WORKERS' COMPENSATION

REPORTER

WORKERS' COMPENSATION REPORTER

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WORKERS' COMPENSATION BOARD

Province of British Columbia

Workplace safety and health is our challenge.

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Sections and excerpts from the Workers Compensation Act, *Revised Statutes of British Columbia, Chapter 437 are provided for convenience and are to be used for informational purposes only.*

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- *Blue — Governors' Decisions*
- *Green — Appeal Division Decisions*
- *Pink — Miscellaneous*
- *Purple — Review Board Findings*
- *Orange — Court Decisions*

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Decision of the Governors

Number: 26
Date: October 26, 1992
Subject: Assignment to President — Adjustments to Certain Amounts Paid Under the *Workers Compensation Act* to Reflect Changes in the Consumer Price Index

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WHEREAS the Workers' Compensation Board pays clothing allowances, personal care allowances, an independence and home maintenance allowance, a transportation allowance, and subsistence allowances (the "Allowances") under the *Workers Compensation Act* all of which, in recent years, have been adjusted from time to time to reflect changes in the Consumer Price Index but on an ad hoc basis only;

AND WHEREAS the amount of compensation representing a "substantial amount of compensation" for purposes of Section 10(8) of the *Act* has, in recent years, also been adjusted from time to time to reflect changes in the Consumer Price Index but on an ad hoc basis only;

AND WHEREAS, on August 10, 1992, the governors of the Workers' Compensation Board decided that the Allowances should be updated to 1993, as follows, to reflect changes in the Consumer Price Index since March 1991:

1. effective January 1, 1993, the transportation allowance should increase to 26 cents per kilometre, the per diem subsistence rate should increase to $37.00 per day and the special subsistence rate to workers electing not to stay at the W.C.B. Residence should increase to $15 per day,
2. effective January 1, 1993, the personal care allowances and the independence and home maintenance allowance should be increased by the increase in the Consumer Price Index since March 1, 1991, and
3. effective July 1, 1993, the clothing allowances should be increased by the increase in the Consumer Price Index since March 1, 1991;

AND WHEREAS the governors also decided that, effective January 1, 1993, the amount of compensation representing a "substantial amount of compensation" for purposes of Section 10(8) of the *Act* should be increased by the increase in the Consumer Price Index since March 1, 1991;

AND WHEREAS the governors also decided that, commencing January 1, 1994, or (in the case of the clothing allowances) July 1, 1994, the Allowances and the amount of compensation representing a "substantial amount of compensation" for purposes of Section 10(8) should be adjusted annually to reflect changes in the Consumer Price Index since the last adjustment;

AND WHEREAS a question has arisen as to who should have responsibility for ensuring that the formerly ad hoc amounts are adjusted automatically on an annual basis hereafter:

NOW THEREFORE THE GOVERNORS RESOLVE THAT the president and chief executive officer of the Workers' Compensation Board shall be responsible for ensuring that the personal care allowances, the independence and home maintenance allowance and the amount of compensation representing a "substantial amount of compensation" for purposes of Section 10(8) are increased effective January 1, 1993, by the increase in the Consumer Price Index since March 1, 1991, and that the clothing allowances are increased effective July 1, 1993, by the increase in the Consumer Price Index since March 1, 1991;

AND THE GOVERNORS FURTHER RESOLVE THAT the president and chief executive officer of the Workers' Compensation Board shall be responsible for ensuring that all the Allowances and the amount of compensation representing "a substantial amount of compensation" for purposes of Section 10(8) are adjusted annually hereafter, commencing on January 1, 1994 or July 1, 1994, as the case may be, in accordance with the formulas set out in the applicable items of the *Rehabilitation Services and Claims Manual* and that this responsibility shall be included in the definition of the functions of the president and chief executive officer under Section 82(a)(i) of the *Workers Compensation Act*.

Decision of the Governors

Number: 27
Date: October 26, 1992
Subject: Appointments of Members of the Governors' Financial Standing Committee

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WHEREAS, on April 6, 1992, the governors of the Workers' Compensation Board constituted the Governors' Financial Standing Committee (the "Committee") pursuant to Section 82(b)(i) of the *Workers Compensation Act* and Section 8 of Bylaw No. 3 (Board of Governors Procedural Bylaw);

AND WHEREAS the Committee shall consist of one worker representative governor, one employer representative governor, one public interest governor, and, on an ex officio basis, the chairman of the governors;

AND WHEREAS a quorum of the Governors' Financial Standing Committee shall consist of the worker representative governor, the employer representative governor, and either the public interest governor or the chairman of the governors;

AND WHEREAS, Peter Cameron, the worker representative governor appointed to the Committee on April 6, 1992 resigned as a governor on Friday, July 10, 1992:

NOW THEREFORE THE GOVERNORS RESOLVE THAT Len Werden is appointed to the Governors' Financial Standing Committee as the worker representative governor, on a temporary basis, from July 13, 1992 until October 26, 1992, inclusive, AND THAT the presence of Len Werden at any meeting of the Committee between July 13, 1992 and October 26, 1992 shall be counted as part of the quorum required for the Committee to conduct its business;

AND THE GOVERNORS FURTHER RESOLVE THAT effective October 27, 1992, Maureen Whelan is appointed to the Governors' Financial Standing Committee as the worker representative governor until the expiration of her term of appointment as governor.

Decision of the Governors

Number: 28
Date: October 26, 1992
Subject: Approval of Retroactive Implementation of Changes in W.C.B. Policy Necessitated by Appeal Division Decision No. 91-0850 and Appeal Division Decision No. 92-1210

WHEREAS on November 22, 1991, the Appeal Division of the Workers' Compensation Board issued Decision No. 91-0850 in which the Appeal Division held that:

1) The Board has the authority to declare and collect overpayments arising through administrative error.

2) Generally, the Board does not have the authority to retroactively adjudicate a claim and thereby create a debt owed by a worker to the Board.

3) The Board does have the authority to retroactively adjudicate and create a debt owed to the Board in situations of fraud or misrepresentation by the worker or where the decision under review was not one within the statutory authority of the Board.

4) The Board must pay any additional benefits to a worker that are a result of retroactive adjudication.;

AND WHEREAS on March 2, 1992, the governors of the Workers' Compensation Board approved prospective amendments to the *Rehabilitation Services and Claims Manual* necessitated by Appeal Division Decision No. 91-0850;

AND WHEREAS a question remains as to what action should be taken with respect to prior W.C.B. decisions to recover monies from workers and dependants;

AND WHEREAS on June 23, 1992, the Appeal Division of the Workers' Compensation Board issued Decision No. 92-1210 in which the Appeal Division held that W.C.B. policy with respect to the transfer of experience rating when an employer transfers the employer's business to a different legal entity, for example, from a proprietorship to a corporation, was not in conformity with the *Workers Compensation Act*;

AND WHEREAS on October 5, 1992, the governors approved prospective amendments to the *Assessment Policy Manual* necessitated by Appeal Division Decision No. 92-1210 which allow the transfer of experience rating where a business is transferred if the ownership of the business is substantially unchanged;

AND WHEREAS a question remains as to what action should be taken with respect to prior W.C.B. decisions not to permit a transfer of experience rating in these circumstances;

AND WHEREAS the governors consider that the implementation of the policy changes necessitated by Appeal Division Decision No. 91-850 and Appeal Division Decision No. 92-1210 raises a general question of the extent to which retroactive effect should be given to a change in W.C.B. policy where that policy has been found to be unlawful;

AND WHEREAS the governors intend to adopt a general retroactivity policy in this respect;

AND WHEREAS, pending the adoption of a general retroactivity policy, the governors consider it necessary to address the specific retroactivity issues relating to the policy changes necessitated by Appeal Division Decision No. 91-850 and Appeal Division Decision No. 92-1210, on the understanding that the governors' decisions in this respect do not constitute a precedent for any future decisions on the extent to which changes in policy should be given retroactive effect either in specific instances or as a matter of general policy:

NOW THEREFORE THE GOVERNORS RESOLVE THAT the policy approved by the governors on March 2, 1992 with respect to overpayments will apply as of January 1, 1980 and that the W.C.B. will, without application from workers and dependants, refund all monies collected by the W.C.B. with respect to overpayments resulting from decisional errors where the decision declaring the overpayment was made on or after January 1, 1980;

AND THE GOVERNORS FURTHER RESOLVE THAT the policy approved by the governors on October 5, 1992 with respect to transfer of experience rating will apply to transfers between June 1, 1988 and October 5, 1992 where the employer requests it and that, on and after October 5, 1992, the policy will apply whether or not the transfer is favourable to the employer.

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Decision of the Appeal Division

Number: 92-1885, 92-1886
Date: November 26, 1992
Panel: Sonja Hadley
Subject: Section 33(1) — Unpaid Earnings

A letter dated January 2, 1992 was received from the lawyer for the worker, requesting reconsideration of the former commissioners' decision of July 13, 1988 pursuant to Section 96(2) of the *Workers Compensation Act.*

Introduction

The worker suffered a compensable back injury in 1972, while employed by a railway company as an agent/operator. Back surgeries were performed in 1972, 1973 and 1982. In 1975 she was awarded a pension of 7.5% which was subsequently based on the statutory maximum of compensation payable in 1972. The worker continued to work for the same company until 1978, when she resigned her job to obtain a job as a sales representative for a company producing telephone directories. She worked for this employer until late 1979. Then she quit this job to invest in, and work for, a fishing company. She worked for the fishing company until January 1981. Her back disability deteriorated at this time. The Board reopened her claim for wage-loss benefits in 1981. In 1984 her pension was increased to 12.5%, based on her average earnings at the time of the 1981 reopening. It was found that the worker could perform full-time clerical duties which would pay the same or greater wage rate than she was earning at the time of the reopening of her claim in 1981. Therefore, no greater pension on a loss of earnings basis was awarded. This decision was upheld by the Review Board and the former commissioners of the Workers' Compensation Board.

Submissions

The July 13, 1988 decision of the former commissioners concerned the worker's wage rate at the time of the 1981 reopening of her 1972 claim. The commissioners did not accept her earnings from the fishing company as amounting to $20,000 on the basis that not all of those earnings were actually received or realized by the worker. The worker had received only $14,000 ($12,000 taken as wages) in a settlement by the employer.

The commissioners further upheld a decision to declare an "overpayment" which resulted from the wage rate initially being based on the adjudicator's acceptance of the worker's earnings as $20,000.

Counsel submitted, in a May 30, 1991 letter, that it did not appear that the Board made any effort to determine the market value of services that the worker provided to the company. He asserts there is no indication anywhere in the evidence that the amount she claimed was excessive. He contends that, where a worker is unable to collect all of their wages which they had earned because of the employer's financial difficulties, to calculate their wage rate based on the money actually realized is absurd, illegal, and a patently unreasonable interpretation of the *Act*, leading to a patently unreasonable finding of fact. He submits that the commissioners failed to address the question as to the actual loss suffered by the worker as a result of her injury.

In his letter of January 21, 1992, counsel submits that, given the decision of the Appeal Division No. 91-0850 [*Workers' Compensation Reporter*, Vol. 7(4): p. 173], the overpayment aspect of the claim must be redetermined. He submits that there has never been any question of fraud and misrepresentation on her part, and the decision declaring an overpayment in her case falls squarely within the terms of the Appeal Division's November 22, 1991 ruling.

Counsel representing the employer responded with a submission dated April 14, 1992. He argues that "the issue is not what the wages the worker would have been earning if she had never been injured but by how much compensation for lost income should be reduced by the amount of 'outside' income she earned." He argues that although the worker earned the income in question, various foreclosure and other legal proceedings against her forced her to forego those wages or a part of them. He states that the situation is somewhat analogous to losing one's wages in a bad investment. He further submits that there is nothing in the *Workers Compensation Act* to support the proposition that the W.C.B. would never have recourse to recover compensation paid even in overtly fraudulent circumstances. He states that in the worker's case, there was at least a wage entitlement which was not reported to the Workers' Compensation Board so to that extent there was a misrepresentation, albeit by silence, which resulted in the worker receiving more wage-loss compensation than she was entitled to receive.

Counsel for the worker disagrees that the worker failed to disclose the income which led to the "overpayment." He points to the letter of May 17, 1984 (the decision letter creating the overpayment), which confirms that the worker reported earnings from her fishing employment of $20,000. He states that while these earnings were confirmed by the fishing company employer in a letter dated February 28, 1982, and in other documentation contained in the Board's files, the worker was forced to accept only $12,000 because of the fishing company's financial problems. He disagrees that

there were “various foreclosure and other legal proceedings against [the worker],” as alleged by the employer. Counsel for the worker submits there is no allegation anywhere in the worker’s file that she was guilty of “misrepresentation,” by silence or otherwise.

Background

Originally, the claims adjudicator accepted the amount of $20,000 as the worker’s earnings from the fishing company based on a letter dated June 11, 1981 by the worker to the principal of the fishing company. In this letter, the worker put into writing a verbal discussion between her and the principal of the fishing company with respect to the principal’s “financial circumstances” and inability to meet the sums owing to the worker at that time. In this letter, the company principal agreed to certain alternatives. The first alternative was with respect to the registered ship’s mortgage against M.V. “Boat A” in the amount of $23,542.00. The second alternative was with respect to wages which were agreed to be $20,000. It was agreed that this amount would be reduced to $12,000 to be paid in full upon the sale of the company principal’s residence. It was further agreed that should the residence not sell before the demand date, the worker would be paid in full.

Based on this information, the adjudicator accepted $20,000 as the worker’s earnings in 1980 (Memo #126). He based this conclusion on the fact that the worker was owed $20,000 in wages which would be payable to her upon the sale of the company principal’s residence in Richmond. He calculated the worker’s earnings as follows:

1978, directory company	$11,738.73
1979, directory company	18,739.24
1980, fishing company	20,000.00
to May 7, 1981, directory company	2,066.76
	$52,544.73

This resulted in a weekly wage rate of $384.37 being paid on the reopening of the worker’s claim in 1981.

In a decision dated May 17, 1984, a second claims adjudicator advised the worker that the weekly wage rate established above was in error. It was stated that it should have been established at $283.73 at the time of the reopening on April 29, 1981. The worker was advised that this change was based on the fact that her earnings in the three years prior to the reopening were $38,425.38. As a result of this, an overpayment of $12,887.15 on her claim was declared. The basis for the figure of $38,425.38 was:

1978 directory company employment (start date August 21, 1978)	5,619.38
1979 directory company employment	18,739.24
1980 total proven fishing earnings to date	12,000.00
1981 directory company employment earnings (up to April 29th)	2,066.76
	$38,425.38

The readjudication was based on the second adjudicator's conclusion that the earnings information which was used by the first adjudicator "was not substantiated and is now proven to be incorrect." The second adjudicator noted in this regard that, although the worker had reported a fishing income of $20,000, she had only received $14,000. The $14,000 included employment earnings as well as investment earnings. The adjudicator selected $12,000 of the $14,000 as representing employment earnings. She concluded that the Board could not use promised wages or promised earnings and must use the actually obtained earnings when computing a wage rate. The adjudicator did not believe that the worker purposely defrauded the Workers' Compensation Board in the establishment of the initial wage rate on the claim. She found that the worker expected to be paid these monies.

