

## WORKERS' COMPENSATION REPORTER

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

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

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



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## Decision of the Governors

**Number:** 53

**Date:** December 6, 1993

**Subject:** Transfer of Aquaculture from the Farm and Ranch Assessment Subclass

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WHEREAS on April 5, 1993, the governors of the Workers' Compensation Board made Regulations for Agricultural Operations to apply to all employers, workers and other persons working in or contributing to any agricultural production of the farming industry as defined in B.C. Regulation 434/82, with the exception of aquaculture;

AND WHEREAS on April 5, 1993, the governors also resolved that Sections 2, 4, 6, and 8 of the *Industrial Health and Safety Regulations* (B.C. Reg. 585/77 as amended by B.C. Regs. 71/82, 126/82 and 523/82), as they may be amended from time to time, would apply to the farming industry as defined in Regulation 434/82, with the exception of aquaculture;

AND WHEREAS on April 5, 1993, the governors also approved the establishment of the Farm and Ranch Safety and Health Agency (F.A.R.S.H.A.) to be funded by the Workers' Compensation Board through levy and assessment on the assessment subclass to which the farming industry, as defined by B. C. Reg. 434/82, with the exception of aquaculture, belongs;

AND WHEREAS aquaculture, or the "commercial fish farm" industry belongs to the assessment subclass (0643) that will be subject to the levy and assessment for the funding of F.A.R.S.H.A.;

AND WHEREAS Section 37 of the *Workers Compensation Act* authorizes the Workers' Compensation Board to create and rearrange assessment classes or subclasses and to make the adjustment and disposition of funds, reserves and accounts which is considered just and expedient;

AND WHEREAS the accounts of assessment subclass 0643 have a 1992 unappropriated balance or surplus of \$3,383,000 and a 1991 assessable payroll of \$224,791,293 of which \$12,050,786 was the 1991 assessable payroll of the "commercial fish farm" industry;

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AND WHEREAS the president and Executive Committee presented a recommendation to the governors at their April 5, 1993 meeting that, subject to consultation with the agriculture industry and employers in assessment subclass 0906, aquaculture or the “commercial fish farm” industry be transferred from subclass 0643 to subclass 0906 and that \$181,000 of the unappropriated balance or surplus in the accounts for subclass 0643 be transferred to the accounts of subclass 0906 as well, both effective January 1, 1993;

AND WHEREAS the governors requested that further public consultation be conducted with respect to the recommendation, that public consultation has been completed and all stakeholders who responded either were of the view that the transfer of aquaculture or the “commercial fish farm” industry from subclass 0643 to subclass 0906 was correct or expressed no opinion:

NOW THEREFORE THE GOVERNORS RESOLVE THAT they accept the recommendation that, effective January 1, 1993, aquaculture or the “commercial fish farm” industry be withdrawn from assessment subclass 0643 and wholly transferred to assessment subclass 0906 as a separate industry within that subclass;

AND THE GOVERNORS FURTHER RESOLVE THAT \$181,000 of the unappropriated balance or surplus of subclass 0643 be transferred from the accounts of subclass 0643 to the accounts of subclass 0906, effective January 1, 1993, as well.

## Decision of the Governors

**Number:** 54

**Date:** December 6, 1993

**Subject:** Occupational Safety and Health Regulation Review: Regulation Advisory Committee Rescindment of Appointment/Appointment of New Member

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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*;

AND WHEREAS the governors have adopted a process by which this review will be conducted;

AND WHEREAS this process includes the appointment of a Regulation Advisory Committee which will, under the direction of the governors, oversee the review of the Regulations;

AND WHEREAS the Regulation Advisory Committee is to consist of the chairman of the governors and two worker, two employer and one public interest governors, seven persons representative of workers and seven persons representative of employers, and the coordinator, Regulation Review, as an advisor to the Committee;

AND WHEREAS, on February 3, 1992, the governors appointed to the Regulation Advisory Committee seven persons representative of workers and seven persons representative of employers;

AND WHEREAS one person appointed to the Regulation Advisory Committee on February 3, 1992, has resigned from the Committee and the governors wish to appoint another person to replace him:

NOW THEREFORE THE GOVERNORS RESOLVE THAT:

1. The appointment of Mr. B.A. Hawrysh to the Regulation Advisory Committee as a representative of employers is rescinded effective November 5, 1993.

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2. Mr. Ian May, manager, Occupational Safety and Health, Interior Lumber Manufacturers' Association, is appointed as a member of the Regulation Advisory Committee, effective December 6, 1993, to be representative of employers.
  3. Mr. May shall be paid travel and other reasonable expenses and a per diem allowance of ONE HUNDRED SEVENTY-FIVE DOLLARS (\$175.00) for attendance at Regulation Advisory Committee meetings.

## Decision of the Governors

**Number:** 55  
**Date:** December 6, 1993  
**Subject:** Appointment of Member of the Governors' Industrial Diseases Standing Committee

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

AND WHEREAS the Committee shall consist of two worker representative governors, two employer representative governors, one public interest governor, and the chairman of the governors;

AND WHEREAS the appointment as governor of Murray Farmer, one of the employer representative governors appointed to the Committee on April 6, 1992, expired on December 3, 1993:

NOW THEREFORE THE GOVERNORS RESOLVE THAT Horst Sander is appointed to the Governors' Industrial Diseases Standing Committee as an employer representative governor until the expiration of his term of appointment as governor.



# REPORTER

## Decision of the Governors

**Number:** 56  
**Date:** January 10, 1994  
**Subject:** Ratification of Medical Review Panel Fee Schedule Effective January 1, 1994

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### WHEREAS:

- A. 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
- B. the chairman of the governors has given final approval to the fee schedule for Medical Review Panels held on and after January 1, 1994 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, 1994:

1. the hourly rate payable to the chairmen of Medical Review Panels is \$138.04 (formerly \$136.99),
2. the flat fee payable to Panel members other than the chairmen is \$460.47 (formerly \$456.95), with an additional fee of \$101.26 (formerly \$100.49) per hour when the time taken on an appeal (including travelling time) exceeds 3½ hours up to a maximum of a further 4½ hours, and
3. the stenographic fee for each appeal is \$69.13 (formerly \$68.60).



## Decision of the Governors

**Number:** 57  
**Date:** January 10, 1994  
**Subject:** Appointments of Members of the Governors' Financial Standing Committee

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### WHEREAS:

- A. on April 6, 1992, the governors of the Workers' Compensation Board constituted the Governors' Financial Standing Committee (the "Committee") pursuant to Section 82(b)(i) of the *Workers Compensation Act* and Section 8 of Bylaw No. 3 (Board of Governors Procedural Bylaw);
- B. the Committee shall consist of one worker representative governor, one employer representative governor, one public interest governor, and, on an ex officio basis, the chairman of the governors;
- C. a quorum of the Governors' Financial Standing Committee shall consist of the worker representative governor, the employer representative governor, and either the public interest governor or the chairman of the governors; and
- D. the appointment as governor of John St. C. Ross, the employer representative governor appointed to the Committee on April 6, 1992, expired on December 3, 1993:

### NOW THEREFORE THE GOVERNORS RESOLVE THAT:

- 1. R.H. (Bob) Buckley is appointed to the Governors' Financial Standing Committee as the employer representative governor, on a temporary basis, from December 3, 1993 up to and including January 10, 1994;
- 2. the presence of R.H. (Bob) Buckley at any meeting of the Committee between December 3, 1993 and January 10, 1994, inclusive, shall be counted as part of the quorum required for the Committee to conduct its business; and
- 3. effective January 11, 1994, Richard Baker is appointed to the Governors' Financial Standing Committee as the employer representative governor until the expiration of his term of appointment as governor.



# REPORTER

## Decision of the Governors

**Number: 58**

**Date: January 10, 1994**

**Subject: Approval of Interim 1994 F.A.R.S.H.A. Funding**

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### WHEREAS:

- A. on April 5, 1993, the governors of the Workers' Compensation Board approved the establishment of the Farm and Ranch Safety and Health Agency (F.A.R.S.H.A.);
- B. funding for F.A.R.S.H.A. is to be provided by the W.C.B. through levy and assessment on the farm and ranch subclass (0643) and the annual F.A.R.S.H.A. budget is subject to the approval of the governors;
- C. due to the length of time it is taking to establish F.A.R.S.H.A., the F.A.R.S.H.A. Board of Directors is unable to present a 1994 budget to the governors until spring, 1994; and
- D. the F.A.R.S.H.A. Board of Directors has requested an interim advance of \$150,000 to keep F.A.R.S.H.A. operating;

### NOW THEREFORE THE GOVERNORS RESOLVE THAT:

- 1. they approve an interim advance of \$150,000 from the 1994 F.A.R.S.H.A. budget to keep F.A.R.S.H.A. operating until the Board of Directors is able to submit a formal budget to the governors, and
- 2. in order to receive further funding from the W.C.B., the F.A.R.S.H.A. Board of Directors shall submit a formal budget to the governors by May 2, 1994.



## Decision of the Governors

**Number:** 59  
**Date:** January 10, 1994  
**Subject:** Classification, Setting of Rates and Application of Experience Rating for Industries to which Mandatory Coverage by the *Workers Compensation Act* is Being Extended on January 1, 1994

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### WHEREAS:

- A. the *Workers Compensation Amendment Act, 1993* amended the *Workers Compensation Act* (the "Act") effective January 1, 1994 so that Part One of the Act applies to "all employers, as employers, and all workers in British Columbia, except employers or workers exempted by order of the board";
- B. as a result, employers and workers who were previously not covered by Part One of the Act, or covered through voluntary application, are mandatorily covered effective that date unless exempted by order of the Workers' Compensation Board;
- C. for the purpose of assessment in order to create and maintain the accident fund for the payment of compensation, outlays and expenses under the *Workers Compensation Act* and the *Workplace Act*, Section 36 of the Act divides all industries within the scope of Part One into classes;
- D. Section 37 of the Act empowers the W.C.B.:
  - (a) create new classes in addition to those mentioned in Section 36,
  - (b) consolidate or rearrange any existing class, and
  - (c) withdraw from a class an industry or a part of a class or subclass included in it and transfer it wholly or in part to another class, or form it into a separate class,

and, in doing so, the W.C.B. may make the adjustment and disposition of the funds, reserves and accounts of the classes affected that is considered just and expedient;

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- E. pursuant to Sections 36 and 37, the W.C.B. has established a classification structure for industries within the scope of Part One of the *Act* which, as mentioned in Policy No. 30:20:10 of the *Assessment Policy Manual*, is set out in the *Classification and Rate List*;
  - F. Section 39(1) of the *Act* requires the W.C.B., each year, to assess and levy on and collect from independent operators and employers in each class sufficient funds to meet all amounts payable from the accident fund during the year and to provide certain reserves;
  - G. in complying with Section 39(1), the W.C.B. establishes an assessment rate for each subclass of industry within the scope of Part One of the *Act*;
  - H. Section 42 of the *Act* requires the W.C.B. to establish subclassifications, differentials and proportions in the rates as between the different kinds of employment in the same class as may be considered just; and where the W.C.B. thinks a particular industry or plant is shown to be so circumstanced or conducted that the hazard or cost of compensation differs from the average of the class or subclass to which the industry or plant is assigned, the W.C.B. shall confer or impose on that industry or plant a special rate, differential or assessment to correspond with the relative hazard or cost of compensation of that industry or plant, and for that purpose may also adopt a system of experience rating;
  - I. the W.C.B. has, by policy, established an experience rating assessment (E.R.A.) plan pursuant to Section 42; and
  - J. the W.C.B. is required by the *Act* to determine the classifications and the 1994 assessment rates for, and by policy to determine the application of the E.R.A. plan to, industries whose employers and workers were previously not covered by Part One of the *Act*, or covered through voluntary application, but are now covered mandatory:

**NOW THEREFORE THE GOVERNORS RESOLVE THAT:**

1. the 1993 *Classification and Rate List* which sets out the classification structure and assessment rates for industries within the scope of Part One of the *Act* for 1993 constitutes published policy of the governors within the meaning of Decision of the Governors No. 3 (*Workers' Compensation Reporter*, Vol. 7(1), p. 17) and may only be amended by the governors;
2. the *Classification and Rate List* shall be reissued annually to incorporate any changes made by the governors to the classification and assessment rates,

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3. the classification structure in the 1993 *Classification and Rate List* is amended, effective January 1, 1994, as follows:
- (a) new Classes 31 and 33:
    - (i) new Classes 31 and 33 are created, with the subclasses and industry groups set out in SCHEDULE "A" to this resolution,
    - (ii) the withdrawals from existing classes, subclasses, and industry groups and transfers to new Classes 31 and 33 and their subclasses and industry groups are effected in accordance with the applicable "Description of Industry Group," and
    - (iii) new industries are assigned to new Classes 31 and 33 and their subclasses and industry groups in accordance with the applicable "Description of Industry Group";
  - (b) in existing Class 6:
    - (i) in existing Class 6, the new subclasses and industry groups set out in SCHEDULE "B" to this resolution are created,
    - (ii) the withdrawals from existing subclasses and industry groups in Class 6 and transfers to the new subclasses and industry groups in accordance with the applicable "Description of Industry Group" are effected, and
    - (iii) new industries are assigned to Class 6 and its subclasses and industry groups in accordance with the "Description of Industry Group";
  - (c) existing industry groups in existing classes and subclasses are rearranged as set out in SCHEDULE "C" to this resolution;
  - (d) any industry not assigned by this resolution to a class, subclass and industry group that was immediately prior to January 1, 1994, assigned on a voluntary basis to a class, subclass and industry group will remain so assigned; and
  - (e) the industry group code for any industry group from which all industries have been withdrawn as a result of this resolution is rescinded;

- 
4. the W.C.B. Administration is directed to classify employers who were previously not covered by Part One of the *Act*, or covered through voluntary application, in accordance with the classification structure in the 1993 *Classification and Rate List* as amended by this resolution;
  5. the 1994 assessment rates set out in SCHEDULES "A," "B," and "C" are approved;
  6. with respect to new subclasses created by this resolution:
    - (a) no surplus or deficit shall be transferred from an existing subclass to any subclass created by this resolution, and, if, as a result of this resolution, there are no employers remaining in an existing subclass, any surplus or deficit for that subclass will be spread over the remaining subclasses in the Class, and
    - (b) the limitation in assessment rate change utilized in determining the maximum assessment rate increases or decreases for other subclasses will not apply to subclasses created by this resolution until the determination of their assessment rates for 1999;
  7. both employers who were not previously covered by Part One of the *Act* and employers who were previously covered through voluntary application will begin qualifying for the E.R.A. plan effective January 1, 1994;
  8. the 1993 *Classification and Rate List*, a copy of which shall be initialled on its cover by the chairman of the governors and retained in the records of the Office of the Governors, shall be republished as the 1994 *Classification and Rate List* to incorporate:
    - (a) the changes to the classification structure made by this resolution,
    - (b) the 1994 assessment rates approved by the governors at their regular meeting on October 4, 1993, and
    - (c) the 1994 assessment rates set out in SCHEDULES "A," "B," and "C" to this resolution,

and the chairman of the governors is authorized to approve, on behalf of the governors, the amendments to the *Classification and Rate List* required as a result of this resolution; and

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9. the W.C.B. Administration is directed to present to the governors for approval a draft 1995 *Classification and Rate List* at the same time the Administration presents the 1995 assessment rates for approval.

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## Schedule "A" New Classes 31 and 33

### New Class 31

#### Subclass 3101

(Subclass Assessment Rate — \$.25)

Industry Group Code	Description of Industry Group
310101	Doctors' Offices; Dentists' Offices; Offices or Establishments for the practice of any of the Healing Arts or Sciences, N.E.S.; Audiometric Testing Services; Chiropractic Services; Medical Clinics; Hypnotism Services; Acupuncture Services; Massage Services; Optometry Services; Physiotherapy Services; Psychology Services; Laser Therapy Treatment Clinics
310102	Dental Laboratories; Medical Laboratories; X-ray Laboratories

### New Class 33

#### Subclass 3301

(Subclass Assessment Rate — \$.25)

Industry Group Code	Description of Industry Group
330101	Accountants' Offices; Bookkeeping Services; Income Tax Services
330102	Law Offices; Notary Public Services

#### Subclass 3302

(Subclass Assessment Rate — \$.25)

Industry Group Code	Description of Industry Group
330201	Addressing Services; Mailing Services
330202	Advertising Agencies (no printing); Public Relations Services; Modeling Agencies; Talent Agencies; Booking Agencies

330203	Bailiffs' Operations; Collection Agencies
330204	Travel Agencies; Bed and Breakfast Registries
330205	Consulates; Foreign Embassies
330206	Administration of an Operation Conducted Outside the Province
330207	Telephone Answering Services; Package Office Services
330208	Dating Services; Escort Services
330209	Employment Agencies; Aptitude Testing Services
330210	Weather Stations

**Subclass 3303**  
**(Subclass Assessment Rate — \$.25)**

Industry Group Code	Description of Industry Group
330301	Better Business Bureaus; Chambers of Commerce; Resource Centres (excluding counseling)
330302	Business Consulting Services; Marketing Research; Translating/ Interpreting Services
330303	Computer Programming Services; Computer Bulletin Board Services; Data Processing Services
330304	Labour Relations Services; Arbitration Services

**Subclass 3304**  
**(Subclass Assessment Rate — \$.25)**

Industry Group Code	Description of Industry Group
330401	Financial and Lending Institutions; Cheque Cashing Services; Mortgage Brokers
330402	Insurance Carriers, Agencies and Adjusters' Services; Actuarial Services; Bonding Services

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330403 Investment Services

330404 Real Estate Agencies; Appraising Services

**Subclass 3305**  
**(Subclass Assessment Rate — \$1.00)**

Industry Group Code	Description of Industry Group
330500	In-home Child Caregivers

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## Schedule “B” — New Subclasses or Industry Groups in Existing Class 6

1. The following new industry groups are created in subclass 0627 (Subclass Assessment Rate — \$1.08):

Industry Group Code	Description of Industry Group
062715	Sports instruction activities, including Ski Schools (not allied with a retail shop or ski lodge), Hockey Schools, Sailing Schools, and Golf or Tennis Schools
062716	Administration of sports teams

2. The following new industry groups are created in subclass 0646 (Subclass Assessment Rate — \$.37):

Industry Group Code	Description of Industry Group
064602	Bands and orchestras
064603	Entertainment Productions Other than Television or Motion Picture, N.E.S.

3. The following new industry group is created in subclass 0656 (Subclass Assessment Rate — \$.17):

Industry Group Code	Description of Industry Group
065601	Employer Associations

4. The following new subclass and industry group are created:

**Subclass 670**  
**(Subclass Assessment Rate — \$.25)**

Industry Group Code	Description of Industry Group
067000	Churches; Religious Organizations

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**Schedule “C” — Changes to Existing Industry Groups  
in Existing Classes and Subclasses**

1. “Monitoring of Alarm Systems” is withdrawn from industry group 062113, class 6, subclass 0621 and transferred to industry group 062211, class 6, subclass 0622. (Subclass Assessment Rate — \$1.98)
2. “Customs Brokers” are withdrawn from industry group 062113 in class 6, subclass 0621, and transferred to industry group 090900 in class 9, subclass 0909. (Subclass Assessment Rate — \$.41)
3. “Acting Schools” are added to industry group 140604 in class 14, subclass 1406. (Subclass Assessment Rate — \$.55)

## Decision of the Governors

**Number:** 60  
**Date:** February 7, 1994  
**Subject:** Exemption from Coverage Under Part One of the *Workers Compensation Act*

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### WHEREAS:

- A. the *Workers Compensation Amendment Act, 1993* amended the *Workers Compensation Act* (the "Act") effective January 1, 1994 so that, under Section 2(1) of the Act, Part One applies to "all employers, as employers, and all workers in British Columbia, except employers or workers exempted by order of the board"; and
- B. the governors must determine how the exemption authority of the Workers' Compensation Board is to be exercised under Section 2(1) of the Act:

### NOW THEREFORE THE GOVERNORS RESOLVE THAT:

1. The governors will, as a matter of policy, decide whether general exemption orders will be made under Section 2(1) of the Act. In making their decisions, the governors will have regard, among other considerations, to the following principles:
  - (a) Section 2(1) creates a scheme of *universal* coverage, with exemptions being granted for *exceptional* industries or occupations whose circumstances do not fit the purpose and intent of the Act.
  - (b) Exemption orders will only be made in respect of industrial or occupational groups. Exemption orders will not be granted to individual persons or businesses unless the person or business constitutes the entire industrial or occupational group.
  - (c) Although the following principles underlie the purpose and intent of the Act, an industry or occupation will not be automatically exempted because one or more of the principles do not necessarily apply:
    - (i) prevention of injuries and occupational diseases,

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- (ii) compensation is paid for earnings losses resulting from injuries and diseases up to a maximum wage rate, medical expenses are reimbursed and rehabilitation provided,
  - (iii) coverage is limited to employment relationships and activities,
  - (iv) compensation is no fault and in lieu of the right to sue,
  - (v) compensation is a cost of production for the products and services marketed by the employer, not a charge on the taxpayer, and
  - (vi) collective liability of classes of employers for compensation and other costs of the system.
- (d) The following circumstances will not by themselves be sufficient to result in a general exemption order being made:
- (i) wishes of employers and workers,
  - (ii) size of the employer's operations,
  - (iii) coverage through private disability plans, or
  - (iv) degree of risk of injury.
- (e) Since the W.C.B. is a tribunal charged with administering a statute, principles of good public administration should be applied.
2. The W.C.B. vice-president, Finance/Information Services, or W.C.B. officers designated in writing by the vice-president, Finance/Information Services, may, on request, grant or terminate voluntary coverage for an individual person or business by varying the governors' general exemption order. This will, however, be limited to situations where making the variance would be consistent with the reasons for which the exemption order has been made.
  3. Pursuant to Section 2(1) of the *Act*, the governors make the following general exemption set out in SCHEDULE "A" to this resolution.
  4. The president will present to the governors manual amendment proposals to bring the governors' policy manuals into conformity with the extension of mandatory coverage provisions of the *Act* that came into force on January 1, 1994 and this resolution.
  5. This resolution is a policy decision of the governors of the Workers' Compensation Board.

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## Schedule “A”

The governors of the Workers’ Compensation Board of British Columbia make the following exemption orders, pursuant to Section 2(1) of the *Workers Compensation Act*:

1. A person employed by the owner or occupier in or around a private residence, otherwise than for the purpose of the owner’s or occupier’s trade or business, or employed in serving the personal needs of the owner or occupier or their family is exempt where:
  - (a) the person is regularly employed for a definite or indefinite period on a weekly, monthly or similar basis for an average of less than
    - (i) eight working hours per week, or
    - (ii) fifteen working hours per week and the person is employed caring for children in the period immediately preceding and following school; or
  - (b) the person is employed to do a specific job or jobs involving a temporary period of less than 24 working hours.

The reasons for making this exemption order are set out in Appendix A to this Schedule.

2. Both spouses involved in unincorporated businesses are exempt where one or both own the business. “Spouse” includes common law and same sex spouses. The reasons for making this exemption order are set out in Appendix B to this Schedule.
3. Non-resident employers and workers temporarily working in British Columbia, who would have been excluded by Policy 20:30:40 of the *Assessment Policy Manual* prior to January 1, 1994, are exempt, provided they are covered in another jurisdiction that provides compensation for occupational injuries and diseases. The reasons for making this exemption order are set out in Appendix C to this Schedule.
4. Professional sports competitors are exempt. Coaches, office, management or other support staff do not fall within the terms of this exemption. The reasons for making this exemption order are set out in Appendix D to this resolution.

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## Appendix A — Domestic Workers

Domestic workers were not covered prior to January 1, 1994, because their industry was not listed in Section 2 and Schedule A of the *Act*.

Where an industry was covered prior to *Bill 63*, the *Act* only applied to “employers and workers” in the industry. The provisions of the *Act* and the policies of the governors that define who they are and determine their rights and obligations remain essentially the same. However, the removal of the omissions from coverage by *Bill 63* raises particular issues concerning persons employed by householders.

The nature of these issues is discussed in Section 50.10 of Larson’s *Law of Workmen’s Compensation* as follows:

It has always been assumed, rightly or wrongly, that the cost of compensation protection did not become a burden upon the employer directly, since he was expected to pass the cost along to the consumer in the price of the product. . . .

When a similar liability is imposed upon the householder, however, who produces and sells no goods or services that can bear the cost of compensation insurance, the law has gone one step further and said that any employer, solely because he stands in the employment relation to an employee, is liable without fault for the latter’s injuries and must assume and absorb the entire and ultimate cost himself. . . .

. . . simply to impose workmen’s compensation liability on householders . . . would mean, first, that the employer would bear all the cost of protection . . . and, second, that he could never be quite sure in advance whether he needed compensation insurance and what his potential future liability might be. No closer questions can be found in the entire shadowy realm of employee status than the very questions that would face the householder many times every year: the status of directly hired window washers, repairmen, snow shovellers, grass mowers, baby sitters, and all the army of artisans whose visits are a normal and frequent incident in the life of a house owner. . . .

This is not to say that some such protection should not be worked out. The point here is merely that the job cannot properly be done by a simple sweeping extension of existing

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compensation laws to this class of employers and employees. The effect, both on the administration of the act . . . and on the peace of mind of the average once-in-a-while employer would be chaotic. But if special machinery for insurance and administration could be devised and particularly if some means could be found of achieving . . . predictability of liability, the desired extension of coverage might be successfully accomplished.

