

In the Court of Appeal for British Columbia

Between: James David Hamilton
And: The Workers' Compensation Board of British Columbia and
K.G. Robertson
And: Her Majesty The Queen In Right of The Province of
British Columbia, The Attorney General and Robert Owens
And: Robert Owens

Reasons for Judgment of The Honourable Mr. Justice Hollinrake (Lambert and Gibbs, JJ.A. concurring) (March 3, 1992)

This is an appeal from a judgment in which the plaintiff/respondent was awarded damages of \$68,200 against all the defendants/appellants with the exception of the Attorney General as well as solicitor-client costs. Included in the award of \$68,200 was punitive damages of \$7,500. This appeal is against the trial judge's finding that certain chattels owned by the plaintiff were wrongfully seized and sold by the defendant Owens, then a deputy sheriff, as well as against the awards of punitive damages and solicitor client costs. All this arises from the failure of Forward Sawmills Limited ("Forward") to pay assessments made by the Workers' Compensation Board (the "Board").

The facts in some detail are set out in the judgment and I quote extensively from the judgment.

The Plaintiff, James David Hamilton (the Plaintiff), is a logging contractor and the owner of certain logging equipment that was seized and sold by the Deputy Sheriff of Campbell River, B.C.

The Defendant, Robert Owens (the Sheriff), was at all material times a Deputy Sheriff with the Ministry of the Attorney General.

The Defendant, K.G. Robertson (Robertson), was at all material times the assistant supervisor of the collection section, Assessment Department of the Defendant Workers' Compensation Board (W.C.B.).

The Plaintiff seeks damages for conversion and/or negligence in the seizure of the logging equipment that he owned personally.

All the Defendants allege lawful seizure and rely upon s. 52(2) of the *Workers' Compensation Act*, R.S.B.C. 1979, c. 437 (the *Act*) as amended.

FACTS

1. The Plaintiff now aged 62 years, is a logging contractor and has been involved in the industry since he was 14 years of age.
2. In 1978 he acquired certain timber rights in a Crown grant at Forward Bay, an isolated location about 200 miles up the coast from the Lower Mainland of British Columbia.
3. In March of 1978 the Plaintiff incorporated a company, Forward Sawmills Limited (Forward).
4. The Plaintiff was the sole shareholder, director and president of Forward.
5. The property used by Forward in its logging operations included a mountain logger skidder serial no. ML200-73166 (the "first skidder"), a mountain logger skidder serial no. ML200-73181 (the "second skidder") and one D8 caterpillar dozer (the "cat"). These pieces of equipment were purchased [by the plaintiff Hamilton] and used by Forward in its logging operations at Forward Harbour during the period in respect of which Workers' Compensation Board assessments were made but which remain unpaid.
6. Forward was registered as an employer with the W.C.B.
7. Amounts were due by Forward to the W.C.B. for assessments levied under the *Act*.
8. As a result of the depressed state of the logging industry, the plaintiff found it necessary, in July 1980, to close down his operation at Forward Harbour. He was unable to pay his assessments to the W.C.B.



9. Section 45 of the *Act* provides for the collection of assessments and permits the W.C.B. to file a certificate in the registry which becomes enforceable as a judgment of the Court against the person named in the certificate for outstanding assessments, inclusive of penalties.

10. On October 7th, 1980, a certificate naming Forward as a judgment debtor was filed in the Nanaimo Registry in the sum of \$2,575.19. On January 12th, 1981, a second certificate naming Forward as a judgment debtor was filed in the amount of \$3,230.12 in the Nanaimo Registry. On March 25th, 1982, a third certificate naming Forward as a judgment debtor in the sum of \$671.17 was filed in the Nanaimo Registry.

10(a) W.C.B. caused writs of seizure and sale to be issued and forwarded to the sheriff. The writs commanded the sheriff to seize and sell the assets of Forward to satisfy the certificates.

