WORKERS' COMPENSATION
REPORTER

# WORKERS' COMPENSATION REPORTER

Volume 9, Number 1
February 1993

published by the
WORKERS' COMPENSATION BOARD
Province of British Columbia

*Workplace safety and health is our challenge.*
*Quality rehabilitation and fair compensation is our commitment.*
*World leadership is our goal.*

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

# Contents — Volume 9, Number 1

Decisions of the Governors' Committee for Regulation Review


No. 29 Occupational Safety and Health Regulation Review: Appointment of Members of the Equipment Safety Subcommittee ..... 1

No. 30 Occupational Safety and Health Regulation Review: Amendment of Terms of Reference for the Fishing Subcommittee and Appointment of Members ..... 3

No. 31 Occupational Safety and Health Regulation Review: Ergonomics Subcommittee Rescindment of Appointment/Appointment of New Member ..... 7

No. 32 Ratification of Medical Review Panel Fee Schedule Effective January 1, 1993 ..... 9


Decisions of the Governors


No. 33 Continuation of Appointment — Dr. Leonard C. Jenkins ..... 11

No. 34 Disposition of Silicosis Fund Surplus ..... 15


Decisions of the Appeal Division


Section 96(2) — Pension Amount (93-0111) ..... 19

Medical Review Panel Certificate #5 (92-1818) ..... 33

Section 34 (92-0922) ..... 39

Section 6(1) — Lung Cancer (92-1952) ..... 43

Interpretation of "Worker," "Employer," and Independent Contractor (92-1967) ..... 55

Remedial Jurisdiction (2) (92-1968) ..... 59

Section 96(2) — Composition of a Medical Review Panel #2 (92-1459) ..... 63

Post-Traumatic Stress and Special Circumstances (92-1516) ..... 75

Section 96(2) — Degenerative Disc Disease (92-1670) ..... 85

Section 96(2) — Average Earnings and Loss of Earnings (92-1781) ..... 89

Section 96(2) — Lack of English Skills (92-1938) ..... 97

Section 96(2) — Reimbursement for Retraining (92-1939) ..... 99

Section 96(2) — Employability Assessment (92-1970) ..... 103

Section 96(2) — Grain Dust Asthma and Proportionate Entitlement (93-0030, 93-0031) ..... 107

Rehabilitation Assistance (93-0054) ........ 117
Section 96(2) — Red Cedar Asthma (93-0067, 93-0068) ........ 123
Medical Review Panel — A Medical Decision (93-0069) ........ 135

Vocational Rehabilitation Services' Advisory Council — Terms of Reference ........ 141

*WORKERS' COMPENSATION*

*REPORTER*

# Decision of the Governors' Committee for Regulation Review

**Number:** 29
**Date:** October 22, 1992
**Subject:** Occupational Safety and Health Regulation Review: Appointment of Members of the Equipment Safety Subcommittee

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

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

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

AND WHEREAS the Governors' Committee has decided that there should be a Specialty Subcommittee, called the "Equipment Safety Subcommittee," to assist the governors in the development of regulations on equipment safety for all types of tools, machinery and equipment, including cranes, joists, rigging, mobile equipment, and powder actuated tools;

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

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

To be representative of workers:

Don Krompocker (C.U.P.E. Local 798)
Ed Pittman (United Steelworkers of America Local 9113)
Frank Slyman (Operating Engineers Local 115)

To be representative of employers:

Hans Sather (Crestbrook Forest Industries)
Victor J. Traynor (Construction Industry)
Mike Watson (B.C. Hydro)

AND THE GOVERNORS' COMMITTEE FOR REGULATION REVIEW FURTHER RESOLVES THAT George Matheson of the Secretariat for Regulation Review and Kathleen Sheppard from the W.C.B. Occupational Safety and Health Division (through secondment to the Secretariat for Regulation Review) shall also be appointed to the Equipment Safety Subcommittee.

WORKERS' COMPENSATION
REPORTER

# Decision of the Governors' Committee for Regulation Review

**Number:** 30
**Date:** December 16, 1992
**Subject:** Occupational Safety and Health Regulation Review: Amendment of Terms of Reference for the Fishing Subcommittee and Appointment of Members

---

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

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

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

AND WHEREAS the Governors' Committee decided that there should be a Specialty Subcommittee, called the "Fishing Subcommittee," and, on August 12, 1992, adopted "TERMS OF REFERENCE" for that Subcommittee which contemplate that:

1. the Fishing Subcommittee would consist of three persons representative of workers, three persons representative of employers and two persons from the W.C.B. Occupational Safety and Health Division through secondment to the Secretariat for Regulation Review,

2. the responsibilities of the Fishing Subcommittee would be to assist the governors with the development of fishing regulations, but not including structural design of fishing vessels or navigation equipment, to provide recommenda-

tions to the Canadian Coast Guard with respect to ship design and navigation equipment, and to provide recommendations on participation in a national education and training program with respect to the fishing industry, and

3. the Fishing Subcommittee would work within a time frame of September 1, 1992 to December 31, 1992 to fulfill its responsibilities;

AND WHEREAS the Governors' Committee has decided to amend the "TERMS OF REFERENCE" with respect to the numbers of members, the responsibilities and the time frame and to appoint members of the Fishing Subcommittee:

NOW THEREFORE THE GOVERNORS' COMMITTEE FOR REGULATION REVIEW RESOLVES THAT the "TERMS OF REFERENCE" dated August 12, 1992 for the Fishing Subcommittee shall be amended as follows:

1. the Fishing Subcommittee shall consist of four persons representative of workers, four persons representative of employers and two persons appointed from the W.C.B. Occupational Safety and Health Division through secondment to the Secretariat for Regulation Review,

2. the Fishing Subcommittee's responsibilities shall include the establishment and maintenance of linkage with the various sectors and groups in the B.C. fishing industry, and

3. the Fishing Subcommittee will work within a time frame of January 1, 1993 to April 30, 1993 to fulfill its responsibilities;

AND THE GOVERNORS' COMMITTEE FOR REGULATION REVIEW FURTHER RESOLVES THAT the following persons are appointed to the Fishing Subcommittee:

To be representative of workers:

Joe Bauer (United Fishermen & Allied Workers' Union)
Foster Husoy (Co-op Fishermen's Guild Local 80)
Davin Karjala (United Fishermen & Allied Workers' Union)
Bob Tompkins (Pacific Trollers Association)

To be representative of employers:

Byron Doyle (Canadian Fishing Co.)
Vince Fiamengo (Fishing Vessel Owners Association of B.C.)
John Haugan (Prince Rupert Fishermen's Cooperative Assn.)
Jim Trimble (Icicle Seafoods (B.C.) Incorporated)

From the W.C.B. Occupational Safety and Health Division through Secondment to the Secretariat for Regulation Review:

Harvey Linton as chair
Keith Haigh as technical representative.

WORKERS' COMPENSATION

REPORTER

# Decision of the Governors' Committee for Regulation Review

**Number:** 31
**Date:** December 16, 1992
**Subject:** Occupational Safety and Health Regulation Review: Ergonomics Subcommittee Rescindment of Appointment/ Appointment of New Member

---

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

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

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

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

AND WHEREAS on July 20, 1992 the Governors' Committee appointed three persons representative of workers and three persons representative of employers to the Ergonomics Subcommittee and seconded two employees from the W.C.B. Occupational Safety and Health Division to the Secretariat for Regulation Review to participate on the Subcommittee;

AND WHEREAS one person appointed to the Ergonomics Subcommittee on July 20, 1992, has resigned from the Committee and the governors wish to appoint another person to replace her:

NOW THEREFORE THE GOVERNORS' COMMITTEE FOR REGULATION REVIEW RESOLVES THAT, effective November 23, 1992:

1. The appointment of Alanna Lantela (United Fishermen & Allied Workers' Union) to the Ergonomics Subcommittee is rescinded.

2. Ms. Sharon Saunders (B.C. Nurses' Union) is appointed to the Ergonomics Subcommittee to be representative of workers.

## Decision of the Governors

**Number:** 32
**Date:** January 11, 1993
**Subject:** Ratification of Medical Review Panel Fee Schedule Effective January 1, 1993

---

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

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

AND WHEREAS the chairman of the governors has given final approval to the fee schedule for Medical Review Panels held on and after January 1, 1993, and has requested ratification by the governors of the fee schedule:

NOW THEREFORE THE GOVERNORS RESOLVE THAT they ratify the following fee schedule approved by the chairman of the governors for Medical Review Panels held on or after January 1, 1993:

> The hourly rate payable to chairmen of Medical Review Panels is $135.51.
>
> The flat fee payable to Panel members other than the chairmen is $452.03, with an additional fee of $99.41 per hour when the time taken on an appeal (including travelling time) exceeds 3½ hours up to a maximum of a further 4½ hours.
>
> The steno fee for each appeal is $67.86.

## Decision of the Governors

**Number:** 33
**Date:** January 11, 1993
**Subject:** Continuation of Appointment — Dr. Leonard C. Jenkins

---

WHEREAS, on August 17, 1992, the governors received the "Medical Review Panel Report: A Review of the Administrative, Policy, and Procedural Functions of the M.R.P. Process" by Dr. Leonard C. Jenkins, which contains recommendations for improving the Medical Review Panel process for both workers and employers;

AND WHEREAS, to enable Dr. Jenkins to complete his study of the M.R.P. process and to issue his recommendations, the governors appointed Dr. Jenkins as registrar, Medical Review Panels, and gave him certain administrative responsibilities in order to provide him with first-hand experience about the process;

AND WHEREAS, while his Report has been published and distributed to the community, Dr. Jenkins has continued to perform the duties of registrar, Medical Review Panels;

AND WHEREAS the governors consider it appropriate for Dr. Jenkins to continue to perform the duties of registrar, Medical Review Panels, while the governors consider the recommendations presented in Dr. Jenkins' Report:

NOW THEREFORE THE GOVERNORS RESOLVE THAT they appoint Dr. Leonard C. Jenkins as registrar, Medical Review Panels, until December 31, 1993, while they consider the recommendations presented by Dr. Jenkins in his Report;

AND THE GOVERNORS FURTHER RESOLVE THAT the duties of registrar, Medical Review Panels, shall be those set out in the document entitled *"POSITION OF REGISTRAR, MEDICAL REVIEW PANELS,"* appended to this resolution, as they may be modified from time to time by mutual agreement between the chairman of the governors and Dr. Jenkins and that Dr. Jenkins shall perform those duties on a part-time basis to a maximum of two days per week, as agreed upon between the chairman of the governors and Dr. Jenkins.

## POSITION OF REGISTRAR, MEDICAL REVIEW PANELS

### I. Function

The registrar, Medical Review Panels, is responsible for generally overseeing the administration of the Medical Review Panel process, including the administration of the W.C.B. Medical Review Panel Department.

### II. Responsibilities

1. Has overall responsibility for the administration of the Medical Review Panel Department, including planning, organizing and directing the work activities of subordinates and hiring, training, evaluating, disciplining and terminating assigned subordinates as circumstances dictate.

2. Provides advice and assistance to manager, Medical Review Panels in:

a) supervising the functions performed by the Medical Review Panel Department in preparation for a Medical Review Panel examination, including the determination as to whether a bona fide medical dispute has been defined, the preparation of the Statement of Foundational Non-Medical Facts and issues, the preparation of the file and the gathering of additional medical evidence

b) providing advice and assistance to the medical appeals officers in the performance of their administrative functions

c) establishing and maintaining a program of orientation, training, ongoing education and communication for the Medical Review Panel Department staff.

3. Maintains current list of factors disqualifying chairmen from serving on particular Panels.

4. Designates the specialty or specialties for each Medical Review Panel under Section 59(1) of the *Workers Compensation Act* and maintains current information on each specialist member for the provision, on request, to workers, employers and their representatives. Maintains current list of factors disqualifying specialists from serving on particular Panels.

5. In conjunction with Medical Review Panel chairmen, develops and implements guidelines for:

a) the format of Medical Review Panel certificates and time limits for issuing certificates

b) the format of narrative reports

c) procedures to be followed in conducting an M.R.P. examination.

d) standards expected of M.R.P. chairmen and specialist members

6. Chairs and coordinates Advisory Committee of elected M.R.P. chairmen.

7. Provides advice to the governors with respect to matters relating to the Medical Review Panel process:

a) recommends guidelines for presentation to the lieutenant governor in council for the qualifications, appointment and termination of M.R.P. chairman and of members of the Joint Medical Committee

b) recommends guidelines for presentation to the Joint Medical Committee for the qualifications, appointment and termination of specialist members

8. Interacts with Medical Review Panel chairmen and specialist members.

a) adopts a leadership role among the M.R.P. chairmen with a view to facilitating regular communication among them

b) establishes and maintains a program of orientation, training, ongoing education and communication for the M.R.P. chairmen and specialist members, including the organization of a chairmen M.R.P. Education Day every six months

c) develops and maintains informational and feedback processes for M.R.P. chairmen with regard to W.C.B. Appeal Division decisions, court decisions, W.C.B. communications, issues of the *Workers' Compensation Reporter*, implementation of M.R.P. certificates and so forth.

d) coordinates distribution to M.R.P. chairmen of information regarding advances in knowledge about special common medical syndromes such as chronic pain syndrome, chronic back pain, post-traumatic stress, psychogenic stress post-trauma, and repetitive stress syndrome

9. Interacts with Joint Medical Committee on matters pertaining to the Committee's composition, the maintenance of specialists' lists and additions of new specialties, such as Occupational Health, and other areas of mutual concern

10. Reviews all Medical Review Panel certificates received by the Board with a view to highlighting difficult areas and providing the Board with quality assurance feedback. Assists with resolutions of disputes regarding implementation of Medical Review Panel certificates.

11. Interacts with worker and employer communities to facilitate understanding of Medical Review Panel process.

12. Implements policies of the governors with respect to the Medical Review Panel Department and the Medical Review Panel process.

13. Prepares annual report regarding Medical Review Panel process for inclusion in the *W.C.B. Annual Report*.

14. Performs other related duties as required.

## III. Relationships

The registrar, Medical Review Panels, is accountable to the governors of the Workers' Compensation Board for the fulfillment of the job functions. The registrar's assigned subordinate is the manager, Medical Review Panels, to whom all Medical Review Department staff report.

## IV. Qualifications

Registration in good standing under the *Medical Practitioners Act* and licensed to practise medicine in British Columbia. Several years in the practice of general medicine or any specialty. Legal training or familiarity with basic legal principles an asset.

Ability to communicate effectively with M.R.P. chairmen, specialist members, W.C.B. physicians and community physicians. Good interpersonal and administrative skills. Ability to write clearly and concisely. Good relationship with all peers in the medical community. Knowledge of medical legal issues and the role and function of the M.R.P. process under the *Workers Compensation Act*.

## Decision of the Governors

**Number:** 34
**Date:** December 7, 1992
**Subject:** Disposition of Silicosis Fund Surplus

---

WHEREAS on June 1, 1992, the governors of the Workers' Compensation Board resolved that:

1. the Silicosis Fund shall be abolished effective the end of 1992;

2. the liabilities of Silicosis Fund subclasses 203 and 204, together with sufficient assets to pay those liabilities, shall be merged with subclasses 430 and 411 respectively; and

3. the actuarial calculation of the sufficiency of the assets required to pay those liabilities shall err in the interest of retaining assets to protect and ensure future funding for liabilities payable to workers out of the Silicosis Fund;

AND WHEREAS, once the liabilities of Silicosis Fund subclasses 203 and 204, together with sufficient assets to pay those liabilities, are transferred to Accident Fund subclasses 430 and 411 respectively, an amount ("surplus") will remain in the Silicosis Fund;

AND WHEREAS the W.C.B. Assessment Department communicated the governors' resolution to interested parties including members of the British Columbia Legislative Assembly, pensioners and dependants receiving compensation from the Silicosis Fund, employers in Accident Fund subclasses 411 and 430, and employers in Silicosis Fund subclasses 203 and 204, AND the W.C.B. Assessment Department invited comments with respect to the Department's proposed method of allocating the Silicosis Fund Surplus;

AND WHEREAS a number of interested parties have forwarded comments ("Submissions") regarding the abolition of the Silicosis Fund and the allocation of the surplus;

AND WHEREAS, after considering the Submissions, the W.C.B. Assessment Department has modified its proposed method of allocating the Silicosis Fund surplus;

AND WHEREAS the governors have considered the Submissions and the recommended method of allocating the Silicosis Fund surplus:

NOW THEREFORE THE GOVERNORS RESOLVE THAT they approve the recommended method of allocating the Silicosis Fund surplus, as set out in more detail in Schedule "A" to this resolution;

AND THE GOVERNORS FURTHER RESOLVE THAT the W.C.B. Assessment Department shall notify as soon as possible all affected Silicosis Fund employers and other parties as to whether they will receive a refund AND THAT this notification by the W.C.B. Assessment Department in each case constitutes a "notice of an assessment under section 41" for purposes of Section 96(6) of the *Workers Compensation Act*;

AND THE GOVERNORS HEREBY DECLARE THAT this resolution, including Schedule "A", constitutes "policy of the governors" in accordance with Decision of the Governors No. 3 (*Workers' Compensation Reporter*, Vol. 7, p. 17).

### Schedule "A"

1. Once the liabilities of Silicosis Fund subclasses 203 and 204, together with sufficient assets to pay those liabilities, are transferred in accordance with the governors' resolution dated June 1, 1992 to Accident Fund subclasses 430 and 411 respectively, the amount of the money remaining in the accounts for subclasses 203 and 204 will be considered surplus ("surplus").

2. Only employers with an active registration with the W.C.B. in Silicosis Fund subclass 203 (coal mining) or subclass 204 (metal mining) on December 31, 1992 will be eligible to receive a portion of the surplus for their respective subclass.

3. For Silicosis Fund subclass 203 (coal mining), the individual employer's refund will be calculated using the same ratio as the employer's combined 1984 and 1985 assessable Silicosis Fund coal mining payroll to the combined 1984 and 1985 total assessable Silicosis Fund coal mining payroll for all eligible employers in subclass 203.

4. For Silicosis Fund subclass 204 (metal mining), the individual employer's refund will be calculated using the same ratio as the employer's combined 1986 and 1987 assessable Silicosis Fund metal mining payroll to the combined 1986 and 1987 total assessable Silicosis Fund metal mining payroll for all eligible employers in subclass 204.

5. In determining the individual employer's assessable Silicosis Fund payroll for step 3 or step 4, the Silicosis Fund assessable payroll for the particular years from a predecessor firm will be included with the assessable payroll for the successor firm, provided that there is a significant degree of common ownership between the predecessor firm and the successor firm, the predecessor firm ceased operating when the successor firm started operations and the successor firm makes application for this consideration prior to December 31, 1992.

6. The W.C.B. Assessment Department will communicate this procedure and notify all active registrations in Silicosis Fund subclasses 203 and 204 as to whether they will receive a refund as soon as possible after the governors' decision on December 7, 1992.

7. The amounts of the refunds will be determined in March 1993 if there are no outstanding appeals. Refunds will be made by cheque net of any outstanding amounts in the employer's account.

## Decision of the Appeal Division

**Number:** 93-0111
**Date:** January 25, 1993
**Panel:** Connie Munro
**Subject:** Section 96(2) — Pension Amount

---

The worker seeks a reconsideration of the prior commissioners' decisions of September 27, 1989 and September 4, 1990 on the grounds that they were based upon an error of law.

The amount of the worker's permanent partial disability pension is in issue.

In 1952, at the age of eighteen, the worker sustained a work-related injury to her left hand which resulted in partial amputation of her index, second and third fingers. Her hand had been caught in a meat grinder, resulting in severe crush injuries.

In addition to working in the cafe where the accident took place, the worker had been taking a night school course in typing, shorthand and bookkeeping at the Nelson Business College. In a letter dated August 25, 1952 addressed to the Board, the worker stated that prior to her injury, while good at shorthand, she had made only slow progress in typing. She told the Board that she had taken the job at the cafe to earn funds for "a full year of day school at the Nelson Business College this fall."

As reported in her application for compensation dated June 26, 1952, the worker's weekly wage at the time of her injury was $24.60. The employer's report of accident dated June 16, 1952 shows her weekly wages as $25.00

In a decision letter dated September 10, 1952, the Board awarded the worker a payment of $106.08 in cash and a pension of $20 per month for 60 months. In calculating these amounts, the Board considered $120 to be the worker's monthly wage. The method used to determine the worker's award appears to have been based on physical loss of function estimated at 6.13% of total. The levels of amputation to the fingers were calculated from the medical reports on file — without the benefit of a disability examination.

A Rehabilitation Summary Sheet dated September 16, 1952 mentioned bookkeeping as the type of employment preferred "due to the worker's loss of fingers and leaning toward this kind of work." With the approval of the Rehabilitation Department, the worker enrolled at the Nelson College of Commerce, to take courses in shorthand, spelling and bookkeeping.

The worker started her training at the Nelson College of Commerce on September 15, 1952. In a letter dated November 26, 1952, a Board inspector told the chief rehabilitation officer that he considered the training provided at that institution to be unsatisfactory. The Board inspector noted that the worker was regarded as a good student.

In a letter dated December 1, 1952, the chief rehabilitation officer instructed the worker to discontinue her training with the Nelson College of Commerce and to consider alternative arrangements.

Subsequently, the Board approved of a six-month commercial course at the Trail Business College with an emphasis on bookkeeping and typing. The worker did not complete the course within the six-month period due to difficulties she was experiencing in the typing courses.

In a letter dated August 24, 1953, the rehabilitation officer informed the worker that the Board would not grant her an extension of time to allow her to complete the course. The rehabilitation officer said: "The records on file show that you attended school from September 15, 1952 until June 25, 1953, which is a somewhat longer period of time than we consider normally necessary to complete these studies."

I note that, in a letter dated September 24, 1953 addressed to the rehabilitation officer, the principal of the Trail Business College described the worker's progress in her course as follows: "Although [the worker] has a good understanding of the bookkeeping, it was difficult to have her maintain the standard of neatness and tidiness which would be required by a modern office." A January 20, 1953 letter from the Trail Business College noted her typing instructor had "drawn up special fingering for her."

Subsequently, the worker held various jobs including working for the C.P.R. as a diesel wiper, working as a homemaker and as a part-time cook.

In early 1979, the worker reported to the Board a worsening in the condition of her fingers. Her family doctor indicated growing discomfort in her left hand and requested that her benefits be reassessed.

In a disability examination report dated May 15, 1979, the medical doctor recommended increasing the worker's pension award, arriving at an overall award of 18.8% of total (as opposed to 6.135%). The doctor explained that the original award had been based on medical reports which did not adequately describe the worker's actual injury and the levels of amputation of her left fingers.

In an undated decision letter, the disability awards officer told the worker that he estimated her disability at 13.05% of total. The disability awards officer explained:

> Using the Permanent Disability Evaluation Schedule as a guide, the amputation of the *right* [sic] hand at the wrist would equal 50% of total disability. Based upon the above findings, it is considered that your disability is equal to 26.10% the value of the amputation of the right hand at the wrist or 13.05% of total disability, less the previous award of 5.87% of total disability which was granted under this claim. Thus, it is recognized that your condition warrants an increased award of 7.18% of total disability.

The disability awards officer indicated that the calculation of the increased pension would be based on the 1952 average earnings figure of $120.

In an application dated July 20, 1980, the worker requested that the Board reconsider her compensation benefits under Section 24 of the *Act*.

In a memo dated October 9, 1980, the disability awards officer stated that she agreed with the rehabilitation consultant's assessment of the worker's employability. This assessment was that the worker's attitude, personal choices and lack of motivation affected her employability.

In a letter dated October 27, 1980, the disability awards officer concluded that the worker had been adequately compensated under the *Act*, and, therefore, no adjustment would be made. The disability awards officer reasoned:

> . . . In 1952, your average earnings were *$120.00 per month*. The average wage in 1952 was $257.46 per month; therefore, the ratio is .4661. In 1980, the average wage was $1,530.00 per month; using the same ratio, your projected pre-injury wage rate equals $855.76 per month; this also includes an *age factor of 1.2*.
>
> It is noted that you are presently employed as a cook earning approximately $5.00 per hour. It is felt that you are capable of earning at least $900.00 a month should you so choose. For the purposes of calculation under Section 24 of the *Workers Compensation Act*, a monthly value of $900.00 per month will be given to current earnings. It is noted that you are able to earn over the projected wage rate from your pre-injury employment.
>
> (emphasis added)

In a letter dated April 11, 1989 addressed to the director of Claims (the Board's ombudsman liaison), the ombudsman officer suggested that in granting the original pension award, the Board had failed to take into account the worker's age at the time of her injury. More specifically, the ombudsman officer stated:

> Section 27(2) of the *Workers Compensation Act* in force in 1952 provided that in cases of persons under 21 years of age, if it was established that under normal conditions the worker's wages would probably increase, that fact should be considered in arriving at his/her average earnings or earning capacity. [The worker] was 18 at the time of her injury, and her pension of 13% of total is based on her earnings of $100.00 per month [sic]. Her pension award was for the amputation of three fingers on her right hand [sic].
>
> Before her injury, [she] was working during the day and attending a clerical course at night, a fact which indicates she was motivated to earn more wages in future. She had planned to return to school full-time . . . .

In a memo dated May 26, 1989, the director of Claims examined the suggestion that the Board had failed to consider Section 27(2). He stated:

> There is no indication that the above section was considered in this particular case. We are not certain what the policy was in 1952 and there is little likelihood of determining past practice after 37 years. I am reluctant to disturb a decision made that long ago, particularly in the absence of any direct evidence to confirm that the decision was inconsistent with the usual application of the *Act*. On the other hand there is an argument to be made that [the worker] was in the process of improving her overall qualifications when the injury occurred. If this is accepted then I suppose there is a likelihood that her earnings would probably increase and it would be reasonable to consider the application of Section 27(2). If such an approach is plausible I *would suggest that we obtain a statistical average for a number of clerical/typing positions in 1952* to determine whether this would be a better reflection of potential earnings. If you believe there is some merit to this perhaps the matter should be referred to the Commissioners. There is also of course the possibility that a revised wage-rate would effect the earlier outcome of the Section 24 review. This can be revisited later if it proves necessary.
>
> (emphasis added)

It would appear that the director's suggestion to obtain statistical averages for clerical/typing positions was not followed.