If no exemption were granted, the status of each person employed to do a job in a home would be a matter of individual determination. The Board might create policies and practices to assist the process but it would be possible for each decision to be challenged on the basis that there was or was not an employment relationship. The policies and practices created would tend towards coverage for virtually every person employed in a home at a money wage, regardless of the nature of the work, the person employed and the length of the job. This would in turn raise questions as the ability of the Board to uniformly enforce compensation and prevention coverage, the administrative cost of doing so and extent of the resulting intrusion of the Board's mechanisms into private homes.

The exemption process is a means of providing predictability and avoiding disputes. It establishes a definite rule as to who is not covered under the *Act*. This allows the Board to define who it requires to register. A person may still argue that he or she need not register because there is no employment relationship. However, an exemption should reduce this potential by covering the situations where a dispute is most likely. The line drawn by the exemption should make the Board's administration simpler, more effective and less intrusive.

The exemption for domestic workers is based on two main factors, namely number of hours worked, and regularity of work. It assumes that the longer the hours worked and the more regular the hours, the more likely an employment relationship will exist, and vice versa. It exempts regularly employed persons working less than eight hours a week and other persons doing a job lasting less than 24 hours. This assumes that a lesser number of hours worked regularly may suffice to establish an employment relationship than would be required for one isolated period of employment.

For regularly employed persons looking after children before and after school, 15 hours is substituted for eight hours. This is to deal with what is probably the most common situation in which householders employ persons. The concern here is with the ability of the Board to administer coverage and limiting the extent of the Board's intrusion into the home.

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## Appendix B — Businesses Operated by Spouses

Prior to *Bill 63*, the proprietors or partners of unincorporated businesses were not covered unless they requested personal optional protection under Section 3(3) of the *Act*. This is because they were independent operators rather than workers. The same situation exists under *Bill 63* but Section 2(2) has replaced Section 3(3).

*Bill 63* does, however, make a significant difference to unincorporated family businesses. Spouses and children under 19 of the proprietor will now be covered if they are employees. Prior to January 1, 1994, Section 2(2)(d) of the *Act* excluded them. This means that many businesses may now have to register with the Board that did not previously have to.

Spouses operating businesses raise similar difficulties to those discussed in Appendix A with regard to domestic workers. The family connection may make it difficult to tell whether any contract exists at all and, if there is a contract, whether it is akin to a partnership or one of employment. There may therefore be a lack of predictability as to whether a business is required to register or whether the earnings of a spouse or child should be included in payroll.

Spouses in these businesses have been exempted but not children. It will in most cases be reasonable to assume that spouses have an equal role in managing a business. The same may not be reasonable where children are involved. Children are more likely to be employed as workers without having a say in the management. They are less likely to have a free choice as to their situation. Adoption of the exemption will not prevent an individual employer from showing that a child is in fact an independent operator rather than a worker.

Spouses who are exempt will be able to request voluntary coverage. It may be unclear in some situations whether a request is made by a spouse who is an independent operator or a spouse who is a worker. The former will be a request for personal optional protection under Section 2(2) and the latter a request to be excluded from the general exemption order. It is important to distinguish the two situations because the coverage is different. The applicant specifies the earnings to be covered under Section 2(2). The applicant for exclusion from an exemption order has no choice. Their actual earnings must be used.

As a matter of practice, the general assumption in considering requests for voluntary coverage will be that one spouse is an independent operator and the other an exempt employee. This assumption reflects Assessment Department experience. It has been found that there will usually be one spouse playing a dominant role in a business and that it will normally be apparent who this is. If a situation occurs where the two spouses are clearly equal partners, both will be able to apply under Section 2(2).

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## Appendix C — Non-Residents

Some non-resident workers and employers are excluded from coverage under the *Act* as a matter of constitutional law, for example, non-resident air line flight crews who work in the province for short periods (See Policy No. 20:20:31 of the *Assessment Policy Manual*.) This position is not changed by *Bill 63*.

Prior to January 1, 1994, Section 2(2)(e) of the *Act* also specifically excluded “employers with no place of business in the Province who temporarily carry on business in the Province but do not employ a worker resident in the Province.” Existing Policy No. 20:30:40 determines when non-resident workers and employers who temporarily enter the province fall within the scope of this provision.

Though Section 2(2)(e) has been repealed, *Bill 63* limits coverage to workers and employers “in British Columbia.” This raises issues as to when coverage should commence for non-resident employers and workers entering the province. The same concerns arise as to predictability and the Board’s ability to effectively administer compensation and safety and health coverage as are discussed in Appendix A in regard to domestic workers.

Employers now covered by Policy No. 20:30:40 be exempted under *Bill 63*. The policy reflects the Board’s experience as to what is a practicable and reasonable solution to the question where to draw the line between coverage and non-coverage. The industries affected are aware of and accustomed to these policies. The employers in question will usually have compensation coverage for their employees in another jurisdiction. To cover the few situations where they do not have coverage, it is proposed that the existing policy be modified to specifically require this.

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## Appendix D — Professional Sports Competitors

Professional sports competitors are often independent contractors. Independent contractors are only covered if they have personal optional protection under Section 2(2) of the *Act* (formerly Section 3(3)). The practice is to refuse coverage for these persons.

Where a sports competitor is a worker, Section 2(2)(b) of the *Act*, as it was before January 1, 1994, excluded “players, performers and similar artists” from coverage. This exclusion is removed by *Bill 63*.

### Reasons for Proposed Exemption

There will be an exemption for professional sports competitors. The reasons are discussed below. They involve an analysis of the circumstances of sports competitors in light of the purpose and intent of the *Act* and the principles discussed in paragraph 1 of the resolution.

#### *Prevention of injuries and diseases.*

The aim of most industries the Board regulates is to produce a product or service. There may be normal ways of carrying out the production, but there is no intrinsic requirement for a particular method. This allows scope for regulation. The Board can prescribe requirements for the method used without affecting the aim of the business.

The situation differs in sports. There is no discretion as to the method. Sports are governed by rules prescribing how they are played. The rules often involve violence or other risks as an essential part of the sport’s normal conduct. The risk is part of the product marketed to the public. Outside the sport, the actions in question might be inappropriate or unlawful. To regulate a sport, it would be necessary to eliminate or minimize the risks by changing the rules. This would change the method of play and therefore the game itself.

Some presently covered occupations inherently involve risks, e.g. police, firefighters. However, the object is always to minimize the risk. High-risk activities, such as using force to arrest an offender, are a last resort. They are not an essential feature that occurs whenever work is done. The Board could regulate the manner in which these activities are done without changing the aim.

There are industries now covered for compensation purposes that the Board does not regulate for safety and health purposes, e.g. mines, but there is normally some other governing body which regulates them.

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*Compensation is paid for earnings losses resulting from injuries and diseases up to the maximum wage rate, medical expenses are reimbursed and rehabilitation is provided.*

The maximum wage rate will result in highly paid sports competitors being significantly under-compensated for injuries. These workers will likely prefer to rely on their right to sue or alternative disability insurance. However, the *Act* now covers high-paid workers, for example, corporate executives. Not all professional sports competitors receive unusually high wages. It may only be a minority that do so.

Many professional sports competitors retire at an early age. There is concern this will result in compensation for losses really due to the normal aging process. However, the problem also exists for other workers now covered. This factor may point to a review of pensions policy rather than granting of an exemption.

*Coverage is limited to employment relationships and activities. Domestic, family or other non-work relationships or activities are excluded.*

Sports competitors may often be independent operators rather than workers.

Sports are primarily done for personal enjoyment outside of work. They are one of many non-work activities the *Act* does not normally cover. There may be a fine line between sports as recreation and sports as a profession. Persons who are essentially amateur may receive prize money for winning competitions. Professionals may only do a sport part time. However, many other activities done in personal life, for example, cooking or house maintenance, are also done by workers in businesses. The same fine line may exist between amateurs and professionals.

The main object of sports may be to win competitions or achieve personal thrill or excellence, not to produce a good or service. There may be an element of competition or personal achievement in other occupations, but the normal object is to make money. However, money is often a significant motivation for sports competitors.

*Compensation is no fault and is in lieu of right to sue.*

Highly paid sports competitors will not only have significant limits on their compensation imposed by the maximum wage but they will lose their right to sue.

*Compensation should be a cost of production for the products and services marketed by the employer, not a charge on the taxpayer.*

There would seem to be no difficulty in applying this principle to sports. Highly paid sports competitors are not likely in any event to become a charge on the tax payer.

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*Collective liability of classes of employers for compensation and other costs of the system.*

There would seem to be no difficulty in applying this principle to sports.

The high wages earned by some sports competitors is a concern under several headings. This by itself is a difficult ground for granting an exemption. The same concern would apply to other occupations that are now covered. The principle that really appears to warrant a different treatment from other occupations is the inability of the Board to regulate sports. This may be supported by the difficulty of distinguishing between amateurs, professionals, independent contractors and workers. As these grounds affect all sports, a general exemption is being made.

A more limited exemption was previously proposed for the sports and entertainment industries “where a high level of risk is an accepted and essential element.” There are difficulties with this proposal. What sort of risk is it referring to? Is it limited to a risk of direct physical injury as in boxing or ice hockey? Sports such as baseball might involve no risk in this sense but pitchers may suffer a high level of risk of repetitive strain injury. Sports may be risky for players in some positions but not in others. The previous proposal could result in distinctions being drawn between sports which appear arbitrary and inconsistent and would promote controversy.

Quebec is the only other Board with compensation and safety and health jurisdiction. It covered professional sports for a time. This coverage was ended for the reasons below:

- High risk of injury.
- Players earn high salaries and do not need or want coverage.
- The teams have alternative disability plans. Claims simply involved an exchange of paper. The teams continued salary and the Board partially reimbursed them.
- The Board could not apply its prevention legislation. There is a separate safety organization for sport.

## **Entertainment Industry**

Sports may be seen as a sub-group of the entertainment industry. Some of the reasons for considering an exclusion for sports apply to other entertainment occupations, for example, dancers. An exemption for the non-sports entertainment industry might legitimately be considered. However, the grounds that justify a general exemption for

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sports are not so widespread in the entertainment industries. There would be more ability for the Board to regulate without changing the activity and there is less concern with distinguishing between worker and non-worker relationships.

### **What is “Sports”?**

If the exemption is confined to sports, it becomes necessary to distinguish sports from other entertainment occupations. It appears that sports have three basic elements:

- physical activity;
- the existence of rules governing how the sport is played; and
- competition, whether among teams or individuals.

Since these elements may also exist for non-sports activities, they may not provide an exclusive definition. Generally, the activities that are covered by the term “sports” are well known and are not likely to be disputed.

A guide to the scope of the proposed exemption can be obtained from the description of the occupation “athletes” in the “National Occupational Classification” (1992 Edition):

Athletes compete in competitive sports events on an amateur or professional basis. They play team sports such as hockey, baseball, football and lacrosse, or compete in individual sports such as skiing, figure skating, boxing or track and field. Athletes are employed by professional team organizations or they may be self employed.

#### **Examples of titles classified in this group:**

Athlete	Hockey Player
Baseball Player	Jockey
Boxer	Professional Athlete
Figure Skater	Skier
Football Player	Sprinter
Golfer	Track Athlete
Harness Race Driver	

The persons listed here will all fall within the proposed exemption where they are professional and employees but the list is not an exclusive one.

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## **Non-Competing Employees of Sports Teams**

The exemption will not affect non-competing employees of sports teams, for example, coaches and office staff. They will be compulsorily covered. Some persons may be a professional sports competitor part time and work at other jobs such as coach or office worker for the same employer the rest of the time. The time spent in the other jobs will be covered. However, the proposed exemption is not limited to the actual competitive playing of the sport. It also applies to necessarily incidental activities, for example, training, attending practices, travelling to games and after game assessments.

## **Voluntary Coverage**

Because the major reason for exempting sports competitors is the Board's inability to regulate safety and health, it would seem inappropriate for the Board to grant voluntary coverage by varying the general exemption order.

# REPORTER

## Decision of the Governors

**Number:** 61  
**Date:** February 7, 1994  
**Subject:** Relief of Costs Under Section 47(3) for Employers to Whom Mandatory Coverage Was Extended as a Result of January 1, 1994 Amendments

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### WHEREAS:

- A. as a result of amendments to the *Workers Compensation Act* that came into force on January 1, 1994, mandatory coverage under Part One of the *Act* has been extended to employers and workers to whom it did not previously apply;
- B. Section 47(2) provides that an employer who refuses or neglects to make or transmit a payroll return or other statement required to be furnished by the employer, or who refuses or neglects to pay an assessment shall, in addition to any penalty or other liability to which the employer may be subject, pay to the W.C.B. the full amount or capitalized value of the compensation payable in respect of any injury or occupational disease to a worker in its employ which happens during the period of default;
- C. Section 47(3) provides that the W.C.B., if satisfied that the default was excusable, may relieve the employer in whole or in part from a penalty or liability under Section 47(2); and
- D. some employers to whom mandatory coverage has been newly extended on January 1, 1994 may not be aware of the requirement to register with the W.C.B. and pay assessments as of that date:

### NOW THEREFORE THE GOVERNORS RESOLVE THAT:

- 1. in exercising its authority under Section 47(3) of the *Workers Compensation Act*, the W.C.B. shall, in regard to an employer to whom mandatory coverage was newly extended on January 1, 1994, relieve the employer in whole from liability under Section 47(2) unless the W.C.B. is satisfied that the employer deliberately failed to register,

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2. this basis for granting relief under Section 47(3) shall apply from January 1, 1994 to June 30, 1994 inclusive, and
  3. this resolution is a policy decision of the governors' of the Workers' Compensation Board.

## Decision of the Governors

**Number:** 62  
**Date:** February 7, 1994  
**Subject:** Cost Allocation of Section 19 Repeals

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### WHEREAS:

- A. the *Workers Compensation Amendment Act, 1993*:
  1. repealed Section 19(1) and (2) of the *Workers Compensation Act*, thereby removing the provision for termination, upon remarriage or formation of a common-law relationship, of spousal dependant benefits being paid in respect of a death on or after July 1, 1974,
  2. reinstated spousal dependant benefits that had been terminated under Section 19(1) for remarrying or forming a common-law relationship on or after April 17, 1985, and
  3. provided for the payment of retroactive benefits, plus interest;
- B. the costs of implementing these changes consist of retroactive payments, plus interest, re-creating reserves for terminated pensions and increasing reserves for existing pensions to reflect removal of the remarriage factor;
- C. these costs must be allocated to employer subclasses and a method selected for doing so;
- D. the president and Senior Executive Committee have presented a recommendation, supported by the W.C.B. Actuary and the External Consulting Actuary, as to how this should be done:

### NOW THEREFORE THE GOVERNORS RESOLVE THAT:

1. they approve the recommendation of the president and Senior Executive Committee that the "pooling method" described in the attached Executive Committee Submission dated January 18, 1994, be used to allocate the costs of repealing Section 19(1) and (2) of the *Act* to employer subclasses, and

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2. they direct that, if Section 19(4) is repealed in the future, the same method be used to allocate the costs of the repeal to employer subclasses.

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**Executive Committee Submission**  
**January 18, 1994**  
**Section 19 — Allocation of Costs**

**Sponsor: Sid Fattedad**

**Reason for Submission**

Discussion and recommendation of the most appropriate methodology to allocate the costs arising from the repeal of subsections of Section 19 of the *Act*, to employers by subclass.

**Background/History**

The repeal of Section 19(1), (2) (and potentially (4)) in *Bill 63*, will result in a one-time charge of approximately \$115 million, for both the retroactive and the prospective costs of reinstating spouses' pensions. These one-time costs must be allocated to subclasses.

Three options for the allocation of such costs have been identified and these are:

Option 1 — Allocation to all subclasses based on assessments

Section 39(1)(d) of the *Act* provides a reserve to be used to meet unexpected disaster costs or other circumstances which the Board considers would unfairly burden employers in a subclass. This method effectively charges all subclasses based on their proportion of assessments.

Option 2 — Direct allocation to subclasses in which the pensions arose

This option might appear to be a rational approach, however, spousal pensions involved in the repeal of Section 19, have already been previously charged to the subclasses giving rise to them. When these spousal pensions were subsequently cancelled under Section 19 conditions (remarriage etc.), the resultant reduction of the pension reserves were credited to all subclasses using the pooling method. The pooling method allocates costs or credits on the basis of ten-year averages of capitalized values of pension awards in each subclass.

Option 3 — Pooling method

This method allocates the costs to subclasses based on ten-year averages of capitalized values of pension awards by subclass. It has the effect of most closely restating the subclass charges to what they would have been, had Section 19 not existed.

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## **Explanation of the “Pooling” Method**

At the end of each year, the actuaries determine a “net cost” adjustment in each subclass. This net cost adjustment takes into account the actuarial liability of the subclass at the beginning of the year, plus interest income and capitalized values of pensions awarded in the year, less payments made during the year and less the actuarial liability at year end. This net cost adjustment is then allocated to subclasses on the basis of the ten-year average of the capitalized values of pension awards charged to each subclass.

The reinstatement of spousal pensions will result in two types of benefit costs/liability increases: (1) reinstatement of previously terminated spousal pensions and (2) increase in existing pensions using new present value factors. The previous present value factors were based on the assumption that a certain percentage (experience based) of surviving spouses either remarry or enter into a common-law relationship. The new tables will not reflect this previous discount.

Pension awards are established on an individual basis in the Pension Management System upon entitlement. Once established, this award amount basically remains constant and consists of retroactive payments including interest, plus the estimated liability for future monthly payments as of the award date.

At each year-end, the actuaries determine the survivor benefit liabilities based on the active pensions (i.e. where payments are being made) and on the suspended pensions (i.e. for temporary suspensions for incarceration, under investigation, advances given, address unknown, etc.). Inactive pensions are excluded from the benefit liability calculation. Inactive pensions include those terminated for death, cancellation (entitlement revoked), cash awards, and (previously) spousal remarriages/common-law relationships.

Although a calculation will be made for each reinstated spousal pension to reflect the changes resulting from repeal of Section 19, these adjustments will not be reflected on the Employer Claims Cost Statement. Our practice in past years has been to allocate any adjustments such as gains arising from decease of pensioner or survivor, remarriage etc., back to subclasses on a pooled basis.

## **No Policy/Legislative Implications**

### **Recommendation**

It is our opinion that Option 3 is the most appropriate method to allocate the costs of repeal of Section 19 to subclasses. This recommendation is supported by Actuary,

Mr. Keith Younie as well as the Board’s Consulting Actuary, Mr. Jack Levi.

**TO: Sid Fattedad, Vice-President, Financial Division**

**FROM: Stan Warawa, Actuarial Department**

**DATE: December 20, 1993**

**SUBJECT: Update of *Bill 63* Amendment of Section 19 Cost Estimate and Allocation of Costs**

The following table shows the Actuarial Department's latest estimate of the cost of the *Bill 63* amendment of Section 19, estimated as of December 20, 1993.

I should emphasize that these costs are still estimates and are subject to change in the future, since the final costs for reinstated pensions have not yet been completely calculated by Disability Awards. Furthermore the split of the costs for the non-terminated pensions between those widowed before and after July 1, 1974 has been approximated based on the claim number (year of injury) and not on exact data. This approximation may tend to slightly overstate the costs for non-terminated pensions allocated to those widowed before July 1, 1974, since some of the workers may have died some time subsequent to their injury.

**1993 Cost in 000's (estimated at December 20, 1993)**

Surviving Spouse Category	Reinstated Pensions (previously terminated for remarriage; based on 266 reinstatements)		Non-terminated Pensions (elimination of remarriage contingency)	Total
	Retroactive Payments (incl. interest)	Future Reserve	Future Reserve	
Widowed before July 1, 1974	1,621.1	10,610.0	2,453.2	14,684.3
Widowed after July 1, 1974	6,725.6	58,516.6	31,657.0	96,899.2
Total	8,346.7	69,126.6	34,110.2	111,583.5

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The preceding 1993 costs do not make allowance for the change in the valuation discount rate from  $2\frac{3}{8}\%$  to 3% nor for the provision for mortality improvement over the assumptions used during 1993, since both of these changes are effective January 1, 1994. The change in the discount rate would reduce the above \$112 million by about \$7 million while the change in mortality basis would add about \$2 million.

The above \$112 million estimate is about \$6 million less than the comparable \$118 million estimate made on September 30, 1993 primarily due to the replacement of some of the estimated pensioner data with actual data as determined by Disability Awards.

The attached pages show the allocation of the above cost estimate by subclass using the allocation procedure (the "pooled model") which was recommended.

**Bill 63 — Repeal of Section 19**

<b>Subclass</b>	<b>Proportion of <i>Bill 63</i> Costs Allocated to Subclass</b>	<b>Estimated Allocated Costs Re Spouses Widowed Prior to July 1, 1974 (000's)</b>	<b>Estimated Allocated Costs Re Spouses Widowed After July 1, 1974 (000's)</b>	<b>Estimated Total Allocated Costs (000's)</b>
102	19.427%	2,852.7	18,824.4	21,677.0
104	2.227%	327.0	2,158.1	2,485.2
105	3.578%	525.4	3,467.1	3,992.6
107	0.587%	86.2	568.8	655.0
109	0.582%	85.5	564.0	649.5
403	0.488%	71.7	473.0	544.6
411	7.488%	1,099.6	7,255.9	8,355.4
418	1.366%	200.7	1,324.1	1,524.7
430	1.653%	242.7	1,601.8	1,844.6
602	0.939%	137.8	909.5	1,047.3
603	0.368%	54.0	356.6	410.7
604	0.555%	81.5	537.8	619.2
605	0.000%	0.0	0.0	0.0
608	0.205%	30.1	198.7	228.9
617	0.001%	0.2	1.2	1.4
618	0.226%	33.2	219.3	252.6
620	0.088%	12.9	85.4	98.3
621	0.982%	144.2	951.3	1,095.5
622	1.021%	150.0	989.7	1,139.7
624	0.000%	0.0	0.0	0.0
625	0.000%	0.0	0.0	0.0
626	0.403%	59.2	390.7	449.9
627	0.365%	53.6	353.8	407.4
631	0.000%	0.0	0.0	0.0

<b>Subclass</b>	<b>Proportion of <i>Bill 63</i> Costs Allocated to Subclass</b>	<b>Estimated Allocated Costs Re Spouses Widowed Prior to July 1, 1974 (000's)</b>	<b>Estimated Allocated Costs Re Spouses Widowed After July 1, 1974 (000's)</b>	<b>Estimated Total Allocated Costs (000's)</b>
632	0.295%	43.4	286.1	329.5
636	0.396%	58.2	384.1	442.3
637	0.000%	0.0	0.0	0.0
639	0.181%	26.6	175.6	202.2
643	1.801%	264.4	1,744.9	2,009.3
646	0.000%	0.0	0.0	0.0
654	1.571%	230.7	1,522.2	1,752.9
656	0.199%	29.3	193.1	222.4
657	0.801%	117.7	776.6	894.3
658	0.042%	6.1	40.2	46.3
659	1.479%	217.1	1,432.8	1,649.9
705	0.980%	143.9	949.6	1,093.5
706	6.673%	979.9	6,466.4	7,446.3
707	4.917%	722.0	4,764.5	5,486.5
711	1.123%	164.9	1,087.9	1,252.8
713	0.041%	6.0	39.5	45.5
721	1.122%	164.7	1,086.8	1,251.5
725	1.697%	249.1	1,643.9	1,893.1
726	4.297%	631.1	4,164.2	4,795.3
747	0.405%	59.5	392.5	452.0
748	1.381%	202.8	1,338.5	1,541.3
801	0.811%	119.1	785.8	904.9
808	0.000%	0.0	0.0	0.0
811	0.080%	11.7	77.3	89.1
812	0.271%	39.7	262.2	302.0
820	1.824%	267.8	1,767.0	2,034.7

<b>Subclass</b>	<b>Proportion of <i>Bill 63</i> Costs Allocated to Subclass</b>	<b>Estimated Allocated Costs Re Spouses Widowed Prior to July 1, 1974 (000's)</b>	<b>Estimated Allocated Costs Re Spouses Widowed After July 1, 1974 (000's)</b>	<b>Estimated Total Allocated Costs (000's)</b>
823	1.950%	286.3	1,889.6	2,175.9
851	5.686%	834.9	5,509.6	6,344.6
901	0.999%	146.7	968.3	1,115.1
902	0.889%	130.5	861.1	991.6
906	0.057%	8.4	55.6	64.0
909	0.000%	0.0	0.0	0.0
911	4.508%	662.0	4,368.3	5,030.3
1001	0.111%	16.3	107.7	124.0
1002	0.000%	0.0	0.0	0.0
1006	0.847%	124.4	820.8	945.2
1009	0.000%	0.0	0.0	0.0
1012	0.167%	24.6	162.0	186.6
1013	0.000%	0.0	0.0	0.0
1014	0.000%	0.0	0.0	0.0
1200	0.395%	58.0	383.0	441.1
1201	0.000%	0.0	0.0	0.0
1202	0.000%	0.0	0.0	0.0
1301	0.010%	1.5	10.0	11.5
1302	1.758%	258.2	1,703.5	1,961.7
1304	0.000%	0.0	0.0	0.0
1305	0.000%	0.0	0.0	0.0
1310	0.501%	73.6	485.4	559.0
1312	0.000%	0.0	0.0	0.0
1313	0.000%	0.0	0.0	0.0
1315	0.000%	0.0	0.0	0.0
1316	0.000%	0.0	0.0	0.0

<b>Subclass</b>	<b>Proportion of <i>Bill 63</i> Costs Allocated to Subclass</b>	<b>Estimated Allocated Costs Re Spouses Widowed Prior to July 1, 1974 (000's)</b>	<b>Estimated Allocated Costs Re Spouses Widowed After July 1, 1974 (000's)</b>	<b>Estimated Total Allocated Costs (000's)</b>
1317	0.099%	14.6	96.1	110.6
1318	0.000%	0.0	0.0	0.0
1319	0.000%	0.0	0.0	0.0
1320	0.056%	8.2	54.4	62.6
1321	0.000%	0.0	0.0	0.0
1322	0.000%	0.0	0.0	0.0
1324	0.000%	0.0	0.0	0.0
1325	0.053%	7.8	51.5	59.3
1401	1.605%	235.6	1,555.0	1,790.6
1406	0.154%	22.7	149.6	172.3
1800	0.000%	0.0	0.0	0.0
3800	0.000%	0.0	0.0	0.0
3801	0.000%	0.0	0.0	0.0
3802	0.000%	0.0	0.0	0.0
9802	4.962%	728.6	4,808.0	5,536.6
9803	0.254%	37.4	246.6	284.0
<b>TOTAL</b>	<b>100.000%</b>	<b>14,684.3</b>	<b>96,899.2</b>	<b>111,583.5</b>

## Decision of the Appeal Division

**Number:** 93-1382  
**Date:** October 7, 1993  
**Panel:** Thomas Kemsley  
**Subject:** Interest on Assessment Refund

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This is an appeal by an employer from the decision of the director of Assessments dated June 3, 1993. The director of Assessments found that the employer was not entitled to interest on assessments that were refunded to him.

