

## WORKERS' COMPENSATION REPORTER

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- *Blue* — *Governors' Decisions*
- *Green* — *Appeal Division Decisions*
- *Pink* — *Miscellaneous*
- *Purple* — *Review Board Findings*
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## Decision of the Governors

**Number:** 20  
**Date:** July 13, 1992  
**Subject:** Approval of Proposals to Amend *Rehabilitation Services and Claims Manual* — CM023/CM024

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WHEREAS the Workers' Compensation Board is authorized by Section 16 of the *Workers Compensation Act* to provide certain vocational rehabilitation services to injured workers and dependants of deceased workers;

AND WHEREAS Chapter XI — Vocational Rehabilitation Services — of the *Rehabilitation Services and Claims Manual*, which sets out policies and practices with respect to the provision of vocational rehabilitation services by the Workers' Compensation Board, requires amendment;

AND WHEREAS the president and chief executive officer of the Workers' Compensation Board has forwarded to the governors of the Workers' Compensation Board an amendment proposal identified as CM023 in the meeting binder for the governors' July 13, 1992, meeting, which:

1. reorganizes Chapter XI under revised subject and topic headings,
2. deletes from Chapter XI procedural and descriptive content unrelated to policy,
3. rewords Chapter XI to make it clear, consistent, current and gender-neutral,
4. adds to Chapter XI elements of current W.C.B. policy and practice, and
5. recommends policy amendments to Chapter XI considered necessary or desirable in the interests of improved delivery of existing client services;

AND WHEREAS the revised Chapter XI is to be the foundation of future public consultation and policy review and development;

AND WHEREAS the governors have requested that the president and chief executive officer provide a follow-up review and report on the effects of implementation of the revised Chapter XI before September 1, 1993;

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AND WHEREAS the president and chief executive officer has also forwarded to the governors an amendment proposal identified as CM024 in the meeting binder for the governors' July 13, 1992, meeting, consisting of a list of amendments to footnotes and cross-references in the *Rehabilitation Services and Claims Manual* which will be required if the governors approve amendment proposal CM023:

NOW THEREFORE THE GOVERNORS RESOLVE THAT they approve amendment proposals CM023 and CM024 as contained in the meeting binder for the governors' July 13, 1992, meeting;

AND THE GOVERNORS FURTHER RESOLVE THAT, in order to provide time to prepare revised Chapter XI of the *Rehabilitation Services and Claims Manual* for printing and to orient W.C.B. staff and community stakeholders, the amendments set out in amendment proposals CM023 and CM024 will come into effect on August 1, 1992.

*Editors' note: Manual amendments are presented to the Board of Governors in tabbed binders and are numbered sequentially (e.g. CM023 and CM024 represent Claims Manual amendment 23 and 24). The above resolution was approved on July 13, 1992. The amendments to the Rehabilitation Services and Claims Manual were distributed to Manual subscribers in July and August 1992.*

## Decision of the Governors

**Number:** 21

**Date:** June 1, 1992

**Subject:** Occupational Safety and Health Regulation Review:  
Reimbursement of Expenses for Members of O.S.H. Regulation  
Review Subcommittees

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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* (collectively "the Regulations");

AND WHEREAS, on January 7, 1992, the governors adopted the document entitled "Review and Development of Occupational Safety and Health Regulations" which defines the process by which the governors will review the *Regulations*;

AND WHEREAS, on February 3, 1992, the governors appointed a Regulation Advisory Committee to oversee, under the direction of the governors, the review of the *Regulations* and the governors provided for the payment of a per diem allowance to, and the reimbursement of expenses for, Regulation Advisory Committee members;

AND WHEREAS the document entitled "Review and Development of Occupational Safety and Health Regulations" contemplates that the governors' Committee for Regulation Review will appoint specialty Subcommittees to address specific areas of occupational safety and health regulation;

AND WHEREAS the governors consider it appropriate that members of the specialty Subcommittees be paid the same per diem and be reimbursed for expenses in the same manner as members of the Regulation Advisory Committee;

NOW THEREFORE THE GOVERNORS RESOLVE THAT persons appointed by the governors' Committee for Regulation Review to serve on specialty Subcommittees as part of the Occupational Safety and Health Regulation Review process shall be paid a per diem allowance of ONE HUNDRED SEVENTY-FIVE DOLLARS (\$175.00) and shall be reimbursed for travel and other reasonable expenses for attendance at Subcommittee meetings.



## Decision of the Governors

**Number:** 22  
**Date:** June 1, 1992  
**Subject:** Abolition of Silicosis Fund

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WHEREAS Part One of the *Workers Compensation Act* creates a statutory scheme for paying compensation and providing rehabilitation to workers who sustain injuries arising out of and in the course of their employment, to workers who suffer from industrial diseases and to dependants of workers whose deaths result from their employment;

AND WHEREAS Sections 36 and 39 of the *Act* require the W.C.B. to create and maintain from compulsory assessments on employers in industries covered by Part One of the *Act* an "Accident Fund" for the payment of "compensation, outlays and expenses" under Part One;

AND WHEREAS Section 41 of the *Act* provides that:

- (1) . . . the board may provide a separate fund, which shall be known as the silicosis fund.
- (2) For the purpose of creating and maintaining the silicosis fund, the board shall every year assess and levy on and collect from the employers in the metalliferous mining and the coal mining industries, and in any other industries and occupations that the board determines that there is a liability for payment of compensation for silicosis . . . sufficient funds . . . to
  - (a) meet all amounts payable from the silicosis fund during the year;
  - (b) provide capitalized reserves sufficient to meet the periodical payments of compensation accruing in future years in respect of claims from silicosis allowed during the year; and
  - (c) defray the expense of administering the silicosis provisions in this *Act*.. . . ;

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AND WHEREAS the Workers' Compensation Board has provided for a Silicosis Fund under Section 41(1) consisting of subclass 203 (Coal Mining) and subclass 204 (Metalliferous Mining) which generally correspond to subclass 430 and subclass 411 of the Accident Fund;

AND WHEREAS, in recent years, surpluses have developed in the accounts for the two Silicosis Fund subclasses and in the account for Accident Fund subclass 430;

AND WHEREAS the W.C.B. and the Government of the Province of British Columbia have received numerous representations from the B.C. mining industry to refund the surplus in the Silicosis Fund subclasses and the surplus in Accident Fund subclass 430;

AND WHEREAS the governors of the Workers' Compensation Board undertook to the minister of Labour and Consumer Services to consider the question of collapsing the Silicosis Fund and disposing of the surplus and the question of the surplus in Accident Fund subclass 430 and, to do so, the governors constituted a special committee of the governors called the Silicosis and Coal Mining Surplus Committee;

AND WHEREAS, on February 3, 1992, the Committee proposed and the governors accepted the recommendation that nothing further should be done with respect to the surplus in subclass 430, but, subject to obtaining independent legal advice, the Silicosis Fund should be abolished by collapsing the assets and liabilities of the Silicosis Fund subclasses 203 and 204 into Accident Fund subclasses 430 and 411 respectively by issuing credits (against Accident Fund contributions) to individual Silicosis fund employers also in the corresponding Accident Fund subclass;

AND WHEREAS the chairman of the governors has obtained a legal opinion dated April 23, 1992, from Irwin G. Nathanson, Q.C., of Nathanson, Schachter & Thompson, Barristers and Solicitors, that:

1. the W.C.B. may abolish the Silicosis Fund;
2. except for surplus, the W.C.B. may merge the assets and liabilities of Silicosis Fund subclasses 203 and 204 into Accident Fund subclasses 430 and 411 respectively; but
3. the W.C.B. is not entitled to transfer surplus assets from the Silicosis Fund to the Accident Fund upon the issuance of credits as proposed; rather, the W.C.B. is obliged upon abolition of the Silicosis Fund to pay out surplus funds to the employers who contributed them in proportion to their respective contributions;

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AND WHEREAS the Silicosis and Coal Mining Surplus Committee has recommended to the governors that they accept the legal opinion from Mr. Nathanson, abolish the Silicosis Fund effective the end of 1992 and return the surplus to the appropriate employers:

NOW THEREFORE THE GOVERNORS RESOLVE THAT:

1. the Silicosis Fund shall be abolished effective the end of 1992;
2. the liabilities of Silicosis Fund subclasses 203 and 204, together with sufficient assets to pay those liabilities, shall be merged with subclasses 430 and 411 respectively; and
3. the actuarial calculation of the sufficiency of the assets required to pay those liabilities shall err in the interest of retaining assets to protect and ensure future funding for liabilities payable to workers out of the Silicosis Fund.

*Editors' note: This decision does not affect any past, present or future claims of individual workers.*



## Decision of the Appeal Division

**Number:** 92-1209  
**Date:** June 23, 1992  
**Panel:** Connie Munro, Sonja Hadley, Grant McRitchie  
**Subject:** Section 39(1)(d)

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This is an employer's appeal with respect to a decision of the director, Disability Awards, dated March 27, 1991. The director denied the employer's request for relief of costs under Section 39(1)(d) of the *Workers Compensation Act* (the "Act") with respect to the worker's claim for benefits for a fatal injury sustained on November 23, 1990.

The issue on this appeal is whether the employer and the class to which he belongs ought to be relieved, under s. 39(1)(d), of the costs of the fatality.

Section 39(1)(d) reads as follows:

### Assessment for accident fund

39. (1) For the purpose of creating and maintaining an adequate accident fund, the board shall every year assess and levy on and collect from independent operators and employers in each class, by assessment rated on the payroll, or by assessment rated on a unit of production, or in a manner the board considers proper, sufficient funds, according to an estimate to be made by the board, but the established practice of assessment and levy shall be varied only with the approval of the Lieutenant Governor in Council to,

...

- (d) provide a reserve to be used to meet the loss arising from a disaster or other circumstance which the board considers would unfairly burden the employers in a class;

The worker was a hooktender with a logging crew. He remained in the work area during the lunch hour to reset some of the equipment. As he was engaged in this task, a torrent of several tons of water and natural debris released from the unlogged hillside above him. The worker was caught in its path and sustained fatal injuries.

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In a letter dated March 15, 1991, the employer's representative submits:

The cause of the debris torrent was not the logging activity but the nature of the underlying soils in combination with the excessively heavy rains and snowmelt at that time. In the twenty four hours preceding the release of the debris torrent there had been 18.75 centimetres of rain accompanied by 35 centimetres of snowmelt, as you are no doubt aware this winter has been plagued by similar unusual occurrences. There was no visible evidence that this totally unexpected release of water and debris would occur.

In a letter dated April 8, 1991, the employer's representative states that the word "disaster" is defined as "an adverse or unfortunate event: great or sudden misfortune, calamity." He contends that the death of a human being meets the common understanding of the word "disaster." He explains that, although every fatality does not necessarily fall under Section 39(1)(d), "on the face of it this is so."

The employer's representative further contends that the event causing the worker's death was not one that the employer could have foreseen or prevented, implying that the employer cannot be faulted for having failed to provide for the worker's safety. He offers, as corroborating evidence, the fact that the Occupational Safety and Health Division did not write orders on the employer or request further safety measures in respect of the circumstances of this accident. The employer's representative characterizes this event as "completely fortuitous and unexpected . . . [falling] outside the normal hazards of the industry."

The employer's representative points out that the director's assumption that all fatal costs are equally apportioned among all employers is not accurate. He states that the Assessment Department informed him that fatal costs are apportioned in two ways. All fatal costs are applied to the appropriate class and subclass for base rate purposes. An average fatal cost is determined and that average is applied to each employer who had a fatal claim in direct proportion to the number of fatal claims. Therefore, in the absence of some form of relief, the effect on that employer's E.R.A. rate could be substantial.

As for the phrase "unfairly burden the employers in a class," the employer's representative argues that the director misread this phrase by treating it as if it meant "unfairly burden the class of employers."

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The employer's representative concludes:

The effect of the E.R.A. system on the rate structure has been to eliminate to some degree the framework envisioned by the Legislature in Part Four of the *Act*. In constructing the provisions in Sec 39(1)(d) and Sec 10(8) the Legislature had in mind a system of common rates applicable to all employers within a specific class and subclass and that changes to those rates would affect all employers within that class and subclass equally. That is no longer the case, with the coming of the E.R.A. system a logging contractor can be paying the same or lesser rate than a manufacturer of concrete garden gnomes or a rate that is 100% greater than other employers in his class or subclass. It does not appear to us that policy has kept pace with the changes to the assessment system, nor that the Legislature, although it provided for forms of experience rating, had in mind the extent to which an experience rating system would be applied and the effect on individual employers assessment rates. It is important to ensure that the interpretation of the *Act* fulfills the true intent and takes into consideration non-legislative changes that have occurred in the system.

In sum, the employer's representative urges us to interpret s. 39(1)(d) in light of today's broad-based E.R.A. system and not in light of the assessment system that was in force when the section was first enacted.

The panel agrees with the view expressed by the employer's representative that it is unlikely that the Legislature had the current E.R.A. system in mind when it first enacted s. 39(1)(d). Appeal Division Decision No. 91-0806 held that s. 42 of the *Act* authorizes the E.R.A. system. Nevertheless, it is possible that the expansion of this system has created anomalies or unanticipated inequities that the *Act* does not explicitly address. The question then arises as to whether there is enough latitude in the wording of the *Act* for an interpretation that would cover these situations.

The very able submissions of the employer's representative have underscored the necessity of reviewing the nature of s. 39(1)(d) and its application. This case provides an opportunity to do so. In view of the nature of this issue, a three-person non-representational panel was convened by the chief appeal commissioner. Notice was given to the workers' compensation community and written submissions were invited with respect to the proper interpretation of the words in s. 39(1)(d).

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The gist of the submissions received from the employers' community is that s. 39(1)(d) must be interpreted and applied in a wide and liberal manner. First, the employers argue that the word "disaster" was intended to be given its common (dictionary) meaning and that the Appeal Division must not attempt to define what will (and will not) constitute a disaster.

Second, they argue that the phrase "other circumstance" can be viewed as having a narrow or a broad meaning. The phrase could be interpreted narrowly in light of the preceding word "disaster." According to such an interpretation, the "other circumstance" which would justify granting relief of costs to the employer(s) under s. 39(1)(d) would have to be akin to a disaster. On the other hand, a broad interpretation would attach to the phrase "other circumstance" a meaning separate and apart from that of the word "disaster." The employers submit that the broad interpretation is the better one. They reason that, since the word "disaster" lends itself to a broad interpretation, a narrow interpretation of the phrase "other circumstance" would make the phrase, in effect, redundant.

Third, the employers argue that the phrase "unfairly burden" must be given the widest possible application because the word "unfairly" has subjective connotations. It cannot be interpreted or applied in the abstract.