11. The Defendant Robertson on behalf of the Board, forwarded the writs to the sheriff with a memorandum which stated:

Assets, one cat and one skidder located in Forward Harbour out of Campbell River, Lynn Logging (Lynn Crawford's) TEL 286-6110 has cat in storage with his equipment and can detail the location of the skidder. Sheriff should contact him before seizure and he will cooperate. He expects to hear from sheriff re this matter.

12. On July 21st, 1982, Owens learned the equipment described in the writs was owned, *not by Forward, but by the Plaintiff* personally. The equipment was subject to a chattel mortgage in favour of Island Finance in Nanaimo.

13. On July 26th, 1982, Owens seized the cat and the first skidder.

14. Notwithstanding the fact the sheriff Owens knew the Plaintiff (and not Forward) owned the cat and the first skidder, he believed that he had the power and authority under s. 52(2) of the *Act* to seize that equipment.

* * *

15. Rather than seize the cat and the first skidder, the Plaintiff requested the sheriff to seize logs of Forward to satisfy the outstanding writs.

16. On December 7th, 1982, the Defendant Robertson met with the Defendant Owens at which time Robertson indicated that the policy of the W.C.B. was that 52(2) of the *Act* did not authorize the Board to seize and sell the equipment of a principal of an employer. The Defendant Robertson wrote a letter to the Defendant Owens which stated, inter alia:

It was indicated by the writer to the sheriff's office that our policy has been that section 52 of the Act grants the Board a lien against property owned by a director, principal or shareholder of the company, where used in the business, however, did not permit the Board the right to seize equipment on the strength of this section of our Act.

In view of the amount outstanding in the circumstances I would request that you endeavour to obtain an order for sale of the equipment belonging to the principal of the subject company on the basis of section 52(2) of the *Act*.

Regardless of the outcome of such an action I think it is a worthwhile exercise to test the strength of this particular section of the *Act*.

17. In January or February 1983 the Plaintiff learned that the cat and the first skidder (seized under the writs of seizure and sale) had been removed from Forward Harbour. In addition the *second* skidder, which was not covered under any writ, had been removed by a Mr. Lloyd.

18. The Plaintiff made a complaint both to the Defendant Owens and to the R.C.M.P. that the second skidder had been stolen. At this time the Plaintiff refused to sell the second skidder to Mr. Lloyd.

19. On February 17th, 1983, Owens purported to sell the *second* skidder to Mr. Lloyd for the sum of \$3,500. plus \$210. social services tax.



20. After advertising for sale, the Defendant Owens accepted the bid of Mr. Lloyd for the purchase of the cat and the first skidder for the sum of \$6,000.

The seizure and sale of the second skidder referred to in paragraph 17, 18 and 19 above quoted is not in issue on this appeal.

It is agreed that the certificates referred to in paragraph 10 of the facts quoted above were properly issued and that liens under s. 52 of the *Workers' Compensation Act* (the "Act") were lawfully in existence at all material times.

Section 52 of the Act reads:

Priority as to amounts due board

52.(1) Notwithstanding anything contained in any other Act, the amount due by an employer to the board, or where an assignment has been made under subsection (4), its assignee, on an assessment made under this Act, or in respect of an amount which the employer is required to pay to the board under this Act, or on a judgment for it, constitutes a lien in favour of the board, or its assignee payable in priority over all liens, charges or mortgages of every person, whenever created or to be created, with respect to the property or proceeds of property, real, personal or mixed, used in or in connection with or produced in or by the industry with respect to which the employer was assessed or the amount became payable, excepting liens for wages due to workers by their employer, and the lien for the amount due the board or its assignee continued to be valid and in force with respect to each assessment until the expiration of 5 years from the end of the calendar year for which the assessment was levied.

(1.1) The exception in subsection (1) does not apply in respect of a lien for wages that is, by section 15(3) of the Employment Standards Act, postponed to a mortgage or debenture.