In a letter dated September 27, 1989, the general counsel and secretary of the Board informed the ombudsman officer that the commissioners had rejected her proposal to review the worker's pension. They gave three reasons. First, they were of the opinion that, in the absence of evidence to the contrary, the Board must be presumed to have considered Section 27(2). Secondly, they noted that, in setting the worker's wage rate for the purpose of determining her disability award, the Board did not take her actual wage rate (i.e. $25 per week) into account. Instead, it based her pension on $120.00 per month which, according to the commissioners, may indicate that the Board considered Section 27(2). Thirdly, on the basis of some of post-injury evidence (including the 1952 letter from the principal of the Trail Business College and the 1980 assessment of the rehabilitation consultant), the commissioners questioned the worker's career potential prior to her injury.

In a memorandum dated October 13, 1989, the ombudsman officer requested the pension administrator to review the worker's pension award because of the difference between the medical adviser's assessment of the worker's disability and the pension adjudicator's assessment.

In a letter dated October 30, 1989 addressed to the ombudsman officer, the claims adjudicator concluded that the disability awards officer had been correct in his assessment of the worker's disability. The claims adjudicator stated:

> We have attempted to determine how the Disability Awards Medical Adviser arrived at his figure of 18.8% of total disability, noting the breakdown of impairment as recorded in Point 3, Page 3 of the P.P.D. exam. However, given the description provided in that section of his memo, and calculating [the worker's] entitlement in keeping with the accepted practices of the Board, we are only able to arrive at an impairment figure of 12.28% of total disability. It is apparent that the D.A.M.A. has erred in arriving at his figure. Unfortunately, he has not provided us with his calculations so that the precise nature of the error can be determined.

In a letter dated April 19, 1990 and addressed to the acting chairman of the Board, the ombudsman officer mentioned a decision in which the commissioners acknowledged that the Board tended to set an arbitrary wage rate for new entrants into the labour market. The ombudsman officer suggested that the presumption should be, therefore, that the Board never considered Section 27(2).

The ombudsman officer questioned the rehabilitation consultant's portrayal of the worker as poorly motivated, pointing out that the Rehabilitation Department never contacted any of the worker's employers or co-workers to discuss the worker's attitude.

The ombudsman officer referred to the worker's first job after her 1952 injury. In 1953, the worker obtained a position as a diesel wiper with C.P.R., earning $1.18 per hour. The worker quit that position in 1955 because of dermatitis resulting from exposure to chemicals at work. The ombudsman officer proposed that the worker's pension be based on her wages as a diesel wiper or on a statistical average of the earnings in clerical positions at the time of the worker's injury or on some other equitable method.

In a letter dated September 4, 1990, the general counsel and secretary of the Board informed the ombudsman officer that the commissioners had declined her proposal. The general counsel stated that the case mentioned in the letter of the ombudsman officer had no bearing on this worker's claim. In the case mentioned, the worker was over 21 years of age and, hence, Section 27(2) never came into play.

The general counsel reiterated that, in the absence of evidence to the contrary, the Board must be presumed to have considered Section 27(2). He also stated that the commissioners considered that the inferences to be drawn from the information regarding the worker's training and employment "constitute a judgment matter and the essence of a judgment matter is that different individuals may come to different conclusions based upon the same evidence." The commissioners felt that the worker's ability to obtain a clerical position was questionable, even if she had not been injured.

As for the worker's wages as a diesel wiper, the general counsel stated that "it would seem odd, and even of dubious legality, to use a worker's wage at her post-injury job to determine her pre-injury capacity." He explained:

> . . . it is not the Board's practice to assess the reasonableness of an "old" decision on the basis of the claimant's history from the date of the decision to the present time. Rather, the Board seeks to place itself "in the shoes" of the previous decision-maker and review the decision on the basis of the information available at the time the decision was made.

In a letter dated November 7, 1991 and addressed to the chairman of the Board of Governors, the ombudsman referred to this worker's case. He submitted that "the purpose of s. 24 of the *Act* was to bring old pensions into line with current levels. The requirement that [the worker] provide evidence that [s. 27(2)] was not considered appears oppressive."

In a letter dated January 21, 1992 and addressed to the chief appeal commissioner, the ombudsman requested that the Appeal Division reopen the previous commissioners' decision, in light of the governors' January 6, 1992 resolution.

In a letter dated June 3, 1992 and addressed to the Appeal Division, the worker's adviser submitted that the Board failed to embark upon the proper inquiry. He reasoned that:

> . . . The W.C.B. file contains a memo dated September 4, 1952, which sets out the calculations used to "compute" and "check" [the worker's] wage rate. There is a letter from the worker dated August 25, 1952, which sets out her earnings prior to her date of injury. The evidence of the worker is that she does not recall any discussion with the Board of section 27(2) at the time her wage rate was originally set. The worker submits that this fact demonstrates that the Board did not comply with section 27(2), and that the presumption of regularity is therefore not available to the Board in this case.

The worker's adviser concluded that the original wage rate set in 1952 should be increased.

Because the ombudsman officer proposed that the worker's pension be based on a statistical average of the earnings in clerical positions at the time of the worker's injury, I asked the Board statisticians to provide an estimate for the 1952 monthly average earnings of B.C. workers in clerical positions. They provided a rough estimate which put these monthly average earnings at around $118.

In light of the disability awards officer's calculations which put the worker's projected pre-injury wage rate at $855.76 per month, and which were based on a 1952 wage rate of $120, I asked the Board statisticians to provide an estimate of average earnings in clerical positions in B.C. in 1980. They provided the following information:

| | | | Estimated Monthly Wage | |
|---|---|---|---|---|
| **Year** | **Quarter** | **Occupation Selected** | **Full Time** | **All Workers** |
| 1980 | 1 | Clerical | 1060 | 740 |
| 1980 | 2 | Clerical | 1100 | 760 |
| 1980 | 3 | Clerical | 1130 | 790 |
| 1980 | 4 | Clerical | 1150 | 800 |

I disclosed that data to the ombudsman officer and to the workers' adviser requesting their comments in relation to the submission that the Board's failure to take the worker's age and career potential into account resulted in an inappropriately low wage rate.

In his reply, the workers' adviser argued that the average for "all workers" in clerical position is an underestimate to the extent that the worker intended to work full time. He also suggested that wage estimates for the categories of secretaries or bookkeepers would be more appropriate than estimates for the category of general office clerks.

The workers' adviser reiterated that calculations of the worker's pension ought to reflect the fact that the worker's earnings after her injury were substantially higher than the wage rate set by the W.C.B. on her claim.

Taking into account the suggestion that earnings estimates for the categories of secretaries or bookkeeping clerks might be appropriate, I requested the Board's statisticians to provide those estimates. The 1952 estimates they provided are as follows:

| | | |
|---|---|---|
| 1. | Secretaries | $157 |
| 2. | Bookkeeping clerk | $135 |
| 3. | Typist clerk | $113 |

The Board's statisticians indicated that these were very rough estimates.

## Analysis

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

(a) "new evidence," which meets the requirements of Section 96.1 of the *Act*, or

(b) error of law or breach of the *Charter*, under Section 96(2) of the *Act* and the policy of the governors

The worker has not presented new evidence. She seeks reconsideration on the basis of an error of law.

Some of the worker's dealings with the Board trouble me. I have in mind, for example, the Rehabilitation Department's refusal to grant the worker an extension of time so as to allow her to complete her studies at the Trail Business College. The Rehabilitation Department justified discontinuing their retraining assistance on the

grounds that the worker had been attending school "for a somewhat longer period of time than [the Board] consider[s] normally necessary to complete these studies." I find this difficult to understand, in light of the Rehabilitation Department's negative views on the quality of the training at the Nelson College of Commerce. The Board requested the worker to withdraw from this course. One would have expected the Rehabilitation Department to make allowances for the apparently inadequate training received by the worker from September, 1952 until December, 1952. It did not. Neither does any consideration appear to have been given to the difficulties the worker might have in completing her courses in light of the hand disability. However, I can offer no remedy in that regard.

I am also troubled by some of the reasoning underlying the commissioners' decisions. In their September 4, 1990 decision, the commissioners considered that the proper approach to reviewing a past decision consisted in placing oneself "in the shoes" of the previous decision-maker which would entail scrutinizing the decision "on the basis of the information available at the time the decision was made." Bearing this approach in mind, as well as the fact that permanent disability pensions are intended to compensate workers for an impairment to their earning capacity, I fail to see why, in their September 27, 1989 decision, the commissioners relied on some post-1952 evidence in upholding the 1952 disability award. There seems to be some inconsistency in the commissioners' decisions. But that is insufficient ground for reconsideration. There must be an error of law to justify reconsidering these decisions.

In substance, the commissioners' decisions involve two issues. One issue concerns the worker's wages as a diesel wiper. The other concerns the Board's application of the relevant statutory provisions in 1952.

As regards the first issue, the prior commissioners' considered that the worker's wages as a diesel wiper were irrelevant to the calculation of her pension since they do not indicate the worker's pre-injury earning capacity. That is not a patently unreasonable finding. A wage rate for a claim is commonly established by reference to the average earnings of the worker at the time of or preceding the injury. The worker's wage rate as a diesel wiper does not reflect the impairment of her earning capacity resulting from the disability.

As regards the second issue, the commissioners were not prepared to find that a previous Board simply ignored a provision of its constituent statute in the absence of evidence to the contrary. In other words, they relied on the presumption of the regularity of the acts of public officers. The commissioners' September 4, 1990 decision stated unequivocally that this had formed "the essence" of their September 27, 1989 decision.

The commissioners treated the presumption of regularity as an extremely strong presumption, finding that only evidence that an illegal act had actually occurred could displace it. The question arises whether their application of this presumption can be justified, in the circumstances of this case.

There is a rebuttable presumption in law in favour of the regularity of the acts of public officers. It has been applied in civil and criminal proceedings.

Moreover, as pointed out by the commissioners, the courts have used this presumption in deference to administrative agencies. This is in keeping with the court's reluctance to intervene in the affairs of such agencies. However, in this case, the commissioners were being asked to review the decision of a claims adjudicator as it involved the application of the statute. The commissioners' expertise lay in the application and interpretation of the *Workers Compensation Act*. Hence, the argument in favour of deference on the basis of special expertise — relevant in the course of judicial review of administrative actions — does not apply here.

In *A Treatise on the Anglo-American System of Evidence* 3rd ed. (Boston: Little Brown and Company, 1940) Vol. 9, Wigmore discusses the presumption of regularity as follows:

> . . . and its scope as a real presumption is indefinite and hardly capable of reduction to rules.
>
> It may be said that most of the instances of its application are found attended by several conditions; first, that the matter is more or less in the past, and incapable of easily procured evidence; secondly, that it involves a mere formality, or detail of required procedure, in the routine of a litigation or of a public officer's action; next, that it involves to some extent the security of apparently vested rights, so that the presumption will serve to prevent an unwholesome uncertainty; and, finally, that the circumstances of the particular case add some element of probability.
>
> p. 488

I appreciate the prior commissioners' point that the original pension decision was made years ago and, at that time, the factors taken into account in making decisions were often not completely documented. Therefore, lack of documentation is not sufficient "proof" of lack of consideration. In terms of Wigmore's criteria, the matter can be fairly characterized as "incapable of easily procured evidence." In the memo dated May 26, 1989, the director of Claims pointed out the difficulty of determining past Board practice. But this does not entirely absolve an internal appeal body with investigatory powers from trying to determine whether an impugned decision was consistent with the relevant statutory provisions. In this case, as suggested by the

director of Claims, a plausible “consistency test” could have been devised by obtaining estimates of earnings in relevant work categories and comparing these estimates with the award actually made. The commissioners did not do so.

Although not directly relevant to the question of whether Section 27(2) was properly considered, it is noteworthy that in 1952 Board practice as to compensation awards for physical impairment deviated from the relevant statutory provision (at the time Section 22(1)). This provision did not empower the Board to evaluate compensation from “the nature and degree of the injury” solely. The Board had to “have regard to the workman’s fitness to continue in the employment in which he was injured or adapt himself to some other suitable employment or business.” But, in evaluating compensation awards, the Board did not adhere to this requirement. It merely translated the degree of physical impairment into a more or less arbitrary percentage of loss of earning capacity without paying attention to the difference between the average wage at the time of the injury and the actual or potential wages after the injury. Mr. Justice Sloan discussed this discrepancy between Board practice and the theory underlying the applicable compensation provision in his 1942 Report (at pp. 108-110) and his 1952 Report (at pp. 152-154). The statutory provision was subsequently amended to validate Board practice to compensate on the basis of loss of physical function alone.

Evidently then, in some compensation matters, Board practice in 1952 did not abide by the statutory requirements. The commissioners were in a position to know this which might have flagged to them the need to examine more closely the decision involving this worker.

In light of the above considerations, the commissioners’ application of the presumption of regularity was weak. By putting the entire onus of rebutting this presumption on the applicant and insisting that it must be shown that an illegal act was actually done, the commissioners took a very harsh stand.

However, the general standard of review I adopted in relation to prior commissioners’ decisions is that of patent unreasonableness (see Decision No. 92-0818 in *Workers’ Compensation Reporter*, Vol. 8, page 211). Although I have strong reservations about the manner in which the commissioners applied the presumption of regularity, I cannot go as far as to find their use of this presumption patently unreasonable. The Board’s use in 1952 of $120 in calculating the worker’s pension as opposed to her actual earnings at the time of injury gives some measure of justification to their presumption.

Furthermore, even if there were an error of law in the commissioners’ decisions, I would still be reluctant to disturb the 1952 Board decision, in light of the evidence now before me. I would only be prepared to set aside this decision if the evidence suggested that it was more probable than not that the Board failed to take Section 27(2) into account in calculating the worker’s pension. Or put somewhat differently, the evidence

would have to show that use of $120 as the average earnings figure was clearly inappropriate, in light of Section 27(2) and the evidence available on the worker's employment prospects prior to her injury.

Subsection 27(2) required the Board to make a projection into the future when assessing the average earnings of a worker who at the date of the accident was a minor. In 1952 the provision read as follows:

> (2) When the workman was at the date of the accident under twenty-one years of age, and it is established to the satisfaction of the Board that under normal conditions his wages would probably increase, the fact shall be considered in arriving at his average earnings or earning capacity. R.S. 1936, c. 312, s. 25; 1943, c. 72, s. 23.

Before the accident, the worker had been studying typing, shorthand and bookkeeping in evening classes.

The Board estimates provided for earnings in possibly relevant occupations ranged from $113 to $157. More specifically, the estimated average earnings (including those of temporary and part-time workers) in the following occupations were:

| | |
|---|---|
| Typist clerk | $113 |
| General office clerk | $118 |
| Bookkeeping clerk | $135 |
| Secretaries | $157 |

The $120 figure used by the Board is very close to the average earnings in general clerical positions and evidently exceeds the average earnings of typists. Admittedly, it bears a weaker relationship to the average earnings of bookkeepers and secretaries. The evidence on file indicates that the worker experienced some difficulties with typing but none with shorthand and bookkeeping. Hence, the $120 figure used by the Board appears to be somewhat out of line with a projection of the worker's earnings into the future, taking into account the worker's abilities and vocational training prior to her injury. But the discrepancy is not substantial enough to warrant the inference that Section 27(2) was not considered by the Board.

The workers' adviser argued that the proper comparison must be between the $120 figure used by the Board and estimates of earnings of full-time workers (as opposed to all workers) in the relevant occupations, implying that any other form of comparison would be misleading. I cannot accept this argument. The consistency between the 1952 Board decision and the statutory requirements has to be measured in the broadest possible terms.

The commissioners’ decisions of September 27, 1989 and September 4, 1990 must, therefore, stand.

THE APPLICATION FOR RECONSIDERATION IS DENIED.

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

WORKERS' COMPENSATION
REPORTER

# Decision of the Appeal Division

**Number:** 92-1818
**Date:** November 18, 1992
**Panel:** Connie Munro, Chief Appeal Commissioner
**Subject:** Medical Review Panel Certificate #5

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This matter comes before me as a request by the ombudsman that the commissioners' decisions of October 16, 1990 and February 22, 1990, be set aside on the basis of an error of law. The worker's case had been considered by a Medical Review Panel of orthopedic specialists. The panel issued a certificate dated September 8, 1987, stating:

1. The condition of the claimant is only fair, because of exaggerated complaints of pain.

2. He does now have a disability with respect to his back.

3. The nature of the disability is low back and right leg pain of moderate extent. It limits his bending, lifting, sitting, standing, or walking for prolonged periods of time and this has limited his capacity for work.

4. His compensable injury of 7 February was of causative significance as it temporarily aggravated a pre-existing condition.

5. The disability was partly the result of causes other than his compensable injury of 7 February, 1984. These other causes are degenerative disc disease at L4-L5 and grade one spondylolesthesis at L5 on S1, moderate degenerative changes throughout his lower thoracic and lumbar vertebrae. He also has a psychogenic pain disorder which was initiated but not caused by the accident of February 7, 1984. At the time of the compensable injury the pre-existing conditions and the injury were of equal significance in the production of his disability.

6. a) Each cause did not independently result in some disability.

   b) The pre-existing causes as noted in issue #5 acted together with the compensable injury of 7 February, 1984 to produce the disability.

7. The panel feels that the claimant was not disabled as a result of his compensable injury of 7 February, 1987 [sic, should read "1984"] beyond 20 November, 1984. The Panel believes that any back or right leg pain beyond that date is due to the pre-existent conditions and the psychogenic pain disorder.

8. The claimant did suffer from pre-existent conditions as outlined in Issue #5 which were aggravated by the compensable injury of 7 February, 1984. The aggravation was temporary and did not extend beyond 20 November, 1984.

9. The disability of the claimant's back and right leg is permanent and stabilized on or about 20 November, 1984.

As a result of representations made to the commissioners by the Ombudsman's Office, the certificate was referred back to the Medical Review Panel. The ombudsman, in a letter to the Board March 21, 1988, expressed concern about the ambiguous wording of the description of the psychogenic pain disorder. The certificate referred to it being "initiated but not caused by the injury." The ombudsman argued that

> Since the words initiate and cause both denote a precipitating effect, it is contradictory to use them in opposition to each other. A disorder initiated or caused by a compensable injury can be compensable as a personal injury under the *Workers Compensation Act*.
>
> In a letter dated April 26, 1988, the chair of the panel was asked to "advise as to what was meant by the comments in clause 5 of the certificate."

A May 13, 1988, letter of clarification was issued by the panel. The three panel members concurred that:

> The word "initiated" in Clause 5 should have been "activated."

The appeals administrator advised the worker and the Ombudsman's Office that he felt the panel's letter of clarification confirmed:

> the earlier decisions of the Board regarding the duration of your disability arising out of the 1984 incident.

He advised that there would be no change in the status of the claim.

The Ombudsman's Office wrote again September 19, 1988, pointing out that:

> . . . the Panel's substitution of the word "activated" for initiated does not resolve the ambiguity in the wording, and since the issue of the causation of the psychogenic pain disorder has not been determined, we would propose, pursuant to section 14(2) of the *Ombudsman Act*, that a Medical Review Panel composed of psychiatrists be set up to decide on the issue of the psychogenic pain disorder.

The commissioners rejected this proposal in a letter dated December 2, 1988. The commissioners said they were unable to agree with the proposal, stating that they concluded the findings of the Medical Review Panel certificate dated September 8, 1987, as clarified by the May 13, 1988, letter, were within the panel's jurisdiction and sufficiently clear so as to not require any further clarification.

On April 17, 1989, the ombudsman again wrote stating that while their office had not reached a final conclusion on the complaint, they were prepared to tentatively find, pursuant to Section 16 of the *Ombudsman Act*, that the Board's acceptance of the ambiguous wording in a certificate written by a panel composed of specialists who are not expert in the area of psychological disability constitutes an unfair procedure (Section 22 *Ombudsman Act*). The tentative recommendation advanced by the ombudsman was:

> That [the worker] be given a Medical Review Panel composed of psychiatrists to determine whether there is a psychogenic pain disorder related to his work injury in 1984 or to previous compensable or non-compensable factors.

In a letter dated February 22, 1990, Board counsel advised the ombudsman of the B.C. Supreme Court decision in *Kooner* v. *Workers' Compensation Board* (in *Workers' Compensation Reporter*, Vol. 7, p. 131). The ombudsman, in a letter dated April 20, 1990, agreed that the judgment allows a Medical Review Panel composed of specialists in an organic field to make findings of a psychiatric nature. However, the ombudsman raised

again the issue of the wording of the certificate, arguing that although the panel can make a conclusive and binding medical certificate only the Workers' Compensation Board can interpret the legal aspects of the certificate.

The ombudsman contended that any disability which was "activated" or precipitated by a work injury can be compensable. Therefore, although the panel altered its wording from "initiated" to "activated," the two words have the same legal implications with respect to the worker's claim. The ombudsman's contention was that the similarity in the meaning of the two words indicates that the Medical Review Panel found the psychogenic pain disorder to have been triggered by the work injury, a finding which would make the injury of causative significance in the development of the psychogenic pain disorder.

The ombudsman's submissions pointed to the certificate, the clarification and the narrative as making the following relevant findings:

1. That the worker has a psychogenic pain disorder which was activated but not caused by the 1984 compensable injury.

2. That any back or right leg pain beyond November 20, 1984 is due to the pre-existing conditions and the psychogenic pain disorder.

3. That magnified pain behaviour and functional overlay are due to a psychogenic pain disorder which was present prior to the injury. The psychiatrist consulted by the Medical Review Panel found it related to two prior compensable injuries. The worker's "apprehension" was related to his 1984 compensable injury.

The ombudsman pointed out that although the panel's certificate following the clarification is not completely clear that there was nothing in the certificate to indicate that the psychogenic pain syndrome is non-compensable as assumed by the commissioners. It was further pointed out that the findings in both the initial certificate and the clarification relate the syndrome directly to the 1984 injury and/or to prior compensable injuries. The ombudsman, therefore, sought a further response from the commissioners. He did not consider the Board's letter of February 22, 1990, as adequately responding to the issues raised in the April 17, 1989, submission on the legal implications of activation of any psychological disability. In a response dated October 16, 1990, the Board's general counsel advised the ombudsman that:

> . . . the Commissioners are unable to agree that [the worker] is entitled to be further compensated as a result of the Medical Review Panel certificate dated September 8, 1987 as subsequently clarified on May 13, 1988.

The matter now becomes before me to consider whether an error of law is contained in the decisions of the commissioners:

a) that the worker has no further entitlement to compensation benefits; and/or,

b) the refusal to refer the matter to another Medical Review Panel.

I have considered all of this material on file and am satisfied that the certificate contains a serious ambiguity. Paragraph 5 of the certificate refers to the psychogenic pain disorder as having been "activated" but not caused by the compensable work injury. One possible view of the certificate is that it would appear the panel felt the activation "temporarily aggravated a pre-existing condition" as referred to in paragraph 4. That interpretation is supported by paragraph 7.

> The panel feels that the claimant was not disabled as a result of his compensable injury of 7 February, 1987 [sic, should read 1984] beyond 20 November, 1984.

However, it is also clear from the certificate that the psychogenic pain disorder remains a factor in the ongoing disability. Paragraph 7 goes on to state:

> The Panel believes that any back or right leg pain beyond that date is due to the pre-existent conditions and the psychogenic pain disorder.

The psychogenic pain disorder is not identified as a pre-existing disability and once activated is identified as having ongoing significance to the level of the worker's disability. Therefore, on the face of it, the certificate raises a suggestion of ongoing Board responsibility.

These ambiguities are compounded, as the ombudsman points out, by the suggestion in the narrative report by the panel and in the consultation report by the psychiatrist engaged by the Medical Review Panel, that other compensable injuries were also a factor.

I have reviewed and weighed all of the medical evidence, the history of this case and the history of the previous compensable injuries. In light of the degenerative spinal changes identified by the Medical Review Panel I am doubtful that the work accidents would have had any permanent significance to the current condition of the worker's back. That is not, however, a judgment that is open to me following certification by a Medical Review Panel. Neither was it open to the commissioners. Once a Medical Review Panel certificate was issued, the role of the commissioners was simply to

implement that certificate. If the certificate contained sufficient ambiguity that it could not be implemented without re-weighing the medical evidence, then the issues must be referred back to the Medical Review Panel or to a new Medical Review Panel. It was not open to the commissioners to resolve the ambiguity created by the wording of the medical certificate by imposing their judgment of the medical evidence.

In doing so the commissioners committed an error going to jurisdiction. Their decision must be set aside. In the circumstances it appears to me that the best resolution of this matter would be to accept the recommendation of the ombudsman that the worker be examined by a panel of psychiatrists. The determination required is whether there is a psychogenic pain disorder related to the worker's compensable injury in 1984, or to previous compensable or non-compensable factors.

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

## Decision of the Appeal Division

**Number:** 92-0922
**Date:** May 1, 1992
**Panel:** Connie Munro, Chief Appeal Commissioner
**Subject:** Section 34

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On January 21, 1992, the Appeal Division denied an appeal by the employer from Review Board findings dated August 30, 1990. Subsequently, correspondence has been received from the solicitor for the employer. The employer's representative is not requesting a reconsideration of the Appeal Division decision but rather is seeking to have addressed an issue raised in their submission to the Appeal Division which was not referenced in the panel's decision.

The issue relates to the application of Section 34 of the *Workers Compensation Act* where, as in this case, the worker is in receipt of a wholly employer-funded pension. The request is that the Board exercise its discretion under Section 34 to deduct the amount of pension benefits being received by the worker from his W.C.B. award and pay the amount deducted to the employer.

The employer correctly points out that the Section 34 issue was raised in the submissions made with respect to the appeal of the Review Board decision, however, at no point in the decision is the submission with respect to Section 34 addressed. The employer's counsel points out that the issue raised with respect to Section 34 of the *Act* is of considerable importance both to the employer and to the industry as a whole and accordingly they are requesting that it be addressed.

A review of the correspondence on this file indicates that the former commissioners recognized the issue of the application of Section 34 as a significant policy matter which needed to be addressed. In a letter dated October 17, 1990, the employer was advised by an appeals officer that the commissioners would consider both the Section 91 appeal and the Section 34 policy issue at the same time. On February 4, 1991 the appeals officer sent a letter to the employer's representative confirming that submissions were considered completed. The employer had every reasonable expectation that the policy matter would be dealt with at the same time as the Section 91 appeal.

I have consulted with the single appeal commissioner who heard the employer's appeal in this matter. She has confirmed that she was cognizant of the Section 34 issue having been raised, however, felt that as this was purely a policy matter that she lacked the authority to deal with it. I am advised that she intended to state same in the written reasons for her decision on the Section 91 appeal, however, she neglected to do so.

I have, therefore, reviewed this matter and given consideration to what disposition ought to be made of the employer's Section 34 argument at this stage.