The adjudicator, in a memo dated August 8, 1984 (Memo #217) asked the director, Claims, Overpayment Waiver Committee, for advice regarding waiver of the overpayment in the worker's case. The adjudicator found that the overpayment was a Board error; no fraud or misrepresentation had occurred; the overpayment was a significant amount and total or partial recovery would cause a hardship to the worker. The worker was a single mother with two children and had not worked for some years. The adjudicator had requested that the declared overpayment be waived.

The adjudicator was advised by the director of Claims, (Memo #218) that in accordance with Board policy, the matter would not be referred to an Overpayment Waiver Committee. Because of new Board policy, the worker would be asked for the total monies now owing to the Board.

The Review Board, in their findings of September 8, 1986, found that the $20,000 could not be accepted as a basis for recommending a change in the wage rate established on the worker's claim. The Review Board found that these earnings were in fact not realized and, of the $14,000 settlement, $12,000 was taken as wages which was accepted as such by the worker. The Review Board found that the manner in which the second claims adjudicator recalculated the worker's average earnings on reopening was consistent with Board policy and reflective of the worker's actual earnings.

The worker has estimated that $20,000 in wages was owing to her (which she described at the Review Board hearing to be an underestimate). Other documents presented at the Review Board hearing showed different figures of her wages owing. First, there is a letter dated September 16, 1981 to the worker's lawyer at the time in which the worker encloses a summary of her claim for wages. In this document, the worker submits the following:

Ocean crewing	76 days @ $100.00/day
Shore crewing	100 days @ $100.00/day
Secretarial duties	111 days-guarantee — $10,000.00/year

TOTAL: $27,600.00

Alternate:

An average of ten hours per day for 287 days (most days were longer than 10 hrs.)

TOTAL: $28,700.00

Second, there is a letter dated February 28, 1982 signed by the principal of the fishing company. This letter states that the worker was employed by the fishing company from November 1979 to January 1981 and earned $28,700 during this period. Third, there is a Statement of Claim in the Federal Court of Canada, Trial Division, dated October 1981. This Statement of Claim states, among other things:

1. The terms and conditions of the . . . Marine Mortgage were that [the fishing company] promised to pay to [the worker] the sum of $23,542.00 on demand. [The worker] has demanded payment of the . . . Mortgage together with interest and [the fishing company] has failed to pay the principal sum and interest.

2. The worker was employed by the fishing company from February 5, 1980 to April 4, 1980 as a crew member and [the fishing company] agreed to pay to her the sum of $3,000 as wages. That sum had not been paid.

3. The worker was employed by the fishing company from April 5, 1980 to May 31, 1981 as a crew member and the company agreed to pay her the sum of $12,000 as wages for such employment. That sum had also not been paid.

4. The worker advanced the sum of $10,002.00 to purchase the ["Boat B"] and is entitled to be a registered and beneficial owner of that ship, jointly with the Defendant.

5. The worker advanced the sum of $5,000 for the purchase of supplies for ["Boat A"] and that sum had not been repaid to the worker.

It was submitted at the Review Board hearing that the agreed sum of $10,000 for secretarial services was not part of the Statement of Claim because that matter would have to be brought into the B.C. Supreme Court rather than the Federal Court (page 28 of transcript).

Thus, it is evident that there are discrepancies in the amount of money claimed to be wages. First, there is the estimate of $20,000 which the worker advised the Review Board hearing was an underestimate. Second, there is the company principal's statement that the earnings were $28,700. Third, there is the worker's summary of wages in her letter to her lawyer for a total of either $27,600 or $28,700. Fourth, there is the $15,000 as wages in the Statement of Claim. (This figures does not include the $10,000 for secretarial services, which would give a total of $25,000.)

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 (No. 92-0818) in which she decided, in general, that the proper standard of review is that the decision must be so patently unreasonable that it cannot be rationally supported by the relevant legislation.

The former commissioners, in their decision of July 13, 1988, determined that the wage rate at the time of the 1981 reopening of the claim was properly determined with reference to the worker's earnings for the three years prior to the reopening (between August 21, 1978 and April 29, 1981). The commissioners stated they were in agreement with the reasoning and conclusion of the Review Board on this issue. They referred to the Review Board finding that the worker's career change to fishing was not principally motivated by her compensable back disability, but was more the result of a personal choice of "investing and working in the fishing industry with its concomitant high risk factor for investment and earnings." (The Review Board had made this finding with respect to the issue of a pension based on a loss of earnings basis. The Review Board found that any loss of earnings that was greater than the functional award reflected, was principally a result of the worker's personal choice of career change and not her compensable disability).

The Review Board found that the worker left a full-time job at the directory company in June 1979 to go into what she felt was a more lucrative job, which had the potential, in her opinion, of giving her a better return for her time and her monetary investments. The Review Board found that the primary motivating factor for the worker was to increase her financial security (by investing) in the enterprise. The

Review Board concluded that the manner in which the claims adjudicator calculated the worker's average earnings on reopening was reflective of her actual earnings. The commissioners agreed with the Review Board that it would not be appropriate to accept the worker's earnings from the fishing company as amounting to $20,000 when in fact those earnings were not realized.

In applying the standard that a decision must be so patently unreasonable that it cannot be rationally supported by the relevant legislation to the commissioners' decision of July 13, 1988, it is first necessary that the relevant section of the *Act* is reviewed. That section is Section 33(1) of the *Workers Compensation Act.* It states:

> 33.(1) The average earnings and earning capacity of a worker shall be determined with reference to the average earnings and earning capacity at the time of the injury, and may be calculated on the daily, weekly or monthly wages or other regular remuneration which the worker was receiving at the time of the injury, or on the average yearly earnings of the worker for one or more years prior to the injury, or on the probable yearly earning capacity of the worker at the time of the injury, as may appear to the board best to represent the actual loss of earnings suffered by the worker by reason of 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 earned during the one or more years or other period previous to the injury by a person in the same or similar grade or class or employment.

There is no definition of "earnings" or "earning capacity" in the *Workers Compensation Act.* However, *Black's Law Dictionary* defines earnings as:

> Income. That which is earned; *i.e.* money earned from performance of labor, services, sale of goods, etc. the price of services performed; the reward from labor or the price received for personal services, whether in money or chattels. The fruit or reward of labor; the fruits of the proper skill, experience, and industry; the gains of a person derived from his services or labor without the aid of capital; money or property gained or *merited* by labor, service, or the performance of something. Term is broader in meaning than "wages."
>
> (emphasis added)

Black's Law Dictionary defines "earning capacity" as:

> *Earning capacity.* Term refers to capability of worker to sell his labour or services in any market reasonably accessible to him, taking into consideration his general physical functional impairment resulting from his accident, any previous disability, his occupation, age at time of injury, nature of injury and his wages prior to and after the injury. *Sims* v. *Industrial Commissioner*, 10 Ariz. App. 574 460 P. 2d 1003, 1006. Term does not necessarily mean the actual earnings that one who suffers an injury was making at the time the injuries were sustained, but refers to that which, by virtue of the training, the experience, and the business acumen possessed, an individual is capable of earning.
>
> Fitness, readiness and willingness to work, considered in connection with opportunity to work.

The purpose of Section 33 of the *Workers Compensation Act* is to determine the earning capacity and average earnings of the worker at the time of injury, *as best represents the actual loss of earnings suffered by the worker by reason of the injury*. This purpose is appropriately described by Dean Larson in *Larson's Workmen's Compensation Law*, Vol 2:

> The entire objective of wage calculation is to arrive at a fair approximation of claimant's probable future earning capacity. His disability reaches into the future, not the past; his loss as a result of injury must be thought of in terms of its impact on probable future earnings, perhaps for the rest of his life. This may sound like belaboring the obvious; but unless the elementary guiding principle is kept constantly in mind while dealing with wage calculation, there may be a temptation to lapse into the fallacy of supposing that compensation theory is necessarily satisfied when a mechanical representation of this claimant's own earnings in some arbitrary past period has been used as a wage basis. (60.11 (f))

Dean Larson, in discussion under the heading, "Wage That Fairly Represents Claimant's Earning Capacity," states the following:

> Suppose, for example, that the employer, having agreed to pay a certain wage, then simply refused to pay the claimant anything at all. Suppose at the time of hearing the claimant had in fact not been paid a single dollar for his work, although under his agreement

> with the employer he was entitled to receive $200 a week. Obviously no court would hold that the employee's "average weekly wage" for that period was zero . . . .

The basis for Dean Larson's conclusion above is that the worker's earning capacity at the time of his injury was not best reflected by the amount of his unrealized earnings. The worker did not agree to work for no wages. Had he not been injured and the non-payment of wages had continued, he presumably could have obtained, and been physically able to perform, paid employment elsewhere doing similar work. In determining what the worker actually earned, the Board can look beyond the amount earned but not paid if it does not represent the worker's earning capacity.

Similarly, in this worker's case, there is no evidence to suggest that, in commencing employment with the fishing company she anticipated not receiving the agreed wages from her employer. In changing her employment to that of the fishing industry, it was her stated intention to realize the same, if not greater, earnings as she had with her previous employer, the directory company. Her earnings with the directory company in 1979 (January to June) were $18,739.00. The only reason her intentions were not realized was because of the financial circumstances of her employer. Had she not had a temporary recurrence of her compensable disability in 1981 resulting in an increase in her permanent disability, it would be reasonable to conclude that she would have been physically able to perform work in the future for other fishing industry employers and receive the wages she had earned.

Evidence given at the Review Board hearing was that the worker had instructed her lawyer to settle all claims to the sum of $14,000 because of her limited financial resources and the legal advice she received that if she pursued the lawsuit, it would cost her more than the amount to be gained. The purpose of Section 33 is to choose a method to best represent the actual loss of earnings suffered by the worker. The section gives the Board discretion as to how to make this determination (earnings at the time of injury; average earnings for one or more years prior to the injury; probable earning capacity). However, the determining factor is that the method chosen must best represent the actual loss of earnings.

To exclude the worker's unrealized earnings in making a determination under Section 33(1) requires a conclusion that such unrealized earnings would have been a normal and expected part of the worker's earnings pattern in the future had she not been injured. There is no evidence to support such a conclusion. In the absence of such evidence, the fact that one employment venture failed in the sense that the worker was not successful in obtaining all of her earnings is not relevant to a determination of her long-term earning capacity. Her previous work history, with this one exception, did not include any such failures.

The prior commissioners' only stated reason for not accepting the earnings from the fishing company as amounting to $20,000 was the fact that the earnings were not realized in full. In concluding that the non-realized earnings would not be accepted in determining the average earnings of the worker over the three-year period, the prior commissioners failed to consider whether the earnings received *best reflected* the worker's actual loss of earnings. Such a determination would require a consideration of the worker's earning capacity at the time of injury. In this case, there was a potential discrepancy between the worker's past average earnings and her future earning capacity by virtue of the fact that, in the three-year period in question, the worker had earned more than she had received. This had only occurred once, and the occurrence was in the three-year period considered by the Board in determining her actual loss of earnings. Whether these past average earnings, reduced because of the employer's financial circumstances, were reasonably reflective of her future earning capacity and therefore constituted her actual loss of earnings was not considered.

In the absence of such consideration, the worker's earning capacity was, by default, equated with her past reduced average earnings. Such an automatic equation does not fulfill the intent of Section 33(1). To determine earning capacity requires a consideration of not only the worker's pre-injury earnings pattern, but also a consideration as to whether that earnings pattern would have continued into the future had the injury not occurred. In this case, there was consideration of the first part of the question, but no consideration of the second part. By failing to consider this required issue under Section 33(1), the commissioners failed to exercise their statutory duty. As a result, their determination in the worker's case is based on a patently unreasonable application of Section 33(1) and therefore an error of law.

Reconsideration

As I have found the former commissioners' decision of July 13, 1988 to be based upon an error of law, I will now proceed to reopen, rehear and redetermine the matter under Section 96(2) of the *Workers Compensation Act.*

In redetermining this matter I note that the worker's estimated "earnings" of $20,000, which she stated was an underestimate, is in fact the lowest earnings figure given, by either the worker or employer. Therefore, I have no problem in accepting this estimate as the worker's earnings while working for the fishing company. The worker's stated intention was to go into the fishing business to increase her financial position and security. Her one-time fishing venture was, in retrospect, financially unsuccessful. However, consideration needs to be given to whether, even if her first fishing venture was, in retrospect, financially unsuccessful, the worker would have been physically able to work for other fishing boat employers in the future if her disability had not

reoccurred and permanently worsened, resulting in an increase to her pension effective 1984. Also to be considered is whether it was likely that the worker would have suffered similar financial losses in the future by continuing to work in the fishing industry. Of relevance is that her earnings at the railway company from 1972 to 1976 were in excess of the maximum wage rate payable; her earnings in 1978 and 1979 while working for the directory company were in excess of those earned at the railway company. The worker has shown herself to be capable of maximizing her earnings potential. In fact, the comments in the claim file portray her as having an excessive desire to achieve. In view of the above, I find that it is likely that the worker would have learned from her financial setback in the fishing industry and would have taken precautions to safeguard her financial interests in any future employment. I find, therefore, that the worker's wage rate at the time of the 1981 reopening of her claim should be based on her three-year earnings of $46,425.38. This includes her $20,000 estimated earnings.

With respect to the issue of the overpayment, I note that the basis of its calculation only involved, in part, the issue of the $14,000 versus the $20,000 earnings figure. The second basis for the declared overpayment was that the worker's earnings from the directory company in 1978 were reduced from $11,738.73 to $5,619.38 in the readjudication. It appears that the reason for this reduction was that the original figure included all earnings for 1978 when in fact the worker did not commence work for the directory company until August 21, 1978 and the claim was not reopened until April 29, 1981. The second adjudicator, when recalculating the wage rate, used the earnings figure of $5,619.38, based on the worker's earnings with the directory company commencing August 21, 1978.

The former commissioners found that the overpayment was properly declared on the worker's claim, and that the Board was entitled to seek recovery of the overpayment. The declared overpayment has to date not been collected by the Board.

However, this issue now becomes academic as the governors have established new policy as to what constitutes an overpayment (#48.41 of the *Manual*). The policy states that:

> . . . A decision regarding entitlement which is modified or reversed by a later decision does not result in an overpayment. These are referred to as "Decisional Errors" and include errors of policy. They include situations where new information is later received which initiates a judgment change in the original decision. They can also include situations where information was available but overlooked, or a missed wage rate change . . .

By Resolution of the Governors dated October 26, 1992, the above policy will apply as of January 1, 1980.

Therefore, the “overpayment” declared on this claim should be dealt with pursuant to the governors’ policy cited above. According to that policy, there is no overpayment to be declared or collected in this case.

