

WORKERS' COMPENSATION REPORTER

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- *Blue* — *Governors' Decisions*
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Decision of the Governors

Number: 23

Date: July 20, 1992

Subject: Occupational Safety and Health Regulation Review:
Appointment of Members of the Ergonomics Subcommittee

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" (the "Strategy Document") which defines the process by which the governors will review the Regulations;

AND WHEREAS the Strategy Document contemplates that the Governors' Committee for Regulation Review (the "Governors' Committee") will appoint Specialty Subcommittees to address specific areas of occupational safety and health regulation;

AND WHEREAS the Governors' Committee has decided that there should be a Specialty Subcommittee, called the "Ergonomics Subcommittee," to assist the governors in the development of regulations for the work environment and ergonomics and to address specifically the risks of cumulative trauma disorder and back strain;

AND WHEREAS the Governors' Committee has decided to appoint three persons representative of workers and three persons representative of employers to the Ergonomics Subcommittee and to second employees from the W.C.B. Occupational Safety and Health Division, as necessary, to the Secretariat for Regulation Review to participate on the Subcommittee:

NOW THEREFORE THE GOVERNORS' COMMITTEE FOR REGULATION REVIEW RESOLVES THAT the following persons shall be appointed to the Ergonomics Subcommittee:

To be Representative of Workers:

Karen Dean (Hospital Employees' Union)
George Heyman (B.C. Government Employees' Union)
Alanna Lantela (United Fishermen & Allied Workers' Union)

To be Representative of Employers:

Lance Ewing (Audaciter Enterprises Inc.)
Tony Gould (Weiser Lock Inc.)
Brent Sauder (MacMillan Bloedel Research)

AND THE GOVERNORS' COMMITTEE FOR REGULATION REVIEW FURTHER RESOLVES THAT Thirugnana (Bawan) Saravanabawan and Toby Steele shall be appointed to the Ergonomics Subcommittee from the W.C.B. Occupational Safety and Health Division through secondment to the Secretariat for Regulation Review.

Editors' note: This resolution of the Governors' Committee for Regulation Review has been indexed under Decisions of the Governors for ease of reference.

Decision of the Governors

Number: 24
Date: July 20, 1992
Subject: Occupational Safety and Health Regulation Review:
Appointment of Members of the Occupational Hygiene
Subcommittee

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" (the "Strategy Document") which defines the process by which the governors will review the Regulations;

AND WHEREAS the Strategy Document contemplates that the Governors' Committee for Regulation Review (the "Governors' Committee") will appoint Specialty Subcommittees to address specific areas of occupational safety and health regulation;

AND WHEREAS the Governors' Committee has decided that there should be a Specialty Subcommittee, called the "Occupational Hygiene Subcommittee," to assist the governors in the development of regulations;

AND WHEREAS the Governors' Committee has decided to appoint four persons representative of workers and four persons representative of employers to the Occupational Hygiene Subcommittee and to second employees from the W.C.B. Occupational Safety and Health Division, as necessary, to the Secretariat for Regulation Review to participate on the Subcommittee:

NOW THEREFORE THE GOVERNORS' COMMITTEE FOR REGULATION REVIEW RESOLVES THAT the following persons shall be appointed to the Occupational Hygiene Subcommittee:

To be Representative of Workers:

Lisa Hansen (Health Sciences Association of British Columbia)
Jim Parker (I.W.A. — Canada)
Larry Stoffman (United Food & Commercial Workers of B.C.)
Gordon Steep (United Steel Workers of America)

To be Representative of Employers:

Dave Bell (Occupational Safety and Health — University of
British Columbia)
Ron Dennis (City of Victoria — Human Resources)
Maurice Fernandes (Weyerhaeuser Pulp Division)
Kent Hillman (B.C. Hydro)

AND THE GOVERNORS' COMMITTEE FOR REGULATION REVIEW FURTHER RESOLVES THAT Peter Gilmour shall be appointed to the Occupational Hygiene Subcommittee from the W.C.B. Occupational Safety and Health Division through secondment to the Secretariat for Regulation Review.

Editors' note: This resolution of the Governors' Committee for Regulation Review has been indexed under Decisions of the Governors for ease of reference.

Decision of the Governors

Number: 25

Date: July 20, 1992

Subject: Occupational Safety and Health Regulation Review:
Appointment of Members of the First Aid Subcommittee

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" (the "Strategy Document") which defines the process by which the governors will review the Regulations;

AND WHEREAS the Strategy Document contemplates that the Governors' Committee for Regulation Review (the "Governors' Committee") will appoint Specialty Subcommittees to address specific areas of occupational safety and health regulation;

AND WHEREAS the Governors' Committee has decided that there should be a Specialty Subcommittee, called the "First Aid Subcommittee," to address regulating the installation and maintenance by employers of first aid equipment and services, the training of industrial first aid attendants and instructors, and other regulatory matters arising under Section 70 of the *Workers Compensation Act* and the *Industrial First Aid Regulations*;

AND WHEREAS the Governors' Committee has decided to appoint three persons representative of workers and three persons representative of employers to the First Aid Subcommittee and to second employees from the W.C.B. Occupational Safety and Health Division, as necessary, to the Secretariat for Regulation Review to participate on the Subcommittee:

NOW THEREFORE THE GOVERNORS' COMMITTEE FOR REGULATION REVIEW RESOLVES THAT the following persons shall be appointed to the First Aid Subcommittee:

To be Representative of Workers:

Lisa de Lange (B.C. Ferry & Marine Workers' Union)
Ilona Kenny (Canadian Paperworkers' Union)
Bob Patterson (I.W.A. — Canada)

To be Representative of Employers:

Jim Butterfield (Weldwood of Canada)
Lance Ewing (Audaciter Enterprises Inc.)
Walter Rosner (Cominco Metals);

AND THE GOVERNORS COMMITTEE FOR REGULATION REVIEW FURTHER RESOLVES THAT Al Dresser and Ron Hazelton shall be appointed to the First Aid Subcommittee from the W.C.B. Occupational Safety and Health Division through secondment to the Secretariat for Regulation Review.

Editors' note: This resolution of the Governors' Committee for Regulation Review has been indexed under Decisions of the Governors for ease of reference.

Decision of the Appeal Division

Number: 92-1215
Date: June 24, 1992
Panel: Paul Petrie
Subject: Composition of a Medical Review Panel

This application is pursuant to Section 96(2) on behalf of the worker with respect to the three decisions of the former commissioners dated August 15, 1989, May 18, 1988 and August 4, 1987. The allegation by the worker's representative is that the commissioners' decisions contain an error of law. This application is based on the January 6, 1992 resolution by the Board of Governors which provided:

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*; . . .

This application has been referred to the registrar for consideration under Section 85(8) of the *Workers Compensation Act* (the *Act*). The issue to be resolved is whether the January 11, 1988 supplement to the medical review panel certificate of April 4, 1986 complies with the terms of Section 58 through 65 of the *Act*. That supplement was issued by the two remaining members of the medical review panel in response to a request by the commissioners for clarification of the April 4, 1986 medical review panel certificate.

Evidence and Argument

The history of this case is complex and only those facts relating to the issue of the medical review panel appeal are detailed in this decision. The worker sustained a number of compensable back injuries including claims in 1965, 1972 and 1973. He was granted a 5% physical impairment pension in December 1979 under the 1972 claim number. Because his loss of earnings was higher, a 28.54% pension was paid on a loss

of earnings basis under Section 23(3) of the *Act*. In 1984, he fell off a ladder at home as a result of his right leg giving out. On June 25, 1984, the Board denied the back injury was responsible for his complaint of his right leg giving out and concluded that his back disability had not worsened.

He appealed this decision to a medical review panel on July 24, 1984. His appeal was supported by an enabling certificate from his family physician dated July 16, 1984. In that certificate the family physician stated that he did not agree with the Board's decision that the worker's back problems had not deteriorated and he felt it was possible that the worker's leg giving out was related to his compensable injuries.

A Statement of Foundational Non-Medical Facts was prepared and mailed to the worker on December 11, 1984. The W.C.B. commissioners appointed a specialist, Dr. A, on behalf of the defunct employer under Section 59(2) of the *Act*. On February 25, 1985, the worker nominated Dr. B and also nominated Dr. C as an alternate. It was eventually decided that Dr. C would serve on the medical review panel because of a scheduling conflict for Dr. B.

The medical review panel certificate dated April 4, 1986 certified as follows:

<i>Issues</i> <i>December 11, 1984</i>	<i>M.R.P. Certificate</i> <i>April 4, 1986</i>
1. What is the condition of the claimant?	1. The condition of the claimant is good.
2. Does he now have a disability with respect to his right knee and back? If not, could the Panel advise the Board whether historically they believe that the claimant did, at any time, have a disability with respect to his right knee and back?	2. He does not have a disability with respect to his right knee. The Panel believes that there is no historical evidence to identify and recognize a previous disability of his right knee. He does have a disability with respect to his back.
3. If he has or had such a disability, what is its nature and extent and in what ways has it affected the body function of the claimant? In particular, in what ways has it limited his capacity for work?	3. The nature of the disability is low back pain. The extent of the disability is mild to moderate. The disability limits low back movement and function. It limits his capacity to work in that the pain restricts low back movement and function.
4. If he has or had such a disability, was his compensable injury of 28 October 1972 of causative significance and, if so, in what way?	4. The compensable injury of October 28, 1972 was not of causative significance.
5. If he has or had such a disability, was the disability wholly or partly the result of causes other than his compensable injury of 28 October 1972? If so, what other causes were there, and how and to what extent was each cause significant.	5. The disability is wholly the result of causes other than his compensable injury of October 28, 1972. The cause is degenerative back disease. The degenerative back disease is responsible for the low back pain.
6. [Not Applicable].	6. Not Applicable.

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- | | |
|--|---|
| 7. Did the claimant suffer from any pre-existing condition or disability and, if so, was it activated, accelerated or aggravated by his compensable injury of 28 October 1972? | 7. Other than the cause identified, no pre-existing conditions are noted. |
| 8. If the claimant now has a disability, is it permanent and, if so, when did it stabilize? | 8. The disability is permanent and it has not stabilized. |

The certificate was signed by Dr. D, panel chair, and Dr. A and Dr. C, members.

On April 24, 1986, the director of Appeal Administration referred the certificate to the medical review panel solicitor stating:

The findings of the Medical Review Panel are responsive to the questions posed, and are within their jurisdiction. The Certificate should be accepted, and referred to the Claims Department for implementation.

On June 4, 1986, the worker filed an appeal to the commissioners from the Board's decision to accept the medical review panel certificate as a valid certificate. He sent with his notice of appeal a letter from the orthopedic surgeon, Dr. E, which stated in part:

The x-rays of May 14th, 1980, show 50% narrowing of the L2-3 disc space with moderate hypertrophic lipping, showing the same area as a localized condition in the same location as was found in 1972 and 1973, by Dr. F, and with continuing symptoms ever since.

I would consider it an irrational decision by the Review Panel to consider his symptoms at the time of their examination due to arthritis and not due to the previous injuries. A further supporting reason for this objection is that even his x-rays at the present time, i.e. 1980, show a single localized lesion in the lumbar spine at the L2-3 level. No one could rationally call this arthritis, without there being at least a considerable degree of the same condition at other levels as well. The localized lesion continuing for so many years is a clearcut indicator of physical damage that has taken place in the past by some injury and that arthritis has no bearing on it at all.

On July 10, 1986, the worker was advised by the senior pensions adjudicator that his permanent partial disability award of 28.54% for back disability was discontinued effective May 1, 1986 as a result of the medical review panel certificate. The worker's counsel argued that the medical review panel certificate should not be used to deny his pension entitlement because the medical review panel did not adequately address the

effect of his compensable back injuries, particularly the 1973 compensable back injury and its effect on the development of degenerative disc disease.

The commissioners' decision of August 4, 1987 concluded that:

. . . the Medical Review Panel Certificate is a proper one within the Panel's jurisdiction and is binding on the Board. However, before reaching a final decision on your case, the Commissioners are obtaining clarification from the Panel regarding your work injuries other than your 1972 injury.

On August 7, 1987, the appeals administrator wrote to Dr. D seeking clarification as to whether the worker's other compensable injuries were of causative significance with respect to his back disability. The letter advised:

Copies of the Panel's Certificate and Narrative Report are enclosed for reference. It would be appreciated if any letter of clarification was signed by both Dr. A and yourself. As Dr. C is no longer serving on Medical Review Panels, clarification is requested from the remaining members of the Panel.

On November 25, 1987, the worker's counsel wrote to the Board stating that the worker was entitled to nominate a new specialist, since his alternate nominee, Dr. C, was unable to complete his duties. That request was denied by the appeals administrator in a letter dated December 1, 1987.

On January 11, 1988, the two remaining members of the medical review panel issued a "Supplement to Certificate of Medical Review Panel" which stated in part:

On January 11, 1988, Doctors A and D, the remaining two active members of the Medical Review Panel of March 7, 1986, met, reviewed the data including subsequent medical reports of Dr. G (March 14, 1986), Dr. E (June 26, 1986), and Dr. F (October 7, 1986). It also reviewed the letters [from the worker's representatives].

It is our belief that the injuries of 2 August 1965, 24 January 1972, 10 October 1973 were not of causative significance with respect to the degenerative disc disease. These injuries were factors which caused temporary back pain and time loss and did not contribute to the overall course of his degenerative disc disease.

[The worker's counsel] has written the Medical Review Panel suggesting that it is not duly reconstituted to exercise the function as noted above. The Panel believes that this is not a medical issue and will leave such contentious issues to the Board.

All above conclusions and beliefs are unanimously held by the undersigned.

The "Supplement" was signed by Dr. D, chairman, and Dr. A, member.

On February 2, 1988, the appeals administrator wrote to the worker's counsel and advised that the January 11, 1988 "letter" would be referred to the commissioners along with any further submissions. His counsel submitted on March 1, 1988:

. . . there can now be no legal alternative to the appointment of an *entirely new* Medical Review Panel pursuant to either section 58(5) or 58(3) of the *Act*. It is our position that the "old" Panel has, with the greatest of respect to the doctors, hopelessly compromised itself.

(emphasis in original)

This submission was supported by arguments regarding the constitution of the panel, its failure to hold a hearing, and its failure to consider relevant medical reports.

The commissioners' further decision dated May 18, 1988, concluded that the Supplement issued by the remaining two panel members:

. . . should be accepted as valid part of the Panel's Certificate and considered binding on the Board pursuant to section 65 of the *Act*.

The commissioners rejected the argument that the Supplement issued by the remaining two members of the panel was not valid. The commissioners defended the supplement on the grounds that the panel was not being asked to render a new decision, but only being asked for clarification of its previous decision.

On July 6, 1989, an ombudsman's officer wrote to the W.C.B. acting chairman stating:

. . . it seems that the *Act* and procedural fairness require that [the worker] have the benefit of his own nominee, i.e., a full panel for the consideration and evaluation of the new evidence and the rendering of a binding decision. We suggest therefore that a new panel be convened with respect to the 1973 injury. We would further suggest that, to avoid a reasonable apprehension of bias which could arise because Doctors D and A have already decided the issue on two occasions, the new panel be composed of new members.

On August 15, 1989, the Board's general counsel and secretary wrote to the worker and advised that the commissioners rejected the proposal by the ombudsman's officer. In support of their decision, the commissioners stated:

When a question arises as to whether a three-member Medical Review Panel considered a particular issue and, if so, the decision which was reached, it is preferable that all three members participate in the "clarification". If, however, one of the members is unable to do so, it is, in the Commissioners' opinion, proper to seek this type of clarification from the two remaining Panel members. These individuals are not making a new decision or performing statutory duties within the meaning of Section 59(4). Rather, they are merely stating whether a decision has already been made and, if so, the nature of that decision. This does not require the consideration of new evidence . . .

Further representations were made to the commissioners by the worker in December 1989 and by his family physician, on January 2, 1990. In their letter of January 12, 1990, the commissioners confirmed their previous findings and denied any further consideration of the medical review panel certificate of April 4, 1986 and the Supplement provided by the two remaining panel members of January 11, 1987.

The workers' adviser wrote to the Appeal Division on July 23, 1991 seeking a reconsideration of the former commissioners' decision under Section 96.1 of the *Act*. In a decision dated December 18, 1991, a panel of the Appeal Division denied that application on the grounds that the evidentiary requirements of Section 96.1 had not been met. Subsequent to the January 6, 1992 resolution by the Board of Governors, the workers' adviser again wrote to the Appeal Division seeking a decision that the former commissioners' decision of January 12, 1990 contained an error of law. The representative argued:

. . . the supplemental certificate of January 11, 1988 should be severed from the Medical Review Panel's certificate of March 7, 1986 (sic). [The worker] further contends that the Medical Review Panel's certificate of March 7, 1986 contains a material flaw contrary to Section 61 of the *Workers Compensation Act* and should therefore be declared null and void.

Law and Policy

Section 59 of the *Act* provides for the appointment of a medical review panel. Subsection 59(1) of the *Act* provides for the worker and employer to each nominate a specialist to serve as members on a medical review panel. Subsection 59(2) provides for

the Board itself to nominate a specialist where the employer is no longer active. The remainder of Section 59 reads as follows:

(3) The board shall, within 18 days from the receipt of the nominations, if the specialists are prepared to accept the nominations, appoint the specialists members of a medical review panel to examine the worker and the 2 specialists so appointed together with a chairman shall be a medical review panel.

(4) If a specialist does not accept the nomination or if for any reason he is unable to complete his duties as a member of the panel, another specialist shall be nominated and appointed in his place in the manner provided in this section for the appointment of the specialist; and if the party who expressed the grievance under section 58(3) or (4) fails to nominate a specialist within 8 days after receipt of the notice, no further proceedings shall be taken under this section with respect to that grievance.

(5) If the party other than the one who expressed the grievance fails or neglects to nominate a specialist within 8 days after receipt of the notice, the minister shall appoint a specialist as a member of the panel, and that member shall be deemed to be appointed on the recommendation of that party.

Subsection 61(1) states in part:

61. (1) The decision of a majority of the panel is the decision of the panel . . .

Section 65 provides that:

A certificate of a panel under sections 58 to 64 is conclusive as to the matters certified and is binding on the board

Section #103.50 of the *Rehabilitation Services and Claims Manual* states in part:

If a certificate is considered incomplete or ambiguous it is referred back to the Medical Review Panel, as that is the only tribunal with authority under the *Act* to provide a complete certificate.

Decision

The application by the workers' adviser alleges that the Board violated the requirements of natural justice in denying the worker an opportunity to select a replacement nominee to the medical review panel after they were asked to consider the commissioners' request for clarification of the April 4, 1986 certificate of the full panel.

The appropriate test for reconsideration under Section 96(2) was considered by the chief appeal commissioner in Appeal Division *Decision No. 92-0818*. In that decision it was concluded:

In light of the fact that the former Commissioners' decisions were protected by a privative clause, I find 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, in the case of decisions pertaining to natural justice issues, it is my view that the Appeal Division's scope of review is broader. In such cases, the Appeal Division must have the power to redetermine decisions of the former Commissioners on the grounds that they misinterpreted the law, irrespective of whether the misinterpretation can be characterized as "patently unreasonable". This is consistent with various judicial pronouncements on the standard of review applicable to decisions involving natural justice issues.

The issue to be resolved in this application is whether the medical review panel that issued the January 11, 1988 "Supplement to Certificate of Medical Review Panel" was properly constituted. The resolution of this issue requires consideration of three questions.

1. *Was the medical review panel certificate of April 4, 1986 responsive to the issues submitted to the panel?*

I find on the evidence in this case that this question must be answered in the affirmative. The Board accepted the findings of the medical review panel as "... responsive to the questions posed" and within the panel's jurisdiction. The request for clarification arose out of the worker's submissions that the medical review panel had failed to address a relevant question — did the (January) 1972 and 1973 injuries have causative significance in the development of the degenerative back disease? The former commissioners found no ambiguity in the panel's certificate, but, nevertheless concluded that "clarification" should be sought from the panel regarding the relationship between the compensable injuries and the degenerative back disease.

2. *Did the request for clarification raise a new issue for the panel to decide?*

It is clear from the evidence that the worker was taken by surprise by the medical review panel decision that the 1972 compensable back injury was not the cause of his back disability. It is equally apparent from the evidence on file that the Board, too, had not anticipated the panel's decision. The issue of causation for the permanent back disability had been decided in 1979 when the disability award was made. The only issues in dispute in 1984 were whether the recognized back disability had worsened, and whether the right leg problems were a consequence of the compensable back disability.

Although the panel certified that the (October) 1972 compensable injury was not the cause of the worker's back disability, the panel did not specify what did cause the "degenerative back disease" that resulted in his permanent disability. It is the worker's position that the (January) 1972 and 1973 compensable back injuries activated, accelerated, and/or aggravated the degenerative back disease resulting in his permanent disability.

The medical review panel did not address the relationship between the (January) 1972 and 1973 compensable injuries and the degenerative back disease, because the Board did not raise this issue in their December 11, 1984 questions to the panel. This omission is understandable, since the panel's conclusions were not anticipated. In this respect, the panel's certificate did not fully resolve the medical issue in dispute. In the face of these circumstances, the former commissioners acted reasonably in seeking a determination from the medical review panel of any possible relationship between the other compensable injuries and the onset and development of degenerative back disease.

The August 7, 1987 letter from the appeals administrator to the medical review panel chairman pointed out that the issues previously referred to the medical review panel did not address the injuries of August 2, 1965, January 24, 1972 and October 10, 1973. The appeals administrator stated:

The commissioners have concluded that clarification from the panel would be of assistance, as to whether these other compensable injuries were of causative significance with respect to the claimant's back disability.

I find that the referral of this new question to the medical review panel amounted to more than a clarification of what the panel had already decided. The former commissioners had concluded that the medical review panel certificate of April 4, 1986 was clear and unambiguous. The referral raised a new issue not previously decided by the medical review panel. The fact that the remaining members of the panel considered new evidence not previously available supports this finding. The panel's January 11, 1988 response to this request was correctly described as a "*Supplement*" rather than a clarification. In effect, the request for "clarification" was a request to determine a new issue not previously decided.

-
3. *Was the medical review panel properly constituted to decided the new issue raised in the August 7, 1986 referral from the commissioners?*

The *Act* is clear on the proper constitution of a medical review panel. Subsection 59(3) states that “. . . the 2 specialists so appointed together with a chairman shall be a medical review panel”. Subsection 59(4) makes provision for replacing a specialist “. . . if for any reason he is unable to complete his duties as a member of the panel.” The *Act* requires that “. . . another specialist shall be nominated and appointed in his place.” If the appellant who expressed the grievance fails to nominate a replacement specialist, the *Act* requires that “. . . no further proceedings shall be taken under this section with respect to that grievance.” The *Act* also makes provision for the minister of Labour to appoint a specialist to complete the panel where the respondent to the appeal fails to nominate a specialist.

I find that the clear intent of the legislation is to establish a panel composed of two specialists and a chairman who together shall be a medical review panel. There is no provision in the *Act* for a quorum to act on the panel’s behalf. The fact that the Legislature has specified a detailed procedure for replacing a specialist who is unable to complete his duties provides strong support for this position. The severe consequences of discontinuing the appeal where the appellant fails to nominate a replacement specialist also supports this conclusion. Finally, the requirement that the minister of Labour nominate a specialist where the respondent does not make a nomination emphasizes the importance that the Legislature attaches to completion of the panel.

In *Kooner v. B.C. (W.C.B.)* (1991) 54 B.C.L.R. (2d) 92, the Court of Appeal held that:

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

In this case, the former commissioners denied the worker an opportunity to nominate a replacement specialist and concluded that the provisions in Section 59(4) of the *Act* requiring appointment of a replacement specialist did not apply in this case.

Section 59(3) of the *Act* requires that a medical review panel shall be composed of two specialists and a chairman. I find the Board failed to meet the statutory requirement in Section 59(4) when it denied the worker an opportunity to nominate a replacement specialist. The *Act* does not give the Board the authority to refer an issue to a medical review panel for a decision without the appointment of the appellant's nominee, and where that nominee is unable to complete his duties, the *Act* requires the appointment of a replacement nominee.

A certificate issued by an improperly constituted medical review panel is not conclusive as to the matters certified and is not binding on the Board. The former commissioners erred in law in accepting the January 11, 1988 "Supplement to Certificate of Medical Review Panel" issued by the two remaining members of the prior medical review panel.

The appropriate remedy in this case is for the worker to be examined by a new medical review panel to determine the issue raised in the referral of August 7, 1987. Because this matter has remained in dispute for more than seven years, expedited consideration by a medical review panel would be appropriate.

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



Decision of the Appeal Division

Number: 92-1377
Date: August 10, 1992
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Medical Review Panel Certificate #3

This matter comes before me pursuant to a request from the Office of the Ombudsman that the Appeal Division reconsider the prior commissioners' decision of February 20, 1990, contained in a letter signed by the general counsel and secretary for the Board. The commissioners rejected the proposal by the ombudsman:

1. To refer back to the medical review panel a certificate dated December 9, 1988
2. To have the worker examined by a second medical review panel composed of specialists from the field of psychiatry
3. To have the worker examined by a Board psychologist

The ombudsman's requests arise out of a medical review panel certificate which contained the following questions and answers:

1. Q. What is the condition of the claimant?
 - A. *The Claimant has had 5 surgical operations on his back which have left him with some back pain, with some radiation to the lower limbs. But, it is the unanimous conclusion of the Panel that the Claimant has allowed this pain to dominate his lifestyle to such a degree that he has become, in his own mind, a chronic invalid, with respect to his back.*
2. Q. 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 claimant did, at any time, have a disability with respect to his back?
 - A. *Yes, the patient does have a disability with his back.*

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3. Q. If he has or had such a disability, what is its nature and extent and in what ways has it affected the body function of the claimant? In particular, in what ways has it limited his capacity for work?
- A. *As a result of some discogenic disease combined with the post-operative effects of 5 surgical interventions, the Panel agrees with other observers that this man is unable to perform any heavy work. The overlay to this pain has caused him to develop a lifestyle which is inconsistent with the objective physical findings in the back and the leg. The Panel would agree with the assessment of Dr. H and Dr. I that "this man is only unemployable in his own mind".*
4. Q. If he has or had such a disability, was his work injury of 26 July 1979 of causative significance and, if so, in what way?
- A. *The Panel agrees that the work injury of 26 July 1979 was of causative significance to this back problem and to the subsequent surgery.*
5. Q. If he has or had such a disability, was the disability wholly or partly the result of causes other than his work injury of 26 July 1979? If so, what other causes were there, and how and to what extent was each cause significant?
- A. *There is radiological evidence that the Claimant did have pre-existing degenerative changes in his spine. According to the Claimant, this was totally symptomless and there had been no previous injuries to his back prior to the work-related accident of 26 July 1979.*
6. Q. If there are or were two or more causes of the Claimant'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 this disability?
- A. a) *The chronic asymptomatic back disease paved the way for the discogenic episode that occurred on 26 July 1979 which appears to be genuine and work-related. The predominant proportion of the disability must be attributed to the work accident.*
- b) *These causes were consecutive.*

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7. Q. The Board has recognized that the claimant was temporarily disabled as a result of his work injury of 26 July 1979 for the period set out in non-medical fact Nos. 3, 11 and 15 of this statement. Would the Panel please state whether they feel that the claimant was temporarily disabled for any further period or periods as a result of his work injury of 26 July 1979 and, if so, what the nature and extent of the disability was during this further period of time.
- A. *The Panel agrees with the periods of temporary disablement as a result of the work injury set out in The Non-Medical Facts 3, 11, and 15. Further to this, the Panel also agrees with the 15% permanent disability pension that has been awarded to this Claimant by Doctors H and I.*
8. Q. Did the claimant suffer from any pre-existing condition or disability and, if so, was it activated, accelerated, or aggravated by his work injury of 26 July 1979?
- A. *The Claimant did have radiological evidence of a pre-existing degenerative condition of his back which, in the opinion of the Panel, was activated by the work injury of 26 July 1979.*
9. Q. If the claimant now has a disability related to his work injury of 26 July 1979, 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.
- A. *The disability caused by the work injury of 26 July 1979 has been modified by the Claimant's experience of 5 back operations, a stay in the Rehabilitation Clinic, a further prolonged period of treatment in the Columbia Pain Clinic, by numerous medical examinations, both by his general practitioner, by specialists, and by a battery of psychologists. No significant change is expected by the Panel in this state of affairs unless the Claimant changes his reaction to his discomfort in a more positive way.*

The worker is in receipt of a loss of earnings pension based upon the difference between his pre-injury earnings and earnings that could be realized from working as a parking lot attendant. He has not returned to any form of gainful employment.

The ombudsman officer submits that Section 61(1) of the *Workers Compensation Act* requires the medical review panel to certify as to:

- a) The condition of the worker

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- b) The existence or non-existence of a disability
 - c) If there is a disability, its nature and extent
 - d) If there is a disability, 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

It is alleged that the medical review panel certificate in this case did not answer those questions with respect to the psychological aspects of the case. Referring to questions #3 and #9 it is alleged that the panel, in assessing the extent of the worker's disability, distinguished between his reaction consistent with the objective findings and his reaction inconsistent with the objective findings. It is contended that the answer to question #9 "appears to attribute this inconsistent response to compensable factors."

The ombudsman apparently accepts the worker's contention of 100% disability. Reference is made to the medical review panel description of the worker as "a chronic invalid" in his own mind as a result of his reaction to his injury and its sequelae. The submission notes that the panel stated in the Narrative Report:

The pension at the present time is quite adequate for the amount of disability the panel has found but that the mental overlay to the case was going to make it difficult for the Claimant to return to work.

The ombudsman reasons that such statement implies that the panel's consideration of the amount of pension for the actual physical findings was separate from the mental overlay aspect of it. It is alleged that accepting the panel's endorsement of the 15% permanent partial disability award as including the entire mental overlay issue was incorrect in that the overlay which caused the worker to develop a lifestyle inconsistent with the objective physical findings is also responsible for the worker being "unemployable in his own mind." It is, therefore, alleged that the extent of this portion "of his mental disability" has not been clearly answered by the medical review panel.