Section 34 of the *Act* states as follows:

> 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.

The governors' policy respecting the application of that section is contained in *Rehabilitation Services and Claims Manual* items #34.40 and 34.42. Item #34.40 deals with employers who continue paying full wages to disabled workers for periods of temporary disability. Item 34.42 deals with the application of Section 34 to termination pay. 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.

This has been identified as one of the outstanding compensation issues to be addressed by the governors. The issue as acknowledged by the governors, is whether permanent partial disability benefits should be offset by any pension benefits being paid by an employer. There is nothing even of a general nature in the current policy that could potentially cover this situation.

The employer's submission refers to a case involving another employer in which the previous commissioners had considered this issue. The employer alleges that ". . . the commissioners decided that where a pension is wholly funded by an employer 'as a minimum the Board's policy would require deduction of pensions in cases such as the present up to age 65 years'."

I have reviewed that file to determine whether the use of Section 34 in the manner requested by the employer has been established practice within the Board although not formally acknowledged in the governors' policy. The case referred to by

the employer was the subject of a commissioners' decision dated January 25, 1984. The worker had been awarded a loss of earnings pension. On an appeal by the employer, a majority of the Review Board panel determined that the amount of the pension that the employer paid the worker should be deducted from the loss of earnings pension paid by the Board and that the employer should be reimbursed by the Board all or part of that amount. The matter was referred to the commissioners on the basis that the Review Board finding breached policy. The decision on the referral stated:

> The Commissioners have concluded that the board of review decision does represent a proper interpretation of Section 34 of the *Workers Compensation Act*. Since the pension is wholly funded by you, the Board is obliged to take it into consideration in determining the amount of payments it makes to [the worker]. Because the conclusion of the board of review raises a new question of policy which requires extensive consideration by the Commissioners, they are not at this point prepared to make a final decision on a complete new policy on this matter. They have, however, concluded that as a minimum the Board's policy would require the deduction of pensions in cases such as the present up to age 65 years. The board of review decision regarding this claim will, therefore, be implemented to that extent.

The matter was further considered in a decision letter dated November 14, 1988, sent to the worker. Firstly, the commissioners acknowledged that their previous decision had not been wholly complied with in that the worker's pension had been reduced but reimbursement was only made to the employer of one month's deduction. They went on to say:

> You reached age 65 on December 30, 1987. Since it does not appear that a policy is likely to be issued in the near future, a decision has now be [sic] made on the particular facts of this case.

The decision reached by the commissioners was that:

> . . . the award originally granted to you by the decision of the Disability Awards Officer dated October 16, 1981, should be reinstated effective December 30, 1987.

The policy issue was not further dealt with under that file. No general practice implementing the interpretation of Section 34 utilized in that file was adopted. That is, other workers receiving loss of earnings pensions since that decision have not had their benefits reduced by the amount of any employer-funded pensions they may receive.

Having reviewed the employer's submission in this case, the provisions of the statute and of the governors' policy, as well as what occurred in the claim heard by the prior commissioners, it does not appear appropriate that the Appeal Division ought to further consider this matter. This issue is clearly a policy matter as to whether the discretionary authority of Section 34 ought to be invoked in the case of pension entitlement. The governors currently have a policy dealing with the application of Section 34 that applies only to temporary disabilities. It is not argued by the employer that such policy encompasses the facts of the particular case. Moreover, the governors have specifically acknowledged that this is a matter requiring their attention.

The employer's request, therefore, cannot be dealt with within the parameters of the existing policy and any expansion of that policy is in the hands of the governors. I will, therefore, forward a copy of this decision to the governors to alert them to this matter having arisen with respect to a particular case.

The employer's request for further consideration of the Section 34 issue by the Appeal Division is accordingly denied.

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

## Decision of the Appeal Division

**Number:** 92-1952
**Date:** December 8, 1992
**Panel:** Patrick L. Byrne, Alex S. Brokenshire, Sarwan Boal
**Subject:** Section 6(1) — Lung Cancer

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This is an appeal of the April 15, 1992 findings of the Workers' Compensation Review Board. The Review Board upheld the claims adjudicator's decision and found that the worker's lung cancer did not result from his employment.

The issue is whether the worker's lung cancer was due to the nature of his employment.

### Background

The worker came to Canada in 1966 and worked for his employer in general maintenance and as a bricklayer repairing and renewing refractory lining. He continued in that employment until 1987. On January 14, 1987 the worker, then 56 years of age, had surgical right pneumonectomy for squamous cell carcinoma of the lung. The worker filed a claim for compensation.

The claims adjudicator requested an opinion from the Board's medical referee for the pneumoconioses. The doctor's opinion is recorded in Memo #3:

> There is no radiographic evidence of parenchymal or pleural disease caused by asbestos.
>
> Furthermore, the pathologist was specifically asked to look for evidence of asbestosis in the resected right lung. He reported finding none.
>
> [The worker], therefore, does not meet the requirements of Schedule B with respect to his carcinoma of the lung.

The claims adjudicator reported in Memo #4 that the claim was, "not acceptable as a W.C.B. responsibility," as the requirements of Schedule B had not been met. The worker was informed of this decision by letter dated May 5, 1988. On June 22, 1988 the worker's representative wrote to the claims adjudicator requesting a review of the case with respect to whether the worker's lung cancer was work related.

On August 22, 1988 the claims adjudicator wrote to the worker's representative stating that the case did not meet the requirements of Schedule B or Section 6(1) of the *Act*.

The worker appealed to the Review Board, unfortunately, he died in February 1989 apparently due to the progression of his lung cancer. We note, however, that there is no Certificate of Death or autopsy report on file. We are satisfied from the medical reports that the worker had lung cancer. However, it is not clear if lung cancer was related in any way to his death. The worker's widow continued the appeal.

The Review Board denied the appeal and found that the worker's lung cancer and his work activities did not meet any of the presumptions in Schedule B and further concluded:

> There is not nearly enough evidence to support a conclusion that [the worker's] lung carcinoma arose from his employment in general. We accept that [the worker] was exposed to inhalation of large amounts of dust, including asbestos dust for the 16 years of his employment as a bricklayer. We also accept, from the data sheets filed that there may have been a hazard to the worker's health of developing cancer, from being involved with certain products used in the workplace but there is no qualified objective evidence that it is likely [the worker] developed the lung cancer from his employment . . . .
>
> This panel takes notice that prolonged tobacco smoking, as in the worker's case, often leads to carcinoma of the lung.
>
> We join the widow and the worker's representative in thinking that it might well be hazardous to health to inhale asbestos and other dust as a bricklayer or otherwise, but we must find on the evidence that the link between the worker's cancer or lung condition and his particular employment is not established as likely. It may be that sometime in the future medical science can satisfactorily establish that relation and when and if that happens it should be brought to the Board's attention for consideration of this claim.

The widow now appeals to the Appeal Division.

## Evidence and Argument

The employer chose only to participate in this appeal if there was to be an oral hearing. There was no oral hearing in this case and none was requested.

The widow's submission states in its entirety:

> The Review Board requires an unreasonable standard of proof to be met before finding the lung cancer to be caused by asbestos and dust exposure. The facts are that [the worker] was exposed to asbestos and silica dust in large quantities for 16 years while he worked as a bricklayer. Both substances are known to cause cancer. Even if the worker did not have asbestosis, we submit that the claim should be accepted on the basis that the cancer was most likely due to occupational dust exposure. Please review the union's submission to the Review Board.

## Reasons and Findings

We considered this case under Section 6 of the *Workers Compensation Act* which provides:

> 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.
>
> (2) The date of disablement shall be treated as the occurrence of the injury.
>
> (3) If the worker at or immediately before the date of the disablement was employed in a process or industry mentioned in the second column of Schedule B, and the

> disease contracted is the disease in the first column of the schedule set opposite to the description of the process, the disease shall be deemed to have been due to the nature of that employment unless the contrary is proved.

Item #25.21 in the *Rehabilitation Services and Claims Manual* provides the procedure for applying Sections 6(1) and 6(3):

> The first stage is to determine whether the disease alleged is one that the Board recognizes as an industrial disease. This requirement is satisfied if the disease is listed in the first column of Schedule B, or if it is recognized by the Board under the rules set out in #25.22-24. It is not necessary that the conditions in the second column of Schedule B be present . . . .
>
> The second stage is to determine whether the disease from which the claimant is suffering is due to the nature of his employment. The second column of Schedule B simply relates to one method of establishing that. If the claimant is suffering from one of the diseases listed in the first column of Schedule B, and the conditions set out opposite to that disease in the second column of the schedule apply to the claim, there is a presumption that the disease is due to the nature of the employment. Where the conditions set out in the second column are not present, that simply means that there is no presumption. However, the Board must still determine on the evidence whether the disease was in the particular case due to the nature of the employment.

Schedule B provides:

| Description of Disease | Description of Process or Industry |
|---|---|
| 4. Cancer: | |
| (a) Carcinoma of the lung when associated with: | |
| (i) asbestosis | Where there is exposure to airborne asbestos dust. |
| or | |

| Description of Disease | Description of Process or Industry |
|---|---|
| (ii) bilateral diffuse pleural thickening or fibrosis, over 5 mm thick and extending over more than a quarter of the chest wall | Where there is exposure to airborne asbestos dust and the claimant has not previously suffered collagen disease, chronic uremia, drug-induced fibrosis, tuberculosis or other infection or trauma capable of causing pleural thickening or fibrosis. |
| (e) Primary cancer of the lung | Where there is prolonged exposure to:<br>(1) aerosols and gases containing arsenic, chromium, nickel or their compounds; or<br>(2) bis (chloromethyl) ether; or<br>(3) the dust of uranium, or radon gas and its decay products; or<br>(4) particulate polycyclic aromatic hydrocarbons. |

### Parts 4(a)(i) and (ii)

The claims adjudicator and the Review Board determined that the worker did not have asbestosis and, therefore, the presumption did not apply. Schedule B recognizes lung cancer associated with asbestosis or bilateral pleural thickening and primary cancer of the lung as industrial diseases. We agree with the Review Board that the medical evidence does not support a conclusion that the worker had asbestosis or bilateral pleural thickening. There was a 1989 C.T. scan which showed the presence of pleural calcification which, "... raised the possibility of either tuberculous empyema or less likely asbestosis." While there may have been some calcification there is no evidence of fibrosis, asbestos bodies or bilateral pleural thickening. The doctors in this case did not entirely agree on whether the diagnosis of asbestosis ought to be made on the basis of radiographic or histologic criteria, or both. However, the medical evidence does not support a diagnosis of asbestosis by any of those criteria. We therefore find that the worker did not have the industrial disease of lung cancer associated with either asbestosis or bilateral pleural thickening.

## Part 4(e)

There is no dispute that the worker had primary cancer of the lung. Therefore, the worker had an industrial disease mentioned in Schedule B. However, the conditions set out in column two, opposite primary cancer of the lung, do not apply in this case. There is no evidence that the worker had prolonged exposure to any of the substances listed in column two. The question, therefore, is whether the worker's lung cancer was due to the nature of his employment.

In our view this question was not dealt with in any substantive way by either the claims adjudicator or the Review Board. The claims adjudicator stated in his letter of August 22, 1988 that he had considered the question, however, that does not appear to be the case. His memos deal exclusively with the presumptions under Schedule B and there is no evidence on the file showing any inquiry into whether the worker's lung cancer was due to his employment. Likewise, the Review Board considered the presumptions in Schedule B and sought evidence in that regard. However, with respect to whether the worker's lung cancer was due to his employment the Review Board concluded, "... we must find on the evidence that the link between the worker's cancer and his particular employment is not likely as established." There was very little evidence, aside from certain data sheets, before the Review Board on that question, as there had not been a proper inquiry by the claims adjudicator and the Review Board did not seek further evidence. The Board is obligated to conduct such inquiries, as outlined in Decision No. 326 in the *Workers' Compensation Reporter* (1981):

> ... since the compensation system in this province operates on an inquiry rather than adversary basis, there is no onus on the worker to prove his case. All that is needed is for him to describe his personal experience of the disease and the reasons why he suspects the disease to have an occupational basis. It is then the responsibility of the Board to research the available scientific literature and carry out any other investigations into the origin of the claimant's condition which may be necessary. There is, of course, nothing to prevent the claimant, his representative, or physician from conducting his own research and investigations, and indeed, this may be very helpful to the Board. However, the claimant will not be prejudiced by his own failure or inability to find the evidence to support his claim.
>
> (references deleted)

There is evidence on file that the worker smoked and was exposed to asbestos and silica dust. The scientific literature with respect to the association between those substances and lung cancer has been adequately canvassed by various agencies and commissions. In that regard, we reviewed the relevant sections of:

1. The 1984 Report of The Royal Commission on Matters of Health and Safety Arising from the Use of Asbestos in Ontario.

2. The 1985 U.S. Surgeon General's Report on the Health Consequences of Smoking, Cancer and Chronic Lung Disease in the Workplace.

3. The 1987 Merck Manual of Diagnosis and Therapy, Fifteenth Edition.

4. The 1990 International Agency for Research on Cancer (I.A.R.C.)'s publication, Occupational Exposure to Silica and Cancer Risk.

### Smoking

The worker smoked about one pack of cigarettes a day for 30 years before quitting in 1978. With respect to lung cancer, the Merck Manual provides on page 705:

> Cigarette smoking accounts for >90% of cases in men and about 70% in women, with a strong dose-response relationship and regression of incidence after quitting . . . . A small proportion of lung cancers (15% in men and 5% in women) is related to occupational agents, often overlapping with smoking: asbestos, radiation, arsenic, chromates, nickel, chloromethyl ethers, mustard (poison war) gas, and coke oven emissions.

The Report of the Ontario Royal Commission provides at page 295:

> It is now a well-accepted fact that cigarette smoking plays a critical role in the incidence of lung cancer. Smoking has been a common habit among working populations including those individual cohorts of asbestos workers that have been subjected to epidemiological study. It therefore becomes important to consider the extent to which the incidence of lung cancer among asbestos workers is attributable to their smoking habits rather than to their asbestos exposure . . . . Smokers were at 11 times greater risk of lung cancer than non-smokers.
>
> (references deleted)

and at page 300:

> To the extent that asbestos-exposed persons stop smoking, their risk of death from lung cancer, like that of non-exposed persons who stop smoking, decreases quite considerably. Again, utilizing the North American insulation workers data, the risk of lung cancer mortality for those workers who had previously smoked but stopped in 1967 was approximately one-third that of their workmates who continued to smoke over the next 10-year period.
>
> (references deleted)

It is clear that cigarette smoking is a major cause of lung cancer. However, since the worker quit smoking 10 years prior to developing lung cancer, the relevant scientific literature indicates that the risk factor would be mitigated, possibly to one-third.

### Asbestos Exposure

The Ontario Royal Commission concluded, at page 296:

> The authors found that asbestos workers who did not smoke had approximately a 5 times greater risk of dying of lung cancer than the non-smoking control population . . . .
>
> . . . asbestos on its own, in the absence of smoking, is capable of inducing lung cancer, a finding that has been amply confirmed both on the basis of experimental models and other cohort studies.

The worker was exposed to asbestos, however, there has been no quantification of that exposure. The employer reported that the worker handled asbestos products and the employer's consulting physician, Dr. A, reported, "[t]he C.T. scan of January 24, 1989 shows bilateral pleural plaques, a finding that is virtually diagnostic of previous exposure to asbestos." The duration and extent of the worker's exposure is unclear. The worker's representative reports that the worker was exposed to asbestos from 1966-1987, a period of 21 years. The Review Board seemed to only use the period of time when the worker was employed as a bricklayer, some 16 years. The Report of the Ontario Royal Commission states on page 281:

> Most epidemiological studies of asbestos workers that have demonstrated an excess lung cancer risk associated with the inhalation of asbestos have produced results consistent not only with a linear relationship between cumulative dose and

> mortality, but also consistent with the absence of a threshold . . . .
> In all of these studies there appears to be a progressive and proportional increase in the S.M.R. [Standardized Mortality Ratio] for lung cancer and no evidence of a threshold level.
>
> (references deleted)

Thus, while quantification of exposure would be helpful in assessing a risk factor, there was sufficient exposure to have caused bilateral pleural plaques. With respect to mitigation of any risk factor following cessation of asbestos exposure the U.S. Surgeon General's report on page 13 states:

> Cessation of asbestos exposure may result in a lower risk of developing lung cancer than continued exposure, but the risk of developing lung cancer appears to remain significantly elevated even 25 years after cessation of exposure.

We are satisfied that the worker was at increased risk of developing lung cancer from asbestos exposure alone, even in the absence of smoking, and that risk would not have been mitigated following cessation of his exposure.

### Asbestos Exposure and Smoking

The U.S. Surgeon General's report provides on page 9:

> The public health importance of interaction between smoking and occupational exposure is typified by the relationship between cigarette smoking and asbestos exposure among asbestos workers. A number of studies published in this country and abroad have demonstrated an approximately fivefold excess risk for lung cancer among nonsmoking asbestos insulation workers. Smoking in nonasbestos-exposed populations increases the lung cancer risk by approximately tenfold. However, the risk is more than fiftyfold greater if the asbestos worker also smokes. The risk in cigarette-smoking asbestos workers is greater than the sum of the risk of the independent exposures, and is approximated by multiplying the risks of the two separate exposures. Thus, the interaction of cigarette smoking and asbestos exposure is multiplicative in nature. To state this in another way, for those workers who both smoke and are exposed to asbestos, the risk of developing and dying from lung cancer is 5,000 percent greater than the risk for individuals who neither smoke nor are exposed . . . .

That analysis is also reflected in the report of the Ontario Royal Commission which states on page 299:

> What is important is that there is a very powerful interaction between cigarette smoking and asbestos which produces an effect that is certainly greater than the sum of their individual contributions . . . . Still, the exact manner in which asbestos and cigarette smoke combine in synergistic fashion to produce lung cancer remains uncertain.
>
> (references deleted)

The literature is clear in expressing the synergistic effect of smoking and asbestos exposure on the risk of developing lung cancer.

### Silica Exposure

The evidence on file shows that the worker was exposed to silica dust for many years. Like the worker's asbestos exposure, it is difficult to quantify his silica exposure. There is, however, no evidence that the worker had silicosis. The 1990 I.A.R.C. publication on page 7 provides:

> Our present knowledge of the potential carcinogenic effect of silica dust is characterized by three main findings: (i) silica is carcinogenic in experimental systems (I.A.R.C., 1987); (ii) lung cancer risk is increased among workers exposed to silica and not exclusively among those exposed to known carcinogens; (iii) when investigated separately, the lung cancer risk is concentrated among the subpopulation of exposed workers who develop silicosis.

It appears that there may be some increased risk of developing lung cancer due to silica exposure, however, it is not clear what that risk would be in the absence of silicosis.

### Conclusion

The question before us is whether the worker's lung cancer was due to the nature of his employment. The *Rehabilitation Services and Claims Manual* does not provide any guidance with respect to adjudicating cases where there are multiple, both compensable and non-compensable, causes of industrial diseases, except with regard to contagious diseases. Decision No. 101 in the *Workers' Compensation Reporter* (1975) considered the meaning of the phrase, "due to the nature of the employment in which the worker was employed," in the context of an industrial disease case. The commissioners reasoned:

> It follows that a worker is not entitled to compensation simply because he contracted the disease while at work. For the disability to be compensable, *there must be something in the nature of the employment which had causative significance*.
>
> (emphasis added)

In his book, Workers' Compensation in Canada, Terence Ison writes at page 58:

> ". . . it is not necessary that the worker's employment be the *most* significant factor in her ongoing condition; it is sufficient that the employment was a significant contributing factor." It is irrelevant to classify one cause as primary and the other as secondary, and it is improper to screen out contributing causes by seeking to identify "*the* cause". If the employment contributed in a material degree to the disablement or death, it is compensable. Thus, for example, where a disablement has resulted from the combined and possibly synergistic effect of industrial contamination and cigarette smoking, it is compensable.
>
> (references deleted)

It is quite often difficult to apply epidemiological studies to individual cases. There are, however, certain general conclusions that can be drawn in this case:

1. The worker was at risk from developing lung cancer from his cigarette smoking alone. However, that risk was reduced because he had quit smoking 10 years prior to developing lung cancer.

2. The worker was at risk from developing lung cancer from asbestos exposure alone; the risk would not have been mitigated for about 25 years after cessation of exposure.

3. The worker was at a substantially greater risk of developing lung cancer due to the combined effect of smoking and asbestos exposure. It is not clear if there would be any mitigation of that risk in this case, although, the overall risk appears to be a multiplicative function of the individual risks due to smoking and asbestos exposure.

4. The worker may have been at some risk of developing lung cancer from his silica exposure. However, that risk appears to be less than the risk of developing lung cancer from either smoking or asbestos exposure.

We are satisfied, based on the above conclusions, that the worker's employment had causative significance in the development of his lung cancer. Certainly, the synergistic effect of asbestos exposure and smoking greatly increased the worker's risk of developing lung cancer far beyond their individual contributions. We, therefore, find that the worker's lung cancer was due to the nature of his employment.

THE APPEAL IS ALLOWED.

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

## Decision of the Appeal Division

**Number:** 92-1967
**Date:** December 11, 1992
**Panel:** Thomas Kemsley
**Subject:** Interpretation of "Worker," "Employer," and Independent Contractor

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This is an appeal by a company from the decision of the asst. audit manager, dated August 18, 1992 which stated, in part:

> The Assessment Department has ruled that *all of your managers are considered to be workers* and, as such, all payments made to them must be included in assessable earnings.

Attached to that decision letter was a memorandum issued by the manager of policy — Assessment Department, dated August 13, 1992, which outlined the basis for the decision.

Several written submissions were received on behalf of the company on this appeal. As the Assessment Department had already provided reasons for its decision, no response was requested from it to these submissions.

This appeal concerns the relationship between the company and its managers, which also will determine which party employs the painters. This relationship arises from a document entitled "Branch Manager Agreement" until 1990 and "Branch Manager's Agreement" in 1991 and 1992 (both called Branch Manager's Agreement in this decision) made between the company and an individual (called the "manager" in the Branch Manager's Agreement and in this decision). The managers hire painters, who are not parties to the Branch Manager's Agreement. The Assessment Department determined that the managers, and the painters, are "workers" of the company, and assessed the company based on the assessable payroll of the managers and painters. The company argues that the managers are really Independent Operators, as being true franchises, and the painters are the workers of the managers. Thus, the company should not be required to pay assessments on the assessable earnings of the managers and painters. The written submissions on behalf of the company are very comprehensive and well argued and I will not attempt to summarize or repeat them in this decision.

The basic issue here concerns the interpretation of the words "worker," "employer" and "independent operator" in the *Workers Compensation Act*. Section 1 of the *Act* defines worker and employer, but not independent operator. Several decisions of the former commissioners and several policy items in the *Rehabilitation Services and Claims Manual* and the *Assessment Policy Manual* elaborate on the meaning of these three categories, and add a fourth category of "labour contractor."

Issues of interpretation involve consideration of the language of the *Act*, the purpose of the legislation and the published policies of the governors. Here, the relevant language of the *Act* is somewhat general in nature and does not specifically address franchise-type arrangements. Similarly, the published policies of the governors provide only general guidance in interpreting the categories of worker, labour contractor and independent operator or independent firm. Thus, it is necessary to consider the purpose of the legislation in interpreting and applying the *Act* to this particular situation.

The interpretation of "worker" in workers' compensation law will not necessarily correspond exactly with the definition of worker or employee in other areas, for example, labour law. Different legislation has different purposes and a legislative scheme must be interpreted in light of its own purposes. As stated in *Larsen's Workmen's Compensation Law* (Matthew Bender), one basic theory of workers' compensation is that:

> . . . the cost of all industrial accidents should be borne by the customer as part of the cost of the product. It follows that any worker whose services form a regular and continuing part of the cost of that product, and whose method of operation is not such an independent business that it forms in itself a separate route through which his own costs of industrial accident can be channelled, is within the presumptive area of intended protection.

Thus, an important consideration in the determination of who is a worker, employer or independent operator in a particular situation is who is in the best or most appropriate position to determine assessable earnings, make the appropriate assessment payments to the Board, and pass on the cost to the customer.

House painting is a compulsory industry under the *Act* and all workers engaged in that industry in British Columbia are covered under the workers' compensation system. Employers are assessed on the basis of their payroll and this cost is passed on to the customer as part of the overall price for the work done. The Board's tests, for resolving disputes about who is a worker, focus on issues of control and independence. The submissions argue that in the business relationship between the company and the managers, there was only the amount of control and interdependence necessary to

maintain the goodwill of the company, to ensure quality work, and to protect the financial interests of the company. The submissions also point to some inaccurate language in the Branch Manager's Agreement.

A number of the factors present in the relationship between the company and the managers could be found in an employment relationship or in an independent contractor relationship. This is due to the high degree of interdependence that exists in most franchise, and certainly these, agreements. In this complex relationship, certain factors emerge as significant in the determination of this appeal. The company has considerable control over finances in the Branch Manager's Agreement. All customers' cheques are made out to the company and go directly to their bank account. These payments do not go to the manager and the manager has no signing authority on the company account. The company "administers" this money by paying the wages of the painters, the benefits associated with those wages including workers' compensation assessments, suppliers' accounts, liability insurance, applicable taxes, any damages owed to the company by the manager, the company's administrative service charges, and the company's fee. The balance is paid on a bi-monthly basis to the manager. This financial structure is mandatory.

The company says that it does not "pay" the various accounts — it only administers the money and issues the cheques on behalf of the manager. The company says this degree of financial control is necessary to protect its financial interests. However, from a workers' compensation perspective, this degree of financial or monetary control points strongly to an employer/worker relationship between the company and its managers. All accounts are paid before the manager gets his or her money or "commission." The company does not set the price of any particular painting job, but it controls the money. On the information presented, this is more than a mere payroll service, and is significant control at the point where the money is distributed. This is a significant point in the workers' compensation system, as it is the point at which the assessable payroll is determined and workers' compensation assessments are paid — directly from the money received from the customer. The business of the manager is not independent from the company at this point as all deductions are made by the company. The manager determines what wages are owing to individual painters but, other than that, the company's system determines and makes the other payments, including the appropriate W.C.B. payments. Due to this significant control over this part of the business, the company is in the best position to determine assessable payroll and ensure that assessments are paid. They in fact do this.