Fourth, the employers contend that the phrase "employers in a class" allows the Board to relieve a particular employer. It is contended that equating the phrase "employers in a class" with the concept of a "class of employers" is unwarranted.

The employers submit that the *Interpretation Act*, R.S.B.C. c. 206 supports a broad interpretation of s. 39(1)(d). More specifically, they rely on s. 8 and s. 28(3) of the *Interpretation Act*.

Section 8 of the *Interpretation Act* states:

Every enactment shall be construed as being remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

Subsection 28(3) of the *Interpretation Act* states:

In an enactment words in the singular include the plural, and words in the plural include the singular.

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The employers also submit that the current published policy of the governors indicates that s. 39(1)(d) will and must be applied in situations where a particular employer in a class (as opposed to the class of employers) is considered to be unfairly burdened. The employers object, however, to the fact that in practice the Board has limited the application of s. 39(1)(d) to certain specified situations. They are of the view that, by limiting the application of s. 39(1)(d) to these situations, the Board has misinterpreted and misapplied the governors' policy and has fettered its discretion.

## Analysis

The specific question before us is whether s. 39(1)(d) applies to relieve an individual employer of the costs of a single fatality, taking into account the particular circumstances which led to this fatality.

As is apparent from the submissions, s. 39(1)(d) can be read in different ways. It is important, therefore, to identify at the outset the potential readings that might be given this provision.

One possible reading of s. 39(1)(d) is that it provides for a reserve to be used to meet losses arising from a disaster or some other *similar* circumstance which the Board considers would unfairly burden a class of employers.

A second possible reading of s. 39(1)(d) is that it provides for a reserve to be used to meet losses which the Board considers would unfairly burden a class of employers. These losses could be due to a disaster or *any* other circumstance.

We note that neither the first nor the second reading requires the "disaster or other circumstance" to occur to all the employers in a class. What is required, under these readings, is that the losses arising from the "disaster or other circumstance" would unfairly burden a class of employers. Conceivably, a disaster or other circumstance occurring to one employer or some employers could be of such magnitude that the class as a whole would be unfairly burdened.

We also note that both the first and the second readings point in the same direction, namely the losses involved must be substantial enough to have an effect on a class (or classes), in order to come within the meaning of s. 39(1)(d). In that sense, both readings interpret the phrase "the employers in a class" narrowly.

A third reading of s. 39(1)(d), which is the one urged upon us by the employer, is that it provides a reserve to be used to meet losses which the Board considers would unfairly burden an individual employer, some employers, or a class of employers.

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These losses could be due to a disaster or any other circumstance. Unlike the first and second readings, this reading assigns to the required reserve, a very broad equitable function that includes meeting whatever substantial losses would unfairly burden a class as well as the more minor losses which would unfairly burden individual employers.

Because the wording of s. 39(1)(d) leaves room for some ambiguity, we cannot look only at the words of the statute and give effect to them. We must take into account the history of this provision, the statutory context in which it arises, relevant rules of statutory interpretation and, if available, cases on point.

The substance of s. 39(1)(d) originated in 1916. In the *Workmen's Compensation Act*, S.B.C. 1916, c. 77, what was then s. 29(1)(e) read in part as follows:

- (e) To provide a reserve fund to be used to meet the loss arising from any disaster or other circumstance which, in the opinion of the Board, would unfairly burden the employers in *any* class.

(emphasis added)

The change in wording from “unfairly burden the employers in *any* class” to the present wording of “unfairly burden the employers in *a* class” occurred in 1979 when the *Workers Compensation Act* R.S.B.C. 1979, c. 437 replaced the *Workmen's Compensation Act* R.S.B.C. 1968, c. 59. A change in wording does not necessarily imply that a change in substance was intended. The legislative history of s. 39(1)(d) fails to disclose any intention on the part of the Legislature to alter the meaning of the provision by this slight change in wording.

Although it is only in 1932 that the Board introduced its first experience rating plan, the statutory provision authorizing experience rating was enacted in 1916. Hence, the argument cannot be made that the legislative scheme in 1916 contemplated only collective liability and that, therefore, s. 29(1)(e) of the *Workmen's Compensation Act* [today's s. 39(1)(d)] must have been intended to provide relief of costs only in cases of losses affecting a class of employers. Had the provision authorizing experience rating been introduced subsequent to the provision requiring the reserve specified under s. 29(1)(e), such an inference would have been logical. However, the two provisions were introduced simultaneously. The sequence of legislative events, therefore, provides us with no clues as to the intent behind s. 29(1)(e).

To our knowledge, there is no judicial interpretation of the words “disaster or other circumstance which the board considers would unfairly burden the employers in a class” or, for that matter, of the words “disaster or other circumstance which the board considers would unfairly burden the employers in any class,” as these words

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have appeared in the B.C. workers' compensation legislation. The few decisions that discuss the application of s. 39(1)(d) do not specifically interpret these words.

We note, however, that both the phrases "in any class" and "in a class" would be redundant, if the intention was to authorize the Board to provide relief to individual employers quite apart from what happens to a class. Under the 1916 *Workmen's Compensation Act*, all employers belonged to a class for assessment purposes. The same applies to employers under the *Act*. Hence, specifying "the employers in any class" or "the employers in a class" adds no meaning to the provision, if it is to be understood as providing individual relief in addition to class relief. Had the legislative drafters omitted these phrases and simply ended the provision with the words "which the board considers would unfairly burden employers," they would have covered unambiguously both grounds. *Prima facie* then, the phrases "in any class" and "in a class" suggest a restrictive meaning, namely, that the contemplated losses would unfairly burden a class (or classes) of employers. As stated by Viscount Simon in *Hill v. William Hill (Park Lane Ltd.)*, [1954] S.C. 530 at pp. 546–47:

The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which would not be there if the words were left out.

Commission Reports can be of great help in interpreting a statute beyond its verbal context. They generally outline the background against which legislation was enacted, thereby giving the relevant facts and surrounding circumstances.

In Mr. Justice Tysoe's 1966 *Report of the Commission of Inquiry into the Workmen's Compensation Act*, there is at pp. 60–61 a brief discussion of the concept of a "disaster" as it appears in s. 39(1)(d). This discussion suggests that this provision was enacted to address situations such as coal mine accidents. In response to Mr. Justice Tysoe's questioning, Mr. King, then comptroller of the Board, referred to the fund authorized by s. 39(1)(d) as a disaster fund. Mr. King expressed the opinion that a disaster would be any event that would increase the rate approximately two to three times in one year on a particular rating group. He also stated that he knew of two instances which were submitted to the Board as disasters — the Second Narrows Bridge collapse and an instance involving a rash of boat fatalities in one year. To his knowledge, the Board decided that neither instance constituted a disaster in relation to the figures for that year.

In his 1952 *Report of the Commissioner relating to the Workmen's Compensation Act and Board*, Mr. Justice Sloan reminds us, at page R149, that the B.C. *Act* was based on the Ontario *Act*, which, in turn, was drawn largely from the English and Washington Statutes.

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In Ontario, *An Act to Amend the Workmen's Compensation Act* S.O. 1915, c. 24, s. 26 amended *The Workmen's Compensation Act* S.O. 1914, c. 25, s. 88 by adding the following subsection:

- (2) The Board may where it deems proper add to the assessment for any class or classes or for all the classes in Schedule 1 a percentage or sum for the purpose of raising a special fund to be laid aside and used to meet the loss arising from any disaster or other circumstance which in the opinion of the Board would unfairly burden the employers in any class.

In 1915, the B.C. attorney-general, Hon. W.J. Bowser, K.C., appointed a Committee of Investigation on Workmen's Compensation Laws. This Committee visited many American centres and gathered much data which were submitted to the attorney-general together with the Pineo Report. In view of this history, American sources are relevant and may shed some light on the intent behind s. 39(1)(d). Special funds for a variety of purposes have long since been established under American workmen's compensation legislation.

In an early American text on workers' compensation insurance, *Workmen's Compensation Insurance* by G.F. Michelbacher and Thomas M. Nial (New York, 1925), the authors associate the concept of a "catastrophe" with that of a "shock" loss. At p. 336, they describe a "shock" loss as a type of loss which occurs infrequently but is also of considerable magnitude. At p. 337, they define the word "catastrophe" as follows:

The term "catastrophe" may be defined as an accident which involves at least five deaths or permanent total disability cases. *Catastrophes are presumed to result in shock losses. Shock losses may originate in other ways, however, as for example, where a verdict for injury to one individual exceeds \$50,000, or where, under a workmen's compensation law with liberal benefits, the compensation allowed on account of injury to a single employee exceeds \$25,000. There are many cases where the loss from an accident involving less than five persons reaches a sum which is substantial enough to warrant the use of the term "shock loss".*

(emphasis added)

Further, at p. 337, the authors explain how "shock" losses could disrupt an insurance scheme unless there are built-in safeguards such as reserves and/or reinsurance arrangements.

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According to *Words and Phrases*, Permanent Edition, Volume 6, St. Paul, Minn. West Publishing Co., at p. 512:

A “catastrophe” is a final event, usually of a calamitous or disastrous nature; a sudden calamity; a great misfortune. *It is synonymous with “disaster”*; it means a notable disaster, a more serious calamity than might ordinarily be understood from the term “casualty” (emphasis added). *W.A. Woodward Lumber Co. v. Unemployment Compensation Commission*, 145 P.2d 477, 479, 173 Or. 333.

Of course, these American sources are by no means conclusive. Nevertheless, it is noteworthy that around the time our special fund provision was first enacted, some relevant discussions of workers’ compensation insurance stressed the need to accumulate reserves to absorb the risks posed by contingencies occurring infrequently and causing losses of considerable magnitude. These discussions recognized that contingencies of this kind need not fall in the category of a “disaster” and they focused on the concept of “shock” losses. By definition, the impact of such losses must be on a group, a class or a substantial segment of the insurance system. Applying this reasoning, a cogent argument would be that the reserve under s. 39(1)(d) was intended to absorb “shock” losses — be they caused by a disaster or any other circumstance.

An elementary rule of statutory interpretation is that every provision of a statute should be construed with reference to its immediate context and the other provisions of the statute. Subsection 39(1) enumerates quite specifically the uses to which various reserves are to be put. Leaving aside s. 39(1)(d), each provision under s. 39(1) has a single, well-defined purpose. Therefore, an interpretation that ascribes to s. 39(1)(d) a twofold purpose such as providing a disaster reserve in addition to wide-ranging equitable relief (or a reserve to meet substantial, highly improbable losses as well as smaller more likely losses) is incongruous with the rest of s. 39(1). So is an interpretation that ascribes to s. 39(1)(d) an extremely broad subjective purpose, that is, equitable relief as the Board deems fit. The rest of s. 39(1) deals only with clearly ascertainable, objective situations.

In this connection, it is noted that in 1966 Mr. Justice Tysoe recommended the enactment of an express provision allowing the Board to set up and operate a second injury fund precisely because there were doubts as to whether the Board had the power to do so utilizing s. 39(1)(d). That resulted in s. 39(1)(e) being passed by the Legislature.

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In Ontario, however, the Workers' Compensation Board has established a Second Injury and Enhancement Fund under a special fund provision which is analogous to our s. 39(1)(d). This special fund provision, today's s. 120(2) of the *Workers Compensation Act*, R.S.O. 1990, c. W.11, states:

(2) *Special fund.* The Board, where it considers proper, may add to the assessment for any class or classes or for all the classes in Schedule 1 a percentage or sum for the purpose of raising a special fund to be laid aside and used to meet the loss arising from any disaster or other circumstance that, in the opinion of the Board, would unfairly burden the employers in any class.

However, it is under a different, much more general provision, today's s. 65(3) of the *Workers Compensation Act*, R.S.O. 1990, c. W.11, that the Ontario Board has also established an Administrative Fund to be used when an employer is unjustly or incorrectly charged with the costs of a claim. This provision reads in part as follows:

(3) *Powers of Board.* The Board has power to,

- (a) establish the assessment policies of the Board;
- (b) review this *Act* and the regulations and recommend amendments or revisions thereof;
- (c) consider and approve annual operating and capital budgets;
- (d) review and approve investment policies of the Board;
- (e) review and approve major changes in programs of the Board;

.....

The Administrative Fund set up by the Ontario Board is not specified in the legislation as it was created under this general provision. It is to be used, for instance:

- (a) after unsuccessful attempts to recover an overpayment;
- (b) for costs resulting from an accident out of treatment;
- (c) where there is no record of a firm and rate number for the employer;
- (d) where an Appeals decision so directs.

Aside from the way in which the Second Injury and Enhancement Fund was created in Ontario, the above considerations point in the direction of an interpretation which acknowledges that the words "the employers in a class" restrict the meaning of

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s. 39(1)(d). The above considerations do not necessarily suggest that the only purpose of the reserve required under s. 39(1)(d) is to serve as a fund for major disasters. Rather, they suggest that the purpose of this reserve is to meet losses that would unfairly burden a class (or classes) of employers, irrespective of whether a disaster or other circumstances caused these losses.

As against these considerations one must weigh an interpretation of s. 39(1)(d) that would allow the Board to relieve individual employers in whatever circumstances it considers just.

In their submissions, several employers have impressed on us that such an interpretation would be consistent with the provisions of the *Interpretation Act*. They have referred us to s. 8 and s. 28(3) of this legislation. S. 8 specifies that every enactment “shall be given such fair, large and liberal construction and interpretation *as best ensures the attainment of its objects* (emphasis added).” We are of the view, however, that where the object of a provision is precisely in doubt, s. 8 cannot be of much assistance.

S. 28(3) of the *Interpretation Act* provides that “In an enactment words in the singular include the plural, and words in the plural include the singular.” As a rule of construction, s. 28(3) provides some guidance as long as its application is consistent with the intent behind the enactment. Therefore, on its own, the application of this rule cannot settle the question of the intent underlying s. 39(1)(d). Of course, it is obvious that, where only one employer constitutes the class, s. 39(1)(d) empowers the Board to relieve the employer.

The employers have also stressed that, because of experience rating, it is possible for an individual employer — and not the class — to be unfairly burdened by the cost of a claim in situations other than those specified under s. 10(8) and s. 39(1)(e). They argue, therefore, that there is a need for an interpretation of s. 39(1)(d) that would allow the Board to grant equitable relief to individual employers.

This argument is compelling. Its underlying premise is that statutory interpretation involves taking into account changes in the circumstances surrounding the legislation. However, we are of the view that, should there be a clear gap in the legislation, it is not incumbent upon the Appeal Division to remedy a deficiency by stretching the interpretation of the legislation. The Appeal Division can only alert the governors to the existence of such a deficiency. It would then be within the discretion of the governors to report the matter to the Legislature. The Appeal Division’s duty is to interpret the existing legislation including its limitations. The existence of a legislative gap does not give the Appeal Division a license to tailor the interpretation to solve an acknowledged problem irrespective of the provision’s probable purpose.