I have fully reviewed the submissions by the ombudsman's office and also those previously received from the workers' advisers office. I am not convinced that the February 20, 1990, decision of the commissioners constitutes an error of law. To satisfy that test it is necessary to show that the commissioners' decision was patently unreasonable. I am not satisfied that the decision was unreasonable at all, let alone, patently unreasonable. The principal reason for that conclusion is actually contained in the submission from the ombudsman officer. She points out that:

The overlay and reactions are not ever described as a disability or a syndrome.

It is clear to me, upon reviewing the whole of the medical review panel certificate, read in conjunction with the Narrative Report, that the medical review panel did not accept the contention that the worker's mental state constituted a disability. Hence there was no requirement to define its extent pursuant to Section 61.

I also note that the medical review panel never identified a clear causal connection between the worker's mental state and his compensable injury.

The alternative request by the ombudsman was to have the worker examined by a second medical review panel composed of specialists from the field of psychiatry. There was no legal error in the commissioners' rejection of that proposal. The position of the commissioners appears to be consistent with the court decision in the case of *Kooner v. Workers' Compensation Board* (1991) 54 B.C.L.R. (2d) 83. The Court made it clear in that decision that a panel's certificate must be accepted as conclusive and binding on the Board, in the sense that the Board is required to act on it, unless and until some significant new circumstance comes to light which would call into question the validity of the certificate. No such evidence has been provided in this case.

Finally, the ombudsman's office has requested that the worker be examined by a Board psychologist. That would not appear to be warranted. There is evidence on file of examination by various psychiatrists and psychologists over the years. There is no evidence or argument presented to suggest that the commissioners erred in law by refusing to again have the worker psychologically examined.

THE APPLICATION FOR RECONSIDERATION BY THE OMBUDSMAN'S OFFICE MUST, THEREFORE, BE DENIED.

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



Decision of the Appeal Division

Number: 92-1422
Date: August 17, 1992
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Medical Review Panel Certificate #4

This case comes before me on an application from the ombudsman's office for a reconsideration of the commissioners' decision of October 15, 1990. In that decision the prior commissioners refused to reconsider the worker's entitlement to compensation on the basis of the medical review panel certificate dated October 27, 1989. The medical review panel certificate stated:

1. Q. What is the condition of the claimant?
A. *The Claimant has chronic lumbar degenerative back disease.*
2. Q. 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 claimant did, at any time, have a disability with respect to his back?
A. *The Claimant does have a disability at the present time with respect to his back.*
3. Q. If he has or had such a disability, what is its nature and extent and in what ways has it affected the body function of the claimant? In particular, in what ways has it limited his capacity for work?
A. *The Claimant's disability is one of pain brought on by moderate activity but also occurring at rest. The pain is low back pain with some radiation to the right leg. This, in itself, has limited his capacity for work but his reaction to this back pain has limited his capacity for work to a much greater extent.*
4. Q. If he has or had such a disability, was any one or any combination of the claimant's compensable work injuries of causative significance and, if so, in what way?

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- A. *The Panel has carefully reviewed the 20 episodes of injury and temporary total debility. The Panel does not believe that any one or any combination of these work injuries were severe enough to cause the present disability structurally. The overlay to the injuries particularly the injury of June 6, 1984, when the Claimant was, for a short period of time, buried up to the knees at the bottom of a ditch, have very considerably increased the symptomatology although these symptoms are not supported by physical findings.*
5. Q. If he has or had such a disability, was the disability wholly or partly the result of causes other than any one or any combination of the claimant's compensable work injuries? If so, what other causes were there, and how and to what extent was each cause significant?
- A. *There is radiological evidence of arthritis in the facet joints of the spine and of the degenerative changes of aging in the spine. In addition to this, there is a degree of osteopenia which has been present for at least 10 years.*
6. Q. If there are or were two or more causes of the claimant'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?
- A. a) *This back is the subject of degenerative aging changes. There have been many episodes of temporary aggravation of these aging changes which have been well treated and have been compensated. The major disability is due to aging changes in the back.*
- b) *The cumulative series of compensated back injuries have resulted in a functional overlay, and it is the functional overlay which has acted with the degenerative condition of the back to produce the disability.*
7. Q. The Board has recognized that the claimant was temporarily disabled as a result of his compensable work injuries for the period set out in non-medical fact number 5, 10, 15, 20, 25, 31, 36, 42, 50, 56, 64, 66, 71, 77, 80, 85, 97, 102, 104 and 114 of this statement. Would the Panel please state whether they feel that the claimant was temporarily disabled for any further period or periods as a result of his compensable work injuries and, if so, what the nature and extent of the disability was during this further period of time.

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- A. *The Panel believes that the Claimant has been fairly compensated for the numerous episodes of back injury, and that the disability that remains is due to the aging degenerative changes of the back coupled with the overlay to the back pain.*
8. Q. Did the claimant suffer from any pre-existing condition or disability and, if so, was it activated, accelerated, or aggravated by his any one or any combination of his compensable work injuries?
- A. *There is no evidence of any pre-existing condition or disability. This Claimant has degenerative changes in the back which have been temporarily exacerbated by repeated injuries leaving behind the still-slowly progressive degenerative changes in the back.*
9. Q. If the claimant 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.
- A. *The natural history of this disease suggests that over the years it is likely to get worse. It is not likely to change within the next twelve months. If the Claimant accepts the fact that he does have some natural degenerative changes in his back, which do cause some pain, and that he will have to live with this pain, and that this pain is not the fault of his work history, then the overlay to the pain might improve.*
10. Q. If not already answered, would the Panel please state whether the claimant's osteoarthritis in his back is causally related to any one or any combination of any of the claimant's injuries sustained at work.
- A. *The Panel does not believe that the degenerative condition of this patient's spine is related to any one or a combination of his injuries, but is rather a natural degenerative condition of the back which has been temporarily exacerbated by injury, rather than caused by injury.*

The issue raised by the ombudsman's request is whether the interpretation of the certificate adopted by the commissioners, that no further compensation was payable to the worker, was patently unreasonable. The ombudsman contends that as the medical review panel identified a functional overlay related to the worker's compensable injuries which acted together with his degenerative back condition to produce a disability, that the Board has some continuing responsibility with respect to that disability. The panel found that the symptomology was not supported by the physical

findings and the commissioners interpreted the decision to mean that the overlay was not compensable. The ombudsman alleges that such interpretation does not follow the published policy regarding psychological disability and argues that since the panel has determined that the worker's functional overlay was caused by his work injuries and that the functional overlay forms part of his disability, the issue of temporary or permanent benefits with respect to the psychological reaction needs to be addressed.

Having reviewed all of the documents in respect of this matter I am in agreement with the position advanced by the ombudsman. In the face of a certification that the "functional overlay" was a result of "the cumulative series of compensated back injuries" and that the functional overlay was a factor "which has acted with the degenerative condition of the back to produce the disability" further analysis was required.

One cannot ascertain from the medical review panel certificate what precisely was meant by the panel's use of the term "functional overlay." Its context suggests the worker is experiencing some psycho-social response that goes beyond the physical. "Functional overlay" is not a medical diagnosis. Moreover, the certificate uses other terms and phrases interchangeably with functional overlay, such as, "attitude and overlay" and "mental overlay."

Despite the ambiguity of the terms, however it was not open to the prior commissioners to simply ignore the causal connection identified by the panel between the compensable injuries and what they referred to as "functional overlay." The panel certified that the functional overlay was a result of the compensable injuries and also that it was a cause of the worker's disability. Further medical investigation is required with respect to the nature and extent of the psychological aspects of this worker's claim.

The interpretation of the certificate by the prior commissioners denying absolutely any right to further entitlement on the basis of the medical review panel certificate was patently unreasonable. Clarification of the issues raised by the certificate is required. I have concluded that this matter would be best disposed of by referring the questions regarding the worker's psychological status to a further medical review panel consisting of a chair and two psychiatrists.

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

Decision of the Appeal Division

Number: 92-1431
Date: August 14, 1992
Panel: Thomas Kemsley, Derrick Spooner, Walter N. Peain
Subject: Sufficiency of Evidence

This is an appeal by the employer from the findings of the Workers' Compensation Review Board dated August 13, 1991. Submissions were received on behalf of the employer and on behalf of the worker.

In 1989 the worker, a logging truck driver, developed symptoms of headaches, eye irritation, burning nose, throat, a cough that produced sputum, and a sweet taste in his mouth. He related this to his exposure to diesel fumes and ethylene glycol vapors from radiator coolant leaks in one of the vehicles he drove at work. He saw a doctor in June 1989 who concluded that he had symptomatology related to fumes from a truck that he drove at work and he should be removed from the source of exposure. The worker had difficulties in getting his company to accommodate him. He also underwent testing to determine the cause of his symptoms. The situation was reviewed by a medical officer with the Board's Occupational Health Division. The doctors were not able to agree on the cause of the worker's symptoms. Some considered that he had developed a sensitivity to ethylene glycol due to his exposure at work, and that this was a permanent condition. Others considered that his symptoms were not work-related. The worker continued with some attempts to work at other positions or on different vehicles. Finally, he stopped working in September 1990 as he could no longer tolerate the symptoms.

The claims adjudicator relied on the report of the Board medical officer and denied the worker's claim as there was no documented exposure to ethylene glycol and it was speculative to say that the worker had any sensitivity reaction to ethylene glycol. The Review Board allowed the worker's appeal by finding that he had developed a sensitivity to ethylene glycol and this was caused by his exposure at work. The employer appeals.

This case involves some uncertainty regarding the cause of the worker's symptoms. There is no onus of proof on a worker, but there must be some evidence to link his symptoms to his work activity. Section 99 must be used if the possibilities

raised by the evidence are evenly balanced. Generally, when there is some suspicion of a link between a worker's symptoms and his work activities but there is no further evidence, the claim is denied as only being supported by speculation. Often in those cases there is no clear evidence that refutes the worker's claim, rather, it is the lack of evidence plus contrary speculation that causes the claim to be denied.

Thus, it is important to determine when the material and opinions available in support of a worker's claim have moved beyond a speculative possibility to the point of constituting affirmative evidence. That distinction is not always easy to make.

This case is a good example of that problem. The worker has a variety of symptoms that show a reaction or sensitivity to some irritant or substance. At first, the attending physician thought it might be diesel fumes, but that was later ruled out and other suggestions were considered before he and other doctors concluded that the worker's reaction was to ethylene glycol. Tests were conducted using propylene glycol instead of ethylene glycol, due to the toxicity of the latter substance. Questions have been raised about the extent of the worker's exposure to ethylene glycol in his work setting, the reliability of the tests and the interpretation of the tests. It is clear that the research and literature in this area is not complete and it is not possible to have as much certainty as we would like in determining cause and effect with respect to the worker's symptoms.

Nevertheless, on reading all the medical evidence on file, we are satisfied, as was the Review Board, that the medical evidence in support of the worker's claim goes beyond a speculative possibility. The testing done by the internist and the diagnoses of the allergy specialist and the attending physician present affirmative evidence that ethylene glycol was the cause of the worker's symptoms. As well, there is evidence that the worker was regularly exposed to ethylene glycol at work prior to the onset of his symptoms and this exposure caused his symptoms.

We have concluded this with all due respect to the Board medical officer and others, who are not satisfied that the worker's symptoms had an occupational relationship. That is as reasonable a view of the information and research available as are the opinions in support of the worker's claim, as it is not possible to know for certain what is the cause of his symptoms. However, as we are satisfied that the testing, analysis and diagnosis do give rise to affirmative evidence in support of the worker's claim, and there is no better evidence that is contrary to his claim, we find it was proper to allow the worker's claim. Therefore we deny the employer's appeal.

WE DENY THE EMPLOYER'S APPEAL.

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

Decision of the Appeal Division

Number: 92-1437
Date: August 18, 1992
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Dual Medical Review Panels

This matter comes before me as a request from the ombudsman to consider pursuant to Section 96(2) the lawfulness of the prior commissioners' decision of May 2, 1990. The ombudsman's complaint concerns the interpretation of the effect of two medical review panel certificates. The worker's permanent partial disability award was terminated by the decision of May 2, 1990.

The background to this matter is that a medical review panel of psychiatrists and another medical review panel of orthopedic surgeons were constituted with a common chairman. Both panels issued certificates in November 1989, one day apart. The commissioners interpreted the effect of the certificates to be that the worker does not have a compensable disability.

The worker's original injury on this claim occurred March 29, 1983 when he was lifting a wheelbarrow loaded with dry concrete. He was diagnosed at the time as suffering an acute lumbar strain. His recovery, however, did not proceed as expected. Despite the fact that there was a lack of objective findings there were numerous medical consultations and a surgical procedure carried out. All matters were ultimately placed before the two medical review panels for a conclusive determination as to whether the worker's ongoing problems were a consequence of the work injury.

On November 19, 1987, the Workers' Compensation Review Board had concluded that there was no organic basis for the worker's ongoing back pain symptoms or inability to return to work. They considered, however, that there was a psychological basis which was directly related to the work injury and this was said to be a chronic pain syndrome. The Review Board further found that the chronic pain syndrome was disabling. The Review Board finding was subsequently referred to the commissioners under Section 96(2) of the *Workers Compensation Act*. In a letter of March 1, 1989, the worker was advised that the referral was made on the grounds that the Review Board finding that he had a chronic pain syndrome which was disabling was contrary to Board policy and against the overwhelming weight of the evidence. The commissioners, however, decided to defer a decision on this matter as the worker was to be examined by a medical review panel.

Following receipt of the two medical review panel certificates an appeals administrator, in a letter dated January 4, 1990, expressed concern that the certificates appeared to be at odds with each other and referred the matter to the commissioners. The conflict identified was that the psychiatric panel indicated that the worker did not have a disability with respect to his psychological complaints while the orthopedic panel appeared to indicate that he did have such a disability. The commissioners subsequently agreed with that analysis but concluded that the orthopedic finding must:

. . . give way to the contemporaneous finding by a panel of psychiatrists that [the worker did] not have a disability with respect to [his] psychological complaints and historically did not have such a disability.

The commissioners refused to request clarification of the certificates.

It is alleged that such action was patently unreasonable in the face of the statute. Having reviewed this entire matter I am in agreement with the position taken by the ombudsman's office that the commissioners' action in this instance was patently unreasonable. There was, at the time and currently, a policy in the *Rehabilitation Services and Claims Manual* #103.50 that states:

If a certificate is considered incomplete or ambiguous it is referred back to the Medical Review Panel, as that is the only tribunal with authority under the *Act* to provide a complete certificate.

The commissioners' decision of May 2, 1990, makes clear the nature of the ambiguity in the certificates and the apparent conflict between them. Given that the two panels shared a common chair it may be that there is, in fact, no conflict and that the confusion is simply a matter of terminology, such as the difference of the characterization of a disability from a medical and a compensation perspective. Alternatively the ambiguity may arise through the meaning the Board, as distinct from the medical review panel, attributed to the term chronic pain syndrome. The issue which has to be resolved is whether either medical review panel considered the worker's chronic pain syndrome to constitute a disability.

It was not open to the commissioners to resolve this matter by accepting one of the medical review panel certificates as having greater validity than the other when the certificates were issued virtually contemporaneously. This is a clear instance of having two certificates which require clarification pursuant to the published policy.

I find that the failure of the prior commissioners to remit the matter to the panel chair for clarification of the apparent ambiguity between the two certificates and the preference given to one medical review panel certificate over the other, in the circumstances of this case, was patently unreasonable. I reopen the case and remit the matter to the medical review panel section to correspond with the medical review panel chair. Clarification is required as to whether the proper interpretation of the certificates is that they contradict one another. Following clarification of the certificates they ought to be returned to the Claims Division for any further action required to implement same.

THE APPLICATION FOR RECONSIDERATION IS ALLOWED.

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



REPORTER

Decision of the Appeal Division

Number: 92-1423
Date: August 18, 1992
Panel: Thomas Kemsley
Subject: Sections 96.1 & 96(2)

This is a request on behalf of the worker for a reconsideration of the October 31, 1990 decision of the commissioners on the grounds of new evidence and error of law.

Jurisdiction

The Appeal Division has jurisdiction to reconsider a decision of the prior commissioners on the basis of either:

- (a) "new evidence," which meets the requirements of Section 96.1, or
- (b) error of law, or breach of the Charter, under Section 96(2) and the policy of the governors.

The consideration of this application will involve a two-part process. I will consider first whether the requirements for reconsideration [Section 96.1, or Section 96(2) and the governors' resolution] are met. If so, I will proceed to consider whether the worker:

... suffered a compensable injury in this "shelving unit incident" and that that incident occurred in late March or early April, 1988 so as to bring him within the one year time limit set out in section 55(2) of the *Act*.

The worker first reported a lower back injury to the W.C.B. in his application (Form 6) which was signed and received on October 28, 1988. The application referred to back problems at work on September 29, 1988 and, on investigation by the Board, it appeared that this was an aggravation of earlier back problems. The worker maintained that the earlier back problems were a result of a work injury (the shelving unit incident) in March or April, 1988. No claim had been made at that time. The claims adjudicator did not accept the worker's claim as she concluded that the shelving unit incident occurred on October 1, 1987 and, since the worker did not seek medical

attention nor lose any time from work until April 1988, he was not off work in October due to the shelving unit incident or any other work-related problem.

In their findings dated August 10, 1990, the Review Board allowed the worker's appeal by a majority decision. The majority accepted that the shelving unit incident occurred in March or April of 1988, rather than in October 1987 and that the worker suffered a compensable injury to his back at that time. The dissent agreed with the reasoning of the claims adjudicator.

In a letter dated October 31, 1990, the commissioners overturned the finding of the majority of the Review Board and disallowed the claim. The commissioners concluded that the shelving unit incident occurred in October of 1987 and this did not cause an injury as it was not reported and medical attention was not sought. They also considered that any claim for an injury arising out of that incident would be barred by the operation of Section 55 of the *Workers Compensation Act*.

The new evidence submitted consists of a Statutory Declaration sworn February 21, 1992 by a co-worker regarding the approximate date and circumstances of the original injury. The witness stated that he reviewed employee time cards and, while he was uncertain as to the exact date of the shelving unit incident, it was his recollection and belief that this incident occurred in or about late March or early April 1988.

It is submitted that this new evidence was not available earlier as all the time cards had only become available after a change in the management at the pre-injury employer, and only after the commissioners' decision had the worker received an address for the witness which he had not had previously.

I do not find that the evidence meets the requirements of Section 96.1(3) of the *Act*. While it may be material to the decision, I do not consider it to be substantial. The Statutory Declaration agrees with some of the other evidence that was in front of the commissioners. It is another piece of similar evidence and could be added to the weight of the evidence in support of the worker's claim. However, even though the witness refers to his review of the time cards, I do not find this adds anything substantial to the evidence that was available to the commissioners. The accuracy of the time cards had been questioned at that time. The actions of the worker and his physician in making no reports of a work injury in April 1988 and actually crossing out those sections in the Application for private Disability Benefits appear to have been far more significant to the decision of the commissioners than the matter of the time cards and the recollection of co-workers. The witness's declaration does not affect that evidence.

Further, I am not satisfied that this evidence could not have been discovered at the time of the commissioners' decision through the exercise of due diligence. The worker's counsel refers to getting an address for the witness, although the witness states his place of work is still the pre-injury employer, so it appears that he has always been available at the same workplace. While I do not think the matter of the time cards is significant, as the reliability of these had been questioned earlier, the worker's counsel gave no details as to when the management of the employer changed and when the further time cards became available.

Thus, I find that the evidence presented on this appeal is not substantial to the decision and I am not persuaded that it did not exist at the time of the commissioners' consideration or that if it did exist, which it seems it did, that it could not have been discovered through the exercise of due diligence.

It is also submitted that the commissioners erred in concluding that the Review Board finding was "against the overwhelming weight of the evidence." The worker's counsel argues that the difference between the commissioners and the majority of the Review Board was based on the different weight each put on certain evidence. He stated:

... while the Commissioners were certainly entitled to disagree with the weight given to certain evidence by the Review Board, they should not have interfered with the Review Board's decision because it was supportable on the evidence.

Decision No. 403 of the former commissioners, dated September 23, 1986, set out the Board's policy and procedure concerning findings of the then new Review Board. Section 96(2) of the *Act* stated that:

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

Decision No. 403 stated that a Board officer whose decision was not consistent with a Review Board finding would be required to alter that decision unless one of six conditions existed. One of those conditions was that:

6. The finding is against the overwhelming weight of the evidence.

That is the standard referred to by the worker's counsel along with the test applied by appellate courts in civil and criminal proceedings. I note that later in Decision No. 403 it stated:

The six criteria set out above will limit the Review Board findings which are referred to the Commissioners, but, once the referral has been made, will not limit the Commissioners' consideration of the matter.

The jurisdiction of the Appeal Division is set out above. There must be an error of law or an issue under the Charter before a redetermination can occur. The January 6, 1992 resolution of the Board of Governors did not specifically delegate to the Appeal Division the authority to redetermine matters on the basis of a failure to follow Board policy. Any redetermination on that basis would have to meet the test of being an error of law.

Decision No. 92-0818 of the Appeal Division, dated April 14, 1992, contained a discussion of the proper standard of review where decisions of the former commissioners are involved. If such a decision contains an error in interpreting the Board's jurisdiction under the *Workers Compensation Act*, which would include a breach of the provisions of natural justice, the Appeal Division can redetermine that decision. However, if the former commissioners made an error in law that did not pertain to jurisdiction, then the Appeal Division will only redetermine that decision if the decision was so patently unreasonable that it cannot be rationally supported by the *Act*. That is, in such cases, if the decision of the former commissioners is reasonably viable in light of the purpose behind the *Act*, then the Appeal Division will not interfere to determine if there is a better or more "correct" interpretation of the *Act*.

If there was no evidence to support the decision of the commissioners that would constitute an error of law. However, the worker's counsel has not made that argument. He says that there was conflicting evidence; that is, evidence to support both sides.

I cannot see how, in such a situation, the decision of the former commissioners can be found to be an error of law that either goes to jurisdiction or is patently unreasonable. This is not a jurisdictional issue, as the Board clearly had the power to reconsider matters that was virtually unlimited by the *Act*. While Decision No. 403 put some constraints on Board officers, it was stated not to apply to the commissioners. Further, there was evidence available that supported the commissioners' decision. I agree that there was evidence available to support the worker's claim; however, the standard on this application is whether the commissioners' decision was patently unreasonable. It is not a question of whether I merely agree or disagree with their decision. The commissioners' decision was not made without any supporting evidence

nor was it an interpretation of the *Act* that is not viable. Further, I cannot find it to be patently unreasonable in its conclusion. Thus, I find there was no error of law in the decision of the commissioners to overturn the finding of the Review Board.

IN CONCLUSION, THE REQUEST FOR RECONSIDERATION IS DENIED.

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



Decision of the Appeal Division

Number: 92-1427
Date: August 18, 1992
Panel: Thomas Kemsley
Subject: Section 96(2) — Average Earnings

A letter dated March 19, 1992, requested, on behalf of the worker, a reconsideration of the commissioners' decision dated March 27, 1985.

The worker was a floorlayer. He had a sporadic earnings record and apparently worked for only one company. He had been off work and then worked one day when he suffered a back injury. He had no earnings in the prior three-month period. The claims adjudicator determined that it was appropriate to determine his wage rate (average earnings) by looking at his earnings history. As a result, his wage rate was determined on the basis of his average earnings over the previous 12-month period. The Board's general policy was that the wage rate on new claims was based on the worker's rate of pay at the date of injury. Board policy also provided an exception to this in situations where the claims adjudicator was satisfied that the worker's earnings over a longer period (of three months or one year prior to the injury) better represented his loss of earnings due to the injury. The Board of Review and the commissioners upheld the decision of the claims adjudicator.

It is alleged that the commissioners' decision constituted an error in law and policy as they departed from the general policy set out in the *Rehabilitation Services and Claims Manual* and failed to determine what best represented the worker's actual loss of earnings due to his injury.

The Appeal Division has jurisdiction to reconsider a decision of the prior commissioners on the basis of either:

- (a) "New evidence," which meets the requirements of Section 96.1, or
- (b) Error of law, or breach of the Charter, under Section 96(2) and the policy of the governors.

In this matter, no "new evidence" was presented and thus the request will be considered under (b) above.

Section 96(2) of the *Workers Compensation Act* states that:

. . . 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.

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

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*; . . .

In Decision Number 8 of the Appeal Division dated June 26, 1992, the chief appeal commissioner delegated her authority under the above provisions to appeal commissioners Sonja Hadley, Thomas Kemsley and Paul Petrie, conditional upon a matter being assigned to them by the chief appeal commissioner. Subsequently, this matter was assigned to me by the chief appeal commissioner.

The consideration of this application will involve a two-part process. First, I will consider whether the requirements for reconsideration (Section 96(2)) are met. If so, then I will proceed to reconsider the determination of the worker's average earnings.

Decision No. 92-0818 of the Appeal Division, dated April 14, 1992, contained a discussion of the proper standard of review where decisions of the former commissioners are involved. If such a decision contains an error in interpreting the Board's jurisdiction under the *Workers Compensation Act*, which would include a breach of the provisions of natural justice, then the Appeal Division can redetermine that decision. However, if the former commissioners made an error in law that did not pertain to jurisdiction, then the Appeal Division will only redetermine that decision if the decision was so patently unreasonable that it cannot be rationally supported by the *Act*. This is, in such cases, if the decision of the former commissioners is reasonably viable in light of the purpose behind the *Act*, the Appeal Division will not interfere to determine if there is a better or more "correct" interpretation of the *Act*.

With regard to the submission that the commissioners' decision constituted an error in policy, I note that the above resolution of the Board of Governors did not specifically delegate to the Appeal Division the authority to redetermine matters on the

basis of a failure to follow Board policy. Any redetermination on that basis would have to meet the test of being an error of law as set out above.

The *Rehabilitation Services and Claims Manual* had a general policy regarding average earnings and also provided for exceptions. The court cases and texts on administrative law make it clear that the Board cannot blindly apply its policies. It must consider whether the policy should apply in the individual case. The commissioners, in the decision letter dated March 27, 1985, concluded that on the facts of this case the general policy did not apply. In a further letter dated June 19, 1985, the commissioners pointed out that the policy is only a guideline and is subject to the exception also set out in the *Rehabilitation Services and Claims Manual*. The worker's case fit into the exception. The commissioners stated that their decision did not involve any change in policy. The commissioners did not fail to consider the relevant policy in their decision. They examined the facts and determined that this case fit into the exception, rather than the general rule. There were facts that supported the commissioners' decision. Arguably, there were also facts that supported a different conclusion. Nevertheless, the commissioners did not fail to consider or apply the policy, nor did they make a decision that had no basis in fact. I cannot find that they committed any error of law in this regard nor made a patently unreasonable decision.

With regard to the submission that there was an error of law, I will consider whether the commissioners misinterpreted Section 33(1) of the *Act* and made a decision that was patently unreasonable.

The general requirement of Section 33(1) was that the Board determine average earnings and earnings capacity in the way which "may appear to the board best to represent the actual loss of earnings suffered by the worker by reason of the injury" The commissioners decided that, in some cases, this determination was best done by looking at what the worker had earned in the past three months or one year. I find there was no error of law in interpreting the *Act* in that way. Not all workers have the same earnings pattern. A worker's actual earnings at the date of injury will not always best represent his or her actual loss of earnings due to the injury. It could be too high or too low, depending on any temporary fluctuations in earnings, and the Board recognized that there would be exceptions to the general rule of using the actual earnings on the date of injury.

Thus, I find that it was not an error of law to interpret Section 33(1) as allowing for different approaches to the determination of average earnings.

As well, I find no error of law in the decision that, under Section 33(1), the worker's average earnings should be determined based on his one-year average. His employment history and prospects did not fit into the usual pattern. He did not take

any union job that became available. Rather, he worked only for his father's company. He had significant periods of unemployment. There were no guarantees as to how long his employment would last. In short, he had distinct fluctuations in his earnings record. Thus there were facts on which the commissioners could decide that the general policy should not apply. It is not a question of whether I agree or disagree with their conclusion; rather, it is a matter of whether or not there were facts which could reasonably support their conclusion. There were such facts and thus there was no error of law. The decision was not patently unreasonable.

No issue under the Canadian Charter was raised, nor am I aware of any, so that ground does not apply.

As the grounds for a redetermination have not been established, I will not proceed to reconsider the worker's claim.

In conclusion, I find there was no error of law in the Commissioners' decision of March 27, 1985. As a result, I deny the request for reconsideration.

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

Decision of the Appeal Division

Number: 92-1457
Date: August 21, 1992
Panel: Thomas Kemsley
Subject: Section 96(2) — Loss of Earnings Pension

This is a request for a reconsideration of a decision of the former commissioners dated March 15, 1991. The request contained a 1989 submission from an earlier representative of the worker.

In the decision of March 15, 1991 the commissioners decided not to allow an appeal and not to reconsider earlier decisions of the Board that found that the worker was not entitled to be assessed for a loss of earnings pension prior to November 1983. The worker originally injured his back at work in 1969. He has had numerous aggravations of his back and re-openings of his claim. In 1971 he was awarded a 5% permanent disability pension based on a functional impairment assessment.

Decision No. 8 [*Workers' Compensation Reporter*, Vol. 1: p. 27] dated October 2, 1973, introduced the dual system for disability pensions involving spinal injuries. It provided for the loss of earnings method. Decision No. 109 [*Workers' Compensation Reporter*, Vol. 2: p. 59] dated May 9, 1975, made the dual system applicable to existing disability pensions involving the spinal column.