Another factor that points to an employer/worker relationship for workers' compensation purposes is the extent to which the managers and painters constitute an essential part of the company's business. The submissions state that the company is in the business of selling franchises, not painting houses. However, it is clear that most of the company's financial return comes directly from house painting. They have a low

initial fee and receive a percentage of the gross sales of the managers. They receive this directly from the customers' payments, not from the manager. They also offer a two-year written guarantee to the customer, which is the guarantee of the company not the managers. The managers must operate their business and contract with all of the customers in the name of the company. I am satisfied that the company is significantly involved in the business of house painting, and not merely selling franchises. Thus, the managers, and painters, perform an essential part of the company's business and do not really have an independent or separate business venture. This is significant in the relevant policy of the governors.

Finally, the language of the contract cannot be totally ignored. The Branch Manager's Agreement is a standard form contract which is drafted and provided by the company. Most of the terms are not negotiated. The submissions point out that the Board does not look solely at how parties describe their relationship in a contract. The Board is concerned with the true nature of the relationship. It is true that the Board will not allow parties to avoid certain obligations merely by choosing carefully their contract language. On the other hand, the language of a contract is not totally ignored in determining the intent of the parties. As well, generally, contracts will often be read more strictly against the party who was able to dictate most of the terms.

In the Branch Manager's Agreement, there are various references in the different agreements over the years to "branch managers," "commissioned agents," the manager's "commission," the manager's "bonus," "profit centre" and "approved suppliers." The submissions state that these terms are inaccurate and do not reflect the true relationship. However, in combination with the above factors, I find that the contractual language chosen by the company does point to an employer/worker relationship. The Branch Manager's Agreement also refers to the manager as a "sole proprietor," but the majority of the indicative language shows that the company is trying to exert substantial control over these managers and is using contract language that reinforces that degree of control. I cannot accept that this language was chosen in error, especially as the 1992 Branch Manager's Agreement continues to use it, nor was chosen just to make it easier for the student managers to comprehend. It is the language of control, not independence, and, as such, is significant in the workers' compensation context.

In conclusion, while there are many factors present in the relationship between the company and its managers that are equivocal as to the true nature of their relationship, there are several factors which lead me to conclude that, for the purposes of workers' compensation, the managers, and painters, of the company are "workers" of the company within the meaning of Part I of the *Workers Compensation Act*.

I THEREFORE DENY THE APPEAL.

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

WORKERS' COMPENSATION
REPORTER

## Decision of the Appeal Division

**Number:** 92-1968
**Date:** December 10, 1992
**Panel:** P. Michael O'Brien, Alex Brokenshire, Walter N. Peain
**Subject:** Remedial Jurisdiction (2)

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The worker appeals the September 13, 1990 finding of the Worker's Compensation Review Board. That finding upheld, in part, earlier decisions of Board officers with respect to the worker's permanent partial disability. Those decisions had increased his permanent partial disability pension, on a functional basis, to 11.59% and had denied a loss of earnings pension on the grounds that there were occupations within the worker's skills and abilities that would provide him with an income which, when combined with his functional disability pension, would at least equal his pre-injury earnings.

The Review Board concurred with the disability awards officer's assessment of the functional pension but rejected the loss of earnings decision. The Review Board said that the worker could not do the jobs identified by the rehabilitation consultant and went on to give their "opinion" that he was not 100% unemployable. The matter of employability was referred back to the Board for reassessment.

That reassessment was conducted and a further decision was issued dated January 22, 1991. That decision was also appealed and a Review Board finding of June 26, 1992 dealt with the loss of earnings issue again. The rehabilitation consultant had recommended this time that the worker could be employed as a taxi driver or dispatcher, or as a sales clerk. The rehabilitation consultant said that these occupations would result in a loss of earnings of approximately $248.46 per month. The Review Board disagreed with this finding on new evidence that demonstrated the worker was functionally illiterate. That panel, however, found that it was bound by the comment in the earlier Review Board finding with respect to their opinion that the worker was not 100% unemployable. The later Review Board characterized that opinion as being a conclusion or finding of fact of the Review Board with which the panel could not disagree.

The later Review Board went on themselves to conclude that the worker could not perform the occupations of taxi driver or dispatcher or sales clerk, but rather agreed with a later recommendation of a rehabilitation consultant that the worker could perform a bench repair type of position reconditioning laser printer cartridges. The

panel, however, determined that they had no jurisdiction to make such a finding as no decision had yet been made by the Board and appealed by the worker on the specific position of laser printer cartridge repairman. The panel therefore referred the matter of employability back to the Board, one more time, for further reconsideration.

The worker's representative submitted that the worker was unemployable and should therefore receive a 100% permanent disability pension. No differentiation was made by the representative between a functional pension or a loss of earnings pension.

### The Issue

As this panel sees it, the sole issue to be determined is what compensation is payable to the worker as a result of his permanent partial disability. Section 23(1) of the *Workers Compensation Act* provides that workers shall be paid "a sum equal to 75% of the estimated loss of earnings resulting from the impairment . . . ." Further paragraphs in Section 23 go on to provide different methods for estimating that loss of earnings.

The panel does not agree with the second Review Board that the first Review Board finding bound them. The first Review Board very carefully does *not* make a finding of fact when making reference to the worker's employability. They simply state their "opinion." If the first Review Board had made a finding of fact that the worker was not 100% unemployable, they would have been bound to go on and determine the degree of employability. They did not do so. Rather, they referred the whole matter back to the Board for further consideration.

The panel also does not agree that the second Review Board had no jurisdiction to make a finding on loss of earnings. Clearly, the loss of earnings method of calculating a worker's permanent partial disability pension entitlement is simply one of the two alternatives that are available to Board officers, and indeed to the Review Board. The identification of a specific occupation that can or cannot be performed by a worker arises out of Board policy which is simply intended to avoid vague suggestions that workers can make certain levels of earnings without being specific as to occupations that will provide those levels of earnings. The decision appealed was contained in a letter of January 22, 1991. The adjudicator said:

> This letter is the decision relating to your disability entitlement.

The letter went on to determine residual ability to work.

Surely that brought the whole issue of employability in front of the Review Board on appeal. Therefore, although the specific matter of employment as a bench worker had not been mentioned in the decision letter in front of the second Review

Board, evidence on that matter was clearly available to that Review Board and could well have been used by them in assessing employability. Indeed, if by some stretch of the imagination that evidence was not in front of the Review Board, the memorandum from the rehabilitation consultant responding to a query from the Review Board clearly brought the matter of the worker's employment in that capacity in front of the Review Board as a matter of direct evidence.

The worker's permanent partial disability pension was first decided some 28 months before the second Review Board heard his appeal and some 34 months before their finding was issued. To send that matter back for further reconsideration by the Board, and potentially further appeal through the system again, engendering even further delay, is in this panel's view entirely inconsistent with the aims of the Workers' Compensation system. The second Review Board panel had evidence in front of it as to the Board's position on employability including a functional assessment, a permanent partial disability assessment, input from the rehabilitation consultant, as well as independent evidence from the R.E.A.D. Society with respect to the worker's literacy level. That Review Board panel also had an extensive history of the worker's employment and the opportunity to discuss all of these matters directly with the worker and with his representative. Having had all of that evidence in front of them, and being fully aware of the significant amount of time that had transpired while the worker was attempting to have this matter dealt with, this panel finds it most unusual that the Review Board would decline to deal with that matter on the narrow technical ground that a particular job was not specifically mentioned in the decision letter giving rise to the appeal.

## Reasons for Decision

The evidence with respect to the worker's employability referred to above is outlined in detail in both of the earlier Review Board decisions and will not be repeated here. Suffice it to say that the panel finds that the worker's loss of earnings should be based on earnings as a laser printer cartridge repair person.

In making this decision the panel is cognizant of the opinion of the worker's family physician; the opinion of the vocational evaluator and allied Board personnel; the evidence from the R.E.A.D. Society on the worker's virtual illiteracy; and the worker's own evidence as recorded in the two Review Board findings.

On balance we find that the Board's position that the worker is, in effect, malingering, is unsupported by those who know him well, and also by his past history. On the other hand we find the worker's representative's position that he is totally unemployable equally untenable. We therefore accept that the worker could be employed in a reasonably sedentary job *such as* that outlined by the rehabilitation

consultant in Memo #53, a bench worker reconditioning laser printer cartridges. We, however, do not agree with the rehabilitation consultant that the worker would automatically rise to the higher salary scale outlined for such a position. The starting rate identified for the job was $6.00 per hour and the rehabilitation consultant thought that the worker could get to $7.00 or $8.00 per hour and therefore calculated his maximized earnings on the $8.00 per hour figure. The panel feels that the $7.00 per hour figure would be more reasonable, simply on the grounds of the worker's illiteracy, age, and his lack of demonstrated ability to adjust to changes in the work environment. We do not find that lack of ability to be blameworthy, but rather a product of the worker's history.

In summary, the panel finds that the worker does suffer a loss of earnings and that is best calculated by comparing his pre-injury earnings with his potential earnings at $7.00 per hour, using appropriate calculations to normalize those earnings for the same time periods.

THE PANEL ALLOWS THE APPEAL TO THE EXTENT NOTED ABOVE.

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

WORKERS' COMPENSATION
REPORTER

## Decision of the Appeal Division

**Number:** 92-1459
**Date:** August 26, 1992
**Panel:** Paul Petrie
**Subject:** Section 96(2) — Composition of a Medical Review Panel #2

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This matter arises from a January 21, 1992 request from the ombudsman that the Appeal Division reconsider the former commissioners' decision of June 19, 1986 and subsequent commissioners' decisions of April 18, 1988 and April 9, 1991 on the grounds of an error of law pursuant to Section 96(2) of the *Workers Compensation Act*.

The history of this case is both complex and contentious. Only those matters relating to the consideration of this application are summarized here.

While working as a chokerman on December 12, 1971, the worker was struck on the head and shoulders by a falling snag. At the time of the accident he was wearing a hard hat and he was knocked to the ground and momentarily stunned. He was hospitalized for 10 days after the injury. The medical evidence indicated that he sustained a compression fracture of the lower dorsal spine.

He was examined by a Medical Review Panel on March 18, 1977. The Medical Review Panel certified that he did have a disability with respect to his back but concluded that:

> whether his subjective back pain and depression can be related to the accident is not determinable by this panel.

The former commissioners concluded that the Medical Review Panel certificate in this case supported a finding that "there is no basis for the Board to accept responsibility for the claimant's continuing complaints of pain."

An application to the commissioners to reconsider this decision was denied on March 13, 1978. Counsel for the worker initiated an application for Judicial Review. On February 16, 1979, the B.C. Supreme Court granted the petition for Judicial Review and ordered the W.C.B. to determine the type of disability found to exist by the Medical Review Panel and to consider the award of a pension in this case.

The Board's disability awards officer eventually concluded that the worker did have a psychological disability of 15% of total. It was also concluded that only 25% of this psychological disability was due to the injury of December 12, 1971. A functional impairment award of 3.75% of total was therefore made for the psychological disability. The Board also concluded that he was totally unemployable because of the personality disorder and calculated the award on a loss of earnings basis. The Board also applied proportionate entitlement to the loss of earnings award.

The worker appealed the pension decision to the Board of Review. The Board of Review decision of May 3, 1985 concluded that he should be awarded a pension of at least 2.5% in relation to the lumbar spine and recommended that residual disability of the dorsal spine be reassessed. The Board of Review also found that he suffered from a psychological disability caused by the injury under this claim and concluded that proportionate entitlement should not be applied to the psychological disability.

The Board of Review decision was referred to the former commissioners under Section 90(3) of the former *Workers Compensation Act*. On June 19, 1986, the commissioners decided not to implement the decision of the Board of Review on the grounds that the decision was contrary to the 1977 Medical Review Panel certificate. Because of the significant new evidence that had been received since the 1977 Medical Review Panel certificate, the commissioners concluded that the claim should be reviewed by a new Medical Review Panel. The commissioners decided to defer their decision concerning the Board of Review decision pending receipt of a certificate from the new Medical Review Panel.

The worker was referred to a second Medical Review Panel made up of a psychiatrist, a neurosurgeon and an internist as chairman. On the basis of the majority Medical Review Panel certificate of August 18, 1987, the worker's pension was cancelled. The minority of the panel supported a work relationship. He then filed a complaint with the Ombudsman's Office that has lead to this application.

The ombudsman has identified three issues to be considered by the Appeal Division:

1. whether the 1987 Medical Review Panel was lawfully constituted;

2. whether the Board correctly implemented the 1987 Medical Review Panel certificate; and

3. whether the November 30, 1991 clarification by the Medical Review Panel answered the question of causation relating to the issues of hearing and visual impairment.

The appropriate test for reconsideration under Section 96(2) was considered by the chief appeal commissioner in Appeal Division Decision No. 92-0818 (in *Workers' Compensation Reporter*, Vol. 8, p. 211). In that decision, it was concluded:

> In light of the fact that the former Commissioners' decisions were protected by a privative clause, I find that, in general, the test must be whether their decision was so patently unreasonable that it cannot be rationally supported by the relevant legislation. However, in the case of decisions pertaining to natural justice issues, it is my view that the Appeal Division's scope of review is broader. In such cases, the Appeal Division must have the power to redetermine decisions of the former Commissioners on the grounds that they misinterpreted the law, irrespective of whether the misinterpretation can be characterized as "patently unreasonable". This is consistent with various judicial pronouncements on the standard of review applicable to decisions involving natural justice issues.

### Composition of the Panel

Consideration of whether the 1987 Medical Review Panel was lawfully constituted requires a review of the procedures for appointing that panel and an analysis of the requirements of the legislation that apply to such appointments.

On September 30, 1986, the Board sent the employer a list of neurosurgeons from which the employer selected Dr. B, who accepted the nomination. On the same date, the Board sent the worker a list of psychiatrists from which the worker selected C, who declined the nomination. The worker's first alternate, Dr. D, accepted. The panel was, therefore, composed of the chairman, Dr. E (an internist), and a neurosurgeon and psychiatrist.

Section 58(2) of the *Act* states in part:

> The Lieutenant Governor In Council shall appoint a medical committee which shall prepare a list of specialists in particular classes of injuries and disabilities in respect of which workers have claimed compensation . . .

Section 59(1) of the *Act* states in part:

> On receipt of the expression in writing made under section 58(3) or (4), or on a decision being made under section 58(5), the board shall, within a reasonable period of time, by notice by registered

> mail, require the worker and his employer each to nominate, from the list mentioned above, within eight days after receipt of the notice, one specialist in the particular class of injury or ailment in respect of which the worker has claimed compensation . . .

The Board's policy concerning Section 59(1) has evolved over the years. The evolution will not be detailed here because the question before me is whether there was an error of law in the composition of the Medical Review Panel in this case. The current published policy of the governors does, however, provide a framework for analyzing the question of law raised in this application. Section 103.32 of the *Rehabilitation Services and Claims Manual* states:

> *Both the worker and the employer should receive the same list of specialists for nomination for service on the Medical Review Panel.* In cases where more than one specialty is relevant, the worker and employer may each be provided with both lists. This would apply to cases where the medical question in dispute was in a borderline area between two specialties. Where the medical question in dispute involves two disparate specialties (i.e. orthopaedic surgery and psychiatry), a choice must be made as to which of the two specialties is of primary relevance to the matter in dispute. *Disparate specialties cannot be combined on one Medical Review Panel.*
>
> In certain exceptional circumstances, this will result in a need for two Medical Review Panel appeals on a claim, in different areas of specialization. However, the need for the involvement of specialists from other areas may normally be met by a Medical Review Panel obtaining a consultation report from a specialist in another area.
>
> Where an appeal is being taken to a Medical Review Panel, there can be a question of how to deal with psychological problems without the expense and complexity of a separate psychiatric panel. On this point, it is obviously desirable that a panel of say, orthopaedic surgeons, should not reach conclusions on a complex psychiatric problem that requires the expertise of psychiatrists. On the other hand, there is no objection to a panel of, for example, orthopaedic surgeons reaching a conclusion on the psychological aspect of the matter insofar as the ordinary psychological consequences of injury are a matter normally dealt with by orthopaedic surgeons. In other words, if the main problem is orthopaedic, one would expect a panel of orthopaedic

> surgeons to comment and advise on any psychological problem to the extent that orthopaedic surgeons normally consider related to psychological problems. *But if it looks as if the psychological problem is the major disability, it may well be desirable that the panel should be composed from the psychiatric list in the first instance.*
>
> (emphasis added)

It is clear from the evidence on file that the primary issue before the commissioners in their June 1986 reconsideration of the Board of Review decision was with respect to the worker's psychological problems. For example, the Board of Review's May 3, 1985 decision states:

> With regard to the primary issue, that is, the cause of the worker's psychological condition, we are satisfied, . . . that the primary if not sole cause of his current psychological disability is the injury sustained under this claim . . . .
>
> We find, therefore, that 100% of [the worker's] current psychological disability and unemployability are attributable to the accident under this claim.

In *Kooner* v. *B.C. (W.C.B.)* (1991) 54 B.C.L.R. (2D) 92 [and *Workers' Compensation Reporter*, Vol. 7, p. 131], the Court of Appeal quoted with approval Section 103.32 of the *Rehabilitation Services and Claims Manual* noted above. Although the matter before the courts in *Kooner* was concerned with referring previously decided issues to a new Medical Review Panel, the court's comments with regard to composition of the panel has some bearing in this case. In the court's judgment in *Kooner*, Taylor, J. A. states at page 95:

> So it was open to the Board to take either of the courses prescribed in its manual — to refer the whole dispute to a panel composed of neurological experts with a view to having that panel dispose of any psychiatric issues which might arise as well as neurological issues, or, alternatively, to advise the claimant and employer that there were be two panels, the first to dispose of the neurological issues and the second to decide thereafter the psychiatric questions which might remain should the first panel find no neurological disability.

In the worker's case, the Board chose a third option, that is, to provide a panel composed of a chairman and two separate specialties, a neurologist and a psychiatrist. The issue raised in this application is whether the composition of the Medical Review Panel was contrary to the requirements of the *Act*.

Section 59(1) states that the Board shall require the worker and the employer each to nominate a specialist from a list of specialists in the particular class of injury or ailment in respect of which the worker has claimed compensation. A plain reading of Section 59(1) indicates that the *Act* requires:

1. the Board to identify the particular class of injury or ailment involved in the claim;

2. the Board to provide the same list of specialists in the particular class of injury or ailment to both the worker and his employer; and

3. the worker and his employer each to nominate from the list one specialist in the particular class of injury or ailment involved in the claim.

In his report on "Commission of Inquiry *Workmen's Compensation Act*" 1966, Mr. Justice Tysoe comments as follows on the choice of panelists:

> When an application to the Medical Review Panel is properly taken, the medical department of the Board determines which specialty in medicine is involved. The complete list of nominees in that field is then sent to the workman and his employer, and each of them is required to nominate one specialist and an alternative from the list.
>
> (Page 380)

In recommending that the Board be given the authority to refer medical issues directly to a Medical Review Panel on its own motion [subsection 58(5)], Mr. Justice Tysoe heard evidence and considered the importance of adhering to fair and impartial procedures where the worker himself did not initiate the Medical Review Panel appeal. Mr. Justice Tysoe recommended that the *Act* be amended to give the Board the right to refer a matter directly to a Medical Review Panel with the qualification that appropriate provisions as to the selection of specialists to serve on the panel be established (page 373-374).

The appointment procedure followed by the Board erred in two respects. The Board failed to identify the particular class of injury or ailment in respect of which the worker claimed compensation. Two distinct specialties were identified. The Board also failed to provide the same list of specialists to the worker and the employer. These two errors are not simply technical defects in the appointment process.

Jones and DeVillars in their text *Principles of Administrative Law* (1985) observe:

> Sometimes defects in the appointment of the members of a statutory body will render its actions void. Examples of fatal defects have included: failing to appoint persons with proper professional qualifications; appointing members for the wrong term of office; not complying with a mandatory step in the appointment process; adding unauthorized additional members to a tribunal; and a lack of a quorum.
>
> (Page 108)

The two errors in this case — failing to appoint persons with particular specialty qualifications and not complying with the requirement that both the employer and the worker each nominate a specialist from the same list — together constitute a serious defect in the composition of the 1987 Medical Review Panel. I find that the appointment of the panel did not meet the requirements of Section 59(1) of the *Workers Compensation Act*.

Because the primary issue before the Board of Review and the commissioners was the nature and extent of the psychological disability and its cause, the particular class of injury or ailment in respect of which the worker had claimed compensation would normally have been psychiatry. The worker's nominee, a psychiatrist, dissented from the 1987 Medical Review Panel certificate, and concluded that the compensable injury was of causative significance in producing the psychological disability. In the circumstances, it is not unreasonable for the worker to feel that natural justice had been denied because the specialists were not both from the particular specialty in respect of which he was claiming compensation as required by the *Act*.

In deciding this matter, I have considered the fact that the worker had to seek the assistance of the court in forcing the Board to implement the 1977 Medical Review Panel certificate. In the face of this rare intervention of the court against the Board, there was a special onus on the Board, in my view, to adhere strictly to fair and proper procedures in the further consideration of this claim. This is particularly true since the intervention of the former commissioners in 1986 was to overturn a Board of Review decision that was favourable to the worker. In considering the Board of Review decision, the former commissioners took the unusual step of referring the question of the nature and extent of psychological disability to second Medical Review Panel. This could (and eventually did) result in negating the effect of the 1977 Medical Review Panel certificate that had been upheld by the court. The Board's duty to be fair in this case must withstand close scrutiny and must be seen to be fair and just.

In *Kooner*, the Court of Appeal held that:

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

In my view, the Board failed to meet this fundamental test of fairness in deciding the speciality from which the nominees were chosen and in not providing the worker and employer with the same list from which to nominate a specialist. I find that the procedure followed by the Board to appoint the 1987 Medical Review Panel breached the Board's duty to be fair in the circumstances of this case.

Having found that the procedures used by the Board to appoint the 1987 Medical Review Panel did not meet the requirements of Section 59(1) of the *Act* and also breached the Board's duty to be fair, I have no option but to find that the Medical Review Panel was not lawfully constituted and that the August 18, 1987 Medical Review Panel certificate is, therefore, void.

Because the ombudsman's recommendations regarding the Board's implementation of the 1987 Medical Review Panel certificate and the November 30, 1991 clarification by that Medical Review Panel are consequent to the panel's 1987 certificate, it is not necessary to deal with those matters in this decision.

## Disposition of the Matter

These findings raise the question of the proper disposition of this claim. The May 3, 1985 Board of Review decision in this case was referred to the commissioners for reconsideration under Section 90(3) on the ground that it was inconsistent with the certificate of the 1977 Medical Review Panel. Effective February 20, 1986, the Board's authority to reconsider findings of the Review Board was provided under the amended Section 96(2). This statutory change has no substantial effect on my consideration of this matter.

In their decision of June 19, 1986, the commissioners stated:

> The Commissioners have concluded that the Board of Review decision is inconsistent with the certificate of the Medical Review Panel in your case. The Board of Review found that you had a disability in your dorsal spine related to your compression fractures. The panel made no mention of any such disability. It only found subjective pain in the neck and lower back and could attribute it to no physical cause. The certificate specifically refers to a compression fracture and indicates that it was healed. Furthermore, the finding of the Board of Review that you have organic brain damage which is the sole cause of your psychological problems is inconsistent with the panel's diagnosis of back pain and depression for which there is no physical cause.

At the time of their decision of June 19, 1986, the commissioners had initiated but had not completed a rehearing into the referral of the Board of Review decision. The final determination of the matter was to be decided in accordance with the 1987 Medical Review Panel certificate. Since that certificate has been declared void, the final determination regarding the implementation of the Board of Review decision of May 30, 1985 has not been completed. Section 17(2) of Bill 27 contains the following transitional provision:

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

A continuation of the matter dealt with in the June 1986 commissioners' decision must be conducted under and in conformity with the new *Act* insofar as it may be done consistently with this new *Act*.

The former subsection 90(3) in effect at the time of the referral (and subsection 96(2) in effect at the time of the commissioners' decision of June 19, 1986) have now been changed as a result of Bill 27. The new provision for reconsidering Review Board decisions is contained in Section 96(4) of the *Act* which reads as follows:

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

The continuation of the matter under consideration by the commissioners in June 1986 but not completed by them, must now be carried out consistent with the legislative intent inherent in Section 96(4). The test, then, is whether the May 3, 1985 Board of Review decision contained an error of law or contravention of published policy of the governors.

Section 65 of the *Act* provides:

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

Mr. Justice Tysoe in his 1966 report states:

> It was suggested to me by some of those appearing at this inquiry that many workmen do not apply to the panel because once they do so they are forever barred from any further rights even should there be a deterioration or other change in their condition in the future, or at least they think they are. I can only say that this is a mistaken idea.

Mr. Justice Tysoe quotes from Chief Justice Sloan's 1952 report as follows:

> The adjudication of the Medical Appeal Board is only final and binding *as of the time of its decision*. [Mr. Justice Tysoe's emphasis]. In other words, it merely makes the finding on the medical issue in dispute which the Board's doctors ought to have made. Its direction in that regard does not stultify the Board's powers to reopen and review a case any more than a decision of its own medical division would do so. Nor, is it any more binding on the appellant himself . . .

> The Medical Appeal Board's decision is as I have said, and I repeat it for emphasis, final and binding only at the time it is made. If a man's disability changes for better or worse after that decision, the Board's power to reopen and review his case on the basis of the changed condition is in no way impaired . . . . The decision of the Medical Appeal Board on any disputed medical issue remains final and binding in relation to the facts and circumstances existing at the time of the decision and remains so unless and until there is a material change of those facts and circumstances, in which case the foundation and basis for the decision no longer exists.

Section 103.56 of the *Rehabilitation Services and Claims Manual* contains published policy of the governors explaining the binding nature of Medical Review Panel certificates. That policy specifies:

> [Section 65] means that any subsequent decision of the Board or finding by the Review Board, at any point in time, must be consistent with the certificate. For example, a decision by a Medical Review Panel that a worker has no disability can be followed by a Claims Department decision that he has a disability, even a week later if there is evidence that he suffered a further disability in this interval. The Claims Department cannot, however, decide that he has a disability even ten years later if the medical evidence is such that there has been no change in his condition and it simply alleges that the original diagnosis by the Medical Review Panel was wrong.

In this case, the Board of Review relied on extensive new evidence regarding the cause and the extent of the worker's disability subsequent to the 1977 Medical Review Panel certificate. The former commissioners recognized this fact and relied on this new medical evidence to refer this claim to a different Medical Review Panel to make a fresh determination. The commissioners' interim decision of June 19, 1986 states:

> Because of the significant amounts of new evidence received since the certificate and the new diagnosis of organic brain damage which does not appear to have been considered by the panel, the Commissioners have concluded that your claim should, again, be reviewed by a Medical Review Panel.