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

WORKERS' COMPENSATION

REPORTER

Decision of the Appeal Division

Number: 92-1684
Date: October 20, 1992
Panel: Thomas Kemsley
Subject: Section 10(8) — Definition of Employer

An application was brought under Section 10(8) of the *Workers Compensation Act* by B. Construction to transfer the costs of a claim to the class of employers of which S. Trucking is a member. The claim concerns a severe leg injury suffered by an employee on May 23, 1990. She was employed by B. Construction as a flag person and her leg was run over by a truck driven by Mr. S., the sole proprietor of S. Trucking.

At the time of the accident, B. Construction was registered with the Board under Class 7 and S. Trucking was registered under Class 8. Mr. S. had personal optional protection with the Board. His representative stated that Mr. S. was unincorporated, provided only one piece of equipment, worked for one company at a time, did not have any workers, and was registered with the Board as an independent operator. The submission referred to a distinction between "independent operator" and "employer" in the *Act*.

The representative of B. Construction referred to Sections 3(3) and 10(9) and said there was no intent within the *Act* to define who is or is not an employer in relation to a transfer of costs application.

Section 10(8) of the *Act* provides, in part, where:

> (a) a *substantial amount of compensation* has been awarded as a result of the injury or death of the worker; and
> (b) the injury or death was caused or substantially contributed to by a *serious breach of duty of care of an employer* in another class or subclass,
>
> the board may order that the compensation be charged, in whole or in part, to the other class or subclass;
>
> (emphasis added)

It was not disputed that the amount of compensation paid out was a "substantial amount," as required under Section 10(8)(a) and defined in Item #114.11 of the *Rehabilitation Services and Claims Manual* (the *Manual*).

The dispute on this application is on two points:

(1) whether S. Trucking was an "employer" within the meaning of Section 10(8)(b); and, if so,

(2) whether S. Trucking committed a "serious" breach of duty of care.

Section 10(8)(b) sets out that an "employer" must commit the serious breach of duty of care for a transfer of costs under Section 10(8). Decision No. 65 in the *Workers' Compensation Reporter* (1974, Vol. 1: p. 270) and Item #114.12 of the *Manual* set out that:

> The doctrine of vicarious liability has no application to Section 10(8), and a transfer of costs is only available where the breach of duty of care consisted of acts or omissions by management personnel who can be identified as the employer, and not to cases where the breach of duty consists only of the act or omissions of other workers.

Thus, the serious negligence of a worker of another employer will not necessarily give rise to a transfer of costs to that other employer.

The *Act* sets up three categories — worker, employer and independent operator. Section 1 of the *Act* defines "worker" and "employer," but not "independent operator." The independent operator category is recognized in the following three sections of the *Act*:

> The definition of "worker" in Section 1 of the *Act* includes ". . . (f) an independent operator admitted by the board under section 3(3); . . . ."
>
> Section 3(3) of the *Act* sets out that:
>
> > . . . an independent operator, not being an employer or a worker, may be admitted by the board as being entitled for himself . . . to the same compensation as if he were a worker . . . .

Section 39 also refers to independent operators:

> 39. (1) For the purpose of creating and maintaining an adequate accident fund, the board shall every year assess and levy on and collect from independent operators and employers in each class . . . .

As noted above, for a transfer of costs under Section 10(8), it is necessary to find that an "employer" was responsible for a serious breach of duty. Section 1 of the *Act* defines an "employer" as "every person having in his service under a contract of hiring . . . a person engaged in work . . . ." An independent operator with employees is an "employer" in regard to those employees, although not with respect to himself. The submission on behalf of Mr. S. stated that he had no employees. Thus, he does not fit within the definition of "employer" found in the *Act.*

There is no other section in the *Act* that states that an independent operator who has personal optional protection is an "employer." Further, Section 39(1) set out above recognizes a distinction between employers and independent operators who have personal optional protection.

B. Construction Ltd.'s representative referred to Section 10, which covers limitation of actions, subrogation and transfer of costs, and states in part (9): "For the purpose of this section, "worker" includes an employer admitted under section 3(3)." Section 3(3) also refers to an "admission of an employer under this subsection . . . ." The argument is that this shows an intent to treat all of those admitted under Part I of the *Act* the same.

However, the first part of Section 3(3) provides for the admission of an "employer within the scope of this Part, a member of his family excluded by Section 2(2)(d) or an independent operator, not being an employer or a worker . . . ." Thus, that part of Section 3(3) does refer to "employers" being admitted, as distinguished from "independent operators," and this distinction cannot be ignored.

I note that in Decision No. 169 in the *Workers' Compensation Reporter* (1975, Vol. 2: p. 262), the commissioners dealt with a similar issue of interpretation of the *Act*. In that case, an independent operator with personal optional protection was seeking immunity from suit under Section 10 of the *Act.* At that time, the definition of "worker" in Section 1 did not include Part (f) as set out above. The commissioners noted that Section 10 provided immunity from suit to "workers" and "employers." They considered whether an independent operator with personal optional protection should also obtain immunity from suit. That would be similar to one point raised in argument here — that the *Act* must have intended an independent operator with personal optional protection to

be an "employer" for all the rights and duties within the *Act.* However, the commissioners did not extend immunity from suit to independent operators with personal optional protection, saying that the above argument was not relevant to the interpretation of the *Act* but that it was an argument for legislative change. The *Act* did change and Part (f) was added to the definition of "worker" in Section 1, but there has been no amendment that added independent operators with personal optional protection to the definition of "employer."

Thus, I cannot find that Mr. S. was an "employer" by virtue of Sections 10(9) or 3(3). Nor can I find anything that equates an independent operator who has personal optional protection to an "employer" under the *Act.* As noted, Section 1 allows independent operators to be "workers," and Section 10(9) allows employers to be "workers" for some purposes. However, no section includes an independent operator in the definition of "employer." It is not clear why the *Act* defines an independent operator who has personal optional protection as a "worker," but creates no corresponding "employer." Nevertheless, that is how the *Act* is structured.

As a result, I find that, at the time of the accident, S. Trucking was not an "employer" within the *Act.* Therefore, the application for a transfer of costs under Section 10(8) is denied. As a result of this finding, it is not necessary to consider the second issue raised as to whether S. Trucking committed a "serious" breach of duty of care.

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

WORKERS' COMPENSATION
REPORTER

Decision of the Appeal Division

Number: 92-1720
Date: October 28, 1992
Panel: Patrick L. Byrne, Verna Ledger, Alex S. Brokenshire
Subject: Exposure to Laser Radiation

The worker appeals the Workers' Compensation Review Board finding dated July 24, 1992 which upheld the claims adjudicator's denial of his claim for compensation for macular edema. The Review Board found that it was unlikely that his condition was related to his exposure to laser light while at work.

Issue

The issue is whether the worker's condition of macular edema, in his right eye, was due to the nature of his employment.

Background

The worker began employment as a grader/trimmerman in the sawmill industry, in late 1987. As part of his duties, he was required to clean lenses on a laser scanning system in front of his work station. He carried out this activity five days a week. While the worker cleaned these lenses the power was not disconnected and the laser remained operative.

The worker reported to his employer on May 7, 1990 that his eye became irritated on May 2, 1990, during day shift. The worker experienced ongoing irritation which he reported to first aid. The worker first saw his own optometrist, Dr. A, on May 12, 1990 with complaints that, for eight days, his right eye was itchy, watery and his vision was blurred. A maintenance log book entry dated May 7, 1990 included the following statement:

> Operator complaining of a laser shining in his eyes. While looking, found top W/S segment 10' laser had been struck and damaged.

The worker was referred to Dr. B, an ophthalmologist, on May 28, 1990, whose diagnosis was a macular edema involving the right eye. Dr. B added:

> The changes are consistent with exposure to laser light. Suggests edema is getting less.
>
> When exposed to laser beams he should be wearing protective lenses against the light frequency used.

The worker filed a claim for compensation on June 19, 1990. The claims adjudicator asked the Board medical advisor whether or not it was reasonable to expect that reflected light from a 5 milliwatt laser could reasonably cause the symptoms which the optometrist and ophthalmologist had reported. The medical advisor sought advice from a Board medical officer in the Occupational Health Department who in turn sought information from the Board Engineering Department regarding the intensity and power of the laser beam at the particular worksite. The Engineer was supplied with the information regarding the specifications of the laser along with photographs of the worksite and work station.

After reviewing the engineer's report, dated January 31, 1990, the Board doctor stated in Memo #4:

> It appears to me that the claimant's diagnosed macular edema (right) is unlikely in relation to his employment activities as outlined.

The claims adjudicator subsequently denied the worker's application for compensation stating that it was unlikely the macular edema was related to his work activities. The worker appealed to the Review Board.

The Review Board sought an opinion from the Board's Occupational Health Department with respect to the following question:

> Is it likely that looking at the laser beams in question from the side, at a distance of 6 to 8 inches, will cause the eye damage described?

The response dated March 3, 1992 from the same Board doctor provided:

> I had the opportunity to speak with [a Board engineer], concerning the Review Board question. He indicated to me that it would be virtually impossible for this worker to view the laser beam from "the side" as the beam was essentially pointing downward and was being reflected from the surface.

> (I kindly refer you to his report which explains this).
>
> He indicated to me that the claimant would virtually have to be underneath the equipment for this to take place.

The findings of the Review Board included:

> The panel considers it important to note that although [he] was working in the vicinity of lasers, at no time is there any evidence of intra-beam viewing.

The Review Board denied the worker's appeal.

Evidence and Argument

The worker's union representative provided a written submission dated September 10, 1992. He advised that the worker began cleaning the lasers in late 1987 and was required to do so twice daily. Each cleaning took between 7 and 20 minutes. The worker is right handed so that when cleaning the panel, his right eye was approximately six inches away from the emitting rays of the lens. The representative noted the worker stated in his submission to the Review Board that:

> Laser was always on and I peeked into it from 6-8" at the most. Every time I cleaned the laser, doing my best to see/peek on an angle.

The worker's representative points to the opinions of Doctors C and B that the worker's injuries are either due to or consistent with laser exposure.

The worker's representative submits that the worker cleaned the lenses on a regular basis and therefore there was excessive exposure from the laser beam over a three-year period which would meet the requirements of Section 6(3) of the *Act* and the Schedule B, 17(b)(ii) presumption. It was further submitted that the presumptions cannot lightly be rebutted, and the engineering report was based on incomplete information as the engineer had not conducted an actual examination of the worksite.

There has been no submission from the employer to the Appeal Division in this case.

Law and Policy

Schedule B of the *Workers Compensation Act* provides:

Description of Disease	Description of Process or Industry
17. Radiation injury or disease:	
(a) Due to ionizing radiation . . .	Where there is exposure to ionizing radiation
(b) Due to non-ionizing radiation:	
(i) conjunctivitis, keratitis	Where there is exposure to ultra-violet light
(ii) cataract or *other thermal damage to the eye*	*Where there is excessive exposure to* infra-red, microwave or *laser radiation*

(emphasis added)

Reasons and Findings

The first question to be considered is whether the worker was employed in a process or industry mentioned in the second column of Schedule B. The applicable section provides:

> Where there is excessive exposure to infra-red, microwave or laser radiation.

The laser used at the worksite is a Helium–Neon laser with a wavelength of 632.8 nm and a power output of 3.5 milliwatts. The engineer reported that the manufacturer of the equipment utilizing the laser adjusted the power output to 2.0 milliwatts. The laser is used to measure lumber. The worker's station is within 6–7 feet of the beam. He also cleaned the lenses twice daily. The worker's representative reported that the cleaning took from 7 to 20 minutes to complete and that the worker would have to peek into the laser from 6–8 inches away.

In addition, the laser had been knocked out of alignment and it was reported that the worker complained of the laser shining in his eyes. It is generally recognized that workers could be exposed to lasers either by direct viewing of the beam or by various

reflections of the beam. The worker, however, apparently did not recall directly viewing the beam. On that basis the engineer, adjudicator and the Review Board did not consider that such exposure had occurred. However, in our view the Review Board erred in concluding that ". . . at no time is there any evidence of intra-beam viewing." There is considerable circumstantial evidence. Given the power of the laser, the engineer calculated the length of time someone would have to directly view the beam to exceed the maximum permissible exposure established by the American National Standards Institute, a standard referenced in the Board's *Industrial Health and Safety Regulation* 13.73. The engineer's calculations show that viewing the beam directly for more than 2.42×10^{-7} seconds or .000000242 seconds would exceed the safe limit. In our view an exposure for such a minute period of time is hardly an exposure likely to be recognized by the worker. Given the power of the laser; the work activities; the misaligned equipment; the worker's report of injury subsequent to the misalignment and the minute period of exposure needed, we find that it is likely that there was direct exposure to laser radiation and that exposure would have been excessive.

The claims adjudicator and the Review Board relied on the engineer's report with respect to reflected light. They concluded that the reflected light would not exceed safe limits. It is not necessary to consider that question here as we have already concluded that excessive exposure was likely from direct beam viewing.

The second question to be considered under Section 6(3) is whether the disease contracted is the disease in the first column of the schedule set opposite to the description of the process. In this case the disease is, "thermal damage to the eyes." The diagnosis of macular edema made by Dr. B, an ophthalmologist, is not in dispute. Further, Dr. B reported that the changes were consistent with exposure to laser light. Dr. C, the worker's physician, is of the opinion that, "[c]auses of unilateral macular edema are very rare and include direct trauma (none) and intense light injury (laser)." The presumption in Schedule B is a rebuttable presumption, however, there has been no evidence provided that would link the worker's injury to any other cause. We find that the worker suffers from an industrial disease and his macular edema is due to the nature of the employment in which he was employed.

THE WORKER'S APPEAL IS ALLOWED.

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

WORKERS' COMPENSATION

REPORTER

Decision of the Appeal Division

Number: 92-1717
Date: October 26, 1992
Panel: Paul Petrie, Alex Brokenshire, Verna Ledger
Subject: Section 34 — Deduction from Compensation

The worker appeals from the January 28, 1992 finding of the Review Board which allowed the employer's appeal regarding deduction from compensation under Section 34 of the *Workers Compensation Act.* The Review Board found that the worker was not entitled to receive a full loss of earnings pension while, at the same time, receiving accumulated sick leave and vacation benefits that amount to full salary. The issue in this appeal is whether the employer is entitled to reimbursement out of the accident fund for payment of these accumulated benefits.

The following summarizes the facts and Board decisions relevant to the issues in this appeal. The worker is a 56-year-old firefighter who began work for the fire department in 1959. On October 22, 1982, he suffered an acute myocardial infarction. On April 8, 1983, he received coronary bypass surgery. He was given medical clearance to return to work on August 24, 1983. Apparently, he did not return to work at that time, but opted to use accumulated vacation entitlement. He attempted to return to work as a firefighter in February 1984. However, on February 21, 1984, he was admitted to hospital with unstable angina and his claim was reopened for wage-loss benefits. The Board determined that his disability stabilized September 2, 1984 and wage-loss benefits were terminated as of that date pending an assessment of permanent disability.