In 1976, the disability awards officer said that the worker was not entitled to be considered under the loss of earnings method as there had been no increase in his existing disability pension. That decision was not appealed. In a decision dated November 12, 1986, the Review Board determined that the worker was entitled to have his disability pension assessed on a projected loss of earnings basis. As a result, he received an increase in his pension, effective to November 28, 1983, which was the date his file had been re-opened. The worker appealed on the issue of the effective date, but the Review Board, in a decision dated August 8, 1988, and the commissioners, in the decision under review here, denied the appeal on the basis that the Review Board in 1988 and 1986 had no jurisdiction with regard to the 1975 decision of the disability awards officer. The commissioners also denied a request to reconsider the earlier decisions.

Jurisdiction of Appeal Division

The Appeal Division has jurisdiction to reconsider a decision of the former commissioners on the basis of either:

- (a) “new evidence”, which meets the requirements of Section 96.1, or
- (b) error of law, or breach of the Charter, under Section 96(2) and the policy of the governors.

In this matter, no “new evidence” was presented and thus the request will be considered under (b) above. The applicable provisions are as follows.

Section 96(2) of the *Workers Compensation Act* states that:

. . . 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.

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

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*; . . .

In Decision Number 8 of the Appeal Division dated June 26, 1992, the chief appeal commissioner delegated her authority under the above provisions to appeal commissioners Sonja Hadley, Thomas Kemsley and Paul Petrie, conditional upon a matter being assigned to them by the chief appeal commissioner. Subsequently, this matter was assigned to me by the chief appeal commissioner.

The consideration of this application will involve a two-part process. First, I will consider whether the requirements for reconsideration (Section 96(2)) are met. If so, then I will proceed to reconsider the worker’s entitlement to have his disability pension assessed on the projected loss of earnings basis prior to November 1983.

Decision No. 92-0818 of the Appeal Division [*Workers' Compensation Reporter*, Vol. 8(3): p. 211], dated April 14, 1992, contained a discussion of the proper standard of review where decisions of the former commissioners are involved. If such a decision contains an error in interpreting the Board's jurisdiction under the *Workers Compensation Act*, which would include a breach of the provisions of natural justice, then the Appeal Division can redetermine that decision. However, if the former commissioners made an error in law that did not pertain to jurisdiction, then the Appeal Division will only redetermine that decision if the decision was so patently unreasonable that it cannot be rationally supported by the *Act*. This is, in such cases, if the decision of the former commissioners is reasonably viable in light of the purpose behind the *Act*, the Appeal Division will not interfere to determine if there is a better or more "correct" interpretation of the *Act*. An error of fact can amount to an error of law where there is no evidence to support the decision or where the decision appears patently, or wholly, unreasonable in relation to the evidence submitted.

Commissioners' Decision

In February 1976, in Memo #51 — now #58, the disability awards officer stated:

I have been informed by the administrative assistant (Disability Awards) that in cases where a P.P.D. has been established and re-assessment (be it under the original claim or any subsequent claim), does not reveal any increase in the functional disability, then no change can be made in the original award, notwithstanding that there may be evidence that there is now possible loss of earnings involved.

As a re-assessment by reason of the further aggravation on February 25, 1974, has revealed no increase or deterioration in his condition and no change can be made in the permanent disability award.

That is the only reason given by the disability awards officer for not considering the worker's entitlement to be assessed under the dual system. That was a clear error in the interpretation of the policy, as set out in Decision No. 8 and No. 109. In the case of spinal injuries there was no requirement that the existing disability pension, based on functional impairment, had to increase before the projected loss of earnings method could be used. That requirement did appear with respect to pensions for non-spinal injuries.

With regard to the commissioners' decision under review here, I agree that neither the 1986 or 1988 Review Board panels had jurisdiction over the 1975 decision of the disability awards officer. The 1975 decision had not been appealed in time. Therefore, the appeal to the commissioners from the 1988 Review Board decision was properly decided; that is, that appeal was denied as the Review Board no longer had jurisdiction over the 1975 decision.

With regard to the request for reconsideration of the earlier decisions of the Board, the commissioners stated:

The commissioners do not consider that grounds have been established to reconsider those decisions. Prior to November 1983 you were earning \$1,000.00 a month working 35 hours a week. Between January 1985 and May 1985 you earned \$1,200.00 a month, almost equalling your 1976 [sic — 1967] wage rate with C.P.I. adjustments to late 1983. The Commissioners consider that your ability to earn these amounts before and after the November 1983 commencement of your loss of earnings pension strongly suggests that the pension calculated on the basis that you were only able to earn \$782.14 a month in 1983 working part-time should not be backdated any further. You earned more and worked longer hours before and after the 1983 commencement than the hours and amounts indicated in the pension award. The Commissioners consider that any earlier commencement of the pension would not be supportable.

Thus, the commissioners seemed to deal with the merits of the case, in explaining why no grounds were established to reconsider the earlier decisions. That procedure was not consistent with decisions of the former commissioners.

Commissioners' Decision — Grounds

Decision No. 29 dated February 6, 1974 [*Workers' Compensation Reporter*, Vol. 1: p. 118], set out the circumstances in which the commissioners would re-open and reconsider a previous decision of the Board due to allegations that the previous decision was not correct. The commissioners stated that there must be grounds for such an application, such as:

- (a) certain critical evidence was obviously overlooked,
- (b) facts were mistakenly taken as established which were not reasonably supported by the evidence,
- (c) rumour was inadvertently treated as evidence,
- (d) there was some clear error of law.

Decision No. 281, dated July 12, 1978 [*Workers' Compensation Reporter*, Vol. 4: p. 49], clarified this further. It distinguished between appeals and re-openings and further distinguished between applications for re-openings which were based on changed circumstances, and applications for reconsideration which questioned the validity of the previous decision. With respect to reconsiderations it stated:

The question of whether there are sufficient grounds for re-consideration should be clearly distinguished from the question of whether those grounds warrant a change in the previous decision.

With regard to the grounds, it stated:

In general, . . . it must be shown that the previous decision was based on some error in applying the relevant *law or policy*. Therefore, consideration will not be given to an application which merely requests a review of the evidence already considered and decided upon.

. . . First, it must be decided whether there are grounds on which the application can be based. For example, the Adjudicator, the board of review or the Commissioners must consider first whether any significant new evidence is submitted or whether there is any indication that the previous decision was contrary to *law or Board policy*. Assuming that the question is answered in the affirmative, it is then necessary to go on to consider the merits of the application.

(emphasis added)

It is the above procedure that was relevant to the application for reconsideration. However, it appears that the commissioners dealt with the merits, rather than the grounds, of the application.

On the question of whether there were grounds for reconsideration of the 1976 decision of the disability awards officer, the commissioners made a patently unreasonable decision. They did not address the fact that the disability awards officer had misunderstood and made a decision contrary to Board policy. The decision of the disability awards officer, that the worker could not be considered for a projected loss of earnings pension because there had been no increase in his functional impairment, was clearly contrary to Board policy, as set out in Decision No. 8 and No. 109. While Decision No. 8 was not clear as to how the new dual system for assessing pensions would apply to existing pensions involving spinal injuries, that was clarified in Decision No. 109. Therefore, as of the date of Decision No. 109 — May 9, 1975, Board

policy was clear on this point and any time after that date on which the worker's disability pension was being reconsidered, he was entitled to have it reconsidered under the projected loss of earnings method. I am not saying that he was entitled to a loss of earnings pension in 1975. I am only saying that when his pension was being considered in late 1975, the policy required that the disability awards officer had to determine his entitlement under the projected loss of earnings method. That would require the disability awards officer to consider what he was capable of earning in suitable occupations with his permanent functional impairment, and compare that with his pre-injury earnings. That was not done.

Decision No. 281 said that grounds for a reconsideration would be established if a previous decision was contrary to Board policy. In the decision under review here, there was no basis on which the commissioners could decide that the disability awards officer had not acted contrary to Board policy. It was not a request to merely review the evidence already considered. The disability awards officer did not consider the evidence about the worker's employability, as he mistakenly thought it was not relevant. Thus, the decision of the commissioners that there were no grounds for the application for reconsideration was wholly unreasonable on the facts and constitutes an error of law.

However, that does not automatically lead to a reconsideration of the worker's claim. There was a further decision of the commissioners that is also subject to the standard of review set out above.

Commissioners' Decision — Merits

It is a bit awkward to conclude that the commissioners discussed the merits of the case, when they said there were no grounds for a reconsideration on the merits. However, they appear, in fact, to have considered the merits of the worker's claim. As set out above, on this review I cannot just decide if the commissioners were right or wrong in their decision on the merits. There must be an error of law that is patently unreasonable.

It is important to note that the commissioners did not rely on the same misinterpretation of Board policy as did the disability awards officer in turning down the worker's request to back-date his loss of earnings pension to 1973. That is, the commissioners did not misinterpret the *Act* nor the policy. They decided that the worker's claim failed on the facts. If there was no evidence to support that decision or if the decision appears wholly unreasonable in relation to the evidence submitted, that could amount to an error of law. Otherwise, the decision of the commissioners will stand.

In the decision on the merits, I find the commissioners' conclusion was wholly unreasonable in relation to the evidence on file. They took the worker's earnings from one five month job in 1985 to show that he had no projected loss of earnings from 1973 to 1983. They ignored all of the evidence of the rehabilitation consultants, much of which was summarized in the 1986 Review Board finding, that since approximately 1975 he had only been capable of "suitable" work, which *might* not include his pre-injury job of second cook. To my mind, that evidence completely outweighs the 1985 evidence used by the commissioners. Further, the commissioners stated that what the worker earned at this five-month job in 1985 almost equalled his 1967 wage rate with C.P.I. adjustments to late 1983. In 1985 the worker earned \$1,200.00 a month. His 1967 earnings with C.P.I. adjustments to 1983 worked out at \$1,414.00 a month. That is, in 1985 he was earning \$214.00 a month less than he should have in 1983. That does not take into account a C.P.I. adjustment from 1983 to 1985, and thus the "shortfall" in his earnings by 1985 must have been greater than \$214.00. The \$1,000.00 a month that the commissioners said the worker earned prior to 1983, was well short of the \$1,414.00 figure.

These facts do not give any reasonable support to the decision of the commissioners. They glossed over the real difference between the 1983 or 1985 earnings and the pre-injury earnings. They then used this very rough comparison, based on the short-term 1985 job, to determine the worker employability from 1973 to 1983. I am satisfied that almost all of the evidence from 1973 to 1983 indicated that the worker was only capable of suitable employment. I find the decision of the commissioners is wholly unreasonable in relation to the evidence on file and thus is based on a patently unreasonable error of law. Therefore, the grounds for a reconsideration have been established.

Projected Loss of Earnings Assessment — Effective Date

While it was requested that the worker's projected loss of earnings pension be backdated to 1973, I am satisfied that the relevant point in time for that is the date of Decision No. 109 — May 9, 1975. I cannot find that Decision No. 8 in 1973 provided that existing pensions for spinal injuries were to be recalculated on the projected loss of earnings method. Decision No. 109 made it clear that on any re-opening of an existing disability pension involving the spinal column, the dual method of assessment would be applied. That decision said the effective date for any readjustment would be the date of application for re-opening. However, I cannot find that Decision No. 109 created any right to have a disability pension readjusted prior to the date of that decision. Thus I find the earliest date that the worker's disability pension could be considered under the dual method was the first time after May 9, 1975 that his pension was reconsidered.

The disability pension was being reconsidered in May 1975. In Memo #54, dated May 2nd and 5th, 1975, the disability awards medical advisor, agreed that a P.P.D. would be in order. In Memo #55, dated May 27th and 28th, 1975, he gave an initial

report. In Memo #57, dated December 15, 1975, the doctor made his final report which stated that the “existing physical disability appears to be adequately covered by the present award of 5% of total” and that “consideration should be given to a loss of earnings.” In Memo #58 (previously Memo #51) the disability awards officer said that the worker would not be considered for a loss of earnings as there had been no increase in his functional disability.

The request for a re-opening had been in 1974, prior to Decision No. 109. However, by the time that his disability pension was being re-assessed, Decision No. 109 had been made. As this reassessment had started by early May 1975, I find that the worker was entitled to be considered for a projected loss of earnings pension effective to the date of Decision No. 109 — May 9, 1975. As stated above, I cannot find that Decision No. 109 created any rights to have an existing pension adjusted to any date earlier than the date of that decision.

Since the re-assessment of the worker’s pension was being considered when Decision No. 109 was made, I find that May 9, 1975 is the appropriate date from which the worker was entitled to have his pension assessed under the projected loss of earnings method.

Reconsideration

It is not possible for me to do the projected loss of earnings assessment on this reconsideration. As set out in the Review Board decision of November 12, 1986, there had been reference to the worker’s need to find “suitable” employment. There also had been different opinions as to whether or not this included working as a cook, a second cook, or a cook’s helper. The question of what was “suitable” employment will have to be considered by the disability awards officer, with the assistance of the Rehabilitation Department. Then a determination will have to be made about the earnings that the worker could have expected from such employment. His actual earnings over the years may provide some assistance, but they will not be determinative as they may reflect personal and economic factors that are not relevant to a projected loss of earnings assessment. As no projected loss of earnings assessment was done for the 1975 to 1983 time period, the relevant information about suitable jobs and expected earnings is not on file.

In line with Decision No. 109, it first will be necessary to determine the worker’s entitlement to a projected loss of earnings pension in 1975, as his file had been re-opened at that time and his pension was being reconsidered. If he is entitled to a loss of earnings pension as of that time, then it will be effective to May 9, 1975. However, if it is determined that his expected loss of earnings at that time was no greater than his existing pension, then he will not receive a loss of earnings pension as of May 9, 1975.

According to Decision No. 109, he then would be eligible to be reconsidered for a loss of earnings pension effective to the next time he applied for a reopening of his pension entitlement.

I have not decided that the worker should receive a projected loss of earnings pension from 1975 to 1983. I have only decided that he is entitled to have that assessed. I have read the comments about occasional lack of motivation and exaggeration and over-reaction by the worker. I also note that it was expected that he would be a good worker. I note that he worked from 1975 to 1981 for a Greek nightclub and only stopped that job due to the bankruptcy of the club — an economic factor. I also note that his ability to cope with the pain and disability deteriorated from 1971 to 1984, and thus his ability to work at suitable employment may have been greater in 1975 than it was in 1983, which was the effective date of his projected loss of earnings pension. That is, just because he received a loss of earnings pension as of 1983, does not necessarily mean that he should receive one back to 1975. That has to be determined by the Disability Awards Department.

In conclusion, the grounds for this reconsideration are established as the commissioners made a patently unreasonable error of law in their decision of March 15, 1991.

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



Decision of the Appeal Division

Number: 92-1378
Date: July 24, 1992
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Section 96(2)

This is a request for a review pursuant to Section 96(2) of the *Workers Compensation Act* of a commissioners' decision dated March 13, 1990. The request is contained in several items of correspondence from both the Office of the Ombudsman and the worker's union.

The Appeal Division has the authority to hear this application as a consequence of the following resolution of the Board of Governors approved 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 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*.

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.

The history of this matter is that in a decision rendered November 26, 1986, a medical review panel composed of two orthopedic specialists and a chairman determined that the worker's disability consisted of chronic pain syndrome. The panel said that she had bilateral discomfort in her wrists, forearms and elbows. They did not find

that her work activities resulted in her present disability, although they agreed with the period of compensation paid by the Board. The panel stated that the whole of the worker's present disability was related to causes other than her work activity. They did not find evidence of persisting lateral epicondylitis, but did find the worker to be inconsistent in the history she presented. There were also inconsistencies in the examination findings. In addition, the panel did not believe the pain syndrome disabled the worker as much as she claimed.

The certificate stated:

1. Q. What is the condition of the claimant?
A. *The condition of the claimant is good.*
2. Q. Does she now have a disability with respect to her right or left elbows (or arms)? If not, could the Panel advise the Board whether historically they believe that the claimant did, at any time, have a disability with respect to her right or left elbows (or arms)?
A. *The claimant has some disability with respect to her arms.*
3. Q. If she has or had such a disability, what is its nature and extent and in what ways has it affected the body function of the claimant? In particular, in what ways has it limited her capacity for work?
A. *The nature of her disability is a chronic pain syndrome of both upper limbs. The bilateral discomfort in her wrists, forearms and elbows is aggravated, historically, by effort, particularly repetitive effort. This limits her capacity for physical repetitive work with her arms, either in the home setting or at work.*
4. Q. If she has or had such a disability, were her work activities as an assembly operator prior to November 1978 of causative significance and, if so, in what way?
A. *Historically her work activities prior to November, 1978, were of causative significance in precipitating her disability. However, this work activity prior to November, 1978, is no longer operative in producing her present disability.*
5. Q. If she has or had such a disability, was the disability wholly or partly the result of causes other than her work activities as an assembly operator prior to November 1978? If so, what other causes were there, and how and to what extent was each cause significant?

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- A. *Initially, her disability was wholly the result of her work activities as an assembly operator prior to November, 1978. However, her present persisting upper limb symptoms are no longer caused by work activity.*
6. Q. If there were two or more causes of the claimant's disability with respect to her right or left elbows (or arms), could the Panel please explain:
- a) Did each cause independently result in some disability and, if so, what proportion of the disability found by the Panel?
- b) If each cause did not independently result in some disability, did two or more causes act together to produce a disability and, if so, which causes acted together to produce this disability?
- A. a) N/A
- b) *The initial upper limb disability in 1978 was related to her work activities prior to November, 1978. The whole of her present disability is related to causes other than her work activity. She does not have any findings of persisting lateral epicondylitis.*
7. Q. Did the claimant suffer from any pre-existing condition or disability and, if so, was it activated, accelerated, or aggravated by her work activities as an assembly operator prior to November 1978?
- A. *The claimant did have mild bilateral upper limb symptoms prior to November, 1978, but had recovered from these prior problems. It is the opinion of the Panel, therefore, that there was no pre-existing condition or disability that was activated, accelerated or aggravated by her work activities as an assembly operator immediately prior to November, 1978.*
8. Q. If the claimant now has a disability, is it permanent and, if so, when did it stabilize?
- A. *It is the opinion of the Panel that her present condition is permanent and that it has been stable since her recovery in June, 1981, following her second operation.*

In response to a proposal from the ombudsman's office that the Board request clarification from the medical review panel the commissioners replied on September 15, 1988, that they did not believe clarification was required. They stated, however, that another medical review panel might be appropriate if the worker presented significant new evidence of a disabling psychological condition resulting from the 1978 work

activities. The worker, with the assistance of her union, then provided an opinion from a psychologist, who related the worker's chronic pain problems to her work activities, scarring, arthritic changes, and the effect of conflict with the Board over the merits of her case. The commissioners did not find that the psychologist's opinion constituted significant new evidence and denied a referral to a medical review panel composed of psychiatrists.

Subsequent to that decision the worker's representative sent a response from the psychologist to the commissioners. The psychologist clarified her previous report and sent her curriculum vitae outlining her experience in the field of chronic pain treatment. The commissioners replied in a letter dated August 28, 1990, that the psychologist's response did not alter their decision. They also pointed out that the decision in *Kooner v. Workers' Compensation Board* [1991] 54 B.C.L.R (2d) 83 supported the jurisdiction of a medical review panel composed of orthopedic specialists to make a determination regarding a psychological issue.

The ombudsman's office points out that the medical review panel certificate is clear that the work activity did not cause the chronic pain syndrome, but does not address whether the chronic pain is secondary to the compensable injury and treatment. This view of the certificate involves a very narrow reading of the term "work activity" as used by the medical review panel. It presupposes having excluded consideration of those incidents giving rise to the original problem of epicondylitis and the diagnosed problem itself. While the precise wording of the M.R.P. certificate, read alone, may foster this concern, the narrative report makes it clear that the panel considered the whole of the worker's problems and not simply the pre-injury work activities in arriving at the conclusions certified.

The ombudsman also points out that in question 5 the panel was asked whether the disability was wholly or partly the result of causes other than her work activity and if so what other causes there were. The ombudsman contends that the panel did not answer this question. They merely described the present disability as a chronic pain syndrome but did not discuss its etiology. Finally, the ombudsman argues that once the commissioners represented in their letter of September 15, 1988 that there was the opportunity for a second medical review panel, if the worker obtained significant evidence regarding a relationship between her work activities and psychological disability, it was unfair to reject the new evidence provided by the psychologist "without a complete explanation."

The Appeal Division has very limited jurisdiction in respect of decisions of the prior commissioners. In the absence of new evidence meeting the requirements of Section 96.1, which is not alleged to be relevant here, the Appeal Division's right to alter the decision would not arise unless the impugned decision was based upon an error of law or involved an issue under the *Canadian Charter of Rights and Freedoms*.

There is nothing in the submissions or apparent on the face of the file to suggest that an issue under the *Charter* is involved. On the question of whether or not the decision was based on an error of law the test is whether the refusal of the commissioners to refer the matter to a further medical review panel was patently unreasonable.

The argument that it was unfair for the commissioners to reject the new evidence provided by the psychologist “without a complete explanation” does not meet the patently unreasonable test. The degree to which evidence is scrutinized cannot be reviewed. The evidence before me indicates that the prior commissioners looked at the evidence. While the expressed reasons for rejecting it may have been minimal, this does not by itself constitute grounds for reconsideration.

The ombudsman’s submission makes the point that question 5 asks the panel not only to determine if the disability was wholly or partly the result of causes other than the work activities but goes on to ask the panel to identify what other causes there were and how and to what extent each cause was significant in producing the disability. The certificate is explicit in specifying that the work activities were not a relevant causal factor but it does not identify what other causes there were.

Irrespective of whether the Board submits questions to the medical review panel, the panel must under s. 61(1)(d) certify to the Board:

if there is a disability, 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 authority of the Board to ask questions of the medical review panel arises under Section 61(3) which states:

The board may submit questions to the panel relating to matters enumerated in subsection (1) and the certificate of the panel *shall* include answers to those questions.

(emphasis added)

The question which is alleged to have resulted in an incomplete answer states:

5. Q. If she has or had such a disability, was the disability wholly or partly the result of causes other than her work activities as an assembly operator prior to November 1978? If so, what other causes were there, and how and to what extent was each cause significant?

This question appears to be an attempt to replicate the substance of s. 61(1)(d). In certifying that a disability is “no longer caused by work activity,” the panel has met the first requirement of this statutory provision. It has identified the whole cause of the disability as “non-work” activities. Therefore, the panel need not respond to the balance of s. 61(1)(d) and certify how much of the disability is related to one cause and how much to another. Before the second part of s. 61(1)(d) would come into play, the causes of the disability must be determined to include both work and non-work factors.

Question #5 posed by the Board and the panel’s response to it can be understood along similar lines. Admittedly, the grammatical structure of the question is poor. It is not entirely clear whether the second part of the question is meant to probe into the causes of the disability if it resulted wholly from non-work activities, both work and non-work activities, or in either case. A plausible interpretation is that the question was intended to have the panel identify non-work factors only where they partly caused the disability. There is no apparent necessity to identify non-work factors which wholly caused a disability as there are no implications for entitlement to compensation once their non-work status is confirmed. Viewed in that light, s. 61(1)(d) and question #5 share a common purpose, namely, to have the medical review panel distinguish between the relative contribution of work and non-work causes of a disability. These findings can then be applied to determine compensation entitlement.

Hence, there is a viable argument that the certificate was in accordance with the terms and purpose of the *Act*. Only a very narrow view of question #5 would lead to the conclusion that it is incomplete. Therefore, the refusal of the commissioners to refer the matter to a further medical review panel was not patently unreasonable and does not constitute an error of law.

IN CONCLUSION, THE REQUEST FOR RECONSIDERATION IS DENIED.

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

Decision of the Appeal Division

Number: 92-1386
Date: July 27, 1992
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Section 96(2) — Proportionate Entitlement

This is a request for reconsideration of a decision by the prior commissioners on the grounds that it involved an error of law. This decision, dated April 12, 1991, confirmed the prior commissioners' decision of April 20, 1988 to apportion the benefits payable to the worker on the basis of the causes of his disability as certified by a medical review panel.

The governors' *Decision No. 8, Workers' Compensation Reporter*, Vol. 7, Number 4 (December 1991) gives the Appeal Division the authority to hear this application. 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:

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.

The history of this claim goes back to March 30, 1973 when the worker sustained a compensable injury to his right hip. The question arose as to whether the worker was psychologically disabled as a result of this injury.

In a decision dated September 9, 1982, the prior commissioners found that the worker was psychologically disabled as a result of his 1973 injury. They stated in this decision:

While (the Commissioners) do not consider it possible to determine definitively the origin of these problems, the Commissioners note that (the physician) at the Pain Centre appears to attribute them to your injury, although he also considers the deaths of your parents to have been a major contributing factor. In view of your good work history prior to the injury, which apparently continued subsequent to your parents' deaths, the Commissioners are prepared to extend to you the benefit of the doubt under Section 99 of the *Workers Compensation Act*.

In Memo #91 dated October 21, 1982 the then secretary to the Board explained that

the [prior] Commissioners did consider the question of proportionate entitlement in coming to their decision of September 9, 1982. They were, however, unable to conclude that there was evidence of a pre-existing psychological disability that would make apportionment under s. 5(5) of the *Act* applicable.

Shortly after the September 9, 1982 decision was rendered, the employer requested that the prior commissioners reconsider this decision on the grounds that there had been a denial of natural justice. The employer argued, amongst other things, that his access to relevant Board files had been unduly limited.

In a letter dated March 16, 1983 and addressed to the worker, the prior commissioners indicated that the employer had provided grounds for a reconsideration. As part of the reconsideration process, the prior commissioners scheduled an oral hearing for October 25, 1983 to receive evidence and argument about the question of the worker's disability. Subsequent to this hearing, they appointed a Board field officer to carry out further investigations. The prior commissioners also decided to have the worker examined by a medical review panel.

A medical review panel certificate dated December 7, 1984 ("the First Certificate") read as follows (emphasis added):

1. The condition of the Claimant is physically good but psychologically impaired by reason of a psychogenic pain disorder, a probable personality disorder of a passive aggressive nature, and borderline intellectual function.

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2. He does now have a disability with respect to his psychological condition.
 3. The nature of the psychological disability is as outlined in issue number 1. It is of moderately severe extent but it does not affect his body function in a physical sense but it does affect his capacity to carry on his duties which involve heavy physical work. It limits his capacity for problem solving because of his borderline intellectual function.
 4. Compensable injury of 30th of March, 1973 was of *causative significance* in that it produced his psychogenic pain disorder.
 5. *The disability was partly the result of other causes than his compensable injury of the 30th of March, 1973. The other causes were a probable passive aggressive personality disorder and a borderline intellectual function which predisposed the psychogenic pain disorder, but the injury was of more causative significance than the personality disorder and the borderline intellectual function in perpetuating the disability.*
 - 6a. Each cause did not independently result in some disability.
 - 6b. The pre-existing conditions of a probable passive aggressive personality disorder and borderline intellectual function predisposed the Claimant to a psychogenic pain disorder.
 7. The Claimant *did suffer from pre-existing conditions*. Borderline intellectual function was not aggravated, accelerated or activated by the injury. Possible passive aggressive personality disorder was also a pre-existing condition but the Panel feels it is impossible to answer whether it was aggravated, accelerated or activated by the injury.
 8. The Claimant has a permanent disability which stabilized approximately in 1974.

In a decision letter dated April 2, 1985 and addressed to the worker, the prior commissioners concluded, on the basis of the First Certificate, that the Board was only responsible for part of the worker's psychological disability. The prior commissioners explained:

You are at present receiving a 100% pension from the Board, of which 95% is attributable to your psychological condition. The Commissioners have concluded as a result of the Medical Review Panel certificate that this pension is in excess of the Board's proper responsibility. The Medical Review Panel states that your psychological disability is comprised of three elements, namely a psychogenic pain disorder, a personality disorder of a passive aggressive nature, and borderline intellectual function. The latter two elements are stated by the Panel to have existed prior to your 1973 injury. In light of this statement, the Commissioners feel that, pursuant to the provisions of Section 5(5) of the *Workers Compensation Act*, the Board is only responsible for a portion of your present psychological disability.

In a letter dated December 16, 1985, the director of the Appeals Administration informed the worker that the prior commissioners had decided to reconsider their decision of April 2, 1985 because memos on the file suggested an improvement in his condition.

In a letter dated April 7, 1986 and addressed to the prior commissioners, the workers' adviser argued that the application of proportionate entitlement to the worker's claim was contrary to the law and Board policy since there was no evidence whatsoever that the worker's pre-existing psychological conditions manifested themselves as a disability prior to his 1973 compensable injury.

In a letter dated September 25, 1986, the director of the Appeals Administration informed the worker that, in light of the evidence suggesting an improvement in his condition, the prior commissioners had decided to refer the claim back to the medical review panel.

A medical review panel certificate dated September 8, 1987 ("the Second Certificate") stated in part (emphasis added):

2. The Claimant does now have a disability with respect to his psychological condition.
3. The nature of his disability is chronic low back pain of moderately severe extent. It affects his ability to do heavy physical work.

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4. *His compensable injury of the 30th of March, 1973 is of causative significance* in that it initiated his psychogenic pain disorder.
 5. *The disability was partly the result of factors other than his compensable injury of the 30th of March, 1973. These other factors were a probable passive aggressive personality disorder and borderline intellectual function which predisposed this individual to the development of a psychogenic pain disorder. The injury of the 30th of March, 1973 in the Panel's opinion was of greater significance than the passive aggressive personality disorder or borderline intellectual function.*
 - 6a. Each cause did not independently result in some disability.
 - 6b. There were a number of factors that acted together to produce his disability: his injury of March 30th, 1973, the probable predisposing passive aggressive personality disorder, and the borderline intellectual function, and possible psychosocial stresses. Regarding the latter as an example the Panel noted that the Claimant's mother died on March 13th, 1973 and it is not possible in retrospect to judge the importance of that event in the causation of his problem or for that matter any other social stress that may have existed.
 7. The Claimant had *pre-existing conditions* of borderline intellectual function and probable passive aggressive personality disorder. The borderline intellectual function was not aggravated, accelerated, or activated by the injury. The Panel feels that it is impossible to state whether the probable passive aggressive personality disorder was aggravated by the injury.
 8. The Claimant has a permanent disability which stabilized approximately in 1974.