The essence of the March 18, 1977 Medical Review Panel certificate was that the worker did have a disability with respect to his back consisting of pain in his neck and lumbar area which spread to both legs. He also suffered from depression. The Medical Review Panel found that:

> Since there is clinical and radiological healing of the compression fracture of T11, there is no evidence of a physical cause for his persisting back pain. Whether his subjective back pain and depression can be related to the accident is not determinable by this panel.

There was considerable new medical, psychological, and documentary evidence gathered in the eight years between the March 1977 Medical Review Panel certificate and the May 1985 Board of Review decision. The Board of Review held a two-day oral hearing in this case and heard expert testimony from a treating psychologist and the worker's family physician. The Board of Review concluded:

> With regard to the primary issue, that is, the cause of the worker's psychological condition, we are satisfied on the basis of the reports from the psychologists F, G, H, and I, the psychiatrist, Dr. J, and Dr. K, the evidence of head trauma in the original incident, and the statements from the various lay witnesses who have known [the worker] over the years attesting to personality changes following the 1971 injury, that the primary if not sole cause of his current psychological disability is the injury sustained under this claim and not other factors such as pre-morbid personality characteristics, malingering or alcoholism . . .

The Board of Review's conclusion ". . . that 100% of the worker's current psychological disability and unemployability are attributable to the accident under this claim" simply answers the question that the 1977 Medical Review Panel was unable to determine. The Board of Review's findings were based primarily on extensive and significant new medical evidence gathered subsequent to the 1977 Medical Review Panel certificate.

I find, therefore, that the Board of Review decision was not inconsistent with the 1977 Medical Review Panel certificate. In the circumstances, the appropriate remedy is implementation of the May 3, 1985 Board of Review decision.

IN THE RESULT, THE OMBUDSMAN'S APPLICATION UNDER SECTION 96(2) OF THE *ACT* ON BEHALF OF THE WORKER IS GRANTED.

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

WORKERS' COMPENSATION

# REPORTER

## Decision of the Appeal Division

**Number:** 92-1516
**Date:** September 10, 1992
**Panel:** Paul Petrie
**Subject:** Post-Traumatic Stress and Special Circumstances

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This is a request pursuant to Section 96(2) of the *Workers Compensation Act* for a review of two decisions of the former commissioners dated November 14, 1986 and January 28, 1987.

The request for reconsideration under Section 96(2) is contained in several letters from the worker and the workers' adviser. The employer was provided with an opportunity to respond to the worker's submissions.

The history of this matter goes back to June 17, 1981 when the worker, an ambulance attendant, responded to an ambulance call at approximately 3:30 a.m. involving a motor vehicle accident. The car had flipped over and was burning when the ambulance arrived. The driver of the car burned to death before the fire truck arrived. As part of his duties, the worker had to remove the dead driver from the car after the fire was put out. Approximately two weeks after this incident, the worker began to develop anxiety symptoms, had "screaming nightmares" and couldn't sleep. He began to doubt his capability to continue working as an ambulance attendant.

In August 1981, the worker handed in his resignation to his employer. His supervisor refused to accept the resignation and referred the worker to the employer's Occupational Health Department for counselling. The worker was admitted to stress management program and received psychological treatment for approximately four weeks. During this period, he made application for and was paid through the employer's short-term disability program. He returned to work in late September 1981. He apparently worked without further difficulty until January 1982 when he attended a two-car motor vehicle accident. One car had gone over a bank, pinned the driver, and both the car and driver burned. The anxiety and nightmares recurred within a week of the second accident. The worker spoke by phone with the psychologist from the stress management program, but declined to attend further counselling or therapy. Again, he had difficulty coping with work and resigned in March 1982. His former supervisor visited him and convinced him to return to work as an ambulance attendant. He was rehired in May 1982 and transferred to the Vancouver area.

When he returned to work he was able to manage without any difficulty. However, during the latter part of 1982 and early 1983 he noticed the anxiety gradually return, particularly in relation to attending motor vehicle accidents. On July 4, 1983, the worker booked off work and called a psychologist to discuss his anxiety problem. He was referred to a psychologist at U.B.C. for counselling. The worker's family physician diagnosed anxiety related to previous acute traumatic experience. On August 5, 1983, the worker filed an application for compensation with the Workers' Compensation Board for post-traumatic stress disorder and indicated that the period of exposure was from June 17, 1981 to the date of his application.

The claims adjudicator denied his claim on September 19, 1983 on the grounds that his application was not made within one year of the initial incident of June 17, 1981, and that there were no special circumstances which precluded the filing of an application within one year. On April 16, 1985, the Board of Review upheld the claims adjudicator's decision. The worker appealed to the commissioners. The commissioners' decision of November 14, 1986 concluded:

> Given your prior history of twelve W.C.B. claims, you would have had some familiarity with the Board's reporting requirements. In light of this knowledge, the specific period of disability which you experienced, the fact that you received medical treatment, and the fact that you were then able to carry on at work without any serious difficulties, the Commissioners do not consider there to have been special circumstances which precluded you from filing an application within one year. The failure of your employer or doctor to submit reports to the Board does not excuse your failure to satisfy your own obligation to file an application.

The worker asked the commissioners to reconsider their decision, particularly with regard to the problems associated with the diagnosis of post-traumatic stress disorder which the worker felt constituted special circumstances. On January 28, 1987, the commissioners advised the worker:

> In their decision of 14 November 1986, the Commissioners noted the argument that you had been experiencing psychological problems which would have detrimentally affected or interfered with your capacity to consider the need to file an application with the Board. The Commissioners considered the evidence on this point, but found it was outweighed by the evidence as to your familiarity with the Board's reporting requirements, the occurrence of a specific period of disability during which you received medical treatment and your ability to continue working from 21 September 1981 until 1 March 1982.

The worker's application for reconsideration is based on a number of grounds including:

1. the employer and treating physicians failed to comply with the *Act* by not filing injury reports with the Board;

2. the fact that the worker had prior W.C.B. claims is not a valid ground for denying his appeal without considering the claim on its own merit;

3. the application for compensation was filed late due to special circumstances of suffering from post-traumatic stress disorder; and

4. post-traumatic stress disorder claims were not being accepted at the time of the worker's injury.

In response to the worker's application, the employer submitted that an error in law or issue under the *Canadian Charter of Rights and Freedoms* did not exist in this case. The employer argued that there was no reason to reverse the former commissioners' decisions.

Section 55 reads as follows:

> Application for compensation
>
> 55. (1) An application for compensation shall be made on the form prescribed by the board or the regulations and shall be signed by the worker or dependant; but, where the board is satisfied that compensation is payable, it may be paid without an application.
>
> (2) Unless an application is filed, or an adjudication made, within one year after the date of injury, death or disablement from industrial disease, no compensation is payable, except as provided in subsection (3).
>
> (3) Where the board is satisfied that there existed special circumstances which precluded the filing of an application within one year after the date referred to in subsection (2), and
>
> a) where an application is filed within 3 years after that date, it may pay the compensation provided by this Part; or

> b) where the application is filed after 3 years after that date, it may pay the compensation provided by this Part but not in respect of a period prior to the date of the application is received by the board.
>
> (4) This section applies to an injury or death occurring on or after January 1, 1974 and to an industrial disease in respect of which exposure to the cause of the industrial disease in the Province did not terminate prior to that date.

The governor's policy (*Rehabilitation Services and Claims Manual* #93.22) establishes that the application for compensation cannot be considered on its merits if no special circumstances existed or if the Board declines to exercise its discretion in favour of the worker. The policy also prescribes that these two requirements must be considered separately.

The appropriate test for reconsideration under Section 96(2) was considered by the chief appeal commissioner in Appeal Division Decision No. 92-0818 (in *Workers' Compensation Reporter*, Vol. 8, p. 211). In that decision, it was concluded:

> In light of the fact that the former Commissioners' decisions were protected by a privative clause, I find that, in general, the test must be whether their decision was so patently unreasonable that it cannot be rationally supported by the relevant legislation. However, in the case of decisions pertaining to natural justice issues, it is my view that the Appeal Division's scope of review is broader. In such cases, the Appeal Division must have the power to redetermine decisions of the former Commissioners on the grounds that they misinterpreted the law, irrespective of whether the misinterpretation can be characterized as "patently unreasonable". This is consistent with various judicial pronouncements on the standard of review applicable to decisions involving natural justice issues.

The issue to be resolved in this application is whether the commissioners' decisions of November 14, 1986 and January 28, 1987 were so patently unreasonable that they cannot be rationally supported by the relevant legislation, or alternatively, that those decisions resulted in a denial of natural justice. The submissions are considered in the order presented above.

## 1. The failure of the employer and treating physicians to send injury reports to the Board in 1981

Section 54(1) of the *Workers Compensation Act* requires an employer to report to the Board within three days of its occurrence every injury to a worker that is or is claimed to be one arising out of and in the course of employment. Section 56(1) requires the treating physician to furnish reports to the Board where there has been an injury or an alleged injury within the scope of employment. There is no evidence at the time of the June 1981 incident or the August 1981 disablement that the worker, the employer, or the treating physicians considered that the disablement was work related or even that the possibility of workers' compensation benefits was considered applicable in the case. I can find no basis to conclude that the failure by the employer and treating physicians to send reports to the Board in 1981 violated the *Act*. The commissioners considered the worker's submission on this point. There is no basis to conclude that the decisions of the prior commissioners were patently unreasonable with respect to the failure of the employer and the physician to submit reports in 1981.

## 2. Prior W.C.B. claims

The commissioners' decision in this case makes it clear that the worker's familiarity with the Board's reporting requirements was one of a number of factors considered and given weight in their final decision. I find the familiarity of the W.C.B. reporting requirements is a relevant issue and the commissioners' consideration of this issue is reasonable in the circumstances of this case.

## 3. Post-traumatic stress disorder: special circumstances

The workers' adviser submits that the commissioners failed to embark upon the proper inquiry into whether the psychological problems precluded the worker from filing an application for compensation within the prescribed time. The adviser submits:

> In the decision letter of January 28, 1987, the Commissioners write that they considered the evidence submitted by [the worker] regarding the post-traumatic stress syndrome and found that it was out-weighed by the evidence of [the worker's] familiarity with the Board's reporting requirements. This statement emphasizes the Commissioners' profound lack of knowledge of post-traumatic stress syndrome. The Commissioners failed to inquire *fully* and to gain a *genuine insight* into the incapacitating effect of post-traumatic stress syndrome. [The worker's] previous cognitive skills and functioning capabilities

> were not present during this time. He was suffering from post-traumatic stress syndrome and he lost these abilities to function in an efficient, capable manner.
>
> (emphasis in original)

The adviser's submission speaks more to the weight given to the post-traumatic stress disorder as a special circumstance, rather than to the lack of consideration of this factor. On the basis of my review, I find that the former commissioners did consider whether the psychological problems would have detrimentally affected or interfered with the worker's capacity to file an application with the Board. This consideration was evident in the decision of November 14, 1986. This matter was further reviewed by the commissioners in their decision of January 28, 1987. While the workers' adviser may disagree with the weight given to this issue by the commissioners, I find that there are no grounds on which to conclude that the commissioners' consideration was patently unreasonable.

**4. The contention that post-traumatic stress disorder claims were not being accepted at the time of the worker's injury**

This submission relies on a memo on file dated November 30, 1988 by a solicitor with the W.C.B. Legal Services Division which states, in part:

> With respect to arguing the issue of special circumstances, I referred the worker to the Workers' Advisor. There is some possibility that he might wish to explore with the Workers' Advisor any possible entitlement he might have under s. 55(3) or some argument to the effect that since post-traumatic stress syndromes and similar complaints were not being accepted by the Board at the time of his injury, that in itself constitutes as special circumstances.

Decision No. 7 of the *Workers' Compensation Reporter*, *Volume 1, September 14, 1973* considered the issues of psychological impairment. That decision states in part:

> Under the *Workmen's Compensation Act*, compensation is payable not for "injury", but for "personal injury". That is a technical term adopted by the legislature from the jargon of the common law courts. In those courts, that term includes psychological impairment as well as physical injury, and there is no ground for attaching a different meaning to the phrase in the present context
>
> (Page 24)

> It is, therefore, no answer to a claim for a Workmen's Compensation to say that the injury is psychological. If it is a disablement from work, and if its cause arose out of and in the course of employment, it is compensable.
>
> (Page 25)

Published policy of the Board contained in the *Rehabilitation Services and Claims Manual* at the time of worker's initial disablement stated:

> "Personal injury" includes psychological impairment as well as physical injury. The Board has accepted claims where the injury was totally psychological. For example, in one case, a claimant suffered a mental breakdown through witnessing the death of another worker. However, such cases are rare and are approached cautiously.

From the foregoing, I find that the Board policy at the time of the worker's 1981 disablement did provide coverage for psychological impairment resulting from traumatic incidents arising out of and in the course of employment. The application for reconsideration under Section 96(2), therefore, cannot succeed on this ground.

After considering the submissions in support of the worker's application, I find that the commissioners' decisions of November 14, 1986 and January 28, 1987 are not patently unreasonable on the question of whether there were special circumstances that precluded the filing of an application within one year of the June 17, 1981 incident or the August 21, 1981 disablement. The worker's application under Section 96(2) on the issue of special circumstances must, therefore, be denied.

One further matter requires consideration in this case. The worker's February 7, 1992 letter to the chief appeal commissioner which initiated this Section 96(2) application contained the following statement:

> First, I would like to mention that the issued claim number is misleading. This claim was first filed in 1983 with no request to back date the whole thing to 1981 on my part.

The evidence in this case shows that prior to the disablement on July 4, 1983, the worker had two specific episodes of disablement relating to post-traumatic anxiety. The evidence also indicated that the worker was able to function at work without medical treatment during the two periods between the episodes of disablement. The former commissioners found that the worker was able to carry on work without any serious difficulties. From the worker's evidence, the episode on July 4, 1983 appeared to come on gradually, particularly in relation to attending motor vehicle accidents. The physician's first report dated July 19, 1983 states:

> Could not handle job after being shown a picture of a burned out car with burned out driver. Got sick and felt he was unable to continue job.

It is worth noting that this claim was initially set up as a 1983 claim. It was subsequently assigned the 1981 claim number after investigation showed that the initial incident occurred in June 1981. No further investigation of the July 1983 episode was carried out.

Published policy of the governors' (*Rehabilitation Services and Claims Manual*, #107.10) specifies that:

> Where a worker claims compensation in circumstances that could reasonably be alleged either as a recurrence of a previous injury or as a new claim, the matter should be treated as if the worker is claiming both in the alternative. Thus, where the worker himself treats the claim as a recurrence of a previous injury or as a new injury, the matter should be processed as if he is asking for it to be treated as both in the alternative. The adjudicator should obtain the necessary documents and reach a decision both on the possibility of it being a recurrence, and on the possibility of it being a new claim. The worker and the employer, or in some cases both employers, should be informed that both possibilities are being considered.

In adjudicating this claim, the claims adjudicator did not follow the procedure specified in Board policy with regard to considering whether the July 1983 disablement constituted a new injury related to the work activities preceding July 3, 1983. This error was not remedied in the course of the commissioners' consideration of the worker's appeal.

In the British Columbia Supreme Court decision of *Plamondon and Workers' Compensation Board of British Columbia* (1988) 47 D.L.R. (4th) 114, the Court granted an application for judicial review where the Board failed to consider whether the work activities subsequent to an initial injury caused personal injury superimposed on the already existing disability. Mr. Justice Shaw stated as follows at page 123:

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

While the circumstances in this case are somewhat different, I find that the same reasoning applies. The failure to consider, and then render a decision, as to the possible causal significance of the worker's employment activities during the period prior to his application for compensation, in relation to the July 4, 1983 episode, was patently unreasonable and constituted an error of law.

The worker is, therefore, entitled to adjudication of his 1983 claim in accordance with Section 5 of the *Act*. In my view, it is in the interest of all parties to resolve this long outstanding matter without further delay. Since this matter was before the former commissioners, but not completed by them, I will proceed to determine the worker's entitlement under Section 5.

The evidence in this case shows that the worker was a capable emergency medical assistant whose skills were valued by his employer. After the 1981 incident he was off work for about a month and after receiving treatment apparently worked without difficulty until the second incident in January 1982. This incident resulted in further emotional difficulties and eventually led to a two-month period away from work on U.I.C. There was no medical treatment after this second episode. The worker was rehired in May 1982 at the initiative of his employer. In the fourteen months between May 1982 and the episode of disablement in July 1983, the evidence indicates that he performed his work at an acceptable level, although during this period he noticed that the anxiety gradually returned, particularly as a result of attending motor vehicle accidents.

The medical and factual evidence in this case leads to only one conclusion — that the psychological disablement experienced by the worker in July 1983, arose out of and in the course of his employment. There is no substantial evidence to support a conclusion that his disablement was related to factors other than his employment. No medical practitioner or decision maker has even speculated that the 1983 disablement was related to other factors. The work activities in 1983 preceding the July disablement, together with his prior six years cumulative exposure to traumatic incidents including the incidents of June 1981, and January 1982, had causative significance in producing the personal injury under the 1983 claim. I find, therefore, that the worker's claim for the psychological disablement experienced in July 1983 and subsequently should be accepted by the Board. The worker is entitled to wage loss benefits related to this disablement until such time as the disability resolved or stabilized. The medical evidence from the employer's Occupational Health director, Dr. L, indicates that he was medically stable in January 1985. The calculation of appropriate benefits and referral for consideration of any possible permanent disability is left to the claims adjudicator.

The evidence from Dr. L in 1983 indicates that the worker should not have returned to the emergency medical assistant position. This view was eventually confirmed in the subsequent failed attempt to return the worker to this position in 1985. He is, therefore, entitled to vocation rehabilitation assistance to assist him in returning to suitable employment. Because of the nature of the disablement, vocational rehabilitation should be arranged in consultation with his family physician.

In the result, the worker's application under Section 96(2) is allowed to the extent outlined above and the file is referred to the Compensation Services Division for payment of appropriate benefits under the 1983 claim as provided in this decision.

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

WORKERS' COMPENSATION
# REPORTER

## Decision of the Appeal Division

**Number:** 92-1670
**Date:** October 13, 1992
**Panel:** Connie Munro, Chief Appeal Commissioner
**Subject:** Section 96(2) — Degenerative Disc Disease

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This file comes before me by reason of a request from the ombudsman for a reconsideration of the former commissioners' decision dated May 28, 1985. There are principally two submissions supporting the application. One contained in a letter dated May 30, 1991 by an ombudsman officer, one dated April 16, 1992 by a workers' adviser.

The decision dated May 28, 1985 was one in which the prior commissioners refused to implement a Board of Review decision dated March 25, 1985. The Board of Review was hearing an appeal from the decision that the worker's problems were related to degenerative disc disease of the spine and that there was no permanent aggravation arising out of the injury of November 20, 1981. The Board of Review found that decision in error and granted a 2.5% pension for the worker's continuing problems. The worker was referred back to the Board for consideration of an award under the dual system.

The ombudsman submits, on behalf of the worker, that the prior commissioners' decision not to implement the Board of Review decision was based on an error of law.

The worker had a number of compensable injuries to both his neck and lower back but was always able to return to work until 1981. In 1979 a Medical Review Panel considered the worker's 1977 and 1978 neck claims and certified that the effect of those injuries had been temporary. The Medical Review Panel found at the time of their examination that the worker was still disabled as a result of the effects of a 1979 lower back injury and degenerative changes in his spine. The worker continued to receive wage loss in respect of the 1979 claim until November 1979, but from the time that claim had been accepted the Board refused to acknowledge the potential for permanent consequences of the work injury. When the worker had another claim in 1980 his employer was relieved of costs under Section 39(1)(e) on the basis of the worker's underlying degenerative changes in his spine. The worker's last work injury occurred in 1981 when he again injured his lower back and received temporary wage loss benefits.

Following his appeal on the termination of benefits related to the 1981 claim the then boards of review in a decision dated February 18, 1983, referred the question of permanent disability arising from the 1981 lower back injury to the Board for consideration. The Board decided that the worker's ongoing problems were related to degenerative disc disease. They concluded there had been no permanent aggravation of this condition as a consequence of the back injury of November 20, 1981. Another Workers' Compensation Review Board panel heard the appeal from that decision and found that the worker should receive a pension of 2.5%. The matter was sent back to the Board for an assessment of that award under the dual system. The matter, however, was intercepted by a referral to the commissioners which resulted in the May 28, 1985, decision not to implement the Review Board decision.

The commissioners stated that the evidence overwhelmingly indicated that the 1981 injury caused only a temporary aggravation of the degenerative condition noted by the Medical Review Panel in 1979. The ombudsman officer contends there was a failure on the part of the commissioners to embark on the proper inquiry called for by the circumstances of the case. In particular, it is alleged that the failure to consider evidence relating to the worker's previous claims when applying the test of whether the decision of the Review Board was against the overwhelming weight of evidence amounted to an error of law. The commissioners' decision referred to injuries in 1977, 1978, 1979 and 1981. There is no reference to the injuries in 1951, 1957, 1963 and 1966. I requested copies of all documents in the Board's possession relating to any claims made by this worker. There is reference (on a 1957 claim) in a summary of claims dated September 6, 1957 to a 1951 claim. It states:

> Claimant Aged 30 — employed by "A" Co. (B.C.) Ltd., Vancouver, B.C.
>
> On August 31/51 workman was pulling, tightening a pipe when he twisted his back. Reported same to his employers on number form 7 on file. Seen by Dr. M at Port Alice on September 15/51.
>
> Diag: There was pain in lower back with spasm of muscles on right side. Limited movement in all movements except left bending. Pain on right straight leg raising. No Form 6 on file.

The next claim is in 1957. The First Aid Report states:

> This is an old injury, happened at Port Alice in July or August, 1952 (sic) while working for "A" Co. (B.C.) Ltd., Vancouver, B.C.

Also the employer's Form 7 stated:

> This is an old injury.

The worker went on to suffer further injuries March 20, 1963 and May 3, 1963. In the later 1963 claim the final diagnosis recorded in a report dated May 8, 1963, was "prolapsed disc." There were then further claims. Only the claims in 1977 and 1978 were specifically found by the Medical Review Panel not to have had any permanent effect. The certificate of the Medical Review Panel focused on the cervical problems resulting from those two claims. The certificate refers to the worker having:

> . . . radiologic evidence of pre-existing degenerative changes in the cervical spine.

It noted, however, that the worker was:

> . . . pain free, with respect to his neck, prior to the April 17, 1977 work related injury.

The certificate does not comment on the degenerative changes in the balance of the worker's spine. Nor does it comment with respect to the cervical spine as to whether the pre-1977 work accidents had any causative significance to the degenerative changes. Moreover, that question seems to have been ignored in later consideration of the worker's claim. The ombudsman is correct in pointing out that the prior commissioners' decision is silent on this important point. The compensability or non-compensability of the degenerative changes in the worker's spine are crucial to a determination of the Board's present liability.

The leading case on the effect of the failure to consider evidence in a claim for compensation is *Plamondon* v. *Workers' Compensation Board of British Columbia and Savona Timber Company Ltd.*, (January 11, 1988 — B.C.S.C.). The Court found (at page 15):

> There was a failure to embark upon the proper inquiry which the circumstances of this case called for. This, in turn, caused a failure to take into account all factors relevant to Mr. Plamondon's 1977 claim. Mr. Plamondon was deprived of the right to have his claim adjudicated under sections 5.(1) and 5.(2) of the *Workers Compensation Act* based on the continued use of his partially disabled back in work for which it was not suited. In my view this was error of such seriousness as to properly be termed patently unreasonable.

Similarly in the present case the prior commissioners failed to embark upon the proper inquiry into this worker's compensable back injuries prior to 1977. It was necessary to determine their causal relationship, if any, to his pre-existing degenerative changes in order that the compensability of ongoing complaints in relation to his 1981 injury could be assessed. This was an error of such seriousness that the prior commissioners' decision must be reconsidered. In the circumstances, I set aside the prior commissioners' decision and will proceed to reconsider this matter.

The evidence on the 1963 and 1966 files establishes that the March, 1963, injury was of causative significance with regard to narrowing at L3-L4 and disc involvement, as well as the second 1963 injury and the 1966 injury.

The first X-rays on any of this worker's files are found on the 1963 claim. The X-ray report indicated narrowing at L3-L4 and disc involvement. A Form 11A, dated 8 May 1963, contained the following comment by the physician regarding that finding:

> This is consistent with the original injury of March 1963 in the radiologist's opinion.

In 1966 the worker had a back injury which prompted the Board to consider the contribution of the earlier injuries. File Memo #3 stated:

> This worker had a back injury in 1963 and again later in the year. The x-ray changes were related to the first injury. We cannot now limit the worker's entitlement.

The Medical Review Panel, in considering the 1977 and 1978 claims, did not comment whether the earlier injuries had contributed to the degeneration of the lumbar spine. Neither is that question addressed in any of the medical reports on the several files either from Board doctors or outside specialists. The evidence, therefore, consists of medical opinions which acknowledged in the 1960's that problems in the L3-L4 area were caused by compensable injuries. That evidence supports the conclusions arrived at by the Review Board in awarding the worker a 2.5% pension. In the circumstances the fairest disposition of this matter would be to reinstate the findings of the Review Board decision of March 25, 1985. The worker should receive a 2.5% functional award in accordance with the 1985 Review Board finding and be assessed pursuant to the dual system.

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

# Decision of the Appeal Division

**Number:** 92-1781
**Date:** November 12, 1992
**Panel:** Paul Petrie
**Subject:** Section 96(2) — Average Earnings and Loss of Earnings

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On January 21, 1992, the ombudsman wrote to the chief appeal commissioner requesting reconsideration of the former commissioners' decisions of June 12, 1990 and May 1, 1991 on the grounds of error of law under Section 96(2) of the *Workers Compensation Act*. The issue in this reconsideration is whether the commissioners' decisions with respect to the calculation of average earnings and loss of earnings pension contain an error of law.

The worker received head and back injuries when hit by a falling snag on January 24, 1985. The snag was approximately 60 feet long and 18 inches at the base. It hit him on the head resulting in a concussion and severe back injuries. On March 18, 1987, he underwent surgery, a posterior Harrington compression procedure from T3 to T6 with fusion. At the time of injury he was employed as a contract Faller with personal optional protection coverage of $2,700.00 per month. The Board granted a 3% permanent partial disability award on October 21, 1988 using average earnings based on the optional protection coverage. The Board based the average earnings for long-term loss of earnings on his employment income of $2,054.00 per month.