(2) Where the employer is a corporation, the word "property" in subsection (1) includes the property of any director, manager or other principal of the corporation where the property is used in, or in connection with, the industry with respect to which the employer was assessed or the amount became payable, or was so used within the period in respect of which assessments are unpaid.

(3) Without limiting subsection (1), the board may enforce its lien by proceedings under the Court Order Enforcement Act.

(4) The board may assign its lien rights to a person, contractor or subcontractor who has fully discharged his liability for the amount of an assessment under section 51 by payment of it.

The defendants rely on s. 52(2) to support their position that this seizure and sale was a lawful one even though the chattels were owned by the plaintiff and not by the Board's judgment debtor Forward.

In paragraph 16 of the above quoted facts the reference to the defendant Robertson writing a letter to the defendant Owens is in error. What is quoted in paragraph 16 above is an internal memorandum from Robertson to Massing, an in-house solicitor for the Board.

There are further facts which are relevant to the issues of punitive damages and solicitor-client costs and I will refer to those facts when I deal with these two issues.

I turn now to the issue of the lawfulness of the seizure and sale of the cat and the first skidder.

On this issue the trial judge said this in part:

There is no dispute that the cat and the first skidder were, at the time of seizure and sale, owned by the plaintiff and not by Forward. There is no dispute the Board had a valid judgment against the corporation Forward. It was obtained pursuant to section 45 which provides:

Collection of assessments by suit or summarily

45.(1) If an assessment or part of it is not paid in accordance with the terms of the assessment and levy, the board has a right of action against the defaulting employer in respect of the amount unpaid, together with costs of the action.

(2) Where default is made in the payment of an assessment, or part of it, the board may issue its certificate stating that the assessment was made, the amount remaining unpaid on account of it and the

person by whom it was payable, and that certificate, or a copy of it certified by the secretary under the seal of the board to be a true copy, may be filed with any district registrar of the Supreme Court, or with the registrar of any County Court, and when so filed becomes an order of that court and may be enforced as a judgment of the court against that person for the amount mentioned in the certificate.

The judgment obtained by the Board against Forward could be satisfied by execution against “all goods, chattels and effects” of Forward, pursuant to section 49 of the *Court Order Enforcement Act*, R.S.B.C. 1979, c.75 which provides:

Except as exempted by sections 64 to 72 or otherwise provided by this Act, all goods, chattels and effects of a judgment debtor are liable to seizure and sale under a writ of execution against goods and chattels.

There is no dispute that the cat and the first skidder (owned by the plaintiff) were used by Forward in the logging operation during the period in respect of which the assessments remain unpaid.

There is no dispute over the fact that the Plaintiff was at all material times a director and the principal of Forward.

By virtue of section 52(2), *supra*, the Board is therefore entitled to a *lien* on the cat and the first skidder owned by the Plaintiff.

Section 52(3) *supra*, expressly provides that enforcement of the lien by execution proceedings under the *Court Order Enforcement Act* shall be without any limitation on the expanded definition of “property” available for execution.

The Defendants contend that the lien rights created under section 52(2) entitle the Board to execute against the property of a principal if it is used in, or in connection with the industry with respect to which the employer was assessed.

It is submitted by the Defendants the writ of seizure and sale can be used to enforce the W.C.B. lien against all property of Forward, whether or not the property is used in the industry, AND,

in addition, the W.C.B. may enforce its lien by using the writ of seizure and sale against the judgment debtor Forward, against such of the Plaintiff's personal property as was used in the industry for which assessments were made.

The Plaintiff does not take issue over the Board's right to a statutory lien over his goods that were used in the industry. He does take issue over the Board's actions enforcing its judgment against Forward by seizing and selling the Plaintiff's personal goods.