In a letter dated January 26, 1988 and addressed to the prior commissioners, the workers' adviser commented on the Second Certificate, reiterating that the application of proportionate entitlement to this worker's claim was contrary to s. 5(5) of the *Act* and Board policy.

In their decision dated April 20, 1988, the prior commissioners reached a different conclusion. They reasoned that:

. . . Section 5(5) specifically requires the Board to apportion its responsibility in cases “where the personal injury or disease is superimposed on an already existing disability” . . . It does not explicitly state that the Board cannot apportion in other circumstances, for example, when there was a non-disabling pre-existing condition. However, in light of the history behind the enactment of Section 5(5), the Board’s practice has recognized a broader legislative intent than is expressly stated by the words of the Section. This is that, once the Board has accepted a relationship between an injury and a disability in a case where there is a pre-existing condition, it can be usually inferred from the fact that the pre-existing condition was not disabling that the whole of that disability is likely due to that injury. *However, that inference cannot be made when there is, as in your case, a Medical Review Panel Certificate stating that a portion of your disability was due to the pre-existing condition.* The normal Board practice must give way to the explicit terms of the binding certificate.

The Commissioners have therefore decided to confirm the decision of April 2, 1985, that only a portion of your disability (greater than 50%) is acceptable as a consequence of your 1973 injury. *They would change that decision only to the extent of concluding that, as indicated above, this apportionment is not being done pursuant to Section 5(5).*

(emphasis added)

The approach outlined in the decision dated April 20, 1988 was incorporated into the *Rehabilitation Services and Claims Manual* in May 1988. Paragraph 103.54 of the 1988 *Manual* stated:

Where a valid medical review panel certificate is received stating that a permanent disability is due in part to a work injury and in part to other non-work causes, since the certificate is binding on the board, it is no longer open to the Board simply to conclude under Sections 22 and 23 that the total disability results from the work injury. This would contradict the finding of the Medical Review Panel to the effect that the disability resulted from causes of which the injury was only one. The Board has no alternative in such cases but to apportion the disability found by the Medical Review Panel

between the causes in question and find that only a portion of the disability found by the panel is a disability resulting from the work injury for the purpose of Section 22 and 23.

Apparently the April 20, 1988 decision was one of several that led to adopting this approach. Seemingly, prior to 1988, there was no formal Board policy on the question of apportionment with respect to the implementation of medical review panel certificates.

In a subsequent decision dated March 12, 1990, involving another worker, the prior commissioners adopted a different approach. Paragraph 103.54 of the *Manual* was accordingly changed to read as follows:

Effective March 12, 1990, where a valid Medical Review Panel certificate is received stating that a disability is due in part to a work injury and in part to other non-work causes, the Board should adjudicate the claim exactly as if the medical findings made by the panel had been made by the Board. This means that the Board should decide in each case whether, in light of the medical findings of the panel, the disability results from the injury for the purpose of Section 22, 23, 29 and 30 of the *Act* and, where appropriate, follow the criteria prescribed by Section 5(5) in determining the amount of compensation payable. The Board should, in doing this, follow the normal policy and practice of the Board in determining eligibility to compensation.

In a letter dated January 11, 1991, to the prior commissioners, the worker applied for a reconsideration of the April 20, 1988 decision and the resulting decision of June 3, 1988 by a senior pension adjudicator. Counsel for the worker explained that “the major ground for the application was the new policy of the Board which was announced in a decision dated March 12, 1990”

In the decision dated April 12, 1991, the prior commissioners rejected the worker’s request for a reconsideration. They stated:

The Commissioners have decided to reject your request for reconsideration. They consider that the decision to apportion the Board’s responsibility for your disability was properly made in accordance with the policy in existence at the time. Yours was not the first claim in which this had been done. The Board changed its policy in a later March 12, 1990, decision *But this in itself does not provide grounds for reconsidering past decisions based on the previous policy.*

(emphasis added)

In a letter dated May 30, 1991, the worker requested the Appeal Division to reconsider the prior commissioners' decisions of April 12, 1991 and April 20, 1988, under s. 96(2) of the *Act*. Counsel for the worker argued that the pre-March 12, 1990 policy on apportionment was illegal.

The worker's request was not considered by the commissioners prior to the legislative changes which took place on June 3, 1991.

On June 3, 1991, the *Workers Compensation Act* was amended when Bill 27 (the *Workers Compensation Amendment Act, 1989*) came into effect. Following this amendment, the jurisdiction of the Appeal Division to reconsider previous decisions was restricted to the terms outlined in s. 96.1 of the amended *Act*. This provision requires that there be new evidence. In a decision dated September 11, 1991, I found that the worker had not submitted any new evidence and, therefore, his application for reconsideration of the prior commissioners' decision did not meet the requirements of s. 96.1. However, the matter was referred to the Board of Governors so as to obtain clarification about the role of the Appeal Division, where decisions of the prior commissioners are impugned as unlawful.

The Board of Governors' resolution of January 6, 1992 expanded the jurisdiction of the Appeal Division, empowering it to reconsider the decisions of the prior commissioners if there was an error of law or a violation of the Charter.

In a letter dated January 30, 1992, counsel for the worker submitted that the prior commissioners' decision involved an error of law in that the Board had no jurisdiction to apportion benefits for a pre-existing medical condition that did not amount to a disability. Counsel for the worker reiterated that the pre-March 12, 1990 policy was illegal.

The employer has declined to make any submissions regarding the worker's application.

Analysis

This case raises two separate questions:

1. Was the prior commissioners' decision of April 20, 1988 wrong in law, bearing in mind that it was one of several decisions which lead to the policy set out in #103.54 of the 1988 *Manual*?
2. If the April 20, 1988 decision and, therefore, the policy set out in #103.54 of the 1988 *Manual* were wrong in law, is the worker's entitlement to compensation automatically governed by the 1990 policy?

According to the April 20, 1988 decision, where a medical review panel certificate states that a disability was due in part to some pre-existing conditions, the Board's responsibility had to be apportioned. The Board did not have the freedom to infer that the whole of the disability was due to the injury on the basis that the pre-existing condition was not disabling. In reaching this conclusion, the prior commissioners explicitly stated that they were not applying s. 5(5) of the *Act*, implying, therefore, that the principles of compensation, in the case of a medical review panel certificate, differ from the principles applicable to all other claims. This approach was subsequently incorporated into the 1988 *Manual*.

In addressing the question of whether the prior commissioners' decision of April 20, 1988 was wrong in law, the Appeal Division must first establish the applicable test. In Decision No. 92-0818 (*Workers' Compensation Reporter*, Vol. 8(3): p. 211), I stated that to determine the lawfulness of the prior commissioners' decisions, the proper test to apply is, in general, the patently unreasonable test. The criterion is whether the decision is at all viable in light of the purpose behind the *Act* and the terms of the statute. If the construction given by the prior commissioners to a statutory provision is viable, the Appeal Division will not find an error of law on the basis that there is a better or more exact interpretation. Rather it will stand aside out of respect for the right of the prior commissioners, at the time, to interpret the *Act* and the privative clause which protected their decisions.

Subsection 5(5) of the *Act* which limits the Board's liability where there are multiple causes of a disability is as follows:

(5) Where the personal injury or disease is superimposed on an already existing disability, compensation shall be allowed only for the proportion of the disability following the personal injury or disease that may reasonably be attributed to the personal injury or disease. The measure of the disability attributable to the personal injury or disease shall, unless it is otherwise shown, be the amount of the difference between the worker's disability before and disability after the occurrence of the personal injury or disease.

The language of this provision is unambiguous. The realm of application of the provision is set out clearly in its introductory clause which states that "where the personal injury or disease is superimposed on an *already existing disability*, compensation shall be allowed only . . ." (emphasis added) In other words, this first clause requires that there be an already existing disability. In the absence of such a disability, the balance of the subsection does not apply.

The balance of the subsection concerns the measurement of the disability attributable to a work-related injury or disease that is superimposed on an already existing disability. A general rule is enunciated, namely, that the measure of the disability attributable to a compensable injury or disease will be the amount of the difference between the worker's disability before and disability after the occurrence of the personal injury or disease. However, the provision allows for some deviation from this measure when it qualifies the general rule by stating "unless it is otherwise shown." For instance, where a worker suffers from a progressively deteriorating pre-existing disability, some adjustment to the measure as specified by the general rule may be needed. Should the evidence warrant a conclusion that the compensable injury or disease had no effect in advancing the pre-existing disability, the difference between the worker's disability before and disability after the occurrence of the compensable injury or disease might overstate the measure of the disability attributable to the compensable injury or disease.

The provision makes no mention of "pre-existing conditions." The prior commissioners acknowledged that the entire provision has no bearing on the subject of pre-conditions and their interaction with a compensable injury in stating that they were not applying s. 5(5) of the *Act* in reaching their conclusion regarding the apportionment of the worker's benefits. They did not, however, cite any other provision of the statute which would support the decision to apportion liability.

In his 1966 *Commission of Inquiry Workmen's Compensation Act*, Mr. Justice Tysoe recommended amendments to what was then subsection 7(5) of the *Workmen's Compensation Act*, R.S.B.C. 1960, c. 413. Enacted in 1959, this subsection was intended to limit the Board's liability in the case of multiple causes of disability. It read as follows:

(5) Where the personal injury consists of injury or disease in part due to the employment and in part due to causes, other than the employment or where the personal injury aggravates, accelerates, or activates a disease or condition existing prior to the injury, compensation shall be allowed for such proportion of the disability as may reasonably be attributed to the personal injury sustained.

Mr. Justice Tysoe's discussion suggests that difficulties in administering this provision led some labour unions to advocate abolishing the subsection and adopting instead the principle of taking a worker as the employer finds him in the broadest sense, disregarding any pre-existing disability or bodily condition. Mr. Justice Tysoe disagreed with this. He recognized the problems associated with the provision as it was then worded; nevertheless, he was of the view that there is a place for apportionment of the Board's liability so long as there is a genuine pre-existing disability.

It is worthwhile to refer to extensive excerpts from Mr. Justice Tysoe’s discussion of this issue:

The concept of taking a workman as he is is borrowed from a general principle of the law of tort. But the principle is not so wide as some persons seem to think it is. It does not mean that a tort-feasor must pay for a disability which existed in the victim prior to his being injured by the tort-feasor. All it means is that, to take an easy example, if your victim happens to have a thin skull or abnormally brittle bones and as a result the injury has more harmful effects to him than it would have to a person with a normally thick skull or with normally sound bones, you must nevertheless pay for all the harmful effects. This principle is followed and applied by the Board. In my opinion it is a sound one, properly applicable in workmen’s compensation cases. (p. 207)

.....

It should be noted — and I think this is the key to the assessment of apportionment — that pre-existing disability and pre-existing condition are not synonymous terms. “Condition” is a general word and, if there are other things with it, it may constitute a disability. It is “disability” that counts in workmen’s compensation and not mere “condition”. (p. 209)

.....

I am pleased to be able to record that industry, as represented by Mr. Locke, Q.C. and Mr. Fraser, is in agreement with me that the principle of subsection (5) of section 7 should be applicable only if there is a pre-existing disability as distinct from a pre-existing condition. Workmen’s compensation is based on conditions resulting from injuries which produce disability in the sense of a loss of bodily function. If a workman’s right to compensation depends upon the existence of disability, the measure of benefits should not be cut down by anything less than a condition that actually produces disability. (p. 217)

.....



The task may be easier if those who have to perform it will keep in mind that it is not right or proper to assign a disability to a pre-existent category if the most one can say is that it is possible that so-and-so had a disability of 5, 10 or 20 per cent. There is no room here for “guessing”. In my view it would not be sufficient if one could say it is “reasonably probable”. I think one should be able to go further and have a firm conviction that the balance of probabilities arising out of all the relevant facts and circumstances so strongly point to the pre-existence of a true disability that it must be assessed against the man. (p. 219)

.....

I am unable to see what place there is for apportionment in cases of activation of a disease or condition existing prior to an industrial injury. If such an injury converts a dormant condition which is non-disabling into an active one which is disabling, it seems to me that the injury should be regarded as the cause of the disability. Certainly, in jurisdictions where recourse to the Courts in compensation cases is available to workmen, it is well established that when industrial injury precipitates disability from a latent or dormant prior condition, the entire disability is compensable. The rule that is followed is that to be apportionable an impairment must have been independently producing some degree of disability before the occurrence of the industrial injury and must be continuing to operate as a source of disability after that occurrence. I regard this rule as a sound one and properly applicable in our compensation scheme.

Cases of aggravation should present no difficulty. If the case is one of aggravation of a pre-existing disability the measurement for compensation should be the amount of the increase or enlargement of the disability, for such increase or enlargement is what the industrial injury caused.

Acceleration is to me somewhat akin to aggravation. The former relates to time and the latter to quantity or substance. The difficulty about applying the apportionment principle to cases of acceleration is that in very few cases indeed could a doctor do any more than essay a guess as to what would be the point of time in the future at which the condition would, in the normal course of nature, reach that stage in its progression to which the industrial injury advanced it.

It seems to me that if the theory of apportionment is to be applied to cases of activation and acceleration, doctors would be called on to perform feats of medical magic and they and the Board to make computations of mathematical wizardry. It is my opinion that in such cases compensation should be payable for the whole of the disability precipitated by the industrial injury. If it were to be otherwise, I feel the

Board doctors would be driven to making decisions based not on judgment, but on guesswork. The justice to workmen and employers resulting would be altogether too rough for my liking.

With the distinction between a pre-existing condition and a pre-existing disability in mind, Mr. Justice Tysoe recommended that s. 7(5) be amended to read as follows:

(5) Where the personal injury or disease is superimposed on an already existing disability, compensation shall be allowed only for such proportion of the disability that exists following the personal injury or disease as may reasonably be attributed to such personal injury or disease. The measure of the disability attributable to such personal injury or disease shall, prima facie, be the amount of the difference between the workman's disability before and disability after the occurrence of the personal injury or disease.

The 1968 legislation incorporated Mr. Justice Tysoe's recommendation. [See *Workmen's Compensation Act* S.B.C. (1968), c. 59, s. 6(5)]. Since then, the provision limiting the Board's liability has remained substantially the same.

Mr. Justice Tysoe's discussion reinforces the notion that once a claim has met the basic criteria for compensability (s. 5(1)), the Board's liability can be limited only where there is a true pre-existing disability as distinct from a pre-existing condition. Nothing in this discussion qualifies this principle. To the contrary, the entire discussion suggests that such principle must apply to workers' compensation claims in general.

Admittedly, Commission reports are not determinative of the meaning and intent of a statute. Hence, if there was a provision in the *Act* that could be construed as authorizing apportionment of the Board's liability, in the case of a pre-existing condition, such a provision would prevail. But there is no such provision. In fact, the only statutory provision that expressly mentions pre-existing conditions points in the same direction as Mr. Justice Tysoe's discussion. This is the provision authorizing the creation of a second injury fund. It states that, for the purpose of creating and maintaining an adequate accident fund, the Board shall:

- (e) provide and maintain a reserve for payment of that portion of the disability enhanced by reason of a pre-existing disease, condition or disability.

The language of s. 39(1)(e) implies that the presence of a pre-existing condition would not interfere with the amount of benefits a worker receives. Section 39(1)(e) contemplates compensation for the disability resulting from a compensable injury, including enhancement, and reinforces the scheme of full compensation in the case of a pre-existing condition.

Taking into account the above considerations, I have concluded that the prior commissioners' decision of April 20, 1988 was patently unreasonable. It disregarded the various elements in the *Act* pointing to a common regime of compensation for all workers as opposed to a differentiation between those undergoing medical review panel examinations and those who do not.

The decision was also patently unreasonable in failing to distinguish between causality in a medical sense and causality in a legal sense. There is no question that the Board is bound by the medical review panel's certification of the medical causes of a worker's disability. But the consequences of the medical determination is a legal question to be determined by the Board in accordance with the spirit and intent of the *Act*. [See Decision No. 17, *Re Disablement Following Unauthorized Surgery*, *Workers' Compensation Reporter*, Vol. 1: p. 78.] The language of the *Act* and a pointed discussion in a much respected Commission report are clear that apportionment in the case of pre-existing conditions was not intended.

The medical review panel referred to the worker's pre-existing conditions as causes. It characterized these conditions as having predisposed the worker to the development of his disability while stating that the compensable injury produced the disability (in the First Certificate) or initiated it (in the Second Certificate).

I conclude that the April 20, 1988 decision of the prior commissioners was wrong in law and set it aside as well as their decision of April 12, 1991.

I now turn to the question of whether the worker's entitlement to compensation is governed by the 1990 policy. This is the new policy which, according to the prior commissioners, could not govern retroactively the compensability of the worker's disability since it was effective as from March 12, 1990.

The worker's entitlement to compensation is not automatically governed by the terms of the new policy. In order to determine his entitlement, the *Act*, as it read in 1988, must be interpreted. I find the correct interpretation of the relevant statutory provisions to be consistent with the terms of the current policy. The worker's benefits should not have been apportioned. The same result would flow from the new policy. I have not concluded, however, that limiting the retroactive effect of a policy change is unlawful and that the 1990 policy must automatically govern the worker's entitlement

to compensation. I am simply interpreting the relevant statutory provisions in the 1988 legislation along the lines of the interpretation underlying the 1990 policy because I consider that interpretation properly captures the terms and intent of the *Act*.

THE WORKER'S PENSION SHOULD NOT HAVE BEEN APPORTIONED.

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



Decision of the Appeal Division

Number: 92-1059
Date: May 20, 1992
Panel: Paul Petrie, Walter N. Peain, Alex Brokenshire
Subject: Application of *Government Employees Compensation Act*

The worker appeals from the June 11, 1991 finding of the Worker's Compensation Review Board. The worker is employed by Canada Post Corporation and coverage is provided under the *Government Employees Compensation Act (G.E.C.A.)*. The Review Board panel denied the appeal on the grounds that the worker's right medial epicondylitis was not due to "injury by an accident" as required by subsection 4(1) of the *G.E.C.A.* The Review Board panel also considered whether the worker would have been entitled to benefits if his claim had been considered under the *Workers Compensation Act* of British Columbia. The Review Board Panel concluded that the worker's epicondylitis arose out of and in the course of his employment within the terms of the *B.C. Workers Compensation Act*. While the Review Board panel would have allowed the claim on the merits under the *B.C. Act*, they denied the appeal on the basis of their interpretation of the phrase "personal injury by an accident" in subsection 4(1) of the *G.E.C.A.*

Two issues arise in this appeal:

- (1) Whether the test for entitlement in subsection 4(1) of the *G.E.C.A.* requires a separate incident or series of incidents preceding the injury? and
- (2) Whether the worker's epicondylitis injury arose out of and in the course of his employment.

Subsection 4(1) of the *Government Employees Compensation Act*

This appeal was one of the three cases which raised the issue of the interpretation of the phrase "personal injury by an accident" in subsection 4(1) of the *G.E.C.A.* The worker's representative of the Canadian Union of Postal Workers, submitted that the Review Board interpretation of subsection 4(1) of the *G.E.C.A.* was erroneous and contrary to an unpublished decision of the former commissioners dated July 7, 1989. The worker's representative also expressed concern that the Review Board did not make any reference to the interpretation of subsection 4(1) of the *G.E.C.A.* at the Review

Board hearing and the inclusion of this issue in the Review Board finding “came as a complete surprise.”

A panel of the Appeal Division considered the interpretation of the phrase “personal injury by an accident” contained in subsection 4(1) of the *G.E.C.A.* after holding a public hearing on this matter on February 3, 1992 and considering submissions provided by affected and interested parties. The Appeal Division Decision No. 92-0743 (*Workers’ Compensation Reporter*, Vol. 8(3): p. 165) dated March 31, 1992 concluded:

... we find that “by an accident” in subsection 4(1) of the *G.E.C.A.* does not require that there be a clearly ascertainable incident or series of incidents which caused the injury. Injuries that arise gradually over time or “by process” are not excluded by this subsection. The injury itself can be the “accident” for the purposes of subsection 4(1). Thus, the test for federal employees in B.C. under subsection 4(1) of the *G.E.C.A.* is, in effect, the same as the test for other workers in B.C. under subsection 5(1) of the *B.C. Act*.

This panel finds that the interpretation of “injury by an accident” contained in Appeal Division Decision No. 92-0743 applies in this case. The test for entitlement for the worker’s epicondylitis claim is, in effect, whether his injury arose out of and in the course of his employment.

Is the Epicondylitis Injury Work-Related?

The worker is a 44-year-old postal clerk who has worked for the Post Office for approximately 12 years. In September 1989, he was assigned to work on the Optical Character Reading machine (O.C.R.) which is used for sorting mail. He was required to pick up bundles of envelopes with his right hand 3"-5" thick and feed the mail into the O.C.R. at the rate of about 27,000 envelopes per hour. The bundles of mail were taken from boxes which weighed about 15 pounds and were placed on the counter from the trolley cart every 1½ to 2 minutes.

A W.C.B. occupational health physician, and the claims adjudicator observed the work activities at Canada Post on January 8, 1990. The doctor concluded:

So after having actually viewed the specific (sic) work activities, I am still of the opinion that the work activities were not likely to have been causative of this condition.

The worker himself appeared to be a very sincere and honest individual, who truly believes that the work activities were responsible for his condition. However, I am unable to agree with him in this respect given the specific elements of the job that we witnessed personally.

In a letter dated January 18, 1990, the claims adjudicator denied the worker's claim on the grounds that he was unable to conclude on a balance of probabilities that the work activities had causative significance in producing the right medial epicondylitis injury. The claims adjudicator did not indicate any other possible cause of the epicondylitis.

The worker's physician, in a progress report dated February 9, 1990, objected to this denial of the claim and stated:

Both the repetitive nature of the arm motion in grasping the mail and the grasping hand (right) must frequently regrasp the mail, hence tugging the medial epicondyle, makes a strong case for work exposure.

The Review Board sought a further medical opinion from the W.C.B. Medical Department. The senior medical advisor in the Occupational Health Department, reviewed the file and concluded:

On a review of the occupational history as currently documented on file, I would certainly conclude the worker is involved in very frequently repetitious use of the musculature of his right forearm, including both the flexor and extensor groups. The work is minimally forceful in nature. However, as indicated this work was essentially unaccustomed, his symptoms occurring within the first month of his full-time employment on the O.C.R. machine. Previously it would appear that only several hours per week would be on this machine.

Therefore I would agree that these work activities were frequently repetitive and unaccustomed, albeit minimally forceful.

Therefore I would conclude that the criteria which support a reasonable occupational association would balance the probability now greater than 50% that this worker's occupational activities are related to his medical diagnosis.

This panel finds the senior medical advisor's opinion is based on a careful review of the relevant factual evidence in this case and provides a specific analysis of the issue of causation. The panel finds that the weight of medical evidence in this case strongly supports a conclusion that the work activities in sorting mail had causative significance in producing the right epicondylitis injury. There is no substantial evidence on file to support an alternate explanation for the development of the worker's epicondylitis injury.

WE THEREFORE ALLOW THE WORKER'S APPEAL FOR MEDICAL AID AND WAGE LOSS FOR THE PERIODS OF DISABLEMENT FROM WORK.

Editors' note: This decision was edited for publication.

Decision of the Appeal Division

Number: 92-1188
Date: June 18, 1992
Panel: Sonja Hadley, Alex S. Brokenshire, Walter N. Peain
Subject: Commutation — Worker Deceased

The estate of the deceased worker appeals from a decision of the Workers' Compensation Review Board (Review Board), dated January 15, 1992. The Review Board found that the Board was correct in calculating the worker's further award on a monthly basis, ceasing at the time of his death, rather than commuting his pension.

The sole issue is whether the worker's estate is entitled to have the additional portion of his pension awarded in a lump sum, rather than on a monthly basis.

Evidence and Argument

The worker had appealed an earlier decision of a disability awards officer dated August 15, 1989 advising him that he had suffered a permanent disability in his left knee equal to 3% of a totally disabled person. He was also informed that it was felt that approximately 50% of that impairment was due to pre-existing non-compensable difficulties and therefore an award of 1.5% of total disability, along with a .14% enhancement to cover age adaptability would be granted. At that time the worker was informed that although permanent partial disability awards were generally payable on a monthly basis, in his case the monthly amount would be so small that his award had been commuted into a lump sum payment of \$2,813.74.

On June 27, 1990, a Review Board panel found that while the 3% disability found was correct, the requirements of Board policy as outlined in Item 44.10 of the *Rehabilitation Services and Claims Manual (Manual)* had not been satisfied. They found that there was no evidence that the pre-existing condition constituted a disability and further found that the worker's functional award was improperly reduced, and should be based on the full 3% of impairment found. The worker had died on December 22, 1989.

The Review Board stated in its decision of January 15, 1992 presently under appeal, that:

. . . Decisions to commute are not made in a vacuum and are inextricably bound to the percentage of disability awarded. In other words, the Board does not decide to commute a worker's pension and *then* determine the percentage of disability that is present; it is only *after* the percentage has been decided that commutation is considered. Thus, the decision in (this worker's) case on August 15, 1989 was to commute *only* the 1.64% functional impairment that was granted.

Both the disability awards officer and the Review Board relied on the example contained in Item 45.21 of the *Manual* entitled "Death of Worker Prior to Award under Category A in #45.10." The example cited was a case where a disability awards officer, unaware that the worker had died, sent a decision letter making a lump sum disability award. That lump sum award was issued but returned to the Board upon notification of the worker's death.

Counsel for the estate, submitted in a letter dated April 27, 1992 that there was a substantial difference between the example used in Item 45.10 of the *Manual* and the award to the worker's estate. Counsel noted that the example used concerned a person who had died prior to the award having been made. Counsel agreed that was a void decision. He argued that in this case the decision was made on August 15, 1989, to make an award to somebody who did exist in respect of a disability that did exist. Counsel said that the Workers' Compensation Board had made an election to commute a pension but that the sum that they arrived at was wrong. Therefore, there was no reason that the sum that was properly to have been paid, should not now be paid. Counsel argued further that the W.C.B. elected to commute the pension prior to August 15, 1989 and therefore either the \$2,813.74 or \$5,627.48 was payable. The Workers' Compensation Board should have paid \$5,627.48 at that time and the proper lump sum payment should be made.

Act and Policy

Section 35 of the *Workers Compensation Act* entitled "Manner of payment of compensation" reads in part:

- (2) The board may in its discretion
 - (a) commute all or part of the periodic payments due or payable to the worker to one or more lump sum payments, to be applied as directed by the board; and

- (b) divide into periodic payments compensation payable in a lump sum.

The *Manual* Item 45.10 entitled "Pension Categories/Lump Sum Awards" reads:

A. Where

1. a compensable disability has been assessed at not more than 10% of total disability,
2. the pension is not more than \$100.00 per month, and
3. the commuted value is not more than \$40,000.00,

a lump sum will be awarded in lieu of a monthly pension.

Item #45.21 of the governors' policy states:

In a Board decision, a worker suffered a compensable injury resulting in permanent residual disability to his left ring finger. The worker died on June 27, 1975. The compensable disability was not a cause of death. On July 3, 1975, the disability awards officer, being unaware of the death, sent a letter of decision addressed to the worker making a disability award based on 1.45% of total disability. Since the disability was not serious and the future monthly payments would be small, the decision letter indicated that, following normal practice, the monthly payments were being commuted into a cash payment of \$1,410.97. A cheque was issued to and addressed to the worker for that amount, but was returned to the Board when the Board was notified of the death. The widow enquired whether the cheque could be reissued to her.

Under the terms of the *Act*, disability awards are payable to a worker. There is no provision for a disability award to be payable in respect of a deceased worker. Although the decision letter was honestly sent out in the belief that the worker was living, there was no basis for that decision to be sent at that time. It was a letter making an award to someone who did not exist in respect of a disability that did not exist. It was a void decision.

The *Act* distinguishes between two different categories of benefits:

1. Benefits payable to a disabled worker.
2. Benefits payable to dependants and others in respect of the death of a worker.

No compensation under the first heading can validly be awarded in respect of future disability after the death of a worker. The letter of decision sent by the disability awards officer was therefore void, and no payment was due under it.

Reasons and Conclusion

The Review Board found that proportionate entitlement should not have applied and that the worker's functional award was improperly reduced, and should be based on the full 3% impairment.

This panel agrees with counsel that the worker was entitled to receive a 3% disability pension when it was initially awarded. As it has been found that the worker did not have a pre-existing disability, proportionate entitlement should not have been applied by the disability awards officer in his decision of August 15, 1989. If proportionate entitlement had not been erroneously applied to the worker's claim, there is no doubt that, according to the governors' policy, the total, correctly calculated pension would have been commuted. We find, given both the low cash amount involved and the percentage of the award, failure to commute the pension would have been totally inconsistent with W.C.B. policy.

If proportionate entitlement had not been applied to the pension, the worker would have received the total amount of his pension to which he was entitled, in a lump sum, on the day on which he received his original pension.

This panel does not agree with the Review Board's reasoning that the worker's case was not distinguishable from policy Item #45.21. The Review Board stated in this regard:

In (this worker's) case, the Board Officer who applied Section 5(5), thereby reducing the award to 1.5% plus age adaptability, had the legal authority to make that decision and (the worker) did not become *entitled* to the amount originally withheld until the Review Board so found on June 27, 1990 — a date subsequent to (the worker's) death . . . Since (the worker) did not become entitled to the further percentage of impairment until after his death, his estate can expect no more than the monthly payments ceasing at the date

of that demise. (The worker's) case is thus not distinguishable from policy Item 45.21 in the sense that entitlement arose subsequent to death. Neither the Board nor this panel can ignore the fact that there is no legislative authority to award compensation in respect of future disability subsequent to the death of the worker.

This panel finds that the worker's circumstances are distinguishable from the facts outlined in Item #45.10. Although the Review Board did not find until June 27, 1990 that he was entitled to the *amount originally withheld*, this does not mean that entitlement to the withheld amount commenced on June 27, 1990. Rather, his entitlement commenced August 15, 1989, but the Board's error in determining his entitlement in 1989 was not rectified until the Review Board finding of June 27, 1990. The fact that the worker had died before the Review Board had corrected the error of entitlement made while he was alive does not lead to a conclusion that his entitlement arose subsequent to his death, as found by the Review Board.