In their finding of January 2, 1990, the Review Board concluded that the worker's total personal income for the period August 31, 1984 to January 24, 1985, was $28,106.15. Based on a one-year projection the Review Board concluded that the worker's monthly income was $5,855.44. The Review Board found that this figure or the maximum compensation allowable should be used in calculating the worker's average earnings for a loss of earnings consideration. The Review Board also found that the worker's long-term monthly earnings potential was $2,125.00 and that he did suffer a loss of earnings. The Review Board finding resulted in an additional pension entitlement of $404.24 per month on a loss of earnings basis.

The Review Board finding was referred to the former commissioners under Section 96(2) of the *Workers Compensation Act* for reconsideration on the grounds that the Review Board's conclusion contravened Board policy and was against the overwhelming weight of the evidence. The commissioners' decision of June 12, 1990, states:

> The amounts reported by you by way of personal and business income on your income tax returns are in stark contrast to the finding by the Review Board with respect to the amount of your earnings. The total business income which you reported for income tax purposes for both 1984 and 1985 (i.e. which encompassed the entire period of operation of your business) was $5,226.13. The Review Board found that your *monthly* business income was $5,855.44. (The Review Board noted that your annual income for the five previous years from 1979 to 1983 averaged $16,692.94).

The commissioners also state:

> . . . there is a glaring error in the Review Board finding. Two figures were considered by the Review Board: one for your stated "net proprietorship income" of $15,932.31, and the other for your actual personal drawings (found by the Review Board to have been $10,136.34). The Review Board found that these amounts should be counted separately, and that both should be included in your earnings. In other words, the Review Board found that these two figures should be added so that your income from these "two sources" totalled $26,068.65 . . . . In attributing to you as income both your actual drawings, and the net income position of the proprietorship, the Review Board has in effect counted the same amount ($10,136.34) twice.

The decision of June 12, 1990, goes on to state:

> The Commissioners do not consider it appropriate to base your long term wage rate on the approximately five month period prior to your injury during which you operated as a proprietorship. Having regard to the shortness of this period, and to the uncertainties inherent in starting a business, they consider it speculative to conclude that your change in occupation would likely have been of a permanent nature. The Commissioners consider that the Board officer was correct in including both your T4 earnings from employment and your income from your business, from the approximately 13 month period prior to your injury.

The commissioners decided to overturn the Review Board finding with respect to the calculation of average earnings and referred the matter to the claims adjudicator in the Disability Awards department for recalculation in accordance with their instructions. The commissioners also determined that the worker's long-term earnings potential was in the range of $2,900.00 per month and concluded that there was no entitlement to a loss of earnings pension.

On October 18, 1990, the claims adjudicator, Disability Awards, advised the worker:

> . . . as the Commissioners have determined that you do not have a long term loss of earnings entitlement, your actual pre-injury earnings determination becomes academic.
>
> . . . your only entitlement is the functional award originally established under your claim.

The disability awards adjudicator determined that the worker total earnings for the period January 1, 1984 until January 24, 1985 was $23,419.37.

The worker requested that the commissioners review their June 12, 1990 decision on the grounds of significant and substantial new evidence. In an eight-page submission dated March 4, 1991, he pointed out that his income splitting between he and his wife for income tax purposes distorted his "real earnings position." He questioned the logical and factual basis for the commissioners' conclusion that it was ". . . speculative to conclude that [his] change in occupation would likely have been of a permanent nature." He argued that there was not "a single shred of evidence" to support the commissioners' conclusion that his business would fail. He points out that the bank did not think his business would fail when they granted him a business loan. In fact, the worker argued that all indications were that his business would succeed. He stated:

> During the brief period while I was self-employed the success of the company was apparent right from the start, and I had plans in place to expand into other areas of logging over the next year or two.

The worker submitted that the commissioners' decision of June 12, 1990 was:

> so clearly against the overwhelming weight of the fact and evidence in this claim that they must overturn that decision.
>
> . . . This is clearly a denial of natural justice. In this case the commissioners have totally disregarded the law in overturning the review board decision.

The commissioners' further decision of May 1, 1991 denied the worker's request for reconsideration. The commissioners advised that they accepted $17,873.36 as his total business earnings for the period August 31, 1984 to January 24, 1985. The commissioners concluded that the worker did not provide sufficient grounds to alter their decision that his average earnings should be based on the actual earnings in the period following January 1, 1984. In effect, the commissioners concluded that his actual earnings in his business would likely decline significantly if he had not been injured. In reaching this conclusion, the commissioners did not make any reference to the evidence submitted by the worker on the following points:

1) During the period January 1, 1984 to August 31, 1984 his earnings of $5,546.01 reflected the fact that there was a severe economic downturn in southeast B.C. where he lived and the employment opportunities were extremely limited.

2) Employment prospects as a faller in Northwest B.C. were good and because of his experience and reputation in the woods industry, he was able to secure a falling contract which he used to start his business.

3) His personal income was based on the work that he did. The wages paid to his employees were based on their job performance. If they did not cut down trees, they didn't earn money and there was no likelihood that his business could face a loss.

4) His Accountant certified his gross business income was $71,669.49 for the period August 31, 1982 to December 31, 1985. He said his gross earnings from August 31, 1984 to January 23, 1985 were $45,202.51. The balance of $26,466.98 was earned after his injury. He maintains that the 1985 earnings would have been significantly higher if he had not been injured and had been able to work directly for and with his company to maximize its earning potential.

The commissioners stated that they:

> [were] not satisfied that your work experience in the latter half of 1984 would be more representative of your future earning capacity than your work experience in the first half of 1984.

The commissioners did not offer any substantial evidence on which to base their conclusion that his business earnings would significantly worsen in the period following his injury. They did not comment on or respond to the worker's evidence and arguments that his business would have in all likelihood succeeded but for his injury.

On May 27, 1991, the ombudsman wrote to the acting W.C.B. chairman stating:

> It does not appear that the Review Board's use of the period following the change in employment violates the Board's policy or that it was expressly contrary to the Commissioners' own stated policy. The Review Board did commit an accounting error in its calculation of the worker's average earnings while he was self-employed, but this error does not affect the decision regarding the period used for the establishment of the rate.
>
> . . . the Commissioners refer only to the short time of operation of the new business and to "the uncertainties inherent in starting a business". With due respect, the latter reason appears to be a generalization which has no specific relevance to this case. The second reason is also problematic, as the corollary would appear to be that only long-established business could possibly qualify.

The ombudsman also questioned the basis for the commissioners' conclusion that the worker would not suffer a loss of earnings as a result of the injury. The ombudsman proposed that the commissioners reconsider their decision to overturn the Review Board finding with respect to the period on which the average earnings were based and the rate selected for the deemed earnings.

Before the former commissioners could respond, the Appeal Division was established as a result of the proclamation of Bill 27. There is no indication that the former commissioners had considered the ombudsman's proposal or reopened their previous decisions. On January 21, 1992, the ombudsman sought reconsideration of the former commissioners' decision under Section 96(2) of the *Act*.

The worker provided a detailed written submission in support of the reconsideration under Section 96(2). He stated:

> The review board, the Ombudsman, and I submit that according to section 33 of the W.C.B. *Act* my actual loss of income is best represented by using my business income alone.

The worker states that his move to Northwest B.C. was in all probability a permanent one.

He also maintains that his change in occupation was most likely permanent. His business was profitable. He paid his workers the industry rate of $250 per day. His business continued to operate successfully after he was injured. He submits that he had made a relatively fixed change in earning pattern which was likely to continue into the

future. Finally, he submits he has suffered a significant loss of earnings and asks that the Review Board finding be reinstated.

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

> **Average earnings**
>
> 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 of employment.

In considering this application, the first question is whether the former commissioners' decisions to overturn the Review Board finding were based on an error of law. I am guided by the test detailed in the chief appeal commissioner's Decision No. 92-0818 contained in *Workers' Compensation Reporter*, Volume 8, page 211. In that decision she concluded that, in general, the appropriate standard of review under Section 96(2) is whether the decision is so patently unreasonable that it cannot be rationally supported by the relevant legislation.

In this particular case, the former commissioners concluded that the worker's change in occupation was not likely to be permanent in nature. The commissioners did not cite any substantial evidence in support of this conclusion. The former commissioners also failed to comment on or respond to the specific evidence provided by the worker to show that the change in occupation was likely permanent. The former commissioners relied on a general policy of basing average earnings on the worker's earnings of one or more years. They did not address the evidence provided by the worker that a shorter period best represented his actual loss of earnings.

In *Testa* v. *W.C.B.* (1989), 58 D.L.R. (4th) 676, the Court of Appeal considered Section 33(1) of the *Workers Compensation Act*. In that case, the W.C.B. had insisted on applying its general policy of determining average earnings on the actual earnings of the worker for the year preceding his injury. The court found that the W.C.B. decision was patently unreasonable on two grounds. First, it constituted a patently unreasonable application of Section 33(1) of the *Act* in that it ignored the broad statutory basis upon which discretion of the W.C.B. is to be exercised, and involved the blind application of a policy laid down in advance. Second, it constituted an unreasonable finding of fact in that the W.C.B. could only find as it did by ignoring the actual facts. In the reasons for judgment, Mr. Justice McFarlane stated:

> Section 33(1) provides a broad basis for determining the average earnings and earning capacity of a claimant. There are a number of ways in which the W.C.B. may decide this question. One method has been adopted by the W.C.B. as a general policy. The application of that one method where it has no application, and the disregard of other methods is an unreasonable application of the statute. It is no answer to say that the W.C.B. had a discretion to exercise. To blindly follow a policy laid down in advance is to disable the tribunal from lawfully exercising a discretion. The law is summed up in this passage from Wade, *Administrative Law*, 4th ed. (1977), at p. 317:
>
>> An authority can fail to give its mind to a case, and thus fail to exercise its discretion lawfully, by blindly following a policy laid down in advance. It is a fundamental rule for the exercise of discretionary power that discretion must be brought to bear on every case: each one must be considered on its own merits and decided as the public interest requires at the time.
>
> The result of the patently unreasonable application of s. 33(1), and the unreasonable finding of fact which flowed from it has been to deprive the claimant of the benefits he is entitled to under the statute. In my view, the judge reviewing the matter was completely justified in setting aside the determination of the W.C.B.

The reasoning in *Testa* has direct application in this case. The evidence shows that the worker changed his occupation in August 1984 and, but for the injury, it was very likely that he would continue in that new occupation. There is no substantial evidence to support the conclusion that he would return to his pre-August 1984 earning capacity and any such suggestion is at best highly speculative. The former commission-

ers could only find as they did by ignoring the facts provided by the worker in support of his claim. The Review Board heard the worker's evidence at an oral hearing and had an opportunity to judge the credibility of that evidence. The former commissioners did not hold an oral hearing and gave no reasons for ignoring the worker's evidence. Their conclusion that his earnings would decline in the new occupation was patently unreasonable in the circumstances of this case. The former commissioners relied on a general policy and failed to exercise the discretion provided in the *Act* to apply a different method for calculating the average earnings that would best represent the worker's actual loss of earnings due to the injury.

I find that the former commissioners' determination in this case is based on a patently unreasonable application of Section 33(1), and as a result, the worker has been denied benefits to which he is entitled under the *Act*. I conclude that the June 12, 1990 decision of the former commissioners was wrong in law and set it aside as well as their decision of May 1, 1991. I now turn to the question of redetermining the worker's entitlement with regard to average earnings and loss of earnings.

The period used by the Review Board to determine the average earnings was consistent with the *Act* and with the published policy of the governors. There was an accounting error in the Review Board finding and it was appropriate for the former commissioners to correct that calculation error. (This calculation error is academic since it doesn't change the fact that the average earnings should be calculated on the statutory maximum.) In all other respects, the Review Board finding is consistent with the *Act* and published policy of the governors and should be implemented.

THE APPLICATION FOR RECONSIDERATION UNDER SECTION 96(2) IS, THEREFORE, ALLOWED.

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

## Decision of the Appeal Division

**Number:** 92-1938
**Date:** December 7, 1992
**Panel:** Connie Munro, Chief Appeal Commissioner
**Subject:** Section 96(2) — Lack of English Skills

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This file comes before me by way of an application from the ombudsman dated November 7, 1991, seeking to have the commissioners' decision of January 30, 1991, reconsidered pursuant to Section 96(2). In a unanimous decision on November 9, 1989, the Review Board found that the worker was fit for the job of light delivery truck driver but was unsuited for work as a security guard, welding supervisor or counterman, as outlined in the pension decision which awarded him a 5.5% functional award. The Review Board accepted that the worker was unsuitable for those jobs because of his lack of English skills and found that until he received adequate retraining none of those positions would be reasonably available to him.

The matter was referred to the prior commissioners pursuant to Section 96(2), who overturned the Review Board findings stating that the assessment of a worker's earnings must be made over the long term. They said that since there was a possibility the worker could improve his language skills the Review Board erred in finding a loss of earnings.

The ombudsman's submission argues that the Board's own employability assessment model contained in Decision No. 394 in the *Workers' Compensation Reporter*, Vol. 6, states that funding for rehabilitation measures must be practically available and offered to the worker to achieve the occupational scenario upon which the assessment's conclusions are based. It is argued that was not done in this case. Moreover, the ombudsman argues that loss of earnings pensions are reviewable. The Board made no effort to review the worker's situation after the initial denial of the pension and yet made a retroactive decision based on the assumption of rehabilitation assistance at a level never offered to the worker. It is contended, therefore, that the commissioners did not have a basis for overturning the decision of the Review Board.

No separate arguments are provided by the ombudsman as to how the prior commissioners' decision errs in law or contravenes the *Charter of Rights* so as to bring it within the ambit of the Appeal Division's jurisdiction to reconsider same under Section 96(2).

The ombudsman's submission does not directly challenge the lawfulness of the commissioners' reconsideration of the Review Board findings. Rather, it is argued that they incorrectly weighed the evidence in the case and came to incorrect conclusions regarding the worker's anticipated future loss of earnings. That may, in fact, be correct. It goes, however, to the judgment on the merits of the case by the commissioners. Given all of the evidence it cannot be characterized as patently unreasonable.

Specifically with respect to the offer of rehabilitation assistance, I note that subsequent to the commissioners' decision that the worker was visited by a rehabilitation consultant and that English language training possibilities were explored. There is some indication that the worker at the time was pursuing courses available through Canada Employment and Immigration. However, it is apparent that the Board made clear that they were prepared to provide English language training. Training in keyboard skills was also offered to eliminate any writing requirements of clerical or other jobs as mentioned in the employability assessment.

There is nothing that has been cited in the prior commissioners' decision that I could characterize as constituting an error of law. I have, therefore, no alternative but to refuse the request for reconsideration of the prior commissioners' decision.

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

WORKERS' COMPENSATION
REPORTER

# Decision of the Appeal Division

**Number:** 92-1939
**Date:** December 8, 1992
**Panel:** Paul Petrie
**Subject:** Section 96(2) — Reimbursement for Retraining

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The worker has requested reconsideration of the former commissioners' decision of November 17, 1989 on the grounds of an error of law under Section 96(2) of the *Act*. The issue in this reconsideration is whether the former commissioners' decision to deny reimbursement for educational expenses incurred by the worker in the period 1959-1962 contains an error of law.

In Decision No. 92-0818 of the Appeal Division (*Workers' Compensation Reporter*, Volume 8, page 217), the chief appeal commissioner considered the proper standard of review under Section 96(2) for deciding whether a decision of the former commissioners contains an error of law. In that decision she said:

> In light of the fact that the former commissioners' decisions were protected by a privative clause, I find that, in general, the test must be whether their decision was so patently unreasonable that it cannot be rationally supported by the relevant legislation. However, in the case of decisions pertaining to natural justice issues, it is my view that the Appeal Division's scope of review is broader. In such cases, the Appeal Division must have the power to redetermine decisions of the former commissioners on the grounds that they misinterpreted the law, irrespective of whether the misinterpretation can be characterized as "patently unreasonable". This is consistent with various judicial pronouncements on the standard of review applicable to decisions involving natural justice issues.

The former commissioners' decision of November 17, 1989 states in part:

> Having carefully considered all the available evidence, the Commissioners have decided to deny your request to reimburse you your education expenses in the period 1959 to 1962. They

> base this decision on the fact that you appear to have made no request at the time for the program you underwent in 1959/1960, the fact that your request for assistance for the period 1961/1962 appears to have been denied by the Board, the fact that you were receiving substantial compensation payments during the periods in question, and the lapse of many years that has occurred since. It may be that the Board today would grant to someone who suffered an injury like yours a greater amount of assistance than was granted by the Board just after your injury. However, the Board cannot judge actions of previous Board's carried out many years ago on the basis of today's practice. The Commissioners note that you have earlier this year been provided with additional rehabilitation assistance from the Board in the form of a computer and related items to establish you in your own business.

On January 15, 1990, the worker wrote to the former commissioners requesting reconsideration of their decision of November 17, 1989. He provided reference to extensive evidence from the claim file to support his request for reconsideration of the rehabilitation issue. The commissioners' further decision of March 29, 1990 concluded that no new information or argument had been provided that would warrant reconsideration of their previous decision. On the rehabilitation issue, the commissioners stated that:

> . . . the provision of rehabilitation is a matter of Board discretion and this was also the case at the time of your injury in 1959. The Commissioners remain of the opinion that there are insufficient grounds for them to interfere with the exercise of discretion made by the Board in the years immediately following your injury. The Board is open to consider any present rehabilitation needs you may have and has in fact provided some recent assistance.

Prior to this application to the Appeal Division, the worker sought assistance from the Ombudsman's Office. On June 19, 1990, the ombudsman's assistant wrote to the W.C.B. director of Claims noting that consideration had not been given to policy provisions in *Workers' Compensation Reporter*, Vol. 1, Decision No. 62. The ombudsman's assistant stated:

> . . . Although Decision 62 was not written in 1961, it would seem reasonable to apply these principles in this case especially in view of the fact that [the worker's] formal request for reimbursement was not made until 1988. Also, Section 16 of the *Workers Compensation Act* has not substantively changed from 1961 to the present time.

A solicitor for the W.C.B. Legal Services wrote to the senior ombudsman officer on July 17, 1990 advising of the previous commissioners' decision and seeking clarification of whether the ombudsman wished to initiate a request for reconsideration under Section 96(2) of the *Act*. The request for reconsideration was initiated in September 1990, but was not acted on by the former commissioners before the Appeal Division was established in June 1991 because of an ongoing Medical Review Panel appeal in 1990 and subsequent implementation of the Medical Review Panel certificate in 1991. On January 21, 1992, the ombudsman wrote to the chief appeal commissioners referring the worker's claim for reconsideration under Section 96(2) as provided in the governors' resolution assigning the Appeal Division this authority.

In support of this application, the worker submits:

(1) The W.C.B. knew he was disabled and needed to be rehabilitated in 1959;
(2) His requests for rehabilitation were ignored and not documented;
(3) His disabilities were significant and prevented him from working;
(4) He should not have been expected to use his own resources or commute his pension to sponsor his own rehabilitation.

A submission dated April 1, 1991 from the workers' adviser states in part:

> [The Commissioners'] denial was based on the fact that it appeared to the Commissioners that [the worker] had not made a request at the time of the program and a lapse of many years had occurred since . . .
>
> Section 16 of the *Act* as quoted above contains no limitation on when the entitlement may be requested, may be implemented or may be reimbursed . . .
>
> It is [the worker's] submission that Section 16 of the *Act* contains no time constraints for entitlement and therefore the Commissioners' decision of November 17, 1989 contains an error of law.

As outlined in Appeal Division Decision No. 92-0818, the proper standard of review is generally whether the commissioners' decision was so patently unreasonable that it cannot be rationally supported by the *Act*. However, where a natural justice issue is raised, the Appeal Division may redetermine the decision of the former commissioners on the grounds that they misinterpreted the law.

The objections to the former commissioners' decision of November 17, 1989 raised by the worker, the workers' adviser, and the ombudsman do not specify or suggest that the former commissioners misinterpreted the law in this case. I have

carefully examined the file documents and considered the submissions in support of this application and I find no misinterpretation of the law in the commissioners' decision of November 17, 1989 or their subsequent reconsideration of March 29, 1990. Thus the issue to be determined is whether the former commissioners' decision was patently unreasonable.

I do agree with the workers' adviser that Section 16 of the *Act* contains no limitation on when rehabilitation benefits may be requested, may be implemented, or may be reimbursed. However, the commissioners did not refuse to consider the worker's request because of a time limitation. Rather, they denied his request for a number of reasons including among them the lapse of many years that had occurred since the education expenses had been incurred. In this case, the worker detailed his request for reimbursement of the 1959–1962 education expenses in his nine-page letter received at the Board on April 25, 1988. His request was denied by the Board in letters of September 20 and September 23, 1988. He appealed these decisions to the Review Board and the Review Board finding denied his appeal after detailed review of the relevant evidence. The worker appealed to the commissioners and that appeal was denied for the reasons specified in their decision as quoted above.

I also agree with the ombudsman that it would seem reasonable to apply the principles contained in *Workers' Compensation Reporter* Decision 62 dated October 11, 1974. However, it would appear that the commissioners considered this possibility when they stated:

> It may be that the Board today would grant to someone who suffered an injury like yours a greater amount of assistance than was granted by the Board just after your injury.

However, the commissioners declined to judge the previous actions carried out by the Board on the basis of current practice.

The issue before me is not whether, in my view, the commissioners were right or wrong in their weighing of the evidence, or whether a different decision would have been more reasonable in the circumstances of this case. The only issue before me is whether in making their decision the former commissioners' determination to deny payment of education expenses in the period 1959–1962 was patently unreasonable in law. After reviewing all of the evidence and submissions on this issue, I can find no basis on which to conclude that the commissioners' decision was so patently unreasonable that it cannot be rationally supported by the relevant legislation.

FOR THIS REASON I MUST DENY THE REQUEST FOR RECONSIDERATION IN THIS CASE.

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

WORKERS' COMPENSATION
REPORTER

## Decision of the Appeal Division

**Number:** 92-1970
**Date:** December 11, 1992
**Panel:** Connie Munro, Chief Appeal Commissioner
**Subject:** Section 96(2) — Employability Assessment

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This file comes before me as an application by the ombudsman for a reconsideration of the prior commissioner's decision dated May 23, 1990. In addition to submissions by the Ombudsman's Office, a written submission has been received from the Ministry of Labour, workers' adviser's Office, dated May 5, 1992. The ombudsman filed a detailed request to reconsider this decision dated May 30, 1991 and a further letter dated November 7, 1991.

The May 23, 1990, decision of the prior commissioners was a result of a Section 96(2) referral of a Review Board finding dated February 10, 1989. The Review Board had confirmed a 5% functional assessment but had found that the employability assessment for the loss of earnings pension calculation was not carried out in a manner consistent with the March 25, 1987 Review Board findings. The panel also stated that

> The conduct of an employability assessment without taking into account the most recent medical findings of the capabilities of [the worker] could in no way be reflective of [the worker's] actual capabilities.

Initially the commissioners issued a decision dated June 14, 1989. They stated there was no objection to the conclusion that a further employability assessment should be carried out. With respect to that assessment, the commissioners stated that it:

> . . . should have regard to the documentation provided to the Review Board and to the Commissioners in relation to the jobs in question. The Review Board also said that the Rehabilitation Consultant should have regard to an opinion from your attending physician which you provided but the Commissioners would instead direct that he have regard to the findings to the Medical Review Panel. In this connection, it is not clear to the Commissioners that the jobs of parking lot or gas station

> attendant considered in the April 11, 1985, decision would be precluded by the terms of the Medical Review Panel certificate or unavailable to you. They are therefore directing the Rehabilitation Consultant to include those jobs in his assessment.

The intention was that the commissioners would make a decision regarding loss of earnings following receipt of the employability assessment.

An employability assessment dated December 1, 1989, was produced by a rehabilitation consultant. That assessment found the worker was unemployable. The commissioners stated, however, that they "had some concerns with it." They therefore obtained further comment regarding the employability assessment dated January 20, 1990, from a rehabilitation manager. On May 23, 1990 the commissioners issued the further decision which the ombudsman is now seeking to reopen. The commissioners decided that the effect of the Medical Review Panel certificate of October 17, 1984, was that the worker should be physically capable of doing certain types of work. They rejected the report of the rehabilitation consultant and agreed with the conclusions of the rehabilitation manager. They decided the worker's physical disability left open a number of employment options which would not result in the worker suffering a loss of earnings.

As this application for reconsideration is proceeding under Section 96(2) it is necessary to show that the decision of the commissioners was patently unreasonable or otherwise involved an error of law. It is alleged by the workers' adviser that this test is met by the direction in the commissioners' decision (as interpreted by the workers' adviser) that the worker's non-compensable medical problems "cannot be taken into consideration." It is argued that was an improper limit or restriction on the exercise of the Board's discretion under Section 23(3) of the *Act*. In addition, it is alleged that the stipulation by the commissioners that the employability assessment should have regard to the Medical Review Panel findings and not the opinion of the worker's attending physician, was an improper limit or restriction of the exercise of the Board's discretion under Section 23(3) of the *Act*. Finally, it is submitted on behalf of the worker that "on the balance of possibilities, the employability assessment by [the rehabilitation consultant] was correct, in that the worker is entitled to 100% loss of earnings award."

With respect to the worker's non-compensable medical problems, I do not read the commissioners' decision as suggesting that those problems that pre-existed his injury, namely his vision problem in one eye, should not be taken into account. Rather, I understood the commissioners' direction as suggesting that the post injury problems of cancer in the right kidney, and prostrate in 1987, and the fractured finger in 1988 could not be used to determine the limitations on his employability. In other words, the employability assessment had to take into account the worker's circumstances at the time of the work accident and the consequences of the work accident rather than

subsequent non-compensable problems that might affect his employability. I note, in this regard, that the May 23, 1990 commissioners' decision did not make any reference to the jobs involving assembling of electrical components or circuit boards, in which visual acuity would be important.

Further, I do not see the direction of the commissioners as suggesting that the opinion of the worker's attending physician ought to be totally disregarded. It was reasonable for the commissioners to point out the October 17, 1984, Medical Review Panel's certificate as establishing the medical facts upon which to base the assessment. There is nothing on the file to suggest that the worker's medical condition, by reason of the compensable injury, changed dramatically from the date of the Medical Review Panel certificate.