The employer registered with the Board in 1980 as a miner/pro prospector. He listed the major pieces of equipment he supplied as "front-end loader, compressor, ventilating equipment, mining equipment." Because he listed ventilating equipment, the silicosis classification was assigned to his account. In July 1987, an assessment officer audited his account and determined that the silicosis category no longer applied. It was cancelled at that time. In 1993, the employer wrote to the Assessment Department and said he never should have been registered in the silicosis category. In the decision of June 3, 1993, the director of Assessments accepted that submission, cancelled the silicosis classification from the beginning, and refunded all assessments paid by the employer in that classification.

The director said the employer was not entitled to interest on the refund as there was no "blatant Board error" or an appeal to the Board. He noted that the addition of the silicosis classification seemed reasonable given the information provided in 1980 and that the employer had not questioned that classification. He also noted that the employer did not provide a description of his operations as requested on his Employer Payroll and Contract Labour Reports for the years 1980 through 1986. Therefore, the Board had no information from him to review the classification on an annual basis.

The employer's submissions raised several points. First, he said the director's decision is contrary to the published policy of the governors, as there was a blatant Board error. Secondly, he said there was an error of law as the Board fettered its discretion by not considering the special circumstances of his case. Thirdly, he said an employer who is receiving a retroactive overpayment should be treated the same as a worker who is receiving retroactive benefits. Finally, he said Assessment Policy 40:70:40 is contrary to Section 96(7) of the *Act*.

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In Decision No. 93-1164 (*Workers' Compensation Reporter*, Vol. 10(1), p. 31) dated August 18, 1993, the Appeal Division considered the issue of the payment of interest on the refund of assessments after a successful appeal. That panel decided that the part of Assessment Policy 40:70:40, which makes the payment of interest contingent on a "blatant Board error," is inconsistent with Section 96(7) of the *Act* and is, therefore, unlawful. That panel said that on a successful appeal, the employer is entitled to interest on the amount returned whether or not the appeal involved a "blatant Board error."

That decision is not directly applicable here as this is not an appeal of an assessment. The Assessment Department agreed to refund the full assessment under the silicosis classification. Thus, the provision in Section 96(7) of the *Act* which states that "if the appeal is successful, the amount to be returned to the employer shall be accompanied by interest" does not apply. The employer's claim for interest here does not arise under Section 96(7) of the *Act*. Therefore, the test of "blatant Board error" can be applied in this case.

### **Contrary to Published Policy of Governors**

The employer argued that the Board erred in incorrectly classifying him in the silicosis classification. He said he submitted all of the relevant information, but the Board made no inquiry or investigation. He said he did not question the classification prior to 1987 as it was not reasonable for him to be familiar with the Board's classification policy.

I am unable to find a blatant Board error here. It is not possible for the Assessment Department to investigate every application for registration. The Assessment Department must rely on information supplied by employers. In this case, the employer submitted information in 1980 which indicated he was involved in mining and had ventilation equipment. On that basis, the Board applied the silicosis classification. It was reasonable to do that on those facts. It was not reasonable to expect the Board to investigate further, especially when the employer submitted no different facts in subsequent years. Thus, I can find no blatant Board error in 1980 in applying the silicosis classification.

Further, I can find no blatant Board error in 1987. While the classification was cancelled at that point, it was on the basis of an evolutionary change in the firm's operations. There is no evidence that the Board was presented with facts at that time which should have led it to investigate further or conclude that there had been an error in 1980. If such an error had been apparent in 1987, but the Board had done nothing about it, it would have amounted to a blatant Board error and the employer would be entitled to interest from 1987. However, the material on file in 1987 indicated an evolutionary change in the business and not an original error. Only in 1993 was the Assessment Department presented with all of the facts.

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Therefore, I find there was no blatant Board error in this case. Further, I find there was no contravention of the published policy of the governors.

### **Error of Law**

I find the Assessment Department did not fetter its discretion. On the material on file, it applied its general policies and practice. There were no special facts presented to it from 1980 to 1987 that suggested there was any error. The fact that there was an error is not a special fact that requires the Board to pay interest. The Assessment Department applied the policy regarding interest, having regard to the facts. I find the Assessment Department did not fetter its discretion. Thus, there was no error of law on this point.

### **Equity Between Workers and Employers**

Retroactive payments receive different treatment by the Board. Some, but not all, retroactive payments to workers include interest. Some retroactive assessment refunds may be paid with interest. While there can be a difference between the treatment of retroactive payments in claims cases and retroactive payments in assessment matters, I cannot find this is contrary to the *Act*. The Board is not required to pay interest in many situations. The *Act* distinguishes between compensation matters and assessment matters. The Board follows that distinction in some of its policies regarding interest on retroactive payments. I find that does not constitute an error in the decision under appeal here.

### **Section 96(7) of the Act**

The employer pointed to Section 96(7) of the *Act* which sets out that, on a successful appeal, the amount returned to the employer shall be accompanied by interest. He said Assessment Policy 40:70:40 is in conflict with that section.

As set out above, Section 96(7) is not applicable in this case. This is not an appeal of an assessment decision. The only amount of money in issue here is the interest. There is no amount to be returned to the employer pursuant to this appeal, other than interest. Thus, the provision in Section 96(7) for interest on the amount returned cannot apply here.

Therefore, while there is a conflict between Section 96(7) of the *Act* and Assessment Policy 40:70:40, that conflict is not relevant here as Section 96(7) is not applicable. I find Assessment Policy 40:70:40 is not otherwise inconsistent with the *Act* and is the appropriate policy to apply.

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## **Conclusion**

In conclusion, I find the decision of the director of Assessments was not contrary to the published policy of the governors as there was no blatant Board error. Further, the Assessment Department did not fetter its discretion and commit an error of law. Further, the different treatment of claims cases and assessments cases is not an error. Finally, Section 96(7) of the *Act* has no application here.

THEREFORE, I DENY THE APPEAL.

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

## Decision of the Appeal Division

**Number:** 93-1569  
**Date:** November 9, 1993  
**Panel:** Thomas Kemsley  
**Subject:** O.S.H. Jurisdiction

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This is an application by the employer pursuant to Section 96(2) of the *Workers Compensation Act* to reopen, rehear and redetermine a decision of the former commissioners dated May 13, 1991 on the grounds of error of law. The issue is the Board's constitutional jurisdiction to regulate certain employment activities of the employer.

The commissioners' decision upheld a \$15,000.00 penalty imposed on the employer by the Board. This penalty was imposed after an occupational health and safety officer investigated an accident, which occurred in December 1989, in which an employee died. The employee was a ship loader and was loading lumber for export onto a ship at the private dock of the employer in Kitimat. He died when he fell from the ship onto the dock pilings.

The employer argued that the Board had no jurisdiction to impose the penalty as the ship was a foreign registered vessel and fell under federal jurisdiction. The employer's argument makes a distinction in the Board's operations. It says the Board does have jurisdiction with regard to assessments and compensation, but it does not have jurisdiction to levy and enforce penalties with regard to its ship loading activities. The submission of the employer relied on several court decisions. Those cases establish that a provincial authority does not have the constitutional jurisdiction to regulate federal undertakings. The issue here is whether the employer's ship loading activities were a federal undertaking.

The deceased worker was employed by the employer as a ship loader. The employer also employed other ship loaders, although the major business of the employer was pulp and paper. Its ship loading activities were part of its pulp and paper business, and not a separate business. The employer's ship loading activities were not separated for any purposes from its other pulp and paper activities. The ship loading activities were carried on only in connection with those other activities. There is no evidence that the employer offered ship loading services to other businesses.

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At the time of the accident, the employer's workers, including the ship loaders and the deceased worker, were members of the Canadian Paper Workers' Union — which has now merged to become the Communications, Energy and Pulp and Paper Workers' Union of Canada (C.E.P.). This union is certified under the provincial labour legislation. The ship loaders were not separated from other employees of the employer for the purposes of collective bargaining or labour relations. The employer's operations at Kitimat were registered with the Board in the Pulp and Paper classification. There was no separate classification for the ship loaders.

In considering the Board's jurisdiction, I reviewed the following cases:

*Reference Re Validity of Industrial Relations and Disputes Investigation Act*, [1955] 3 D.L.R. 721 (S.C.C.)

*Societe Canadienne Des Metaux Reynolds Ltee. v. Francoeur* (1983), 9 D.L.R. (4th) 364 (Que. C.A.)

*Bell Canada v. Quebec (Commission de la sante et de la securite du travail)* (1988), 85 N.R. 295, 51 D.L.R. (4th) 161 (S.C.C.)

*C.N.R. Co. v. Courtois*, [1988] 1 S.C.R. 868, 85 N.R. 260, 15 Q.A.C. 181

*Alltrans Express Ltd. v. B.C. (W.C.B.)*, [1988] 3 W.W.R. 285, 51 D.L.R. (4th) 253, 28 B.C.L.R. (2d) 312 (S.C.C.)

These cases establish that federal undertakings are not subject to provincial labour or health and safety regulations. The cases are less clear as to when the activities of a firm will be separated into provincial and federal undertakings.

In the 1955 Supreme Court of Canada decision in *Reference Re Validity of Industrial Relations and Disputes Investigation Act*, the issue concerned a company engaged exclusively in stevedoring and terminal services in ports in Nova Scotia, New Brunswick, Quebec, and Ontario on ships that operated on regular schedules between ports in Canada and ports outside of Canada. The issue was whether certain employees in the Toronto operations were subject to provincial or federal labour legislation. The case established that the federal Parliament had legislative authority to enact labour legislation for people employed in federal undertakings as set out in the *B.N.A. Act*. Pursuant to Section 91(10) of the *B.N.A. Act*, "Navigation and Shipping" is within federal jurisdiction. All nine judges on the Court wrote separate decisions in the case. The majority of the Court found that the type of services described above fell within federal jurisdiction. All the operations of the company were within federal jurisdiction. However, while the individual judgments are less clear on this point, I do not interpret the decision to say that stevedoring services which are merely part of an undertaking that is clearly within provincial jurisdiction are within federal jurisdiction.

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In the case before me the ship loading services were connected to a business which, otherwise, was within provincial not federal jurisdiction. Further, the ship loading activities were necessarily incidental to those operations and had no separate existence. The facts in this case are materially different from those in the above Supreme Court of Canada case.

The Quebec Court of Appeal in *Societe Canadienne Des Metaux Reynolds Ltee. v. Francoeur* separated the activities of a firm into those that fell within provincial and federal jurisdiction. However, that case relied considerably on the above Supreme Court of Canada decision which I interpret to result in no separation in the activities of the employer in the case before me.

The other three Supreme Court of Canada cases were a trilogy that raised the issue of provincial health and safety regulation in federal undertakings. They all dealt with businesses that were federal undertakings. They decided that provincial health and safety regulations are not applicable to federal undertakings. However, those decisions do not lead to the conclusion that the ship loading activities of the employer were a federal undertaking. For example, in the *Alltrans Express Ltd.* case, the business of the trucking company was exclusively interprovincial and international. It regularly engaged in interprovincial trucking. The whole industry was a federal undertaking under the *Constitution Act, 1867*.

The facts in this case are very different. The employer was not engaged in a federal undertaking. In fact, it argues that only its ship loading activities were within federal jurisdiction.

I find that the employer's ship loading activities cannot be characterized as part of "Navigation and Shipping" and, hence, are not within federal jurisdiction. It is not possible to separate the employer's activities in that way. It would involve drawing a totally artificial line through what is, in reality, one undertaking. That undertaking is the business of pulp and paper and falls within provincial jurisdiction. The ship loading activities are a mere facet of that business and are part of the normal and habitual activity of the employer's pulp and paper business in Kitimat.

Since I have found the ship loading activities were necessarily incidental to, and a part of, the employer's pulp and paper business and not a federal undertaking, the principle in the above trilogy is not applicable.

In conclusion, I find no error of law on this point in the decision of the former commissioners dated May 13, 1991. Therefore, the request to reopen and redetermine that decision is denied.

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



## Decision of the Appeal Division

**Number:** 93-1634  
**Date:** November 24, 1993  
**Panel:** Patrick L. Byrne, Thomas Kemsley, Lorna Pawluk  
**Subject:** Employer Reclassification

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The employer appeals the May 17, 1993 decision of the manager of Employer Assessments. In that decision the employer's request for reclassification was denied. The employer appeals under Section 96(6) of the *Workers Compensation Act* (the *Act*) on the grounds of error of fact, error of law and a contravention of a published policy of the governors. The issues are:

1. Whether the Assessment Department properly classified the employer, and
2. Whether the make-up of subclass 0621 contravenes Section 42 of the *Act*.

### Background

The employer is a non-profit service organization licensed under the *Societies Act of B.C.* They were originally founded in 1946 to provide basic medical coverage to individual families and in 1948 offered group medical coverage. Today the employer offers wage indemnity and medical and dental insurance. The employer did not come under the compulsory scope of the 1948 *Act*. They made application and were admitted by the Board as being within the scope of Part 1, under Section 5 of the 1948 *Act*. The employer is not currently operating in a compulsory industry. The *Act* admits such employers under Section 3(1). Those admitted under that section are generally referred to as "application" industries or voluntarily registered employers.

Since their original registration in 1948 the employer has been in subclass 0621. By letter dated March 4, 1993 the employer requested a reconsideration of their classification. They were concerned there had been a 95% increase in their assessment rates since 1989. They felt that other employers in subclass 0621 in "furniture rental or retail stores" were largely responsible for the increase. They said:

The original classification was done in 1948 and although there may have been some rationale for subclass 0621 at that time, the existing nature of (our) business is not consistent with its classification.

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As a remedy the employer requested that they be reclassified and placed in subclass 0747, which has a lower assessment rate. By letter dated May 17, 1993 the Assessment Department denied the employer's request for reclassification:

Your client's organization is involved in adjudicating claims for health benefits (dental and extended) and short term disability. I understand that the work is all done in an office setting and clerical in nature. We have, therefore, grouped your client with other firms such as accounting services, business consultants, insurance agencies, etc. which, in turn, have been placed in a retail category to form part of that insurance group. It is the combined experience for employers within this group which determines the assessment rate for the group.

We have reviewed and discussed your client's activities and I would confirm that we continue to consider Classification 062113 the appropriate classification for your client's organization. Registration of organizations doing this type of work is not compulsory under the *Workers Compensation Act*. Your client's registration is voluntary which means they may cancel at any time. Because of the optional nature of their coverage, experience rating does not apply. Instead, they are assessed at the basic rate for the class.

The assessment costs have been increasing over the years. Part of this has been an increase in your client's assessable payroll and part of it has been an increase in the basic assessment rate. The rate for this class remained constant at \$0.56 from 1982 through 1988. It increased to \$0.66 for 1989 and 1990. It increased again to \$0.79 for 1991, \$0.95 for 1992 and \$1.09 for 1993.

The reason for the increase has been an overall worsening of experience for the subclass. It is the combined experience for all firms within the subclass which determine the basic assessment rate from year to year. At any point in time, there will be firms whose cost experience is better than average and those whose cost experience is worse than average. It is, however, the combined experience of the group which determines the rate.

In summary, I would advise that we have considered the points which you have raised, but do not feel a change in your client's classification is warranted.

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## Evidence and Argument

The employer argues that the Assessment Department contravened governors' policy 30:20:10 contained in the *Assessment Policy Manual*. They contend that:

. . . The Assessment Department is required by policy to give fair and proper consideration to the type of service and type of industry an employer is operating in and to ensure that the classification system not be an economic factor in the way business is conducted. A decision such as the one of May 17, 1993 does in fact impact on how employers conduct business. The letter almost appears to contemplate this result in the third paragraph of page 1 where a suggestion is made that if (the employer) is unhappy with the classification it may cancel coverage.

The employer argues that Section 42 of the *Act* has been violated on the basis that they have been placed in a subclass which includes industries which do not have the same or similar type of work. Further, that these other industries do not, "have the same type of workers performing the same type of activities," and they do not have the same injury frequency.

The employer requests that they be moved to subclass 0747 or to move them to another subclass "which has firms conducting similar business and with similar injury frequency expectations." In the alternative, the employer asks that a new subclass be created containing the firms currently in classification 062113.

## Reasons and Findings

Section 96(6) of the *Workers Compensation Act* sets out the grounds for appeal in this case:

- 96(6) An employer who has received notice of
- (a) an assessment under section 39, 40 or 41,
  - (b) a classification, special rate, differential or assessment under section 42, or
  - (c) an additional assessment, levy or contribution under section 73

may, not more than 30 days after receiving the notice or within a longer period the chief appeal commissioner may allow, appeal the assessment, classification, special rate, differential or

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additional assessment, levy or contribution to the appeal division on the grounds of error of law or fact or contravention of a published policy of the governors.

Under that section, an error of fact, error of law or a contravention of a published policy of the governors in the decision under appeal must first be established before an appropriate remedy can be granted. In this case, the employer alleged an error of fact in their Notice of Appeal. However, their submissions did not point to any factual errors. We are satisfied that there are no factual disputes in this case.

The employer alleges a contravention of governors' policy 30:20:10 contained in the *Assessment Policy Manual*. The pertinent section of that policy provides:

Classifications are assigned to accounts on the basis of the industry in which the employer is operating. In assigning the classification, some of the factors considered are the type of product or service that is being provided and the type of industry with which the employer is in competition. It is desirable that the assessment classification system not be an economic factor in the way business is conducted in the province.

Occupations of individual workers may be reviewed when assigning the classification, but only as an indicator as to the type of industry being carried on by the firm.

Once a clear understanding of an employer's industrial activity has been reached, the appropriate classification is selected from the Classification and Rate List (which is available upon request from the Assessment Department). This classification is then added to the firm's registration and an assessment rate automatically assigned. The employer reports payroll in the appropriate classification and pays an assessment on that payroll at the assessment rate for that classification.

This manual does not contain the specific criteria for putting a firm in a particular classification, because of the immense number and detailed nature of these rules. However, these rules, along with copies of the Classification Committee Minutes (see Section 30:20:50), are available for viewing at any one of the Board's offices throughout the province. When applying these rules to specific situations or firms, individual consideration will be given and variations from the policy will be implemented where the Board's judgement suggests that literal application may be inappropriate or inequitable.

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The *Workers Compensation Act* provides:

**Section 36.**

For the purpose of assessment in order to create and maintain a fund, to be called the accident fund, for the payment of the compensation, outlays and expenses under this Part and for payment of expenses incurred in administering the *Workplace Act*, all industries within the scope of this Part shall, subject to section 37, be divided into the following classes:

- Class 1. - forest products industries;
- Class 4. - mining; quarrying; manufacture of sand, rock, lime, clay or cement products;
- Class 6. - light manufacturing, service and trade industries;
- Class 7. - heavy manufacturing, construction, air transportation;
- Class 8. - power and gas utilities, communications, motor vehicle transportation;
- Class 9. - water transportation, wharf operations, fishing and fish packing;
- Class 10. - Canadian Pacific Limited, Canadian Pacific Steamships Limited, Esquimalt and Nanaimo Railway Company, Cominco Limited, West Kootenay Power and Light Company Limited, Canadian Pacific Airlines Limited, Kootenay Engineering Company Limited;
- Class 11. - the operations of members of the British Columbia Lumber Manufacturers' Association and are placed in this class by the board for the purposes of assessment;
- Class 12. - Canadian National Railways, Air Canada, Canadian Car Demurrage Bureau;
- Class 13. - the Crown in the right of the Province and any permanent board or commission of the Crown in right of the Province;

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Class 14. - municipal corporations and agencies;

Class 18. - Burlington Northern Inc.;

Class 20. - Northern Alberta Railway Company.

**Section 37.**

(1) The board may

- (a) create new classes in addition to those mentioned in section 36;
- (b) consolidate or rearrange any existing class; and
- (c) withdraw from a class an industry or a part of a class or subclass included in it and transfer it wholly or in part to another class, or form it into a separate class.

**Section 42.**

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

Subclass 0621 established under Section 42 includes:

- 062102 Furniture Rental or Retail Stores
- 062103 Interior Designing or Interior Consulting
- 062105 Microfilming, Photography Studios, Photographic Film Processing, Recording Studios, Motion Picture or Video Tape Production or Editing, Computer Software Mfg./Duplicating, Video Production, Photocopying Service

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- 062107 Barber Shops
- 062108 Hairdressing Establishments or Beauty Salons
- 062109 Auctioneering Establishments
- 062111 Mfg. of Cigars
- 062112 Dental Laboratories  
On Request: Audiometric Testing, Chiropractors' Offices, Clinics, Medical Laboratories, Offices or Establishments for the practice of any of the Healing Arts or Sciences, N.E.S., Physiotherapy Offices, X-Ray Labs, Laser Therapy Treatment
- 062113 On Request: Accounting Service, Actuarial Service, Addressing Service, Advertising Agency (no printing), Appraisal Service, Bailiffs, Banks, Bed and Breakfast Registry, Better Business Bureau, Business Consultants, Chambers of Commerce, Chartered Accountants, Collection Agencies, Computer Programming Service, Credit Unions, Crime Prevention Programs, Customs Brokers, Data Processing Service, Financial Institutions, Information Service, Insurance Agency, Investment Dealers, Law Office, Mailing Service, Monitoring of Alarm Systems, Mortgage Brokers, Notary Public, Real Estate Agency, Resource Centres (excluding Counseling), Security Brokers and Dealers or Stockbrokers, Telephone Answering Services, Translation Service or Travel Agencies, Weather Stations
- 062114 Supplying Clerical Workers as a Business
- 062115 On Request: Employers' Associations
- 062116 Mobile Home Sales
- 062117 Commercial Stock Audit

Note: The last two digits in the classification number distinguish industrial groups within subclass 0621, for statistical purposes. All of the industries listed above form subclass 0621 and all pay the same basic rate, subject only to experience rating.

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Policy 30:20:10 sets out how individual employers are to be classified within the Classification and Rate List. In this case the employer was placed in subclass 0621 and industrial group 062113. In our view, the Assessment Department did not contravene policy 30:20:10 in coming to that conclusion. The employer is in class 6. That is, “light manufacturing, service and trade industries”; they do not fit into any other class as set out in Section 36. The role of the Assessment Department, with respect to classification, is to assign individual employers into the various classes and subclasses. The best subclass within class 6, for this employer, is 0621. The employer does not point to any other subclass within class 6 as being more appropriate and upon reviewing the various subclasses within class 6 we find that subclass 0621 is the most appropriate subclass. They are grouped with other firms in class 6 such as accounting services and insurance agencies who perform work in an office setting. Further it could be argued that this employer is essentially an insurance agency. The employer suggested that they be reclassified into subclass 0747. However, that would first require a finding that this employer was properly within class 7, “heavy manufacturing, construction, air transportation” as set out in Section 36 of the *Act*. Given the nature of this employer’s business they would not properly be within class 7 and thus could not be placed into any of the subclasses within class 7.

The employer seems to take the view that the Assessment Department has the authority to rearrange and create new classes and subclasses. However, that authority rests with the Board of Governors. Under Section 82 of the *Act* the governors have the broad general authority to “approve and superintend the policies and direction of the board, including policies respecting compensation, assessment, rehabilitation and occupational safety and health.” Section 82(a)(iv) grants the governors specific authority to “develop policies to ensure adequate funding of the accident fund. . . .”