The worker, again, attempted to return to work on December 31, 1984 but booked off work after four shifts because of problems related to his heart disability. He suffered a further myocardial infarction on March 17, 1985 and his claim was reopened for wage-loss benefits from March 16, 1985 to June 4, 1985. On January 26, 1986, the Board advised the worker that his physical impairment disability under Section 23(1) of the *Act* was 25% and no loss of earnings was payable. He successfully appealed this decision to the Workers' Compensation Review Board, whose finding of October 13, 1987 recommended an increase in the physical impairment award and a re-evaluation of the loss of earnings pension under Section 23(3).

On October 26, 1988, the worker was advised that his physical impairment award was increased to 50% effective August 24, 1983. On January 10, 1989, the Board advised the worker that his loss of earnings pension would be based on the assumption that he could earn $800.00 per month in sedentary part-time work such as telephone solicitor or gas bar attendant. The resulting pension of 61.13% was paid on a loss of earnings basis effective August 24, 1983.

The employer questioned the effective date of both a physical impairment and loss of earnings pensions. On February 15, 1990, the worker was advised that the effective date of the increased physical impairment pension was changed from August 24, 1983 to June 5, 1985, but the effective date of the loss of earnings pension would remain at August 24, 1983.

The employer also pointed out that the worker continued to receive vacation and sick leave benefits equivalent to full salary from September 2, 1984 to November 30, 1986. The employer was reimbursed under Section 34 of the *Act* for periods the worker was on wage loss under Section 29 (February 22, 1984 to September 1, 1984 and March 16, 1985 to June 4, 1985). The employer sought reimbursement under Section 34 for the additional periods between August 23, 1983 and November 30, 1986 in which the worker received a loss of earnings pension.

The Board denied the employer's application in a letter dated September 21, 1989 which stated in part:

> It would appear that the [employer] has, either through contractual arrangement or error (depending on the nature of the contractual arrangements) continued this worker on full salary. While as the employer may have a legitimate argument for saying that the worker should not have been paid those monies in view of the award from the Compensation Board, this is a matter strictly between the employer and the worker as opposed to a matter created by the Compensation Board.

This decision was upheld by a Manager Review and eventually appealed to the Review Board. The Review Board finding of January 28, 1992, allowed the employer's appeal on the following grounds:

> Although the collective agreement allows [the worker] to exhaust all accumulated vacation and sick leave entitlement including what is known as gratuity days, we find that the ongoing payment of sick leave entitlement and accumulated vacation, was dependent upon [the worker] maintaining an employed status with [the

> employer] and that those payments would not have been part of any lump sum termination pay out. Consequently, we agree with the employer's position, and find that these benefits can be regarded as "payments . . . which the worker may receive from his employer during the period of his disability . . . provided wholly at the expense of the employer", as described in *section 34*.

Section 34 of the *Act* states:

> In fixing the amount of a periodic payment of compensation, consideration shall be had to payments, allowances or benefits which the worker may receive from his employer during the period of his disability, including a pension, gratuity or other allowance provided wholly at the expense of the employer, and a sum deducted under this section from the compensation otherwise payable may be paid to the employer out of the accident fund.

In his text *Workers' Compensation in Canada* (1989), Professor T.G. Ison comments on statutory provisions for reimbursement of employers:

> A payment by the employer of termination pay or vacation pay is not deductible from the compensation payable to a worker.

Published policy of the governors in Section 34.40 of the *Rehabilitation Services and Claims Manual* (the *Manual*) makes it clear that Section 34 of the B.C. *Act* is discretionary. It requires that the Board must consider the matter, and that any compensation deducted under this section *may* be paid to the employer. The section is permissive, not mandatory.

Policy of the governors with respect to wage-loss benefits provides that "employers who continue paying full wages to disabled workers are reimbursed in amounts equal to the compensation that would normally be paid to their employees" (the *Manual* #34.40). The policy of the governors with respect to termination pay is detailed in *Workers' Compensation Reporter* Decision No. 107 [Vol. 2: p. 42] and summarized in Section #34.42 of the *Manual*. The policy cites a case of a miner who was terminated by the employer and subsequently received termination pay pursuant to Section 19 of the *Mines Act* while still in receipt of workers' compensation. The Board rejected the employer's application to have the compensation payments reimbursed to the employer on the grounds that this was not a voluntary payment by the employer. It was termination pay required by law. The Board's determination in *Reporter* Decision No. 107 related only to termination pay under the *Mines Act*. The governors' policy goes on to state:

> Other arguments may be relevant with regard to other kinds of termination payments. However, where the payment is of a similar type or category in that it results from a legislative requirement or a contractual agreement, it will likely be treated in the same manner as that described above.

In a decision of the Appeal Division (No. 92-0922; to be published in a future *Reporter*), the chief appeal commissioner found:

> There is no policy to apply section 34 where the worker is in receipt of a wholly employer funded pension, or to apply that section to any permanent disability awards. The only applications outlined in the Governors' policy relate to temporary disability payments.

The issue to be resolved in this appeal is whether the employer is entitled to reimbursement in whole or in part for the accumulated sick leave benefits paid to the worker for those periods between August 23, 1983 and November 30, 1986 for which the employer did not receive reimbursement of wage loss under Section #34.40 of the *Manual*.

Counsel argues that the sole issue in this appeal is whether the sick leave and vacation pay are payments wholly at the expense of the employer. He says Section 34 of the *Act* applies to temporary disability only. He argues that the payment of benefits earned while employed prior to the date of injury are created by a contribution of the worker and are not wholly at the expense of the employer. Counsel refers the Panel to policy from the Ontario W.C.B. which establishes that a similar statutory provision does not apply to situations of permanent disability.

Counsel points out that under the worker's collective agreement, sick days are accumulated at the rate of 20 twelve-hour shifts per year to a maximum of 261 days. Vacation time accumulates at the rate of 20 duty shifts per year. He says it is established that prior to taking retirement by reason of disability, firefighters are allowed to exhaust all accumulated vacation and sick leave time. The worker's counsel submits:

> The fact that [the worker] earned his vacation pay and sick time means that he made a clear and substantial contribution to these benefits. They are not, therefore, payments "wholly at the expense of the employer". This is not a case where the worker is in receipt of a pension wholly funded by the employer or in receipt of full wages while receiving W.C.B. wage loss . . .

> Just as termination pay is required to be paid out by law, so is vacation pay and sick time. These are entitlements under the collective agreement and they are required by law to be paid under the agreement.

The employer's representative points out that Section 34 applies to "periodic payments" of compensation and this term applies equally to permanent disability awards and wage-loss payments. He says that the accumulated sick pay and vacation pay were provided wholly at the expense of the employer. He says the Ontario policy is not relevant to the issue in this appeal. Finally, he submits:

> . . . that the benefits, etc., that [the worker] received were in an interval during which "periodic payment" has been calculated by the Board, and that those benefits, etc., were paid wholly at the expense of [the employer]. Accordingly, we submit that those benefits *must* pursuant to Section 34, be considered by the Board . . .
>
> . . . we acknowledge that once those benefits, etc. have been considered by the Board it is discretionary whether any sum deducted from the compensation otherwise payable is paid to the employer. We acknowledge that the policy does not enunciate principals respecting permanent disability awards and the relationship of Section 34 to those awards . . .

The worker's representative objects to the employer's interpretation of the term "wholly" in Section 34 and argues that:

> . . . A benefit must be made exclusively, entirely, totally and completely by the employer before section 34 applies. Where a worker makes a contribution the payment or benefit is not made exclusively or wholly by the employer.

Reasons And Findings

The submissions by both parties focus on whether the accumulated sick leave and vacation entitlement were provided wholly at the expense of the employer. While the question of whether benefits were provided wholly at the expense of the employer is a relevant consideration, it does not by itself determine the matter before us. The *Act* requires the Board to consider ". . . payments, allowances or benefits which the worker may receive from his employer during the period of his disability, *including* a pension, gratuity or other allowance provided wholly at the expense of the employer . . ." (emphasis added). The word "includes," when contained in a statute, generally

enlarges rather than restricts meaning. The word "including" must be read in light of its potential to enlarge meaning and considered in the context of the *Act* as a whole.

We are mindful of the provisions in the *Act* that ensure that compensation is not assignable or liable to attachment (Section 15); that prohibit direct or indirect contribution from workers (Section 14); and, that a worker may not agree to waive a compensation benefit (Section 13). We are also cognizant of the specific provisions in the *Act* for suspension of compensation entitlement including Section 57 (failure to attend a required medical examination) and Section 98 (worker is confined to jail, etc.). Where the worker has entitlement to compensation within the terms of the *Act*, the *Act* generally protects that entitlement (even from taxation). This is foundational principle in the legislation that must guide the interpretation and application of Section 34 and the applicable policy of the governors.

Policy of the governors provides for deduction under Section 34 where the employer continues a worker's wages when the worker is entitled to benefits under Section 29 or 30 of the *Act.* The policy provides for an exception for this general rule where the worker has legal or contractual entitlement to termination benefits. This Panel finds that the employer is not entitled to reimbursement under Section 34 beyond that already granted in this case for the following reasons.

First, the policy of the governors does not specifically provide for such deductions where the worker is entitled to a permanent disability award under Section 23 of the *Act.* The worker had a recognized permanent disability effective August 23, 1983. Under Section 30 of the *Act*, the Board makes adjustments to compensation for short-term earnings in some suitable employment. However, under Section 23(3), the Board sets the long-term loss of earnings based on the projected earnings in some suitable occupation. Once the projected loss of earnings is established, deductions are not made for short-term increases or decreases in actual earnings. The governors' policy in the *Manual* #40.20 provides:

> In calculating a worker's projected loss of earnings, no account is taken of any disability or retirement pensions received by him from his employer to which he has contributed or any other source than the Board.

Second, the accumulated sick leave and vacation benefits are not wholly at the expense of the employer. The worker earns entitlement to these benefits through length of service with the employer. Long-term employees would be penalized to a greater degree than short-term employees if their accumulated benefits were deducted from their compensation. We note that the worker's collective agreement (clause 12.8) requires workers to contribute to a sick leave fund administered by the Union to cover the first six shifts of sick leave for any illness.

Third, the employer has a contractual obligation to pay these benefits where they have been earned in accordance with the collective agreement. These collective agreement provisions are legally enforceable obligations. We note that the applicable collective agreement addresses the question of payment of sick leave benefits while a worker is in receipt of W.C.B. wage loss (clause 12.4).

Fourth, the accumulated sick leave and vacation entitlement in this case are payments of a similar type or category to termination payments. The policy of the governors in *Reporter* Decision 107 concluded that deduction from compensation did not apply to termination pay under the *Mines Act*. Governors' policy in the *Manual* #34.42 goes on to state:

> Other arguments may be relevant with regard to other kinds of termination payments. However where the payment is of a similar type or category in that it results from a legislative requirement or a contractual agreement, it will likely be treated in the same manner as described [in Decision 107].

We conclude that deduction from the worker's loss of earnings pension in this case would be inconsistent with the governors' policy in the *Manual* #40.20 and #34.42 as outlined above. Loss of earnings pensions under Section 23(3) of the *Act* provide for a determination of the worker's loss of earnings over the long term. Fluctuation of the worker's earnings in the short term are not taken into account by the Board except through a formal review of the projected loss of earnings pensions provided in the *Manual* #40.30.

The Panel appreciates the employer's expressed concerns in this case. However, the *Act* establishes the principle that entitlement to compensation cannot be waived and that compensation is not assignable. The collective agreement between the employer and the worker's union provides for the employer to pay accumulated sick leave and vacation entitlement while the worker is in receipt of a disability award. In the Panel's view, it would not be appropriate to use the discretionary provisions in Section 34 of the *Act* to address the employer's concerns that result from provisions of the collective agreement. That is a matter more properly considered through the collective bargaining process.

IN THE RESULT, THE WORKER'S APPEAL IS ALLOWED.

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

WORKERS' COMPENSATION
REPORTER

Decision of the Appeal Division

Number: 92-1620
Date: October 6, 1992
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Section 20(3) — *Criminal Injury Compensation Act*

The issue before me is the claimant's entitlement to compensation under the *Criminal Injury Compensation Act*. It arises out of an incident in which the claimant suffered a broken arm on December 4, 1980.

Upon advice from the Ombudsman's Office, the claimant first applied for criminal injury compensation on December 29, 1986. At the suggestion of the registrar of Criminal Injuries, he then reported the incident to the R.C.M.P. The R.C.M.P. advised him that they would not proceed with a charge of assault causing bodily harm against the alleged perpetrator because there was no evidence that he had intended to break the claimant's arm, and it was not in the public interest to pursue a charge when the incident occurred long before the laying of the charge and was not reported to the police at that time.

In a letter dated November 3, 1987, the registrar of Criminal Injuries informed the claimant that his application had been denied.

At the claimant's request, an oral hearing was held concerning the facts and circumstances surrounding the incident. The Criminal Injuries solicitor affirmed the decision of November 3, 1987 denying the claimant's application.

The claimant requested a review of his claim by an Appeal Committee. A hearing was held on May 9, 1989. In findings dated June 7, 1989, the Appeal Committee allowed the appeal and referred the file back to the Criminal Injury Section for determination of the amount of compensation.

In a memorandum dated June 27, 1989 addressed to the general counsel and secretary to the Board, the Criminal Injuries solicitor who had originally denied the claimant's application requested that the Appeal Committee's findings be referred to the commissioners for review. The Criminal Injuries solicitor appears to have strongly disagreed with the Appeal Committee's conclusions.

In a further memorandum dated June 28, 1989 and addressed to the general counsel and secretary to the Board, the Criminal Injuries solicitor stated:

> Reference our telephone conversation of today re . . . ., the Board *may* act on the findings of the Appeal Committee. The Board does not have to adopt the Appeal Committee's findings. Attached is the relevant section of the *Act* for your information.

In a letter dated July 7, 1989 and addressed to the claimant, the appeals administrator explained that the findings of the Appeal Committee had been referred to the commissioners under Section 22(2) of the *Criminal Injury Compensation Act*. The commissioners were to determine whether or not the Board would implement the findings and report of the Appeal Committee.

The claimant's lawyer made submissions to the commissioners. In a letter dated October 3, 1989, the director of Appeals Administration informed the claimant that the commissioners were not prepared to act upon the findings and report of the Appeal Committee.

In a letter dated May 23, 1991 and addressed to the acting chairman of the Board, the ombudsman officer proposed that the commissioners reconsider their decision of October 3, 1989.

In a letter dated November 7, 1991, and addressed to the chairman of the Board of Governors, the ombudsman referred to this claimant's application, expressing concerns about the basis on which the commissioners overturned the Appeal Committee's findings.

In a letter dated January 21, 1992, and addressed to me, the ombudsman requested that I reconsider the commissioners' decision of October 3, 1989 on the grounds set out by the governors in their resolution of January 6, 1992. This resolution states:

> 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*; 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*.

This resolution, however, did not give me the authority to reconsider the commissioners' decisions under the *Criminal Injury Compensation Act*.