It is of some concern to me that the detailed employability assessment prepared by the rehabilitation consultant was rejected in favour of the summary analysis by the rehabilitation manager. The latter apparently did not involve contact with the worker. Moreover, the attention to the details of the case exhibited in the initial employability assessment appear to have been lacking. Nonetheless, that evidence was clearly considered by the commissioners. This was not a case where there was a failure to consider relevant evidence. One might have thought that the commissioners, having sought the rehabilitation consultant's assessment might have accepted the advice it contained with respect to employability, rather than seeking a further opinion. Nonetheless they had a right to continue their enquiry to the extent they felt necessary. The test in the application of Section 96(2) is not whether I would have arrived at the same decision or whether I would have weighed the evidence in the same way as the prior commissioners. Rather, the question is whether they arrived at a patently unreasonable conclusion. I cannot conclude that their decision was patently unreasonable on this basis.

In the course of reviewing this matter, I noted Dr. N's January 17, 1989 report in which she advised:

> We have additionally discovered a problem with his vision which had apparently been present for some years. [The worker] has severely reduced vision in his right eye (20/200) which can be only slightly assisted with corrective lenses. His ophthalmologist tells me this condition is not correctable.

The worker's claims history indicates that he had two right eye injuries. There is no indication that consideration has been given to whether the worker's loss of visual acuity in his right eye is causally related to his 1966 or 1968 injuries. This matter should be investigated further by the claims adjudicator as to whether the worker has any entitlement on this basis.

In conclusion, the request for reconsideration of the May 23, 1990 commissioners' decision is denied. The question as to the cause of the worker's vision problems in his right eye is referred to the claims adjudicator for consideration.

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

# Decision of the Appeal Division

**Number:** 93-0030, 93-0031
**Date:** January 8, 1993
**Panel:** Paul Petrie
**Subject:** Section 96(2) — Grain Dust Asthma and Proportionate Entitlement

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The worker applies for reconsideration of the former commissioners' decision of April 5, 1991. This is the second application for reconsideration to the Appeal Division. The first application was considered by the chief appeal commissioner in Decision No. 91-0238, dated August 16, 1991. In that decision, the chief appeal commissioner concluded that the worker's initial application did not provide any substantial or material new evidence and did not meet the requirements of Section 96.1 of the *Workers Compensation Act*. The chief appeal commissioner concluded:

> The decision that the worker's letters do not meet the reconsideration tests does not bar him from submitting at a later date a copy of the consultation report or any other new evidence and again requesting reconsideration.

The worker has submitted a new application for reconsideration on the grounds of

(1) significant new medical evidence under Section 96.1 of the *Act*, and

(2) an error of law in the former commissioners' decision regarding the amount of his permanent disability award.

This application will first consider whether the new medical evidence provided meets the requirements of Section 96.1 of the *Act*, and second, whether the former commissioners' decision of April 5, 1991 contained an error of law.

### New Evidence — Section 96.1

Two new medical reports have been submitted. Dr. O's report dated June 24, 1991 describes the worker's medical history and the examination results of that date. In that report, Dr. O states:

> This patient has airways obstruction which is variable and is found without a history of any allergy or airways disease in childhood or early life. There is, however, evidence of variability and response to bronchidilator [sic] suggesting a significant asthmatic component. If we compare the 1987 values with the May 15, 1991 values, there has been no significant deterioration in the airways obstruction between those two dates. However, also between those two dates, the airways obstruction has clearly been variable, and in fact the May 30, 1991 values are lower than these.
>
> In terms of variable airways obstruction, this patient therefore does exhibit from time to time, according to trigger and infection, etc., a reduction in FEV-1 to less than 60%, i.e. 48% on May 30, 1991 before bronchodilator, and 57% after bronchodilator. In terms of variable airways obstruction, and the disability related to that therefore, he would be in Class III, not Class II, of the A.M.A. assessment since his FEV-1 is less than 60% . . .
>
> This patient has documented airways obstruction which at its worst, when documented in the last year, i.e. May 30, showed values which are compatible with Class III of the A.M.A. classification. I do not have figures demonstrating this level of airways obstruction prior to May 30 this year, or in any other year.

Dr. O documents a worsening of the worker's respiratory disability as of May 30, 1991. This new evidence does not meet the test in Section 96.1 because it documents a change in the worker's condition as of May 30, 1991, a period of time after the initial pension decision dated July 6, 1989 and the commissioners' subsequent decision of April 5, 1991.

Also submitted was a report from Dr. P, dated May 29, 1992. Dr. P stated that the lung function tests in 1987/88 indicated that, ". . . at that point, according to the A.M.A. criteria, he had Class II impairment (10-20%)." Dr. P also notes that there has been a progressive deterioration in the worker's lung function which suggests:

> . . . that the values of May 30 are compatible with Class III of A.M.A. classification . . .

Dr. P concludes:

> In general, I believe the Medical Review Panel's decision that ⅔ of [the worker's] disability was attributed to grain dust exposure,

> was fair. There has been a progressive deterioration in [the worker's] lung function. This should be taken into consideration by the Workers' Compensation Board. At present he should be classified according to A.M.A. criteria as having Class III disability.

Dr. P's medical opinion also concludes that there has been a deterioration of the worker's lung function and documents that worsening as of May 30, 1991. This new medical opinion does not meet the test of 96.1 because it deals with changed circumstances after the July 6, 1989 pension decision and the subsequent commissioners' decision of April 5, 1991.

After reviewing the new medical evidence provided and the worker's and employer's submissions, I find that the requirements of Section 96.1 have not been met and deny the worker's application under this section. It is clear from the medical evidence, however, that there has been a deterioration in the worker's disability subsequent to the initial assessment and the worker should be further assessed to consider the medical evidence from Dr. O and Dr. P that his disability now falls within A.M.A. Classification III.

### Error of Law — Section 96(2)

The second issue to be considered in this application is whether there is an error of law in the implementation of the December 2, 1988 Medical Review Panel certificate. In addressing the question of whether the prior commissioners' decision of April 5, 1991 was wrong in law, the applicable test must first be established. In Decision No. 92-0818 [*Workers' Compensation Reporter*, Volume 8, page 211], the chief appeal commissioner concluded that to determine the lawfulness of a decision of the prior commissioners, the proper test to apply is, in general, the patently unreasonable test. The criterion is whether the decision is at all viable in light of the expressed terms of the *Act* and the intent of the statute. If a decision of the prior commissioners is based on a viable interpretation of the *Act*, the Appeal Division will not find an error of law simply because there is a preferred or a more precise interpretation available. The Appeal Division will not reopen a decision of the former commissioners unless there is a patently unreasonable interpretation of the *Act* that is inconsistent with the terms of the statute.

I have reviewed the commissioners' decision in light of all the evidence on file and the submissions from the worker and his representative and the employer. I can find no basis to conclude that the commissioners' decision contains an error of law with respect to the issue of age adaptability or enhancement.

In their decision of April 5, 1991, the commissioners state:

> It was considered that your overall respiratory impairment was equivalent to 17.5% of total. The Adjudicator noted that pursuant to the Medical Review Panel's findings the Board was only responsible for two-thirds of your disability . . .
>
> The Commissioners do not consider that the assessment of your overall lung impairment at 17.5% is in error . . . .
>
> The Commissioners consider that the additional particulars provided by the Medical Review Panel concerning your lung function support a conclusion that your overall disability has been properly assessed.

In response to the questions submitted by the Board the Medical Review Panel certified in part as follows:

> **Issue #2**
>
> Q: Does he now have a disability with respect to his respiratory condition? If not, could the Panel advise the Board whether historically they believe that the claimant did, at any time, have a disability with respect to his respiratory condition.
>
> **Certificate #2**
>
> *A: He does now have a disability with respect to his respiratory condition.*
>
> **Issue #4**
>
> Q: If he has or had such a disability, was the exposure to grain dust of causative significance and, if so, in what way?
>
> **Certificate #4**
>
> *A: The exposure to grain dust was of causative significance in that it caused increased airway reactivity and air flow limitation.*

**Issue #5**

Q: If he has or had such a disability, was the disability wholly or partly the result of causes other than exposure to grain dust? If so, what other causes were there, and how and to what extent was each cause significant?

**Certificate #5**

*A: The disability was partly the result of causes other than the exposure to grain dust. These other causes were cigarette smoking, left hemidiaphragmatic dysfunction and cardiovascular causes. These latter three causes contributed to ⅓ of the disability and exposure to grain dust to about ⅔ of the disability.*

**Issue #6**

Q: If there were two or more causes of the claimant's disability with respect to his respiratory condition, could the Panel please explain:

a) Did each cause independently result in some disability and, if so, what proportion of the disability found by the Panel?

b) If each cause did not independently result in some disability, did two or more causes act together to produce a disability and, if so, which causes acted together to produce this disability?

**Certificate #6**

*A: The causes as described in paragraph 5 acted together to produce the respiratory disability.*

**Issue #7**

Q: The Board has not recognized that the claimant was disabled for any period of time as a result of his exposure to grain dust. If the Panel does believe the claimant was disabled as a result of his exposure to grain dust would the Panel state for what period or periods of time the claimant was so disabled, and state what the nature and extent of the disability was during this period of time?

**Certificate #7**

*A: The panel notes that the claimant was not disabled due to his respiratory condition at the time of his early retirement related to back pain in February of 1987.*

*Based on his history, and the results of the pulmonary function studies in June of 1987, the panel believes that the claimant would probably have become disabled towards the end of 1987.*

*The disability at the end of 1987 secondary to respiratory stataus [sic] would have been partial and only for heavy work, particularly in a dusty or polluted environment. The claimant could have, and still can, in the opinion of the panel, do lighter work in a cleaner air environment with respect to his respiratory status.*

**Issue #8**

Q: Did the claimant suffer from any pre-existing condition or disability and, if so, was it activated, accelerated, or aggravated by his exposure to grain dust?

**Certificate #8**

*A: The claimant did not suffer from any preexisting condition.*

The W.C.B. denied wage loss benefits to the worker on the grounds that the Medical Review Panel concluded that he was not disabled due to his respiratory condition until late 1987 when the condition became a permanent disability. The decision to apply proportionate entitlement under Section 5(5) of the *Act* to this claim was initiated by the senior pensions adjudicator in Memo #8 where she concluded:

> I believe that there is sufficient evidence on file to support that this worker did have an impairment in his lungs prior to 1988, and the Board's responsibility for this worker's entitlement will be limited under Section 5(5).

The Board's pension decision of July 6, 1989 did not specifically reference the application of Section 5(5) but concluded that the findings of the Medical Review Panel regarding causation were binding on the Board and apportioned the Board's responsibility with regard to the permanent disability award to two-thirds of 17.5% or 11.67% of total disability.

Section 5(5) of the *Act* provides for the application of proportionate entitlement as follows:

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

There is no ambiguity in this section. The application of proportionate entitlement is limited to those claims where the disease (or injury) is superimposed on an *already existing disability*. Where this prerequisite exists, the *Act* requires the Board to pay compensation only for that proportion of the disability that may be reasonably attributed to the disease (or injury). Where there is no pre-existing disability, the balance of subsection 5(5) does not apply.

The requirement that there be a pre-existing disability before proportionate entitlement can be applied was added to the *Act* in 1968 after Chief Justice Tysoe in his 1966 Royal Commission Report into the W.C.B. strongly recommended its inclusion. Mr. Justice Tysoe reasoned

> If a workman's right to compensation depends on the existence of disability, the measure of benefits should not be cut down by anything less than a condition that actually produces disability.
>
> (page 217)

Since 1968, the *Act* has required an already existing disability before proportionate entitlement can be applied. There is no other provision in the *Act* that provides for apportionment of compensation for a disability once it has been determined that the work had causal significance in producing that disability. The Board is required to compensate for disability due to a work injury or disease. It should be added that if an intervening event occurs after the compensable injury or disability such as a non-compensable injury or disease the Board could limit its responsibility to the portion of the disability that results from the compensable injury or disease. However, where it is determined that a work injury or exposure has causal significance in producing a disability, compensation is payable without apportionment except as provided in Section 5(5) of the *Act*.

It should be noted that Section 39(1)(e) of the *Act* does provide for relief of costs to the employer for that portion of the disability enhanced by reason of a pre-existing disease, condition or disability. Relief of costs under Section 39(1)(e), however, does not reduce any benefit entitlement the worker might otherwise have.

In this particular case, the Medical Review Panel found that the worker's respiratory condition was caused primarily (two-thirds) by exposure to grain dust and caused secondarily (one-third) by three other facts — cigarette smoking, left hemidiaphragmatic dysfunction and cardiovascular functions. The primary and secondary causes "*acted together* to produce the respiratory disability" (emphasis added). The Medical Review Panel also noted that the worker was not disabled due to his respiratory condition until the end of 1987. Finally, the Medical Review Panel certified that the worker did not suffer from any pre-existing condition.

Two conclusions flow from the Medical Review Panel certificate:

1. Exposure to grain dust had causal significance in producing the respiratory disability and,

2. The worker did not suffer from a pre-existing respiratory disability before late 1987.

The Medical Review Panel's conclusion that the exposure to grain dust had primary significance in causing the respiratory disease is binding on the Board and meets the criteria for compensation entitlement under Section 6(1). There is no provision in the *Act* for subsequently apportioning compensation simply because there were multiple causes of the compensable disease. In this case, the causes acted together to produce the disability. The evidence indicates that there were some respiratory symptoms in 1987, but the Medical Review Panel concluded that there was no respiratory disability before late 1987. The Medical Review Panel certificate is binding on the Board as provided in Section 65 of the *Act*.

I find that the application of proportionate entitlement in this case does not meet the statutory requirements of Section 5(5) of the *Act*. This constitutes an error of law. The commissioners' conclusion that the worker's pension has been properly assessed by applying proportionate entitlement is patently unreasonable in light of the binding conclusions of the Medical Review Panel. The application for reconsideration under Section 96(2) is granted.

The appropriate remedy in these circumstances is to remove the application of proportionate entitlement and to increase the worker's pension to the full 17.5% entitlement recognized as a result of the Medical Review Panel certificate. The application for reconsideration under Section 96(2) is allowed to this extent.

As previously indicated, the application for reconsideration under Section 96.1 for an increase in the 17.5% disability on the basis of significant new evidence is denied. The new evidence relates to a deterioration in the worker's disability subsequent to the pension decision of July 6, 1989. The new medical evidence from Dr. O and Dr. P indicates that the worker's lung disability should be considered under A.M.A. Class III impairment. This evidence is referred to the Disability Awards Department for a reassessment of the worker's increased disability in light of these medical findings. The further reassessment should be carried out without application of proportionate entitlement in accordance with the Medical Review Panel certificate and this decision.

The file does not indicate that a decision has been made with regard to relief of costs to the employer under Section 39(1)(e) of the *Act*. This matter is referred to the adjudicator to determine if any relief of cost is applicable in this case.

In summary, the application for reconsideration is granted to the extent of the finding that proportionate entitlement is not applicable.

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

WORKERS' COMPENSATION
REPORTER

# Decision of the Appeal Division

**Number:** 93-0054
**Date:** January 14, 1993
**Panel:** Hilrie Reimer
**Subject:** Rehabilitation Assistance

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The employer appeals from Review Board findings dated September 15, 1992. The issue before the Appeal Division is whether the worker is entitled to the equivalent of full wage loss benefits while undertaking a twelve-month program through the Open Learning Agency.

## Evidence and Arguments

The Review Board found that the worker was entitled to training allowances at wage loss equivalency for a period of twelve months while undertaking a program through the Open Learning Agency. The Review Board noted that a doctor with the Board's Back Evaluation and Education Program concluded that a change of occupation on a preventative basis was appropriate. The Review Board was satisfied that the vocational rehabilitation consultant thoroughly investigated the worker's employment situation, including her physical capabilities, her prior work experience, her education, aptitudes and abilities, and explored available job opportunities with the accident-employer and in her industry in general. They agreed that it was not advisable for the worker to return to work as a cable television installer. Her previous work experience would not enable her to obtain an equal paying job. Therefore, the worker was deemed eligible for formal training to equip her with new marketable skills to optimize her occupational potential. Vocational and aptitude testing by both the Board and outside agencies indicated that the worker's best choice was in the social service worker field and that she could maximize her earnings in this area.

The Review Board noted that while a ten-month course was suitable for the rehabilitation process, it was not available to the worker for over a year. They stated that it was likely that the worker would have required some form of benefits from the Board if she was made to wait that one year, as she had been advised not to return to her pre-injury job.

The Review Board concluded:

> The panel finds that the Board, having determined that [the worker] was eligible for formal training, and agreeing on the suitability and necessity of the social worker program, should pay wage loss equivalent training allowances to [the worker] for a twelve month period. Our finding deals only with [the worker's] initial entitlement to sponsorship of her formal training program, and does not address the responsibilities of [the worker] in maintaining that support.

In a Notice of Appeal from the Review Board findings, dated October 27, 1992, the employer submits:

> [The worker] received sponsorship of a 12 month training program when there were opportunities with the accident employer that were within her physical capabilities and would have enabled her in the long term to obtain an equal paying job.

In a subsequent letter, dated November 18, 1992, the employer further submits that a retraining program was inappropriate and unnecessary and so too were the extension of benefits allowed by the Review Board.

The employer maintains that the rehabilitation consultant, in offering a retraining program, disregarded the other four steps of the rehabilitation process that are described in Section 87.20 of the *Rehabilitation Services and Claims Manual*. She states that the employer has always maintained that the worker was eligible for consideration of other job postings within the company and attaches a list of jobs. The employer concludes:

> Given the information on the file, providing a program of retraining to [the worker] was contrary to the policy of the board. An extension to this retraining should not have come from the Review Board.
>
> The Review Board hearing was August 20, 1992. Even at that time, [the worker] was doing poorly in school, yet this information was not presented by [the worker], nor queried by the panel.

A submission dated December 3, 1992, by the business representative of the worker's union argues that the employer's submission contains a number of statements and arguments that are not relative to the appeal. She repeats that the sole issue in this appeal is whether the worker should be paid the wage loss equivalent while undertaking a twelve-month formal training program and that the employer is clouding this issue by bringing up "outdated issues that they had a right to appeal at the appropriate times, but chose not to."

The union representative states that the union relies on Section 88.51 and 88.53 of the *Rehabilitation Services and Claims Manual* and Section 16(1) of the *Workers Compensation Act* to support the worker's claim. Section 88.51 states, "the Board should provide the cost of any formal training program considered reasonably necessary to overcome the effects of any residual disability. This can also apply to preventative rehabilitation under #86.30." Section 88.51(a) states, "the primary guideline is that the Board should, where practical, support a program sufficient to restore the worker to an occupational category comparable in terms of earning capacity to the pre-injury occupation."

The union representative notes that the worker had a job that paid $40,000 a year when she was injured. She submits:

> Contrary to what the Employer says in their submission, employment within the company was not available to the claimant, especially prior to the Fall of 1991 when she and the Board had already committed themselves to the retraining. This is evidenced in Memos #22, #23, #28, #33, #34, and in the letter from [the employer] to the claimant dated June 26, 1991 (attached). Also attached is a list of job postings submitted to the Review Board by the Employer at the hearing and marked as Exhibit #3 for that hearing. It is interesting to note that all postings are dated from September 9, 1991 onward, well after [the worker] had started her courses.

The union representative further points out that the worker did not possess the required skills for the positions available. She does not have basic typing or computer experience, nor is she a graduate of a recognized educational institution or possesses training in the electronics field. To be considered for alternate employment with the employer, the worker would need additional training and education. The union representative draws attention to a letter on file, dated June 26, 1991, from an engineering manager for the employer, which states in part:

> As of this date, no light duty positions have been identified and no other suitable position is available. As such, we have no alternative but to terminate your employment.

In a response to the union's submission, dated December 17, 1992, the employer reiterates that the formal training in social work was not reasonably necessary to overcome the effects of any residual disability arising from the compensable injury. She submits:

> If the "proof of the pudding is in the eating," the poor results of the Social Worker's course she was adamant to take, is supportive of the Employer's argument that the training was inappropri-

> ate and unnecessary. Her current job search in the cable industry adds further credence to our argument . . . .
>
> We ask the Appeal Division to reverse the Review Board finding and make a determination that the Rehabilitation Consultant did not follow the Policy, as it is written in Chapter 11 of the *Rehabilitation Services and Claims Manual*.

## Reasons and Findings

This panel has reviewed the entire file, the submissions and Board policy regarding rehabilitation assistance. I find that, pursuant to Section 16(1) of the *Workers Compensation Act*, rehabilitation assistance was necessary in order to assist the worker in returning to the work force. This section of the *Act* states in part:

> The Board may take the measures and make the expenditures from the accident fund that it considers necessary or expedient, regardless of the date on which the worker first became entitled to compensation.

Medical evidence clearly establishes that the worker was at considerable risk if she returned to work as a cable television installer. Her work experience would not enable her to obtain an equal paying job and therefore retraining was “necessary.”

Once it was established, that retraining was “necessary,” the rehabilitation consultant closely followed a rehabilitation process as outlined in Chapter 11 of the *Rehabilitation Services and Claims Manual*. The rehabilitation consultant, however, erred in providing insufficient funds for a program that would return the worker “expeditiously” to the work force. This error was recognized and corrected by the Review Board.

I find that the rehabilitation consultant met on a number of occasions with the accident employer and was not advised of “alternate employment.” Of particular note is a memo from the rehabilitation consultant, dated May 15, 1991, which states in part:

> On May 15 I spoke with [the employer]. I advised her of the medical opinion upon discharge that the worker would not appear capable of returning to her former employment. I noted that the limitations would be with regard to heavy lifting, bending, twisting and manoeuvring in awkward positions. I noted that there would appear to be a mismatch in the strength requirement of the occupation. I did note, however, that there was also further medical investigation undergoing in terms of a review with a neurologist.

> [The employer] notes that they have no light duty available for the worker. However, they are agreeable to sending postings of any positions which do become available and the worker is welcome to apply for these, although she is not sure whether she would in fact receive any extra consideration.

There is no evidence on file that appropriate postings were sent to the worker or the rehabilitation consultant *before* retraining was considered.

The rehabilitation consultant found that available non-union jobs would not return the worker to her pre-injury earning capacity and therefore a loss of earnings would likely be incurred. The four steps outlined in item #87.20 of the *Rehabilitation Services and Claims Manual* had been explored without success; consequently, retraining was correctly contemplated.

In summary, this panel finds that the rehabilitation consultant appropriately exercised his discretion in recommending a retraining program for the worker, but unfortunately erred in not providing sufficient funds so that the worker could begin a program as expeditiously as possible. I concur with the Review Board, that formal training was necessary and the additional funds were appropriate.

## Conclusion

I DENY THE EMPLOYER'S APPEAL.

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

WORKERS' COMPENSATION

REPORTER

# Decision of the Appeal Division

**Number:** 93-0067, 93-0068
**Date:** January 20, 1993
**Panel:** Connie Munro, Chief Appeal Commissioner
**Subject:** Section 96(2) — Red Cedar Asthma

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This is a request by the worker for reconsideration of a February 2, 1988 prior commissioners' decision. It is submitted that the former commissioners erred in law in their interpretation of a June 5, 1986 Medical Review Panel certificate and a subsequent July 13, 1987 certificate of clarification. The worker is represented by the workers' adviser's Office.

In October 1980, the worker applied for benefits claiming disablement from red cedar asthma. Initially, he was compensated between July 18, 1980 and September 21, 1980 for an "acute asthmatic attack."

By way of a May 4, 1982 Boards of Review decision, the worker was advised that

> . . . the exposure to cedar dust was non-occupational and was a cause of the continuing asthmatic condition . . . The cause of that asthma and resultant disability was therefore non-compensable.

In March of 1983, the worker's diabetic condition was determined non-compensable by the Board.

In July of 1983, the worker filed appeals to the Medical Review Panel in relation to two decisions by the Board. The decisions in dispute were:

1. That the claimant did not suffer from any disabling condition after 21 September 1980 as a result of occupational exposure to red cedar. Rather, it was considered that his red cedar asthmatic condition after that date was due to his non-occupational exposure to red cedar; and,

2. That the claimant's diabetic condition was not causally related to the medication prescribed to treat his asthmatic condition which was the result of his occupational exposure to red cedar.

The Medical Review Panel certificate of June 5, 1986 stated:

On the issues regarding red cedar asthma:

1. *What is the condition of the claimant?*

    1. The condition of the Claimant with regard to his asthma is fair.

2. *Does he now have a disability with respect to his asthma?*

    2. He does now have a disability with respect to his asthma.

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

    3. The nature of his disability is shortness of breath even on slight exertion. This is of moderate extent and renders him unable to do physical work.

4. *If he has had such a disability, was his occupational exposure to red cedar of causative significance, and if so, in what way?*

    4. His occupational exposure to red cedar is of causative significance in that it caused bronchial asthma because of an allergy to red cedar.

5. *If he has or had such a disability, was the disability wholly or partly the result of causes other than his occupational exposure to red cedar? If so, what other causes were there, and how and to what extent was each cause significant?*

    5. The disability is not wholly or partially the result of causes other than his occupational exposure to red cedar.

6. *If there were two or more causes of the claimant's disability with respect to his asthma, could the Panel please explain:*

    *a.) Did each cause independently result in some disability and, if so, what proportion of the disability found by the Panel?*

b.) *If each cause did not independently result in some disability, did two or more causes act together to produce a disability and, if so, which causes acted together to produce this disability?*

6a. This issue is not applicable.

6b. This issue is not applicable.

7. *The Board has recognized that the claimant was fully disabled as a result of his occupational exposure to red cedar for the period set out in non-medical fact #10 of this statement. Would the Panel please state whether they feel that the claimant was disabled for any further period or periods as a result of his occupational exposure to red cedar and, if so, what the nature and extent of the disability was during this further period of time.*

    7. The Panel feels that the Claimant was disabled since the 18th of July, 19890 to the present time as a result of his occupational exposure to red cedar. The nature of the disability is bronchial asthma and the extent of his disability was total during this further period of time with regard to any physical work.

8. *Did the claimant suffer from any pre-existing condition or disability and, if so, was it activated, accelerated, or aggravated by his occupational exposure to red cedar?*

    8. The Claimant did not suffer from any pre-existing condition or disability which was activated, accelerated or aggravated by his occupational exposure to red cedar.

9. *If the claimant now has a disability, is it permanent and, if so, when did it stabilize?*

    9. The Claimant now has a disability which is most likely to be permanent but late recover is possible. He has improved slightly in his asthma since he no longer requires the use of steroids to control it but the panel doubts if it can be stated that he has stabilized.