The panel finds that the worker's estate should not be deprived of what the worker would have received as his entitlement had the Board not erred in applying proportionate entitlement on this claim.

THE APPEAL IS ALLOWED.

Editors' note: This decision was edited for publication.



Decision of the Appeal Division

Number: 92-0925
Date: May 4, 1992
Panel: Thomas Kemsley, Verna Ledger, Derrick Spooner
Subject: Section 19(1) — Change of Marital Status

This is an appeal by Mrs. B from the findings of the Review Board dated November 20, 1990. In a decision dated October 27, 1989 the Workers' Compensation Board terminated Mrs. B's "widow's" benefits. The claims adjudicator concluded that she had entered a common-law relationship seven years earlier with Mr. M. The relationship lasted for at least four years. Therefore, the benefits Mrs. B had been receiving since her husband was killed in a work accident in 1980, were terminated immediately. The Review Board denied the appeal and found that there had been a man and wife relationship between Mrs. B and Mr. M.

The issue on this appeal is whether Mrs. B and Mr. M were living in the "relationship of man and wife" for the purposes of Section 19(1) of the *Act*. This panel held a hearing on January 17, 1992 and heard evidence from Mrs. B, her son, and her first cousin, and submissions from her lawyer.

There are various phrases that are used to describe the relationship of two adults who live together without being legally married. For example, they could be room mates, common-law spouses, living in a common-law relationship, living together as husband and wife, living together as man and wife, or other similar phrases. The meaning given to any of these phrases will depend on the context. And, the interpretation put on any of these phrases might change depending on that context. Therefore, while it is helpful to look at how these phrases have been interpreted in a certain context, for example — in determining entitlement to a division of property, that will not necessarily determine how the same phrase will be interpreted in a different context, for example — in determining entitlement to workers' compensation benefits.

In this case, Mrs. B received benefits under Section 17 of the *Act* as the dependant widow of her deceased husband. These benefits were terminated under Section 19.

The issue is, what does the “relationship of man and wife” mean in Section 19(1). We have considered the submissions of counsel which referred us to case law in the family law area. We also looked at Section 17(11) of the *Act* which provides, in part, that the Board may pay compensation:

- (11) Where a worker has lived with and contributed to the support and maintenance of *a common law wife or common law husband*, and
 - (a) where the worker and the common law wife or common law husband have no children, for a period of 3 years;
- (emphasis added)

Section 17(11) uses the words “common law wife or common law husband” whereas Section 19(1) uses the words “the relationship of man and wife.” Item #57.00 of the *Rehabilitation Services and Claims Manual (Manual)* states, in part:

The phrase “common-law wife” or “common-law husband” is used in regard to situations in which two people of opposite sex are living together in a regular and established way, enjoying sexual relations in a common household.

There is no definition in the *Act* or *Manual* of the words “the relationship of man and wife.” In interpreting Section 19(1) we have paid close attention to Decision No. 90 in Volume 1 of the *Workers’ Compensation Reporter*, dated January 9, 1975. [The panel applied the same reasoning as in #92-0926 (p. 557) to determine that the relationship must subsist three years to form a basis on which to terminate benefits.]

We cannot interpret Section 19(1) as including a financial standard. Counsel argued that since Section 17 requires financial dependency as a prerequisite to entitlement to benefits, then we must interpret the phrase “the relationship of man and wife” in Section 19 as also involving financial dependency. The language in Sections 17 and 19 is quite different on this point as Section 17 refers to financial dependency or deemed dependency or financial contribution as one of the prerequisites to benefits, whereas Section 19 makes no reference to these factors in the termination of benefits. As well, Decision No. 90 sets out that common-law and legal wives are to be treated in the same way. No financial dependency test is applied when benefits are terminated under Section 19(1) due to re-marriage and thus none can be applied in the case of a common-law relationship. Otherwise, common-law spouses would be treated more favourably than legal spouses under Section 19(1). That would be contrary to the principles set out in Decision No. 90.

We realize that this sets up a different requirement for entitlement under Section 17 than for termination of benefits under Section 19(1). However, this different test applies equally whether the person is a legal or common law spouse.

This difference between Section 17 and Section 19 could result in financial hardship. A widow is not entitled to benefits under Section 17 unless she was financially dependent or deemed dependent on her deceased husband. However, those benefits can be terminated under Section 19 without regard to whether she has received financial benefits from the new relationship (whether re-marriage or living together as man and wife) or remains financially dependent on the benefits from her deceased husband.

Finally, we need to determine if Mrs. B and Mr. M were living “in a relationship of man and wife” for the purposes of Section 19(1). The cases in the family law area indicate that no one factor is determinative in deciding whether a “common law” relationship has been established. For workers’ compensation purposes, it is important to focus on objective factors, as the Board has to be able to determine if benefits should be terminated. Item #57.00 from the *Manual* refers to “living together in a regular and established way, enjoying sexual relations in a common household.”

We find that most of the objective factors here satisfied the definition in Item #57.00. We accept the evidence that Mrs. B and Mr. M lived in the same house for five years and shared the same bed for three and a half years. They ate together, she did the cooking, she did the laundry and he did odd jobs around the house and yard. They took vacations together, visited relatives and regularly went to dances and other social events with other couples. Mr. M gave Mrs. B a diamond ring and it is clear that she would have married him. In June 1986, they signed an Agreement which stated that:

- A. M and B commenced to co-habit as man and wife in December of 1982

Mrs. B said this recital was put in by the lawyer who drafted the Agreement and she just signed it. That lawyer filed a Declaration on this appeal which set out his reasons for advising Mrs. B to protect herself at that time with a Separation Agreement. It appears that the lawyer felt that Mrs. B’s and Mr. M’s relationship for the past three and a half years could potentially have given Mr. M a claim against Mrs. B for a Declaration of Trust. Mrs. B and Mr. M kept their financial affairs separate during their relationship. They had no joint bank accounts or joint property and only one joint debt — a \$6,000 truck loan that Mrs. B co-signed for Mr. M. As well, Mrs. B said that Mr. M did not make regular financial contributions to the joint household, although he did make some financial contributions. Their separation agreement stated, in part:

-
- C. During this period of co-habitation B purchased certain items of furniture with monies which M had deposited into her account.
 - D. M has expended other monies on certain items of furniture in the home and in addition provided labour and some materials for improvements on the said lands and premises.

Mrs. B's evidence is that she contributed considerably more than Mr. M did to the relationship. However, it also appears that Mr. M was not working at all times as he was on W.C.B. benefits and U.I.C. benefits at some points. Pursuant to the separation agreement Mrs. B paid Mr. M \$6000 to release all his claims against her and move out of the house. She estimated this as his contribution to the relationship in the previous three and a half years. He did not move out for another one and a half years, although he had a separate bedroom for that time. Counsel submitted that there was not enough of a financial link here for this relationship to be that of "man and wife." Mrs. B said she did not consider Mr. M to be a "common law husband" as they had separate financial affairs and he did not support her. However, she had been willing to marry him.

There was financial sharing in this relationship, although most of it flowed from Mrs. B to Mr. M. Nevertheless, that is sufficient to satisfy the test of "the relationship of man and wife" or "common law wife or husband." Those relationships are not just established when the man contributes more financially than the woman. If either one contributes to the support of the other, especially when the other has fewer financial resources, then a financial link is established. If the situations here had been reversed, Mrs. B would have been able to claim that she had received financial support from Mr. M for a number of years. With all the other factors, that would have been sufficient to establish a "common law" relationship. We cannot see why the result should be different just because Mrs. B contributed more than Mr. M. The fact that the relationship broke up cannot change the conclusion that it was "the relationship of man and wife." The same is true for marriage. A separation agreement may end the relationship, but that does not mean there never was a relationship. We are satisfied that most of the relevant factors support the conclusion that Mrs. B and Mr. M lived "in the relationship of man and wife" for over three years. We are also satisfied that this relationship would have met the requirements of Section 17(11) of living as "common-law wife or common-law husband . . . for a period of three years" if Mrs. B had been making a claim under that section.

Mrs. B felt that Mr. M took financial advantage of her as she contributed much more to the relationship than he did. As well, her workers' compensation pension has been terminated as a result of that relationship. The result is no different than if she had married him. She took certain risks in entering the relationship and one of those risks was that her workers' compensation pension would be terminated under Section 19(1)

of the *Act*. She had been informed of this, as, on July 21, 1981, the Board sent her a letter which stated, in part:

Widow's pensions are paid on the basis of dependency. If a widow is therefore living with a man in the relation of man and wife, without being married to him, the Board may discontinue or suspend a pension.

As set out above, while financial dependency is required for entitlement to widow's benefits, it is not required for the termination of those benefits. We find that Mrs. B and Mr. M met the requirements of Section 19(1) of living together "in the relationship of man and wife." The *Act* has no provision whereby Mrs. B widow's pension could be reinstated once her relationship with Mr. M ended.

WE THEREFORE DENY THE APPEAL.

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



Decision of the Appeal Division

Number: 92-0926
Date: May 4, 1992
Panel: Thomas Kemsley, Alex S. Brokenshire, Walter N. Peain
Subject: Section 19(1) — Terminating Widows Benefits

This is an appeal by Mrs. M from the findings of the Review Board dated December 16, 1991. Mrs. M was married to Mr. M who died on March 23, 1981 as a result of a malignant mesothelioma stemming from his exposure to asbestos in the workplace. Mrs. M received compensation pursuant to Section 17 of the *Workers Compensation Act* for herself and her two dependent children. Her benefits were terminated effective January 1, 1990 on the basis that she had been living in a common-law relationship with Mr. F from January 1985 until November of 1987. Section 19(1) of the *Act* states, in part:

- (1) Where a widow . . . of a deceased worker marries, or without marrying, lives with a man . . . in the relationship of man and wife, the monthly payments attributable to that person as a widow . . . shall cease;

Mrs. M appealed on the basis that she did not live “in the relationship of man and wife” with Mr. F. She admitted that she had lived with Mr. F for two years and nine months but said that there was no financial sharing between the two of them and they never considered themselves to be in a common-law relationship. Mrs. M’s lawyer cited court cases from the family law area to show that the tests for a common-law relationship had not been met in this case. As well, counsel submitted that as Mrs. M had not been maintained financially by Mr. F, her benefits should not have been terminated as that would be contrary to the intent and principles of Sections 17 and 19 of the *Act*.

The Review Board denied Mrs. M’s appeal and found that, on the objective factors, Mrs. M and Mr. F had lived “in the relationship of man and wife” for two years and nine months. They agreed that Section 19(1) requires that, in such circumstances, monthly payments should cease. They interpreted Section 19 as only requiring the existence of a marriage or common-law relationship for the termination of benefits, but not requiring any further enquiry into financial dependency.

On this appeal, counsel made further written submissions. He argued that the Review Board erred in finding that there was a “common-law” relationship and erred in its interpretation of Section 17(7) and Section 19 of the *Workers Compensation Act*. He placed considerable reliance on the financial aspect of the “common-law” relationship.

We have decided this appeal on the basis of our interpretation of Section 19(1) of the *Act*. There are a few preliminary points. First, the family law cases are helpful in defining “the relationship of man and wife” for Section 19 but they are not determinative. That phrase has to be interpreted in light of the *Workers Compensation Act*, which may produce a somewhat different interpretation from similar phrases in family law statutes. Secondly, we do not have much difficulty with the way the Review Board analyzed the facts here. The relevant factors will rarely all point in one direction and, as in the family law area, no one factor is determinative. It is necessary to weigh all the factors and, as stated by the Review Board, the objective factors are very important in this area as the W.C.B. has to be able to determine whether or not benefits should be terminated under Section 19(1). Thirdly, we do not agree with the argument that Section 19 has any requirement of financial dependency, or something similar, as does Section 17. The language in these sections is quite different as Section 17 refers to financial dependency or deemed dependency or financial contribution as one of the prerequisites to benefits, whereas, Section 19 makes no reference to these factors in the termination of benefits. We realize that this sets up a different test for entitlement than for termination of benefits, but we find the language of Sections 17 and 19 to be quite clear in establishing this difference.

In interpreting Section 19(1) we have paid close attention to Decision No. 90 in Volume 1 of the *Workers’ Compensation Reporter* (p. 236), dated January 9, 1975. Pursuant to Item #96.10 of the *Rehabilitation Services and Claims Manual (Manual)*, this decision is part of the published policies of the governors.* The *Act* was slightly different in 1975, but the general approach set out in that case is still applicable in interpreting the current provisions for the termination of a widow’s, or widower’s, benefits. Decision No. 90 stated, in part:

To a large extent, living common-law is recognized under the *Act* as equivalent to a legal marriage. There are various provisions of the *Act* relating to marriage. Some are positive in nature, prescribing the circumstances in which compensation benefits accrue. Others are negative, referring to the circumstances in which

* *Editors’ note: Reporter Decision 1 to 423 constitute part of the published policy of the governors. Decisions of the Appeal Division published in the Reporter are intended to assist in communicating and creating an understanding of the Act and policies.*

benefits terminate. But it is not likely to have been intended that common-law wives should be treated in the same way as legal wives with respect to the positive features of the *Act*, yet treated differently and more favourably with regard to the negative features. The establishment of a common-law relationship should, therefore, have the same significance with regard to the termination of compensation benefits as it has for their commencement.

In Decision No. 90, the commissioners used Section 17(11) as a guideline in determining when a widow's benefits should be terminated. The effect of the decision was that a widow's benefits were not finally terminated until she had been in a common-law relationship for three years. That was the same length of time that it took under Section 17(11) to become entitled to a widow's benefits. Therefore, any new common-law relationship did not bring about a final termination of a widow's benefits until it also satisfied the common-law relationship test for Section 17(11). The commissioners also discussed the suspension and reinstatement of a widow's benefits within that three-year period; however, that part of the decision is no longer applicable due to a change in the *Act*.

In applying the approach in Decision No. 90 to the current Section 19(1), we also will use the current Section 17(11) as a guideline. Section 19(1) terminates benefits when the widow or widower, lives "in the relationship of man and wife." Section 17(11) grants benefits to widows or widowers (where there are no children) where the person was a "common-law wife or common-law husband . . . for a period of three years." If the establishment of a common-law relationship is to have "the same significance with regard to the termination of compensation benefits as it has for their commencement," as set out in Decision No. 90, then Section 19(1) must be interpreted as not terminating a widow's benefits due to a common-law relationship until that relationship would be sufficient for the commencement of benefits under Section 17(11). That means, where there are no children, the words "lives . . . in the relationship of man and wife" in Section 19 must be interpreted to mean "lived with . . . a common-law wife or common-law husband . . . for a period of three years" as set out in Section 17(11). Item No. 57.00 of the *Manual* provides a definition as follows:

The phrase "common-law wife" or "common-law husband" is used in regard to situations in which two people of opposite sex are living together in a regular and established way, enjoying sexual relations in a common household.

The phrase "the relationship of man and wife" in Section 19(1) is not defined in the *Act* or *Manual*.

At the time of Decision No. 90, the *Act* allowed the Board to suspend a widow's benefits while she was in a common-law relationship. If the common-law relationship lasted beyond three years, then her benefits were permanently terminated. However, if the common-law relationship terminated within three years, her benefits were reinstated. Section 19(1) no longer provides for benefits to be suspended. They are either paid, or they cease. Therefore, since a common-law relationship must last for three years before the benefits cease, the widow's or widower's benefits must continue in the meantime. There is no power to terminate or suspend these benefits prior to the expiration of three years.

As noted above, this does not mean that we are interpreting Section 19 as including the same financial tests as Section 17. The matters of "marital" status and financial dependency are separate in Section 17 and we cannot read into Section 19 a requirement of financial dependency in the absence of any such language. This difference between Section 17 and Section 19 may well be a matter that the Board of Governors will want to consider.

Mrs. M's benefits were terminated based on her relationship with Mr. F. However, that relationship did not last for three years. Therefore, they did not live in the "relationship of man and wife" for the purposes of Section 19(1) of the *Act*, as interpreted above. Following the principles in Decision No. 90, Mrs. M's benefits should not have been terminated.

WE THEREFORE ALLOW THE APPEAL.

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

Decision of the Appeal Division

Number: 92-0977
Date: May 7, 1992
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Section 96(2) — Natural Justice (2)

A letter dated May 14, 1991 was received from the worker's union representative, requesting a reconsideration of the April 22, 1991 commissioners' decision on her claim. The employer was notified of the worker's application, but advised that no submissions would be provided by them.

The background of this matter was that the September 19, 1990 Review Board finding on the worker's claim was referred to the prior commissioners for reconsideration under Section 96(2) of the *Act*. The claims adjudicator asserted that the Review Board finding was contrary to the overwhelming weight of the evidence, as set out in Memo #57. This was under the policy in effect at that time, contained in Decision No. 403 of the *Workers' Compensation Reporter* (Vol. 6: p. 50). The commissioners considered the matter, and issued a preliminary decision dated December 12, 1990 in which they stated that further medical investigation was required. The commissioners concluded their decision by advising the worker as follows:

You will be contacted directly by the Medical Services Division concerning the arrangements for these investigations. When the results are obtained, they will be disclosed to you and (your representative) with an opportunity to make further submissions before the Commissioners reach a decision on your claim.

The worker subsequently sent a letter to the Board dated January 13, 1991, advising of her change of address. This was received by the Board on January 23, 1991. She also wrote to the Board on February 13, 1991, using her new address at the top of her letter.

On March 6, 1991, the appeals officer wrote to the worker to provide her with copies of the documents concerning the further medical investigation carried out at the commissioners' request. She was given until March 27, 1991 to provide a response. Unfortunately, this letter was forwarded to the worker's former address. A copy was sent, however, to the worker's union representative, and was apparently received by her.

On April 15, 1991, a letter was sent to the worker by the claims adjudicator. This was correctly addressed to the worker's new address. The worker thus received confirmation that her change of address had been noted by the Board.

On April 22, 1991, the commissioners rendered a decision on the worker's claim in which they overturned the Review Board finding. They noted in their decision:

You and (your representative) have been provided with copies of the February 18, 1991 report of (the physician) and the x-ray report dated February 20, 1991. No response to these reports has been received from you or (your representative).

Both the commissioners' decision of April 22, 1991 and the March 6, 1991 letter from the appeals officer were sent in error to the worker's former address notwithstanding her written notification of the change of address to the Board.

The worker's union representative submits in her letter of May 14, 1991 as follows:

Given that she did not receive any communications, and therefore neither made representation herself nor advised me as to any action which I might make on her behalf, I would request that in the interests of due process that firstly, she be sent a copy of the letter and attendant medical documents. Secondly, that an extension of time to respond be granted to May 31, 1991, despite the Commissioners already having dealt with the matter, and that the Commissioners reconsider the matter upon receipt of such response by the worker.

By letter of May 28, 1991 the worker wrote to the appeals officer to advise that she had just received the new medical documentation obtained by the commissioners. She complained that:

. . . this is not a very just or fair process for a decision to be made without me having an opportunity to see these materials or have a chance to respond to any of these documents.

The Appeal Division has jurisdiction to reconsider a decision of the prior commissioners if new evidence is provided which meets the requirements of Section 96.1 of the *Act*. This provision does not seem to contemplate a situation such as has arisen in this case, however. The basis for this application for reconsideration is not that new evidence has arisen or has been discovered subsequent to the hearing of the matter by the prior commissioners. Rather, the basis for this request is that there was an apparent breach of

natural justice in that the new evidence obtained by the prior commissioners was not disclosed to the worker and she thus had no opportunity to respond to the new evidence.

I have considered the fact that a copy of the March 6, 1991 letter, with enclosed medical records, was provided to the worker's union representative. It may be argued that, in law, provision of a copy to the worker's agent or representative was equivalent to providing a copy to her. On this basis, the worker may be deemed to have had disclosure of these records, as well as an opportunity to provide a submission. This argument does not, however, take into account the fact that the commissioners specifically advised the worker that when the results of the further investigation were obtained these records would:

be disclosed to you and your representative with an opportunity to make further submissions before the Commissioners reach a decision on your claim.

The worker and her representative were entitled to rely on this advice.

I am also guided by Section 99 of the *Act* which provides:

The board is not bound to follow legal precedent. Its decisions shall be given according to the merits and justice of the case . . .

Natural justice requires that a party who may be adversely affected by a decision be given the opportunity to be heard. I am satisfied, in the circumstances outlined above, that the merits and justice of this case required that the worker be given a full opportunity to be heard.

I note, in particular, that it is apparent from the commissioners' decision of December 12, 1990 that it was their intention that the worker be given the opportunity to respond to the new medical reports which had been obtained. It was only through error or inadvertence that such disclosure was not provided to the worker at her new address. While it may well be that in other circumstances notification to a representative would be sufficient, I do not find that such notice was sufficient on the particular facts of this case.

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

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*; . . .

This was published in the *Workers' Compensation Reporter*, Vol. 7(4): p. 171, as Decision of the Governors Number 8.

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.

A breach of natural justice constitutes an error of law within the meaning of the governors' resolution. I find, therefore, that the April 22, 1991 commissioners' decision should be reopened under Section 96(2) of the *Act*, on the basis that the worker was denied a sufficient opportunity to be heard.

I have considered whether a further opportunity should be granted to the parties for submissions, following which the matter could be assigned to a panel of the Appeal Division for consideration. For the reasons set out below, however, I find that the Appeal Division's consideration of this matter should now be concluded.

The Review Board finding on this claim was referred to the commissioners on the ground that it was contrary to the overwhelming weight of the evidence. This was in accordance with the policy of the Board which was in effect at that time. The *Workers Compensation Act* was amended effective June 3, 1991, however, by the bringing into force of Bill 27, the *Workers Compensation Amendment Act, 1989*. Section 96(4) of the *Workers Compensation Act* now provides:

The president may, not more than 30 days after a finding of the review board is sent out, refer the finding to the appeal division for redetermination *on grounds of error of law or contravention of a published policy of the governors*.

The legislature has limited the grounds on which a Review Board finding can be referred for reconsideration by the Appeal Division. A Review Board finding cannot be referred by the Board to the Appeal Division for a reweighing of the evidence which was considered by the Review Board. In the absence of an appeal by the worker or the employer, a Review Board finding can only be brought before the Appeal Division by the Board on the basis of the grounds specified in Section 96(4).

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

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

A reopening of the matters dealt with in the April 22, 1991 commissioners' decision has the result that the Appeal Division is required to continue the rehearing commenced by the prior commissioners. This rehearing must be under and in conformity with the new *Act*, however, so far as it may be done consistently with this new *Act*. This requires that the legislative intention inherent to Section 96(4) be respected.

I find, therefore, in light of Section 96(4), the Review Board finding should not, in the absence of an appeal by the worker or employer, be further considered by the Appeal Division. The worker's file will be returned to the Claims Division for implementation of the Review Board finding.

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



Decision of the Appeal Division

Number: 92-1408
Date: August 5, 1992
Panel: Sonja Hadley
Subject: Section 96(2) — Average Earnings

A letter dated September 18, 1991 was received from the worker's representative requesting reconsideration of the former commissioners' decision of October 16, 1990. A further submission dated February 26, 1992, was made by the workers' adviser addressing the issue of whether the prior commissioners' decision of October 16, 1990 was based upon an error of law, and making submissions on the merits of the application of Section 33(3) in this case. The submission was pursuant to Section 96(2) of the *Workers Compensation Act*.

The governors' *Decision No. 8, Workers' Compensation Reporter* Vol. 7(4): p. 171 (December 1991) gives the Appeal Division the authority to hear this request. 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:

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 1, 1991, where the Chief Appeal Commissioner finds that the decision was based upon an error of law, or involves an issue under the *Canadian Charter of Rights and Freedoms*; . . .

The resolution was effective as of January 6, 1992.

I have been delegated the authority of the chief appeal commissioner to make such a determination under Section 96(2).

Background

In a decision dated August 22, 1989, the disability awards officer advised the worker that his permanent partial disability was assessed at 26.5% of a totally disabled person. This award was calculated using the statutory minimum compensation rate, as 75% of the worker's average earnings yielded an amount below the statutory minimum. As a result, the worker was awarded a permanent partial disability award of \$252.58 per month, effective February 6, 1989. The disability awards officer concluded that given the worker's wage-rate of \$7.00 per hour, it was not anticipated that he would have a loss of earnings in the long run greater than that reflected by his functional award of 26.5%.

The worker appealed to the Review Board. The Review Board concluded, with reference to the worker's low earnings at the time of his compensable injuries as follows:

Approximately five years ago [the worker] was driving a truck for a company involved in research and development. A change in tax laws resulted in this company no longer being viable. It went bankrupt and [he] was laid off. As a result, he and his wife made some very conscious career decisions. The result was that [the worker] would return to school to upgrade to at least receive his Grade X and preferably his Grade XII equivalent and then he would take a commercial heavy duty mechanic's course

[The worker] was able to obtain his Grade X at Camosun College by May 1987. He was also able to write and obtain his Grade XII by passing a general education development testing program in June of 1987

[The worker] then enrolled in a commercial heavy duty mechanic's course to commence in the latter part of October, 1987. In the few weeks intervening he went to work for the employer on a part-time basis delivering meat. On August 7, 1987 fate intervened and [the worker] sustained a compensable injury when the driver of a truck at the ferry terminal, instead of moving forward as planned, put his truck in reverse and backed up, pinning [him] between two trucks. Although no bones were broken he did have extensive bruising and damage to his legs about the knees which disabled him sufficiently that he was not able to then take the commercial heavy duty mechanic's course in October. Arrangements were made for him to delay this course to the next term, some six months later.

After he was no longer totally temporarily disabled from his leg injuries [he] returned to work for only one day when he sustained another compensable injury, this time to his back and the other areas already referred to under this claim. [The worker] is now not physically able to take a commercial heavy duty mechanic's course.

Having regard to this factual background, the Review Board found:

The panel found the circumstances of this appeal to be quite unique. The uniqueness came from the fact that when [the worker] was injured, although he was not yet enrolled in a commercial heavy duty mechanic's course he had completed his upgrade prerequisites and was accepted to start his course within two weeks

At the time of injury [the worker] was in the process of upgrading his skills. This move was a conscious choice made in consultation with his wife not only to improve family earnings but also to provide better occupational security. There was a price to pay to do this. That price was to take lower earnings for short term employment when between courses and to generally have lower current earnings in return for future benefit

[The worker's] decision to upgrade did not just entail him taking a commercial heavy duty mechanic's course. It involved him taking certain prerequisites first, including initially his Grade X and then his Grade XII equivalent. He had done both and had succeeded He then did not sit by to wait for his next step, his commercial heavy duty mechanic's course, which was to start a few months later. He went out to work at the best job he could find for that interim period. If he were not already accepted into that course at the end of October, the panel finds it would have been unlikely that he would have been in a \$7.00 an hour job. He was earning \$14.00 per hour before he returned to school.

As a result, the panel finds that [the worker] was "for all intents and purposes" in the course of learning a trade when he was injured, bringing him under the provisions of Section 33(3) of the *Act*. He is therefore entitled to have his pension so calculated. That is, to ". . . calculate the award by taking into account the probable increase in average earnings." . . .

[The worker's] dedication and commitment in his past work record, his upgrade courses, and his later job search efforts all speak highly to indicate [he] would have been successful in this course and would have been easily placed as an apprentice. There was, the panel finds, a reasonable expectation of him becoming fully accredited or certified in due course

The finding of the Review Board was referred to the commissioners on the basis that the Review Board finding conflicted with the provisions of Section 33(3) of the *Workers Compensation Act*. It was stated in this referral that, although it was confirmed that the worker was on a waiting list at Camosun College for a T.R.A.C. commercial transport course, there was a complete lack of confirmation that the worker was ever accepted into this programme, let alone his successful completion of the programme. In a letter to the worker dated August 15, 1990, the manager, Policy and Review Department, indicated that he did not believe the Review Board finding was consistent with Section 67.10 of the *Rehabilitation Services and Claims Manual*, cited by the Review Board.

In a letter dated September 6, 1990, a representative of the Canada Employment Centre wrote to the commissioners to confirm that the worker was on a confirmed wait-list for the T.R.A.C. commercial transport course at Camosun College effective September 1986. It was also stated that he had been accepted by Camosun College prior to being placed on the wait-list. It was further stated that in order for acceptance for wait-listing, a client must first meet all the prerequisites required by the training institution. It was confirmed that the worker was enrolled and scheduled to commence the commercial transport training course on November 2, 1987.

In a letter of September 13, 1990, the dean, Industrial Technical and Trades Division, Camosun College, wrote that the Commercial Transport Programme was approximately six months long and covered all aspects of the first year of the apprenticeship programme. He stated that graduates usually entered the trades with a six-month reduction in apprenticeable time and are not required to do the first-year technical session. The dean also stated that at the time of the worker's application, the demand for graduates of both Heavy Duty and Commercial Transport students was high. He stated that most graduates who were willing to relocate to rural areas were obtaining employment. He added that most employers indenture these students and prepare them for their journeyman certification which leads to greater employment opportunities and better remuneration.

On October 16, 1990 the commissioners decided that the Review Board finding would not be accepted. It was stated in this letter that: “The issue is the determination of your *average earnings under Section 33 of the Workers Compensation Act* for the purpose of calculating your permanent partial disability award.” (emphasis added) In the decision of October 16, 1990 it was stated that:

. . . the Commissioners consider the Review Board finding to be contrary to the proper interpretation of the *Workers Compensation Act*. The Commissioners note that at the time of your injury you were working as a truck driver and had been for some two months. While you have taken courses to upgrade your high school education and had enrolled in the commercial transport course at Camosun College, you had not yet started the formal training to become a heavy duty mechanic. You also had not yet started working for any employer as an apprentice to learn the trade of a heavy duty mechanic. Having regard to these facts, the Commissioners do not see how you could be considered to be *in the course of* learning a trade, occupation, profession or calling at the time of your injury.