I emphasize here that it was common ground before the trial judge and before us that these chattels were properly the subject of a lien under s. 52 of the Act. What is in issue is the right of the Board under s. 52 of the Act to seize and sell these chattels that did not belong to the Board's judgment debtor Forward. As I understand the position of the parties it is conceded that these chattels could have been seized and sold by execution proceedings in court. This seizure and sale was done summarily, and if it is to be lawful, it must be so by the provisions of s. 52 of the Act.

The Board submits that the enforcement of the lien provisions in the Act should be interpreted liberally. It says that to hold the seizure and sale unlawful is to defeat the substance and intent of s. 52 of the Act. At worst, says the Board, what happened here was a procedural misstep which should not defeat the substance and intent of s. 52. Having said that, the Board does not concede any misstep be it procedural or of substance.

In his reasons the trial judge reviewed the history of s. 52 and the authorities the Board referred to in support of its proposition that the Board may enforce its assessment as a judgment pursuant to s. 45 of the Act, and by reason of s. 52 the chattels of the plaintiff in this case were available to it in that execution process. The judge referred to the following decisions:

Workmen's Compensation Board v. Werner (1959, 29 W.W.R. 47 (B.C.C.A.);
Re Clemenshaw; Workmen's Compensation Board v. Canadian Credit Men's Trust Association Ltd. (1962), 40 W.W.R. 199 (B.C.C.A.);
Bank of Montreal v. Workmen's Compensation Board (1967), 60 D.L.R. (2d) 680 (B.C.C.A.);
Re Inland Equipment Company Ltd. and Workmen's Compensation Board (1967), 65 D.L.R. (2d) (B.C.S.C.);

and concluded that:

On the authority of *Clemenshaw*, supra, I reject the submission of the Defendants that sections 45 and 52 permitted seizure of the Plaintiff's caterpillar and first skidder in order to satisfy its judgment against Forward.

Counsel for the Board points out that the four cases the trial judge referred to in reaching his conclusion that ss. 45 and 52 of the Act do not permit the seizure of the plaintiff's cat and first skidder all preceded the 1972 and 1974 amendments to the Act: see:

Workmen's Compensation, 1968 Amendment Act, S.B.C. 1972, c. 64, s. 25;
Workmen's Compensation Amendment Act, 1974, S.B.C. 1974, c. 101, s. 26.

Prior to these amendments there were no provisions similar to what is now s. 52(2) and (3) which extend the meaning of the word "property" in s. 52(1) and permit enforcement of the Board's lien under the *Court Order Enforcement Act*. The Board says that in holding that the summary judgment process in s. 45 of the Act had nothing to do with the enforcement of the s. 52 lien the trial judge failed to give effect to s. 52(1) and (3) of the Act.

In my opinion, the propositions put to us by counsel for the Board while attractive cannot succeed when one analyzes the statutory provisions the Board relies on.

I turn now to that analysis.

S. 52(1) of the Act constitutes the Board's lien over property "used in or in connection with . . . the industry with respect to which the employer was assessed". S. 52(2) defines the word "property" in s. 52(1) as including property of a principal of the company where that property is used in connection with the industry with respect to which the employer is assessed.

It is clear from s. 51(1) and (2) that this property of the plaintiff was properly the subject matter of a lien under s. 52. That is not contested.

The enforcement section is s. 52(3) which permits the Board to "enforce its lien by proceedings under the *Court Order Enforcement Act*."

Before turning to the *Court Order Enforcement Act* I must turn to s. 45 of the Act which refers to "collection of assessments by suit or summarily". S. 45(2) says that where there is default in payment of an assessment the Board may issue a certificate stating that an assessment was made, is unpaid and "the person by whom it was

payable". S. 45(2) goes on to say that this certificate may be filed in the Supreme Court and "may be enforced as a judgment of the court *against that person* for the amount mentioned in the certificate." (Emphasis mine.) This means in this case a judgment in *personam* against Forward and Forward only, and it is against Forward and Forward only that the judgment may be enforced. In my opinion, if the Board is to succeed in its submissions before us there must be some statutory provision that renders the property of the plaintiff in this case the property of Forward for the purposes of execution. S. 52(2) tells us that the property in s. 52(1) which is the subject matter of the lien includes the plaintiff's cat and skidder. There is nothing in s. 52 which renders the property referred to in s. 52(1) the property of Forward against whom the assessment is made and against whom the judgment is on the filing of the certificate under s. 45(2).