We find the creation and rearrangement of classes, including the subclasses, is a responsibility of the governors rather than the Assessment Department. The chairman’s report in the *Workers’ Compensation Board of British Columbia 1992 Annual Report*, a public document, contains a statement as to the “Duties of the Voting Governors” at page 8, under the heading “Policy” as follows:

#### Assessments

- Determine all policy concerning assessment matters including:
  - assessment rates
  - creation and rearrangement of classes

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There is nothing in the policies of the governors indicating that they had assigned the Board's authority under Sections 37 and 42 to create or rearrange classes and subclasses to the Assessment Department. Given the potential of a large number of employers to be affected by a change in the classes or subclasses, public consultation with all affected or potentially affected parties would be expected. There are compelling reasons to characterize the setting of the assessment rates and the rearrangement and creation of the classes and subclasses as coming within the policy-making authority of the governors.

In this case, we do not find a contravention of a published policy of the governors. The employer was properly placed in subclass 0621 with other employers providing a similar service.

The final ground for appeal is error of law. The employer contends that the establishment of the subclasses and the various rates between the different kinds of employment in class 6 are not "just," thus contrary to Section 42. Specifically, the employer objects to the inclusion of certain retail stores in subclass 0621, as it appears that since 1989 certain retail stores were responsible for much of the claims costs.

The word "just" denotes a spirit of fairness or equity. That is fairness or equity for all employers in the establishment of the subclasses. The employer in this case contends that only firms conducting similar business, who have workers conducting the same kind of work, with similar injury expectations, ought to be placed in the same subclass. Otherwise, the make-up of the subclasses would be unjust.

This Board operates on a modified collective liability system as described in governors' policy 30:10:00 in the *Assessment Policy Manual*:

The classification system is based on the principle that the cost of producing a product or providing a service *includes* the cost of injuries or diseases incurred by the workers producing the product or providing the service. The classification system is therefore constructed on the basis of industrial undertaking rather than on an occupational or hazard basis. In other words, if a specific product were being manufactured, the classification would be the same regardless of the process used in its manufacture, or whether the manufacturing was done by the employer's workers or subcontracted out to another firm. An industrial classification therefore includes all occupations within the industry, including office or clerical staff.

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Another method of classifying firms is to establish only one group into which all employers are classified, regardless of their industrial undertaking. In this way, every employer would pay the same assessment rate and all would share in the total costs of administering the *Act*. This is the pure collective liability theory of assessment; but the inequity of assessing very hazardous industries at the same rate as industries with relative few injuries is obvious. At the other end of the scale is self-insurance, where a firm pays only its own costs.

The B.C. Board, along with other jurisdictions in Canada, has chosen to make self-sufficient groups of employers on the basis of the industries in which they operate. In establishing these groups, the size is of critical importance. Since one serious injury can cost in excess of \$1 million, it is apparent that the size of the group must be large enough to provide for an adequate spread of the risk and stability in the assessment rate.

Not all industrial classifications are large enough to stand alone; they must be grouped together to provide an adequate insurance base. This grouping is done on the basis of industry similarity and an experienced cost similarity. Therefore, while there are separate classifications for very small industrial groups to provide statistical data, each industrial group does not necessarily stand alone but will be grouped with others based on industry and cost similarity if necessary.

These two factors, classification by industry and forming a group large enough to be a valid insurance base, are the basis of the classification system.

Item No. 248 in the *Workers' Compensation Reporter* (Vol. 3, p. 133) which consolidated class 11 with class 1, subclass 5 discussed the classification system:

. . . The workers' compensation system in this province is based on a collective liability principle whereby industries are divided into classes and subclasses and the costs of claims within any such class or subclass are shared by all employers within it. Since more hazardous industries will give rise to greater claim costs, the classes to which they belong will be subject to greater assessment rates. However, within each class or subclass each employer will pay the same rate without regard to claim costs

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incurred in respect of his particular operations. This is modified where an experience rating system is in operation. In this case, the claim costs incurred in respect of a particular employer's operations may reduce or increase for him the normal rate paid by the class or subclass.

Class 11 is an exception to the general rule which places operations of one particular type into one particular class. Sawmill operations are the only ones subject to a dual classification. How do special classes such as Class 11 fit into the collective liability system described above?

It is reasonable to assume that the only groups who would wish a separate class or a special assessment rate would be those which have injury costs below the average for their industry. It is even possible to imagine individual firms with sound accident records forming associations for the prime purpose of forming a separate class and obtaining a lower assessment rate. For every such group taken out of the class, the heavier will be the assessment burden on those remaining. Yet among those remaining there may be many individual firms with excellent safety records and programs. These firms will be penalized simply for not belonging to an association having a separate class and pressure may be created to join the association. This may have the anomalous result of producing different assessment rates for firms otherwise identical in size, accident frequency and cost. Moreover, the association having a separate class could restrict its membership for the purpose of excluding firms with inferior records and lowering its assessment rate.

The result of these tendencies could be the fragmentation of the Board's existing classification structure into smaller and smaller classes and subclasses. The collective liability system could gradually degenerate into a system of small groups or associations of employers meeting the costs of accidents within their own particular operations. It might be argued that the Board could prevent this by placing restrictions on the number of classes similar to Class 11. However, this would be unfair to those groups of employers who are not lucky enough to receive the privilege of a separate class. Nor does this argument remove the serious inequity to individual employers with good accident records who for some reason are unable or do not wish to join an association or the possibility that associations with separate classes may restrict their membership to reduce their assessment rates.

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The fragmentation of the classification structure would also lead to increased administrative cost for the Board. This would be required to analyze the requests of associations for special status and to supervise the greater number of classes and subclasses that could result.

Thus, there is a need to restrict the number of classes and subclasses to ensure faithfulness to the modified collective liability system. There are currently a total of 64 subclasses, 26 in class 6, by far the largest number. The factors set out in governors' policy 30:10:00 indicate that there is an attempt to place similar industries together in the same subclass. Where the size of the group is too small to provide adequate spread of the risk and stability in the assessment rate the smaller groups are put together based on industry similarity and experienced cost similarity. The factors suggested by the employer for the creation of subclasses are, in our view, too limited. The employer's submission ignores the requirement for stability in a modified collective liability system. This employer has been in subclass 0621 with retail stores and other industries for the last 40 years. Fluctuations in the cost experience of an individual employer or groups of employers would not be unusual. In this case, the employer notes that the cost experience of certain retail stores has increased markedly since 1989, thus increasing the overall costs of subclass 0621. Such fluctuations, by themselves, do not mean the make-up of subclass 0621 is unjust. We note that the administrative inventory of the Assessment Department conducted in 1992 by H. Allan Hunt, referred to by the employer, noted that there was some public dissatisfaction with the make-up of the subclasses. However, he did not suggest that the current subclasses contravene Section 42.

Within each subclass, the experience rated assessment system allows firms with lower claims costs to pay lower assessment rates. Governors' policy 30:50:41 excludes this employer from participating in the experience rating system as they are an application industry under Section 3 of the *Act*. The employer has not argued that governors' policy 30:50:41 contravenes Section 42. As there are no submissions on that question the matter will not be considered by this panel. Even though other employers within the subclass participate in the experience rating system, other voluntarily registered employers, as well as [this employer] do not; however, this is insufficient to make the subclass unjust. We are unable to find, on the submissions before us, that the make-up of subclass 0621 contravenes Section 42 of the *Act*. We note that effective January 1, 1994 this employer will come under the compulsory scope of the *Act* by virtue of Bill 63. Thus under the current policy this employer will have the benefit of experience rating.

There was no error of fact, error of law or a contravention of a published policy of the governors. Therefore, the employer's appeal is denied.

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

## Decision of the Appeal Division

**Number:** 93-1687  
**Date:** November 26, 1993  
**Panel:** Connie Munro, Thomas Kemsley, P. Michael O'Brien  
**Subject:** Legal Fees

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This is an appeal from the findings of the Workers' Compensation Review Board dated August 28, 1992.

[This decision has been edited to only deal with the issue of legal fees.]

A worker died in an accident in August 1982. His widow and children received dependants' benefits under Section 17 of the *Workers Compensation Act*. There has been a considerable dispute over the years as to the proper amount of that pension. That dispute focused primarily on the calculation of the worker's average earnings at the time of his death. The widow appealed to the Review Board and the former commissioners and her pension was increased as a result. She retained legal counsel to assist and represent her in those appeals.

In a letter dated September 25, 1991, counsel asked the Board to reimburse the widow for her legal fees and costs. The Board denied this request and the Review Board denied the appeal.

Counsel's submissions on the question of legal costs refer to the complexity of this case over the years, the errors made by the Board, the lack of thorough investigation by the Board, the worker's need for legal analysis, research and argument, and the lack of available alternatives to meet this need.

### **(a) The Board's Jurisdiction to Pay Legal Expenses**

In its findings, the Review Board reasoned that the worker could have used, at no cost, the services of the workers' advisers and the Ombudsman's Office. The Review Board relied extensively on *Decision No. 69* (1974) in the *Workers' Compensation Reporter*, Vol. 1, p. 285, quoting the following passages:

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The practice is that the Board does not pay fees for legal advice or advocacy in connection with a claim for compensation. So far as advocacy is concerned, that practice was re-affirmed in *Decision No. 54*. . . .

First, our system of claims adjudication is designed to make legal advice and advocacy unnecessary. Claims adjudicators are instructed to seek out the evidence and explore the arguments themselves, not to rely on initiative or presentation of material by workers or employers. Boards of review take the same approach, and if there is any inadequacy in the extent of the inquiries made at first instance, that is subject to correction by a board of review on appeal whether or not a presentation is made.

Secondly, it is difficult to see on what rational basis lawyers can be distinguished from other kinds of advisers. Lawyers are generally helpful in having a capability for presenting material in an organized way. But in terms of training to deal specifically with workers' compensation matters, the training of lawyers is not, generally speaking, greater than that of union officials; and this is so both with regard to substantive law and procedure.

Thirdly, if a claimant finds a need for advice from a lawyer, it is available without charge from the Compensation Consultant. He is a barrister and solicitor specializing in Workers' Compensation matters and appointed by the Cabinet to advise and assist claimants. If a claimant prefers to have the advice of a lawyer in private practice he is free to do so, but not at the expense of the Accident Fund.

Fourthly, . . . if the Board were to pay for advocacy by lawyers, that would obviously create a tendency to expand the use of lawyers as advocates in compensation claims. This could easily snowball, because once the use of lawyers became a common practice, those who did not have one might then begin to feel under-represented. Further, if the claimant is represented by a lawyer, an employer may feel that he needs one too. One result would obviously be rising costs, but not necessarily accompanied by any improvement in the quality of adjudication. Another consequence of any expansion in the use of lawyers would be a tendency to exclude trade union officials. We would regard that as a retrograde step, particularly because the advice of a union

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official has the advantage of coming from someone who is familiar with the working environment of the claimant and other factors relevant to his rehabilitation. . . .

. . . .

. . . We do not feel therefore that advocacy by lawyers should be supported out of the Accident Fund.

Policy #100.40 of the *Rehabilitation Services and Claims Manual* (the *Manual*) is based on *Decision No. 69*. On the face of it, it precludes the payment of fees for legal advice or advocacy out of the Accident Fund. It states:

No expenses are payable to or for any advocate. Nor does the Board pay fees for legal advice or advocacy in connection with a claim for compensation. (41) The Board will not pay the legal costs of a claimant or employer in connection with court proceedings to challenge a Board decision beyond what it may become subject to pay following the court's decision under the general law of costs.

However, this policy has not been interpreted as rigidly as its wording suggests. In several unpublished decisions, the former commissioners characterized the policy as providing merely "guidelines." For example, in an unpublished decision dated May 22, 1980, the former commissioners stated:

The Commissioners do not regard the policy decisions which the Board makes as being absolute, unchanging rules to be applied regardless of the circumstances of a particular case. They recognize that a policy enacted to meet a particular type of situation may require modifications or exceptions as particular situations develop. A policy applied for particular reasons may not be relevant in situations in which those reasons do not operate or there are additional distinguishing factors.

On the other hand, this does not mean that the policy will be ignored when it becomes necessary to make a judgment over a concrete situation. Regard must be had not only to the individual circumstances of the particular situation, but the possibly overriding general considerations which produced any relevant policies. A policy laid down by the Board is an indication to its staff and the outside world as to how it will treat certain

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situations. This means that when those situations do arise, the Board will normally act in accordance with its policy. Otherwise, there would be no point in having the policy in the first place. However, the application of the policy in each case will be subject to arguments raised at the time and the particular circumstances of the case. A statement to similar effect is contained in Decision No. 252 at pages 148 and 149.

The particular policy with which your letter is dealing is laid down in Decisions No. 54 and 69. These decisions state that the Board will not pay fees for legal advice or advocacy, and sets out the reasons for that policy. The Commissioners recognize that in the last paragraph of Decision No. 69, the statement is made that “For the reasons explained, this must be maintained without exception and without attempting any judgment on the legal services in the particular case”. This may appear to contradict the approach outlined above. However, that is a matter of interpretation into which the Commissioners do not propose to enter. Whatever may have been intended by the Commissioners at the time Decision No. 69 was written, the approach of the Commissioners is now, and has been for some time, as stated in the previous two paragraphs.

In that decision, the former commissioners did not award legal costs.

On at least one occasion, the former commissioners actually ordered payment of legal costs out of the Accident Fund. In an unpublished decision dated August 12, 198, the former commissioners concluded that the circumstances of the case warranted departing from the Board’s general policy. The commissioners explained:

. . . the Claims Adjudicator had advised [the worker] that he might be prosecuted for fraud, thus introducing an element of the criminal justice system into the workers’ compensation system. . . . the Claims Adjudicator, having raised the possibility of a fraud prosecution, then neglected for an extensive period of time to carry out any further investigation or even adequate documentation, thus leaving [the worker] in a state of “limbo”. While neither of these factors by itself would be sufficient for the Board to make an exception to its general policy not to pay legal fees, the Commissioners felt that when they were combined with all the other circumstances of [the worker’s] case, sufficient grounds existed for an exception being made.

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Neither counsel's submissions in the case before us nor the above decisions of the former commissioners clearly set out the statutory authority or discretion of the Board to pay legal costs.

The workers' compensation legislation in B.C. has included from the outset an expenses provision which has remained substantially unchanged over the years. Section 69 of the *Workmen's Compensation Act*, S.B.C. 1916 c. 77 provided that:

The Board may award such sum as it may deem reasonable to the successful party to a contested claim for compensation or to any other contested matter to meet the expenses he has been put to by reason of or incidental to the contest, and an order of the Board for the payment by an employer or by a workman of any sum so awarded, when filed in the manner provided for the filing of certificates by subsection (2) of section 34, shall become a judgment of the Court in which it is filed and may be enforced accordingly.

Today, Section 100 of the *Workers Compensation Act* provides that:

The board may award a sum it considers reasonable to the successful party to a contested claim for compensation or to any other contested matter to meet the expenses he has been put to by reason of or incidental to the contest, and an order of the board for the payment by an employer or by a worker of a sum so awarded, when filed in the manner provided for the filing of certificates by section 45(2), becomes a judgment of the court in which it is filed and may be enforced accordingly.

The governors' policies interpret this section very narrowly. According to policy #100.70 of the *Manual* and *Decision No. 208* (1976) in the *Workers' Compensation Reporter*, Vol. 3, p. 25 on which it is based:

1. s. 100 comes into play *only* in the context of an appeal;
2. s. 100 empowers the Board to order a party to pay costs *excluding legal costs* to the other party but does *not* empower the Board itself to pay costs out of the Accident Fund.
3. s. 100 will be used only in very rare cases.

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*Decision No. 208* states at pp. 26–27:

. . . The reference to “contested claim for compensation” in Section 83 [today’s section 100] . . . does not mean, for the purposes of this section, a claim by a worker which is “protested” by his employer. As was indicated above, the Board investigates and determines the acceptability of a claim whether or not there is any opposition to it. The opposition provides merely one course of evidence that the Board uses to reach its conclusion. A “contested claim”, for the purposes of Section 83, is one in respect of which there has been an appeal by the worker or the employer. The appeal may be to the board of review or the Commissioners, but does not include the reference of a board of review decision to the Commissioners under Section 76B(3). An appeal to a Medical Review Panel might amount to a “contest” of a claim but it is unlikely that a question of costs would arise in such a case.

The Commissioners consider that an award under Section 83 might be made on an appeal but only in unusual cases. The section is limited to cases where the worker or employer abuses his rights under the *Act*. For instance, the worker or employer may put the opposite party to the expense of an appeal for no good reason. In other words, it may appear that an appeal was pursued simply because the right of appeal existed and without any substantial grounds on which the position could be argued.

. . . .

Section 83 provides that the Board may “award such sum as it may deem reasonable to the successful party . . . to meet the expenses he has been put to by reason of or incidental to the contest.” *The Commissioners consider that it would not be reasonable to make an order for costs against a worker or employer in respect of an expense which the Board would not allow under Decision 54 or any related decision.* The reasoning set out in *Decision 69* against the Board paying the fees of lawyers and other persons for advice and advocacy in connection with a claim for compensation also applies when the question is whether the Board should make orders for costs against one party. *On this ground, any order for costs under the present application would not cover the fees of the claimant’s solicitors.*

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The Commissioners consider that only in rare cases will an appeal be sufficiently without merit to justify an award under Section 83. . . .

(Emphasis added)

In effect, *Decision No. 208* says that the only costs the Board may order a party to pay to another party under Section 100 are costs that would be payable out of the Accident Fund. An order for the payment of costs by one party to another under Section 100 is viewed, therefore, “as an alternative” to the payment of expenses by the Board out of the Accident Fund. *Decision No. 54* (1974), *Workers’ Compensation Reporter*, Vol. 1, p. 229 at 231 used the term “alternative” in comparing an order for the payment of costs by one party to another with the payment of costs under the Accident Fund.

However, the former commissioners relied on Section 100 at least once to order an employer to pay the legal costs of a worker. In an unpublished decision dated January 30, 199, the former commissioners castigated the employer for abusing their right of appeal and ordered them to pay the worker’s legal costs. By impugning the worker’s credibility, the employer had put him through the expense of an oral hearing and then changed their position as to his credibility at the oral hearing. In ordering the employer to pay the worker’s legal costs, the former commissioners were well aware of the policy set out in *Decision No. 208*, namely, that an order for costs under Section 100 would not cover legal costs but they decided to depart from the policy because of the unusual circumstances of the case. To justify departing from the policy against ordering a party to pay another party’s legal fees, they applied the very same reasoning that would justify, to their mind, departing from the policy against payment of legal fees out of the Accident Fund. The former commissioners simply reiterated what they had been saying in other decisions as regards the payment of legal fees out of the Accident Fund:

. . . they do not regard the policy decisions which the Board makes as being absolute, unchanging rules to be applied regardless of the circumstances of a particular case.

To summarize, the governors’ published policies seemingly bar the payment of legal costs, whether out of the Accident Fund or by one of the parties. Yet, on rare occasions, the Board has paid legal costs out of the Accident Fund or ordered a party to pay them, treating the policies as general guidelines that admit of exceptions. This raises questions about the interpretation of Section 100 of the *Act*.

Section 100 empowers the Board to “award a sum . . . to the successful party to a *contested* claim for compensation or to any other *contested* matter . . . (emphases added).” The word “contest” means, amongst other things, to “call in question,” “challenge” or “dispute” (see *Black’s Law Dictionary* and the *Concise Oxford Dictionary*). In that sense, at

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the first level of adjudication, a claimant could be “contesting” a Board decision, even though there is no appeal in motion and even though the employer may be supportive of the worker’s claim. When the legislation was first enacted in 1916, it provided no appeal rights yet it included Section 69 (now Section 100); presumably though, some form of internal review procedures would have been available to workers and employers.

Section 100 contemplates the award of a sum “to meet the *expenses* [the worker] has been put to (emphasis added).” The word “expenses” is very broad and could include a range of costs, including legal expenses. It is not defined in the *Act*.

Section 100 consists of two clauses separated by a comma. It states “The board may award a sum . . . , and an order of the board for the payment by an employer or by a worker of a sum so awarded . . . becomes a judgment of the court in which it is filed and may be enforced accordingly.” The first clause could be read in light of the second clause. According to that reading, the award is to one party as against the other party, where the two parties are the employer and the worker. Alternatively, the first clause could be read independently of the second clause. According to that alternative reading, the first clause simply empowers the Board to award expenses but it does not specify the source of the funding. It could be the Board, a worker or an employer. From this perspective, the purpose of the second clause is merely to enable the Board to enforce an award where an employer or worker must pay it.

We find that the language in Section 100 is quite broad, giving the Board the authority and discretion to determine what expenses are to be paid and who is to pay them. The only clear limitation in the section is that the award must be linked to success. We can think of no obvious reason why the Legislature chose to limit the Board’s discretion to make an award “to the successful party.” We can only conjecture that the Legislature may have been influenced by cost awards in court proceedings. In court, costs usually “follow the event”: the loser is usually ordered to pay the winner’s expenses.

We are aware that in the *Milito* case [*Re: Estate of Artibano Milito*, Supreme Court of British Columbia, Vancouver Registry No. A840860, date of decision June 7, 1984] the Court described the *Act* as silent on the subject of legal costs. In that case, counsel for the deceased worker’s family sought to have the legal fees incurred at an inquest carried on under the *Coroners Act* reimbursed by the Board. The Court denied this request, stating:

The *Workers Compensation Act* is silent on the subject and the Board has a general policy not to pay the legal fees and costs of workers pursuing claims under the *Act*. [Counsel] was unable to point to any section of the *Act* which required the exercise of a statutory discretion as to the payment of such legal fees and costs. The request here is even further removed — it is to cover

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legal fees at an inquest being carried on under the *Coroners Act*. [Counsel] stresses the fact that neither the Chairman of the Boards of Review nor the Secretary to the Worker's Compensation Board state that they have no power to authorize the payment of legal fees. I have no doubt that the legal fees of any particular claimant could be paid if those charged with the responsibility of administering the *Act* deemed it appropriate — but that is a far different matter from a duty imposed by statute to exercise a discretion as to payment of legal fees with respect to each and every claimant. In short, there is no exercise of a “statutory power of decision” to review. I should mention in passing that there is a Compensation Advisory Service established under the *Act* to give advice and assistance to workers and/or dependants with claims under the *Act* and to provide representation in complex cases. Currently two of the five advisors are barristers and solicitors.

Because the Court in *Milito* did not specifically analyze Section 100, we do not consider that decision conclusively settled the question of whether the terms of Section 100 are broad enough to authorize the Board to pay legal fees as well as other expenses.

We find that Section 100 of the *Act* is broad enough to authorize the Board to award expenses to a successful party in an appeal or non-appeal context (for example, in the context of first instance adjudication or a referral), and it is broad enough to authorize the Board to award legal costs out of the Accident Fund or order them paid by one of the parties.

Next we must consider whether the governors' published policies which deny the payment of costs are unlawful. In *Testa*, [*Testa v. British Columbia (Workers' Compensation Board)* (1989), 58 D.L.R. (4th) 676 (B.C. C.A.) ] the issue was the interpretation of “average earnings and earning capacity” in Section 33(1) of the *Act*. The Court said that Section 33(1) provided a broad basis for determining the average earnings and earning capacity of a claimant and the Board had adopted one method as a general policy. The Court found that the Board failed to exercise its discretion under the *Act* when it blindly followed that policy in all cases.

The governors' policies in #100.40 and #100.70 of the *Manual* denying the payment of legal expenses in all cases appear to fetter the Board's discretionary authority under Section 100 of the *Act*. That could be contrary to *Testa*. However, inasmuch as the policies are viewed merely as guidelines, they are viable. It is evident that, in practice, the Board has viewed them as guidelines and has occasionally departed from them on that basis.

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We accept that it is reasonable and lawful for the policies to refuse, in general, to make legal costs awards, whether to be paid by the Board or by a party to a contested compensation claim. Awarding legal costs is more consistent with an adversarial process than with the inquiry process contemplated by the *Act*. Also, as noted by the judge in *Milito* and by the Review Board, there is a compensation advisory service under the *Act* to assist workers and/or dependants with claims under the *Act*. There is also an advisory service to assist employers. In 1916 the *Act* did not provide for those services. Workers' compensation cases may have tended to become more complex over the years, but this is partly why the *Act* was amended to provide for advisory services.

Following *Testa* there must be a limit to #100.40 of the *Manual*. The Board has, on rare occasions, paid legal expenses and it is necessary to consider the potential exceptions to the general policy which denies payment of those expenses. The governors' policy in #100.70 of the *Manual* regarding "The Awarding of Costs" against a party states in part:

An award under Section 100 might be made on an appeal but only in *unusual cases*. The section is limited to cases where the worker or employer *abuses his rights* under the *Act*.

(emphasis added)

Similarly, payment of costs by the Board would arise only in unusual or extraordinary circumstances. It would not include cases in which Board officers merely erred or failed to exercise good judgment. It would require flagrant abuse by a Board officer of a worker's, or claimant's, or employer's rights under the *Act* or governors' policy, which was clear on the face of the file. Even that would give rise only to consideration of the payment of legal expenses, as other factors might also be relevant.

Flagrant abuse would not arise from a mere failure to investigate a matter fully, as it is virtually always a judgment call as to when adequate information has been obtained. Neither would it arise from a mere error in interpreting and applying governors' policies or the *Act*, as both are open to various interpretations and contain considerable discretion, so there is considerable scope for differences of opinion on matters of interpretation and application.

It is not possible to specify the types of situations which would justify payment of legal fees by the Board. It would require flagrant abuse as noted above, and then consideration of other relevant factors, such as the availability of free legal advice from other sources. We emphasize that entitlement to the payment of legal fees will arise only in very unusual cases.