By a resolution dated September 8, 1992, the governors gave the Appeal Division the authority to reconsider the commissioners' decisions pertaining to criminal injuries compensation. This resolution states:

> 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 20(3) of the *Criminal Injury Compensation Act* to reopen, rehear and redetermine any decision made by the former Commissioners prior to June 3, 1991, where the Chief Appeal Commissioner finds that the decision was based upon an error of law or involved or involves an issue under the *Canadian Charter of Rights and Freedoms*.

The incident that led to this application occurred when the claimant was 16 years old. He was working for a fast food restaurant in Duncan. On December 4, 1980, while on the employer's premises, the claimant became involved in a conversation with a supervisor after completing his shift. The conversation did not concern work. In the course of the conversation, the claimant jokingly called the supervisor a "cow." Thereupon, the supervisor chased him and threw him to the ground. The claimant complained that his right arm was hurt at which point the supervisor poked the claimant's right arm. The claimant sustained a fracture in this arm. Apparently the supervisor and some other manager told the claimant to report the injury as due to a slip and fall on a wet floor of the employer's premises and gave him a worker's compensation form. At the hearing before the Appeal Committee, a co-worker who witnessed the incident and drove the claimant to hospital confirmed the claimant's version of events.

The claimant applied for workers' compensation. The claim was accepted. Benefits were paid including a small pension of $25.50 per month recognizing a 2% of total disability arising from a partially fused elbow. In June 1982, the claimant initiated contact with the W.C.B. and admitted to the Board that his injury was not sustained due to a slip and fall. The claimant and the supervisor involved in the incident were interviewed by a Board field officer in July 1982. The supervisor alleged that he never told the claimant to say that he had slipped on a wet floor. The Board determined that the claimant's injuries did not arise out of and in the course of his employment and declared an overpayment on the claim. The claimant did not reimburse the Board and a Small Claims action was commenced. The Provincial Court gave judgment for the Board.

As indicated earlier, it was not until 1986 that the claimant first applied for compensation under the *Criminal Injury Compensation Act*. The decision rendered on November 3, 1987 attached significant weight to the fact that the claimant had not reported the incident to the police for a number of years and that he had initially misrepresented what happened. The decision also stated that "[There] is now no corroboration of [the claimant's] story that he was a victim of an attack of any kind." On that basis his application was denied.

The decision dated September 23, 1988 which affirmed the rejection of the claimant's application also attached significant weight to the fact that he did not tell the truth at the outset and that he did not report the matter to the police for some years. The decision read in part as follows:

> . . . While one can have some sympathy for [the applicant] at the time of this incident he has admitted perpetrating a concocted story. His credibility is accordingly very limited to say the least. In view of the initial story and as one is now being asked to believe a completely different story, one has great difficulty in delineating fact from fiction in the case . . . .

In their findings and report, the Appeal Committee which heard both the claimant's and his co-worker's evidence concluded that the actions of the supervisor constituted an assault. The Appeal Committee considered whether the claimant's remark (i.e., calling his supervisor a "cow") was sufficient provocation to make him ineligible for compensation under Section 4 of the *Criminal Injury Compensation Act* and concluded that it was not.

The Appeal Committee discussed the claimant's application for workers' compensation as follows:

> . . . The committee concluded that [the claimant] would have been significantly intimidated by the situation of his three supervisors demanding that he report his injury as a compensation matter from slipping on ice. This conclusion was confirmed by [his co-worker] who told the committee that young employees at [the employer's] restaurants are not in a position to question the judgement and orders of their supervisors or manager. In virtually every situation they would respond to a demand without question.
>
> The action therefore by [the claimant] to follow through with his application for workers' compensation was not one which the committee would condone but is one which, given the circum-

> stances, would be an expected reaction from a 16 year old youth who is only a few months into his first job.

Regarding the corroborating evidence of the co-worker, the Appeal Committee stated that it was clear to them that the claimant and the co-worker were not ongoing friends and had little contact with each other over the years other than in connection with the 1981 incident. The Appeal Committee found the claimant's evidence credible.

The Appeal Committee pointed out that, in workers' compensation terms, the claimant's disability had been assessed at 2% of a totally disabled person. It concluded that the compensation which should be awarded to the claimant should be in excess of $100.00. This was in reference to the limitations to receiving compensation set out under Section 5 of the *Criminal Injury Compensation Act*.

The commissioners' decision of October 3, 1989 overturned the Appeal Committee's findings and report on the basis that the incident amounted to horseplay. The commissioners told the claimant:

> . . . it should have occurred to you that calling [the supervisor] a "cow" would result in a bit of horseplay, and while you may not have anticipated that your arm would be broken, you should have anticipated some sort of action or response from [the supervisor].

Hence, the commissioners reasoned that, within the spirit of Section 4 of the *Act*, even if the claimant was technically a victim of crime, the circumstances did not support an award of compensation for criminal injury. However, in light of the age of the claimant at the time of the incident and the actions of his employer, the commissioners waived the outstanding overpayment for benefits which the claimant was paid under the *Workers Compensation Act*.

Analysis

The first question that needs to be addressed is whether the commissioners had the jurisdiction to review the Appeal Committee's findings. Internal Board memos as well as the appeal administrator's letter to the claimant dated July 7, 1989 clearly indicate that it was the Board's view (i.e., the commissioners' view) that the Appeal Committee's findings and report merely constitute an advisory opinion which may or may not be followed by the Board. In other words, according to this view, the findings have no decisive effect by themselves and they need affirmation by the Board to become effective.

The Board's view as to the effect of the Appeal Committee's findings is based on a particular interpretation of the word "may" in Section 22(2) of the *Criminal Injury Compensation Act*. Under this provision, the Appeal Committee "shall review" the decision of the Board officer upon request of the victim, a dependent of the victim, or the attorney general. That same provision stipulates that the Board "may act," not "shall act," upon the findings and report of the Appeal Committee. The Board interpreted this to mean that it was in no way bound by the findings and report, implying that the word "may" expresses a permission and not a duty.

However, the wording of Section 22(2) does not necessarily lead to the conclusion that the commissioners had the jurisdiction to review the Appeal Committee's findings and report. In statutory interpretation, the difference between "may" and "shall" is not always clear cut. Professor Driedger explained in his text *Construction of Statutes* (Toronto: Butterworths, 1983) at p. 14:

> Each case must be decided on its own facts and, as has been frequently said, no general rule can be laid down. It would appear, however, the where the intention is merely to relieve the custodian of the permission or power of liability for its exercise, the word *may* will usually be regarded as discretionary only. Thus, provisions that a peace officer *may* enter, search, seize, or arrest, or that a company *may* lend money to a director or purchase its own shares, or that a landlord *may* enter the premises, or that the payment *may* be made out of the Consolidated Revenue Fund, would normally be regarded as discretionary only and not imposing a duty, as in the *Falconbridge* case. Where, however, the provisions are for the benefit of the public, as in the *Clarkson*, case, a duty to do the permitted act or to exercise the power granted may arise.

Numerous judicial decisions indicate that, while the word "may" used in a statute confers a power upon somebody to do something, the exercise of that power may be discretionary or obligatory, and this must be determined from an interpretation of the statute. Relevant factors in statutory interpretation include the context in which a term is used and the characteristics of the body entrusted with the administration of the statute.

The use of the word "may" in criminal compensation legislation proceeds from the theory that criminal compensation payments are *ex gratia* — that is, are awarded as a matter of grace and not because there is legal entitlement. In practice, however, this theory makes little difference to claimants since compensation is paid as a matter of course to all those who fall within the scope of the compensation schemes. Hence, the use of the word "may" in the provision empowering the Board to act upon the findings and report of the Appeal Committee does not necessarily indicate that the report and

findings only amount to an advisory opinion without any decisive effect by themselves. The use of this word is not specific to the provisions dealing with the appeal system. The use of the word "may" in Section 22(2) is simply in keeping with the rest of the statute; all the provisions in the statute which empower the Board to make payments to victims of crime use the term "may" [see, for example, Sections 2(3), 2(4)].

The statutory provisions dealing with the manner of payment of compensation awards [see Section 3] and those dealing with interim payments [see Section 9] mention expressly "the board may, *in its discretion* . . . [emphasis added]." A reasonable inference is that, within the context of the statute, there is a difference in meaning between the word "may" used on its own and the word "may" used in conjunction with the phrase "in its discretion." Where this phrase is absent, the word "may" would appear to imply a duty to exercise the power conferred.

The statute confers upon the Appeal Committee the power to inquire into, hear and *determine* whether any person is entitled to compensation under the legislation [see Section 22(4) and Section 20(2)(h)]. The power to determine a person's entitlement to compensation appears to exceed an advisory opinion.

I note that, prior to 1974, like the criminal injury compensation legislation, the workers' compensation legislation had provided that "the Board may act upon the findings and report of the Board of Review." However, in 1974, an amendment to the workers' compensation legislation made it mandatory for the Board to reconsider every board of review decision which did not conform to the initial adjudication [see Section 76(B)(3) of the *Workmen's Compensation Act*; R.S.B.C. 1968, c. 59 as am. by Section 43 of the *Workmen's Compensation Amendment Act*, S.B.C. 1974, c. 101 later to become Section 90(3) of the *Workers Compensation Act* and eventually repealed in 1986]. No such amendment to the criminal injury compensation legislation was made although the appeal system under this legislation was also revamped in 1974.

If the legislative intent had been that the Appeal Committee's findings and report amounted only to a recommendation, a provision similar to the old Section 90(3) of the *Workers Compensation Act* would have helped clarify this intent. That the legislature did not introduce such a provision, when it was particularly timely for it to do so, raises doubts as to whether the purpose was to create an appeal body with only advisory functions.

A tribunal necessarily has the authority to decide whether a matter before it comes within its jurisdiction. It must decide what limitations there are on that authority. It is doubtful that the legislation intended the commissioners to have the power of reconsideration which they assumed in this case. In accepting to reconsider the case before me, the commissioners were opening a door to the Board to self-initiate

a referral to itself, if it did not agree with the findings of a body it had itself appointed. The appearance of the word “may” in Section 22(2) of the *Act* is not sufficient to legitimate this process.

Once a question is classified as one of jurisdiction, it does not matter whether an error as to such a question is defensible or not unreasonable, or on the contrary is excessive, blatant or patently unreasonable. Such an error, whether slight or serious, is fatal to the decision.

I conclude that the commissioners erred in accepting to review the Appeal Committee’s findings of June 7, 1989. These findings must stand and the Board has a duty to act upon them.

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

WORKERS' COMPENSATION
REPORTER

Decision of the Appeal Division

Number: 92-1751
Date: November 3, 1992
Panel: Thomas Kemsley
Subject: Section 19(1) and the *Charter of Rights*

This is the decision on a widow's appeal from the findings of the Workers' Compensation Review Board dated September 27, 1990. The appellant's husband was killed in the course of his employment in April 1975. She received compensation in the form of a "widow's pension" under the *Workers Compensation Act*. Those monthly payments began in 1975. In 1989, those benefits were terminated on the basis that she was, and had been since 1981, living with Mr. S. as "man and wife." Section 19(1) of the *Act* provides:

> 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 . . . .

On this appeal, the appellant's counsel, submitted that Section 19(1) is contrary to the *Canadian Charter of Rights and Freedoms*, that Section 19(1) cannot operate retroactively to remove rights that vested in 1975, and that the facts do not support the conclusion that the appellant and Mr. S. were living together as "man and wife."

The *Canadian Charter of Rights and Freedoms*

Counsel argued that Section 19(1) of the *Act* is contrary to Section 2(d) and Section 15(1) of the *Charter*.

(a) Section 2(d)

Counsel stated that Section 2(d) of the *Charter* guarantees the right of freedom of association without sanction. He stated that Section 19(1) infringed on the appellant's freedom of association as it discontinued her benefits solely because she cohabited with Mr. S. Counsel cited no cases or other authority for these arguments.

I disagree that Section 2(d) of the *Charter* guarantees the right of freedom of association without sanction. It recognizes that people have a right of association, but they may be subject to both benefits and costs as a consequence of the associations they choose. This is clear in court cases that, for example, have not allowed union members to take the benefits of unionization without the costs. It is a common consequence of a marriage or common-law relationship that certain rights, for example — financial support and property rights, are altered. That does not make various statutory provisions regarding financial support and sharing of property contrary to Section 2(d) of the *Charter*. It is the sanctions that are designed to restrict the freedom of association that are contrary to Section 2(d) of the *Charter*.

In the *Workers Compensation Act*, a common-law relationship or a marriage can create new entitlement to benefits under Section 17 and can cause previous entitlement to benefits to be lost under Section 19. Section 19 is not intended to interfere with the right to remarry or cohabit as "man and wife." It recognizes those relationships and adjusts a person's status for workers' compensation purposes accordingly. In the letter that the appellant received informing her of the termination of her benefits, she was also told that her relationship with Mr. S. would appear to make her eligible for benefits under Section 19 of the *Act* if Mr. S. were killed while in the course of his employment. This recognized that, for workers' compensation purposes, the appellant had ended one relationship and entered another. I cannot find that Section 19 of the *Act* infringes on the appellant's fundamental freedom of association.

Further, it is not clear to me that a common-law relationship comes within the meaning of "association" as found in Section 2(d) of the *Charter*. The fundamental freedoms guaranteed in that section have a public nature to them and it may be that "association" refers more to organizations which pursue activities or goals in common, than to family-type relations. However, it is not necessary for me to resolve that as I have already found that Section 19(1) of the *Act* does not infringe on the appellant's freedom of association.

(b) Section 15(1)

Counsel stated that Section 19(1) of the *Act* infringes Section 15(1) of the *Charter* as it discriminates on the basis of sex and marital status. Again, he cited no cases or other authorities for these arguments.

In regard to discrimination on the basis of sex, counsel stated that Section 19(1) is discriminatory as it removes the widow's benefits only if she lives with a man, but not if she lives with a woman. This point really seems to raise the issue of discrimination on the basis of sexual orientation, rather than sex (i.e. gender).

The *Workers Compensation Act* reflects a decision by the legislature to grant benefits to spouses of workers killed in the course of their employment. The *Act* has provided that entitlement to these benefits will arise whenever the surviving spouse was legally married or living in a common-law relationship with the deceased worker. The *Act* also has provided for such benefits to be removed if the surviving spouse remarries or lives as "man and wife" without remarrying. Both of these provisions have been based on the traditional model of marriage or common-law relationships existing between two people of the opposite sex.

Clearly it is within the power of the legislature to grant and take away benefits on the basis of a legal marriage or a common-law relationship. Various statutes do that for different purposes. Recently, some of those statutes have been challenged for being under-inclusive — that is, for not including same-sex partners in the particular legislative scheme. However, the point of those challenges has been to try and make the statutes more inclusive — that is, to include same-sex partners. Statutes, like the *Workers Compensation Act*, which do not give same-sex partners the same benefits as opposite-sex partners may discriminate against same-sex partners on the basis of sexual orientation. However, I am not aware of any cases which say that such statutes discriminate against opposite-sex partners when they exclude same-sex partners. Sections 17(11) and 19(1) of the *Workers Compensation Act* may be under-inclusive, but I cannot find that Section 19(1) discriminates against the appellant for removing her widow's benefits for living with a man as "man and wife."

