which he suspected was a spider on the right side of his spine and was bitten by an unknown insect on his right wrist. He was not sure when the relevant bite occurred and placed it either in the summer or fall of 1985. He recalled having a lesion on his upper lip at some time before his health deteriorated in 1985 which he, in 1990, concluded was a tick bite.

A W.C.B. occupational health physician reviewed the claim on April 17, 1989. He thought that the likely route of transmission in this case was from the worker's dog, who accompanied the worker during his stay at his claim site and who ran through the brush and chased muskrats in the worker's mine. The dog liked to sit on the worker's lap. The worker acknowledges that a pet can pass a tick. Indeed, the worker speculated that his dog could have carried an infected tick. (He also notes that the dog developed "bad arthritis" by the fall of 1986.)

A professor of medicine at the University of California wrote in a letter dated June 15, 1990 that it is very unlikely that tick bites arise from contact with a dog's fur in the setting of heavy direct exposure to the tick's habitat. He thought the probability that the worker's illness arose from natural acquisition was at least 90%.

In view of the foregoing, the worker could have acquired the disease from a number of types of insects. If it was a tick, the tick could have been found on wild or domestic flora or fauna. If it was another insect, the transmission of the disease could have taken place outside the May to August timeframe for tick bites. The worker is uncertain when the bite occurred. Therefore, we cannot be confident about where it occurred.

I agree with the Review Board that although the worker might have been bitten by a diseased insect during the course of his employment, he also might have been bitten by one at any other time, as he lives in a rural area which most likely has as high an incidence of insects which are thought to be carriers of the disease as the area where he worked. As the Review Board noted, there was no evidence that two of the three other people in the region who the worker said had the disease worked outdoors.

Despite the letters provided by the worker and despite his contention that he carried his goldpan with him wherever he went and was thereby always in productive employment, I do not accept that the worker was acting "out of and in the course of his employment" throughout the period that he resided on his claim. I agree with the Review Board that the majority of his work was done underground, where there would be very little likelihood of being bitten by an infected insect. His non-work activities may have placed him at greater risk than when he was working.

The worker's memory does not help us. He candidly admits that he has memory problems. It is not of great assistance that in 1990 he cast his memory back to a lesion that occurred years before and, because of recently gained knowledge, concluded it was the result of a bite by an infected tick. He has not placed the date of that bite. Nor can we be comfortable that it was in fact caused by a tick, let alone an infected one.

It is simply speculation and conjecture to conclude that the worker's acquisition of the disease arose out of and in the course of employment. I agree with the Review Board that the evidence is not evenly balanced and so I would not apply Section 99.

THE APPEAL IS DENIED.

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



Decision of the Appeal Division

Number: 92-0412
Date: February 14, 1992
Panel: Alison Narod
Subject: Work-Required Motion

The worker appeals Review Board findings dated May 14, 1991. The issue is whether the worker sustained a back injury arising out of and in the course of his employment on February 14, 1990.

The injury occurred on February 14, 1990. The worker was employed as a heavy-duty mechanic. His back was fine before he started his shift that day. He changed the cylinders in a piece of heavy equipment. This work was somewhat awkward, but he did not feel any untoward sensations in his low back while engaged in this activity. According to the Review Board:

At approximately 11:00 a.m. [the worker] needed some solvent in order to clean some mechanical parts. He bent over at the waist to pick up a five gallon pail containing Varsol. This had been cut down to approximately half of its original height. While in the process of bending forward, and in the absence of any slip, trip, or any awkward motion, he experienced a sudden onset of pain in his low back. In response to questioning by the panel, [the worker] confirmed that he had not yet touched or picked up the container of Varsol. He was merely bending forward preparatory to doing so.

The worker's condition was ultimately diagnosed as a low back strain and possible disc herniation with no nerve impingement signs. The worker had two previous back injuries, one which involved a bilateral L4-5 discectomy and documented surgical findings of stenosis at L5-S1 and L4-5, as well as anterior bulging of the L3-4 disc. A W.C.B. medical advisor felt that the current injury was not related to the prior ones.

On February 28, 1990 the claims adjudicator advised the worker that his claim was denied. It was noted that the worker was simply bending over at the waist when he experienced his problems. This type of movement is done many times a day both within and without the work situation. The claims adjudicator found there was nothing

particularly significant about the employment circumstance which would show that the work activity was causatively significant. In a memo of the same date, it shows that the claims adjudicator concluded that the worker's employment and duties had no causative significance in producing his condition because the worker was involved in a "normal body movement – bending over at the waist." It is clear, therefore, that the reason the claim was denied was because the act of bending over was a "normal body movement."

The Review Board upheld the denial of the claim.

The Review Board noted that an injury is not compensable simply because it happened at work, it must also arise out of the employment. That is, the employment must have some causative significance in the onset of symptoms. The Review Board commented that it was not the activity of lifting the pail of solvent that caused the back pain. The worker felt the symptoms before he even came in contact with the container. It wrote:

In [the worker's] case, he was simply bending forward preparatory to picking up a container from the floor. This, in the opinion of the panel, constitutes a natural body motion as described by the commissioners, and it is simply coincidental that the back pain came on while [the worker] was bending at work, rather than while he was bending elsewhere. The work activity itself had no causative significance in the onset of the symptoms.

I observe that virtually all body motions are natural body motions and some are more awkward than others to perform. Body motions such as bending are typically performed both at work and home, although a particular worker's duties may require him to perform them at work.