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## (b) The Facts of this Case

In this case counsel argues for reimbursement of legal fees for three specific errors committed by the Board. Firstly, he says the adjudicator's initial decision to deny the widow's claim for dependants' benefits was overturned only on the intervention of legal counsel.

The worker died as a result of accidental drowning on August 29, 1982. The claims adjudicator obtained evidence, including witness statements and the coroner's report, prior to coming to his initial decision on November 5, 1982. The claims adjudicator concluded that the worker's death was not compensable on review of the evidence as well as previous published decisions of the Board contained in *Workers' Compensation Reporter* Decisions Numbers 10, 39 and 48 (all in Volume 1). The certificate of death states that the worker, a tugboat operator, drowned. He was returning to his own vessel after visiting with friends on another vessel when he slipped over the side of the friends' boat and went under a log boom. Evidence on file indicates that alcohol was involved. The adjudicator issued his decision letter on November 9, 1982. The widow's legal counsel requested a review of that decision by letter of December 23, 1982. He presented no new evidence, however, he made submissions on the proper interpretation of the previously mentioned *Reporter* decisions. The claims adjudicator then sought permission from his manager to re-adjudicate the claim. By letter of February 11, 1983, he advised the widow and her counsel that the claim was now accepted.

It appears that the adjudicator erred in interpreting Decisions No. 10, 39 and 48. Counsel pointed out the error and the adjudicator immediately reconsidered his earlier decision, sought appropriate approval from his superiors to re-adjudicate and did so. This exhibits an initial error of judgment on the part of the adjudicator. This was not, however, a clear cut case. The facts raised several issues with respect to whether the worker's death arose out of and in the course of his employment. There is no evidence on file of flagrant abuse of the widow's rights by the adjudicator at this stage.

The second circumstance cited by counsel was the adjudicator's failure to act promptly on the widow's expressed dissatisfaction with her rate of compensation. After the claim was accepted, dependants' benefits were processed and rehabilitation assistance was provided to the widow. It was not until May 31, 1984 that there was any indication on the claim file that the widow was dissatisfied with the pension. Memo #17 of that date indicates she advised the rehabilitation consultant she thought her rate of compensation was too low and that she was going to seek legal advice. The memo largely dealt with rehabilitation assistance but referred to the wage rate in the following terms:

She had asked several questions about her rate. Apparently she is intending to ask [her counsel] to pursue an increase in the rate. She doesn't have any additional information to supply, however.

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Nothing further was heard on this matter until September 1987, when the adjudicator reviewed the wage rate on which the widow's allowance was based and declined to change that rate.

The record shows that the adjudicator neglected to do anything about the widow's expression of dissatisfaction until prompted to do so by further correspondence from legal counsel in September 1987. The record shows that the adjudicator was simply awaiting further submissions from counsel. When those submissions were received he promptly reconsidered the matter and issued a decision. The lapse of time may have constituted an error of judgment in that the adjudicator could well have pursued the matter on his own initiative; however, poor judgment alone does not constitute evidence of flagrant abuse of the claimant's rights. The adjudicator's September 1987 decision in this matter was eventually overturned by the Review Board in their findings of March 31, 1989. Once again, the mere fact of an error on the part of the adjudicator is not grounds for consideration of payment of costs. There is no evidence of flagrant abuse by the adjudicator in that decision.

The third circumstance counsel says gives rise to a claim for legal fees involves the implementation of the March 31, 1989 findings of the Workers' Compensation Review Board with respect to the average earnings issue. The Review Board's finding contained some specific instructions to the adjudicator on how to recalculate the wage rate. The adjudicator did not follow exactly the Review Board's instruction but used an alternative method of calculation which he said approximated the results of the Review Board. It was not until two years later, that is May 21, 1991, that the then commissioners agreed that the Review Board's instructions should have been followed with greater precision. The adjudicator was instructed to do so.

It is true that the claims adjudicator did not implement all of the Review Board's instructions. The evidence on file shows the adjudicator did a thorough analysis of the wage rate issue after the Review Board finding. He referred the file to the manager of Audits in the Assessment Department for assistance. The adjudicator referred to the Review Board's recommendations, but set out how difficult it was to actually obtain accurate figures about the worker's earnings. The relevant financial statements, corporate tax returns, personal tax returns and Employer's Payroll Reports did not match. The adjudicator set out that [The worker] reported different earnings for himself depending on who he was reporting to." The adjudicator then followed Assessment policy in calculating the average earnings figure. He did not include several amounts the Review Board said should be considered; in particular, dividends and a bad debt expense. The adjudicator said it would "go against our normal Assessment policies and it would not be possible to determine what percentage of these earnings would go directly to [the worker] as earnings. It would be pure speculation to use these earnings in any manner."

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The commissioners' decision of May 21, 1991, addressed the adjudicator's decision and stated:

Although this appears quite reasonable to the Commissioners, they consider that it was not the basis on which the Review Board found the calculation should be made. The Commissioners are therefore unable to conclude that the decision of the Review Board has been implemented as required by Section 92 of the *Act*.

Thus, the claims adjudicator erred in failing to implement the Review Board's finding. That was contrary to Section 92 of the *Act*. The adjudicator knew he was not following all of the Review Board finding, but he said he thought the calculations were fair and in accordance with Assessment policy. He did a thorough analysis of the facts and produced what he thought was a proper decision. While this was an error, there was no flagrant abuse of the claimant's rights by the adjudicator. He justified his decision with reference to the policy. Admittedly, if he felt that the Review Board decision was contrary to policy, he should have referred the matter to the commissioners. He erred in failing to do that, but that was not uncommon practice at the time. Such an error might be viewed differently today. Therefore, we find this situation does not warrant an exception to the governors' policy that denies payment of legal fees. We deny the appeal on this issue.

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



## Decision of the Appeal Division

**Number:** 93-1140  
**Date:** August 12, 1993  
**Panel:** Connie Munro, Hilrie Reimer, Thomas Kemsley  
**Subject:** Loss of Visual Acuity

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The worker appeals from a majority finding of the Review Board dated November 2, 1992. The issue before the Appeal Division is whether it was correct to assess the permanent functional impairment in the worker's left eye on the basis of his corrected vision alone.

In a letter, dated January 8, 1992, the worker was advised that all the medical information on file had been reviewed concerning his left eye injury of October 9, 1990. A disability awards officer stated that an ophthalmological consultant had reviewed the information concerning the worker's injury and recovery, and confirmed that his best corrected degree of visual acuity would entitle him to a permanent partial disability award, in accordance with the Board's permanent disability evaluation schedule, equal to 1% of a totally disabled person.

A Review Board majority upheld the disability awards officer's decision. The majority made reference to item #39.42 of the *Rehabilitation Services and Claims Manual* which states:

Measurement of the loss of visual acuity is usually based on the best vision obtainable after correction with conventional lenses.

The majority found "no compelling argument has been made as to why the Board should not follow their usual practice in the worker's case."

The dissenting member drew attention to a previous Review Board finding where the panel found the Workers' Compensation Board should assess the worker's functional impairment based on his uncorrected visual acuity. The dissenting member stated:

I have determined that the Board did not refer this worker's claim to the Appeal Commissioners on the basis that it was an error of law or policy. Therefore, I must conclude that the Board

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does pay pensions based on uncorrected visual acuity when there is something “unusual” about the situation although that is not clear in the other appeal. The worker’s pension in that case was implemented as the Review Board found.

In a submission before the Appeal Division, dated March 14, 1993, the worker’s representative maintains the Workers’ Compensation Board has accepted, in certain circumstances, that uncorrected vision can be the basis of determining pension entitlement. He points to a Review Board decision provided to him by the worker’s union and states:

The circumstances of that case are identical to those of [the worker’s] in fact, [the worker] had additional factors other than visual acuity, such as difficulties with depth perception, decreased peripheral vision and headaches.

The worker’s representative argues the use of corrected vision as the determinative factor in assessing pension entitlement for loss of visual acuity is inconsistent with the *Act* which requires in Section 23 that the impairment of earning capacity shall be estimated “from the nature and degree of the injury.” He argues that in the worker’s case, the nature and degree of his injury is visual acuity of 20/200 as reported by the ophthalmologist in his June 16, 1992 report and states:

. . . to use corrected vision is also inconsistent and discriminatory with respect to the Board’s measurement of all other disabilities. If a person has a disability, such as drop foot, the disability is not measured while wearing a splint. Measurement of hearing loss is conducted without “corrected hearing”, by wearing a hearing aid during testing. If technology advances so that a prosthetic hand can perform the same dexterity and functional usefulness as a human hand, will pension awards cease for hand amputations.

## Reasons and Findings

Appendix 4 of the *Rehabilitation Services and Claims Manual* contains the Permanent Disability Evaluation Schedule. Items 77 through 90 outline various percentages for some visual problems; loss of visual acuity to the extent of 20/50 entitles the worker to a pension of 2%. No mention is made whether corrected or uncorrected vision is to be measured. Item #39.42, however, states:

Measurement of the loss of visual acuity is *usually* based on the best vision obtainable after correction with conventional lenses.

[emphasis added]

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Since item #39.42 specifies that measurement of loss of vision will usually be based on the best vision obtainable after correction, it is likely that the Evaluation Schedule is also based on the same principle.

There is no explanation in the *Manual* or in the Evaluation Schedule as to when uncorrected vision might be used, and no explanation as to why corrected vision should be the usual basis.

The question which must be addressed is whether measurement of loss of vision only after correction with conventional lenses is consistent with the *Act*. Section 23 of the *Workers Compensation Act* states in part:

- (1) Where permanent partial disability results from the injury, the impairment of earning capacity shall be estimated from the nature and degree of the injury, . . .
- (2) The board may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations which may be used as a guide in determining the compensation payable in permanent disability cases.

The policy would appear to be inconsistent with the wording of Section 23(1). According to this provision, the impairment of earning capacity is to be estimated “from the nature and degree of the *injury*.” A policy that bases the measurement of vision loss on the best vision obtainable after correction assumes that correction does away with the injury. That is not a tenable assumption. Even if correctable, the injury remains. Moreover, although Section 23(1) does not concern itself with the individual worker’s actual wage loss, it provides a method of estimating “the impairment of earning capacity.” To the extent that vision loss before correction or the need for corrective lenses may narrow the range of potential lines of employment, it must be compensated under Section 23(1).

The governors’ present policy is in keeping with that of other Canadian workers’ compensation jurisdictions, all of which assess vision loss after correction. Recognition of impaired earning capacity only if loss of vision is not correctable differs from the usual practice of assessing impairment on the basis of an uncorrected disability (e.g. in cases of hearing loss or the loss of a limb). The argument generally adduced in support of the special treatment of vision loss is that it is rarely considered a handicap in our society and that it can be readily corrected. In the case of hearing loss, hearing aids are less effective in removing a handicap than eyeglasses. In the case of loss of limb, prosthetic devices are also relatively less effective.

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In *Decision No. 453/89*, 15 W.C.A.T.R. 81, the Ontario Tribunal specifically dealt with the question of whether the policy of assessing pensions for vision loss after correction was justified. The Ontario *Act* provided that:

Where permanent disability results from the injury, *the impairment of earning capacity of the worker shall be estimated from the nature and degree of the injury, . . .*

The Ontario Appeals Tribunal Panel reasoned that:

Because the impairment is to be estimated from the *nature* and *degree* of the injury, the panel accepts that the statute allows the board to take into consideration the specific characteristics (nature) of the injury when developing an assessment process or schedule for the resultant impairment. The statute anticipates that different kinds of injuries may be treated differently because of their nature. It is in the nature of eye injuries that they are frequently easily and conveniently corrected as far as the impairment to earning capacity is concerned. It is therefore our view that the treatment of vision loss cases in the Schedule does not provide for compelling reasons to conclude that the Schedule does not comply with the legislation.

We do not find the above reasoning persuasive. It would be tenable if the impairment of earning capacity were to be estimated from the “nature and degree of the *disability*” as opposed to the “nature and degree of the *injury*.” “Injury” and “disability” are different concepts. An injury is any harm or damage to the health of a person. A disability is an incapacity, either congenital or caused by injury or disease. The A.M.A. guide defines disability as an alteration of an individual’s capacity to meet personal, social, or occupational demands. The requirement in Section 23(1) to estimate the impairment of earning capacity from the “nature” of the injury indicates that corrected vision may be considered a relevant factor but certainly not to the exclusion of uncorrected vision. The requirement to estimate the impairment from the “degree” of the injury requires consideration of uncorrected vision.

The issue of assessing impaired vision before rather than after correction has been explored in many American workers’ compensation cases. A review of *Larson’s Workmen’s Compensation Law* suggests that usually uncorrected vision is used as a basis for assessing disability. In volume 1C, paragraph 58.13(f), Larson states:

The *usual* holding is that loss of use should be judged on the basis of uncorrected vision or hearing, and that therefore loss of use will not be ruled out because some correction is achieved.

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Indeed, an award for total blindness in one eye has been upheld, although use of an optical lens had restored a “substantial function in the eye” [emphasis added].

p. 10 — 492.140

This is not, however, the case where the worker had some degree of prior impairment of vision. According to Larson, courts appear to agree that the beginning point should be the claimant’s vision *as corrected before the accident* which logically implies that vision should be compared with the worker’s vision as corrected after the accident.

The American courts have sometimes drawn a distinction between cases of permanent partial and permanent total disability. Several decisions have held that it is appropriate to use the “uncorrected vision” standard in specific loss claims (permanent partial disability claims) but that in claims of total permanent disability involving sight, the “corrected vision” standard must be used [see *Harkala v. Burroughs Corp.*, 417 Mich. 359, 338 N.W. 2d 165 (1983); *State ex rel. Szathowski v. Industrial Comm’n*, 30 Ohio St. 3d 320, 530 N.E. 2d 880 (1988)].

Section 23(1) begins with the clause “where permanent partial disability results from the injury.” The reasoning underlying the current policy seemingly presumes that as long as vision is correctable there is no disability or potential alteration of the worker’s earning capacity.

We cannot agree that is the case. Several employers in occupations such as police officer, firefighter, armed services, or airline pilot may impose specific vision requirements.

For the above reasons, the panel finds that the use of corrected vision alone under policy item 39.42 contravenes the legislative requirements found in Section 23(1). Uncorrected vision must also be considered. Therefore we allow the appeal on this issue to this extent; the functional impairment assessment was in error for failing to take account of the worker’s uncorrected vision.

We have not found that only uncorrected vision is relevant to the assessment of impairment of earning capacity for Section 23(1). Many vision injuries are readily correctable in whole or in part with lenses. And, in many cases, vision injuries can be corrected more successfully than can other permanent injuries. Injuries that can be corrected more successfully will likely have less impact on impairment of earning capacity than injuries which cannot be corrected. However, a vision injury is still a disability even when corrected with lenses. It would not seem inconsistent with the *Act* to base the assessment for Section 23(1) on a combination of the worker’s uncorrected *and* corrected vision *both* before and after the compensable injury. That is, a permanent vision injury which is 100% correctable with lenses could receive a lower functional

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impairment assessment than the same injury which is not correctable with lenses. However, a worker who suffers a permanent loss of visual acuity (uncorrected) due to a work injury is not disentitled to an award under Section 23(1) just because the visual injury can be 100% corrected to the pre-injury state with lenses.

In the absence of a lawful policy and schedule as regards compensation for loss of vision, the panel could, on its own initiative, set some award in the particular case under consideration. One method would be to apply Appendix 4 to the worker's uncorrected vision. However, we do not consider that would be appropriate as the Impairment of Vision part of Appendix 4 was designed to apply to corrected vision. There is no other obvious way for us to set an award in this case. Therefore, we consider it advisable in the circumstances to direct this policy issue to the governors. Once the governors have developed a new policy and devised a corresponding schedule on loss of vision, the Disability Awards Department will need to give fresh consideration to the worker's permanent functional impairment and disability award under Section 23(1).

## **Conclusion**

The appeal is allowed as set out above. The worker's permanent partial disability award must take account of the uncorrected injury to his left eye. This matter is referred to the governors for appropriate policy amendments. The worker's permanent functional impairment will then be reassessed.

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

## Decision of the Appeal Division

**Number:** 93-1502  
**Date:** October 27, 1993  
**Panel:** Patrick L. Byrne  
**Subject:** Responsibility for Compliance

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*Note: The Occupational Safety and Health Division of the WCB is now known as the Prevention Division.*

This is an appeal of the August 2, 1993 decision of a hearing officer in the Variance and Sanction Review Section of the Occupational Safety and Health Division (O.S.H.) to impose a penalty assessment of \$4,000.00. The hearing officer determined that the employer had violated *Industrial Health and Safety Regulations* 8.50 and 8.54 on January 26 and January 27, 1993, and the circumstances warranted a Type I penalty assessment.

The employer appeals on an error of fact. The issue is whether a penalty assessment was appropriate in the circumstances.

### Background

On January 26 and January 27, 1993 a W.C.B. occupational safety officer (O.S.O.) inspected the employer's construction worksite. The O.S.O.'s observations are recorded in his memorandum dated February 4, 1993:

The evaporator area of the construction project was inspected on January 26, 1993. The inspection revealed that water had collected on the ground floor level and subsequently froze, creating hazardous conditions underfoot for any worker entering the area. The slipping and tripping hazard was exacerbated by the presence of a large number of cords, cables, hoses and the storage of scaffold components, especially in the breezeway area between the evaporators.

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Similar problems with housekeeping and the presence of slipping/tripping hazards were observed when the firm's work areas in the recovery building were inspected on January 27, 1993. As can be seen in photograph #3, the access route to the roof area of the recovery building was obstructed by a tangle of cables, hoses, cords, and the storage of materials, presenting a significant slipping and tripping [hazard] to workers. A worker had in fact sustained an ankle injury in the same area just prior to the time that photograph #3 was taken. Similar housekeeping deficiencies and the presence of slipping and tripping hazards were observed in the remainder of the firm's work areas inside the building, especially on the floors from elevation 77 down to and including the ground floor. Photographs #4 and #5 illustrate significant tripping/slipping hazards and obstruction of walkways along the east and west sides of the recovery boiler on elevation 37.

Similar violations were cited on previous Inspection Reports #— —, #— —, #— — and #— —.

A Warning Letter for similar violations was processed under Sanction Recommendation S.R. 921652.

The O.S.O. cited the employer for violations of Regulations 8.50 and 8.54 on Inspection Reports #— — and #— — and recommended that the employer receive a penalty assessment. By letter dated April 13, 1993 the employer was notified that the O.S.H. Division was considering a penalty assessment of \$4,000.00. The employer was invited to either attend a Divisional oral hearing or to provide written submissions. The employer attended a Divisional oral hearing on June 9, 1993. The hearing officer determined that the violations occurred and that the employer did not have a program of compliance. By letter dated August 20, 1993 the hearing officer imposed the penalty assessment.

## **Regulations**

The *Industrial Health and Safety Regulations* provide:

### **Slipping and tripping hazards**

**8.50.** Floors, platforms, stairs and walkways used by workers shall be maintained in a state of good repair and shall be kept free of tripping and slipping hazards.

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## Removal of waste materials

8.54. Refuse, spills and waste materials shall not be allowed to accumulate so as to constitute a hazard.

## The Appeal

The employer provided a written submission dated October 14, 1993. They argue:

Housekeeping/access/egress was a continual problem on this project and affected the entire work area. (D.Co.) was *the only subcontractor* to actually hire labourers (six) to do clean-up of wastes and materials. *This does not mean they were responsible for housekeeping on the entire site.* On the contrary, it only means they were the only subcontractor to seriously consider the safety hazards posed by poor housekeeping and to take action to minimize them. This does not in any way negate the safety responsibilities of other subcontractors on the site nor of (A.Co.) to perform their role as principle contractor.

...

To reiterate, (A.Co.) was the principle contractor and, from our perspective, did not fulfill their obligations: they did not actively enforce safety practices by either taking charge of the situation themselves or by forcing other subcontractors to do their own clean-up or pay (D.Co.) to do it. Without this support from (A.Co.), (D.Co.) was incorrectly singled out for this penalty action and should not have been fined. We are not the principle contractor, (A.Co.) was.

The employer points to Regulation 4.02(4) and contends that either the owner or the general contractor was responsible for maintaining housekeeping on the entire site.

The Regulations set out responsibilities for ensuring compliance:

### Responsibility of the Principal Contractor or Owner

**34.16(2)** When a construction project involves the services of one or more subcontractors or their workers, the principal contractor, or if there is no principal contractor, the owner, shall ensure that all industrial health and safety regulations are complied with in

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respect of the construction project, but nothing in this regulation shall relieve any subcontractor or his workers from compliance with the industrial health and safety regulations.

### **Contravention by persons subject to regulations**

**2.16(1)** Contravention of a regulation shall be deemed to be a contravention by the employer and shall make that employer liable for the penalty prescribed by the *Workers Compensation Act*, but nothing in this clause shall relieve the supervisor or worker.

### **Coordination of several employers' activities**

**4.02(4)** When the work force at a place of employment includes workers of more than one employer, each employer shall be responsible for the accident prevention program for his workers. Where the work areas of two or more employers adjoin or overlap, the principal contractor, or if there is no principal contractor, the owner shall ensure the continuing coordination of the industrial health and safety activities of the several employers.

On construction sites there is a hierarchy of responsibilities. In this case (D.Co.) contends that they were a subcontractor and not responsible for housekeeping on the entire site. Assuming that (D.Co.) was a subcontractor they would not have the responsibility for ensuring compliance or coordination under the Regulations for the entire site. However, as an employer they are responsible for ensuring compliance for their workers. In this case, there were slipping and tripping hazards in the work area of (D.Co.) They had an obligation to either correct the deficiencies or to prevent their workers from entering the hazardous area. Much of the employer's argument in this case centers on the responsibility of the general contractor and other subcontractors on site. (D.Co.) appears to have made some efforts to maintain the housekeeping on site and felt that other subcontractors and the general contractor were not cooperating. While I am somewhat sympathetic to the difficulties (D.Co.) encountered with respect to housekeeping on this site they had a responsibility to ensure their workers were not exposed to the tripping and slipping hazards. I am not convinced that (D.Co.) was prevented from complying with the Regulations. It is not clear from the file whether other subcontractors or the general contractor were cited for violations on this site, however, given the history of non-compliance with the housekeeping regulations by (D.Co.) it was reasonable for the O.S.H. Division to have imposed the penalty assessment.

Section 96(6) of the *Workers Compensation Act* allows employer appeals of penalty assessments on the grounds of error of fact, error of law, or a contravention of a published policy of the governors. The employer alleged an error of fact on the basis

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that they were not the only contractor responsible for the violations. As stated earlier, even if that were the case that would not relieve (D.Co.) from their responsibility to ensure compliance for their workers. The employer did not allege an error of law or a contravention of a published policy of the governors. I have reviewed the employer's file and find that there was no error of fact, error of law or a contravention of a published policy of the governors. In the circumstances of this case a penalty assessment was appropriate.

THEREFORE, THE EMPLOYER'S APPEAL IS DENIED.

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



## Decision of the Appeal Division

**Number:** 94-0019  
**Date:** January 17, 1994  
**Panel:** Patrick L. Byrne  
**Subject:** O.S.H. Penalty Regulation 60.38(b)

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S. Ltd appeals the July 27, 1993 decision of a hearing officer in the Variance and Sanction Review Section of the Occupational Safety and Health Division (now called the Prevention Division) to impose a penalty assessment of \$3,500.00. The hearing officer concluded that S. Ltd had violated *Industrial Health and Safety Regulation* 60.38(b) and the circumstances warranted a Type III penalty assessment. That Regulation provides:

Where practicable, snags shall be felled:

(b) before falling adjacent live trees.

The employer appeals on an error of law and an error of fact. The issues are whether there was a violation of the cited Regulation by S. Ltd and if there was whether a penalty assessment was appropriate in the circumstances and if a penalty was appropriate whether the quantum was excessive.

### Background

On November 2, 1992, a logging worksite at Oona River was inspected by a W.C.B. occupational safety officer (O.S.O.). The O.S.O. issued the following order to S. Ltd on Inspection Report #— — :

There is a snag that was not felled before adjacent trees were felled, in violation of I.H. & S. Reg. 60.38(b) all snags shall be felled before adjacent trees are felled.

The O.S.O. recommended that the employer receive a penalty assessment and on December 14, 1992 the employer was sent a letter proposing a penalty assessment of \$3,500.00. The employer was invited to either attend an oral hearing or to provide a written submission. The employer provided a submission dated December 17, 1992. The

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employer argued that the snag did not pose a hazard as it was difficult to fall and the loader operator was protected by a cab. Further, the falling was subcontracted to B.J. Ltd. and that S. Ltd has a good safety record.

The employer's submission was forwarded to the O.S.O. for comment. The O.S.O.'s response of January 14, 1993 was forwarded to the employer for comment. The employer did not respond. On July 27, 1993 a hearing officer imposed a penalty assessment of \$3,500.00. The hearing officer's "Summary and Conclusions" state:

It is not acceptable that after the snag had been felled and found to be sound inside that other snags are assumed to be in the same condition. Because the condition of snags cannot accurately be determined by a visual inspection, it is irresponsible to assume that some snags are sound inside and therefore can be left standing. In order not to place workers at risk, Governor's Policy 1.4.3(7) "failing to fall snags as required by the regulations", is considered a work practice having a high (*sic*) risk of death or serious injury associated with it. It was inappropriate for the employer to assume that certain snags could be left standing where others could be felled. The regulations do not allow this discretion for the reasons mentioned above.