In regard to discrimination based on marital status, I cannot find any discrimination. As set out above, marital status can give rise to entitlement to or termination of benefits under the *Act*. It should be noted that the *Act* attempts to treat living common-law in the same way as a legal marriage. It might be discriminatory to do otherwise. Here, the appellant's widow's benefits were obtained because of her marital status. They have now been removed because of another relationship. I do not see how this discriminates on the basis of marital status.

In conclusion, I find that Section 19(1) is not contrary to Section 2(d) or Section 15(1) of the *Canadian Charter of Rights and Freedoms*.

Vested Rights

Counsel argued that the appellant's benefits vested in 1975, subject to the *Act* at that time. He stated that in 1975 the *Act* provided for the termination of widow's benefits only on remarriage and that it was an amendment to the *Act* in 1985 that first provided for those benefits to be removed if the widow was living with a man in the relationship of "man and wife." He said this 1985 amendment could not operate retroactively to remove her benefits.

The provision in the *Act* that removes a widow's benefits for living with a man as "man and wife" did not first appear in 1985. A similar provision was found in Section 81(1) of the 1973 consolidation of the *Act*, and provided for benefits to be discontinued or suspended. In 1974, Section 81(2) was added to provide for termination of such benefits. In the 1979 Revised Statutes those two sections were re-numbered as Sections 98(1) and 98(2). In 1985, Sections 98(1) and 98(2) were repealed and they essentially were consolidated into a new Section 19(1), along with the provisions regarding termination of benefits on remarriage. Thus, provisions in the *Act* for termination of widow's benefits where the widow lived with a man as "man and wife" existed at the time the appellant received her widow's pension in 1975.

Further, benefits under the *Act* do not vest as argued by counsel. The Board's statutory power to reopen, rehear and redetermine any matter at any time allows it to raise or lower benefits at any time. This was made clear in the case of *RE Workmen's Compensation Act — RE Chenoweth* (1963), 45 W.W.R. 364 (B.C.S.C.). While a recent decision of the Appeal Division found that the Board could not adjudicate retroactively, that referred to taking away benefits already paid. It is not retroactive adjudication to cancel future benefits, as was done here.

Thus, the Board did not adjudicate retroactively, and it had the statutory authority to reconsider the appellant's entitlement to future benefits at any time on the basis that she was living with a man as "man and wife."

Relationship of "Man and Wife"

Counsel argued that the relationship of the appellant and Mr. S. was more one of friendship and companionship than one of "man and wife." He stated that there was very little financial commonality in the relationship.

While Section 17 of the *Act* grants benefits to a surviving spouse on the basis of status (that is having been married to or living together common-law with a deceased worker) and dependency or contribution of support, Section 19 refers only to status as the basis for terminating benefits. The language of Section 17 and Section 19 is quite different in that regard and I cannot interpret Section 19 as requiring financial dependency or financial support before benefits can be terminated. This difference between Section 17 and Section 19 could result in financial hardship. However, that is how the *Act* and the *Rehabilitation Services and Claims Manual* are structured and I see no basis on which I can override the *Act* or rewrite the published policy of the governors.

There is no definition in the *Act* or the *Rehabilitation Services and Claims Manual* of the words "the relationship of man and wife." Item #57.00 of the *Rehabilitation Services and Claims Manual*, in defining "common-law wife" or "common-law husband," refers

to “living together in a regular and established way, enjoying sexual relations in a common household.” Cases in the family law area indicate that no one factor is determinative in deciding whether a “common-law” relationship exists. For workers’ compensation purposes, it is important to focus on objective factors, as the Board must be able to determine if benefits should be terminated.

Here I find that most of the objective factors establish that the appellant and Mr. S. were living together in a regular and established way, enjoying sexual relations in a common household. They had cohabited and shared a bedroom and a bed since 1981. They shared various costs. Mr. S. did not pay rent, but he did chores around the house. They went to family events together, they travelled together, and they had sexual relations. For some period of time, the appellant and her daughter were on Mr. S.’s medical plan. The appellant, on the advice of counsel, refused to give many other details of their life together to the Board’s field officer. I assume from the description of their relationship that they did many regular things together, such as eating, cooking, cleaning, socializing, etc. I also assume that they shared the costs of these activities. While there may have been little financial commonality, I do not find that factor to be determinative. They both contributed to the common household. One may have contributed more than the other in a financial way, but that is not uncommon in marriages and common-law relationships.

I am satisfied that the appellant and Mr. S. were living in the relationship of “man and wife” for the purposes of Section 19(1) of the *Workers Compensation Act*. As noted above, the claims adjudicator’s letter that notified the appellant of the termination of her benefits also said that her relationship with Mr. S. would appear to make her eligible for widow’s benefits under the *Act* if he were killed while in the course of his employment. I agree with that statement. The appellant’s relationship with Mr. S. met the requirements of Sections 17(11) and 19(1) of the *Act*.

IN CONCLUSION, I DENY THE APPEAL.

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

WORKERS' COMPENSATION
REPORTER

Decision of the Appeal Division

Number: 92-1553
Date: September 15, 1992
Panel: Sonja Hadley
Subject: Section 96(2) — Pleural Plaques

A letter dated June 21, 1991 was received from counsel for the worker, requesting reconsideration of the former commissioners' decisions of November 26, 1990 and February 18, 1991 pursuant to Section 96(2) of the *Workers Compensation Act* (the *Act*).

The worker, a lifetime non-smoker, was exposed to asbestos while employed from 1969 to 1986. The results of a Board medical examination were that the worker had pleural hyaline plaques due to exposure to airborne asbestos dust. There was, however, no clinical, radiographical or physiological evidence of the worker having asbestosis or a respiratory impairment. The adjudicator denied the worker's claim for compensation on the basis that the worker had not developed an asbestosis condition and there was no medical information to support that his respiratory complaints related to his work activities. He also stated that pleural hyaline plaques, although evidence of exposure to airborne asbestos dust, do not constitute an industrial disease under Section 6 and are therefore not compensable.

On appeal, the Review Board found that the worker suffers from a condition diagnosed as asbestos-related pleural disease. It sent the worker's claim back to the claims adjudicator for referral to the commissioners in accordance with the policy contained in Item #25.24 of the *Rehabilitation Services and Claims Manual* (the *Manual*), which pertains to recognition of diseases in individual cases.

The commissioners, in their decision of November 26, 1990, stated, in part:

> The Commissioners have decided not to recognize pleural hyaline and calcified plaques as an industrial disease in regards to claims in general. They accept that this condition may result from asbestos exposure and therefore could be an occupational one. It may also be that, as [counsel] argues, it could be considered a "disease", but this in itself does not warrant its being recognized as an "industrial disease." They feel that, since the condition does not normally

> cause impairment, there is generally no need for compensation to be paid . . . If a particular worker can establish that his plaques are causing him disability or require treatment, it would always be open to the Commissioners to recognize his condition as an industrial disease in his particular case under Section 1.
>
> The Commissioners do not consider that the Board's requirement that there be disablement before an industrial disease will be recognized in an individual is contrary to the *Act*. The *Act* does not list criteria that must be considered when such recognition is reviewed. The Commissioners do not believe that a claim should be accepted for an industrial disease in a specific case when no benefits are payable. As noted above, wage loss or pension benefits are not normally payable and most workers with pleural plaques have normal respiratory functioning that does not require treatment. Thus medical aid benefits are not payable. As noted above, the Board will pay for the cost of investigating this type of claim regardless of whether it is accepted. Thus workers are not being deprived of any benefit that they might obtain if the Board accepted the claim.
>
> It is true that claims for diseases listed in Schedule B and recognized by regulation will be accepted even where there is no disablement. The Commissioners consider that a critical difference between pleural plaque claims and those other disease claims is that treatment is involved and medical aid benefits are payable.
>
> The Commissioners have considered whether your condition should be recognized in your particular case. They note from a review of the medical reports that while you receive medical attention it would appear that no treatment is being directed at your pleural plaques. They do not consider that recognition of your condition as an industrial disease is reasonable in these circumstances.

In a further letter dated February 18, 1991, the commissioners declined to reconsider their earlier decision. They stated, in part:

> . . . [Counsel] asserts that the Commissioners made an error in law and failed to follow the express terms of the *Workers Compensation Act*. He argues that subsection 6(1) of the *Act* requires the Board to accept a claim for medical aid in an industrial disease in a specific case where there is no disablement. He indicates that you seek

> payment of periodic medical aid as you regularly visit your respiratory specialist in order to have your condition monitored. He argues that the provisions in the *Act* for payment of medical aid only in the case of non-disabling industrial disease was intended to cover your situation.
>
> After having carefully reviewed the matter the Commissioners do not consider that the November 1990 decision warrants reconsideration. They do not accept [counsel's] contention that an error in law was committed. Subsection 6(1) deals with cases where a worker has an industrial disease. Only if it is recognized that a disease is an industrial disease, do the provisions of subsection 6(1) come into play, namely that medical aid may be paid where there is no disablement. Nothing in subsection 6(1) requires acceptance of your case as an industrial disease.
>
> In his 09 November 1988 report Dr. D, your specialist, indicated that you had pleural plaques. The Commissioners consider that it is significant that he indicated that he had not arranged a follow up visit and commented that he would help out in the future if difficulties arose . . . .

In his application to the Appeal Division, counsel submits that the prior commissioners made an error in law by failing to comply with Sections 1 and 6(1) of the *Act*. It is argued that the *Act* does not permit the different treatment of industrial diseases in individual cases and other claims of compensation for industrial diseases. It is argued that it is a mistake of law for the commissioners to conclude that, since the worker's condition does not normally cause impairment, there is no need for compensation to be paid, or by implication, for the claim even to be accepted. It is further submitted that all of the medical reports describe the worker's condition as a disease and that it is as a result of exposure to asbestos; and that there is no question that he was exposed to asbestos at work. It is submitted that the only "logical description" of the worker's condition is that he has an industrial disease. Further, it is stated that "It is certainly medical aid for [the worker] to see his respiratory specialist on a regular basis and to receive that doctor's opinion as to his condition."

The employer was given an opportunity to respond, but declined to do so.

Analysis

In considering this application, the first question is whether the prior commissioners' decisions were based upon an error of law. I am guided by a decision of the chief

appeal commissioner (Appeal Division Decision No. 92-0818 in the *Workers' Compensation Reporter*, Vol. 8(3): p. 211) in which she decided that, in general, the proper standard of review is that the decision must be so patently unreasonable that it cannot be rationally supported by the relevant legislation.

In applying this standard to the commissioners' two decisions before me, it is first necessary to review the relevant sections of the *Act*. They are:

Section 1:

> "industrial disease" means any disease mentioned in Schedule B, and any other disease which the Board, by regulation of general application or by order dealing with a specific case, may designate or recognize as an industrial disease, and "disease" includes disablement resulting from exposure to contamination;
>
> Section 6(1) Where
>
> (a) a worker suffers from an industrial disease and is thereby disabled from earning full wages at the work at which he was employed or the death of a worker is caused by an industrial disease; and
>
> (b) the disease is due to the nature of any employment in which the worker was employed, whether under one or more employments,
>
> compensation is payable under this Part as if the disease were a personal injury arising out of and in the course of that employment. Medical aid may be paid although the worker is not disabled from earning full wages at the work at which he was employed.

In their decision of November 26, 1990, the former commissioners accepted that the condition of pleural plaques may be an occupational one and may be considered a disease. However, they declined to recognize it as an industrial disease generally because the condition does not normally cause impairment and therefore there is generally no need for compensation to be paid. They referred to the Board's "requirement" that there be disablement before an industrial disease is recognized in an individual case. They further considered that this requirement was not contrary to the *Act* because the *Act* does not list criteria that must be considered when such recognition is reviewed. They further found that the worker was not receiving medical treatment for his condition and so no benefits were payable.

In the decision of November 26, 1990, the former commissioners, in deciding whether to recognize an industrial disease under Section 1, set up as a relevant criterion that a disease be disabling or that treatment be required *before* an industrial disease in an individual case will be recognized. The worker's disease is not disabling but he seeks acceptance of his claim and medical aid with regards to treatment for pleural plaques.

In coming to the conclusion that there was no need for compensation to be paid, the commissioners stated:

a) the Board could pay the medical costs of investigating a condition without recognizing it as an industrial disease;

b) the worker was not receiving treatment for his pleural plaques and;

c) the worker was seeking ongoing medical attention for other respiratory conditions.

The commissioners distinguished medical treatment from medical attention. They questioned whether the worker's pleural plaques condition, rather than his other respiratory conditions, was the reason for his seeking ongoing medical attention.

In declining to reconsider their decision, the commissioners noted that Section 6(1) deals with cases where a worker has an industrial disease. They reasoned that *if* it is recognized that the worker has an industrial disease, *then* medical aid may be paid where there is no disablement. They further noted that Section 6(1) did not *require* them to accept the worker's condition as an industrial disease.

Findings

1. Error of Law

Decision No. 348, *Workers' Compensation Reporter*, 1982, Vol. 5: p. 127 entitled "Re Alcoholism" establishes two minimum requirements before a condition can be recognized as an industrial disease under the *Workers Compensation Act*. These are:

1) The condition is a disease.

2) There is sufficient evidence that a person's employment can have causative significance in causing the condition.

In that case, the commissioners concluded that alcoholism should not be recognized as an industrial disease, both because it is not a "disease" within the meaning of the *Workers Compensation Act* and because there is insufficient evidence that a person's employment has causative significance in producing it.

It is clear from Decision No. 326, *Workers' Compensation Reporter*, 1980, Vol. 5: p. 78 that the designation of an "industrial disease" in an individual case depends on evidence that the "disease" was caused by employment. It is stated that recognition of a disease is restricted to a particular claim when, though the evidence in that claim supports a work relationship, the evidence is insufficient to support a more general recognition by regulation.

The commissioners recognized that pleural hyaline and calcified plaques may be a disease. The commissioners accepted that pleural hyaline and calcified plaques may result from asbestos exposure. However, they stated that this, in itself, did not warrant it being recognized as an "industrial disease." The basis for this conclusion was that the worker was not disabled as a result nor did he require treatment. In this case, the medical evidence is consistent that the presence of pleural plaques is due to occupational exposure to airborne asbestos dust.

The commissioners, in deciding whether to recognize the worker's pleural hyaline plaques as an industrial disease under Section 1 of the *Act*, clearly considered as determinative their conclusion that the worker's condition did not require treatment. The definition of "industrial disease" under Section 1 does not specify the considerations that may be relevant in an individual case. The commissioners, although recognizing pleural plaques may be a disease and result from asbestos exposure, found that such facts by themselves were insufficient to require recognition of the condition as an industrial disease. The consideration of whether treatment is required in deciding whether to recognize an industrial disease is a viable interpretation of Section 1. I do not agree that it is the best or even a reasonable interpretation of the *Act*. It is viable, however, and so cannot be characterized as patently unreasonable. One of the difficulties with the interpretation adopted by the commissioners is that it combines elements of the decision-making process under Section 1 (recognition of a disease) with Section 6(1)(b) (determination of benefits payable). This was contrary to published policy in that these functions were to be separated and performed by the commissioners (Section 1) and the adjudicator (Section 6(1)).