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That experience rating may penalize an employer for something he cannot control was discussed by both Mr. Justice Sloan and Mr. Justice Tysoe. In his 1952 *Report of the Commissioner*, Mr. Justice Sloan described a disadvantage of experience rating as follows:

It places a premium on a good or bad fortune which may attend an employer's operations. In many cases an employer may have a carefully conducted operation and, through no fault of his, one or more workmen may sustain costly injuries which result in the employer being assessed a demerit rate, while, on the other hand, another employer may conduct a careless or neglectful type of operation and, just because he happens to be lucky, may obtain a merit reduction in his rate. (p. R184).

In his 1966 *Commission of Inquiry*, Mr. Justice Tysoe stated how, under experience rating, an employer is frequently penalized for something he cannot control (p. 108).

We note that neither Mr. Justice Sloan nor Mr. Justice Tysoe mentioned any provision in the *Act* — let alone the predecessor of our s. 39(1)(d) — as a possible remedy for this disadvantage of experience rating.

The employers contend that the existing governors' policy supports a broad interpretation of s. 39(1)(d). The governors' policy with respect to the application of section 39(1)(d) is set out primarily in:

1. *Rehabilitation Services and Claims Manual* #114.30 and, in particular, #114.31 and #114.32.
2. *Workers' Compensation Reporter*, 1975, Vol. 2: p. 11, Decision No. 97.

Reference to the application of s. 39(1)(d) also appears in the *Workers' Compensation Reporter*, 1977, Vol. 3: p. 100, Item No. 236, the *Workers' Compensation Reporter*, 1977, Vol. 3: p. 109, Item No. 239 and the *Rehabilitation Services and Claims Manual* #105.10 and 105.20.

The employer whose appeal is under consideration does not contend that existing governors' policy applies to his case. Indeed, the express words of this policy do not cover a single fatality, unless this fatality occurs in the course of treatment or rehabilitation subsequent to a compensable injury. The worker's death, in the appeal before us, does not meet this criterion.

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Whether the governors' policy can be interpreted to cover more than its express terms is a function of the meaning of s. 39(1)(d). It is only if it is accepted that an expansive interpretation of s. 39(1)(d) is proper that the policy can be regarded as inclusive and not exhaustive. Certainly, the policy itself cannot guide the task of statutory interpretation.

Having weighed the different considerations entering into the interpretation of s. 39(1)(d), we find no reason to displace Viscount Simon's presumption that words in the statute "add something which would not be there if the words were left out." The words "in a class" in s. 39(1)(d) cannot be ignored. They restrict the meaning of this provision. Hence, in order for this provision to apply, the losses resulting from a "disaster or other circumstance" must be substantial enough to affect potentially a class. Since losses of this magnitude remain a possibility, experience rating has not rendered such a provision meaningless. According to our interpretation of s. 39(1)(d), it is immaterial whether the "other circumstance" is akin to a disaster. What matters is that it results in losses that would have an effect on a class.

We recognize that experience rating has created a gap in the legislation to the extent that our current legislation provides only very limited relief to individual employers who are unjustly or incorrectly charged with the costs of a claim. It is within our jurisdiction to identify this problem but not to correct it. As indicated earlier, should the governors consider it desirable, they could draw the attention of the Legislature to this problem, or, alternatively, consider whether an existing legislative provision other than s. 39(1)(d) empowers the Board to create a fund akin to the Ontario Administrative Fund.

In the case before us, however tragic, the worker's death did not result in the type of losses contemplated by s. 39(1)(d).

Because the facts involving the worker's death bear no relationship to the situations contemplated by the governors' policy, we do not make any specific finding as to the lawfulness of the policy. The governors may, however, wish to review the policy and the Board's practice in light of our conclusions respecting the proper interpretation of s. 39(1)(d).

THE APPEAL IS DENIED.

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



# REPORTER

## Decision of the Appeal Division

**Number:** 92-1210  
**Date:** June 23, 1992  
**Panel:** Connie Munro, Grant McRitchie, Sonja Hadley  
**Subject:** Transfer of Experience Rated Assessment

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This is an employer's appeal with respect to a decision of the Assessment Department dated September 16, 1991. The Assessment Department advised the employer that the assessment rate assigned to the firm "A" Logging Ltd. would be \$7.15 per \$100.00 of assessable earnings.

The firm's business had operated as a partnership, referred to as "A" Loggers or "A" Logging Co., up until June 30, 1991. The 1991 assessment rate for the partnership was \$6.21 per \$100 of assessable earnings. On July 1, 1991, the whole logging business operating under the partnership was transferred to a limited company, "A" Logging Ltd. The new assessment rate of \$7.15 per \$100 of assessable earnings was, therefore, the result of the incorporation. The Assessment Department refused to transfer the experience rating earned by "A" Loggers to "A" Logging Ltd.

In a letter dated October 30, 1991, and addressed to the chairman of the W.C.B. Board of Governors, a representative of the Canadian Federation of Independent Business, stated in part:

Our member [from "A"] Logging Ltd. in Vanderhoof has contacted us concerning his experience rating with W.C.B. ["A"] Logging has very recently become a limited company. There have been no other changes to this 20 year old company other than becoming "limited". The employees remain the same, the management remains the same and the work remains the same.

.....  
 It seems totally ludicrous that ["A"] Logging should have to start over to gain an experience rating when the only thing that has changed is becoming "limited."  
 .....

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We are appealing to you as this is a policy issue and should be addressed by the Board which oversees all W.C.B. operations. We would ask that you address our concerns immediately and correct this unacceptable situation.

The president of "A" Logging Ltd. forwarded a letter to the Appeal Division dated December 2, 1991. This letter was accepted as a Notice of Appeal. The president provided information indicating that the "beneficial ownership of the business has remained the same." The same three partners in "A" Logging Co. retained the same percentage of interest in the incorporated company, "A" Logging Ltd.

The president of the company also stated:

I object to the rate increase to 7.15 simply because of a change in legal entity, there is no new ownership. The new legal entity has the same management, same operations, same equipment and same workers as before. The new company should benefit from the same experience rating that existed for the partnership.

.....

In the case of simply transferring a business from an unlimited ownership to a limited company with the same beneficial ownership, other taxation or assessing authorities do allow for special provisions. These other authorities allow for this type of ownership transition without additional costs assessed. In particular, Social Services Tax of B.C., Revenue Canada, Federal income taxes and Revenue Canada Excise for G.S.T.

In a letter dated December 3, 1991, the vice-president of the Board's Financial Services Division clarified the decision of the Assessment Department. He stated in part:

An incorporated company is an artificial person separate and distinct from those who own and control it. Notwithstanding the impact of taxation and estate planning issues, liabilities from the partnership, except where specifically provided for in the legislation, do not flow through to the incorporated company. This is because the company is independent of its owners.

Prior to June 1988 the Board did have a policy of transferring experience rating when the majority ownership remained the same. This policy was changed when challenged by some employers and the Commissioners found it increasingly difficult to justify an exception to the common law principle separating an incorporated

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company and its owners. As a result the policy was changed to respect this legal principle. The policy is therefore that new legal entity employers are treated as new registrations and that such changes implemented by the owners will be respected.

The Assessment Department considered the circumstances of your member but felt there was no reason to make an exception to the policy. Experience rating therefore was not transferred.

In view of the nature of the issues raised by this appeal, a three-person non-representational panel was convened by the chief appeal commissioner. Notice was given to the workers' compensation community and participation in an oral hearing scheduled for May 12, 1992 was invited. Written submissions were also invited. The appellant consented to having details of his appeal disclosed to facilitate public discussion of the issues involved.

The gist of the submissions made by the employers' community is that a policy making the transfer of experience rating a function of changes in the legal status of a firm is inconsistent with the philosophy of the experience rated assessment system.

The main arguments presented are as follows:

1. It is counterproductive to implement a plan for the purpose of fostering more effective safety and health programs and then administer a policy which removes the rewards from employers who have successfully reduced their claims costs.
2. The change from a proprietorship or a partnership to an incorporated company may have legal significance but the effect on the worksite is non-existent. No one would suggest, for instance, that a proprietorship is intrinsically any more or less safe an operation than a partnership or an incorporated company. The factors which are identified as influencing the safety of the workplace are the worker, the workplace, the equipment and the management. A significant change in any one or more of these factors has the potential of changing the safety record of the business.
3. The common law principle establishing the separate legal identity of an incorporated company is not relevant to the issue of the transfer of experience rates.
4. The current governors' policy on the transfer of experience rating may in fact conflict with the purpose underlying s. 42 of the *Workers Compensation Act*, R.S.B.C. 1979, c. 437 (the "Act").

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A union submission expresses concern about the practice of some firms to go out of business and register as a new company, when faced with a significant increase in assessment cost as a result of experience rating.

The specific question before us is whether the Board's refusal to transfer the employer's experience rating when it changed from a partnership to a limited company is supported by the *Act*.

The Appeal Division has the jurisdiction to consider employers' assessment appeals under ss. 96(6) and 96(6.1). These statutory provisions specify the grounds for reviewing the Board's assessment decisions to be an error of law or fact or contravention of a published policy of the governors.

The Board has broad discretionary powers regarding assessment policies and the adoption of experience rating [ss. 39(2), 39(3), 39(4), 39(5), 39(7), 39(8) and s. 42]. The Appeal Division must, therefore, treat the decisions of the Assessment Department in these areas with deference yet ensure that the governors' policies are lawful. The governors stated in *Decision 1 (Workers' Compensation Reporter, 1991, Vol. 7(1): p. 7)* that the Appeal Division must apply and interpret the *Act*, Regulations and published policy. This entails a review of the governors' policy to determine if it is inconsistent with the *Act*.

Should the Appeal Division find that a governors' policy is inconsistent with the statute, it would, in effect, be narrowing the range of policies open to the governors. Although this may be misconstrued as policy-making and usurping the governors' role, it is but an incidental — albeit inevitable — consequence of the Appeal Division's own role in the system as the interpreter of the *Act*. A finding that a policy is inconsistent with the *Act* does not determine what the policy ought to be but only identifies the legal boundaries within which policy can be developed.

### **Current Policy on the Transfer of Experience Rating**

The governors' current policy on the transfer of experience rating is outlined in Policy 30:50:50 of the *Assessment Manual*. This policy must be read in conjunction with Policy 20:30:21. It states that:

Where a change occurs to an employer (see Policy 20:30:21) registered with the Board which results in a new employer being established, generally experience rating will not be transferred.

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One notable exception to this is when two or more companies amalgamate and continue as one company under Section 271 of the *Company Act* (the amalgamated company holds and possesses all of the property, rights and interests and is subject to all of the debts, liabilities and obligations of each amalgamated company) we will assign a new firm number but we will transfer experience and excess earnings.

Refer to items 20:30:21 — “Assignment of firm numbers”.

The Assessment Department will consider a transfer of experience rating where it appears to the Department that the reorganization of an employer’s business is being done, at least partially, to avoid a demerit. This would usually be characterized by an employer incorporating a new company which carries on the same contract or operation previously carried on by the old company without any other legitimate explanation for the change.

Policy 20:30:21 states in part that:

In general, firm numbers are issued to an employer operating a business. When the business is transferred from one employer to another, the normal practice will be to change the firm number. (See also registration of Divisions, Policy #20:30:31).

According to Policy 20:30:21, an employer is a legal entity such as a proprietorship, a partnership, a corporation, etc.

The effect of the above two policies is that, if there is a change in the legal status of a firm, the Board will not generally transfer the experience rating. However, there are some exceptions to this general rule, namely:

1. If the employer is a corporation and undergoes a name change in accordance with the *Company Act*, the existing experience rating continues.
2. If two or more corporations amalgamate and continue as one corporation under the *Company Act*, the experience ratings of the previous corporations are amalgamated. Advice from the Assessment Department representative in the course of the hearing was that the claims histories are, in fact, combined to produce a new assessment rate.

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3. If the Board thinks that the purpose of the reorganization of the employer's business is to avoid an unfavourable experience rating, the rating of the previous employer may be transferred to the new employer. In the course of the oral hearing, the Assessment Department representative informed us that this is rarely done and is only considered if the employer has unsuccessfully opposed an assessment. The Assessment Department feels this exception to their general practice is consistent with courts piercing the corporate veil in the case of "fraud."

We note that the wording of policy 30:50:50 does not explicitly cover the situation in which a firm changes the nature of its activities while retaining its legal status. Two distinct possibilities arise here. The firm's new activity may fall in a different subclass or class. In this case, the assessment rate that is applicable to any firm joining this subclass or class would apply to the firm, notwithstanding that it has retained its legal identity. On the other hand, the firm's new activity may fall in the same subclass or class as the old activity. To our knowledge, in this case, the Board does not reconsider the firm's experience rating, in light of its new activity. As long as the new and old activities fall in the same class (or subclass) and as long as the firm's legal status remains the same, the Board continues to attach the same experience rating to the firm. Should an incorporated firm, for instance, divest itself of its assets and then acquire different assets, it would retain its experience rating, assuming that it is still categorized in the same class (or subclass).

We also note that, under the current policy, a change in ownership may have no impact on a firm's experience rating. Policy 20:30:21 states, for example, that, if a two-party partnership or joint venture adds another party, it continues to be a partnership or joint venture and, therefore, retains its firm number. This means that the same experience rate continues to apply. Similarly, according to policy 20:30:21, if a partnership or joint venture of three or more parties adds or deletes the partner, it continues to be a partnership or joint venture and, therefore, it too retains its firm number and, by implication, its experience rate.

The Assessment Department justifies the current policy on several grounds. It argues that, by recognizing the legal employer, the policy is consistent with the definition of the word "employer" in the *Act*. It argues further that the policy is administratively convenient and yields predictable results. Apparently, the previous policy was difficult to implement as it required tracking of ownership. Finally, the Assessment Department emphasizes that the current policy is in line with the common law principle that recognizes the separate personality of legal entities such as corporations.

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## Past Policy on the Transfer of Experience Rating

The Board's current policy was instituted in June 1988, prior to which the transfer of experience rating was primarily a function of changes in a firm's ownership. The policy underwent several refinements over the 1980's. Nevertheless, the basic concept remained the same: the transfer of experience rating was linked to changes in ownership. Where the ownership of a firm remained substantially the same, the Assessment Department would transfer the experience rating.