The compensability of an injury that occurs at work does not turn on whether it was awkward or unusual, although such features may assist in the adjudication of a claim. Rather, it turns on whether required work duties, whether awkward or not, have some causative significance in producing the injury. In this case, there appears to be no dispute that the act of bending had causative significance. The issue revolves around whether the bending activity was work-related.

The fact that a specific activity (including an apparently insignificant one) is a natural one that is performed at work and elsewhere does not mean its occurrence at work is thereby "coincidental." One must examine the whole of the facts, including whether the activity is work-required.

This worker is a heavy-duty mechanic. He is required to perform bending activities as part of his work. He had been performing awkward activities earlier in the day of injury. He then bent over to pick up a pail of solvent. The object of this manoeuvre was to use the contents of the pail to clean some equipment. The worker suffered the onset of back pain while bending over and before lifting the pail.

The Review Board agreed that the lifting of the pail was part of the worker's employment duties. I have trouble with the notion of separating the lifting of the pail from the necessary preceding activity of bending over to lift it up. This is an unduly technical and artificial distinction that is not supportable. The whole series of motions involved is work-required.

The Board's policy gives some guidance. Decision No. 145 of the *Workers' Compensation Reporter Series* concerns a substantially similar fact situation. The worker worked on an assembly line. Her normal job involved handling cabinet doors piled on a rolling pallet. At the time of injury, the pile of doors was just about finished, requiring her to bend down lower. She felt the onset of back pain while bending over. She was not lifting at the time. The medical opinion was that the worker's preceding lifts had not caused her strain. The medical evidence supported the view that the act of bending down caused the injury.

The commissioners noted:

A person does not normally suffer a disability simply as a result of bending down. For this reason, a claim for disability resulting from the simple act of bending down should not be accepted without further enquiry. But neither is there any rule requiring such a claim to be denied. It should be examined and evidence obtained to reach a conclusion on whether the disability did result from the act of bending down, or whether it was caused by other factors, such as a deteriorating condition of the back that would have been likely to result in disability about that time regardless of what the worker was doing.

(I note that, in this worker's case, the medical opinion does not reveal another cause. It was felt that the worker's injury was not related to his prior claims.)

In Decision No. 145, the commissioners commented that the facts in that case were an example of the principle that if a job requires a particular motion, and that motion results in injury, the injury arises out of the employment and is compensable. The injury resulted from bending down and bending down was a required movement of her job.

This principle is reflected in Item #15.20 of the Board's *Rehabilitation Services and Claims Manual*, "Injuries Following Motions at Work." It confirms that the mere fact that a natural motion takes place at work does not render a resultant injury compensable. It is necessary to distinguish between work-required and non-work-required motions, although it may often be difficult to do so. It is only where a work-required motion has causative significance in producing an injury that the injury is compensable.

Item #15.20 notes that such claims must be adjudicated with care and may require the exercise of judgment, particularly in cases where it is difficult to draw a line. The policy rejects the position that claims will only be accepted where there is some demonstrable act on the worker's part that is so directly connected with his work that the relationship is indisputable. The present inability of medical science to accurately pin-point the etiology of a great variety of spinal problems leads to a conclusion that, in appropriate circumstances, such incidents should be seen as causative and, if they occur while the worker is at his job, the resulting injury must be compensable. On the other hand, simple acts, such as walking up stairs or turning one's head to speak to a co-worker fall so clearly into the realm of "natural" or "normal" bodily functions that the only connection between them and the employment is the coincidental fact that the worker was on the job at the time.

Item #15.20 goes on to state that simply by adding a few more facts to these situations or others, it might well be possible in individual cases to find that a work relationship existed. The following excerpt is apposite:

Similarly, if a worker *bends* to pick up an object, and that motion is required by his job (e.g. a piece of debris while on clean-up, a piece of mail while working in the mail room, an item of equipment or machinery in a plant) and, *unrelated to the lifting of the object*, suffers an onset of disabling pain, that apparently insignificant motion might also establish some work relationship. In either of these cases, the motion although natural was performed as a matter of the worker's duties and may in that sense gain "work" status. (emphasis added)

As noted, the dispute is whether the act of bending down was a work-required motion and not whether that act caused the injury.

In view of the foregoing, I conclude that the act of bending down was a work-required motion.

THE APPEAL IS ALLOWED.

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

REPORTER

W.C.B. of B.C. Investment Fund – Statement of Investment Policy

Date: March 16, 1992

Purposes of the Fund

The purpose of the fund is to secure the Workers' Compensation Board of British Columbia's obligation to make benefit payments to claimants without burdening employers in future years for the costs of previously incurred injuries.

Statement of Investment Policy

The policy of the Workers' Compensation Board of British Columbia is to seek higher investment returns, increased safety for its investment funds and reduced volatility of investment returns through diversification into additional investment classes.

Scope of Investment Policy

The purpose of this document is to clearly indicate responsibility allocation between the Investment Committee and the investment managers by:

1. Stating the total return goal of the investment fund
2. Stating the asset mix components to be used to achieve this goal
3. Stating performance benchmarks and standards for each investment management position in the W.C.B.'s investment management structure

Total Return Goal

The total return goal is to be slightly higher than the total return used by the W.C.B.'s actuary in his calculations. A total fund return of the Consumer Price Index plus 2.5% over a three to five year investment horizon is the goal adopted by the Investment Committee.

Asset Mix Components

1. *Equities*: includes all qualifying equity instruments
2. *Debt Securities*: includes all qualifying debt instruments

Investment Committee

An Investment Committee consisting of W.C.B. representatives plus at least two outside members will be appointed by the W.C.B.'s president and chief executive officer to carry out the above policies. The Investment Committee reports to the W.C.B.'s president and chief executive officer.