However, accepting that statutory interpretation as viable, I must also consider whether the decision that no treatment was required is viable.

The commissioners made a number of objections to paying for the monitoring of the worker's condition. They considered it significant that Dr. D, in his November 1988

report, had indicated that he had not arranged a follow-up visit and commented that he would help out in the future if difficulties arose.

However, in reviewing Dr. D's reports of October 17, 1988 and November 9, 1988, it is clear that Dr. D was primarily investigating the worker's ongoing symptoms of rhinitis. Dr. D thought complete pulmonary function tests and a methacholine challenge study should be done "to further document the case." As a postscript to his October 17, 1988 letter, Dr. D added that the worker's chest X-ray showed pleural plaques. In his next report of November 9, 1988, Dr. D stated that the pulmonary function tests were within normal limits, and a methacholine challenge test failed to reveal evidence of airway hyperactivity. He then went on to state that there was no support for a "disability claim" on the basis of respiratory limitation secondary to an occupational exposure to some offending inhaled material such as asbestos. He concluded by stating that he had not arranged a follow-up visit, but would certainly want "to help out in the future if difficulties arise." Dr. D did not make any recommendations whether the worker should have ongoing chest X-rays and lung function tests for his pleural plaques condition.

On the other hand, Dr. E, in her report of January 23, 1989, stated that the worker should have annual chest X-ray and lung function tests, and avoid future exposure to asbestos. She was referring specifically to the worker's exposure to asbestos and pleural plaques condition.

Further, Dr. F, in a report dated September 17, 1984, referred to the worker's concern regarding developing lung cancer because of his exposure to asbestos and other chemical substances at work. He stated:

> This man seems somewhat over anxious with regard to his industrial exposures. It is, however, a little difficult to pat him on the back and tell him he is unlikely to develop carcinoma of the bronchus particularly since he tells me has has been exposed to other material which was removed . . . because it was highly carcinogenic. I would recommend therefore that he have a chest x-ray every two years or so and of course he should have further investigations should he become symptomatic.

There is evidence in the file that asbestos was removed from the [workplace], and therefore Dr. F's recommendation for chest X-rays would, to a large degree, be based on the fact that the worker had been exposed to asbestos.

Did the worker's regular visits to his respiratory specialist in order to have his condition monitored constitute required treatment?

Dorland's Medical Dictionary (24th Edition) defines "treatment" as "management and care of a patient or the combating of disease or disorder."

In this case, a normal part of the management and care of pleural plaques would be to have regular chest X-rays and lung function tests as recommended by Dr. E and Dr. F. Such management and care constitutes treatment within the broad discretion of Section 21 of the *Act*.

The presence of pleural plaques, in this worker's case, is due to occupational exposure to airborne asbestos dust. Certainly the worker and Dr. E, a respected specialist in this area, had a reasonable concern that the presence of hyaline pleural plaques could adversely affect the worker's health. Indeed, the worker's attending physician recorded on February 7, 1989 that the worker "has a lung condition (pleural plaque) which is caused by asbestos, and he *must not* return to a risky environment such as the [employer's workplace] (at high risk for fibrosis and cancer)." It is presumably because of such potential risks that medical monitoring was recommended by two respiratory specialists. The medical monitoring of the worker, arising out of this concern, is necessary medical care.

There is no question in this case that the worker's condition has been caused by his long-term occupational exposure to asbestos. Regular medical monitoring is a reasonable measure to take in light of this disease. I find that the recommended medical monitoring constitutes required medical treatment.

In view of this conclusion, the commissioners' decision that no medical treatment was required in the worker's case was patently unreasonable. Medical monitoring was specifically recommended by two respiratory specialists. Dr. D's report, relied on by the commissioners, did not make any specific recommendations regarding medical monitoring. He stated only that he had not arranged a follow-up visit. By relying on a report which did not specifically give an opinion as to whether medical monitoring was required for the worker's pleural plaques condition, and making no mention of two reports which specifically recommended such monitoring, a patently unreasonable result has been produced. This constitutes an error of law.

2. Reconsideration

In view of my conclusion that the former commissioners' decisions were based upon an error of law, I have proceeded to reopen, rehear and redetermine the matter under Section 96(2) of the *Act*.

The first question is what is a disease. There is no definition of "disease" in the *Act*. Decision No. 86, *Workers' Compensation Reporter*, 1974, Vol. 1: p. 317, in distinguishing a disease from an injury, states:

> . . . There is no exhaustive definition of "disease" in the *Act*, nor do we find very clear definitions in medical or general dictionaries. In any event, dictionary definitions do not regard "disease" as necessarily involving infection, and they seem to include in a general way bodily disorders or unhealthy conditions of more than momentary duration and of non-traumatic origin.

The *Concise Oxford Dictionary* defines "disease" as: "an unhealthy condition of the body (or a part of it) or the mind; illness, sickness."

Pleural plaques occur as discrete, raised, grey-white lesions distributed on the inner surface of the rib cage and on the diaphragm. In general, these plaques are not associated with clinical and functional abnormalities. In the worker's case, he has chest X-ray and C.T. scan evidence of pleural plaques, which has been recognized as a sign of exposure to asbestos. According to the above definitions, this would constitute a disease.

The Board's medical referee for the pneumoconioses, after an examination of the worker on January 17, 1989, concluded that the worker had pleural hyaline plaques due to occupational exposure to airborne asbestos dust. He found no respiratory impairment. There was no clinical, radiographical nor physiological evidence of the worker having asbestosis. As found by the Review Board, the medical reports from various physicians all agree that the worker had exposure to airborne asbestos dust most probably through his employment.

There is ample evidence to conclude that the worker's disease was caused by his exposure to asbestos at his employment. Further, the recommended medical monitoring of the worker's disease constitutes required medical treatment. Accordingly, his disease is an industrial disease in an individual case.

As I have found that treatment is in fact required, medical aid benefits are payable.

Conclusion

The commissioners' decisions of November 26, 1990 and February 18, 1991 are set aside. The worker's condition of hyaline pleural plaques is recognized as an industrial disease in this particular case.

The medical monitoring of the worker's industrial disease constitutes required medical treatment and should be paid by the Board.

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

WORKERS' COMPENSATION
REPORTER

Workers' Compensation Board of British Columbia Grants and Awards Policy

Date: **October 26, 1992**

INTRODUCTION

Grants and Awards are specifically authorized in Section 71(4) of the *Workers Compensation Act* which provides for educational programs relating to the Board's general operations and responsibilities, and for that purpose may provide rewards for bravery in rescuing or attempting to rescue a worker from serious injury or death. The Board may also undertake or support research in matters relating to the Board's responsibilities under the *Act.*

Without excluding rewards for bravery, the primary purpose of this program is to encourage the development of new ideas and proposals to prevent occupational injury and disease amongst workers in B.C. For those workers who sustain an occupational injury or disease, it will encourage the development of improved methods of treatment and rehabilitation.

The Board prefers, but is not limited to, the funding of research, education and training activities which have a direct influence on the health and safety of workers coming under its jurisdiction.

I GRANTS

A Purposes

The W.C.B. will consider granting financial support for the following purposes which are consistent with the W.C.B. mission and priorities of the governors:

1) Educational or training programs related to occupational safety and health, rehabilitation and compensation in B.C., *or*

2) Research programs or projects related to occupational safety and health, rehabilitation and compensation in B.C., *or*

3) Position grants or scholarships to support personnel at educational or research institutions, including teaching hospitals, and organized groups representing workers or employers, benefiting occupational safety and health, rehabilitation and compensation of workers in B.C., *or*

4) Specific equipment necessary for research into occupational safety and health, rehabilitation and compensation, *or*

5) Workshops or symposia to be held in B.C. which are directly related to occupational safety and health, rehabilitation and compensation and symposia forming part of major inter provincial, national or international congresses to be held in Canada which are directly related to B.C. occupational safety and health, rehabilitation and compensation, *or*

6) Core funding for research or educational or training or teaching programs at post-secondary level related to occupational hygiene, occupational safety, occupational disease, or injury and rehabilitation, *or*

7) Other programs or projects of exceptional benefit to the activities or responsibilities of the W.C.B. A request for funds approaching or exceeding the W.C.B. budget for grants and awards will be included in this category.

Where a need for any of the above activities is apparent to the W.C.B. or where the need is made apparent to the W.C.B. by outside sources, the W.C.B. may publicize the need for or request proposals for carrying out the activity in question. When received, such proposals will be treated as applications under this Grants and Awards Policy.

B Eligibility

Applications from the following will be considered:

1) Universities, teaching hospitals, technical schools, research centres and other institutions of post-secondary education, including faculties and departments within such institutions, *or*

2) Individuals having recognized professional qualifications and experience in the field appropriate to the proposal and who hold academic appointment at a Canadian university, *or*

3) Other applicants including organized groups representing workers or employers presenting proposals which offer substantial direct benefits to the activities or responsibilities of the W.C.B.

C Initial Application for Financial Support

The Board is prepared to receive a “letter of intent” from an applicant who is unsure of the Board’s interest in funding a project or program. The letter should be submitted to the Office of the President, administrative assistant to the president, and include a brief description of the proposal, its benefit to the workers of B.C., and an estimate of the total funding to be requested. The Board will indicate to the applicant, within six weeks of receipt of the letter, its level of interest in the proposal, so that the applicant can then decide on whether to proceed with an application.

The initial application for a first-time grant must be received by the W.C.B. before August 1 in the calendar year prior to the year of the grant requirement. Applications received after that date will not be considered unless they are for amounts less than $2,000 and the W.C.B.’s budget for financial support has not been exceeded.

Applications must be submitted to the Office of the President, administrative assistant to the president.

Incomplete applications may not receive full consideration. In order to be considered complete, applications must include:

1) For Educational and Training Programs

a) statement of purpose
   i) short-term objectives
   ii) long-term objectives

b) documentation of need

c) proposed course curriculum

d) method of evaluating progress during the program and at completion of the program

e) appendices
   i) applicable literature references
   ii) job descriptions
   iii) curriculum vitae of each professional working in or for the program
   iv) detailed budget proposal broken down into quarters, or, where more appropriate, semesters
   v) alternate sources of financial support considered or asked to partially support program

vi) approval of the head of the faculty, university or other employing institution

2) For Research Projects or Programs

A program is a research project or series of research projects lasting two years or more.

a) statement of purpose
   i) short-term objectives
   ii) long-term objectives

b) description and definition of problem

c) documentation of need

d) method or design description

e) method of evaluating progress during the project and at completion of the project

f) appendices
   i) applicable literature references
   ii) forms and questionnaires to be used in the project
   iii) letters of support from worker and management representatives when workers are to be studied
   iv) job descriptions of positions to be funded
   v) curriculum vitae of each professional working in or for the project
   vi) detailed budget proposal broken down according to personnel, equipment and services
   vii) alternate source of financial support considered or asked to partially support program
   viii) approval of the head of the faculty, university or other employing institution

g) where human subjects are involved in the research which requires exposure to a hazard, the W.C.B. will require evidence of ethical approval of the research project by the ethics committee or head of the institution

h) confidentiality of information

The Board requires a commitment from the applicant, that where a study requires the gathering of personal or confidential information from workers or a workplace, that information will be held in confidence by the researchers and will only be released to other parties:

i) with the informed consent of the individual subject, or
ii) in the case of a work process with the informed consent of the owner, or
iii) as required by law.

i) The Board recognizes that data gathered by researchers and the original report is owned by them. Data from an unpublished report will be quoted in its entirety or in part only with the consent of the author. The Board may however publish a summary of the report. Data from reports published in a scientific or trade journal or book will be quoted by the Board, but will include a reference to the source of the original publication.

3) For Position Grants or Scholarships

a) statement of purpose

b) documentation of need

c) job description for position being supported and/or course curriculum for scholarship grant

d) budget proposal, including benefit plans and any personal income which the holder of such a grant or scholarship may generate directly from the position being funded

e) alternate sources of financial support considered or asked to partially support program

f) approval of the head of the department, faculty or other employing organization

4) For Specific Equipment

Note: Any single item of equipment valued at less than $20,000 and used in an educational or training program or a research project for which financial support is also being requested may be included in the grant application for

that program or project. All other equipment, i.e., any single item of equipment valued at over $20,000 and any equipment not to be used in an educational or training program or a research project for which financial support is also being requested requires a separate application.

a) statement of purpose

b) documentation of need

c) technical data sheet

d) the name and address of:
   i) manufacturer
   ii) supplier
   iii) source of separate maintenance and repair service

e) who will operate the equipment

f) who will be responsible for its maintenance and safe operation

g) budget proposal, including
   i) capital cost
   ii) delivery and installation cost
   iii) maintenance and servicing cost

h) alternate sources of financial support considered or asked to partially support program

i) approval of the head of the department or faculty

5) For Workshops or Symposia

a) statement of purpose

b) documentation of need

c) brief biographies of the person responsible for organizing the event and of the major speakers

d) description of the size and background of the expected audience or participants

e) budget proposal, including total funds required and the amount requested from the W.C.B.

f) alternate sources of financial support considered or asked to partially support program

g) names of the other organizations expected to support the event

D Applications for Renewals of Financial Support

Financial support will normally be granted for a period of time not to exceed one year. Multi-year programs will receive special consideration by the Board of Governors. Renewal requests may be considered for educational or training programs, research programs and position grants or scholarships. Such requests must, however, be received by the W.C.B. before September 1 in the calendar year prior to the year for which the renewed grant is required.

Incomplete applications may not receive full consideration. In order to be considered complete, renewal applications must include:

1) For Educational or Training Programs

a) a detailed course curriculum and progress report, including number of graduates

b) an estimate of the date at which the W.C.B. funding will no longer be needed

c) a comparison of the proposed and estimated actual budget of the current year up to June 1 and a detailed budget proposal for the next year for which funding is requested

d) approval of the head of the faculty, university, or other employing organization

2) For Research Projects

a) an interim progress report

b) an estimate of the date at which the W.C.B. will not be requested to supply further financial support for the project

c) an estimate of the date of completion of the final report

d) a comparison of the proposed and estimated actual budget of the current year up to June 1 and a detailed budget proposal for the next year for which funding is requested

e) approval of the head of the faculty, university or other employing organization

3) For Position Grants or Scholarships

a) a report on the activities and performance of the incumbent of the position or scholarship-holder for the preceding year

b) documentation of need for the continuation of the grant or scholarship

c) any intended change in the job description or course curriculum since the previous application

d) a comparison of the proposed and estimated actual budget of the current year up to June 1 and a detailed budget proposal for the next year for which funding is requested

e) approval of the head of the department or faculty

E Assessment and Approval of Applications

Applications will be assessed on a competitive basis with preference being given to B.C. applicants where other qualifications and merits are substantially equal. The assessment criteria used will include the relevance of the proposal to the W.C.B.'s responsibilities under the *Act*, in particular, to the improvement of occupational safety and health, improvements in the management, rehabilitation and compensation of injured workers, the significance of the progress already achieved in the solution of the particular problem, the technical merit of the proposal, the competence of the applicant, and the cost to the W.C.B. and the likely return to industry on the investment. To assist the W.C.B. in its assessment, W.C.B. representatives may interview applicants or visit the educational or research facilities proposed to be used. The W.C.B. may also send applications for funding to experts of its own choice for evaluation.