While you had made the decision to take the heavy duty mechanic course, you had not yet started the course and therefore were not in the course of learning that trade at the time of your injury.

While it may have been necessary for you to upgrade your high school education before starting the course, the Commissioners do not see how the words “in the course of learning a trade” can be interpreted to include pursuing a high school education. The Commissioners do not agree that the meaning of these words can be expanded to include those steps which are prerequisite to learning the actual trade.

The Commissioners consider that in order for Section 33(3) to apply the injury would in most cases take place with the employer where the trade, occupation, profession or calling is being learned.

. . . In the result, the Commissioners do not accept the Review Board finding as they consider their interpretation of Section 33(3) of the *Act* to be incorrect. The Commissioners consider that your average earnings for the purposes of calculating your permanent partial disability award were properly determined by the disability awards officer as outlined at the beginning of this decision letter.

Submissions

The submission of September 18, 1991, states in part:

. . . I also can see logically how the Commissioners might come to their very narrow interpretation of Section 33(3). However, I believe that a very fundamental point has been overlooked in this attempt to decide whether or not [the worker] was or was not in the course of learning a trade, occupation, profession or calling.

The whole of Section 33(3) of the *Act* must be considered as to its meaning and intention.

The worker's representative quotes Section 33(1) of the *Workers Compensation Act* and submits that the meaning and intent of "or on the probable yearly earning capacity of the worker at the time of the injury, as may appear to the board to best represent the actual loss of earnings suffered by the worker by reason of the injury" makes it incumbent upon the Board to examine the "probable" loss of future earnings.

In his submission of February 26, 1992 the workers' adviser argues that the commissioners' decision of October 16, 1990 constitutes an error of law. It is submitted that the commissioners fettered their discretion and thereby failed to exercise their statutory duty. It is submitted that the commissioners "set up" a principle or rule of interpretation of Section 33(3) which, by definition, precluded a reasoned consideration of the merits of the worker's circumstances, which may have required a modification of the rule. It is further stated that the narrowness of the commissioners' interpretation improperly precluded any consideration of any other possible scenarios, which may have met the statutory requirement. In the workers' adviser's view, the commissioners adopted a restrictive interpretation of Section 33(3), without proper consideration of the intent and legislative requirements of Section 33(1) and (3) of the *Act*. It is stated that both sub-sections deal with "probable earning capacity." It is further stated that, by failing to consider this required issue, the commissioners failed to exercise their statutory duty.

The accident employer was invited to respond to the workers' adviser's submission but no submission was received.

Legislation

Section 33(1) of the *Workers Compensation Act* states:

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

Section 33(3) of the *Act* states:

Where the board is satisfied that the average earnings of the worker at the time of injury by reason of his age or his being in the course of learning a trade, occupation, profession or calling do not truly represent his average yearly earnings or earning capacity, it may, in the case of temporary disability, adjust from time to time the payments of compensation to take into account the probable increase in average earnings and may, in the case of permanent disability, calculate the award by taking into account the probable increase in average earnings.

Analysis

In considering this application, the first question is whether the prior commissioners' decision was based upon an error of law. In considering this question, I am guided by a decision of the chief appeal commissioner (92-0818 in the *Workers' Compensation Reporter*, Vol. 7(3): p. 211) in which she decided that, in general, the

proper standard of review is that the decision is so patently unreasonable that it cannot be rationally supported by the relevant legislation. Both representatives have stated in their submissions that the commissioners interpreted Section 33(3) very narrowly and restrictively. I agree with this description. However, the fact that the section has been interpreted narrowly, does not, by itself, make the decision so patently unreasonable that it cannot be rationally supported by the relevant legislation.

However, the other point made by both representatives is that the commissioners failed to consider the intent of Section 33(1) of the *Act* which also deals with the determination of a worker's earning capacity. The workers' adviser has submitted that by failing to consider this required issue, the commissioners failed to exercise their statutory duty.

In considering this argument, I note that the issue as defined by the commissioners in their decision letter of October 16, 1990 was "the determination of your *average earnings* under Section 33 of the *Workers Compensation Act* for the purpose of calculating your permanent partial disability award" (emphasis added). After deciding that the Review Board findings conflicted with the provisions of Section 33(3) of the *Act*, the commissioners went on to decide that the average earnings for the purpose of calculating the worker's permanent partial disability award were properly determined by the disability awards officer.

As stated earlier, the disability awards officer based the worker's wage rate on the statutory minimum. This decision was made on the basis that the worker's average earnings for the one-year and three-year period prior to his injury were less than that of the Board's minimum. There is no evidence in the file that the disability awards officer considered the earning capacity of the worker at the time of the injury. In fact, in a memo dated June 23, 1988 by the rehabilitation consultant, the following is stated:

The worker was interested in knowing whether or not his compensation rate would be changed due to the fact that he had intended to increase his earnings capacity as a heavy duty mechanic. I have advised the worker that this is impossible as the Board only considered proven employment and not future considerations.

In *Testa v. W.C.B.* (1989), 58 D.L.R. (4th) 676, the Court of Appeal considered Section 33(1) of the *Workers Compensation Act*. In Reasons for Judgment, it was stated in part:

Section 33(1) provides a broad basis for determining the average earnings and earning capacity of a claimant. There are a number of ways in which the W.C.B. may decide this question. One method has been adopted by the W.C.B. as a general policy. *The application*

of that one method where it has no application, and the disregard of other methods is an unreasonable application of the statute. It is no answer to say that the W.C.B. had a discretion to exercise. To blindly follow a policy laid down in advance is to disable the tribunal from lawfully exercising a discretion. The law is summed up in this passage from Wade, Administrative Law, 4th ed. (1977), at p. 317:

An authority can fail to give its mind to a case, and thus fail to exercise its discretion lawfully, by blindly following a policy laid down in advance. It is a fundamental rule for the exercise of discretionary power that discretion must be brought to bear on every case: each one must be considered on its own merits and decided as the public interest requires at the time.

The result of the patently unreasonable application of s. 33(1), and the unreasonable finding of fact which flowed from it has been to deprive the claimant of the benefits he is entitled to under the statute.

(emphasis added)

In a B.C. Supreme Court case, *Plamondon v. Workers' Compensation Board of British Columbia* (1988), 47 D.L.R. (4th) 114 Justice Shaw found that:

. . . Mr. Plamondon has never obtained a decision on the fundamental issue relating to his 1977 claim: did the work he carried out from July, 1976 through to February 7, 1977, cause personal injury superimposed on his pre-existing spinal fusion disability. In my opinion he is entitled to have his claim for compensation adjudicated upon this issue. Without this, Mr. Plamondon will have been denied his claim without the proper issue ever having been addressed. For a claim to be disposed of in that manner is in my view patently unreasonable.

. . . There was a failure to embark upon the proper inquiry which the circumstances of this case called for. This, in turn, caused a failure to take into account all factors relevant to Mr. Plamondon's 1977 claim. Mr. Plamondon was deprived of the right to have his claim adjudicated under s. 5(1) and (5) of the *Workers Compensation Act* based on the continued use of his partially disabled back in work for which it was not suited. In my view, this was error of such seriousness as to properly be termed patently unreasonable . . .

I find in the case before me, a similar failure. There was a failure to embark upon the proper enquiry which the circumstances of this case called for pursuant to Section 33(1) of the *Workers Compensation Act*. The commissioners found that Section 33(3) of the *Act* did not apply in the worker's case as he was not *in the course* of learning a trade, occupation, profession or calling at the time of his injury. However, although the worker may not technically have been in the course of learning a trade, the evidence was that he was enrolled and scheduled to start his Commercial Transport Course on November 2, 1987. The evidence is also that at the time, the demand for graduates was high. The Review Board found that the evidence indicated that the worker would have been successful in the course and would have been easily placed as an apprentice. The Review Board also found that there was a reasonable expectation of the worker becoming fully accredited or certified in due course. The commissioners did not dispute any of this evidence or finding of the Review Board. However, in spite of this undisputed evidence there was no inquiry under Section 33(1) taking these factors into account. Rather, the commissioners accepted the average earnings as determined by the disability awards officer, who also had not taken these factors into account. It is evident, by their definition of the issue before them, that the commissioners restricted their inquiry to the worker's *average earnings* under Section 33 of the *Workers Compensation Act* in considering that the permanent partial disability award was properly determined by the disability awards officer.

Section 33(1) places a duty on the Board to determine the average earnings and *earning capacity* of a worker with reference to the *average earnings* and *earning capacity* at the time of the injury, as may appear to the Board to best represent the actual loss of earnings suffered by the worker by reason of the injury. Section 33(1) gives the Board the discretion as to whether earnings at the time of the injury, average earnings for one or more years prior to the injury, or the probable yearly earning capacity of the worker should be used. However, Section 33(1) qualifies this discretion with the phrase "as may appear to the Board to *best represent* the actual loss of earnings suffered by the worker by reason of the injury." (emphasis added) In many cases, average earnings and earning capacity may be the same, as in the case of an employee who has worked for many years for one employer and would continue to do into the foreseeable future. In many cases, a worker's established earnings pattern prior to an injury is the most reliable method of determining what his or her earnings pattern in the future would have been had the worker not been injured.

In this case, however, the evidence points to a large discrepancy between the worker's average earnings in the three-year period prior to his injury and his future earning capacity at the time of his injury. In order, then, to determine what best represents the actual loss of earnings suffered by the worker by reason of the injury, Section 33(1) requires that consideration be given to the worker's earning capacity

before coming to such a determination. It would not be possible to decide which method of calculation best represented the actual loss of earnings suffered in such a case without consideration of more than one method.

For the above reasons, I find in this case that the commissioners made a patently unreasonable decision when they failed to embark upon the proper inquiry necessitated by Section 33(1) of the *Act*. I agree with the submission of the workers' adviser that by failing to consider this required issue, the commissioners failed to exercise their statutory duty, and that this constituted an error of law.

As a result, the commissioners' October 16, 1990 decision overturning the findings of the Review Board dated December 4, 1986 is declared unlawful.

Reconsideration

In view of my conclusion that the former commissioners' decision was based upon an error of law, I have proceeded to reopen, rehear and redetermine the matter under Section 96(2) of the *Act*. I find that in the circumstances of this case, I accept the reasoning given by the Review Board for why the worker's average earnings at the time of injury did not truly represent his earning capacity at the time of injury. That reasoning applies to the considerations that must be made under Section 33(1).

Accordingly, I find that the worker's pension should be recalculated under Section 23(3) of the *Act*. The basis for the recalculation should be that the worker's probable earning capacity at the time of injury best reflected the actual loss of earnings suffered. The Board's statistical information documents that in 1987, the earnings of heavy duty mechanics was on average \$3027.00 per month (Memo #79). This is the figure that should be used in a recalculation of the worker's pension.

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



Decision of the Appeal Division

Number: 92-1068
Date: May 21, 1992
Panel: Patrick L. Byrne
Subject: Schedule of Recommended Sanctions

This is an appeal of the May 30, 1991 decision of the director of the Field Services Department, Occupational Safety and Health Division to impose a penalty assessment of \$15,000.00. The director concluded that the employer had violated *Industrial Health and Safety Regulations* 4.02(5)(e), 8.08(3), 8.08(5), 8.10, 14.23(1)(b) and 14.23(2) on August 4, 1990 and the circumstances warranted a type III penalty assessment.

The employer appeals on a contravention of a published policy of the governors. This issue is whether the penalty assessment was properly imposed as a type III.

The employer operates a pulp mill. On August 17, 1990 one of their work sites was inspected by a W.C.B. occupational hygiene officer who was investigating an incident that occurred at the mill on August 4, 1990. The officer concluded that:

[The] investigation revealed that a worker, who worked in the screen room area, reported to first aid with symptoms of gas exposure. In accordance with previous Board directive and mill policy, the gassing incident was immediately reported by the first aid attendant to the area foreman for investigation and necessary corrective action(s). Lack of appropriate action by the foreman resulted in other workers continuing to work in the same gassy area without adequate respiratory protection.

The officer cited the employer for violations of the above noted Regulations on inspection report #90629161 and recommended that the employer receive a penalty assessment. On October 9, 1990 the employer was sent a show-cause letter proposing a penalty of \$15,000.00. An oral hearing was held at the divisional level on February 19, 1991 and on May 30, 1991 the director imposed the penalty assessment.

The employer filed a Notice of Appeal on June 24, 1991 and provided written submissions dated August 14 and December 16, 1991. The union representing the workers provided written submissions dated September 16, 1991 and January 2, 1992. The O.S.H. Division provided a memorandum dated October 3, 1991. The employer did not request an oral hearing.

In his August 14, 1991 submission, counsel for the employer objected to the participation in this appeal by the worker representative.

With respect, it is submitted that it is inappropriate in the circumstances of this case for the Appeal Division to have invited the worker representative to participate in the Company's appeal, or to allow [the worker's representative] to respond to our submission.

Counsel for the employer argued that Decision No. 1 of the governors only allows participation of other parties where, "the procedure will assist inquiry into the merits of the issues." Further, that this appeal did not involve the factual circumstances found to have occurred on August 4, 1990 and did not raise any question of any error of law or any argument that the existing Policy 1.4.1 contained in the *Occupational Safety and Health Policy and Procedure Manual* contravenes the *Workers Compensation Act* or common law in general. Therefore, "no such assistance can be provided by [the worker representative]" and as a result the employer's submission should not be forwarded to the workers' representative.

Counsel for the employer argued that the Appeal Division's authority to allow intervention by other parties is discretionary and should not be exercised as a matter of course in every penalty assessment appeal brought by any employer. He continued:

Instead, the Appeal Division should consider the nature of the appeal in each particular case before determining whether "the participation of other parties in the procedure will assist inquiry into the merits of the issues".

The registrar of the Appeal Division explained to counsel the exercise of the division's discretion both generally and specific to this case in his letter of August 27, 1991:

In response to your general point about pre-screening issues to determine whether worker participation will assist the inquiry on the merits of the issues, the Appeal Division will generally assume that worker participation will be of assistance. Day to day participation in the work place by the workers represented may well provide information and insights



that will assist the panel with regards to the merits of the appeal. In some cases, worker representatives choose not to participate where they feel they have nothing to offer in response to or support of the appeal. Where the employer is of the view that worker participation is inappropriate and requests that the Appeal Division exercise the discretion not to invite participation, that request will be considered by the Registrar on the merits of the request.

Your specific request that the participation of the worker representative in this case be discontinued has also been considered. The classification of the category of violation for the penalty assessment deals with the extent of risk of injury or disease. The workers exposed to such a risk may well have some interest in and some information on this issue. For this reason, the worker representative will be invited to respond to your submission. You will have an opportunity to further address this matter in your reply to the worker representative's response.

This panel adopts the registrar's explanation and finds that the exercise of discretion in this matter was reasonable in the circumstances.

The employer's counsel provided a submission dated December 16, 1991 in response to the submission filed by the union's counsel on September 16, 1991. In that submission he did not appear to have pursued his objection. Rather, counsel further explained why the employer had initially objected:

A significant concern which led to our initial objection was that the involvement of the worker representative could turn the penalty appeal process at the Appeal Division level into a highly adversarial one.

In our submission, this is exactly what has happened in the Company's present appeal. [The union counsel's] submission dated September 16, 1991 appears to be antagonistic, adversarial and highly inflammatory . . .

Decision Number 1 of the Appeal Division with respect to practice and procedure provides:

The Appeal Division operates on an inquiry basis and may obtain information from sources other than a party to an appeal.

(emphasis added)

It is unclear from counsel's submission whether he is suggesting that this appeal proceeded within the definition of an adversarial system as opposed to an inquiry system or whether he is suggesting that the workers' representative's views were merely adverse to the employer's views and were expressed in a manner he considered inflammatory.

An adversarial system is not defined by the extent of any antagonism felt or expressed by the parties. An adversarial system is generally defined by such procedures as the method of inquiry, the role and function of the decision maker(s) and the rules of evidence, amongst others. The Honourable Mr. Justice Charles Tysoe in his 1966 Commission of Inquiry into the *Workmen's Compensation Act* (page 353) provided comments on the distinctions between adversarial and inquiry systems. In the panel's view this appeal clearly proceeded under the general procedures of an inquiry system and could find no basis for concluding otherwise. It appears that counsel's objection to the union submissions were based solely on his perception of their inflammatory nature and not on any objection to the proper application of the Governors' Policy with respect to whether the Appeal Division followed an inquiry system. The panel can choose what evidence will be accepted and what weight to give the evidence. This is true whether workers support or do not support the employer's appeal or whether any antagonism is felt or expressed. Further, the panel does not agree with counsel's characterization of the union's counsel submission. While some of the submission was not helpful with respect to the issue under appeal it could hardly be characterized as antagonistic or highly inflammatory.

Counsel for the employer also objected to the Appeal Division allowing the O.S.H. Division to comment on their August 14, 1991 submission. Counsel argued that the, "company has not raised any new issue or presented new evidence in its August 14, 1991 submission which was not raised or available to the O.S. & H. Division." In the panel's view it is not clear from the employer's August 14, 1991 submission that no new evidence or arguments were being raised or whether the characterization of events was as originally presented to the O.S.H. Division. The panel finds that it was reasonable to have requested a response from the O.S.H. Division. Further, the employer was allowed to rebut any arguments from the O.S.H. Division.

The issue in this appeal is whether the penalty was properly applied as a type III. The panel considered the original decision and the related documents, the employer's evidence and argument, the O.S.H. Division's memorandum and the union submissions with respect to the issue in this appeal.

The employer's argument with respect to the quantum of the penalty is outlined in their August 14, 1991 submission:

For the purposes of this appeal, the Company is not contesting the finding that the violations set out in [the Occupational Hygiene Officer's] August 17, 1990 Inspection Report did occur on August 4, 1990. Furthermore, the Company is not appealing [the Director's] decision to impose a penalty assessment against the Company arising from the August 4, 1990 incident.

The Company is appealing the amount of the penalty which [the Director] assessed against it — \$15,000.00. In our submission, [the Director] contravened the published policy of the Board of Governors, as set out in Policy No. 1.4.1 of the *O.S. & H. Manual*, by treating the August 4, 1990 incident as a Type III violation. In our further submission, the incident should have been treated as a Type I, or at the worst Type II, violation pursuant to Policy No. 1.4.1.

The employer's evidence with respect to the sequence of events from their August 14, 1991 submission is as follows:

On August 4, 1990, an incident occurred in the screen room at the pulp mill. In particular, the screen room operators noted the smell of chlorine gas in the area. One of the operators subsequently opened the large doors on the south end of the screen room to get some fresh air. Upon opening the doors, the operator encountered gas which was emanating from outside of the screen room. The operator reported to first aid for treatment of symptoms from gas exposure.

Upon being advised of the incident, a senior supervisor . . . proceeded to the screen room to investigate. The senior supervisor could not detect any gas being present in the screen room, and established that the source of the gas problem was outside the screen room. The senior supervisor determined the source of gas could be stopped by re-establishing stock flow at the washers, and this was where the senior supervisor devoted his efforts to successfully resolve the problem.

In the meantime, a junior supervisor also proceeded to the screen room to investigate, and discovered only a trace of chlorine gas smell. Working conditions were discussed with the remaining screen room operator, and it was determined that work could be

continued in the screen room. The junior supervisor then proceeded to obtain a bite-type respirator for the screen room operator (who had a beard) which could be used in the event that the operator was required to escape from the screen room as a result of further gas exposure. When the junior supervisor returned with the respirator, he could not detect the presence of any gas.

Counsel for the employer characterized the events of August 4, 1990 in his December 16, 1991 submission:

. . . the evidence establishes that the nature of the chlorine exposure in the screen room was a minor one. There is no medical or other evidence that the exposure in the particular circumstances could have led to any permanent or irreversible injury or illness, or that there was any "immediate danger to life or health" involved.

As indicated in O.S. & H. Policy 1.4.1., the nature of the exposure to chemical substances involved in a type III violation "includes *high* exposure" to certain substances. There is no allegation of such exposure in the circumstances under consideration in this appeal.

Counsel for the employer contrasts the definitions of types I and III penalties and concludes that the facts of this case clearly place the circumstances within the definition of a type I penalty (or a repeat of a type I). He relies on the evidence that workers suffered only minor, temporary, reversible injury or illness requiring medical treatment. The risk of injury or disease was less than moderate as the source of the gas was outside the screen room area and two supervisors could not detect any trace of gas shortly after the incident. Further, the penalty was imposed for repeat non-compliance and there was no allegation that such non-compliance was willful or deliberate.

The governor's policy 1.4.1 (Application of Sanctions) provides the following definition of a type I violation:

Risk of injury or disease is moderate. There is no accident requiring Board notification. Injuries are of a minor nature. Exposure to chemical substances can cause temporary, reversible injury or illness requiring medical treatment. There has been repeated non-compliance with Board orders. Non-compliance with regulations due more to neglect than willful and deliberate.

In the panel's view the proper way to interpret this definition is as eight separate conditions, any one of which could characterize a violation as a type I.

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1. The risk of injury is moderate.
 2. The risk of disease is moderate.
 3. There is no accident requiring Board notification.
 4. Injuries are of a minor nature.
 5. Exposure to chemical substances can cause temporary, reversible injury requiring medical treatment.
 6. Exposure to chemical substances can cause temporary, reversible illness requiring medical treatment.
 7. There has been repeated non-compliance with Board orders.
 8. Non-compliance due more to neglect than willful and deliberate.

The governors' policy 1.4.1 (Application of Sanctions) provides the following definition of a type III violation:

Risk of injury or disease is high. There has been a fatality or serious injury. Exposure to chemical substances could result in permanent, irreversible injury, illness or death (includes high exposure to carcinogens, teratogens, mutagens).

In the panel's view the proper way to interpret this definition is as eight separate conditions, any one of which could characterize a violation as a type III.

1. Risk of injury is high.
2. Risk of disease is high.
3. There has been a fatality.
4. There has been a serious injury.
5. Exposure to chemical substances could result in permanent, irreversible injury.
6. Exposure to chemical substances could result in permanent illness.
7. Exposure to chemical substances could result in death.
8. High exposure to carcinogens, teratogens or mutagens.

Once a violation has been characterized as either as a type I or III (or repeat type I and III) policy 1.4.1 provides a recommended schedule of sanctions based on the employer's payroll. With respect to characterizing the type of violation there are 11 specific examples of work situations that would normally be considered "high risk" that are contained in policy 1.4.3. However, those examples were not helpful in the circumstances of this case.

There is one other section of the governors' policy 1.4.1 that provides guidelines with respect to the quantum of penalties. Part (2) provides:

In situations where there are recorded observations of previous non-compliance with regulations or orders, . . . The amount assessed will reflect the degree of hazard occasioned by the non-compliance and/or consideration of the motivational impact required;

In the panels' view what has to be considered here is whether the director's application of policy 1.4.1 is so unreasonable as to constitute a contravention of a published policy of the governors. Policy 1.4.1 is a guideline for the application of sanctions and many of the considerations are discretionary in nature. In this case there are elements of both a type I and a type III violation.

The violations would more closely be associated with a type I with respect to actual injuries suffered. However, with respect to the *risk* of injury or disease it is not clear that the risk was moderate and thus a type I.

The *Concise Oxford Dictionary* defines risk as, "a chance or possibility of danger, loss, injury, or other adverse consequences . . ." In the circumstances of this case a worker had reported to first-aid for treatment as a result of exposure to unknown quantities of chlorine gas from an unknown source. The area was investigated by a senior supervisor who detected gas in the area and determined the source of the gas to be outside the immediate area and devoted his efforts to resolving the problem. A different supervisor also investigated, he detected a trace of chlorine gas, noted that the operator was using a wet paper towel as a makeshift respirator and obtained an escape respirator for the operator which, "could be used in the event that the operator was required to escape from the screen room as a result of further gas exposure."

At least one supervisor appeared to be of the opinion that further exposure was possible. Two supervisors and an operator worked in the area without proper respirators when the source of the gas had not been contained, when no gas testing was being conducted and when there was the possibility of further undetermined exposures. In the panel's view it was not unreasonable for the director to have concluded that the violations constituted a high risk of injury or disease.

The violations on which the penalty under appeal are based have been characterized by the director as repeat non-compliance. The employer does not deny that. The term repeat non-compliance only appears in the definition of a type I (or type II) violation.

However, there is a discretion to apply a quantum that will reflect the degree of hazard and/or the motivational impact required to achieve compliance. The penalty was applied both because of the risk the director found was associated with the violation and because of the employer's history of non-compliance with those Regulations.

The facts of this case do not clearly place the violations in only a type I category. There is at least one element of a type III category and a reasonable application of the discretion under part 2 of policy 1.4.1 to apply a quantum to reflect both the hazard and the motivational impact required to achieve compliance. Considering all of the circumstances of this case the panel finds that the director's discretion to apply a \$15,000.00 penalty was not so unreasonable as to constitute a contravention of a published policy of the governors.

Conclusion

There was no contravention of a published policy of the governors. The penalty assessment was properly applied. The appeal is denied.

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



REPORTER

Decision of the Appeal Division

Number: 92-1376
Date: July 24, 1992
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Section 96.1 — Fibrositis

The worker's counsel has requested a reconsideration of the June 8, 1990 decision of the prior commissioners on the basis of new evidence. Section 96.1 of the *Workers Compensation Act* (the "Act") authorizes the Appeal Division to reconsider a decision of the prior commissioners on that basis.

The worker was injured on November 28, 1977 when hit by a falling filing cabinet at work. Because of disagreement with the Board over the nature and extent of her disability, the worker appealed to a medical review panel.

A medical review panel certificate dated April 29, 1983 stated amongst other things:

.....

2. She does have a disability with respect to her left shoulder, left side of her neck, left anterior chest, and left upper extremity.
3. The nature of the disability is a cervical spondylosis causing pain and discomfort at the extremes of movement. The pain radiates into her left upper extremity — intermittently, and is of moderate to severe extent. It limits her capacity for working as she is unable to carry on with her duties involving lifting and carrying files etc. without pain.
4. The injuries sustained on November 28, 1977 do have causative significance in that it initiated the symptoms of which she complains in her neck, left chest, and left upper extremity.
5. The disability is partly as a result of a cause other than the injury sustained on November 28, 1977. The other cause is a pre-existing cervical spondylosis.

.....

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7. It is reasonable to assume that she suffered a twisting injury to her neck in the accident resulting in symptoms in her neck. The pre-existing spondylosis and the injury were probably equally significant in the production of her disability.

.....

9. The Panel feels that the Claimant was disabled for the time allowed. The Panel finds it extremely difficult to apportion her subsequent residual disability to either the accident or the pre-existent cervical spondylosis. However, the Panel is of the opinion that a fair decision would be that each was equally responsible. Her persistent disability since the accident up to the present should be allocated in a similar manner — i.e. — 50% of the time loss from the accident to the present time should be allowed.

10. Persistent symptoms of her cervical spondylosis precluded her working at her usual employment.

.....

In a letter dated July 18, 1983, Dr. J, the worker's physician, agreed with the medical review panel's description of the worker's disability but disagreed with its conclusion regarding apportionment of the Board's responsibility.

The medical review panel certificate resulted in a referral for a pension examination conducted on July 14, 1983. The functional impairment was assessed at 5% of total. According to Memo #40 of August 3, 1983, the total award was set at 7%. The memo stated:

Given the restriction of movement in the cervical spine on extension, lateral flexion, and rotation, plus a discomfort, impairment at the cervical spine would appear to be equal to 5% of total disability. Consideration has been given also to pain on extremes of shoulder movement and gripping with the left hand, tenderness in the area of the left chest, tenderness in the left trapezius muscle and over the second, third and fourth ribs, reduced pinch grip and grip on the left, diminished sensation to pin prick in the left middle and ring fingers, left trapezius area, tip of the left shoulder and discomfort in the area of the left trapezius left shoulder left anterior chest and left arm, total disability seem to amount to 7%. As 50% of

the current disability is related to W.C.B. involvement based on the incident under the claim, an award of 3.5% of total will be granted on this claim. The effective date is January 9, 1978.

The worker underwent an employability assessment. In Memo #44 of October 3, 1983, the rehabilitation consultant stated that the worker could do the same type of work that she had done prior to the injury. In Memo #45 of March 10, 1989, the senior pension adjudicator concluded, on the basis of the Rehabilitation memo, that no loss of earnings would occur as a result of the compensable injury.

In a decision letter dated November 10, 1983, the worker was advised that, in keeping with the medical review panel certificate, her disability had been assessed at 7% of which only 50% was related to her 1977 work injury. As a result, her award was 3.5% of total. The letter also stated that this functional assessment would adequately reflect any possible long-term loss of earnings which might occur as a result of her disability.

The worker appealed that decision to the Review Board. In a decision dated September 24, 1984, the Review Board denied the worker's appeal.

The worker proceeded with an appeal to the prior commissioners. In a submission dated June 7, 1985, counsel for the worker made three arguments. First, he argued that the 7% award did not reflect the extent of the worker's disability. In support of this, he relied on reports by a rheumatologist, Dr. K, who had first examined the worker in 1982 and then subsequently in 1985.

In 1982, Dr. K had diagnosed the worker to be suffering from a fibrositis syndrome secondary to her cervical spine pathology — a diagnosis mentioned in the report attached to the medical review panel certificate. In a letter dated January 7, 1985 to Dr. J, Dr. K stated that the worker's fibrositis had become more generalized, involving now the low back and the anterior thighs. In a second letter dated February 26, 1985, also addressed to Dr. J, Dr. K reported that the worker's complaints were essentially the same as they were in 1982 except that they were now "slightly more severe in terms of the pain." Dr. K also reported some decrease in the range of motion since 1982.

Secondly, counsel for the worker argued against apportionment of the Board's liability. Thirdly, he questioned the evaluation of the rehabilitation consultant concerning the worker's employability.