Generally, the Assessment Department considered changes in ownership to be "material" where the majority ownership changed and "nominal" where there had been no majority change. The Board also carved out exceptions for those situations in which a member or members of the immediate family took over a firm. For the purpose of applying the experience rating transfer criteria, the immediate family (mother, father, son, daughter, mother, sister) was considered the same person as the owner (proprietor, partner, shareholder). So, under the old policy, where a proprietor incorporated his firm and owned (or whose immediate family owned) 50% or more of the shares of the newly formed company, the Assessment Department categorized the change in ownership as nominal. As a result of this, the Assessment Department would transfer the experience rating to the newly formed company.

The pre-1988 policy was justified on the basis that it is the management of a firm which determines the safety record and attitudes towards injury prevention and it is the owners who determine who the management will be and what sort of management style is adopted.

To ascertain the nature of the Board's past policy on the transfer of experience rating is significant for two reasons. First, it establishes that, in switching to the 1988 policy, the Board intended, amongst other things, to stop the transfer of experience rating, where a proprietor incorporated his firm.

Second, it helps put in context a B.C. Supreme Court decision of the early 1980's. *Western Forest Products v. Workers' Compensation Board* (1983), 8 Admin. L.R. 43 held, *in obiter*, that the policy on the transfer of experience rating was "not unfair and unreasonable but on the contrary . . . desirable." The policy in question was that the transfer of experience rating would depend on changes in the firm's ownership. The Court was not considering the policy that makes the transfer a function of changes in the legal status of a firm. Therefore, the Court's pronouncements in *Western Forest Products* are not immediately relevant to the case before us, apart from supporting the notion that, in the area of assessment and experience rating, a general policy is desirable for the sake of consistency and predictability.

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## The Current Policy in Light of the Act

The governors' policy must be based on the *Act*. Subsection 39(2) of the *Act* provides a very broad discretion in the area of assessments. It states:

(2) Assessments may be made in the manner and form and by the procedure the board considers adequate and expedient, and may be general as applicable to a class or subclass, or special as applicable to an industry or part or department of it.

Section 42 of the *Act* authorizes the establishment of an experience rating system and states:

### Classification of rates

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

(emphasis added)

In statutory interpretation, special provisions take precedence over more general ones. Hence, even though there is a broad discretion in the area of assessments by virtue of s. 39(2), the policies and practice in relation to experience rating have to be consistent with the spirit of s. 42. We recognize that, under s. 42, experience rating is not mandatory. However, we are of the view that, if a system of experience rating is adopted, it must meet the purpose outlined in s. 42. An experience rating system that does not meet that purpose violates the legislation.

The *Act* states that, where any particular industry or plant is shown to be so "circumstanced or conducted" that the accident cost or hazard differs from the average, a system of experience rating may be adopted.

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Mr. Justice Sloan explained in his 1952 *Report of the Commissioner relating to The Workmen's Compensation Act and Board*:

. . . it would appear that it was not intended that a firm should receive an experience rate solely for the reason that its ratio of accident cost was either high or low, but only when that high or low ratio was, in the Board's opinion, the result of the manner in which the industry was "circumstanced or conducted".

Any firm may have a good or bad experience over a short period, and such experience may be the result of either good or bad fortune and in no way indicative of the manner in which the industry [or plant] was "circumstanced or conducted". But over a sufficiently long period and given an adequate payroll exposure, it may be considered that cost is an indication of the manner in which the industry [or plant] is "circumstanced or conducted" (p. 182).

In his 1966 *Commission of Inquiry*, Mr. Justice Tysoe stated, at p. 99, that the purpose of experience rating "is simply to offer an incentive to industry to adopt and maintain safe work practices . . . or at worst to avoid a penalty."

Policy 30:50:41 in the *Assessment Manual* clarifies the purposes of experience rating. It states in part that:

The E.R.A. program attempts to promote a positive safety attitude and provide equity through a system of recognition and accountability for claim costs arising out of an individual firm's *operations*.

(emphasis added)

In sum, the experience rating system authorized by s. 42 must relate to an "industry" or a "plant." Its purpose is to single out "industries" or "plants" that are so differently "circumstanced or conducted" that the hazard or cost of compensation differs from the average of the class or subclass to which they belong.

The words "industry" and "plant" pertain generally to the nature and manner in which goods or services are produced.

"Industry" is defined in the *Act* as follows:

"industry" includes establishment, undertaking, work, trade and business;

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“Industry” is defined in the *Concise Oxford Dictionary* as meaning (among other things):

**industry 1 a** a branch of trade or manufacture. **b** trade and manufacture collectively (*incentives to industry*).

“Plant” is defined in the *Concise Oxford Dictionary* as meaning (among other things):

**2 a** machinery, fixtures, etc., used in industrial process. **b** a factory.

Nowhere in s. 42 is there mention of the “employer” or of a firm’s legal status. We note that the word “employer” is used in many other provisions of the *Act*. Hence, the scheme which is authorized by s. 42 contemplates the use of experience rating with respect to a particular work process and not with respect to a particular legal employer. *By itself*, a change in an employer’s legal status does not affect in any way the nature and manner in which operations are conducted. A change in the legal status of a firm has no obvious relationship to how an industry or plant is “circumstanced or conducted” within the meaning of s. 42 of the *Act*.

It is arguable that, to the extent that a change in legal status is correlated with a change in ownership, it indirectly affects the conduct of a plant since management may be presumed to vest in ownership. However, this cannot be the rationale underlying the governors’ current policy. As indicated earlier, under this policy, notwithstanding a change in ownership, a firm’s experience rating may continue to apply if the firm number and, hence, its legal status stay the same. The transfer of experience rating is thus a function of a firm’s legal status, irrespective of ownership.

The closest the Board comes to justifying the current policy in terms of s. 42 is when the assistant director of the Assessment Department stated in a memorandum dated June 13, 1988: “It is accepted that an employer makes its own business decision to operate as a particular type of legal person and that this should determine, among other things, the continuity of the employer’s experience rate.” This statement was not further elaborated.

The panel is of the view that the experience rating system authorized by s. 42 has nothing to do with the legal status of a firm. If the actual operations of a firm have not changed, the wording of s. 42 suggests that the experience rating should continue to apply. This is so, irrespective of changes in the legal status of the firm. Conversely, if the legal status remains the same yet the facilities and works used by the business have changed, a review of the firm’s experience rating may be in order.

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As contemplated by s. 42, experience rating must be based on the nature and manner in which goods and services are produced or provided. Not only does the current governors' policy depart from this principle but, in some instances, appears to undermine it. For example, it dictates that a firm's experience rating should be discontinued because of a change in legal status, even though the human capital, the physical capital and the output of the firm are the same. Also, it automatically allows a firm's experience rating to continue on the basis that the firm has retained its legal status as long as it remains in the same class (or subclass), even though the human capital, physical capital and output of the firm have changed. Such a policy is not supported by the *Act*. It has no rational connection to s. 42 of the *Act*. It yields perverse effects in terms of one of the major purposes of this section, namely authorizing a system that offers an incentive to industries and plants to adopt and maintain safe work habits.

It may well be that the current policy presents certain administrative advantages in that it may be relatively easy to implement. We also recognize that it has the advantage of yielding predictable results which is, in and of itself, beneficial to employers. However, these advantages cannot save the policy. The purpose of s. 42 must be respected.

The Assessment Department has argued that the current policy is in line with the principle that establishes the separate legal identity of the corporation. Underlying this common law principle is the doctrine of limited liability. Historically, the object of this doctrine was to encourage enterprise and adventure in business (see Masten J.A.'s judgment in *Salomon v. Salomon*, [1987] A.C. 22). According to this doctrine, the liability of participants in a business enterprise is limited to the amount of capital invested in it and does not extend in case of loss to their other assets. This doctrine has been a critical factor in the development of large enterprises because many persons would not be willing to risk their capital on other terms.

The stated goals of experience rating are entirely different. They include promoting a safe work environment and, therefore, discouraging businesses from engaging in operations that expose workers to danger. In other words, one of the objects of experience rating is to minimize the possibility of businesses taking risks at the expense of workers. Hence to justify policies on the transfer of experience rating in terms of the doctrine of limited liability would be incongruous. We have concluded that this common law principle cannot, in and of itself, be determinative of the matter at hand. The implementation of an experience rating system as contemplated by s. 42 cannot be rooted in this principle. It is noteworthy that the current policy departs from this principle, in allowing the Assessment Department to consider a transfer of experience rating, if it appears that the reorganization of an employer's business is done to avoid a demerit. It occurs to us that the view may be taken that a limited company could tend to be more risk prone than an unlimited company. However, the current

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policy does not appear to be predicated on this assumption since it will deny the transfer of experience rating both where a firm moves from the unlimited liability form to the limited liability form and vice versa.

In finding that the governors' current policy is not supported by the *Act*, the Appeal Division is not making any findings as to the appropriateness of the Board's pre-1988 policy on the transfer of experience rating.

### **Disposition of the Case**

In light of the facts surrounding the incorporation of "A" Logging Ltd., we find that the Board's refusal to transfer the experience rating from "A" Loggers to "A" Logging Ltd. has no basis in the *Act*. The policy behind it goes beyond the legislation. The evidence before us clearly indicates that there have been no changes to this 20-year-old company other than the incorporation. The employees have remained the same, so have the management and the work activities. There is no issue about demerit points. The Board's assessment decision is, therefore, set aside. The transfer of the experience rating is granted.

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

## Decision of the Appeal Division

**Number:** 8  
**Date:** June 26, 1992  
**Panel:** Connie Munro, Chief Appeal Commissioner  
**Subject:** Delegation by the Chief Appeal Commissioner: Application for Reconsideration of a Decision of the Former Commissioners

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Section 85(8) of the *Workers Compensation Act* provides:

The chief appeal commissioner may delegate in writing any of his powers and duties to an appeal commissioner subject to any terms and conditions set out in the delegation.

Section 17(5) of the *Workers Compensation Amendment Act, 1989* provides:

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

I now delegate to appeal commissioners Sonja Hadley, Thomas Kemsley, and Paul Petrie, the authority of the chief appeal commissioner under Section 17(5) of the *Workers Compensation Amendment Act, 1989* to determine whether grounds have been provided for reconsideration of a decision by the former commissioners.

I also delegate to these three appeal commissioners the authority of the chief appeal commissioner to consider whether grounds have been provided for reconsideration of a decision by the former commissioners under Section 96(2), pursuant to the January 6, 1992 resolution of the Board of Governors [Decision No. 8 in the *Workers' Compensation Reporter*, 1992, Vol. 7(4): p. 171].

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I retain the powers and duties which are the subject of this delegation, and will exercise them concurrently with the named appeal commissioners. Their exercise of this delegated authority is conditional upon a matter being assigned to them by the chief appeal commissioner.

The delegation of authority in this decision to Paul Petrie is in addition to that contained in Appeal Division Decision 2 (*Workers' Compensation Reporter*, 1991, Vol. 7(1): p. 53) and Decision 7 (*Workers' Compensation Reporter*, Vol. 8(4): p. 249) concerning his appointment as registrar.

This delegation to the three named appeal commissioners is effective until June 2, 1993.

## Decision of the Appeal Division

**Number:** 92-1192, 92-1193, 92-1194, 92-1195  
**Date:** June 19, 1992  
**Panel:** Patrick L. Byrne, Verna Ledger, Derrick Spooner  
**Subject:** O.S.H. Penalties — Delegation of Authority

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This is an appeal of four penalty assessments totalling \$470,000.00 imposed by the director of the Research and Standards Department, Occupational Safety and Health Division (O.S.H.) under Section 73 of the *Workers Compensation Act* for reported violations of the *Industrial Health and Safety Regulations*.

The employer appeals on an error of fact, error of law and a contravention of a published policy of the governors. The issue is whether the director of Research and Standards had the authority to impose the penalty assessments.

### Background

The employer is in the pipeline installation business. Following inspections of their worksites by W.C.B. occupational safety officers the employer was sent show-cause letters and attended divisional oral hearings with the following results:

#### Sanction Recommendation (SR) #910753

A penalty assessment of \$100,000.00 was imposed on October 17, 1991 for violations of Regulations 38.06, 38.18 and 38.22 reported by the officer on May 3, 1991. The orders cited the employer for allowing workers to enter an unsafe excavation eight feet in depth. The employer filed a notice of appeal on November 1, 1991.

#### SR #911048

A penalty assessment of \$110,000.00 was imposed on January 29, 1992 for violations of Regulations 38.06(1)(a), 4.02(5)(c), 8.18, 8.20 and 16.106(1)(b)(c) reported by the officer on June 25, 1991. The orders cited the employer for allowing workers in an unshored and unsloped excavation six feet in depth, for allowing workers to work under a suspended pipe without the use of restraining devices, for failing to develop work procedures and for failing to properly train and supervise workers. The employer filed a notice of appeal on February 12, 1992.

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### **SR #911049**

A penalty assessment of \$120,000.00 was imposed on January 30, 1992 for violations of Regulations 38.06, 8.18 8.20 and 4.02(5)(c) reported by the officer on July 16, 1991. The orders cited the employer for allowing workers to enter an unsafe excavation, for failing to develop work procedures and for failing to properly train and supervise workers. The employer filed a notice of appeal on February 12, 1992.

### **SR #911333**

A penalty assessment of \$140,000.00 was imposed on February 4, 1992 for a violation of Regulation 38.06(1) reported by the officer on September 5, 1991. The order cited the employer for allowing workers to enter an excavation seven feet in depth which had not been properly sloped or shored. The employer filed a notice of appeal on April 8, 1992. The employer was granted an extension of time to appeal by the chief appeal commissioner.

An oral hearing was held before the appointed panel of the Appeal Division on April 23 and 24, 1992. The employer presented evidence and arguments with respect to each of the penalty assessments. Counsel for the employer forwarded written arguments with respect to whether the authority to impose penalty assessments under Section 73 of the *Act* had been properly delegated to the director of Research and Standards.

The vice-president of the Occupational Safety and Health Division was invited to respond and on May 22, 1992 the director of Research and Standards provided a submission. Counsel for the employer forwarded a reply to the director of Research and Standards' submission on May 27, 1992.

### **Law and Policy**

Section 73 of the *Workers Compensation Act* provides:

- (1) Where the board considers that
  - (a) sufficient precautions are not taken by an employer for the prevention of injuries and industrial disease;
  - (b) the place of employment or working conditions are unsafe; or
  - (c) the employer has not complied with regulations, orders or directions made under section 71,



the board may assess and levy on the employer an additional assessment determined by the board and may collect the additional assessment in the same way as an assessment is collected. The powers conferred by this subsection may be exercised as often as the board considers necessary. The board, if satisfied the default was excusable, may relieve the employer in whole or in part from liability.