## The Appeal

Counsel for the employer argues that S. Ltd was not the employer in this case as the falling was carried out by B.J. Ltd. No evidence was provided in support of that argument. Both B.J. Ltd. and S. Ltd were registered employers under the *Workers Compensation Act* at the time of the O.S.O.'s inspection. The employer's submission to the Prevention Division states:

My company is a family operation and communication between workers is excellent. My falling subcontractor is my younger brother's company B.J. Ltd.

It appears to me that it was well within the capability of S. Ltd to produce evidence to support their argument that the falling work had been subcontracted. The O.S.O. who conducted the inspection concluded that S. Ltd was the employer, after being accompanied on the inspection by the principal of S. Ltd. There is no indication that the matter of a subcontractor was raised at that time. The hearing officer's decision did not directly address the question of a subcontractor, raised by S. Ltd at the Prevention Division. However, given the hearing officer's decision in this case to impose a penalty on S. Ltd he seems to have rejected S. Ltd's argument. S. Ltd also did

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not provide any evidence to the hearing officer in support of their argument that there was a falling subcontractor on site. I am unable to conclude that the hearing officer erred in finding that S. Ltd was the employer in this case.

Counsel for the employer argues that Regulation 60.38(b) permits a discretion on the part of the faller whether to fall snags or not and therefore it was permissible to leave the snag as a matter of discretion. They rely on the phrase “where practicable” in the Regulation. The Glossary of Terms in the Regulations provide the following definition:

“practical” — capable of being done, practicable.

The *Concise Oxford Dictionary* defines the word “practicable” as “that can be done or used”; “possible in practice.” In my view, the phrase “where practicable” found in Regulation 60.38(b) does not allow a general discretion on the part of a faller to decide if a snag should be felled. The proper interpretation of the Regulation ought to be that all snags be felled, where it is capable of being done. It is only where snags cannot be felled are they permitted to be left standing. I see no evidence that the snags could not have been felled at the appropriate time. I find there was a violation of the cited Regulation.

Counsel for the employer argues:

In terms of the penalty assessment, it is respectfully submitted that under the circumstances the imposition of a \$3,500.00 penalty is excessive and amounts to an inappropriate exercise of discretion on the part of [the O.S.O] and reviewing officer. . . . Reference has been made to Governor’s policy 1.4.3(7). It is submitted that this policy does not have the legislative authority as it is neither included in the *Workers Compensation Act* nor in the *Industrial Health and Safety Regulations*. Therefore, reliance on this Policy when imposing penalties pursuant to the Regulations is inappropriate.

Governors’ policy 1.4.3 contained in the *Occupational Safety and Health Policy and Procedure Manual* provides:

The work practices listed below have a high risk of death, serious injury or industrial disease. Whenever an officer of the Board observes these work practices, the officer is required to not only issue remedial orders but also to consider recommending a penalty assessment. . . .

7. Failing to fall snags as required by the regulations.

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I agree that the policy does not have legislative authority. However, the policy was adopted by the governors pursuant to Section 82 of the *Workers Compensation Act* and a contravention of governors' policy is an enumerated ground of appeal under Section 96(6), the section relied on by the employer's counsel for the appeal in this case. While policies are permitted it is not permissible to blindly follow such policies. Each case must be considered on its merits. As a general rule failure to fall snags is considered a high risk. The employer in this case argues that the height of the snag was 22 feet, not 32 feet as the O.S.O. contended. The photographs on file showed that the trees had been felled adjacent to the snag. Whether the snag was 22 feet or 32 feet high is only relevant if work activities had taken place outside of that area. As falling had taken place adjacent to the snag the height difference is of no relevance in this case.

I agree with the employer's counsel that the operator of the hydraulic log loader was not at a high risk of injury. The O.S.O. and the employer agree on that point. The question is whether the faller was at a high *risk* of injury. At the Prevention Division the employer argued that the snag was difficult to fall thus there was no high risk. Policy 1.4.3 provides examples of high risk work situations. I view that policy as a presumption. That is, failing to fall snags is a high risk unless the evidence shows otherwise. I do not accept the employer's argument that as they found it difficult to fall the snag, it did not pose a high risk of injury. The employer did not know the condition of the snag when it was left standing, thus posing a *risk* of injury. The employer noted that the snag was sound and that the "top had no weight." The danger imposed by snags involves breaking off of higher portions of the snag as well as unsoundness at the base. A lack of weight at the top of a snag seems to indicate a lack of soundness rather than soundness. I do not accept that there is sufficient evidence to vary from governors' policy, in this case.

Finally, counsel argues that the quantum was excessive. I do not agree. There was a violation of the Regulations which posed a high risk of injury to the faller. In those circumstances, a penalty assessment of \$3,500.00 was appropriate and consistent with the published policy of the governors and I find no basis on which to vary from that policy. There was no error of fact, error of law or a contravention of a published policy of the governors that would allow relief of the penalty assessment.

THEREFORE, THE EMPLOYER'S APPEAL IS DENIED.

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

## Decision of the Appeal Division

**Number:** 93-1745  
**Date:** December 16, 1993  
**Panel:** P. Michael O'Brien, Walter N. Peain, James L. Tonn  
**Subject:** Commutation of Loss of Earnings Award

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The worker appeals a Review Board finding dated August 5, 1993, which denied his request for a commutation of his pension to assist in the purchase of a business. The issue is whether the Review Board and the manager of the Disability Awards Department erred in denying a commutation of the worker's pension.

### Background

On March 10, 1985, the worker suffered multiple injuries when the truck he was driving went off the road.

As a result of his injuries, on June 18, 1987 he was informed that his functional loss was assessed at 5% of total disability. As his loss of earnings was greater than his functional loss, he was granted a loss of earnings pension in the amount of \$544.75 per month effective August 13, 1987.

The worker requested a commutation of his pension in a letter to the Board dated January 24, 1992. In his letter he stated:

I would like at this time to make application for a "Commutation of Pension".

The purpose of this request is to enter a business.

Would you please forward the information required or arrange a meeting so that I may discuss this with your representative.

On February 27, 1992, the claims adjudicator responded and stated, in part:

A review of our records indicate that you are currently in receipt of a loss of earnings disability award which currently is \$696.11 per month.

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Board policy on commutations is that no commutation will be allowed in case of a pension calculated on a projected loss of earnings basis. Therefore, no commutation of your current disability award can be granted.

## Policy

The issue in this decision is the application of the policy of the governors contained in Section 45.20 of the *Rehabilitation Services and Claims Manual*. That policy deals with commutation of permanent disability pensions. A number of criteria are established, one of which states:

5. No commutation will be allowed in the case of a pension calculated on a projected loss of earnings basis.

In this case, the Board officer and the Review Board both declined to examine the merits of the commutation request on the grounds that they were barred from doing so by the policy noted above.

Several sections of the *Workers Compensation Act* are relevant to a consideration of this appeal.

Section 23 of the *Act* sets out two methods of determining pensions payable to workers suffering permanent partial disabilities.

Section 23(1) provides:

Where permanent partial disability results from the injury, the impairment of earning capacity shall be estimated from the nature and degree of the injury, . . . and shall be payable during the lifetime of the worker or in another manner the board determines.

Section 23(2) provides for the establishment of a rating schedule by the Board which may be used as a guide in determining compensation payable in permanent disability cases.

These two sections produce what is known as a physical impairment or functional loss method of calculation of permanent disability pensions.

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Section 23(3) of the *Act* sets out the Board's authority for calculating permanent partial disability pensions on what is commonly called the "loss of earnings" method. It says:

Where the board considers it more equitable, it may award compensation for permanent disability having regard to the difference between the average weekly earnings of the worker before the injury and the average amount which he is earning or is able to earn in some suitable occupation after the injury . . .

Section 35 of the *Act* sets out the Board's authority to determine the manner of payment of compensation and specifically provides for the Board's authority to commute pensions. It states, in part:

- (1) Payments of compensation shall be made periodically at the times and in the manner and form the board considers advisable . . .
- (2) The board may in its discretion
  - (a) commute all or part of the periodic payments due or payable to the worker to one or more lump sum payments, to be applied as directed by the board; and
  - (b) divide into periodic payments compensation payable in a lump sum.

Two other sections of the *Act* are relevant to a consideration of this matter.

Section 82 of the *Act* gives the authority to the Board of Governors to "approve and superintend the policies and direction of the board."

Section 99 of the *Act* ensures that individual cases shall receive individual attention by providing that "decision[s] shall be given according to the merits and justice of the case . . ."

The Board of Governors has approved the policy under #45.20 of the *Manual* referred to above.

In this case, the adjudicator interpreted the policy literally and simply declined to consider the worker's application for a commutation on its merits. That gives rise to the question as to whether the adjudicator was correct in so doing. The panel finds he was not.

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Although policy #45.20 says, on its face, that no commutations will be awarded in cases where pensions have been calculated on projected loss of earnings basis, that must be read in light of the general language of the policy.

Policy #45.20 identifies the statement quoted at the outset of this decision as a guideline. Specifically, the policy says that “the purpose of the *guidelines* set out below is to define those situations where it is in the worker’s long term interests to receive a commutation. . . .” It would, therefore, seem that even on the face of the policy read as a whole, the injunction against granting commutations for projected loss of earnings pensions can only be seen as a guideline and not as a directive.

Such a reading is consistent with published Decision 91-1085 of the Appeal Division (Fettering of Discretion, *Workers’ Compensation Reporter*, Vol. 8, p. 13). In that decision, the chief appeal commissioner reviewed the policy of the governors with respect to the *Assessment Manual*. She noted the general principle that administrative bodies must not fetter their discretion. Section 35 of the *Act* provides a discretionary power of the Board to commute all or a portion of permanent disability pensions. An application of the principle that an administrative body cannot fetter its discretion to this situation would lead to a conclusion that a strict or rigid interpretation of the policy of not allowing commutations on a projected loss of earnings pension would be a fettering of the Board’s discretion in these matters. On that basis alone, a rigid interpretation of the policy cannot be supported.

Further, Section 23(3) of the *Act* sets out the purpose for granting a loss of earnings pension as treating the individual worker in a more equitable fashion. If the result of granting a pension on a loss of earnings basis is to automatically deny a worker flexibility that he would otherwise have under Section 35 of the *Act*, that is, granting of a commutation, that is inconsistent with the notion of equity. On this ground also, it seems that a narrow reading of the policy of the governors on commutations and loss of earnings pensions would be inconsistent with the *Act*.

Section 35 of the *Act* makes no differentiation between “functional loss” and “loss of earnings” pensions. Therefore, there is no basis for the establishment of differing policies on commutations in this section of the *Act*.

There have been five decisions of the earlier commissioners reported in the *Workers’ Compensation Reporter Series* on the issue of commutations. The *Workers’ Compensation Reporter* decisions were adopted by the governors as policy. Those decisions are numbered 5, 67, 155, 272 and 382 (Volumes 1, 1, 2, 4, and 5, respectively). The first four of these decisions made no reference to loss of earnings pensions. That is understandable in that loss of earnings pensions were limited to spinal awards during the period those decisions were written. Decision No. 382, on the other hand, sets out

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the policy that no commutations would be allowed in the case of pension calculated on a projected loss of earnings basis. There is no explanation given for this policy in the body of the decision. Terrence G. Ison in *Workers' Compensation in Canada*, 2nd Edition, said that commutations are not generally allowed for benefits "assessed on an actual loss of earnings basis." Some hint as to his reasoning for that is contained under the heading "Grounds for Refusal." Here Ison says that commutations will not be allowed where "the disability is unsettled. . . ."

In the absence of any reasoning for this portion of Decision No. 382, we are left to speculate on its purpose. Loss of earnings pensions may have a lesser degree of certainty attached to them than functional loss pensions. That is, loss of earnings pensions may be more subject to variation, or, in Professor Ison's words, "unsettled," and therefore less amenable to commutation. Governors' policy at section 40.30 of the *Rehabilitation Services and Claims Manual* limits reviews of a permanent partial disability pension to an automatic review after two years and a further review at the discretion of the disability awards officer. The policy contemplates such reviews only where "set up" by the disability awards officer. In the absence of such a "set up," there is no provision for future review. The pension is then, for all intents and purposes, no different than a pension calculated on a "functional loss" basis.

Similarly, loss of earnings pensions may well represent a very significant portion of a worker's monthly income and therefore the loss of a portion of that through commutation may be seen to jeopardize the worker's future income to such an extent that commutation would not be granted.

There may also be other significant factors attached to the loss of earnings pension of any individual worker that tend to lead to a conclusion that the commutation should not be granted on that particular request.

In any event, it seems clear that the disability awards officer and, for that matter, the Review Board or the Appeal Division, cannot simply deny a commutation request on the basis that the worker is in receipt of a loss of earnings pension. To do so would be to unreasonably fetter the discretion that is inherent in the legislation and in the policy of the governors. The policy of the governors must, therefore, be read in a broad fashion to simply identify the nature of a loss of earnings pension as one of the factors to be considered in assessing requests for commutation.

The panel does not intend any of its examples given in the preceding paragraphs to suggest they are the only circumstances that may require consideration when commutation is requested of a loss of earnings pension. Each application must be considered on its own merits.

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## Reasons for Decision

The panel allows the appeal to the extent of referring the matter back to the Compensation Services Division for consideration of the worker's request in light of our discussion on the issue of commutation of loss of earnings pensions.

Neither the adjudicator nor the Review Board did any investigation with respect to the request for commutation. His request was denied on an improper reading of policy contained in section 45.20 of the *Rehabilitation Services and Claims Manual*. We have found that such a reading of the policy is not consistent with the intent of the *Act* nor with the balance of the policy.

The worker's pension has been reviewed and no change resulted from that review. His pension has not been "set up" for further review.

There is further policy in section 45 of the *Manual* with respect to commutation request for starting a business. Section 45.43 provides, in part, that:

In each case where a business start-up is contemplated for which a commutation has been requested, the Board officers undertaking the assessment of the matter will obtain an appraisal of the viability of the proposed business from the Federal Business Development Bank or some similar organization before a final decision on the commutation request is made.

No information has been gathered about the business the worker is interested in and no assessment has been made as to the impact of that business on his ongoing long-term rehabilitation nor his long-term financial position.

In summary, the panel allows the appeal, in part. The application for commutation should be considered on its merits.

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

# REPORTER

## Terms of Reference for the Employer Assessment Classification Committee

Date: February 4, 1994

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## Introduction

The Employer Assessment Classification System operates to determine the rate at which each employer must contribute toward maintaining the accident fund.

The Classification System is based on the principle that the cost of producing a product or providing a service includes the cost of injuries or diseases incurred by the workers producing the product or providing the service. The Classification System is therefore constructed on the basis of industrial undertaking rather than on an occupational or hazard basis. In other words, if a specific product were being manufactured, the classification would be the same regardless of the process used in its manufacture, or whether the manufacturing was done by the employer's workers or subcontracted out to another firm. An industrial classification therefore includes all occupations within the industry including office or clerical staff. One method of classifying firms would be to establish only one group in which all employers are classified, regardless of their industrial undertaking. In this way, every employer would pay the same assessment rate and all would share in the total cost of administering the *Act*. This is the pure collective liability theory of assessment; but assessing very high cost industries at the same rate as low cost industries is considered undesirable.

B.C., along with other jurisdictions in Canada, has chosen to create self-sufficient groups of employers on the basis of the industries in which they operate. In establishing these groups, the size is of critical importance. Since one serious injury can cost in excess of \$1 million, it is apparent that the size of the group must be large enough to provide for an adequate spread of the risk and stability in the assessment rate.

Not all industrial classifications are large enough to stand alone; they must be grouped together to provide an adequate insurance base. This grouping is done on the basis of industry similarity and an experienced cost similarity. Therefore, while there are separate classifications for very small industrial groups to provide statistical data, each industrial group does not necessarily stand alone but will be grouped with others based on industry and cost similarity, if necessary.

These two factors, classification by industry and forming a group large enough to be a valid insurance base, are the basis of the Classification System.

### **Current Organization and Function of the Employer Assessment Classification Committee**

The Employer Assessment Classification Committee currently functions as an ad hoc committee. It is composed of:

Director of Assessments

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Manager, Assessment Policy

Manager, Employer Assessment

Manager, Assessment Services

Manager, Systems Development and Operations Support

Manager, Assessment Training

Manager, Employer Registration

The committee meets as needed to review the appropriate classification of employers within the framework of the Employer Assessment Classification System. Decisions of the committee that may affect more than one employer are expressed in documents called Classification Committee Minutes (C.C.M.'s). C.C.M.'s are used by Assessment staff as reference documents to assist in determining the appropriate classifications of employers.

In some cases, the committee meets as a result of requests for Managers' or Directors' Reviews of classification issues under appeal.

### **Need for Terms of Reference**

The Executive Committee of the Board has requested that all standing committees within the Board be governed by Terms of Reference. With formalization, the Employer Assessment Classification Committee would be officially recognized.

The following report recommends Terms of Reference relative to the mission, structure, protocol and responsibilities of the Employer Assessment Classification Committee.

### **Mission, Goals and Principles**

#### **Mission Statement**

The mission of the Employer Assessment Classification Committee is to investigate, consider and otherwise review *precedent setting matters* and *individual employer disputes* pertaining to the appropriate classification of employers within the Employer Assessment Classification System. Precedent setting matters include, but are not limited to: defining new industries, re-defining existing industries and clarifying existing definitions of industries.

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## Goals

The overall goal of the committee is to make fair, reasonable, equitable and timely decisions on the interpretation and application of the Employer Assessment Classification System. The decisions of the committee will promote equity among employers while supporting the stability of the modified collective liability principle upon which the Employer Assessment Classification System is based.

In making its decisions, the committee will consider the general guidelines of determining industrial classification. These guidelines include, but are not limited to:

The overall purpose of the business or industry, based on industrial undertaking not occupational hazards;

The product or service is manufactured or delivered;

The materials, resources, equipment and processes used in the manufacture or service delivery;

The business' or industry's competitors and customers;

Appropriate Board of Governors' Assessment Operating Policy.

The secondary goal of the committee is to make recommendations relative to the structure and composition of the classes and subclasses identified within the Industrial Classification System.

The committee will also conduct an annual review of the *Classification and Rate List* for adoption by the Board of Governors as published policy.

## Structure

### Composition

The committee's mission statement and goals primarily support the orderly and equitable collection of employer assessments. The management of the Assessment Department possesses recognized expertise and experience in examining matters of employer classification. As such, the committee should consist primarily of Assessment management staff with direct operational responsibility. Representation from other divisions is important to provide a broader perspective and experience as well as facilitating a faster interdivisional appreciation of the issues.

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To facilitate timely, informed decisions, the standing membership of the Employer Assessment Classification Committee should specifically include:

the vice-president, Financial Services;

the director, Assessments;

the manager, Employer Assessment;

the manager, Assessment Services;

the manager, Registrations

the manager, Assessment Policy

a director or a senior manager designated by the vice-president, Prevention;

a director or a senior manager designated by the vice-president, Compensation Services.

All members should be appointed to the committee for a term of at least a year to ensure efficiency and continuity of decision making.

Chair: Vice-President, Financial Services

Secretary: Manager, Assessment Policy

## **Protocol**

The Classification Committee will set its own operating protocol consistent with the following operating principles.

1. Committee meetings should be convened by the secretary on an as-needed basis.
2. The Agenda and any supporting materials should be delivered to each member of the committee no later than three working days prior to the date of the meeting, where practical.
3. The preferred method of decision making should be through consensus.

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4. Submissions or referrals to the committee should follow a consistent format such as that presented in Appendix A.
  5. Since the committee may be making decisions which are individual in nature or precedent setting in nature, it will need to decide how the Decisions are to be published. For example, precedent setting issues could be distributed as an Appendix to the Policy Manual and may even request that certain Decisions be published in the *Reporter*. Decisions on individual firms may be edited for publication or have limited distribution. A suggested Decision format is presented in Appendix B.
  6. The effect of the Decisions should be to guide staff in classification decisions and to provide a basis for amending the *Classification and Rate List*.
  7. The committee should establish a quorum.
  8. The committee should determine the exclusion of a committee member in those cases where the committee member has previously made a decision on the case at hand.
  9. The vice-president, Finance and Information Services Division, will chair the meetings and determine a substitute for this role in the case of absence.

## **Referrals**

Referrals can be made to the Classification Committee from one of two sources.

1. By Assessment Department staff through the manager, Employer Assessment; manager, Assessment Services; director of Assessments; or vice-president, Finance and Information Services Division.
2. At the request of any person after a review by the director of Assessments has been completed and communicated to the firm.

## **Appeals**

Appeals to the decisions made by the Classification Committee will follow normal protocol for decisions made by a department.

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## Responsibilities

1. The committee will investigate, consider and otherwise review matters pertaining to the appropriate classification of employers within the Employer Assessment Classification System.
2. The committee will make recommendations regarding additions, deletions or significant changes to the class and subclass structure of the Employer Assessment Classification System.
3. The committee will review, amend, and submit annually, to the Board of Governors, a *Classification and Rate List* to be adopted as published policy.
4. Decisions and recommendations of the committee should:
  - be achieved through participation and consensus;
  - maintain the principle of modified collective liability within the Industrial Classification System;
  - be respectful of maintaining equity among employers in a competitive position;
  - be based on information that is as complete and detailed as is reasonably possible; and,
  - be expressed in plain language that is technically competent yet easily understood.
5. The committee should observe and be guided by:
  - the *Workers Compensation Act* of British Columbia and its regulations;
  - the governors' published policy.
6. The chair of the committee will be responsible for conducting meetings.
7. The secretary will be responsible for calling meetings, distributing submissions, preparing the decisions and ensuring published decisions of the committee conform to the accepted standard.

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## Appendix A

### Recommended Format for Submissions to the Employer Assessment Classification Committee

The recommended format is a single page, double-sided “form.” Side one is shown below.

#### WORKERS’ COMPENSATION BOARD OF BRITISH COLUMBIA

##### Employer Assessment Classification Committee Submission

Submission Sponsor

Introduction *(Describe the background, cause or source of the submission.)*

Issues *(State and explain each issue involved.)*

- 1.
- 2.
- 3.
- 4.
- 5.

References *(Indicate any legislative, policy, C.C.M., C.C.D., or other references.)*

*Attach any supporting documentation.*

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Side two of the form is shown here.

Alternatives *(Identify and explain all alternatives to resolve the issue(s).)*

- 1.
- 2.
- 3.

Recommendation *(Indicate your recommended solution to the issue(s).)*

Decision of the Committee

Action Plan *(Indicate what action/tasks are to be done, by whom and when.)*

*Attach any supporting documentation.*

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## Appendix B

### Recommended Format for Classification Committee Decisions

EMPLOYER ASSESSMENT CLASSIFICATION COMMITTEE DECISION (C.C.D.)		
DATE:	<i>Date C.C.D. was prepared or revised</i>	DECISION NUMBER:
SUBJECT:	<i>Title of Minute</i>	
REFERENCES:	<i>Titles and Item Numbers of any previous C.C.M.'s or C.C.D.'s referenced in this Decision</i>	
<b>Introduction</b>		
Background information which precipitated the Employer Assessment Classification Committee decision expressed in the C.C.D.		
<b>Issue</b>		
Description of the issue(s) involved.		
<b>Alternatives</b>		
Description of the alternative(s) considered.		
<b>Decision</b>		
Description of the decision of the committee.		
<b>Rationale</b>		
Explanation of the rationale for the decision.		
<b>Attendees</b>		
List names and positions of the committee members who attended the meeting.		

## Discussion of the Appeal Division

**Date:** November 25, 1993  
**Panel:** Connie Munro, Chief Appeal Commissioner  
**Subject:** Psychological Disabilities and Workplace Stress

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*The following is not a decision of the Appeal Division in a specific case.*

*It is a discussion by the chief appeal commissioner of the current statutory framework and governors' policies regarding psychological disabilities and workplace stress. It expands on the need for a comprehensive and coherent policy regarding the compensability of psychological conditions and refers this issue to the attention of the Board of Governors.*

There are currently several claims for psychological disabilities before the Appeal Division alleging that the causal factor is workplace stress. I am hearing some of these cases as a single member panel and others with representational appeal commissioners. As well, one case is before a panel of the Appeal Division chaired by the registrar.

Viewed together, these cases raise broad compensation questions involving mental (psychological/emotional) aspects of the work environment. Before looking at the facts of particular cases, it is critical to establish the legal foundations for the compensability of claims involving such aspects. This requires a detailed analysis of the *Workers Compensation Act* (herein the "Act") and of the relevant governors' policies.

Over the last decade, Canadian workers' compensation law has had to come to grips with compensation questions involving mental aspects of the work environment. Both in the American and Canadian workers' compensation contexts, claims involving those aspects have frequently been described as falling into one of three categories: "physical-mental," "mental-physical" and "mental-mental." These categories do not serve any analytical purpose but are merely descriptive.

Physical-mental claims are those where a physical injury or disability results in a mental (psychological/emotional) condition, for example, a limb amputation resulting in depression.

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Mental-physical claims are those where a mental stimulus results in a physical condition, for example, witnessing a hostage-taking incident resulting in a heart attack, or stress at work resulting in ulcers. The physical condition could, therefore, result from a single traumatic mental stimulus or from mental stimuli that operate gradually over time.