The W.C.B. will make the details of individual applications available to the public after September 1 of the year submitted on request and will invite and evaluate submissions by interested parties before approving or rejecting the application in question.

Assessment of grants and approval for submission to the W.C.B.'s Executive Committee will be by:

1) Director of Medical Services Department
2) Director of Research and Standards Department
3) Director of Occupational Health Department
4) Controller
5) Where applicable, the director with special interest in the subject under consideration

The Executive Committee will make the final decision on the approval of grants with the exception of the following items which will be submitted to the Board of Governors for final approval:

1) Grants over $250,000
2) Grants payable over a period longer than one year

The Board of Governors will be provided with a list of funding requests and decisions of the Executive Committee, as soon as they are completed.

Funding will be available to successful applicants on March 1 of the year funding is due, or any subsequent date specified by the applicant and agreed to by the Board.

F Terms and Conditions of Financial Support

Where an application for financial support is approved, the W.C.B.'s Legal Services Department will draw up an agreement between the W.C.B. and the organization employing the applicant. The terms and conditions of the agreement may vary according to the purpose for which financial support is to be granted. Generally, however, the following terms and conditions will apply:

1) Financial support shall not be used to cover routine overheads and administrative costs, office furniture, interest on loans, entertainment or other costs not solely and directly related to the purpose for which funding has been granted, unless otherwise specified in the agreement

2) Any commitment incurred by the grantee in excess of the financial support agreed upon by the W.C.B. will not be the responsibility of the W.C.B.

3) The grantee will indemnify the W.C.B. against any claim arising out of a program or project for which the W.C.B. has provided financial support, except where that claim is covered by the B.C. *Workers Compensation Act*

4) Individuals paid from W.C.B. funding will not be regarded as W.C.B. employees

5) Any substantial change to the original proposal, for example, the budget, a substantial change in scope, character or activities, a change in a program or project director, or primary investigator, or an extension or postponement of a project or program, must be approved by the W.C.B.

6) Statements of disbursements must be provided throughout a program or project at intervals described in the agreement, but not exceeding one year, with a final statement of disbursements to be provided at the end of the program or project

7) Disbursement of funds are subject to financial and operational audit by the W.C.B. at any time during or after completion of a program or project. Where the program or project terminates earlier than anticipated or where for any other reason funds are left unspent, such funds will be returned to the W.C.B. by the grantee.

8) An interim report on progress against the planned program is required at intervals described in the agreement, but not exceeding one year

9) A final report will be required in all cases and the W.C.B. may withhold a proportion of the funding until satisfied that the terms of the original agreement have been met. The W.C.B. may send the final report to experts of its own choice for evaluation.

10) It is expected that the findings of a research project or program will be published in a recognized scientific journal

G Budget

The annual budget for grants and awards will be one half of one percent (0.5%) of the W.C.B.'s net administrative budget. The W.C.B. may consider exceeding the annual budget where a program or project of exceptional benefit to the activities or responsibilities of the W.C.B. is received.

H Evaluation and Implementation

The results and findings of all funded activities will be reviewed by the:

1) Director of Medical Services Department
2) Director of Research and Standards Department

3) Director of Occupational Health Department
4) Controller
5) Where applicable, the director with special interest in the subject being reviewed

and they will prepare a report to the Executive Committee detailing the results which the funded activity has achieved and the actions which the W.C.B. should take as a result.

II BRAVERY AWARDS

A Purpose

To provide public recognition for acts of bravery in which the rescuer risked his or her life or personal safety to save a person who is covered under the *Workers Compensation Act* from serious injury or death.

B Eligibility

1) Anyone is eligible for this award, except:
   — the rescuer should not be the cause of the emergency,
   — the actions were voluntary, and
   — the rescuer was not employed as a member of a rescue team.
2) The rescue attempt does not have to be successful to be eligible
3) The rescuer does not have to be a worker
4) Nominations for the award must be made within one year of the act of bravery

C Award Categories

Gold
Silver
Bronze

Each award in the "colour" designated is in the form of a medallion set in a small wooden stand and accompanied by a framed parchment award recording the date and brief description of the incident.

D Criteria for Deciding on the Level of Award Are as Follows:

1) **Gold medallion** — "For exceptional service in alleviating severe suffering or for rescue activities; to include particular circumstances when the personal hazard was extreme and obvious, involving risk of serious personal injury or death; there could be no turning back, yet the provocation to abandon the attempt was obviously great."

2) **Silver medallion** — "For exemplary service in alleviating suffering or for rescue activities, at the risk of serious personal injury or death, under circumstances where, once the attempt was undertaken there was considerable hazard involved even though the attempt could be abandoned."

3) **Bronze medallion** — "For service beyond the call of duty, in alleviating suffering or for rescue activities, at the risk of serious injury, under circumstances where the attempt could be abandoned without undue risk."

E Nominations

1) Nominations for the award may be made by anyone

2) Nominations should be accompanied by a completed copy of the "Bravery Award Report Form" — see Appendix A

3) Nominations should be submitted to the vice-president, Occupational Safety and Health

F Assessment and Approval

1) Following receipt of a nomination, the vice-president, Occupational Safety and Health will arrange for an investigation of the incident in question

2) The director, Field Services Department, Occupational Safety and Health Division will provide a recommendation to the committee described below on the level of award to be made

3) Assessment and approval of awards will be made by a committee of three, appointed as follows:

   a) a worker member nominated by the B.C. Federation of Labour
   b) an employer member nominated by the Business Council of B.C.
   c) A W.C.B. member nominated by the president and chief executive officer of the W.C.B.

III HEALTH AND SAFETY INNOVATION AWARDS

A Purpose

The Health and Safety Innovation Awards Program is intended to recognize and encourage innovation in occupational health and safety, and also to have an educational value in the dissemination of ideas on the prevention of injuries and occupational diseases.

B Eligibility

1) The innovation may be any kind of invention, device, system, program or idea, which is original, or at least original in this province, or which involves a new or different use or modification

2) The innovation should be likely to solve or alleviate a problem of occupational disease or injury in this province

3) The innovation should be of a kind that is usable at places of employment other than the one at which it is originated

4) The innovation should be available for copying, use or adaptation by others

5) The first four conditions are the basic requirements. When those conditions are satisfied, the W.C.B. will consider whether an award should be made. In exercising this discretion, other factors may be considered.

6) An award might be made to an employer, a worker, or any other person or organization that develops the innovation. The person or organization must not be in the business of producing or distributing the particular kind of innovation, or having a commercial interest in its promotion.

7) Where an innovation emanates from a manufacturer or distributor of safety supplies, or emanates from an employer who has produced the innovation as a product in the ordinary course of business, that would not be covered by this awards program. In such cases the W.C.B. might consider whether it should assist in some other way in making the innovation known.

8) Members and employees of the W.C.B. and any other government agency concerned with occupational health and safety and members of their immediate families are not eligible

C Type of Award

An award might be of a certificate and/or cash. A payment may be made if personal expense has been incurred in producing the innovation which cannot be recovered in other ways.

D Timing

Normally an award would be made after there has been successful use of the innovation.

E Nominations

1) The initiative in suggesting an award to the W.C.B. can come from any source. The person who has produced the innovation might wish to notify the W.C.B., or the W.C.B. might be notified by any employer, worker, trade union or employers' association; or the initiative may be taken by an officer of the W.C.B. who identifies the innovation.

2) Nominations should be submitted to the vice-president, Occupational Safety and Health

F Assessment and Approval

1) Following receipt of a nomination, the vice-president, Occupational Safety and Health will arrange for such investigation of the nomination as deemed necessary

2) Following investigation, the vice-president, Occupational Safety and Health will submit the nomination to the W.C.B.'s Executive Committee with a recommendation for approval or disapproval of the nomination

3) The Executive Committee will make the final decision on the approval and the form of award to be made

IV GOVERNOR APPROVAL

This policy document setting out the WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA GRANTS AND AWARDS POLICY has been approved by the governors of the Workers' Compensation Board on October 26, 1992.

Appendix A — Bravery Award Report Form

Date: **October 26, 1992**

	Bravery Award Nominee	**Name of Rescued Worker**
Name *(in full)*		
Home Address		
Telephone	*(Home)* *(Work)*	*(Home)* *(Work)*
Occupation		
Employer *(name and firm no.)*		
Employer Address		
Union and Local *(if any)*		
W.C.B. Claim No. *(if any)*		

	Nominated By	**Witness**
Name		
Home Address		
Employer *(name and firm no.)*		
Occupation		
Telephone		

Employer Contact *(for arranging presentation)*

Name

Address

Telephone

Position

Rescue Incident

Date of Incident Time of Incident

Work Location

Location in Plant or Site

Narrative Report

On a supplementary page or pages, prepare a narrative report of the entire rescue incident. This report must be objective, concise but complete — and should, if appropriate — be accompanied by sketches and photographs.

The narrative report should include:

1. The events leading up to the rescue attempt.
2. A description and assessment of the danger to which the rescued worker was exposed.
3. A description and assessment of the danger to which the nominee was exposed.
4. The specific actions taken by the nominee in the rescue or attempted rescue.
5. Evidence to support the "YES" or "NO" answers given on this form.
6. What other persons were involved in the rescue or attempted rescue.
7. Which of the actions reported are supported by witnesses — give details.
8. Whether or not the actions of the nominee could better be classified as rendering assistance rather than life saving.

Prior to submitting this report, it is essential that the investigating officer check to ensure that the report is complete and accurate. Any observations which the investigating officer feels are relevant and any conclusions which are arrived at as a result of the investigation should be included in the narrative report.

Note:

Upon completion, the bravery award report form along with the narrative report are to be forwarded immediately to the vice-president, Occupational Safety and Health.

____

Investigating Occupational Safety Officer

____

W.C.B. Office

Report Date: ______________________

Consumer Price Index Adjustments

Date: December 9, 1992

WHEREAS Section 25 of the *Workers Compensation Act* requires the Board to determine as of January 1, 1993, a ratio by comparing the Consumer Price Index for October 1992 with the Consumer Price Index for April 1992, and by applying that ratio to adjust those periodical payments of compensation referred to in subsection (2), and to adjust each dollar amount mentioned in the *Act*, except those referred to in subsection (5);

AND WHEREAS the Board is advised that the Consumer Price Index for October 1992 was 128.5 and for April 1992 was 127.6, giving a ratio of 1.00705329;

THE BOARD HEREBY DETERMINES that the ratio applicable under section 25(1) is 1.00705329;

AND THAT all periodical payments of compensation described in Section 25(2) shall be adjusted by applying that ratio as of the 1st day of January, 1993;

AND THAT the British Columbia Regulation numbered 205/92 be repealed as of the 1st day of January, 1993;

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

Section No.	July 1, 1992 Dollar Amount	Change To	January 1, 1993 New Dollar Amount
3(5)(c)	86.53		87.14
13(2)	17,307.72		17,429.80
	3,461.58		3,486.00
17(2)	2,076.86		2,091.51
	692.30		697.18
	692.30		697.18
17(3)(a)(ii)	224.92		226.51
17(3)(c)	726.80		731.93
17(3)(d)	34,615.28		34,859.43

Section No.	July 1, 1992 Dollar Amount	Change To	January 1, 1993 New Dollar Amount
	3,461.58		3,486.00
	31,153.70		31,373.43
17(3)(e)	726.80		731.93
17(3)(f)(iii)(B)	224.92		226.51
17(3)(g)	24,230.74		24,401.65
17(3)(h)(i)	398.05		400.86
17(3)(h)(ii)	398.05		400.86
17(3)(i)(ii)	398.05		400.86
17(13)	1,730.84		1,743.05
18(1)	301.19		303.31
	93.47		94.13
22(2)	1,125.06		1,133.00
29(2)	259.61		261.44
33(5)	1,125.06		1,133.00
35(5)	155.13		156.22
71(8)	17,307.72		17,429.80
73(2)	34,615.28		34,859.43
74(3)	173,076.53		174,297.29
75(2)	34,615.28		34,859.43
75(3)	3,461.58		3,486.00
77(2)	3,461.58		3,486.00
Schedule C	726.80		731.93

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

WORKERS' COMPENSATION
REPORTER

Consumer Price Index Adjustments (formerly *ad hoc*)

Date: December 16, 1992

Section 25 of the *Workers Compensation Act* provides for most of the dollar figures in the *Act* to be adjusted by the Board every six months according to changes in the Consumer Price Index.

Apart from the figures in the *Act*, the policies of the governors contain various dollar allowances or amounts. The former practice was that these amounts would be adjusted on an *ad hoc* basis. The last adjustment took place on March 1, 1991.

On August 10, 1992, the governors decided to increase these amounts as of January 1, 1993 (July 1, 1993, for clothing allowances). In some cases, a new fixed amount has been specified; in others, the Consumer Price Index ratios that have been determined under Section 25 since March 1, 1991, are being applied.

As a result of the governors' decision, the rates set out below will be effective as of January 1, 1993.

(The bracketed references are to the *Rehabilitation Services and Claims Manual*.)

Personal Care Allowances (#80.20)

The previous amounts have been increased by the Consumer Price Index ratios determined since March 1991. The new amounts are:

	Daily	Monthly
Level 1	$11.40	$ 342.99
Level 2	19.40	600.09
Level 3	28.89	866.74
Level 4	37.37	1,123.85
Level 5	46.11	1,381.21

Independence and Home Maintenance Allowances (#81.00)

The previous monthly amount of $171 has been increased by the Consumer Price Index ratios determined since March 1991. The new amount is $181.30.

Kilometre Allowance (#82.20)

The rate is increased from 27 cents per mile to 26 cents per kilometre.

Meal Allowance (#83.20)

The allowance is increased from a daily total of $34.00 to:

Breakfast	$ 8.50
Lunch	10.50
Dinner	18.00
TOTAL	37.00

Subsistence Allowance for Workers Electing Not to Stay at the Board's Rehabilitation Residence (#83.20)

The daily rate is increased from $12.00 to $15.00.

Cost Shifting between Classes (#114.11)

The Board interprets the word "substantial" in Section 10(8) to mean a specific dollar amount.

The previous amount of $29,950.00 has been increased by the Consumer Price Index ratios determined since March 1, 1991. The new amount will be $31,753.91.

Future Adjustments

The governors' decision provides that all the above amounts will in future be adjusted on January 1 of each year by the Consumer Price Index ratios determined for that January 1 and the previous July 1. The first such adjustment will be on January 1, 1994.