The governors' Policy 1.4.2 contained in the *O.S.H. Policy and Procedure Manual* provides:

The General Manager, Occupational Safety and Health Division, and the Director, Field Services Department, do each have authority on behalf of the Board to:

1. Assess and levy on the employer an additional assessment as provided by Section 73(1), and to make levies under Section 73(2) of the *Workers Compensation Act*.
2. Impose a special rate of assessment under Section 70(1)(b) of the *Workers Compensation Act*.

An appeal to the Commissioners may be made on a decision to impose or not to impose a penalty levy or special rate of assessment or the amounts thereof.

## **Evidence and Argument**

Counsel for the employer argued that all of the penalty assessments in this appeal were decisions of the director of Research and Standards and that he was not authorized either explicitly or impliedly by the *Act* or the governors' Policy 1.4.2. to impose penalty assessments. Counsel referenced *Regina v. College of Physicians and Surgeons of British Columbia Ex. p. Ahmad* (1970), 18 D.L.R. (3d) 197 and argued that:

The law in British Columbia is that there can be no delegation of judicial or quasi-judicial decisions except where such delegation has been specifically authorized by statute or must be authorized by necessary implication.

Counsel for the employer argued that, ". . . our courts are more prepared to accept implied delegation of merely administrative functions but not of legislative or judicial ones." Further, the decisions of the director of Research and Standards were

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“judicial in nature or at worst quasi-judicial” and neither the *Act* nor the governors’ policies specifically authorized the director of Research and Standards to impose penalty assessments.

Counsel for the employer argued that there could be no implied delegation of the judicial or quasi-judicial function. He attempted to distinguish the decision of the Supreme Court of British Columbia in *Re Gill et al. and Workers’ Compensation Board* (1983) 149 D.L.R. (3d) 678 which considered whether the Board’s Assessment Department was implicitly authorized to carry out an investigation and to make a determination. The Court held:

. . . the assessment department is impliedly authorized to carry out its investigation and to make its determination and to advise the employer of its right to appeal, and such actions are not an improper delegation of a judicial or quasi-judicial function.

Counsel argued:

In that case, the Court was prepared to assume that a Board investigator carried out an investigation which the Board impliedly authorized because there was no evidence to the contrary.

He reasoned that in the cases under appeal there was a specific delegation of authority to the general manager of the O.S.H. Division and to the director of the Field Services Department and therefore:

. . . it would be straining all rules of interpretation to suggest that jurisdiction could be impliedly bestowed upon [the director of Research and Standards]. Certainly, such jurisdiction could not be bestowed by the Governors who pursuant to Section 82 are restricted to delegating their powers and duties in writing.

Finally, counsel for the employer argued that the necessary consequence of a finding that the director of Research and Standards did not have jurisdiction to make his rulings is, “to render his decision *ultra vires* and therefore void *ab initio*.”

The director of Research and Standards’ submission pointed out that the Penalty Section of the Field Services Department had been transferred to the Research and Standards Department on January 1, 1992 and renamed the Variance and Sanction Review Section. Further, the Executive Committee had approved the transfer on January 29, 1992. The director of Research and Standards argued:

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It is my opinion that *the business change* reflected in the assignment of processing of penalties to the Research & Standards Department rather than the Field Services Department *is within the domain of the O.S.H. Division to enact*. The change in reporting relationships which would naturally arise as a result of such transfer would surely be expected. It is my opinion that the delay in rewording Policy 1.4.2 and, consequent — but resolvable — delay in submission of the rewording to the Board of Governors for tacit approval (seeing that the transfer had already received approval from the Executive Committee), *should not affect the ability of the Director, Research & Standards to impose*.

(original emphasis)

The director of Research and Standards outlined the decision-making process his department followed and argued that the employer was afforded, “the same courtesies of procedure and process afforded to any employer.” The director of Research and Standards argued that decisions regarding whether violations occurred and what the quantum of the penalties should be are decisions of officers in his department and, “[t]he decision to impose [by the director of Research and Standards] is an authentication of process.” (original emphasis)

Finally, the director of Research and Standards argued:

It is my opinion that the Monroe (sic) Committee report which originated the concept of an internalized Appeal Division did so in an attempt to prevent a purely external tribunal from becoming too legalistic in its approach. To overturn an action of this nature on such a trivial technical basis (a procedural defect) would be “too legalistic an approach” and would defeat the envisioned role of the Appeals (sic) Division. It would also significantly compromise the Board’s ability to assess and levy on an employer an additional assessment when the employer fails to take sufficient precautions to ensure the health, safety and well-being of workers for whom they bear responsibility.

## Reasons and Findings

We heard oral arguments in six separate penalty assessment appeals from this employer. From the appearance of the documentation, the penalties in three of the cases were imposed by the director of the Field Services Department and in three cases by the director of Research and Standards . Following the oral hearings we invited counsel for the employer to provide written arguments with respect to the delegation

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issue in the three cases imposed by the director of Research and Standards. Submissions were provided for four cases with counsel arguing that in the additional case (SR910753) the director of Research and Standards was also the actual decision maker rather than the director of Field Services. The submission of the director of Research and Standards confirmed he had imposed that penalty assessment under a delegation from the director of the Field Services Department. This decision concerns the four penalties imposed by the director of Research and Standards.

The authority of the Board to impose penalty or additional assessments on employers for violations of Regulations is contained in Section 73 of the *Act*. Counsel for the employer acknowledged that the *Act* specifically contemplates delegation of that authority. Certainly decisions to impose penalty assessments must, by necessity, be made by individuals and the Board under Section 86(1) of the *Act* may appoint the officers, “. . . necessary to carry out the business and operations of the Board.”

Section 82 of the *Act* provides that, “[t]he Governors shall approve and superintend the policies and direction of the board, including policies respecting compensation, assessments, rehabilitation and occupational safety and health.” As such, the governors’ Decision No. 3 (*Workers’ Compensation Reporter*, 1991, Vol. 7(4): p. 17) provides:

The published policies of the governors, as of June 3, 1991, consist of the following:

1. *Assessment Policy Manual*;
2. *Occupational Safety and Health Division Policy and Procedure Manual*;
3. *Rehabilitation Services and Claims Manual*;
4. *Workers’ Compensation Reporter* — Decision Nos. 1–423.

. . . After proclamation of the *Workers Compensation Amendment Act, 1989*, the published policies of the Governors shall consist of the documents listed above, amendments to the three policy manuals, any new or replacement manuals issued by the Governors, and all decisions of the Governors declared to be policy decisions. . . .

An original of each policy signed by the Chairman shall be filed with the Secretary of the Board.

The policies of the Governors shall be published in print in the three policy manuals or the *Workers’ Compensation Reporter*.

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The governors' Policy 1.4.2 in the *O.S.H. Policy and Procedure Manual* provides that the general manager, Occupational Safety and Health Division and the director Field Services Department, "do each have authority on behalf of the Board," to assess and levy on employers additional assessments under Section 73 of the *Act*. The position of the director of the Research and Standards Department has existed for some time, certainly prior to June 3, 1991 and is not simply a renaming of either the general manager or director Field Services Department positions. It is clear that the director of Research and Standards did not have explicit authority to impose penalty assessments under Section 73 of the *Act*. That authority rests with the Board and was properly delegated to two individual office holders through the policies of the governors. Section 73 of the *Act* should be read in conjunction with the governors' policy and the phrase, "the board may assess and levy on the employer" should therefore be read, "the General Manager, Occupational Safety and Health Division and the Director Field Services Department may assess and levy on the employer."

The director of Research and Standards appears to be of the view that the authority to impose penalty assessments rests with the O.S.H. Division and a transfer of the administration of the "Penalty Section" carries with it a transfer of the authority to impose penalty assessments. We disagree. The authority to impose penalty assessments rests with the individual office holders delegated such authority by the Board through the policies of the governors. The director of Research and Standards was not one of the delegated office holders and therefore we find that the director of Research and Standards did not have explicit authority to impose the penalty assessments.

We considered whether the director of Research and Standards could have acquired jurisdiction in another manner. That is, whether there could be a sub-delegation from the properly delegated office holders or whether the director of Research and Standards was implicitly authorized to impose penalties. This issue was discussed by R. Dussault and L. Borgeat in *Administrative Law*, 2nd ed., pp. 259:

Indeed for reasons of efficiency, legislators more and more frequently grant a power of delegation to administrative authorities. This power may relieve them of some decisions and has the advantage of bringing the decision-maker closer to the public. This delegation may be authorized explicitly or implicitly. . . .

It is a well-known legal principle that a power must be exercised personally by the agent upon whom it was conferred. This principle, generally expressed in the form of a maxim, *Delegatus non potest delegare*, is even more applicable when some degree of discretion is combined with the decision-making . . .

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The British Columbia Court of Appeal in *Regina v. College of Physicians and Surgeons of British Columbia Ex p. Ahmad* (1970) 18 D.L.R. (3d) 197 held:

There is no doubt that judicial functions cannot be delegated unless by express authority or by necessary implication, while on the other hand many administrative functions may be validly delegated: see *Barnard v. National Dock Labour Board*, [1953] 2 Q.B. 18, and *Vine v. National Dock Labour Board*, [1957] A.C. 488.

The question here is whether the decisions to impose penalty assessments under Section 73 of the *Act* should be characterized as judicial (or quasi-judicial) or administrative. We accept the tests for determining whether a function is judicial as set out in de Smith's *Judicial Review of Administrative Action*, 4th ed., pp.80–85:

The first test that may be applied for distinguishing judicial functions from other classes of functions turns upon whether the performance of the function terminates in an order that has conclusive effect . . . This characteristic is generally regarded as one of the essential features of judicial power, and a body exercising powers which are of a merely advisory, deliberative, investigatory or conciliatory character, or which do not have legal effect until confirmed by another body, or involve only the making of a preliminary decision will not normally be held to be acting in a judicial capacity. . . .

A second test, or group of tests, for ascertaining whether statutory functions are of a judicial character turns primarily on the presence or absence of certain formal or procedural attributes . . . The fact that a body has been endowed with many of the “trappings of a court” may not always be sufficient to establish conclusively that it has been invested with judicial power; but the presence of such trappings tends to support that conclusion. Thus in seeking to establish that the proceedings (or the functions) of a statutory body are to be established as judicial for any given purpose, it may be material to show that the body is called a “tribunal” which hold “sittings” and makes “decisions” in relation to “cases” before it, that it is empowered to summon witnesses and administer oaths, that is normally required to sit in public, that its members are debarred from sitting if personally interested in a matter before them, that it has power to award costs or to impose sanctions to enforce compliance with its orders.

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In our view the authority to impose penalty assessments under Section 73 of the *Act* substantially meets the above tests and is quasi-judicial in nature. Although a complete analysis is not necessary we note that oral hearings are held, decisions are rendered imposing penalties and there is authority to administer oaths. We further note that in *Re Gill et al.* the Court characterized an investigation and determination by the director of the Assessment Department as a “judicial or quasi-judicial function.” A decision to impose penalty assessments for violations of Regulations is not merely an administrative function. The impact of a decision to levy a penalty assessment on an employer confirms this conclusion.

Having determined that the decision is quasi-judicial we find that the function cannot be sub-delegated by the authorized office holders. They must exercise such authority personally. The director of Research and Standards could not have acquired jurisdiction from the properly authorized office holders to whom the delegation had been made.

We considered the director of Research and Standards’ argument that the Executive Committee had approved the administrative transfer and renaming of the “penalty section” and that the governors would tacitly approve that action and therefore he ought to be able to impose penalty assessments. It is unclear what the director of Research and Standards meant in his reference to obtaining “tacit” approval from the Board of Governors. The term “tacit” means “understood or implied without being stated.” The governors have provided in Decision No. 3, as noted above, that their policies must be published. Therefore, there could be no understood or implied policy in this case. We could find no evidence that the governors either explicitly or implicitly delegated the authority to impose penalties to the director of Research and Standards.

We agree with the employer’s counsel that the circumstances in this appeal can be distinguished from those in *Re Gill et al.* In that case there was no express delegation and the Court held, in the absence of evidence to the contrary, there was an implied delegation. The Court stated:

In the absence of any contrary indication in the evidence before me, I am prepared to assume that [the Director of Assessments’] “investigation” was one that the board impliedly authorized.

At the time the director of Research and Standards imposed the penalty assessments there was an express delegation in the governors’ policy, however, the authority was not exercised by those to whom it had been specifically delegated. In our view there could be no implied delegation in the face of an explicit delegation.

We find that the director of Research and Standards acted beyond his authority by imposing the penalty assessments.

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The director of Research and Standards complained that to overturn the penalties on the basis that he lacked jurisdiction would be too legalistic an approach. We disagree.

There is a distinction between not being bound to follow legal precedent as outlined in Section 99 of the *Act* and not following the Rule of Law. The Ontario Workers Compensation Appeal Tribunal also dealt with this issue. They reasoned in *Decision #915A* (1988), (269 ONT. W.C.A.T.) at pp. 299:

The meaning of the s. 80 “licence” not to follow “strict legal precedent” has been considered in previous Tribunal decisions. It has been interpreted as meaning that the Tribunal is not required to follow strictly the common-law rules governing an adjudicator’s obligation to be bound by previous precedent setting decisions. It has not, however, been seen as intended to free the Tribunal from an adjudicative tribunal’s general obligation to be governed by the rule of law or to be bound by the substantive law generally prevailing in Ontario.

Similarly, Section 99 of the *Act* does not free the director of Research and Standards from the Rule of Law or the substantive law prevailing in British Columbia.

The director of Research and Standards also argued that to overturn his decisions in these cases would significantly compromise the Board’s ability to assess penalties. We disagree.

We could find no impediment to the properly delegated office holders exercising their authority to impose penalties in compliance with the *Act*, and the policies of the governors.

In their discussion of the legality of administrative action R. Dussault and L. Borgeat in *Administrative Law*, 2nd ed., pp. 31–32 provided the following observation which we find appropriate in this case:

The State, just like its citizens, is subject to the Rule of Law. For public administrators, respect for the law comprises three principle elements: respect for the Constitution, which applies not only to legislators but also to public servants who act for the Administration; respect for the limits of their powers, which have been established by statutes and regulations; and finally, respect, in the exercise of their duties, for certain principles of equity. . . . When the Rule of Law is transgressed, one speaks of an excess of jurisdiction and of an *ultra vires* act.

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We considered the consequences of the finding that the director of Research and Standards acted beyond his authority. Certainly the penalty assessments are removed. We, however, make no finding with respect to whether the employer was in violation of the Regulations, as cited by the officers, in these cases.

## **Conclusion**

There was an error of law and a contravention of a published policy of the governors. The director of the Research and Standards Department did not have authority to impose the penalty assessments. The penalty assessments are removed.

THE APPEAL IS ALLOWED.