The prior commissioners' decision of June 25, 1986 allowed the worker's appeal in part. It found that apportionment of the Board's liability was inappropriate since the worker did not suffer from a true disability prior to the work-related injury. But, it concluded that the 7% award was consistent with awards normally made by the Board

for disabilities of the type and extent found by the medical review panel. It also concluded that the worker could return to a clerical type of employment without violating the restrictions on her work activities laid down by the medical review panel. The prior commissioners commented:

It may be that, with economic conditions as they are, you might now have difficulty in finding employment. However, the Commissioners have to keep in mind that the commencement date of your pension award is 1978 and that, under Board policy, it is the availability of jobs over the long rather than the short term that matters.

In a letter dated April 4, 1987, and addressed to the worker's counsel, Dr. J described the worker as "permanently and totally disabled for all forms of gainful employment." He stated:

She informed me that she could not stand comfortably for more than an hour or two. Doing so would cause her neck, back and legs to ache. She also informed me that she could not sit for more than an hour or two at any given time as this too, would cause her neck and back to hurt. She found stationary positions worse. She also could not focus down (sic) from a sitting position onto a desk or computer type screen for more than a few minutes without this causing discomfort in her neck. Bending movements and turning movements often caused dizziness. She also had difficulty reaching overhead because of pain in her shoulders and neck. Typing and writing could only be performed for short periods of time. Anything more than 30 minutes or so would cause pain in her hands, wrists and forearms and arms.

In a decision letter dated July 13, 1987, the claims adjudicator informed the worker that Dr. J's examination had been reviewed by a W.C.B. physician who found no evidence that any of the worker's objective findings had changed or that she was experiencing a significant temporary deterioration in her condition. The claims adjudicator therefore decided against reopening the claim for temporary wage-loss benefits.

In a further letter dated October 8, 1987 and addressed to the Board, Dr. J provided the following information:

As of April 9, 1987, [the worker] was no longer able to stand or sit for a period of time in excess of one and a half hours, due to intolerable pain levels. As of the same date, she was no longer able to hold her head in a forward position, as would be required for a

desk job, for a period of time in excess of one hour without incurring intolerable pain, coming mainly from her left arm and chest, the left side of her neck and the rear left side of her head. In addition, holding her head in a forward position for longer than one hour causes nausea. Since at least April 9, 1987, she has been unable to sleep properly because of the severe pain she incurs when laying prone. She is unable to have the pain managed by pain killers, due to her negative reactions to them.

In a decision letter dated February 22, 1988, the senior pension adjudicator informed the worker that no change would be made to her 7% disability award. He stated:

At the time of re-examination, you demonstrate slight restriction of neck movement in sideways bending and rotation, discomfort on elevating the left arm above 90 degree and on forward flexion of the left arm, and tenderness to pressure over the neck and ribs. Also noted are your reports of persisting discomfort on the left side of your neck and left chest aggravated by posture and activity, radiation of discomfort down the left arm to the fingers, reduced strength and endurance, and reduced sitting and standing tolerance.

I have compared the recent medical evidence with those reports previously on file. While there are some minor differences, there has been no significant change in your overall condition.

The worker appealed both the July 13, 1987 decision and the February 22, 1988 decision to the Review Board. The Review Board panel found that the worker should be assessed with regard to her psychological condition, its relationship to her compensable injury, and, if there is such a relationship, the restrictions it imposed upon her employability. The panel denied the worker's claims for temporary wage-loss benefits on the basis that there was no evidence indicating that any change in the worker's condition was temporary.

A psychological report dated January 23, 1989 concluded that there was insufficient evidence to justify the diagnosis of any psychopathology. The report stated:

From her report and those of her psychiatrists, as well as her attending physicians, [the worker] is suffering from chronic pain secondary to fibrositis; and this chronic pain along with its associated symptomatology have rendered her incapable of employment. The issue of chronic pain and its impact on employability, however, seems to be an issue more for policy decisions

within the W.C.B. than one of psychological impairment for the Psychology Department.

In a decision letter dated March 29, 1989, the senior pension adjudicator informed the worker that he would not recommend any changes to her entitlement since her condition had remained unchanged and since there was no psychological component to her impairment.

In a letter dated January 9, 1990, the worker appealed to the prior commissioners on the basis of fresh evidence related to her disability in respect of the chronic pain syndrome.

In a submission dated February 7, 1990, counsel for the worker enclosed three medical reports as new evidence, arguing that these reports “are authority for the proposition that whatever the case may have been in 1986, by 1989 both her own physicians and W.C.B. medical staff are of the opinion that [the worker’s] condition has rendered her completely incapable of employment.”

The first medical report submitted was the psychologist’s report dated January 23, 1989 referred to above.

The second medical report submitted was a letter dated August 17, 1988 from Dr. J, her physician, to Dr. L, a psychiatrist. In this letter, her physician stated:

. . . The reasoning for her worsening condition was the development of secondary fibrositis (soft-tissue rheumatism), a very well recognised entity and an entity well known to follow trauma. This fibrositis was diagnosed by me and confirmed by rheumatologist Dr. K. It has led to a diffuse involvement of soft tissues throughout her body in addition to the areas initially involved and has rendered her totally disabled. We also know that fibrositis can be an unrelenting chronic debilitating condition with sleep disturbance resulting in amplification of her pain and leading to depression.

The worker’s physician also stated:

[The Board’s] 7% award was based on injuries to her neck, shoulder and left arm. This was despite claims by myself and Dr. K that she was totally disabled because of her injuries and the development of the fibrositis.

The third report referred to in the submission was a letter from Dr. L. Dated January 10, 1989 and addressed to the Board, it stated:

So basically her psychiatric condition is a depression, which is consequent to a chronic pain syndrome. The condition, that is, the chronic pain syndrome and the depression which is associated with it, have rendered her incapable of working all these years.

In a decision dated June 8, 1990, the prior commissioners denied the worker's request for reconsideration on the grounds that there was no significant new evidence. They reasoned as follows:

The Commissioners must also point out that their decision was based on the Medical Review Panel certificate of April 29, 1983. It appears to them that, since the Medical Review Panel did not suggest that you were incapable of working, your request for reconsideration relates as much to that certificate as to the Commissioners' decision.

The Commissioners note that in the report of the Medical Review Panel which accompanied its certificate, the Panel referred to Dr. M's examination of Section 15, 1980, and his conclusion that most of your problem was "on a functional basis". The report also referred to Dr. K's report of February 18, 1982, in which he concluded that you had a fibrositis syndrome secondary to cervical spine pathology. The Commissioners conclude therefore that the reports that you now provide raise no new matter which was not already before the Panel in 1983 and the Commissioners in 1986.

The prior commissioners also stated in that decision:

The purpose of the Medical Review Panel is to provide final resolution of medical disputes that arise on the adjudication of a claim. It is recognized that the Panel may reach conclusions to which other doctors who have examined the claimant take objection. That is not a reason for reconvening the Panel. The reports of Dr. J contain opinions contrary to that of the Panel but point to no fundamental mistake made by the Panel which would warrant a reconvening of the Panel in accordance with #103.58 of the Board's *Rehabilitation Services and Claims Manual*.

It is the prior commissioners' decision of June 8, 1990 which the worker is asking the Appeal Division to reconsider. The new evidence adduced this time includes a medical report dated August 20, 1991 from a rheumatologist, Dr. N, and two medical reports dated August 5, 1991 and September 28, 1991 from Dr. J who also enclosed several excerpts from articles on fibromyalgia.

We note that Dr. N reported the following:

Extension of the cervical spine is limited to 10°, lateral flexion 20° and rotation 20°. These should be about 40°, 45° and 90° respectively.

On the same subject, the medical review panel's report dated April 29, 1983 had stated that:

Examination of the cervical spine revealed that forward flexion was restricted to 3 fingers from the sternum. Extension was 20 degrees with discomfort referred to the left shoulder. Rotation was to 30 degrees bilaterally. Lateral flexion was to 20 degrees on the right, with discomfort over the left side of the neck. Lateral flexion to the left was 20 degrees with some scalp discomfort.

According to the pension examination conducted on July 14, 1983:

. . . Forward flexion of the cervical spine was 40° and extension 30°. Both produced discomfort. Lateral flexion was 25° bilaterally and [the worker] noted discomfort in the left trapezius area when turning her head to the right. Rotation was 45° bilaterally and again movement to the right produced slight left trapezius discomfort.

According to Dr. K's report dated February 26, 1985:

Clinical examination reveals some decrease in range of motion from her previous investigation, with lateral flexion now reduced to 45° on the left and 15° on the right, rotation to 45° on the right and 55° on the left. I also note the similar findings of secondary trigger points in the area of the left side of her upper back, neck and anterior chest.

Dr. N also reported that the worker has generalized fibrositis, commenting "[o]ne could question whether this was secondary to the injury and the effects of chronic pain and this would depend in part on how long ago Dr. J documented evidence of diffuse fibrositis."

In his report of August 5, 1992, Dr. J suggested that the Board had considered the worker's disability only:

. . . on the basis of the physical injury to her neck, left shoulder, left upper extremity and chest. No consideration was given to the more disabling, generalized rheumatic disorder of fibrositis which was clearly manifesting itself and contributing largely to her total disability.

Dr. J proceeded to describe the various aspects of this syndrome, including chronic pain, sleep disturbance and chronic fatigue. He concluded:

We have a much broader understanding of this very debilitating entity called fibromyalgia today than we did 14 years ago when [the worker] first sustained her injuries.

It is clear with the information provided and with the clear evidence in objectively reviewing her claim, there can be very little doubt as to what the course of events were.

There can be no other conclusion except for the fact that she was injured in the accident and that as a result of this, she developed fibrositis. Both these conditions have rendered her totally disabled.

It is regrettable that she had not been injured today. For had she done so I feel sure that her condition would have been more readily diagnosed and the correct and appropriate consideration would have been given her claim.

Analysis

I have reviewed at length the history of this claim so as to determine the nature of the argument submitted on behalf of the worker. This argument is not so much that the Board's 7% disability assessment in 1983 did not properly measure the extent of the worker's disability, as this disability was described by the medical review panel in 1983. Rather, it is that the worker's condition has deteriorated since the medical review panel certificate was issued and there are developments in the field of medical knowledge that shed new light on this condition and its progression.

S. 65 of the *Act* which states that a medical review panel certificate "is conclusive as to the matters certified and is binding on the board" does not preclude a reopening of a claim, if there is a material change in the facts and circumstances underlying the certificate. In his 1952 Report, Chief Justice Sloan stated:

The decision of the Medical Appeal Board on any disputed medical issue remains final and binding in relation to the facts and circumstances existing at the time of the decision and remains so unless and until there is a material change of those facts and circumstances, in which case the foundation and basis for the decision no longer exists.

Section 103.58 of the *Rehabilitation Services and Claims Manual* specifies:

The Medical Review Panel certificate is binding on the Board only as to matters as these stand at and prior to the date of the certificate. As to the extent and nature of disability after the date of the certificate, it is open to the Board to make a decision without reference back to the original panel or to a new panel, as long as that decision is not inconsistent with the Medical Review Panel certificate.

In their June 8, 1990 decision, the prior commissioners reached the conclusion that the worker's condition had not changed significantly enough since 1983 for them to reconsider her claim. They also noted that the worker had been diagnosed by Dr. K in 1982 as having fibrositis and that, consequently, this diagnosis had been before the medical review panel in 1983 and the prior commissioners in 1986. In other words, according to the prior commissioners, there was no new evidence concerning the extent of the worker's disability or its diagnosis.

The question before us now is whether new evidence in the form of better medical understanding of the fibrositis syndrome should lead to a re-evaluation of the worker's disability as this progressed since 1983.

There is no doubt that new medical knowledge qualifies as new evidence under s. 96.1. The question arises, however, whether the evidence adduced on fibrositis satisfies the conditions specified under s. 96.1(3).

Section 96.1 bars reconsideration, where the basis of an applicant's request is that the prior commissioners or the Appeal Division did not consider evidence which the applicant could through the exercise of due diligence have obtained and submitted prior to the making of the impugned decision. The onus is therefore on the appellant to take reasonable steps to ensure that the evidence on file is complete. This is the intent behind the "due diligence" language in s. 96.1(3)(b). As outlined in *Decision No. 91-0724* in Vol. 7 of the *Workers' Compensation Reporter*, 1991, Vol. 7(3), p. 145:

If, for example, certain information existed, but it was not reasonably foreseeable that it would be germane to the Appeal Division's

consideration, “due diligence” would not have required the appellant to search it out.

At the time of the prior commissioners’ 1990 decision, there already existed in medical journals a variety of materials on the fibrositis syndrome, including some of the pieces submitted with the worker’s most recent request for reconsideration. However, this by itself should not be a bar to accepting the evidence as new within the meaning of s. 96(1)(3)(b). It would not be unreasonable for a worker to consider, initially, that materials on a medical question that is the subject of ongoing but tentative research could not form the basis for a compensation claim and then, subsequently, reassess this opinion, in light of further developments in the area of medicine of concern.

The more problematic question is whether the evidence adduced is substantial and material to the impugned decision.

A review of the material before us suggests that there has been some controversy about whether fibrositis is a proper medical diagnosis. This controversy appears to have arisen primarily because of the nature of the complaints (chronic, diffuse pain associated with a variety of other symptoms). Some studies have concluded that certain symptoms are sufficiently consistent and clinically distinct to establish fibrositis as a syndrome — that is, as a genuine, recognizable, rheumatologic entity with physical causes.

According to these studies, the main disabling aspect of fibrositis is the pain and sleep disturbance so that mere physical examination will not capture the extent of the disability. There is, therefore, a risk of understating a disability resulting from fibrositis.

Assuming that, at this point in time, the development of research on fibrositis supports the view that it is a distinct rheumatologic disease, the question remains whether the diagnosis of fibrositis is at all helpful in assessing the extent of disability. This is a critical element for the disposition of the worker’s reconsideration request since it is precisely the degree of her disability that is in issue.

The diagnosis of the fibrositis syndrome is primarily a finding that certain symptoms exist, rather than a diagnosis which carries with it clear-cut answers about the disabling effect of these symptoms. The evidence before us does not indicate that there is a necessary connection between the existence of certain symptoms and the level of disability. The Ontario Workers’ Compensation Appeals Tribunal put the matter succinctly in *Decision No. 669/87F* (1989), 11 W.C.A.T. *Reporter* 54 when it stated:

The main disabling aspect of fibromyalgia is the pain and sleep disturbance. The amount of pain can vary. It can frequently be severe (23), but even where there is pain, it may not be disabling.



Although Dr. O estimates that most people with fibromyalgia are 80 per cent to 90 per cent disabled, one study of fibromyalgia patients found that they reported high levels of pain, but work disability was limited. Only 6.3 per cent of those in the group studied described themselves as disabled. Most of those who were employed were able to work full work weeks. It, therefore, appears that fibromyalgia may be disabling but it is not necessarily so.

Because the research articles on fibrositis do not admit of any obvious inference regarding the extent of a disability alleged to derive from fibrositis, they arguably do not meet the test imposed by s. 96.1(3)(a). Apparently, fibrositis can, but need not be, totally disabling.

On the other hand, these articles suggest that the diagnosis of fibrositis may be helpful in assessing disability to the extent that certain complaints/symptoms may be seen as medically compatible with the diagnosis.

I note that, although the medical review panel referred to Dr. K's 1982 diagnosis of fibrositis in its narrative report, it did not discuss the implications of this diagnosis or refer to it in the certificate. Similarly, the pension examination conducted in 1983 did not discuss the implications such a diagnosis would have on the level of the worker's disability.

I also note that the field of rheumatology which encompasses the study of fibrositis was an emerging field in the 1980's. In fact, up until at least 1987, there was no special list of rheumatologists from which specialists could be nominated to serve on medical review panels. It is only upon the Board's request that the medical committee responsible for preparing a list of specialists in particular classes of injuries and disabilities provided such a list around 1987.

In addition, Dr. N's examination of the worker, conducted in 1991, suggests a deterioration in the worker's condition. More specifically, Dr. N's measurement of the worker's cervical spine extension, lateral flexion and rotation seems to show a significant decrease in range of motion from previous examinations. It is suggested that this deterioration is a function of the diagnosed fibrositis.

Taking, as a whole, the new developments in the field of rheumatology and in respect of fibrositis as well as the post 1990 medical reports attesting to the deterioration in the worker's condition, I consider that the new evidence adduced is substantial and material enough to the impugned decision of the prior commissioners to justify a reconsideration under s. 96.1.

In conclusion, the requirements of s. 96.1 have been met. I consider that an appropriate disposition of this case would be to have the worker re-examined by a new medical review panel consisting of a chair and two rheumatologists.

Pursuant to Section 58(5) I, therefore, refer the worker to a new medical review panel. The medical issue in dispute is the extent and nature of the worker's present disability and its causal relation, if any, to her 1977 work injury.

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



REPORTER

Decision of the Appeal Division

Number: 9
Date: August 19, 1992
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Delegation by the Chief Appeal Commissioner

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.

In Appeal Division Decision Number 2 [*Delegation by the Chief Appeal Commissioner*, (1991) 7 W.C.R. 53], I delegated certain powers and duties to the appeal commissioner appointed by me to serve as the registrar.

I now delegate to Cassandra Kobayashi, appeal commissioner, the same powers and duties as were delegated to the registrar, but limited to situations where both I and the registrar have determined ourselves to be exposed to a possible or actual conflict of interest or appearance of bias with respect to a given case.

This delegation is effective until June 2, 1993.



In the Supreme Court of British Columbia

Between: Burlington Northern Railroad
And: Workers' Compensation Board of British Columbia
and Karen Firth

Reasons for Judgment of The Honourable Mr. Justice Bouck

(Date: June 19, 1992)

Introduction

Burlington National Railroad (Burlington) seeks judicial review of a decision of the Workers' Compensation Board (the Board). On 12 September 1991, the Board denied the application of Burlington to set aside one of its earlier decisions made on 14 February 1989. The 14 February 1989 ruling granted the respondent, Karen Firth, a 100 per cent loss of earnings pension. Because of these decisions, Burlington is indebted to the Board for the sum of \$300,000 as payment for the pension of Ms. Firth.

Facts

On 27th August 1973, Ms. Firth was leaving her place of employment at the Canadian Forest Products Ltd. (Canfor) plywood plant in New Westminster. As she drove her car across the petitioner's railway tracks, it was struck by a Burlington locomotive. She suffered a severe closed head injury affecting the brain stem. After a series of applications and appeals to the Board for compensation, she was eventually given a permanent disability award of 40.5 per cent; 15 per cent psychological and 25.5 per cent physical.

Ms. Firth was born on 19 May 1943. She was 29 years old when the accident happened. She worked for Canfor as a fork-lift driver. Despite her serious injuries she returned to work at the Canfor plant on 20 October 1976. By 1978 she was working full time. All of this was made possible through the co-operation of Canfor, the Board, her union and her fellow employees. Although she did not do her job quite as well as she did prior to the accident, everyone tried to assist her as best they could.

On 22 August 1985, Canfor decided to close down the plywood plant in New Westminster. Canfor offered her a job as a tractor operator in its hardboard division. Ms. Firth tried it for one day and turned it down. It also offered her a job at its plywood plant in Kamloops as a fork-lift operator but she did not want to leave the Lower Mainland.

In October 1985, Ms. Firth applied to the Board for reconsideration of her pension allowance. The Board then conducted a review of her physical and mental condition. On 2 March 1988 a Review Board Panel concluded she was not totally disabled from work and sent the file back for further assessment. After a number of examinations by medical, disability and psychological experts, on 31 October 1989, the Board's Senior Pensions Adjudicator recommended that Ms. Firth receive a 100 per cent loss of earnings pension.

On 31 January 1989, the Board's Disability Awards Committee considered the report of the Senior Pensions Adjudicator and accepted his recommendations for a 100 per cent pension dating back to 29 August 1985. It then returned the file to him for implementation.

It was not until 22 February 1989 that Burlington was advised of the new 100 per cent award decision. Nor had it been told of the decision of the Board of Review of 2 March 1988, even though it had made representations at the time of the hearing to the Board of Review through its counsel.

Burlington then appealed the 31 January 1989 decision of the Disability Awards Committee to a Board of Review established under the *Workers Compensation Act*, R.S.B.C. 1979, c. 437, s. 90. On 7 June 1989, the Chairman of the Board of Review advised Burlington by letter that it had no right of appeal because it was not the employer of Ms. Firth. In the letter, the Chairman suggested that Burlington apply to the Commissioners of the Board for a rehearing under s. 96(2) of the *Act*. On 23 August 1989 Burlington wrote the Board and asked for a rehearing under s. 96(2). On 10 October 1989 the Board declined the application for a rehearing.

Burlington then applied to this court for judicial review of the matter by a petition filed 22 January 1990. On 10 April 1990, the Board reversed its decision of 10 October 1989 and agreed to give Burlington a rehearing under s. 96(2) of the statute. As a result, the petition for judicial review was dismissed by consent.

The Board then received written submissions from the interested parties as to whether the ruling of the Disability Awards Committee of 31 January 1989 should be upheld, reversed or modified. Amongst other things, Burlington submitted its own psychological, psychiatric and disability expert reports contradicting those of the Board

experts. On 12 September 1991, the Board upheld the decision of the Disability Awards Committee but sent the file back to the Committee in order to determine whether Ms. Firth's case should be reviewed again.

Since then, Board officials and medical officers have conducted examinations of Ms. Firth that tend to confirm her unemployability.

Finally, on 24 January 1992 the petitioner issued this petition under the *Judicial Review Procedure Act*, R.S.B.C. 1979, c. 209. It attacks the Board's decision of 12 September 1991 for reasons I will come to.

At the hearing before me, I was told that Burlington is one of those class of employers which is entitled to pay the complete cost of any claim rather than pay a periodic sum equivalent to an insurance premium. For these reasons, it is obligated to pay the whole \$300,000 pension award of Ms. Firth.

Issues

In its petition, Burlington raised the three grounds that it says justify judicial review. On hearing of the application it applied to amend the petition by adding a fourth ground. In summary, the grounds are:

1. The award of the 100 per cent pension was made without jurisdiction.
2. The decision of the Board dated 12 September 1991 is void because it is patently unreasonable.
3. The decision of the Board dated 12 September 1991 is void because the Board breached the rules of natural justice on the s. 96(2) hearing.
4. Relief in the nature of mandamus should be granted directing the Board to readjudicate the claim having regard to Ms. Firth's fitness to continue working as a fork-lift operator.

In his able argument, Mr. Wooster further articulated the complaints of the petitioner concerning the conduct of the Board as follows:

The Board erred in law by failing to give sufficient regard to the fitness of Ms. Firth to continue working by;

- (a) Failing to test her ability to work as a fork-lift operator in a plant similar to that of Canfor;

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- (b) Failing to continue trials with other machines similar to a fork-lift;
 - (c) Failing to consider whether she could have taken employment in another city;
 - (d) Failing to give sufficient weight to the expert reports and submissions of Burlington.

Law

1. Procedure.

First of all, I should say something about the alleged procedural defects. The rehearing by the Board was authorized under s. 96(2) of the statute. It reads:

96 (2). Notwithstanding subsection (1), 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.

Relying on this authority, the Board assigned the task of rehearing the matter to three members of the appeal division. Whatever may have been procedurally incorrect to that time was cured by the rehearing. Additionally, the petitioner failed to show any breach of rules of natural justice in the conduct of that hearing or a failure by the Board to comply with the terms of s. 96(2). Therefore, ground number 3 in the petition must fail.

2. Jurisdictional Defects.

The main thrust of the petitioner's argument was to the effect that the Board lost jurisdiction when it did not properly take into account the provisions of s. 23(3) of the statute. The relevant part reads:

23 (3). Where the board considers it more equitable, it may award compensation for the permanent disability having regard to . . . the worker's fitness to continue in the occupation in which he was injured or to adapt himself to some other suitable employment or business.

Under s. 96 of the *Act*, the Board had exclusive jurisdiction to hear and determine all matters and questions of fact and law that related to the compensation and disability of Ms. Firth. Thus, it had the exclusive right to decide whether Ms. Firth was fit to continue working as a fork-lift operator or if she was able to adapt herself to some other suitable job. It considered the evidence and the submissions and decided that Ms. Firth was entitled to a 100 per cent loss of earnings pension.

Counsel for the petitioner submitted that the conclusion of the Board on 12 September 1991 was in error because it did not pay sufficient attention to the evidence and arguments of Burlington. However, I agree with the submission of Mr. Massing for the Board on this issue. On a judicial review of this nature, I am not sitting on appeal from the decision of the Board. It is not part of my duty to substitute my decision on the facts for those of the Board. Burlington can only succeed if it satisfies me the 12 September 1991 ruling is flawed because it failed to reasonably interpret the facts or the law.

I am satisfied the Board applied its mind to the facts and the law when reaching its decision. Just because it did not agree with the evidence and the submissions of Burlington does not make its judgment unreasonable. It referred to the petitioner's material and decided against it. That it was entitled to do. There is nothing unreasonable in its conclusion to justify judicial interference. For these reasons the complaint that the Board exceeded its jurisdiction must fail.

3. The Patently Unreasonable Argument.

Section 96 of the *Act* contains a so-called privative clause. It restricts judicial review of the Board decisions that are in the Board's exclusive jurisdiction. In the face of this privative clause I can only review the decision of 12 September 1991 if it is patently unreasonable.

As I just mentioned, the petitioner failed to satisfy me on the lesser grounds that it was unreasonable. Hence, it could not be patently unreasonable. Thus, this ground of objection is dismissed.

4. The Claim for an Order in the Nature of Mandamus.

No authority was cited to me that justifies an order in the nature of mandamus in these circumstances. As counsel for the Board said, mandamus only lies to compel the exercise of a statutory duty. It does not lie to compel the exercise of a discretionary duty. The Board had a

discretion in deciding what evidence it would accept and what evidence it would reject. The statute did not compel it to accept some pieces of evidence and reject others. For these reasons, the application for mandamus must fail.

5. Failure of the Board to Give Sufficient Regard to the Fitness of Ms. Firth.

These are the last objections raised by the petitioner. Most of them were covered in previous points set out above. But since so much reliance was placed upon them by the petitioner, I should say something about them.

The first two complaints relate to the alleged failure of the Board to test the skills of Ms. Firth in driving a fork-lift or machines similar to a fork-lift. Counsel for the Board argues that there is no duty on the Board to perform such tests. He says it is in the discretion of the Board as to how it will examine the qualifications of Ms. Firth. For example, if there was a danger that Ms. Firth might put herself and others at risk by attempting to drive different pieces of equipment in a strange environment the Board was not legally required to use such a test. I agree.

No error of law occurred because the Board failed to test the abilities of Ms. Firth to drive a fork-lift or another similar piece of equipment. The Board was entitled to assess these abilities by whatever reasonable means it found most suitable.

Then, Burlington alleges that the Board failed to consider whether Ms. Firth could have taken employment in another city such as Kamloops. That issue was before the Board. Just because it did not mention it in its reasons does not mean it failed to consider the point.

Finally, the petitioner complains that the Board failed to give sufficient weight to the expert reports submitted by Burlington and to its written submission. Again, the Board was entitled to accept the evidence it found to be most credible. The expert reports of the petitioner were largely argumentative. None of the Burlington experts actually examined Ms. Firth. On the other hand, the Board experts did examine her and did report factually on her condition. The written submission of Burlington to the Board is largely composed of argument directed at the Board experts. In the end, the Board accepted the opinions of its experts in preference to the views of Burlington's experts. It had the right to do so.

From this it follows that the Board did not commit any error of law or fact that can be corrected under the terms of the *Workers Compensation Act* and the *Judicial Review Procedure Act*.

Judgment

1. The petition must be dismissed.
2. Costs follow the event.

Editors' note: These oral reasons have been transcribed unedited.



Bylaw No. 1 of the Industrial Diseases Standing Committee

Date: August 10, 1992

Section 1 — Interpretation

- 1.1 **Definitions** — In this Bylaw, unless the context otherwise requires:
- (a) “Act” means the *Workers Compensation Act*, R.S.B.C. 1979, c437, as amended;
 - (b) “Board of Governors” means the Governors;
 - (c) “Governor” means any one of the individuals appointed by the Lieutenant Governor in Council under Section 81(1) of the *Act*, the President appointed under Section 84(1) and the Chief Appeal Commissioner appointed under Section 85(1)(a);
 - (d) “this Bylaw” means this BYLAW NO. 1 of the Industrial Diseases Standing Committee;
 - (e) “Committee” means the Industrial Diseases Standing Committee;
 - (f) “Committee Member” means any Governor appointed to the Industrial Diseases Standing Committee;
 - (g) “Chairman” means the Chairman of the Board of Governors;
 - (h) “Charter” means the Charter of the Committee adopted by resolution of the Board of Governors dated April 6th, 1992.
- 1.2 **Definitions in Act to Apply** — Unless otherwise indicated, all terms contained in this Bylaw which are defined in the *Act* shall have the meanings given to such terms in the *Act*.

Section 2 — Meetings of the Industrial Diseases Standing Committee

- 2.1 **Notice of Regular Meetings** — To ensure the availability of the Committee Members, the Chairman shall, at least fourteen (14) days prior to each regular meeting, deliver a copy of the agenda for the meeting to each Committee Member. The agenda so delivered shall constitute notice of the meeting, except that failure to deliver the agenda within the time specified shall not invalidate the meeting provided the agenda is delivered at least three (3) days prior to the meeting. Supplementary agenda items may be delivered to each Committee Member at any time prior to any regular meeting. Such supplementary agenda items may be dealt with at the regular meeting specified in the supplementary agenda unless objected to by any Committee Member, in which case consideration of the supplementary agenda item shall be deferred to the next regular meeting of the Committee.
- 2.2 **Agenda and Supporting Materials** — The agenda for a regular meeting shall be set by the Chairman, and:
- (a) shall describe the date, time and place of the regular meeting;
 - (b) shall be sufficiently descriptive of the matters to be decided that the Committee Members will be able to identify the matters without disclosing any information which, for reasons of confidentiality, is not to be disclosed to persons other than the Committee Members;
 - (c) shall be accompanied by supporting materials relating to the matters set out in the agenda whenever possible; and
 - (d) shall contain the proposed schedule of regular meetings for the following two (2) meetings.
- 2.3 **Distribution of Supporting Materials** — If it has not been possible to distribute all of the supporting materials with an agenda for a regular meeting, all such supporting materials shall be distributed to each Committee Member at least twenty-four (24) hours prior to the regular meeting unless all Committee Members present at such meeting consent to the distribution of particular material at the meeting.
- 2.4 **Special Meetings** — The Chairman may call a special meeting of the Committee Members at any place in British Columbia that the Chairman decides, by delivering written notice to each Committee Member at least

twenty-four (24) hours prior to the special meeting; and the written notice shall include the date, time, place and purpose of the special meeting. It is recognized that a special meeting will be called only in unusual or unique circumstances which require early attention and discussion by the Committee. No resolutions pertaining to business raised at a special meeting shall be passed at such special meeting but rather shall be tabled for the next ensuing regular meeting of the Committee.