On the issues regarding diabetes:

1. *What is the condition of the worker?*

    1. The condition of the Claimant is good with regard to his diabetes.

2. *Does he now have a disability with respect to his diabetes?*

    2. He does not now have a disability with respect to his diabetes.

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

    3. The nature of his disability was Diabetes Mellitus of moderate to severe extent requiring high doses of Insulin. He had typical symptoms of diabetes. This did not limit his capacity for work except for the period of hospitalization in January 1982.

4. *If he has or had such a disability, was the medication taken for his asthma which was the result of his occupational exposure to red cedar of causative significance and, if so, in what way?*

    4. The Prednisone medication which he took for his asthma because of his occupational exposure to red cedar, was of causative significance in that it caused glucose intolerance requiring Insulin Therapy.

5. *If he has or had such a disability, was the disability wholly or partially the result of causes other than the medication taken for his asthma which was the result of his occupational exposure to red cedar? If so, what other causes were there, and how and to what extent was each cause significant?*

    5. The Panel believes that the Claimant was a latent diabetic and would have been symptom-free but for the taking of steroids resulting in the necessity of Insulin Therapy.

6. *If there were two or more causes of the claimant's disability with respect to his diabetes, could the Panel please explain:*

   a.) *Did each cause independently result in some disability and, if so, what proportion of the disability found by the Panel?*

   b.) *If each cause did not independently result in some disability, did two or more causes act together to produce a disability and, if so, which causes acted together to produce this disability?*

      6a. Each cause did not independently result in some disability.

      6b. The ingestion of Prednisone for his bronchial asthma together with his latent diabetes acted together to produce manifest diabetes.

7. *The Board has not recognized that the claimant was disabled for any period of time as a result of the medication taken for his asthma which was the result of his occupational exposure to red cedar. If the Panel does believe the claimant was disabled as a result of the medication taken for his asthma which was the result of his occupational exposure to red cedar, would the Panel state for what periods of time the claimant was so disabled, and state what the nature and extent of the disability was during this period of time.*

      7. The Panel believes that the Claimant had to be hospitalized for investigation of his diabetes and stabilization to treatment for a period of fourteen days in January of 1982.

8. *Did the claimant suffer from any pre-existing condition or disability and, if so, was it activated, accelerated, or aggravated by the medication taken for his asthma which was the result of his occupational exposure to red cedar?*

      8. The Claimant was a latent diabetic and Prednisone therapy for his bronchial asthma caused his diabetes to become manifest. Thus his diabetes was activated by the taking of the Prednisone.

9. *If the claimant now has a disability, is it permanent and, if so, when did it stabilize?*

    9. The Claimant now has no disability with regard to his diabetes, since he requires no further Insulin or anti-diabetic therapy.

The panel's certificate was unanimous.

The Medical Review Panel certificate was referred to the Claims Department for implementation on June 18, 1986. The file was referred to a senior pensions adjudicator in July, 1986, for consideration of a permanent partial disability award. On November 18, 1986, the worker was advised that no functional permanent partial disability award would be paid. The worker appealed that decision to the Review Board. (The appeal to the Review Board was later suspended due to further developments regarding the Medical Review Panel certificate as noted below. The commissioners, however, later made a decision regarding the pension issue, apparently using their residual supervisory jurisdiction and the Review Board appeal was never revived.)

Meanwhile, by letter dated September 12, 1986, a solicitor acting on behalf of the worker's employer, submitted that the Medical Review Panel did not have jurisdiction to make the finding that, "The disability is not wholly or partially the result of causes other than his occupational exposure to red cedar." The employer argued that the panel was bound by the facts regarding non-medical exposure which the employer submitted were binding on the panel.

The material portions of the Statement of Non-Medical Facts were:

1. The claimant was employed . . . as a planer maintenance supervisor and while so employed and on 18 July 1980, laid off work with asthma complaints.

5. The claimant started work in a sawmill at about age 18, around 1964. At that time he was exposed only to spruce and Douglas fir and had no respiratory symptoms.

6. The mill began to process red cedar on a regular basis in 1970. Several months later, the claimant began to have respiratory problems.

7. Between 1972 and 1980, red cedar was being cut approximately 30% of the time.

8. During this period, the claimant lived in a trailer on the mill site, and was therefore exposed to red cedar during the time he was off work.

9. In November of 1980, Dr. P recommended that the claimant find another job and move away from the sawmill.

10. A claim was accepted by the Board and wage loss benefits were paid from 18 July 1980 until 21 September 1980.

11. By letter dated 23 January 1981 the claimant was advised that his time off work beyond 21 September 1980 was related to his non-occupational exposure to red cedar, and no further benefits would be paid past 21 September 1980.

12. This decision [to terminate time loss benefits as of September 21st, 1980] was appealed to the Boards of Review which on May 4th, 1983 [sic] confirmed the decision to terminate wage loss benefits on September 21st, 1980 on the basis that the Claimant's exposure to red cedar resulted from the fact that the Claimant lived in a trailer on the employer's premises at the mill. This living arrangement was held not to be directly related to his employment, and his exposure to red cedar as a result was considered non-compensable. This decision would apply to his exposure during off hours during the years he was employed at the mill, and to his exposure after he ceased work on 18 July 1980.

13. The decision that the Claimant's exposure to red cedar during off hours due to this living arrangement at the mill was non-occupational was a factual determination which is not appealable to the Medical Review Panel.

The employer was advised by decision letter dated January 20, 1987, that the submission of September 12, 1986, had been treated as an appeal to the commissioners on the question of whether the Medical Review Panel decision could be accepted as a legally-binding certificate under Section 65 of the *Workers Compensation Act*. The employer was further advised that a panel of two commissioners considered the matter and concluded that clarification should be requested from the Medical Review Panel. Once the clarification was obtained, the commissioners would review the panel's decision to consider whether it was within the jurisdiction of the Medical Review Panel.

By decision letter of June 24, 1987, the commissioners sought clarification from the panel on its findings with respect to asthma and concerning the non-occupational exposure. Clarification was sought on two aspects of the certificate. The first concerned clauses 12 and 13 of the Statement of Foundational Non-Medical Facts. The panel was asked how it viewed the worker's non-occupational exposure. The panel was referred to clauses 7 and 8 of the Statement wherein it was stated that the worker lived in his trailer on the mill site from 1972. The panel was asked whether, if the worker only lived there from June, 1979, it would make any difference to their conclusions. The second matter concerned clause 9 of the statement. The panel was asked whether there have been any significant changes in disability since 1980, when they occurred, and whether there is likely to be any further significant change in the coming year.

By way of clarification, the Medical Review Panel, on July 13, 1987, stated:

> The Panel is of the opinion that the claimant's occupational exposure to red cedar was by far the greater significant causative factor in the production of the man's asthma. The non-occupational exposure to red cedar was at best of minor importance.

The panel went on to state:

> Whether the claimant had lived at the mill site in his trailer from 1972 to 1980 or only from June 1979 to 1980 does not alter the extent of the minor significance of his non-occupational exposure to red cedar in the opinion of the Panel.

With respect to asthma, the panel said that it believed the disability is permanent and stabilized in 1980. The panel said that it did not feel there had been any significant change in disability since 1980 and any further significant change over the coming year was unlikely. The clarification was unanimous.

The commissioners' decision in this matter is dated February 2, 1988. The commissioners concluded that the Medical Review Panel certificate, as clarified, was a proper one within the jurisdiction of the panel and binding on the Board. The commissioners said that implementation of the certificate required consideration of a number of issues, including whether the worker was entitled to a permanent disability award, and if so, the extent of the award and the date of commencement.

The commissioners stated:

> In a letter dated November 18, 1986, the Senior Pensions Adjudicator advised that no permanent disability award would be made. Your condition was too minimal to have any effect on your

earning capacity. This decision was based on the October 24, 1986, examination by Dr. Q.

In his September 10, 1987, report, Dr. R concluded that there was a serious disability which would prevent a return to your previous employment in the lumber industry. Your asthma, diabetes, and chronic back pain would make it difficult for you to find useful employment in any job that required physical labour. The doctor suggested that you should seek further training and try to establish yourself in another job. Dr. R's report was reviewed by Dr. Q in a memo of October 7, 1987. He suggested that the disability fell into Class 2 of the American Medical Association classes of respiratory impairment. The Workers' Advisor, Mr. Williams, has provided a March 23, 1987, report from Dr. S stating that you are totally disabled from any occupation.

The Commissioners conclude from the Medical Review Panel Certificate and subsequent reports from Dr. R and Dr. Q that you have a permanent respiratory disability resulting from your occupational exposure for which a permanent disability award should be granted from the date your wage loss benefits were terminated in 1980. They accept Dr. Q's evaluation of your overall impairment as being in the 10-25% range and feel that an assessment at the maximum in the range would be a fair evaluation of the disability found by the Panel. However the letter of clarification from the Panel states that your non-occupational exposure was of minor causative significance. For this reason, the majority of the Commissioners feel that the Board can only accept responsibility for a proportion, though the major proportion of your disability. They assess this portion as 80% of your disability which means that you will receive an award of 20% of total on a physical impairment basis.

With regard to the assessment on a projected loss of earnings basis, the Certificate of the Medical Review Panel and Dr. R's report indicate that you are unable to do physical work, but you are physically capable of doing other lighter forms of work . . . . If it is found that you have a loss of earnings greater than the physical impairment award due to your asthma, only 80% of that loss will be accepted as the Board's responsibility . . . .

## Submissions

The worker's representative argues that the commissioners erred in law in their interpretation of the June 5, 1986 Medical Review Panel certificate and the subsequent July 13, 1987 certificate of clarification. It is submitted that the improper interpretation led to improper application of proportionate entitlement to the permanent partial disability award. Specifically, the worker's representative argues that the commissioners improperly applied Section 5(5) of the *Act* regarding proportionate entitlement.

## Law

Under the *Act*, the relevant provision which addresses proportionate entitlement and which was came into effect May 17, 1980 is Section 5(5).

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

Legislative history reveals that the predecessor of Section 5(5) was Section 6(5) which came into effect April 6, 1968. Before that, the legislation did authorize proportionate entitlement on grounds of causation. Section 7(5) of the *Workmen's Compensation Act* provided as follows:

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

I have carefully reviewed the Medical Review Panel certificate as clarified. The panel did not find any pre-existing disability. Therefore, the application of Section 5(5) of the *Act* would be inappropriate and, in fact, the commissioners did not state that Section 5(5) was the provision they relied on in approportioning benefits. Rather, the commissioners used causation as the basis for limiting Board liability to 80%.

The relevance of the causative significance of occupational versus non-occupational exposure generally goes to issues pertaining to initial adjudication such as the determination of whether or not an injury arises out of the worker's employment or

whether a disease is due to the nature of employment. The causative significance of occupational as opposed to non-occupational factors is not a ground for applying proportionate entitlement under the *Act*.

I refer to Larson who states at paragraph 59.22(a) in his encyclopedia digest (*The Law of Workmen's Compensation*), New York, 1992.

> "Prior nondisabling defect or disease not apportionable"
>
> Apart from special statute, apportionable "disability" does not include a prior disabling defect or disease that contributes to the end result. Nothing is better established in compensation law than the rule that, when industrial injury precipitates disability from a latent prior condition, such as heart disease, cancer, back weakness and the like, the entire disability is compensable, and except in states having special statutes on aggravation of disease, no attempt is made to weigh the relative contribution of the accident and the preexisting condition to the final disability or death. Apportionment does not apply in such cases, nor in any case in which the prior condition was not a disability in the compensation sense.

In this case, although the worker may have suffered from asthma prior to 1980, it was not considered disabling. Further, although the worker was a latent diabetic, the Medical Review Panel certificate clearly established that it was the Prednisone therapy taken to relieve bronchial asthma as a result of occupational exposure to red cedar which made the diabetes manifest.

Larson also states at paragraph 59.10:

> "Full-responsibility rule"
>
> In the absence of an apportionment statute, the general rule is that the employer becomes liable for the entire disability resulting from a compensable accident.

Larson goes on to explain that the harshness of such a rule is considered tempered through the application of second injury provisions.

It is clear that the legislators put their minds to the issue of proportionate entitlement in the statute revision of 1968. The Board's authority was effectively altered with respect to restricting liability. Given the amendments and in the absence of statutory

authority to approportion benefits on the basis of causation, it is improper. I also refer to the reasoning expressed in my decision, *Section 96(2) — Proportionate Entitlement*.

I have concluded that the commissioners' decision to award only a portion of this worker's pension is wrong in law and set it aside. The worker's pension should not have been apportioned and must be paid to him on the basis of the Board accepting full responsibility for the assessed disability. These comments apply equally the commissioner's direction to proportion to any loss of earnings award.

THE REQUEST FOR RECONSIDERATION IS GRANTED.

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

## Decision of the Appeal Division

**Number:** 93-0069
**Date:** January 18, 1993
**Panel:** Cassandra Kobayashi, Walter N. Peain, Alex S. Brokenshire
**Subject:** Medical Review Panel — A Medical Decision

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The worker appeals the Workers' Compensation Review Board findings of August 28, 1992. The majority of the Review Board allowed the employer's appeal, finding that the February 28, 1991 decision by the claims adjudicator was a non-medical decision, and therefore not appealable to a Medical Review Panel.

The issues defined by the worker and employer representatives are whether the claims adjudicator's decision is appealable to a Medical Review Panel, and whether the doctor's certificate tendered the statutory requirements in providing sufficient particulars to define a bona fide medical dispute.

The facts as set out by the claims adjudicator are that the worker developed a strain involving the left hand, arm and shoulder, alleged to have arisen from her work as a poultry processor. The worker had pain for four to five weeks, and on January 14, 1991, reported this to her employer and saw her doctor. No specific incident was identified.

The workers' adviser argues that "the fundamental issue to be resolved in this case is the causative significance of this worker's employment in producing her diagnosed disability . . . . The sole issue in dispute is the etiology of her disabling injury." The representative disagrees with the Review Board interpretation that four factors lead to the decision of the claims adjudicator. He submits that the mention by the adjudicator of delays in reporting to the employer and seeing her doctor were not specifically found by the adjudicator as reasons for denying the claim. He points out that the worker does not dispute that there was no incident precipitating her injury. Finally, the worker's adviser addresses the adjudicator's assertion that because the worker was accustomed to her work, in the absence of some specific occurrence or a change in the work, she will not be injured. It is submitted that this is a statement of a medical conclusion.

The workers' adviser also takes issue with the Review Board finding that the adjudicator "pointed to a number of non-medical facts which essentially affected the worker's credibility and led to her conclusion that the worker's condition did not arise

out of her employment." The representative points out that there is no mention of the worker's credibility being in question, nor do the factors cited by the Review Board tend to address the issue of credibility.

### Reasons and Analysis

We agree with the conclusion of the Review Board for slightly different reasons. We find that the decision of the claims adjudicator is not appealable to a Medical Review Panel because the decision was based on whether the condition arose out of and in the course of employment. Contained in that question was the medical issue of whether the work activity could have caused the symptoms. However, we find that the decision did not turn on the medical issue. In our view, the adjudicator analyzed the evidence before her:

1. the worker had an onset of symptoms in her left hand, arm and shoulder;

2. these symptoms appeared over four to five weeks;

3. the worker eventually sought medical treatment on January 14, 1991, and, at the same time, notified her employer of the problem;

4. there is no alleged incident or accident;

5. the worker has been performing the same duties without any change for four months;

6. the worker should be accustomed to her work; and

7. given she is accustomed to the work, the work activity is unlikely to cause a strain without a specific accident or occurrence. The adjudicator states, "A conclusion that your symptoms on January 14th, 1991 are job related would be purely based on speculation."

The adjudicator gave her final conclusion as follows:

> In conclusion, I find that I am unable to relate your left hand/arm/ shoulder symptoms of January 14th, 1991 to your work activities.

We find that the reason for denying the claim was that on weighing the evidence, including the medical evidence relating to the causative significance of her work activities, the causative significance of the work activity was not established. In our view, the adjudicator was applying the governors' published policy as stated in

item #97.00 of the *Rehabilitation Services and Claims Manual* concerning the evidence necessary to establish a claim:

> It is therefore not uncommon to see that a claim will be denied when a claimant, away from his employment, begins to feel some pain and discomfort in his lower back, and seeking to find a reason in his own mind for his condition, thinks back to work he has been doing over a period of time and concludes that the problem must have resulted from something which occurred on a certain day when certain heavy work was being performed. *The question then arises whether there was anything other than the claimant's hindsight which would allow the Adjudicator to conclude that the work done some weeks or months previously had causative significance.* It is at this point that investigation takes place and the evidence is weighed. If there is nothing objective to indicate any activity at work was potentially causative of the condition complained of, at or near the time alleged by the claimant, it can fairly be said that the claim has not been established. The claimant has simply failed to present those fundamental facts which bring the provisions of the *Act* into play.

In our view, the decision by the adjudicator concerned the evidence as a whole, and was not specifically tied to the medical issue of causation. The adjudicator did not say so, but the decision leaves open the possibility that the worker's symptoms arose from non-work causes such as recreational activities or an incident arising outside of the employment. However, with respect, we do not agree with the Review Board majority that the adjudicator based her decision on the worker's credibility. As with the other possible explanations for the worker's symptoms, the adjudicator did not state what caused the worker's symptoms, only that the work activity did not.

Given our finding on the first issue, it is not necessary to address the second issue of the sufficiency of the doctor's Certificate for Appeal to A Medical Review Panel.

We are mindful of the need to make the workers' compensation appeal system accessible and understandable to workers and employers. At the same time, the legislative framework of the *Act* must be followed. Section 58(3) allows for an appeal by a worker "after the making of a medical decision by the board." In practice, claims decisions relate to entitlement to benefits, and as such are not purely medical decisions. In each case, whether a decision is appealable to a Medical Review Panel will turn on the particular facts. In this case, although there is a medical issue — namely, whether the worker was conditioned to her work activities by four months' experience — it is not determinative of the acceptance of the claim.

The worker's course of appeal should have been to the Review Board. Given that she expressed dissatisfaction with the claims adjudicator's decision in her Request for Examination by a Medical Review Panel dated March 26, 1991, we hope the Review Board is amenable to granting an extension of time to appeal.

### Dissent — by Walter N. Peain

I have considered the majority decision of this panel. While I agree with the history as stated, I respectfully disagree with the conclusions in that decision.

The panel majority has stated that they disagree with the Review Board finding that the claims adjudicator found that the number of non-medical facts affected the worker's credibility, leading the claims adjudicator to the conclusion that the worker's condition did not arise out of her employment. I agree that the claims adjudicator accepted the worker as a credible witness.

I disagree with both the Review Board and the majority decision of the panel that the claims adjudicator's decision was based primarily on non-medical facts. There is no evidence or indication on the claim file that the claims adjudicator doubted that the worker's disability occurred outside of the course of her employment.

The memo section of the claim file contains six memos. Memo #1 contains reference to the medical history, work history/activities and the worker's stature. Memos #2 and #5 are from the claims adjudicator referring the file for medical opinions. Memos #3 and #5 are from the Board's Occupational Health medical officer. Memo #6 simply consolidates two claims. One claim concerned a further aggravation following a one-day attempt to return to work. There are no memos suggesting any other cause for the problem, which leads me to conclude that the claims adjudicator accepted the worker's evidence that the pain in her left hand/arm/shoulder came on gradually at work over a period of a few weeks. The claims adjudicator concluded that the problem was not caused by the work.

The *Rehabilitation Services and Claims Manual* item #103.11-B.2. entitled "What is the cause of the claimant's condition" states in part:

> The non-medical facts will be examined to see if there is anything in them which could reasonably result in the claimant's condition, for example, exposure to silica dust or an accident in which the claimant twisted his knee. A decision will then be made as to the actual cause of the claimant's condition. Where there is more than one possible cause, this may involve selecting the most likely or attributing the condition to two or more causes acting together or in succession. This is a medical decision.

Item 103.11-B.3. states that:

> Having determined the non-medical facts and made a medical decision as to the cause of the claimant's condition, it remains to be considered whether those decisions bring the condition within the terms of the *Act*. For example, it must be considered whether the injury arose out of and in the course of the employment under Section 5(1), or the industrial disease was due to the nature of the employment under Section 6(1). This determination is a non-medical decision which is not appealable to a Medical Review Panel.

Section 58 of the *Act* is unequivocal in stating that where a worker or employer is aggrieved by a medical decision and sends a certificate from a physician certifying that in his opinion there is or may be a medical dispute to be resolved, with sufficient particulars to define the question, the worker shall be examined by a Medical Review Panel.

The doctor's March 26, 1991 certificate referring to a bona fide medical dispute states that the reasons are contained in his March 14, 1991 Progress Report. That report states that the worker continues to have left shoulder/neck pain. He says the sprain results from chronic overuse syndrome in movements used in her job and directly related despite no acute episode.

The doctor's certificate states sufficient particulars to define the question in issue related to a bona fide medical dispute. I am in agreement with the published decision of the Appeal Division No. 91-0944 (*Workers' Compensation Reporter*, Vol. 8, p. 5) wherein it states:

> In allowing the appeal, we note that the legislature has carved out from the Board's jurisdiction a separate appeal process before a Medical Review Panel. The Medical Review Panel determines its own procedure and determines what evidence it will receive. The decision of a Medical Review Panel is binding on the Board and there is no appeal from their decision.
>
> However, the Board controls access to Medical Review Panel appeals; the Board determines the sufficiency of the enabling certificate, and other preliminary matters in an appeal to a Medical Review Panel. The Board should not unduly restrict access to this appeal process. The *Act* requires the Board to ensure that the statutory requirements are met. The addition of any preliminary requirements defeats the legislative intention that employers and workers have access to this avenue of appeal outside the Board.

I have considered the Board policy, in particular item 103.11-B.3. However, I cannot conclude that a decision based primarily on the evidence that the work was not unusual and that there was no specific trauma constitutes a non-medical decision. Having determined that the decision of the claims adjudicator was a medical one, it is not open to me to deny the worker's right under the *Act* to appeal to a Medical Review Panel. I agree with the Board policy relating to the need to determine whether the issue is a non-medical or medical decision. However, there are times such as in this claim where the consideration of whether the injury arose out of and in the course of the employment under Section 5(1) or Section 6(1) is strictly a medical decision. In such cases the Board has no alternative other than to accept a properly completed certificate of bona fide medical dispute signed by a physician registered under the *Medical Practitioner's Act* of this province.

I WOULD ALLOW THE APPEAL.

### Conclusion

THE MAJORITY OF THE PANEL DENIES THE APPEAL.

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

WORKERS' COMPENSATION
REPORTER

# Vocational Rehabilitation Services' Advisory Council — Terms of Reference

**Date:** **January 22, 1993**

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### 1. Background

The Workers' Compensation Board's mission is:

*Workplace safety and health is our challenge.*
*Quality rehabilitation and fair compensation is our commitment.*
*World leadership is our goal.*

This mission statement confirms the Board's commitment to providing quality rehabilitation. The establishment of an Advisory Council as mandated in the governors' policy in Chapter XI of the *Rehabilitation Services and Claims Manual* reinforces the Board's commitment to identifying and developing quality vocational rehabilitation programs and policies in consultation with the community.

Through shared ownership and true involvement, the community's role as a key partner in this process will be assured. The Board welcomes input, constructive feedback, and joint investment in improving vocational rehabilitation services and programs.

### 2. Purpose

Chapter XI of the Vocational Rehabilitation Services policy in the *Rehabilitation Services and Claims Manual* states, "The Vocational Rehabilitation Services Advisory Council facilitates consultation with members of the community served by the Board." This new chapter is to be the foundation of future public consultation and policy review and development. The Advisory Council will play a critical role in identifying and prioritizing issues that the community considers important to the improvement of vocational rehabilitation services and programs.

## 3. Representative Nature of the Advisory Council

The Vocational Rehabilitation Services Advisory Council will represent community participants in the vocational rehabilitation process at the Workers' Compensation Board. Worker, employer, and vocational rehabilitation public interest will each be represented by three appointed Council members. Representation by persons with disabilities will be a priority. A chairperson will be selected from the public interest members by appointed members of the Advisory Council. Each member will be appointed for a two-year term by the vice-president, Compensation Services Division, after consultation with members of the worker and employer communities. The director of Vocational Rehabilitation Services Department will function as the secretary to the Advisory Council. The vice-president of Compensation Services Division will be an ex-officio member of the Council. The Council will be supported by the Vocational Rehabilitation Services Department.

## 4. Roles and Functions

Accountability for the delivery of services and for the operation of the Vocational Rehabilitation Services Department remains with the director of Vocational Rehabilitation Services and the vice-president of the Compensation Services Division.

The central function of the Council is to act as an advisory body on matters affecting the delivery of quality vocational rehabilitation to workers in British Columbia. The definition of Quality Rehabilitation (#85.20) and the Principles of Vocational Rehabilitation (#85.30) adopted in Chapter XI establish the set of core values upon which the Department operates and guide the Council's activities within the governors' overall priorities. The Advisory Council is not a policy (governors' responsibility) or decision making (operational responsibility) body.

Specifically, the Advisory Council identifies and prioritizes policy and program issues for discussion and debate within the Council. Recommendations for further research, public debate, internal review and consideration may all be made by the Council and presented to the vice-president, Compensation Services Division. Recommendations will be considered by the vice-president and periodic reports will be provided to the governors outlining issues and recommendations identified by the Council and actions arising from them.

Through individual and collaborative efforts of representative Advisory Council members, the broader community, the resources and mandate of the Vocational Rehabilitation Services Department, and those of the Workers' Compensation Board as a whole, we are committed to delivering equitable and consistent vocational rehabilitation to our community.

## 5. Meetings of the Advisory Council

Regular meetings will be held on a quarterly basis. Dates will be established by the secretary to the Advisory Council in consultation with Advisory Council members upon the Council's implementation and annually thereafter. It is anticipated that each quarterly meeting will be two days in duration. Meeting agendas will be set by the chair of the Council in consultation with Council members and circulated at least two weeks in advance with supporting materials. Where special task forces are struck, supplementary meetings of these groups will be held as appropriate.

## 6. Communication

Minutes will be recorded of each Advisory Council meeting and will be presented for review and approval of the Council members prior to distribution. Annually, a summary of the Advisory Council activities and achievements will be produced and distributed.

*This policy document setting out the VOCATIONAL REHABILITATION SERVICES ADVISORY COUNCIL TERMS OF REFERENCE was approved by the governors of the Workers' Compensation Board on December 7, 1992, subject to the unanimous approval of final language by the employer, worker and public interest members of the governors' ad hoc Vocational Rehabilitation Committee.*

*Final language was subsequently approved unanimously by the employer, worker and public interest members of the governors' ad hoc Vocational Rehabilitation Committee.*