*Editors' note: This decision has been edited for publication. The Governors adopted changes to the delegation of authority on July 27, 1992. These changes have now been published in the OS&H Policy and Procedure Manual.*



## Decision of the Appeal Division

**Number:** 92-0923  
**Date:** April 27, 1992  
**Panel:** Connie Munro, Chief Appeal Commissioner  
**Subject:** Section 96.1 and 96(2)

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This is a request for reconsideration of a commissioners' decision of March 22, 1991. The request is contained in a November 25, 1991 letter to the Appeal Division from the president of the employer company (herein referred to as "the employer's representative"). The commissioners' decision confirmed two decisions of the Occupational Safety and Health Division (O.S.H.), levying assessments of \$4,500.00 and \$9,000.00 for violations of the *Industrial Health and Safety Regulations* relating to excavations.

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

### Reconsideration by appeal division

- s. 96.1 (1) Subject to this section and sections 58 to 66, a decision of the appeal division is final and conclusive.
- (2) A worker, the worker's dependants, the worker's employer or the representative of any of them may apply to the chief appeal commissioner for reconsideration of a decision of the appeal division on the grounds that new evidence has arisen or has been discovered subsequent to the hearing of the matter decided by the appeal division.
- (3) Where the chief appeal commissioner considers that the evidence referred to in subsection (2)
- (a) is substantial and material to the decision, and
  - (b) did not exist at the time of the hearing or did exist at that time but was not discovered and could not through the exercise of due diligence have been discovered,

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he may direct that

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

Section 17(5) of Bill 27 contained the following transitional provision:

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

In order for there to be reconsideration of the decision of the prior commissioners by the Appeal Division under Section 96.1 of the *Act*, the statutory requirements in respect of new evidence must be met.

The Appeal Division may also reconsider a decision made by the former commissioners on the basis of the governors' resolution of January 6, 1992, which reads as follows:

RESOLVED THAT the Appeal Division of the Workers' Compensation Board of British Columbia shall exercise the authority of the Workers' Compensation Board of British Columbia under Section 96(2) of the *Workers Compensation Act* to reopen, rehear and redetermine any decision made by the former Commissioners prior to June 3, 1991 where the Chief Appeal Commissioner finds that the decision was based upon an error of law or involved or involves an issue under the *Canadian Charter of Rights and Freedoms*; . . .

The \$4,500.00 penalty was imposed by the Occupational Safety and Health Division in a decision dated April 11, 1990, for a violation of Regulation 38.06(1) which prohibits a worker from entering an excavation over four feet in depth without proper shoring, sloping or other protection. The initiating inspection report of O.S.H. stated that a worker was digging in a five-foot trench when the unshored and unsloped sides of the trench caved in. A follow-up inspection report stated that the shoring which had been installed was deficient.

In a letter dated September 21, 1989, the employer was advised that a penalty was being considered, and he was invited to provide written submissions or request a meeting with the Occupational Safety and Health Division concerning the matter.

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Written submissions were provided, but no meeting was requested. The employer's representative submitted that he was not on the job site, and had not known that the hole would be as long and deep as it was. He requested consideration of the firm's excellent safety record, and the fact that this was a first offence and that safety training had since been provided to the workers. His submissions acknowledged that the shoring was inadequate and that it had been installed as an effort to show compliance rather than to ensure further safety.

The penalty of \$9,000.00 was imposed by the Occupational Safety and Health Division in a decision dated August 7, 1990, for another violation of regulations concerning excavations. In this case, the inspection report stated that a worker had entered the unshored and unsloped excavation, and that no certificate for soil stability of the excavation was onsite as required by the Regulations. A written submission was received from the foreman and the employer requested a meeting with the Occupational Safety and Health Division. According to the minutes of the meeting, the officer who had inspected the site explained that he had seen a pick and a pry bar in the excavation which was more than four feet deep, and was not properly shored. In their written submissions and according to the minutes of the meeting, the employer acknowledged that the excavation was not properly shored, but stated that no one had been working in the trench at that time. The employer advised that one worker (David Sommerfield) had worked from approximately the third rung down on a 10-foot ladder, using a long-handled shovel to clear waste from the bottom of the trench. Similar descriptions were contained in a notarized statutory declaration from Mr. Sommerfield and a handwritten statement from another worker.

The employer appealed both decisions of the Occupational Safety and Health Division to the previous commissioners. After reviewing the penalty of \$4,500.00, the commissioners concluded:

The Commissioners consider that it is clear that violations occurred. Your worker was found in an excavation that did not conform to the regulations. He had not received proper instruction. The responsibility of an employer is to ensure that workers safely perform their work . . .

In relation to the penalty of \$9,000.00, the following was stated:

The Commissioners point out that the regulation prohibits entry. It is not restricted to cases where a worker's feet touch the bottom of the excavation. They consider that aside from whether [the Occupational Safety Officer's] interviews revealed violations it is clear that [your employee] *entered* the excavation. The regulation

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exists to ensure that workers are not exposed to the risk of an excavation collapsing. The fact that [the worker] was on a ladder would not have prevented injury had a collapse occurred.

The employer's representative submits that an oral hearing was necessary as there was "clearly an absolute credibility issue" between the occupational safety officer and his employees, and he had requested an oral hearing to provide his employees the opportunity to swear under oath if necessary as to the conditions that existed at the worksite on the day of the inspection. He further submits that he was never given the opportunity to have an unbiased hearing, and that the commissioners' decision was based on the biased information from the Occupational Safety and Health Division file.

The commissioners had denied the oral hearing request as follows:

As you were advised in [the] 18 May 1990 letter appeals to the Commissioners are usually dealt with through a review of the submissions and the information on file. The Commissioners consider that a fair and reasonable decision can be reached on these appeals without holding an oral hearing.

In his submissions, the employer's representative has not pointed to any new evidence which would meet the qualifications of s. 96.1.

He submits that the commissioners' decision to deny his request for an oral hearing constituted a breach of natural justice. The *Workers Compensation Act* did not require the commissioners to hold an oral hearing on an appeal, nor does it require the present Appeal Division to hold oral hearings on appeals.

Nonetheless, in some instances the failure to hold an oral hearing can constitute a breach of natural justice. Having reviewed this entire matter, however, I do not consider that such was the case here.

The employer's representative has alleged that a credibility issue was involved. I cannot agree. In respect to the first penalty assessment the facts were largely undisputed. With respect to the second penalty the facts alleged by the employer were accepted by the commissioners. The issue, however, was whether, in law, the position of the worker as established by the employer's evidence constituted having "entered" the trench for the purposes of the application of the regulation. The commissioners concluded that it did and, therefore, upheld the assessment of the penalty.

The employer also alleges an error of law based upon the previous decision being "based . . . on the biased information file from the occupational safety division."

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No specific facts are alleged that would constitute bias on the part of the former commissioners. The employer was given ample opportunity to reply to the information placed on his file by the O.S.H. Division. As earlier indicated, the factual basis of the two penalties was not disputed.

The employer obviously disagrees with the interpretation of the regulation applied by the former commissioners. It was, however, within their jurisdiction to interpret the *Act* and regulations. Whether or not any different interpretation of the regulations is possible is not in issue. I could only set aside the previous commissioners' decision if their interpretation was patently unreasonable. I do not find that to be the case.

The employer's request for reconsideration under s. 96.1 or a reopening under s. 96(2) is, therefore, denied.

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



## Decision of the Appeal Division

**Number:** 92-0981  
**Date:** May 7, 1992  
**Panel:** Connie Munro, Chief Appeal Commissioner  
**Subject:** Section 96(2)

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By letter of February 25, 1991, the lawyer representing the worker wrote to the former commissioners concerning this worker's claim. He requested reconsideration of the Board's policy with respect to the application of Section 98(3) of the *Workers Compensation Act*. This concerned the suspension of the worker's pension benefits during the period of his incarceration.

Section 98(3) provides:

Where it is found that a worker is confined to jail or prison, the board may cancel, withhold or suspend the payment of compensation for the period it considers advisable. Where compensation is withheld or suspended, the board may pay the compensation or any portion of it to the worker's wife, husband or children, or to a trustee appointed by the board, who shall expend it for the benefit of the worker, the worker's wife, husband or children.

Counsel sought reconsideration of the February 20, 1990 and January 30, 1991 decisions of the Board officer, in which the worker's pension was suspended under this section during the period of his imprisonment. It is submitted that Section 98(3) of the *Workers Compensation Act*, and the Board's action in suspending the worker's pension based on this section, were contrary to Section 15 of the *Canadian Charter of Rights and Freedoms*.

In a letter of reply dated March 5, 1991, the appeals administrator advised as follows:

It is clear . . . that you are seeking a general policy review. I must advise, however, that the Commissioners are presently deferring any general policy reviews pending the bringing into force (on 3 June 1991) of the *Workers Compensation Amendment Act, 1989*. Under the new legislation, general policy matters are to be dealt with by the new Board of Governors.

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Counsel subsequently wrote to the Appeal Division on May 30, 1991, requesting further consideration of this matter. I am unable to find, however, that a rehearing had been commenced by the prior commissioners which could be continued by the Appeal Division pursuant to Section 17(2) of the *Workers Compensation Amendment Act, 1989*. I would interpret the appeals administrator's letter as indicating that no reopening of the matter was to be undertaken by the prior commissioners. The reference to policy matters being addressed by the Board of Governors once the legislative changes came into effect does not support the conclusion that a rehearing had been commenced by the prior commissioners which should be continued by the Appeal Division.

In a further letter dated January 21, 1992, counsel acknowledges that the prior commissioners had not considered his application, nor had they decided to reopen the matter under Section 96(2). He advises that the worker's appeal from the Board officer's decisions to suspend his pension is to be considered by the Review Board. He notes that, in the circumstances, he would not object to a decision dismissing the May 30, 1991 application insofar as the Appeal Division is concerned and referring it to be addressed by the Claims Division in accordance with the outcome of the pending Review Board appeals. Counsel notes that his suggestion is based on an assumption that the Appeal Division does not consider that it has the authority to exercise Section 96(2) authority over a decision by a Board officer.

Section 96(2) of the *Act* provides:

. . . the board may at any time at its discretion reopen, rehear and redetermine any matter, except a decision of the appeal division, which has been dealt with by it or by an officer of the board.

Decision Number 1 of the governors (*Workers' Compensation Reporter*, 1991, Vol. 7(1), (*Appeal Division Administration, Practice and Procedure*) specified under item 6.0 at page 10 that:

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

This was modified by Decision Number 8 of the governors (*Workers' Compensation Reporter*, 1992, Vol. 7(4): p. 171, *Reopening and Reconsideration of Past Commissioners' Decisions*). The Board of Governors approved the following, effective January 6, 1992:

RESOLVED THAT the Appeal Division of the Workers' Compensation Board of British Columbia shall exercise the authority of the Workers' Compensation Board of British Columbia under

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Section 96(2) of the *Workers Compensation Act* to reopen, rehear and redetermine any decision made by the former Commissioners prior to June 3, 1991, where the Chief Appeal Commissioner finds that the decision was based upon an error of law or involved or involves an issue under the *Canadian Charter of Rights and Freedoms*;  
...

The governors' resolution specifies that the Appeal Division has authority to reopen decisions "made by the former Commissioners," on the basis of an error of law or *Charter* violation. The decision to which the worker is objecting was made by a Board officer, rather than the prior commissioners. The governors' resolution does not contemplate the Appeal Division reviewing decisions by Board officers under Section 96(2) of the *Act*. I would confirm that counsel's assumption as to the limited jurisdiction of the Appeal Division in this regard is correct.

Pursuant to the policy of the governors set out in #108.00 of the *Rehabilitation Services and Claims Manual* (the "*Manual*"), applications for reconsideration of a decision of a claims adjudicator are considered within the Compensation Services Division. #108.12 and #108.40 of the *Manual* provide that one of the grounds for such reconsideration is error of law. Readjudication within the Compensation Services Division is addressed in #108.30 of the *Manual*.

As the worker has appealed the decisions of the Board officer to the Review Board, however, the file will now be forwarded to the Review Board. I note that the Review Board deputy registrar stated in a letter dated January 8, 1992 that the Review Board findings are to be issued on or before July 31, 1992. Counsel is aware of his client's right to bring this matter before the Appeal Division by way of appeal within 30 days of the Review Board findings.

I find that no basis has been established for the Appeal Division to address this application for reconsideration. IT IS, THEREFORE, DENIED.

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



## Decision of the Appeal Division

**Number:** 92-1017, 92-1018  
**Date:** May 14, 1992  
**Panel:** Connie Munro, Chief Appeal Commissioner  
**Subject:** Section 96(2) — Medical Review Panel Certificate

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A letter dated May 28, 1991, was received from an ombudsman officer, requesting reconsideration of the October 25, 1990 decision of the prior commissioners. A further letter dated November 8, 1991, was received from the general counsel, Office of the Ombudsman. The latter correspondence invoked the Appeal Division's jurisdiction under Section 96.1 of the *Workers Compensation Act*, requesting that this case be considered on the basis of new evidence provided by the chairman of the medical review panel.

A letter dated May 31, 1991, was also forwarded to the Board by counsel for the worker requesting reconsideration of the October 25, 1990 decision of the prior commissioners. In a further submission dated January 20, 1992, counsel for the worker addressed the Board's power to reopen, rehear and redetermine under Section 96(2). He contended that the prior commissioners' decision of October 25, 1990 is wrong in law.

In a letter dated April 27, 1992, counsel for the employer submitted that the worker has been "a victim of jurisdictional bickering" between the prior commissioners and the chairman of the medical review panel. He fully endorsed the submissions from the worker's counsel and the Office of the Ombudsman.

The prior commissioners' decision of October 25, 1990 concerned a medical review panel certificate dated January 24, 1990, (the "certificate") and the medical review panel's clarification of this certificate in a letter dated July 13, 1990 (the "panel's clarification").

In a decision dated October 25, 1990, the prior commissioners concluded that some of the statements contained in the certificate were not binding on the Board. They were of the view that these statements lay outside of the jurisdiction of the medical review panel and that they were, if not contradictory, at least ambiguous enough not to be acted upon by the Board.

Examination by the medical review panel had been initiated by the worker's family doctor, as he disputed the decision of the Board that the worker could do the job of strip piler at a sawmill on a full-time basis.

The statutory scheme under which medical review panels are established and carry out their function is found in ss. 58 to 66 of the *Act*.

Section 61 requires that a panel report within a reasonable time after examination of the worker and certify on such matters as "the condition of the worker," "the existence or non-existence of a disability," "its nature and extent," and "its cause and, if there is more than one cause, how much of the disability is related to one cause and how much to another." The panel in this case was requested by the Board to answer a range of questions relating to these general issues.