Mental-mental claims are those where a mental stimulus leads to a mental (psychological/emotional) condition, for example, witnessing an industrial accident resulting in anxiety attacks, or stress at work resulting in emotional exhaustion. The mental-mental claims may be further subdivided into those caused by some specific traumatic incident and those caused by stimuli operating gradually over time. So-called “chronic stress” claims fall into the latter category.

The term “stress” has an ambiguous meaning. *Dorland’s Illustrated Medical Dictionary 27th ed.* defines stress as:

the sum of the biological reactions to any adverse stimulus, physical, mental, or emotional, internal or external, that tends to disturb the organism’s homeostasis; should these compensating reactions be inadequate or inappropriate, they may lead to disorders. The term is also used to refer to the stimuli that elicit the reactions.

Therefore, according to this definition, “stress” is an individual’s reaction to external factors but may also refer to the external factors themselves. In the worker’s compensation context, the term “stress” is used to refer to both external events and an individual’s reaction to those events.

Some types of psychological claims are compensable in all Canadian jurisdictions. Physical-mental claims, where the psychological condition results from a physical injury or disability are compensable, if the original injury or disability is compensable. Both mental-physical and mental-mental claims arising out of a single traumatic incident are also generally compensable. However, that is not the case for mental-physical and mental-mental claims where the mental stimuli operate gradually over time, such as the stress of a particular job function.

In Canada, Saskatchewan has adopted a written policy allowing for acceptance of “chronic stress” claims. The Saskatchewan Board (Order 02/92) distinguishes between the following situations:

- a) where it is *improbable* that a work injury exists — this includes cases where the worker is employed in an occupation where “burnout” is not known to be a problem;

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- b) where it is *doubtful* that a work injury exists — this includes the cases where the worker is employed in an occupation which should not, but may, cause psychological injury;
  - c) where it is *probable* that a work injury exists — this includes “stressful occupation” where “burnout” is a known problem (e.g. teachers and air traffic controllers).

Although the Saskatchewan Board policy does not explicitly state so, one would surmise that the standard of proof will likely vary depending on the category in which a claim falls. A worker employed in an occupation where “burnout” is not known to be a problem would have to produce stronger evidence as to causation than a worker employed in a “stressful” occupation.

Neither Ontario nor Quebec has a written policy regarding “chronic stress” claims. But the appeal tribunals in both provinces have accepted “chronic stress” claims. Acceptance of these claims in Quebec has been, however, more qualified than in Ontario.

In Quebec, the “Commission D’Appel” has dealt with “chronic stress” claims on a case-by-case basis, although it has not yet taken a definite stand on whether chronic stress or burnout is a scientifically acceptable diagnosis. In examining “chronic stress” claims, the “Commission D’Appel” has typically asked itself whether the stress was the result of an “industrial accident”; the Quebec legislation defines an “industrial accident” as a “sudden and unforeseen event.” Notwithstanding this seemingly narrow definition, the “Commission D’Appel” has accepted claims where the alleged causal factors operated over a relatively long period of time. It has interpreted the phrase “sudden and unforeseen event” in a flexible manner.

In Ontario, some of the Appeals Tribunal’s early decisions dealing with “chronic stress” imposed a higher standard of proof than that required in other cases. They posed the question of whether the workplace stress was unusual or predominant — see, for instance, *Decision 918* (1988), 9 W.C.A.T.R. 48. More recent decisions, however, held that it would be unlawful to create a higher standard for some types of claims than others; it would amount to replacing the “true merits and justice” standard set out in the statute with specific standards for particular types of claims. These decisions have concluded that the applicable test should be whether the evidence is persuasive on a balance of probabilities that work contributed significantly to the disability in the particular worker. This is a general test applicable to all claims (see *Decision No. 1018/87*, 10 W.C.A.T.R. 82).

In British Columbia the governors’ policies in respect of claims are contained in the *Rehabilitation Services and Claims Manual* and the *Workers’ Compensation Reporter (Reporter)*. These policies do not use the categories “physical-mental,” “mental-physical”

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and “mental-mental.” Rather, in setting out a worker’s entitlement to compensation, the policies use the concept of “personal injury” and “industrial disease”; the *Act* provides that compensation is payable in respect of a “personal injury” or an “industrial disease.”

Section #31.00 of the *Manual* entitled “Psychological/Emotional Conditions” states:

The Board does accept claims for personal injury where the injury consists of a psychological condition or the psychological condition is a consequence of a physical injury. However, the Board has not recognized any psychological or emotional conditions as industrial diseases related to employment.

This section refers to Sections #22.33, #22.34 and #13.20 of the *Manual*. Section 22.33 entitled “Psychological Problems/Chronic Pain Problems” states:

Psychological problems arising from a physical or psychological injury are acceptable as compensable consequences of the injury. However, there must be evidence that the claimant is psychologically disabled. It cannot be assumed that such a disability exists simply because the claimant has unexplained subjective complaints or is having difficulty in psychologically or emotionally adjusting to any physical limitations resulting from the injury.

When the existence of a psychological disability is suspected, the worker’s claim file will normally be referred by a Board Medical Advisor or Rehabilitation Centre Physician to a Board Psychologist for evaluation. The Board Psychologist’s report will be returned to the Board Medical Advisor or Rehabilitation Centre Physician who will document their resulting recommendation on the claim file.

Because of the complexity of psychological problems in permanent disability claims, they will be referred, by the Adjudicator in the Disability Awards Section, to the Senior Disability Awards Medical Advisor for review by the Board’s Chief Psychologist. When an evaluation has been performed, the worker’s claim file will again be reviewed by the Board’s Chief Psychologist and the Senior Disability Awards Medical Advisor for confirmation of the level of functional impairment.

Since psychological impairment is not included in the Permanent Disability Evaluation Schedule, reference may be made to the American Medical Association Guide to the Evaluation of

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Permanent Impairment to determine the appropriate percentage of disability.

For the policy of the Board when a claim is submitted for psychological problems resulting directly from the claimant's employment without the occurrence of any physical trauma, reference should be made to #13.20 and #31.00.

Section 13.20 entitled "Psychological Impairment" defines "personal injury" to include psychological impairment in the following terms:

"Personal injury" includes psychological impairment as well as physical injury. A claim for traumatically induced psychological impairment could be accepted even if unaccompanied by any physical impairment. Psychological impairment has not been deemed to be an industrial disease. Conditions of this type however may be accepted if they are a sequela to an accepted personal injury or industrial disease.

Section 22.34 entitled "Alcoholism and Drug Dependency Problems" states in part:

Where it is claimed that an alcohol problem may have arisen out of and as a result of a compensable injury, the compensability of the problem is thoroughly investigated in the same manner as followed in investigating the relationship of other problems to an injury. Because of the psychological nature of the problem, this investigation would normally include a reference to a Board Psychologist. The decision on acceptability will however be made by the Claims Adjudicator. Any pre-existing alcohol problem can be treated in the same way as any other pre-existing condition. The Claims Adjudicator will have to decide whether the claimant's problems are simply a continuation of his previous problems or have been worsened by the injury.

....

The policy also has general application in the adjudication of drug dependency problems. . . .

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For the Board's policy toward applications for compensation for alcoholism as an industrial disease, reference should be made to #31.10.

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According to Section 31.10 entitled “Alcoholism”:

The Board has concluded that alcoholism should not be recognized as an industrial disease.

Section 31.20 entitled “Physical and Emotional Exhaustion” which concerns what is commonly known as “chronic stress” or “burnout” states that:

Physical and mental exhaustion is not recognized by the Board as an industrial disease. In a claim made for compensation for a state of physical and emotional exhaustion alleged to have been caused by the stress of work, it was concluded that there was insufficient evidence that employment, as opposed to other factors in the claimant’s life, were of causative significance in producing this condition.

Section 22.22 on suicide provides that:

. . . death benefits are payable if it is established that the suicide resulted from a compensable injury.

*Decision Nos. 1 to 423 of the Workers’ Compensation Reporter* are part of the governors’ policies. Two of these decisions directly bear upon the question of entitlement to compensation for psychological/emotional conditions. They are: *Decision No. 7, Re The Determination of Disability*, (1973) *Reporter*, Vol. 1, p. 19 and *Decision No. 102, Re Disablement Through Exhaustion*, (1975) *Reporter*, Vol. 2, p. 25. Another decision, *Decision No. 348, Re Alcoholism*, (1982) *Reporter*, Vol. 5, p. 127, touches upon the issue of stress as causing a compensable condition and provides a brief analysis of *Decision 102*.

*Decision No. 7* concerned a worker suffering from paranoia following a back injury. The worker became convinced that he was incapable of working. In light of the available evidence, the former commissioners were satisfied that he was not a malingerer and that his paranoia was a genuine psychological disability. The question arose, therefore, as to whether this disability was compensable. The former commissioners held that it was. They reasoned:

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 not ground for attaching a different meaning to the phrase in the present context.

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In the workmen's compensation cases in England, it was well established that psychological harm was compensable. Moreover compensation was payable for psychological harm resulting from the employment even in the absence of traumatic experience. In the United States, the same view has been taken. The same view has been taken in British Columbia and has been recognized, though not consistently followed, by this Board. Thus Commissioner G.M. Sloan, in his first report on workmen's compensation, concluded that:

. . . disabling neurosis, whether caused directly by the accident or 'occasioned', 'excited', 'precipitated', or 'contributed to' by the accident, is a personal injury by accident within the meaning of Section 7 of the *Act* and as such is compensable.

. . . .

It is, therefore, no answer to a claim for 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 the employment, it is compensable. Of course it is difficult to distinguish between a man who is suffering from a psychological impairment and one who is simply work-shy. But the difficulty of making that distinction cannot justify the refusal of compensation in a case where the psychological impairment exists.

In the present case, there was no psychological impairment from work prior to the work injury. To whatever extent the disablement from work may now be psychological, it still results, directly or indirectly, from the work injury. For these reasons, it is not necessary for us to determine exactly to what extent the disablement from work is physical and to what extent psychological. It makes no difference to the right to compensation.

*Decision No. 7* suggests that, in determining a worker's entitlement to compensation, any distinction between psychological harm and physical harm is unwarranted. However, the claim in this decision was of the "physical-mental" type; the alleged cause of the worker's psychological impairment was a physical work injury. In light of its facts, the implications of *Decision No. 7* are arguably less far-reaching than might be inferred from some of its reasoning.

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*Decision No. 102* concerned a claim for a state of physical and emotional exhaustion allegedly caused by the stress of work. The worker had worked for six years with children with behaviour disorders. The worker reported having had to adjust to several changes in treatment methods over the six years as well as to the expansion of the program. The worker's doctor diagnosed the worker's fatigue as "physical and emotional exhaustion due to the nature of . . . work"; the doctor prescribed approximately two months off work. The worker's employer supported the worker's application. The former commissioners denied the claim, assuming the facts as stated by the worker to be correct. The former commissioners' full reasoning in that case is important because it offers a general explanation as to why such claims should be denied:

A state of physical and emotional exhaustion caused by stress over time does not come within the popular understanding of the word "injury", nor is it an "injury" as that word has been construed and understood by the Board. The question, therefore, is whether this kind of disablement should be recognized by the Board as an industrial disease.

For several reasons, we do not feel that recognition of exhaustion as an industrial disease would be practicable, or sound policy.

Almost every occupation involves some physical and emotional demands. To prevent those demands from having a debilitating effect involves a range of judgments. There are the initial judgments by employers in selecting workers for jobs and by workers in selecting employment. Then there are judgments relating to workload, working conditions, working hours, and other factors relevant to stress. There are judgments relating to overtime, and to vacations. These matters often involve judgment both by employers and by workers, though to some extent they are regulated in labour legislation. It has not traditionally been regarded as a compensable disability when a worker is engaged for a position which he subsequently finds is too much for him, or becomes run down through working excessive overtime, or for other reasons finds that the demands of the job have a debilitating effect.

Many people cope with problems of this kind by changing their employment. Others cope by taking a vacation. In other cases, unions and employers cope with the problem by negotiation or arranging for time off in lieu of overtime. In other situations, where an employer recognizes that exceptional work demands

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have subjected a worker to a period of stress, sick leave may be arranged, or some other arrangement may be made by the employer for paid leave. But where an employer does not make such an arrangement, it would hardly seem fair that he should be able to pass on the costs of such leave to other employers who do.

Thirdly, claims of this kind would be extremely difficult to adjudicate. For example, how could the Board conclude that the emotional stress resulted from work without considering whether it resulted from other causes; and how could this be decided without going back perhaps as far as childhood history? The answers may be obvious in some cases, but they would not be in others. Moreover the answers could not be determined in many cases without engaging in a kind of enquiry that many people would resent. For example, how could the Board determine the emotional significance of stress at work without enquiring into the domestic affairs and other aspects of the private life of the worker concerned?

Even apart from problems of causation, there would be obvious difficulties in distinguishing between someone who is suffering from physical and emotional exhaustion, and someone who simply needs a vacation. This is in addition to the problem of justifying the distinction when made. To make these distinctions in cases where someone needs a period of rest would involve substantial administrative costs, both at the Board and elsewhere, to determine whether that rest period should be paid for out of the Accident Fund, or in other ways. Overall and in the long run, we think it in the public interest that this administrative cost should be avoided, and that rest periods of this kind should be provided for through provisions for vacations, time off for overtime worked, sick leave, or in other ways that are provided for by collective agreement, or by arrangements between employers and workers.

Section 31.20 of the *Manual* which is based on *Decision 102* states that physical and emotional exhaustion is not recognized by the Board as an industrial disease. *Decision 102* says more, namely, that a state of physical and emotional exhaustion caused by stress over time is neither recognized as an industrial disease nor as an “injury” as this concept is understood by the Board.

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Interestingly, *Decision No. 348* appears to qualify *Decision No. 102*. In discussing the possible consequences of stress, the prior commissioners stated in *Decision No. 348*:

. . . Clearly, if the evidence indicates that a particular condition does result from the employment, adjudication difficulties and cost are not valid grounds for not paying compensation. However, if the difficulty in adjudication arises from the fact that there is insufficient evidence that the employment, as opposed to the other factors in the claimant's life, caused the condition, then, equally clearly, this is a reasonable ground for not recognizing the condition as an industrial disease. We consider that this was the situation in *Decision No. 102*.

I note that neither the relevant published decisions nor the *Manual* uses the word "stress" to denote an individual's reaction to external events. Rather, the policies use the word "exhaustion" to denote the individual's reaction and the word "stress" to denote the alleged causal factors at work.

Viewed as a whole, the governors' policies are ambiguous — if not inconsistent. That is not surprising. In 1991, the governors adopted as policies a body of materials consisting of guidelines and decisions formulated at different times under a different organizational system. This body of materials was not initially conceived as a self-contained, comprehensive set of policies.

The most common reading of the governors' policies as regards claims involving mental (i.e. psychological/emotional) aspects of the work environment is as follows:

1. The Board does not recognize any form of psychological impairment as an industrial disease;
2. To be compensable the psychological impairment must come within the meaning of the word "personal injury" or, alternatively, be the consequence of a compensable physical injury or industrial disease.
3. The definition of "personal injury" includes psychological impairment but the psychological impairment must be traumatically-induced to be compensable. Therefore, the stress of work could not give rise to compensable psychological impairment.
4. A state of emotional and physical exhaustion due to the stress of work over time is neither compensable as an injury

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nor as an industrial disease. It is not compensable as an injury *because it is not traumatically-induced*; it is not compensable as an industrial disease because the Board does not recognize any psychological or emotional conditions as industrial diseases.

This reading of the policies confines *Decision No. 7* to its facts, namely, the cause of the worker's paranoia in that case was a compensable back injury. And it considers that the definition of personal injury in #13.20 of the *Manual* introduces a trauma requirement. More specifically, according to this reading, the purpose of the second sentence in that definition is to qualify the first sentence; so "personal injury" includes psychological impairment where the claim is for *traumatically-induced* psychological impairment. It is my understanding that this interpretation of the governors' policies is generally consistent with the Board's current practice.

In the 1984 *Rehabilitation Services and Claims Manual*, the definition of personal injury was very broad. It stated:

"Personal injury" includes psychological impairment as well as physical injury. (4) A claim for psychological impairment can be accepted even if unaccompanied by any physical impairment.

In 1986, the definition was changed to include the reference to traumatically-induced psychological impairment. The wording of the definition has remained unaltered since.

The foregoing interpretation of the governors' policies concerning psychological impairment and exhaustion caused by the stress of work is consistent with other governors' policies inasmuch as these policies would seem to bar the consideration of claims involving some physical disorders. For example, *Decision No. 99, (1975) Reporter, Vol. 2, p. 15* seems to rule out compensation for osteoarthritic degeneration of the spine on the grounds that there is no medical evidence that such degeneration is significantly advanced by any particular occupation. *Decision No. 263, (1977) Reporter, Vol. 3, p. 176* relied on the reasoning in *Decision No. 99* to deny a worker access to a Medical Review Panel; the worker suffered from a degenerative condition of the shoulder. In *Decision No. 263*, the prior commissioners specifically agreed that work may have contributed to the worker's problems with his shoulder but decided, nevertheless, to deny him access to a Medical Review Panel. The commissioners concurred with the views expressed in *Decision No. 99*, namely that:

. . . If a worker is suffering from a kind of bodily deterioration that affects the population at large, it is not compensable simply because of a possibility that his work may be one of the range of

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variables influencing the pace of that degeneration. For the disability to be compensable, it must appear that the work activity brought about a disability that would probably not otherwise have occurred [sic], or that the work activity significantly advanced the development of a disability that would otherwise probably not have occurred until later.

It is significant that the existence of a disease (or its diagnosis) was not in question in the above decisions. Rather, these decisions suggested that an implicit precondition for compensation is reasonably clear procedures to establish the cause of a disability. This line of reasoning may also be found in the leading decision concerning the compensability of a state of physical and emotional exhaustion caused by the stress of work, namely *Decision 102*. As well, from this perspective, the existence of an objective, work-connected trauma provides an intuitive guarantee that some alleged psychological impairment is employment-related. This has been referred to in a leading U.S. case in the following terms:

The danger of illusionary and fictional claims is as real and present in workers' compensation as it is in the law of torts. Where a mental injury occurs rapidly and can be readily traced to a specific event, as in McLaren [McLaren v. Webber Hospital Association, Me., 386 A. 2d. 734 (1978)], there is a sufficient badge of reliability to assuage the Court's apprehension. Where however, a mental illness develops gradually and is limited to no particular incident, the risk of groundless claims looms large indeed. *Townsend v. Maine Bureau of Public Safety*, 404 Atlantic Reporter, 2d series, 1014 (1979).

It is apparent, however, that the current Board practice is not the only possible reading of the governors' policies. Another interpretation might highlight the reasoning found in *Decision No. 7* namely that, for compensation purposes, a psychological injury is no different from a physical injury; the same compensation principles must apply, therefore, to both kinds of injury. According to this reading, the reference to traumatically-induced psychological impairment in #13.20 is not limiting. Rather, this reference merely illustrates that psychological impairment is compensable as an injury. According to such alternative reading, it might be concluded that:

1. The Board does not recognize any form of psychological impairment as an industrial disease;
2. To be compensable the psychological impairment must come within the meaning of the word "injury" or, alternatively, be the consequence of a compensable physical injury or industrial disease.

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3. The definition of “personal injury” includes psychological impairment, irrespective of whether it is traumatically-induced.
  4. A state of emotional and physical exhaustion due to the stress of work over time is neither compensable as an injury nor as an industrial disease. It is not compensable as an injury *because it does not constitute psychological impairment*; it is not compensable as an industrial disease because the Board does not recognize any form of psychological or emotional condition as an industrial disease.

Finally, a third possible reading of the policies might not only downplay their reference to a trauma in Section 13.20 of the *Manual* but also consider that, strictly speaking, the policies bar neither the consideration of psychological impairment as an industrial disease in an individual case nor that of a state of physical and emotional exhaustion.

In the case of so-called “physical-mental” claims, according to the policies and no matter which of the above interpretations is adopted, entitlement to compensation does not depend on how long it takes for the physical cause to induce the psychological harm. This harm is compensable if the underlying physical cause is compensable. It does not matter whether the physical cause itself developed gradually or whether the resulting psychological harm developed gradually.

In the case of so-called “mental-mental” claims, under the first interpretation, the policies introduce a requirement (in the form of a trauma) that there be some definitive time when the causal mental stimulus operated. In other words, the mental stimulus would have to be a clearly ascertainable shock (or possibly a series of shocks). The word “trauma” commonly means a physical wound or injury, a physical shock following a physical wound or injury, or an emotional shock following a stressful event. So, for example, a policeman who suffers psychological depression as a result of witnessing a shooting accident would be entitled to compensation. However, a policeman who does not witness a shooting yet experiences anxiety attacks as a result of working in a very difficult and dangerous neighbourhood, would not be entitled to compensation. Neither of the latter two interpretations of the governors’ policy would make that distinction.

Except for Section 31.20 of the *Manual* and *Decision No. 102* which provide that physical exhaustion resulting from the stress of work is non-compensable, the governors’ published policies do not explicitly deal with so-called “mental-physical” claims. The *Manual* implies that claims for physical injuries or disabilities induced by a mental/emotional trauma are compensable since it recognizes psychological impairment induced by such trauma as compensable; therefore a heart attack suffered as a result of witnessing a shooting at work would be compensable. The implications of the *Manual*

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for claims involving physical injuries or disabilities resulting from stress over time are, however, less clear. However, some “mental-physical” claims have been held to be compensable. One case involved a claim for a cerebral vascular accident. Under the prior commissioners, a Board of Review decision allowing this claim had been the subject of the referral mechanism whereby an adjudicator dissatisfied with the disposition of a case by the Board of Review would refer the matter to the then secretary to the Board, N.C. Attewell. Mr. Attewell would review the facts of the case and relevant Board policy and determine whether to refer the matter to the commissioners. With respect to the acceptance of the claim for cerebral vascular accident Mr. Attewell rejected the referral, stating that a physical injury such as cerebral vascular injury precipitated by work stresses is compensable. Similarly, in *Decision 91-0818*, (1991) *Reporter*, Vol. 7, p. 223, the Appeal Division held that, providing the causal link can be established, suicide resulting from work stresses is compensable.

In addition to suffering from ambiguity, the governors’ policies regarding claims involving mental aspects of the work environment are incomplete. They do not directly address the question of eligibility for compensation in the case of mental-physical claims. They do not define “psychological impairment” although they use that term. Nor do they indicate explicitly whether physical and emotional exhaustion qualify as psychological impairment. While the policies state that physical and emotional exhaustion is neither an injury nor an industrial disease, a question arises as to whether the policies intend to go as far as to preclude the consideration of physical and emotional exhaustion as an industrial disease in individual cases.

Where the governors’ policies are ambiguous or incomplete and where the statutory terms tolerate a range of interpretations, it may be proper for the Appeal Division to refer a policy matter to the governors for clarification and, if necessary, to postpone any decision-making on an appeal until the matter has been considered by the governors. Such a referral would preserve the separation provided by the *Act* between the policy-making function of the governors and the judicial function of the Appeal Division. In *Decision No. 1, Appeal Division Administration, Practice and Procedure*, *Reporter*, Vol. 7, p. 7 at 10, the governors stated:

Where the Chief Appeal Commissioner considers it necessary that the Governors address a policy issue prior to a decision being made in one or more appeals, the Chief Appeal Commissioner has the authority to bring that policy issue before the Governors for consideration and to postpone the Appeal Division’s decision in the appeal until the policy issue has been addressed by the Governors.

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Although *Decision No. 1* specifically contemplates a referral prior to a decision being made, I do not read this decision as precluding the possibility of a referral of broad policy issues independently of a particular claim. It would be consistent with the spirit of *Decision No. 1* to refer a broad policy issue to the governors once it becomes clear that the adjudicative system requires the governors' guidance on such issue.

In considering the possibility of a referral to the governors, the current policies must be reviewed in light of the *Act*. Such a referral would be inappropriate if the policies found no support in the terms of the statute. In the event of a conflict between the *Act* and the published policy of the governors, the *Act* is clearly paramount.

If the terms of the *Act* were always so clear as to be amenable to only one possible interpretation, the Appeal Division would only have to ensure that the governors' policies correspond to that interpretation. But in reality there is often latitude in how statutory terms may be interpreted and, therefore, more than one interpretation may be viable. Even where the legislative intent is obvious, interpreting the terms of the *Act* may lead to more than one conclusion as to how exactly the *Act* gives effect to this intent.

The *Act* embodies a historic trade-off. It provides workers with benefits but it also bars workers from suing their employers in those situations where it entitles them to benefits. Historically, the language of the provision barring workers from suing their employers has reflected the language of the entitlement provisions. The language of the statutory bar indicates, therefore, what comes within the purview of the *Act*.

In 1916, when the legislation was first enacted, it provided compensation for "personal injury *by accident* arising out of and in the course of the employment (emphasis added)" as well as for the "industrial diseases" listed in the Schedule or regulations. It did *not* define the words "personal injury." It specified that disablement resulting from an industrial disease shall be treated as the happening of an accident. It defined "accident" to include fortuitous events caused by physical or natural causes. Consequently, the legislation barred workers from suing their employers in respect of "any *accident* which happens to him arising out of and in the course of his employment (emphasis added)."