- 2.5 **Postponement or Cancellation** — Subject to the *Industrial Diseases Standing Committee Charter*, the Chairman may, with the unanimous consent of the Committee Members, postpone or cancel a meeting of the Committee by delivering written notice to each Committee Member of the postponement or cancellation at least twenty-four (24) hours prior to the scheduled time for the meeting.
- 2.6 **Participation by Telephone** — A Committee Member may participate in a meeting of the Committee by means of such telephone or other communications facilities as permit all persons participating in the meeting to hear each other, and a Committee Member participating in a meeting by such means is deemed to be present at the meeting and shall be counted in the quorum.
- 2.7 **Quorum** — A quorum of the Committee shall consist of one worker representative Governor and one employer representative Governor appointed under the Charter of the Committee and either the public interest Governor so appointed or the Chairman. No business shall be conducted by the Committee unless a quorum is present.

Section 3 — Conduct of Meetings

- 3.1 **Chairman to Preside** — The Chairman shall preside at all meetings of the Committee and, subject to this Bylaw, shall decide the order of business and rules of order to be followed, with due regard for the views of the Committee Members.
- 3.2 **Robert's Rules of Order** — The Chairman may, in resolving procedural disputes, if necessary, refer to *Robert's Rules of Order*, 1990 Edition which shall govern where applicable and not inconsistent with the *Act* or this Bylaw. The Chairman's decision on the interpretation of such Rules of Order shall govern.
- 3.3 **Matters To Be Decided** — Unless otherwise agreed by all Committee Members present, only matters set out in the agenda for a meeting shall be decided at that meeting.

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- 3.4 **New Business** — A Committee Member may raise, as “new business,” a matter not set out in the agenda for a regular meeting and the Chairman shall place the matter on the agenda for one of the next two regular meetings of the Committee.
 - 3.5 **Vacancy** — Subject to Section 2.7 a vacancy in the membership of the Committee Members does not impair the right of the other Committee Members to act.

Section 4 — Resolutions and Voting

- 4.1 **How Matters To Be Decided** — At meetings of the Committee every matter shall be decided by resolution duly moved, seconded and carried by a majority of the votes cast by Committee Members present and entitled to vote.
- 4.2 **Personal Vote Only** — No Committee Member may vote on behalf of any other Committee Member.
- 4.3 **Chairman Non-voting Member** — The Chairman shall not vote at meetings of the Committee.
- 4.4 **Voting** — Voting shall be by show of hands on the resolution. The Chairman shall declare to the meeting the decision on every matter in accordance with the results of the show of hands and that decision shall be entered in the minutes of the meeting.
- 4.5 **Equality of Votes** — In the event of an equality of votes on any matter, such matter shall be referred to the Board of Governors.
- 4.6 **Recording of Votes** — A Committee Member who is present at a meeting of the Committee, including a Committee Member deemed to be present under Section 2.6, shall be deemed to have consented to any resolution passed or action taken at that meeting unless the Committee Member dissented on the matter and requests that a written record of his or her dissent be entered into the minutes of the meeting either at the meeting or by written notice to the Chairman within two (2) business days after the meeting.

Section 5 — Conflicts of Interest

- 5.1 **Conflict of Interest** — Provisions dealing with Conflicts of Interest that are adopted by the Governors as applicable to any Governor, including Bylaws No. 2 and 3 of the Board of Governors, shall apply to each Committee Member.

Section 6 — Minutes

- 6.1 **Minutes To Be Taken** — Minutes shall be kept of all meetings of the Committee in accordance with the Industrial Diseases Standing Committee Charter, page 2 item 6.
- 6.2 **Preservation of Minutes** — Original copies of minutes of all meetings of the Committee shall be retained by the Office of the Board of Governors in the manner directed by the Chairman.
- 6.3 **Copies to Governors** — Copies of minutes of all meetings of the Committee shall be forwarded to each Governor.

Section 7 — Chairman Designate

- 7.1 **Chairman May Designate** — The Chairman may designate the Committee Member representative of the public interest to act in the Chairman's place during the Chairman's temporary absence, and while so acting the designated Committee Member shall have the power and authority of the Chairman with respect to Committee matters. Such designated Committee Member shall retain their right to vote while so acting.

Section 8 — Delivery

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

Section 9 — Remuneration

- 9.1 **Remuneration** — Remuneration of Committee Members shall be as set out in Section 11 of Bylaw No. 3 of the Board of Governors.

Section 10 — Committee Records

- 10.1 **Preservation of Supporting Materials** — The Chairman may direct that copies of all supporting materials relating to the matters dealt with by the Committee including, but not limited to, the following;

- (a) correspondence;
- (b) research papers;
- (c) position papers;
- (d) legal, medical and other opinions;
- (e) historical and other records;

(hereinafter called “Committee Records”) be maintained in such manner, and in such places as he may deem appropriate.

- 10.2 **Access to Supporting Materials** — Any Committee member may have such access to Committee Records as may be reasonably necessary for the conduct of Committee business. The Committee may, subject to any laws of general application, adopt rules and procedures with respect to access to Committee Records by persons other than Committee Members.

Section 11 — Secretariat to the Industrial Diseases Standing Committee

- 11.1 **Establishment of the Secretariat** — A secretariat of Workers’ Compensation Board personnel (the “Secretariat”) shall be constituted to assist the Committee in fulfilling its duties and responsibilities.

- 11.2 **Role of the Secretariat** — The Secretariat shall generally assist the Committee in fulfilling its duties and responsibilities, including but not limited to the following:

- (a) drafting and organizing meeting agendas and supporting documentation;

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- (b) maintaining Committee Records;
 - (c) producing reports, commentary, or other advice as may be within its expertise and as may be requested by the Committee.
- 11.3 **Direction to the Secretariat** — The Committee shall have authority to provide direction and instructions to the Secretariat on matters within the mandate of the Committee. The Secretariat shall, from time to time, provide a report to the Vice-President, Compensation Services as to the nature and conduct of its activities.
- 11.4 **Staffing of the Secretariat** — Members of the Secretariat shall be appointed by and shall report to the Vice-President, Compensation Services. Members so appointed may include a staff member or members knowledgeable in the administration of industrial disease claims and such support or administrative staff as may be necessary to carry out the functions assigned to the Secretariat.

Section 12 — Operating Procedures

- 12.1 **General Intent** — This section sets out in general terms the manner in which the Committee intends to conduct its review of Schedule B of the *Act* and of those industrial diseases designated or recognized by regulation of general application and to fulfill its other responsibilities provided for in the Charter of the Committee.
- 12.2 **Principles** — The Committee will, to the best of its ability when dealing with persons interested in the compensation system including the medical community and those responsible for administering the *Act* (the “Interested Parties”), operate in a fashion which is participatory, consultative, open, accessible, comprehensive and fair, with a view to fostering the greatest possible confidence in its recommendations.
- 12.3 **Prioritization** — The Committee may, based on such information as it considers appropriate, including information from Interested Parties, establish priorities for dealing with specific items of its mandate. In particular, items that may arise infrequently and which generate little concern to the Interested Parties may be dealt with in a more summary fashion than those items which arise with greater frequency and which generate greater concern or controversy.

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- 12.4 **Public Documents** — In keeping with the principles provided for in Section 12.2, the Committee shall provide to any Interested Party upon request in writing to the Committee copies of:
- (a) the Constituting Resolution and Charter of the Committee;
 - (b) the Bylaws of the Committee;
 - (c) notice of an address where correspondence or other written communications may be directed to the Committee;
 - (d) such other documents as the Committee may designate from time to time.
- 12.5 **Notice** — In keeping with the principles provided for in Section 12.2, the Committee shall provide written notice, in such manner and at such times as it shall consider appropriate, sufficient to communicate to Interested Parties the dates, times, locations, and subject matters of public hearings or other public forums at which Committee business is being conducted. Failure to provide any notice to Interested Parties shall not invalidate any proceedings of the Committee.
- 12.6 **Initial Input** — In order to facilitate the prioritization of its business the Committee may, in such form as it shall consider appropriate, invite submissions from Interested Parties as to which matters under consideration by the Committee are of concern to them and whether they may wish to make further submissions relative to those matters at a subsequent date when detailed consideration to such matters is being given by the Committee. The Committee may also establish a list of Interested Parties who require all or only some of the notices provided for in Section 12.5.
- 12.7 **Submissions Upon Request** — The Committee may, in such fashion as it shall consider appropriate, invite individual or all Interested Parties to submit information to the Committee including but not limited to position papers, ergonomic or other reports or studies, written submissions and the like, relevant to the mandate of the Committee.
- 12.8 **Other Submissions** — Any Interested Party may at any time make written submission to the Committee on matters within the mandate of the Committee. The Committee shall take those submissions into consideration in fulfilling its mandate.

12.9 **Public Hearings** — Subject to approval of the Governors for funding the Committee may at such times and in such manner as it considers appropriate arrange for the conduct of public hearings into matters within the mandate of the Committee. Such public hearings shall be conducted by such Committee Members as shall be designated at a regular meeting of the Committee. Notice in writing as to the date, time, location and subject matter of a public hearing shall be given in such manner as the Committee shall consider necessary to communicate to Interested Parties the holding of such hearing. The Committee may, prior to the holding of any such public hearing, publish rules of conduct and procedure that shall apply at such public hearing related to matters including but not limited to:

- (a) time limitations for submissions;
- (b) subject matter for submissions;
- (c) which Interested Party or Interested Parties may make submissions; and
- (d) rules of order.

Such rules of conduct shall reflect the principles provided for in Section 12.2.

12.10 **Medical Support** — The Committee shall, in fulfilling its mandate, and in particular in assessing the relationship between a particular industry or industrial process and a particular industrial disease, consider all medical research and medical opinion as may be provided to the Committee by Interested Parties and by experts, expert panels, medical researchers or other qualified persons, whether such information has been requested by or on behalf of the Committee or not. The Committee shall ensure that the Occupational Safety and Health Division of the Workers' Compensation Board is consulted on all matters related to the content of the Committee's recommendations.

12.11 **Independent Research** — Subject to approval of the Governors for funding, the Committee may commission independent research projects, constitute expert panels, retain the advice of consultants, or use any other mechanism which the Committee considers necessary to fulfill its mandate.

12.12 **Research Standards** — Subject to the principles provided for in Section 12.2, the Committee may establish minimum acceptable methodological standards for any research that the Committee may rely upon in making recommendations to the Board of Governors.

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- 12.13 **Recommendations** — Any recommendations which the Committee may make to the Board of Governors shall be based on sound scientific and medical knowledge. The Committee shall gather such information as it considers necessary from, among others, the sources referred to in this Section, and shall at a regular meeting designated for that purpose consider whether a recommendation should be made to the Board of Governors relative to a disease that is or could be provided for in Schedule B of the *Act*, a disease that is or could be designated or recognized by regulation, or a policy that is or could be related thereto. A recommendation to the Board of Governors shall be in such form as the Committee shall determine. A recommendation may also state whether it is a unanimous or a majority recommendation of the Committee. A recommendation shall whenever possible make reference to any source materials relied upon by the Committee in making such recommendation, by citation, or by such other means as shall be sufficient to identify such source materials. The timing of any recommendations to the Board of Governors shall be determined by the Committee from time to time at regular meetings.
- 12.14 **Final Decisions** — The Board of Governors are responsible for making the final decisions on matters related to statutory provisions and policy on industrial diseases.
- 12.15 **Related Issues** — The Committee in fulfilling its mandate may consider policy or legislative issues which are related to industrial diseases. The Committee may resolve to make recommendations to the Board of Governors on such related issues. Such issues may include a consideration of Schedule D of the *Act* (Non-Traumatic Hearing Loss) and suggested statutory amendments to Schedule D or otherwise.
- 12.16 **Publication of Recommendations** — Recommendations of the Committee shall be presented to the Board of Governors prior to their publication. Publication of recommendations of the Committee shall be at the discretion of the Board of Governors.

Section 13 — Bylaws

- 13.1 **Amendment of Bylaws** — The Committee may, from time to time, present to the Board of Governors for approval amendments or additions to this Bylaw for the more effective fulfilling of its mandate.

REPORTER

Workers' Compensation Board of British Columbia Internal Audit and Evaluation Department Charter

Date: August 10, 1992

This charter states the mandate, mission, purpose, authority, and responsibilities of the Internal Audit and Evaluation Department.

Mandate

The mandate of the Internal Audit and Evaluation Department is to carry out internal audits and program evaluations within the Workers' Compensation Board of British Columbia.

Mission Statement

The mission of the Internal Audit and Evaluation Department is to provide assurance to the president and Board of Governors as to the efficiency, effectiveness and economy of internal management policies, procedures, practices and controls, and the efficiency and effectiveness of Board programs, and to act as a catalyst for innovation and improved service to our clients.

Purpose

The purpose of the Internal Audit and Evaluation Department is to provide a periodic, systematic, independent review and appraisal of W.C.B. operations, programs, and activities and to report findings and make recommendations to management and the Board of Governors.

All Internal Audit activities are to be conducted in compliance with the Code of Ethics and the Standards for the Professional Practice of Internal Auditing as promulgated by the Institute of Internal Auditors.

All Program Evaluation activities are to be conducted in accordance with standards adapted for the Board from those developed by the Office of the Comptroller General, Treasury Board of Canada.

Authority

The department, in the performance of audits and evaluations and with strict accountability for safekeeping and confidentiality, has authorized access to all manual and electronic records, personnel, and physical properties of the Board.

The director, Internal Audit and Evaluation, shall report to the president and chief executive officer on a regular basis with the Governors' Financial Standing Committee providing oversight responsibility for the department.

Internal Audit and Evaluation is a staff function that has no direct authority for the operations, programs and activities under review. The performance of these reviews does not in any way relieve management of assigned responsibilities.

Responsibilities

Internal Audit and Evaluation is responsible for assessing and evaluating major functions, programs, activities, and control systems at the Board and for advising management concerning their operational effectiveness and efficiency. Responsibilities include, but are not restricted to:

- a) Reviewing the reliability, integrity, and adequacy of financial and management controls and information.
- b) Reviewing the adequacy of corporate data and information systems.
- c) Evaluating programs to assess their results and the effectiveness of their design and implementation.
- d) Conducting evaluations of efficiency and economy in the use of resources.
- e) Determining the extent of compliance with internal policies, procedures and regulations, the provisions of the *Workers Compensation Act* of B.C., and other applicable legislative or regulatory agency's requirements.
- f) Ascertaining the adequacy of protection afforded funds, physical assets and information and, if necessary, conducting investigations into potential defalcations.
- g) Performing special reviews requested by executive management or the Board of Governors.

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- h) Liaising with the auditor general of B.C. to co-ordinate audit efforts through the sharing of analyses, working papers and reports.

Editors' note: This Charter was approved by the Governors' Financial Standing Committee on August 10, 1992.



REPORTER

Workers' Compensation Board of British Columbia Internal Audit and Evaluation Department Charter Terms of Reference

Date: August 10, 1992

Internal Audit and Evaluation Department Terms of Reference

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Department

Mission Statement

The Mission of the Internal Audit and Evaluation Department is to provide assurance to the president and Board of Governors as to the efficiency, effectiveness and economy of internal management policies, procedures, practices and controls, and the efficiency and effectiveness of Board programs, and to act as a catalyst for innovation and improved service to our clients.

Charter

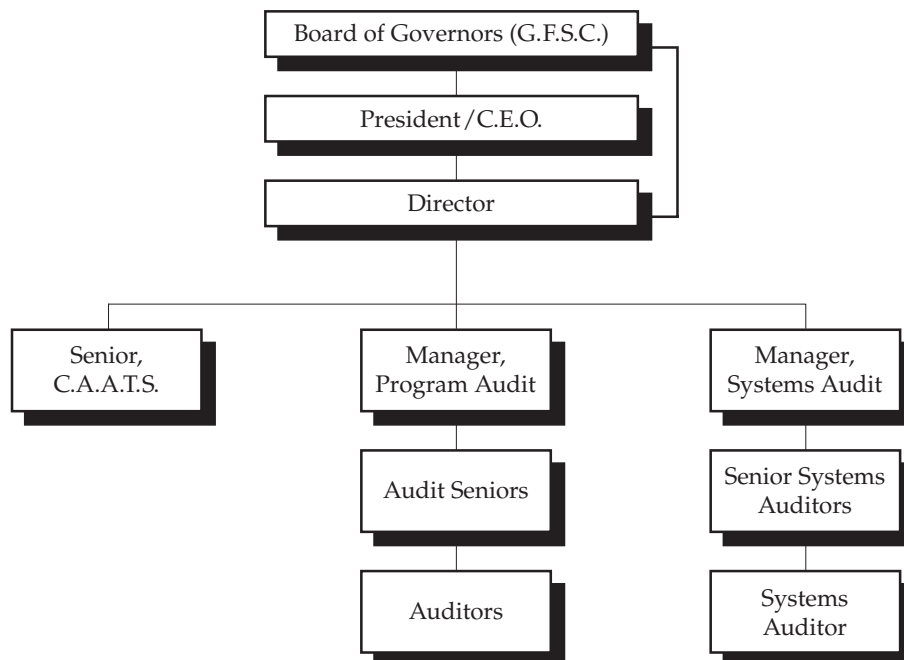
The *Internal Audit Charter*, including the mandate and terms of reference, was last revised in 1984.

Program Evaluation is a new function in the Workers' Compensation Board of B.C. to be introduced in 1992.

A revised charter for the Department will be tabled for discussion and confirmation at the next scheduled meeting of the Governors' Financial Standing Committee. It will include the mandate and terms of reference for both Internal Audit and Program Evaluation.

The charter will now be subject to periodic review by this Committee.

Organization and Structure



There is in addition a secretarial position as well as a co-op student position in the department. The program evaluation positions have yet to be approved and are therefore have not been included on the organization chart.

Reporting

As shown in the organization chart presented above, the director of the Internal Audit and Evaluation Department reports directly to the president/C.E.O. on a regular, operational basis. This is supplemented by the direct access to the Governors' Financial Standing Committee (with regularly scheduled meetings to be held every second month) to ensure the objectivity and independence of both the internal audit and the program evaluation functions.

Internal Audit

Definition

Internal auditing is defined as "an independent appraisal activity established within an organization as a service to the organization. It is a control which functions by examining and evaluating the adequacy and effectiveness of other controls." Internal Audit (I.A.) performs a staff function and as such has *no* authority over any Board operations or line personnel.

Objective

The objective of internal audit is defined as "to assist members of the organization in the effective discharge of their responsibilities. To this end, internal audit furnishes them with analyses, appraisals, recommendations, counsel and information concerning the activities reviewed. The audit objective includes promoting effective control at reasonable cost."

The definitions quoted above were both taken from the Institute of Internal Auditors' "Standards For The Professional Practice of Internal Auditing."

Role and Scope of Activities

The role of Internal Audit is to provide a systematic, independent review and appraisal of all Board operations, including administrative activities, for the purpose of advising management on the efficiency, economy and effectiveness of internal management practices and controls.

The scope of Internal Audit activities includes all aspects of Board operations. Internal Audit assesses and expresses an opinion on:

- The adequacy of all management and financial controls including planning, financial management, personnel management, information processing and other administrative support functions;
- The adequacy of corporate data and information systems; the integrity, controls and security including, but not limited to, design, development, implementation, operation and procedures;
- The adequacy of protection afforded Board funds and assets (and if necessary conducts investigations on potential misappropriations and defalcations);
- The extent of compliance with legislative and regulatory agency's requirements and Board policies and procedures.

Professionalism

Internal Auditing is a discipline, governed by an Institute, with accepted Standards for Professional Practice, a Statement of Responsibilities and a Code of Ethics. It is a policy of the Department to meet or exceed all Institute requirements.

Skill Mix/Training

The Internal Audit staff consists of professionals and specialists assigned by their area of expertise, e.g. the senior auditor responsible for financial audit is a chartered accountant. Other qualifications range from M.B.A.'s with engineering degrees to a B.Sc. in computing science.

All audit staff are expected to maintain their designations/certifications and level of expertise through continuing professional development. All present staff have either achieved or are in the process of attaining certification as internal auditors or systems auditors. In addition, audit staff, regardless of their area of specialization are required to complete elements of the claims adjudicator training program provided by the Training and Education Center.

The auditors-in-charge of Claims Payment audits have an average of 2.5 years experience in the review of claims. The Information Systems auditors have an average of 15 years experience in information systems development and processing.

Types of Audits

Audits performed by the Department have been classified in to one of the four following groups:

- Financial/Operational
- Claims Payment
- Information Systems
- Special/Ad-hoc

Financial/Operational Audits: Financial audits review the flow of financial information and its reliability and accuracy. Operational audits involve the evaluation of operating controls and the identification of inefficient or ineffective practices. A regular cycle of Financial/Operational audits has been put in place.

Claims (Payment) Audits: review benefit payments to ensure accuracy of calculation, compliance with Board policy, and efficiency of the payment process. Payment audits have been concentrated in the Claims area over the course of 1990/91 due to the high absolute dollars expended in this area.

Information Systems Audits: involve review of new systems development, data resource management, systems maintenance, methodology and standards, security and control. Our role has been limited to assessing the adequacy of internal controls and the integrity of data due to internal resource constraints.

Special (or Ad Hoc) Audits: are reviews which were not placed on the schedule as a result of the normal Department's planning process. These could include audits requested by senior management or investigations resulting from misappropriations or defalcations.

Internal Audit Focus

I.A. conducts audits throughout the year that focus on evaluating the adequacy of the Board's system of internal control and compliance. Accounting, financial, and operating divisions, departments, and systems are reviewed on a cyclical basis to determine whether these areas are properly controlled and are functioning in line with management's objectives.

The areas selected for audit are derived from I.A.'s inventory of auditable activities; a comprehensive list of areas that are subject to audit. Priority for audit is determined through the use of specific evaluation criteria developed to identify areas of audit concern. The criteria includes: prior audit findings, size of the entity, risk of loss, time since last audit, financial significance, management's concerns, and presence of compensating controls.

External Audit

Internal auditing differs from external auditing in scope, reach and purpose. Our external auditor, the auditor general of B.C., performs the attest audit function with the objective of rendering an opinion on the fairness of the Board's financial statements. I.A. liaises with the auditor general of B.C. to coordinate audit efforts through the sharing of analyses, working papers, and reports.

Audit Planning

Audit plans are prepared annually for one- and three-year periods. Audit coverage is designed to afford maximal protection and minimize risk to the Board. Planning at this stage involves comparing and assigning available audit resources to the high priority areas of audit concern as identified earlier in the process.

The long-term plan is currently based on an overall six-year cycle for very high and high risk areas. Within the plan, entities are stratified into cycles of one to six years, depending on the level of risk. For example, unit Claims Payment audits are on a two-year cycle starting every third year. The audit plan will be submitted annually to the president and the Governors' Financial Standing Committee for approval.

Audit Process

The major phases of an internal audit are:

- planning
- fieldwork
- debriefing
- reporting
- follow-up

The responsible director (auditee) will normally be notified prior to the commencement of an audit in his/her area. The scope and objectives of the project are discussed with the director and, where applicable, the manager involved. Audit findings are discussed upon the completion of fieldwork with the manager. The director will receive a written draft audit report summarizing the auditor's observations and recommendations. The director, after having the opportunity to review the content of the report, will reply to the recommendations within three weeks, explaining the action taken or to be taken.

The final audit report is issued to the appropriate vice-president with copies to the president/C.E.O., the Governors' Financial Standing Committee, and the directors involved. Any differences between I.A. and the auditee director will normally be resolved before the final report is issued. A follow-up of the audit recommendations will be completed, where appropriate, six to nine months after issuance of the final report. Matters of a minor nature will be reported in a management letter to the auditee and will not be included in the final report.

Next Steps

- Stabilize and complete the current cycle of financial and compliance audits.
- Develop a methodology and approach for Value for Money (V.F.M.) audits within the context of the Board's operations.
- Co-ordinate the audit and program evaluation activities and explore integration.
- Follow-up the Department's 1990 Internal Review.

Program Evaluation

Definition

Program Evaluation is defined as "the periodic application of systematic research methods to assess the results of a program and the effectiveness of the program's design and implementation."

Objective

The objective of program evaluation is "to provide W.C.B. senior management with credible, objective, timely and relevant information on the performance of their programs and to ensure that information is used for the cost-effective and accountable management of programs."

The definition and objective quoted above were adapted from documents published by the Office of the Comptroller General, Treasury Board of Canada.

Role and Scope of Activities

The role of Program Evaluation is to provide a systematic and objective review and assessment of all Board programs for the purpose of advising management on the effectiveness of programs in meeting their objectives.

Program Evaluation assesses and reports on:

- the extent to which programs continue to be relevant to the stated priorities and perceived needs of the W.C.B.
- the extent to which programs are effective in meeting their objectives, within budget and without causing significant unwanted results
- whether programs are implemented and delivered in the most appropriate, efficient and cost-effective manner, relative to alternative approaches, to meet their objectives.

All W.C.B. activities that deliver programs are subject to evaluation.

Professionalism

There is currently no organization parallel to the Institute of Internal Auditors for program evaluators. The only national body that exists is the Canadian Evaluation Society. It has discussed setting standards for evaluations and evaluators; however, none have yet been established.

The federal Office of the Comptroller General within Treasury Board issued *Working Standards for the Evaluation of Programs in Federal Departments and Agencies* in 1991 to assess the performance of departments in evaluating and reviewing their programs as to efficiency and effectiveness. These standards have been adapted to fit the requirements of the W.C.B.

Skill Mix/Training

Program Evaluation staff should consist of professionals and specialists with experience in the program evaluation field or related areas such as planning, policy development and analysis, and performance measurement, and with degrees in social sciences, economics, statistics or M.B.A./M.P.A.

Program Evaluation Focus

Evaluations focus on program evaluation components. A “program evaluation component” is an activity or group of activities that has a common objective or set of objectives. Once components have been defined, they should be evaluated on a cyclical basis to ensure they meet the needs of management. Criteria to assess the need for evaluation should include: the strategic requirements of the Board and its clientele, the impact of the program on the overall effectiveness of the Board, the impact of the program on its clientele, and the size and complexity of the program.

Program evaluation staff should be involved in the design of all new or significantly modified programs to assist in defining objectives and intended impacts, and to ensure that appropriate data will be collected for evaluation of the program at a future time.

Types of Evaluations

The level of effort expended on an evaluation will vary from component to component. It should be commensurate with the importance and budget of the component and reflect the requirements of senior management in terms of scope and timing.

Program Evaluation Planning

Program evaluation plans should be prepared annually for one- and three-year periods.

The program evaluation plan will be submitted annually to the president and the Governors’ Financial Standing Committee for approval.

The long-term plan will be established after our analysis of the program components.

Program Evaluation Process

For established programs, the three major phases of evaluation are:

- evaluation assessment, which constitutes the planning phase for a subsequent evaluation study
- evaluation study, which formally examines specific evaluation issues to examine whether a program is doing what it was supposed to do and working in the way it was intended to work
- follow-up, to ensure study results are implemented.

For new programs or programs undergoing significant redesign, an evaluation framework should be prepared. It describes how the program is intended to work, identifies potential evaluation issues for a future evaluation study, describes the information required to address those issues and assigns responsibility for the collection of those data.

Next Steps

The Department is proceeding with the following:

- approval of the Program Evaluation Terms of Reference
- finalization and approval of the Program Evaluation Manual
- development and approval of a Program Evaluation Plan and budget.

Once these basics are in place, the Department will then proceed to staff the function.

Editors' note: This document was presented to the Governors' Financial Standing Committee on August 10, 1992.

Appeal Division Annual Report

Date: June 26, 1992

Chief Appeal Commissioner, Connie Munro

Editors' note: The following is the complete Annual Report of the Appeal Division submitted to the Board of Governors on June 26, 1992.

I am pleased to present to the Board of Governors the first annual report of the Appeal Division. The period covered in this report included three major accomplishments:

- (a) the creation of the Appeal Division;
- (b) the elimination of a large backlog of appeals; and,
- (c) the establishment of a process for providing decisions on new appeals within 90 days of their commencement unless a longer period is necessary because of an act or omission of the appellant or because of the complexity of the matter under appeal.

The central focus of the Appeal Division in achieving these goals has been the provision of fair and equitable decisions on individual appeals. The appeal commissioners have provided written reasons for all decisions, signed by the appeal commissioners who made the decision. Many oral hearings were held, as well as three public hearings on issues of general importance beyond the particular claims. A number of Appeal Division decisions were published in the *Workers' Compensation Reporter*, to provide guidance to the workers' compensation community and the Board with respect to the interpretation of the *Workers Compensation Act* and the policy of the governors.

The creation of the Appeal Division involved bringing together many individuals from diverse backgrounds, with the common goal of building a new appeal body to meet the legislative mandate provided by Bill 27 (the *Workers Compensation Amendment Act, 1989*). In fulfilling its quasi-judicial function, the Appeal Division has striven to provide quality decisions in a fair and timely manner. I am pleased with the accomplishments of the Appeal Division in its first year of serving the workers and employers of British Columbia.

Connie Munro
Chief Appeal Commissioner



Appeal Division Annual Report (pages 639 to 686) is not currently available in Acrobat PDF (portable document format).