The issues posed by the Board and the answers certified by the medical review panel are as follows:

*Medical issues stated by the Board*

*Answers "certified" by the panel*

What is the condition of the worker?

The conditions the claimant now has are:

- (i) Left sided L5 spondylolysis pars interarticularis (post traumatic)
- (ii) Chronic pain syndrome.

Does he now have a disability with respect to his back? If not, could the Panel advise the Board whether historically they believe that the worker did, at any time, have a disability with respect to his back?

Yes, the claimant now has a disability with respect to his back.

If he has or had such a disability, what is its nature and extent and in what ways has it affected the body function of the worker? In particular, in what ways has it limited his capacity for work?

The disability the claimant now has is low back pain and radiating left leg pain associated with muscle spasm, stiffness and a marked decrease in range of motion of the lumbar spine, with a superimposed well established chronic pain syndrome, which credibly prevents him from performing any physical, manual or sedentary work.

If he has or had such a disability, was the compensable work injury of 28 June 1984 of causative significance and, if so, in what way?

Yes, the compensable injury of June 28th, 1984, is of causative significance in producing the claimant's disability, as the crush injury to his right mid-section by the log caused a severe sudden right lateral flexion and rotation force applied to his lumbar spine, causing a shear injury to the left pars interarticularis, which resulted in his L5 spondylolysis at the pars interarticularis. We do not know the exact cause(s) of the claimant's chronic pain syndrome, but we have concluded that the work related injury of June 28th, 1984, is of primary significance in its development.

If he has or had such a disability, was the disability, wholly or partly the result of causes other than the compensable work injury of 28 June 1984? If so, what other causes were there, and how and to what extent was each cause significant?

If there are or were two or more causes of the worker's disability with respect to his back, could the Panel please explain:

- a) Did each cause independently result in some disability and, if so, what proportion of the disability found by the Panel?
- b) If each cause did not independently result in some disability, did two or more causes act together to produce a disability and, if so, which causes acted together to produce the disability?

The Board has recognized that the worker was temporarily disabled as a result of the compensable work injury of 28 June 1984 for the period set out in non-medical fact number thirteen of this statement. Would the Panel please state whether they feel that the worker was temporarily disabled for any further period or periods as a result of the compensable work injury of 28 June 1984 and, if so, what the nature and extent of the disability was during this further period of time.

We believe the claimant's disability is wholly the result of his work related injury of June 28th, 1984.

- a) Non-applicable
- b) Non-applicable

The Panel has concluded that the claimant was temporarily totally disabled for the period June 29th, 1984, until June 29th, 1986, inclusive, except for two days, the 26th and 27th of July, 1984. The Panel further believes that by June 29th, 1986, the claimant's condition had stabilized, and from that time to the present the claimant has had a total permanent disability, which strictly on a medical basis has credibly prevented him from performing any manual, physical or sedentary work. The nature of his disability is chronic low back pain and radiating left leg pain associated with muscle spasm, stiffness, and marked diminished range of motion in association with a well established chronic pain syndrome.

We believe that the claimant would benefit from a more comprehensive orthopaedic workup and consequently would recommend:

- (i) A bone scan to ascertain if there is an inflammatory response present and active at the site of the L5 spondylolysis.
- (ii) Local anaesthetic blocks at the site to see if his pain is relieved.
- (iii) On the basis of these tests he may be amenable to an orthopaedic procedure to stabilize this site. We believe he may have a treatable condition.

Notwithstanding the orthopaedic workup, the Panel strongly believes the claimant would greatly benefit from a rehabilitation program for his chronic pain syndrome and support from the Board for completion of the Accounting and Finance Diploma program which he started in September of 1986. Alternatively,

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Did the worker suffer from any pre-existing condition or disability and, if so, was it activated, accelerated, or aggravated by the compensable work injury of 28 June 1984?

we would urge that he be given the benefit of vocational counselling and/or training to find non-physical or manual work which he can better tolerate.

If the worker now has a disability related to his back, has it changed to any significant extent since its commencement and, if so, what has been the nature and progress of that change? Is any significant change in the disability reasonably expected in the next 12 months.

No, the claimant did not suffer any pre-existing condition or disability prior to his work related injury of June 28th, 1984.

If not already stated, would the Panel please state whether the worker was able to return to full time work on 29 June 1986, which did not require heavy lifting, bending, rotational movements and static positions.

The Panel believes that without appropriate treatment the claimant now has a disability which is permanent. It became stabilized on June 26th, 1986.

The Panel has concluded that even though the claimant's disability became stabilized on June 26th, 1986, as a consequence of his chronic low back and left leg pain, and superimposed chronic pain syndrome, strictly on a medical basis, he has been unable to work in any capacity, i.e., physical, manual, or sedentary work.

In requesting clarification of the certificate dated July 11, 1990, the prior commissioners asked the medical review panel to answer the following medical questions:

to what extent has the work-related 1984 injury medically affected the worker's ability to function? Specifically, what are the areas of impairment and the extent of the impairment? Is the existing level of impairment temporary or permanent?

The prior commissioners also conveyed the opinion that:

. . . there was a contradiction or at least an ambiguity in the Panel's statement that the worker has a total permanent disability, which strictly on a medical basis has credibly prevented him from performing any manual, physical or sedentary work and its statement that he would benefit from further medical treatment and from rehabilitation assistance to find non-physical or manual work which he can better tolerate.

The panel's clarification stated in part:

With regard to your first question, the Panel has concluded that the claimant's work related injury of June 28th, 1984, *strictly on a medical basis*, has rendered him unable to perform physical, manual or sedentary work. In addition, he is similarly able to participate

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only in a limited fashion in recreational activity and activities of daily living, e.g. household chores, etc. . . .

With regard to your second question, the Panel has concluded that together these two conditions have produced his impairment and total disability. This disability involves constant chronic moderate to severe low back pain and radiating left leg pain, associated with muscle spasm, stiffness and a marked decrease in range of motion of the lumbar spine. . . . The claimant's disability is so marked that while he attended a one year accounting course, which started in the fall of 1988, he could only register for part of the course, which allowed him to limit most of his lectures to one hour at a time. It was then necessary for him to return to his apartment across the street from the college and soak in a hot bath to ease his pain in between lectures. He did much of his studying while in the bath, as he had too much pain to sit up and study. . . .

In answer to your last question, the Panel has concluded that the claimant's total disability became stabilized on or about June 26th, 1986. . . .

As regards the L5 spondylolysis, the Panel feels the claimant may yet have a treatable condition in Item #7 of the Certificate. Without treatment, most certainly the claimant's disability in this regard will become permanent.

As regards the claimant's chronic pain syndrome, we have concluded that it will become permanent if not appropriately treated. By appropriate treatment, the Panel would strongly urge that the claimant be assessed and treated in an intensive rehabilitation program at a multidisciplinary chronic pain centre. Such treatment to be effective, should be in a facility totally unrelated to the Board, given the nature of the claimant's relationship with the Board and the contribution this has made to the maintenance of his chronic pain syndrome.

Turning to the other recommendations made by the Panel in its Certificate which have raised the ambiguity in the minds of the Commissioners, the Panel made these only as alternative recommendations. According to the relevant sections of the *Workers' Compensation Board Act*, a Medical Review Panel is directed to make recommendations arising out of its deliberations. According

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to the Commissioners' interpretation of other sections of the W.C.B. Act, the Board is not bound to follow such recommendations made by the Panel, as they pertain to medical treatment of a claimant. Consequently, although a Panel may make strong recommendations, urging the Board to pursue a specific course of medical assessment and treatment for a specific claimant, the Board, in its wisdom, is not bound to comply. Realizing this fact, this Panel made alternate recommendations, *which are not satisfactory* for the claimant's condition, but as alternatives might have assisted him in his own efforts to help himself, improve his self-esteem, and combat a deteriorating mental state.

Despite the panel's clarification, the prior commissioners informed the worker in their decision letter of October 25, 1990 that:

After having carefully reviewed the matter, the Commissioners do not consider that the wording used by the Panel in its most recent letter means that you will be awarded a functional impairment pension of 100% of total. Regardless of the Panel's assertion that its conclusion is "strictly on a medical basis", the Panel still is describing your disability in terms of what work you can or cannot do. *This is a question of employability* which, as outlined in the Commissioners' June 1990 letter, is a matter beyond the jurisdiction of a Medical Review Panel. The Commissioners do not consider that the Panel's assertions regarding your employability are binding on the Board.

(emphasis added)

The Board subsequently assessed the worker's impairment at 10.5% of total disability.

## Analysis

General counsel for the ombudsman suggested that the opinion of the chairman of the medical review panel, as reported in the senior ombudsman officer's letter to the Board, constitutes new evidence that satisfies the requirements of Section 96.1 of the Act. The ombudsman officer had met with the chairman in order to obtain further clarification of the certificate.

Section 96.1 reads as follows:

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

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

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

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

he may direct that

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

First, I note that because the opinion of the chairman of the medical review panel is reported by the ombudsman officer, it amounts to hearsay evidence. Nothing in the file indicates that the chairman of the medical review panel has certified the statements reported. Hearsay evidence is frequently considered in relation to Workers' Compensation cases. In this instance, however, because of the statutory requirements surrounding medical review panel certificates, I find that I cannot attach significant weight to this evidence.

Second, the evidence is more in the nature of a restatement of the substance of the certificate and the panel's clarification than new evidence that would satisfy the requirements of Section 96.1(3).

In light of the above considerations, I find that reconsideration of the prior commissioners' decision under Section 96.1 is inappropriate.

Counsel for the worker submitted that the failure to respect the findings of the medical review panel constitutes an error of law on the part of the prior commissioners. The governors' Decision No. 8, *Workers' Compensation Reporter*, 1991, Vol. 7(4): p. 171 gives the Appeal Division the authority to reconsider the prior commissioners' decision on this basis. The governors delegated to the Appeal Division, in certain circumstances, the Board's statutory discretion to reopen, rehear and redetermine decisions of the former commissioners. This additional authority was assigned to the Appeal Division in the following terms:

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

The resolution was effective as of January 6, 1992.

In an earlier decision (*Workers' Compensation Reporter*, Vol. 8(3): p. 211, Appeal Division Decision Number 92-0818), I discussed the standard of review where decisions of the prior commissioners are concerned. Because the former commissioners' decisions were protected by a privative clause, I found that, in general, the test must be whether their decision was so patently unreasonable that it cannot be rationally supported by the relevant legislation. However, I also noted that this test must be qualified in the case of decisions involving jurisdictional questions.

There is substantial judicial authority for the proposition that jurisdictional questions must be answered correctly and that the test of patent unreasonableness applies only to errors committed within the statutory delegate's jurisdiction (see Rene Dussault and Louis Borgeat, *Administrative Law* Toronto: Carswell, 1990, p. 221).

According to Section 65 of the *Act*, a certificate of a medical review panel is conclusive as to the matters certified and is binding on the Board. This assumes that the statements made in the certificate are within the jurisdiction of the medical review panel, that is, are the kind of statements authorized by the *Act* under s. 61(1). Statements pertaining to matters outside of the scope of s. 61(1) are not binding on the Board. Thus, in determining whether the medical review panel had the jurisdiction to make the statements appearing in the certificate, the prior commissioners were setting the limits of their own residual jurisdiction. Under the *Act*, the medical review panels and the Board have, in effect, competing areas of jurisdiction, even though the Board (in this instance, the prior commissioners) has the authority to determine the jurisdiction of the medical review panels through their interpretation of Section 61 and the panel certificate.

I conclude that an error concerning the jurisdiction of the medical review panel would put the prior commissioners' decision outside of the protective ambit of the privative clause that is found in Section 96 of the *Act*. On a question of jurisdiction,

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Section 96 does not protect the prior commissioners' decisions from review, nor does Section 65 protect the medical review panels' decisions from review.

### **The Certificate's Reference to "Capacity to Work"**

As indicated earlier, the prior commissioners rejected the medical review panel's repeated statements that the worker's total permanent disability has prevented him from performing any manual, physical or sedentary work.

The prior commissioners contended that the medical review panel's statements pertained to the worker's employability and thus lay outside the jurisdiction of the medical review panel. This was an error.

The medical review panel clearly and expressly stated that its conclusions about the extent of the worker's disability were rendered "strictly on a medical basis." The medical review panel said so in paragraphs 7 and 10 of the certificate and on page 2 of the panel's clarification. I note that the wording "strictly on a medical basis" is underlined in the panel's clarification. In turning a deaf ear to these repeated assertions, the prior commissioners were implicitly challenging the medical review panel's medical expertise.

S. 61(1)(c) makes it mandatory for medical review panels to certify the extent of a worker's disability. That the medical review panel did not describe the worker's medical condition solely in anatomic or physiologic terms does not mean that its assessment of this condition was not based on medical grounds. The medical review panel concluded that, to a large extent, the worker's disability was due to a chronic pain syndrome. In the case of chronic pain, a description solely in terms of limitation of movement or the effect of physical damage to the anatomy may not be suitable.

There is nothing in the language of Section 61 or elsewhere in the *Act* to suggest that the medical review panel cannot describe the nature and extent of a disability in terms of its effect on the worker's capability to perform certain tasks and thus, logically, certain generic types of work. The *Concise Oxford Dictionary* defines "work" as follows:

**work** --n. 1 the application of mental or physical effort to a purpose; the use of energy. 2a a task to be undertaken. b the material for this. c (prec. by the; foll. by of) a task occupying (no more than) a specified time (the work of a moment). 3 a thing done or made by work; the result of an action; an achievement; a thing made. 4 a person's employment or occupation etc., esp. as a means of earning income.

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Statements about a person's capacity to do some generic types of work need not be viewed as statements about that person's employability. The medical review panel's reference to "manual, physical or sedentary work" could be regarded as simply intending to emphasize the medical finding that the worker was incapable of performing the tasks usually encountered in daily living.

Another medical review panel had certified, in an earlier case, that a worker's disability rendered him "incapable of performing his duties as carrier driver or performing *manual labour* or *sedentary labour* (emphasis added)." This case was the subject of a Court of Appeal decision in February 1991, *Kooner v. Workers' Compensation Board* 54 B.C.L.R. (2d) (B.C.C.A.). The Board never contended that the medical review panel had exceeded its jurisdiction by referring to the worker's incapacity to perform "manual labour or sedentary labour." It is hardly arguable that the wording in the *Kooner* case made a difference, and that a reference to "manual or sedentary labour" is acceptable while a reference to "physical, manual or sedentary work" is not. Decisions cannot logically be based on such a slight difference in wording.

In light of the above considerations, I hold that the prior commissioners erred in law when they characterized the medical review panel's statements concerning the worker's disability as pertaining to his employability and, hence, as not binding on the Board. I find that the impugned statements were within the jurisdiction of the medical review panel.