I turn now to s. 49 of the *Court Order Enforcement Act*. That section says:

Effect of writ of execution against goods

49. Except as exempted by sections 64 to 72 or otherwise provided by this Act, all goods, chattels and effects of a judgment debtor are liable to seizure and sale under a writ of execution against goods and chattels.

And so the goods which are liable to seizure and sale under s. 52(3) of the Act are those of Forward, the judgment debtor under s. 45(2) of the Act. I repeat, in my opinion, the provisions of s. 52(1) and (2) do not go so far as to give to Forward property rights in the plaintiff's chattels. Those chattels are the property of Hamilton. What s. 52 of the Act does is to make Hamilton's property the subject matter of the Board's lien. As the chattels in this case do not become the property of Forward they are not liable to seizure and sale under s. 49 of the *Court Order Enforcement Act*. In my opinion, if the intention of the legislature was otherwise clear words would have to be used to state that the "property" referred to in s. 52(2) would be deemed to be the property of the employer/ judgment debtor for the purpose of the *Court Order Enforcement Act*.

In short, the strongest argument that can be made in favour of the Board's position is that subsection 52(3), which provides that the Board may enforce its lien by proceedings under the *Court Order Enforcement Act*, should operate so as to permit the enforcement of the lien not only against the judgment debtor's property but also against any other property covered by the lien. Such an interpretation would require making substantial changes in s. 49 of the *Court Order Enforcement Act*. I do not regard the wording of s-s. 52(3) as carrying with it the requirement that s. 49 of the *Court Order Enforcement Act* is to be regarded as having been given such changes as might be necessary to allow it to be used directly to enforce a lien against someone who has not first become a judgment debtor or a deemed judgment debtor.

To conclude on this issue, it is my opinion, the effect of the provisions of ss. 45 and 52 of the *Act* and s. 49 of the *Court Order Enforcement Act* do not permit execution against the chattels of the plaintiff, the reason being that nothing in those statutory provisions renders the property of the plaintiff the property of Forward for the purpose of execution under the *Court Order Enforcement Act*.

I agree with the conclusion of the trial judge that the seizure of the plaintiff's cat and first skidder was unlawful and the defendant Robertson and the Board must answer in damages to the plaintiff.

[The balance of the judgment considered the liability of the defendants Her Majesty the Queen in Right of the Province of British Columbia and Sheriff Owens, whether punitive damages should have been awarded by the trial judge against all defendants and whether Mr. Hamilton should have been awarded costs on a solicitor-client basis. The Court upheld the decision of the trial judge that Her Majesty the Queen in Right of the Province of British Columbia and Sheriff Owens were liable in damages to Mr. Hamilton, but the Court found that no punitive damages were payable by any of the defendants and that costs should not have been awarded on a solicitor-client basis.]

Editors' note: These reasons for judgment have been transcribed unedited to the end of the portion of the judgment set out above.



In the Supreme Court of British Columbia

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

Reasons for Judgment of The Honourable Mr. Justice Bouck

(Date: June 19, 1992)

Introduction

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

Facts

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

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

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

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

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

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

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

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

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

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

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

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

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

Issues

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

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

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

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

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

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

Law

1. Procedure.

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

96 (2). Notwithstanding subsection (1), the board may at any time at its discretion, reopen, rehear and redetermine any matter, except a decision of the appeal division, which has been dealt with by it or by an officer of the board.

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

2. Jurisdictional Defects.

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

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

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

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

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

3. The Patently Unreasonable Argument.

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

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

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

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

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

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

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

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

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

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

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

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

Judgment

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

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