I should like to add, however, that I understand the basis for the prior commissioners' concerns. The legislative evolution of s. 61 together with the Sloan and the Tysoe Royal Commission Reports suggest that the legislative intent was to make the assessment of the worker's earning capacity a matter outside the jurisdiction of the medical review panels.

Under s. 55(9)(b) and s. 55(9)(c) of the *Workers Compensation Act* R.S.B.C. 1960 c. 413, the medical review panels were explicitly authorized to certify as to the worker's fitness for employment and, if unfit, the cause of such unfitness. These provisions were deleted in 1968. In his 1966 report, Mr. Justice Tysoe had expressed the view that the exclusive jurisdiction of the Board to determine "the degree of diminution of earning capacity by reason of an injury" ought not to be encroached. Thus, the history of the present s. 61 suggests that the medical review panels must not address directly the question of a worker's employability.

On the other hand, s. 61 directs medical review panels to certify a worker's disability. The concept of "disability" is much broader than that of "functional impairment" or "physical impairment." It is a multi-faceted concept which partakes of legal, economic and medical aspects. As defined in *Black's Law Dictionary*, disability is a

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composite of (1) actual incapacity to perform the tasks usually encountered in daily living and one's employment, and (2) physical impairment of the body that may or may not be incapacitating.

Because it explicitly uses the concept of "disability," the *Act* gives the medical review panels a somewhat broader jurisdiction than if it had used instead the concepts of "functional impairment" or "physical impairment." Proper consideration of whether statements made by medical review panels are within their jurisdiction cannot ignore this.

The very wording of the *Act* gives the medical review panels a certain amount of leeway. Statements that might incidentally bear on a person's employability do not transgress the limits set by this wording.

### **The Governors' Policy on s. 61(1) and "Total" Disability**

I note that item #103.53 of the *Rehabilitation Services and Claims Manual* discusses Section 61(1)(c) of the *Act* and states, in part:

There are two distinct elements in a determination that a person is or is not fit to perform a particular job or occupation. There are, first, the physical requirements of the job and, second, the worker's capability of performing those requirements. The first of these is non-medical in nature and therefore outside the jurisdiction of the Medical Review Panel. The second is a medical matter within the jurisdiction of the panel, but only if there are sufficient facts before the panel which the Board has found regarding the physical requirements of the job. Even then, the panel's certification would not be binding with regard to any job where the Board concluded that the physical requirements were different from those before the panel.

I interpret this policy to mean that a medical review panel cannot certify that a worker is disabled from performing a specific job (for example, carpentry or pipe fitting) unless the Board has described the physical requirement of this job. It is my view that this does not imply that a medical review panel's more general statements as to the worker's ability to perform a broad type of activity (be it characterized as "labour" or "work") or a range of tasks are not binding on the Board.

Section 103.53 also states at the outset:

Section 61(1)(c) provides that, if there is a disability, the Medical Review Panel is required to certify as to its nature and extent, but not stated in terms of percentage of disability of the whole body.

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The latter restriction means that the panel should not certify that a worker has a permanent “total” disability as this suggests an award at 100% of total.

This wording first appeared in the May 1988 *Manual*.

Underlying this policy is a series of decisions by the prior commissioners which found its fullest expression in a decision dated April 13, 1988. In this decision, the prior commissioners stated:

. . . the Commissioners consider that the finding by the Medical Review Panel that you are permanently totally disabled may be outside its jurisdiction as involving non-medical factors. *The Commissioners accept, however, that it is possible for a Medical Review Panel to determine on a strictly medical basis that a worker is permanently totally disabled (i.e. in the sense that the worker is suffering from such a degree of impairment that he is medically incapable of functioning in any capacity).*

(emphasis added)

This explains why, in the case before me, the prior commissioners did not object to the certificate on the grounds that the *Act* altogether bars medical review panels from certifying “total” disability.

It is my view that item #103.53 of the *Manual* must be read with the prior commissioners’ qualification in mind. In some circumstances and on a medical basis it must be possible for medical review panels to certify “total” disability. It would be helpful if this qualification was expressed in the policy manual. Read literally and without qualification, item #103.53 is not consistent with the terms of the statute.

As pointed out by worker’s counsel, to state that a medical review panel cannot certify that a worker is totally disabled, because this would be equivalent to certifying a “100% disability” implies logically that a medical review panel would similarly be unable to certify that a worker is not disabled since this would be equivalent to a 0% disability. This cannot be the intent of the *Act*.

A likely reason for the Legislature directing medical review panels not to certify the specific percentage of disability is to ensure consistency. S. 23(3) of the *Act* authorizes the Board to prepare a rating schedule of permanent partial disabilities. Practice has also developed within the Board as to the compensation of non-scheduled disabilities. Medical review panel members usually are not familiar with the Board’s schedule or practice in assessing permanent partial disability awards. To have medical

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review panels specify percentages of disability would risk substantially overcompensating or undercompensating some workers. It, therefore, is logical that medical review panels not engage in the process of fixing the degree of disability. However, particularly where a worker suffers from chronic pain syndrome or psychological problems, certifying the extent of their disability may require reference to the extent of their ability to perform the substantial and material tasks connected with daily living — be it at home or at work.

Taking into account that the *Act* requires medical review panels to certify the extent of a disability, I conclude that a medical review panel which certifies a worker to be totally disabled does not offend the *Act*.

### **The Certificate's Logical Consistency**

The second ground for the commissioners' decision of October 25, 1990 is the alleged contradiction in the certificate between the conclusion that the worker had a permanent total disability and recommendations regarding treatment and vocational assistance that the medical review panel thought might benefit him. Here, the prior commissioners were not challenging the medical review panel's jurisdiction. Rather, they were questioning the logic behind the medical review panel's conclusion that the worker was totally permanently disabled at the time of the examination.

The prior commissioners considered that the certificate was contradictory or at least ambiguous. According to them, the medical review panel's recommendation regarding treatment and vocational assistance raised doubts as to whether the worker's disability was permanent and total. I disagree.

As noted by worker's counsel, in order to be "permanent" for the purposes of s. 23 of the *Act*, a disability need not be immutable or unchangeable. The concept of permanence does not mean that the disability must continue throughout the life of the worker. It simply connotes the idea that the disability must have stabilized, that it must be something more than temporary, and at least presumably permanent. Where a person's welfare is at stake, to act on a presumption and disregard all possible treatment would be clearly irresponsible, however strong this presumption may be. Should treatment be successful, it would obviously be open to the Board to redetermine the worker's benefits.

I see no contradiction in characterizing a disability as "permanent" while simultaneously suggesting treatment for the disabled worker. In fact, it is the Board's general practice to advise workers, at the time a pension award is made, that it is subject to being reviewed if there is a change in the level of their permanent disability.

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The prior commissioners were of the opinion that the certificate indirectly — albeit unwittingly — suggested that the worker was capable of sedentary work and, therefore, less than totally disabled. The prior commissioners based this opinion on the medical review panel’s comment that the worker would benefit from support from the Board for completion of his Accounting and Financial Diploma. The prior commissioners reasoned that, if the worker is capable of studying, he must be capable of sedentary work.

In my opinion, the prior commissioners misjudged the medical review panel’s comment. The panel’s clarification removes any doubts as to the meaning of this comment.

The panels’ clarification made it clear that its recommendations were “in the alternative.” In other words, were the Board not to agree with the panel’s recommendations regarding treatment for the worker’s orthopaedic problems and his chronic pain, the medical review panel was recommending that the Board at least offer the worker vocational assistance with a view to its effect on his self-esteem.

Moreover, the medical review panel described how:

The claimant’s disability is so marked that while he attended a one year accounting course, which started in the fall of 1988, he could only register for part of the course, which allowed him to limit most of his lectures to one hour at a time. It was then necessary for him to return to his apartment across the street from the college and soak in a hot bath to ease his pain in between lectures. He did much of his studying while in the bath, as he had too much pain to sit up and study.

This observation clearly conveys the notion that the worker was unfit for any type of work. To be capable of attending one-hour lectures intermittently is an entirely different proposition from being fit for work.

The medical review panel described the worker’s chronic pain condition at length, strongly recommending an intensive rehabilitation program at a multidisciplinary chronic pain centre. Putting the medical review panel’s recommendations regarding the worker’s Accounting Diploma in the context of what it also said about his chronic pain condition, it logically follows that the worker was not fit mentally or physically to be an accountant or do any other work, regardless of whether he received training. The panel’s clarification suggests quite strongly that the necessary precondition for the worker to be in a position to do any type of work is *successful* treatment for his chronic pain syndrome.

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I conclude that the medical review panel's recommendations do not invalidate their finding that the worker is permanently totally disabled.

In light of the finding that the worker is permanently totally disabled, I suggest that the Board take a fresh look at these recommendations.

In his submission, counsel for the employer requested that every possible consideration be given to finalizing this claim as soon as possible and offering the worker every possible opportunity to rehabilitate himself. However, in the case before me, it is not appropriate for the Appeal Division to usurp the specialized functions of the rehabilitation consultant.

I should like to thank counsel for the worker and the Ombudsman Office for their thoughtful and very capable submissions as well as counsel for the employer, for his detailed account of the worker's unfortunate dealings with the Board.

The worker is entitled to a pension on the basis of the medical review panel finding of permanent total disability.

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



## Decision of the Appeal Division

**Number:** 92-0924  
**Date:** April 29, 1992  
**Panel:** Connie Munro, Chief Appeal Commissioner  
**Subject:** Section 96(2) — Natural Justice

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By letter dated May 30, 1991, the worker's representative requested reconsideration of the May 24, 1991 decision of the prior commissioners. The worker had appealed the April 27, 1989 Review Board finding to the prior commissioners.

In considering her appeal, the commissioners obtained a new medical opinion from the director of the Board's Occupational Health Department. This report was disclosed to the worker on April 11, 1991 by the appeals officer and she was given until May 2, 1991 to provide a response. A submission dated April 30, 1991 was provided by the worker's representative which enclosed an extract from the clinical records of Dr. G with respect to the worker's treatment on November 24, 1986. Unfortunately, however, this submission was addressed to "Workers Compensation Review Board, 6951 Westminster Highway. . . ." Although the Board's street address was correctly written, there was an erroneous reference to the Review Board rather than to the commissioners of the Workers' Compensation Board. The representative's submission is stamped as having been received at the Review Board on May 6, 1991 and then at "20 file" on May 30, 1991. The Review Board is an independent tribunal located at a different address than the W.C.B.

The prior commissioners rendered a decision on the worker's appeal dated May 24, 1991 in which they specifically noted:

While you, your representative, and your employer were provided with a copy of a 01 April 1991 opinion obtained from the Director of the Board's Occupational Health Department, no further submissions were received.

It is evident that the submissions on behalf of the worker were not considered by the commissioners in making their decision on her appeal.

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A request for reconsideration before the Appeal Division must proceed under Section 96.1 of the *Workers Compensation Act*.

- 96.1** (1) Subject to this section and sections 58 to 66, a decision of the appeal division is final and conclusive.
- (2) A worker, the worker's dependants, the worker's employer or the representative of any of them may apply to the chief appeal commissioner for reconsideration of a decision of the appeal division on the grounds that new evidence has arisen or has been discovered subsequent to the hearing of the matter decided by the appeal division.
- (3) Where the chief appeal commissioner considers that the evidence referred to in subsection (2)
- (a) is substantial and material to the decision, and
  - (b) did not exist at the time of the hearing or did exist at that time but was not discovered and could not through the exercise of due diligence have been discovered,
- he may direct that
- (c) the appeal division reconsider the matter, or
  - (d) the applicant may make a new claim to the board with respect to the matter.

I consider that the submission and medical report of the worker's representative constitute new evidence, on the basis that they were not before the prior commissioners at the time of their decision. This new evidence may be considered substantial and material to the decision. This would leave, however, the final requirement to be addressed under Section 96.1(3)(b) which is whether the new evidence did not exist at the time of hearing or did exist at that time but was not discovered and could not through the exercise of due diligence have been discovered.

As the evidence existed at the time of the hearing, the issue is simply whether the evidence "was not discovered and could not through the exercise of due diligence have been discovered." I interpret the requirement of "due diligence" as applying to the applicant for reconsideration. It would not appear tenable to suggest that the applicant could not through the exercise of due diligence have discovered their own submission. The requirements of Section 96.1 do not seem to contemplate a situation such as has arisen in this case.

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The basis of this application for reconsideration is not, in reality, that new evidence has been discovered which was not previously known to the applicant. Rather, the basis for this request is that the applicant's submission was not included in the prior commissioners' consideration. It may be argued that the failure to consider the submission was occasioned by the error of the worker's representative in forwarding it to the Review Board. It may, conversely, be argued that the fault lay with the Board or the Review Board, inasmuch as the Board's correct street address was used and the mistaken reference should have been caught in time to refer the submission to the prior commissioners.

I do not consider that any useful purpose is served in attempting to determine by whose "fault" the submission on behalf of the worker was not considered by the commissioners. I am concerned that the circumstances outlined above give rise to an apparent breach of natural justice. Due to a combination of circumstances, the worker was denied the opportunity to respond to the new medical evidence obtained by the prior commissioners, prior to a decision being made on an appeal.

On January 6, 1992 the Board of Governors approved the following:

RESOLVED THAT the Appeal Division of the Worker's Compensation Board of British Columbia shall exercise the authority of the Workers' Compensation Board of British Columbia under Section 96(2) of the *Workers Compensation Act* to reopen, rehear and redetermine any decision made by the former Commissioners prior to June 3, 1991, where the Chief Appeal Commissioner finds that the decision was based on an error of law or involved or involves an issue under the *Canadian Charter of Rights and Freedoms*; . . .

Section 96(2) of the *Act* provides:

. . . the board may at any time at its discretion reopen, rehear and redetermine any matter, except a decision of the appeal division, which has been dealt with by it or by an officer of the board.

It is well established that a breach of natural justice would constitute an error of law within the meaning of the governors' resolution. Therefore, while the application for reconsideration of this case based on Section 96.1 cannot succeed, I consider that the worker's appeal should be reopened, reheard and redetermined pursuant to Section 96(2) of the *Act* on the basis that the worker was denied a sufficient opportunity to be heard.

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The decision of the prior commissioners will be set aside and the matter assigned to a panel of the Appeal Division to consider the appeal from the April 27, 1989 Review Board finding.

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

# REPORTER

An  
Administrative Inventory  
at a Time of Transition:  
MANAGEMENT RESPONSE

UPDATE – YEAR 1  
JUNE 1992

*Not currently available in Acrobat PDF (portable document format).*