There was an amendment to the definition of "industrial disease" in 1959. This amendment broadened the definition so as to include, in addition to the industrial diseases listed in the Schedule and regulations, diseases "otherwise" recognized by the Board.

The words "by accident" were deleted from the basic entitlement provision in 1968. The coverage formula in respect of personal injury became "personal injury arising out of and in the course of the employment." The words "personal injury" remained undefined.

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The deletion of the words “by accident” goes back to the 1966 Tysoe Commission Report. Mr. Justice Tysoe specifically recommended the deletion of these words from the entitlement provision because they had become apparently redundant. The courts had so liberalized the interpretation of the words “by accident” that the entitlement test had become whether the injury was, in Mr. Justice Tysoe’s words, “truly work-caused” — that is, whether it arose out of and in the course of employment. In recommending adoption of the formula “personal injury arising out of and in the course of the employment,” Mr. Justice Tysoe explained:

. . . Labour must understand that, under this formula, to be compensable an injury or disability must result from work the man is employed to do and is doing or, in other words, must be work-caused. The question will still be “was this man’s injury caused by his work or by something else, as, for instance, the operation of natural causes such as increasing age, congenital or insidious disease, or the natural progression of some constitutional defect?”. If my recommendation is implemented, the problem cases, of which the back cases form the greatest number, will still remain cases of some difficulty. The test applicable to them will be the same as it has always been—namely, that of work connection.

To eliminate the “by accident” requirement is not to open the floodgates as is sometimes alleged. The test of medical and legal causation remains the bulwark against improper claims.

p. 187

Together with the amendment deleting the words “by accident” from the entitlement provision, there was an amendment to the statutory bar; the word “accident” was deleted from that provision too. The statutory bar became applicable “in respect of any personal injury, disablement or death arising out of and in the course of employment.”

Today’s statutory bar (Section 10(1)) is still “in respect of any personal injury, disablement or death arising out of and in the course of employment.” The language of this provision and that of the provision requiring the Board to certify to the courts the status of parties to a legal action (Section 11) suggest that the *Act* uses the phrase “disablement arising out of and in the course of employment” and “disability caused by industrial disease” interchangeably.

The legislative history of key concepts in the *Act* shows an evolution in one of its purposes: whereas at the outset the legislation specifically limited entitlement to situations in which a disability resulted either from an accident or from the industrial

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diseases listed in the Schedule and regulations, the *Act* now appears to entitle workers to compensation for any “truly work-caused” disability. The *Act* does not define “disability,” although it uses the concept in many provisions. Some provisions refer to a “disability” as it results from a personal injury or an industrial disease, other provisions refer to “injuries and disabilities” (Section 58(2)). In one provision, the *Act* uses neither the concept of a “disability” nor that of an “industrial disease” and refers instead to “injuries and ailments” (Section 59(1)).

Because the basic entitlement provisions in the *Act* use the concepts of “personal injury” and “industrial disease,” it may be argued that, to be compensable, a disability must result from a “personal injury” or an “industrial disease” within the meaning of the *Act*. This view seemingly underlies the denial of the compensability of emotional exhaustion on the basis that it is neither a “personal injury” nor an “industrial disease.” But the *Act* does not define “personal injury” or “injury.” Moreover, its definition of “industrial disease” is open-ended; it allows the Board to declare a disease an industrial disease in several different ways without imposing upon the Board a definition of “disease.” Therefore, to say that, according to the *Act*, a disability must result from a “personal injury” or an “industrial disease” leaves the category of compensable disabilities open-ended.

### **“Personal injury”**

Subsection 5(1) of the *Act* sets out the entitlement formula in respect of a personal injury. It states:

5. (1) Where, in an industry within the scope of this Part, personal injury or death arising out of and in the course of the employment is caused to a worker, compensation as provided by this Part shall be paid by the board out of the accident fund.

Because it does not prescribe any limits upon the interpretation of the words “personal injury” and “injury,” an argument may be made that the rules of statutory interpretation require these words in remedial legislation to be interpreted liberally and in a manner consistent with the function of the *Act*.

*Black’s Law Dictionary* offers a broad definition of “personal injury” in the workers’ compensation context, namely:

. . . any harm or damage to the health of an employee, however caused, whether by accident, disease, or otherwise, which arises in the course of and out of his employment, and incapacitates him in whole or in part. The occurrence of disability or impairment. Such includes the aggravation of a preexisting injury.

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*Larson's Workmen's Compensation Law* also offers a broad definition of "personal injury," namely:

. . . any harmful change in the body. It need not involve physical trauma, but may include such injuries as disease, sunstroke, nervous collapse, traumatic neurosis, hysterical paralysis, and neurasthenia.

Other Canadian jurisdictions with entitlement provisions referring merely to "personal injury" (or "injury") as opposed to "personal injury by accident" or ("injury by accident") usually define "personal injury" (or "injury") to include disablement arising out of and in the course of employment (see, for example, the Saskatchewan legislation). In jurisdictions where the entitlement provisions refer to "personal injury by accident" (or "injury by accident"), the definition of accident usually includes disablement arising out of and in the course of employment (see, for example, the Ontario legislation).

The only statutory definition of "injury" in British Columbia is found in the *Criminal Injury Compensation Act*, R.S.B.C. 1979. Section 1 of this legislation states:

"injury" and "injured" means bodily harm, and includes mental and nervous shock and pregnancy;

There is some similarity between this definition and the definition of "personal injury" in Section #13.20 of the *Manual* which includes physical injury and traumatically-induced psychological impairment. But it is worth noting that, whereas the *Criminal Injury Compensation Act* specifically defines "injury," the *Act* does not. This may suggest that the *Act* contemplates a broader meaning when it uses the term "injury."

The term "injury" has received judicial consideration. In *Parrish v. Moore et al*, (1980) 109 D.L.R. (3d) 687, the B.C. Supreme Court considered an action for damages for personal injuries. Callaghan J. held that personal injuries include nervous disorders or conditions such as psychoneurosis anxiety. The plaintiff suffered from anxiety as a result of a shipping accident. This decision implies, therefore, that the concept of "injury" includes psychological conditions that are traumatically-induced which is what Section 13.20 of the *Manual* states.

The manner in which the legislation uses the concept of "personal injury" indicates that it is broad enough to cover mental conditions. It also indicates that there are no grounds to distinguish between injuries depending on whether they result from some physical impact or, alternatively, from some psychological/emotional stimulus. For compensation purposes, a heart attack that results from falling off a ladder is the same as a heart attack that results from witnessing a fall. The basic coverage formula for

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“personal injury” simply refers to injuries “arising out of and in the course of employment.” Finally, the legislation does not distinguish between injuries that result from a relatively sudden trauma and injuries that develop gradually over time. Hence, there is no difference between a back injury resulting from a single lifting accident and a back injury occurring as a result of the cumulative effect of work activities. By the same token, there is no difference between a delusional disorder associated with one shocking incident and a gradually developing delusional disorder.

### “Industrial disease”

The governors’ published policies state that the *Act* authorizes the Board to recognize industrial diseases in individual cases. A statutory discretion must be exercised. The courts have held on numerous occasions that an administrative agency must not fetter its discretion by adhering too strictly to guidelines, rules and policies formulated long before an individual case comes to light. Hence, if the *Act* confers upon the Board a discretionary power to recognize industrial diseases in individual cases, an absolute bar to the recognition of a disease as an industrial disease — be it physical *or* psychological — would seem to be invalid. The existence of a statutory discretion enabling the Board to recognize industrial diseases in individual cases might, therefore, have implications for the compensability of psychological conditions including emotional exhaustion.

The definition of “industrial disease” and Section 6(4) govern the Board’s recognition of industrial diseases. According to the definition section of the *Act*:

“industrial disease” means any disease mentioned in Schedule B, and any other disease which the board, by regulation of general application or by order dealing with a specific case, may designate or recognize as an industrial disease . . .

According to Section 6(4) of the *Act*:

(4) (a) The board may, on the terms and conditions and with the limitations the board deems adequate and proper, add to or delete from Schedule B a disease which the board deems to be an industrial disease, and may in like manner add to or delete from the said Schedule a process or industry.

(b) Notwithstanding paragraph (a), the board may designate or recognize a disease as being a disease peculiar to or characteristic of a particular process, trade or occupation on the terms and conditions and with the limitations the board deems adequate and proper.

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In *Decision No. 19, Industrial Diseases Standing Committee Charter, Workers' Compensation Board of British Columbia, (1992) Reporter, Vol. 8, p. 135*, the governors have characterized industrial disease determinations with respect to individual claims as "an administrative function in accordance with Section 25.24 of the *Rehabilitation Services and Claims Manual*." Section 25.24 of the *Manual*, however, does not use those terms in describing the process whereby the Board recognizes industrial diseases in individual cases. Therefore, I question whether the word "administrative" as used in *Decision No. 19* is intended in a legal or technical sense. Also it is noted that *Decision No. 19* has not been designated as governors' policy.

The governors' policies contain inconsistent interpretations as to the source of the Board's power to recognize industrial diseases in individual cases. At the outset, therefore, it would be helpful to determine which of the interpretations found in the policies is most consistent with the language and intent of the *Act*.

*Decision No. 3* of the governors provides that:

In the event of internal conflict in published policy of the Governors, the interpretation of the policy most consistent with the intention of the *Act* or Regulations is to be applied.

Section 25.20 of the *Manual* states:

There are *four* ways by which the Board may recognize a disease to be an industrial disease. It may do so by including the disease in Schedule B in reference to a particular process or industry. It may designate or recognize a disease to be peculiar or characteristic of a particular process, trade or occupation, but without including it in Schedule B. It may declare a disease to be an industrial disease by regulation, or it may recognize a disease to be an industrial disease in an individual case, where the facts warrant it.

(emphasis added)

This interpretation suggests that both the Board's power to recognize industrial diseases in individual cases and its power to designate industrial diseases by regulation reside in the definition section. It also suggests that Sections 6(4)(a) and (b) provide additional powers to the Board.

This interpretation has particular implications. If the Board's power to designate industrial diseases by regulation and its power to recognize them in individual cases reside in the definition section, the Board need not designate these diseases or recognize

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them with reference to “a particular process, trade or occupation.” This phrase does not appear in the definition section. It only appears in Section 6(4)(b).

The interpretation found in Section 25.20 suffers from an obvious weakness. That interpretation would require the definition of “industrial disease” in Section 1 to be inclusive. The definition is exhaustive. It begins with the words “‘industrial disease’ means. . . .” Use of the word “means” indicates that the definition is intended to cover *all* the means by which industrial diseases may be recognized in accordance with the *Act*, including those described under Sections 6(4)(a) and (b). From this perspective, the Board’s exercise of the discretionary powers granted by Sections 6(4)(a) and (b) must fall under the definition of “industrial disease.”

The connection between the definition of “industrial disease” and Section 6(4)(a) is clear. The definition covers the industrial diseases listed in Schedule B. Workers suffering from those diseases enjoy the benefit of a statutory presumption. Subsection 6(4)(a) specifically permits the Board to add (or delete) industrial diseases to (from) Schedule B of the *Act*.

The connection between the definition of “industrial disease” and Section 6(4)(b) dates from 1959 when the definition of “industrial disease” was broadened and the provision was enacted. Prior to 1959, the definition stated:

“industrial disease” shall mean any of the diseases mentioned in the Schedule, and any other disease which by the regulations is added as an industrial disease.

Following the 1959 amendment to the definition, “industrial disease” would mean:

any of the diseases mentioned in the Schedule, and any other disease which the Board by regulation or *otherwise* may designate or recognize as an industrial disease.

(emphasis added)

Mr. Justice Tysoe’s *1966 Report on the W.C.B.* discussed the changes made in 1959, explaining the enactment of Section 6(4)(b) [then Section 8(3)(c)] as follows:

. . . The Board found that it was running into cases of diseases which, in the circumstances existing in individual cases, ought, in justice to the workmen who had contracted them, to be regarded as having been caused by the nature of the employment and so be compensable. The Board could not establish sufficient incidents so as to justify the application of the

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presumption provided in subsection (2) of section 8 and hence scheduling under subsection (3) (a) of section 4; yet it considered that a particular claim should be allowed and that a particular workman ought to receive compensation. It drew the attention of the Government to this situation and, as a result, subsection (3) (c) of section 8 was enacted in 1959. Mr. Eades gave an example as follows:—

MR. EADES: I think we allowed a case of measles, not very long ago, in a hospital employee. Well now, we wouldn't schedule measles among hospital employees as an occupational disease. In that particular case there had been contact within the incubation period, and so we were satisfied that that should be allowed, but there is — I mean, measles is a common contagious disease.

pp. 228–29

It appears then that Section 6(4)(b) was intended to allow the Board to focus on the merits of individual cases where workers contract employment-related diseases that are not included in Schedule B. The 1959 broadening of the definition of “industrial disease” was consistent with that intent.

In a 1983 amendment to the definition of “industrial disease” (the most recent, after the 1959 amendment) as part of a general clarification of the Board’s regulation-making powers, the words “by regulation of general application or by order dealing with a specific case” replaced the phrase “by regulation or otherwise” (see the *Regulations Act*, S.B.C. 1983 c. 31, s. 21). This most recent amendment is also consistent with the apparent intent behind Section 6(4)(b) — namely, to allow the Board to recognize industrial diseases in individual cases.

In light of the above considerations, I have concluded that the interpretation found in Section #25.20 of the *Manual* is seriously flawed. Both the wording of the definition of “industrial disease” and the history behind Section 6(4)(b) indicate that this provision *must* be read with reference to the definition and is, therefore, the source of the Board’s power to recognize an industrial disease in an individual case.

*Decision No. 238, (1977) Reporter, Vol. 3, p. 104*, also part of the governors’ published policies, is based on the premise that the *Act* provides only *three* ways in which the Board may recognize an industrial disease: through additions to Schedule B, by regulation or under Section 6(4)(b). According to this decision, while the source of the Board’s power to designate an industrial disease by regulation resides in the definition section, the source of its power to recognize an industrial disease in an individual case resides in Section 6(4)(b).

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The interpretation found in *Decision No. 238* implies that the Board may designate an industrial disease by regulation without reference to any process, trade or occupation; however, the recognition of an industrial disease by order dealing with a specific case would have to be with reference to a “particular process, trade or occupation” as specified under Section 6(4)(b).

I note here *Decision No. 231, Re Osteoarthritis of the First Carpo-Metacarpal Joint*, (1977) *Reporter*, Vol. 3, p. 87 in which the prior commissioners invoked Section 7(5)(b) [now Section 6(4)(b)] in order to recognize osteoarthritis of the first carpo-metacarpal joint of both thumbs as being a disease “peculiar to or characteristic of the claimant’s occupation as a physiotherapist”; they qualified this recognition by specifying that “recognition of this disease is limited to factual situations which are substantially the same as this claim.” It appears, therefore, that the prior commissioners recognized an industrial disease with reference to “a particular process, trade or occupation” in dealing with a specific case but they also tied this recognition to the circumstances of that case. This amounts to recognizing an industrial disease for the purpose of an individual claim under Section 6(4)(b) which is consistent with the interpretation found in *Decision No. 238*.

Inasmuch as the interpretation found in *Decision No. 238* traces the Board’s powers to recognize industrial diseases in individual cases to Section 6(4)(b) of the *Act*, it reflects the legislative history of this provision. The question arises, however, as to whether the power to designate an industrial disease by regulation may validly be traced to the definition section. Although it is uncommon for a statute to confer powers in a definition, a B.C. Court of Appeal decision supports the proposition that a definition may be the source of a substantive power [see *A/G of B.C. vs Craig Prov. J.* (1987), 13 B.C.L.R. (2d) 227 (B.C.C.A.)]. Use of the word “may” in the definition is significant. Section 29 of the B.C. *Interpretation Act* defines the word “may” as “permissive and empowering.” The definition of “industrial disease” in the *Act* refers to any diseases “which the board, by regulation of general application or by order dealing with a specific case, *may* designate or recognize as an industrial disease (emphasis added).”

It is also noteworthy that Section 1 of the *Regulations Act* now defines “regulation” to include:

Regulations or rules under the *Workers Compensation Act* made by the Workers Compensation Board

- (a) designating or recognizing a disease as an industrial disease under the definition of “industrial disease” in section 1, . . .

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There seems to be, therefore, some foundation for concluding that the Board's power to designate an industrial disease by regulation is separate from its power to recognize an industrial disease under Section 6(4)(b) and flows from the definition section. Consequently, the Board need not refer to "a particular process, trade or occupation" in exercising this power. In *Decision No. 93*, (1975) *Reporter*, Vol. 2, p. 4, this interpretation prevailed. The Board promulgated a regulation recognizing a number of diseases as industrial diseases. Included in the list of diseases thus recognized were chicken pox, food poisoning, infectious hepatitis, meningitis, mononucleosis, etc. without any reference to "a particular process, trade or occupation." The explanatory note appended to this list of diseases states in part:

It is important to distinguish between recognition of an industrial disease under Section 2, and the addition of an industrial disease to Schedule B. pursuant to Section 7(5).

Where it appears to the Board that a disease is more likely to occur in a particular process or industry than elsewhere, it may be added to Schedule B. The consequence of that for claims decisions is that no evidence is then required initially on each claim to establish that the disease was due to the nature of that employment. It is deemed to have been due to the nature of employment indicated in the Schedule unless the contrary is proved.

Where it appears to the Board that a disease is sometimes due to the nature of an employment covered by the *Act*, but it does not appear that the disease is more likely to occur in a particular industry or process than elsewhere, the Board may designate or recognize the disease under Section 2. The consequence of this for claims purposes is that a disablement resulting from the disease is compensable, but only if it appears from evidence in the particular case that the disease is due to the nature of any employment in which the worker was employed.

The question may be raised, however, as to whether such a recognition is of any value. The *Act* provides the Board with a power to recognize industrial diseases in individual cases. As indicated, the governors' policies may not fetter the Board's discretion to do so by erecting an absolute bar to the recognition of a disease as an industrial disease. In light of that and of the fact that cases still have to be adjudicated on their own merits, from a legal perspective, a regulation such as the one promulgated in *Decision No. 93* would appear to be superfluous.

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Although not in the policies, there is yet another possible interpretation of the scope of the Board's power to recognize an industrial disease under the *Act*. The starting point of that interpretation is that the definition section may not confer upon the Board any additional powers to those specified in Sections 6(4)(a) and (b). Rather, Sections 6(4)(a) and (b) could be read to contain the full range of the Board's powers to recognize an industrial disease. Subsection 6(4)(a) empowers the Board to add a disease to Schedule B; Section 6(4)(b) empowers the Board to designate a disease as an industrial disease by regulation *or* recognize it by order dealing with a specific case. This interpretation implies that the designation of an industrial disease by regulation or its recognition "by order dealing with a specific case" must be with reference to "a particular process, trade or occupation" since both fall under Section 6(4)(b).

A similarity between the wording of the definition of "industrial disease" and that of Section 6(4)(b) suggests that the designation of an industrial disease by regulation may well fall under that provision. The definition refers to diseases "which the board, by regulation of general application or by order dealing with a specific case, *may designate or recognize* as an industrial disease . . . (emphasis added)." Similarly, Section 6(4)(b) provides that the "board *may designate or recognize* a disease as being a disease peculiar to or characteristic of a particular process . . . (emphasis added)." Thus, the *Act* uses two different words in describing how the Board may declare an industrial disease, namely, "designate" and "recognize." Grammatically, the definition of "industrial disease" may be read as using the word "designate" in relation to "regulation(s) of general application" and the word "recognize" in relation to "order(s) dealing with a specific case." That reading makes sense inasmuch as the word "designate" connotes making something public while the word "recognize" suggests accepting something. From this perspective, the word "designate" in Section 6(4)(b) relates to "regulations(s) of general application"; the word "recognize" relates to "order(s) dealing with a specific case."

A particular model flows from interpreting Section 6(4)(b) as containing *all* of the Board's powers to designate or recognize industrial diseases other than through additions to Schedule B. According to this model, the lowest level of recognition is in the individual case where, although the Board recognizes a disease as "peculiar to or characteristic of a particular process, trade or occupation," the evidence linking the disease with the "process, trade or occupation" is weak. Where the evidence is stronger yet not conclusive enough to justify the application of the presumption in Section 6(3), designation by means of a regulation provides an intermediate level of recognition. Where the evidence is so strong as to warrant the application of the presumption, the disease is added to Schedule B.

It could be questioned as to why a provision supposed to empower the Board to recognize industrial diseases in individual cases would include a reference to the disease "as being a disease peculiar to or characteristic of a particular process, trade or

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occupation.” The existence of that phrase in Section 6(4)(b) would suggest a process of recognition with broader implications. However, because Section 6(4)(b) allows the Board to specify “the terms and conditions and . . . limitations” it deems fit, in effect it empowers the Board to limit the recognition of an industrial disease “as being a disease peculiar to or characteristic of a particular process, trade or occupation” to certain factual situations or even to an individual claim. Read in its entirety, Section 6(4)(b) is a versatile provision which gives the Board substantial flexibility. While it is true that by itself the phrase “peculiar to or characteristic of a particular process, trade or occupation” suggests broad recognition of an industrial disease extending to future claims, the qualifying clause that allows the Board to specify *terms, conditions and limitations* is consistent with some narrower form of recognition, including recognition limited to an individual claim.

The presence of the phrase “peculiar to or characteristic of a particular process, trade or occupation” is also consistent with the notion of a three-tiered model for recognizing industrial diseases: recognition in an individual case as the weakest level of recognition based on weak evidence of a linkage between a disease and a particular process, trade or occupation, recognition by regulation as an intermediary level of recognition, and recognition by addition to Schedule B as the highest level of recognition based on a strong statistical relationship. Recognition of an industrial disease in an individual claim or by way of regulation simply advises the working community that the Board is aware that the disease may arise as a result of particular employment environments.

This third and new interpretation as to the Board’s powers to recognize industrial diseases is internally consistent as well as consistent with the language and intent of the *Act*.

Regardless of the nature of the Board’s power to recognize industrial diseases by way of regulation, I conclude that the *Act* confers upon the Board the power to recognize industrial diseases in individual cases. The most cogent interpretation traces this power to Section 6(4)(b) of the *Act*.

The above analysis strongly suggests that the *Act’s* usage of the terms “personal injury” and “industrial disease” is consistent with a general intent to compensate workers for any “truly work-caused” disability. The fact that the *Act* does not define “personal injury,” “injury” or “disease” and that it specifically contemplates recognition by the Board of industrial diseases in individual cases substantiates this. It is also significant that the *Act* does not distinguish between psychological/emotional harm and physical harm. Furthermore, the *Act* blurs, to some extent, the concepts of “injury” and “disease.” It is true that the language of the section dealing with personal injury is more suggestive of disorders resulting from a particular incident (or a series of incidents) than gradually developing disorders because it refers to the day of the injury.

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However, Schedule B of the *Act* includes harm that develops gradually over time as well as harm that develops more suddenly as a result of specific incidents. Schedule B includes, for example, tenosynovitis, an infection caused by the Hepatitis B virus and heart injury.

The *Manual*, which attempts to distinguish between “injury” and “disease” in Section 13.10, does not provide an obvious demarcation line. Under “injury,” it includes sprains or strains caused by activity over time as well as fractures; under “disease,” it includes disabilities caused by the gradual absorption of a chemical through the skin as well as allergic reactions. Section 13.11 of the *Manual* includes both epicondylitis and carpal tunnel syndrome under the category of “injury.” Hence, neither the *Act* nor the policies necessarily characterize a harm as an “injury” or “disease” in accordance with whether it developed gradually or relatively suddenly. The deletion of the words “by accident” from the entitlement provision concerning injuries has contributed to obliterating the distinction between the two concepts. That is consistent, however, with the intent behind the deletion — namely, to focus on causality as determinative of a worker’s entitlement to compensation.

The statement that the *Act* intends to compensate workers for any “truly work-caused disability” stands in need of qualification. An extreme example assists in illustrating this point. Workers who perform day after day tasks requiring only certain skills could lose in the long-run some of their other skills; this could make it harder for them to find alternative employment, should that become necessary. Conceivably then, the loss of these other skills could impair the workers’ earning capacity and be characterized as “disabling.” Obviously, however, that is not a meaning intended by the *Act* which covers disabilities that relate to “injuries” and “diseases.” Although the concepts of “injury” and “disease” are very flexible under the *Act*, there is a point beyond which they cannot be stretched. Therefore, a pragmatic qualification to the statement that the *Act* intends to compensate workers for any “truly work-caused” disability would be that *the disability must be an incapacity related to a set of recognized disease entities and injuries.*

It may be suggested, for instance, that only those psychological claims based on a diagnosis appearing in the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders DSM-III-R* should be deemed to be compensable and this may exclude compensation for diffuse conditions like “exhaustion,” “stress” or “burnout” (although admittedly other diagnoses appearing in the *DSM-III-R* overlap with these conditions). I recognize that limiting diagnoses to the *DMS-III-R* is somewhat artificial. It also raises the question of whether psychiatrists — not psychologists or the worker’s physician — should be the only sources of medical evidence in respect of such claims. The point is, however, that even medically there is a grey area in which it is unclear whether a diagnosis constitutes either a disease entity or an injury.

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In the absence of a generally accepted diagnosis for emotional and physical exhaustion, there are some grounds to distinguish between disabilities alleged to result from such exhaustion and those alleged to result from injuries and diseases with clearly established diagnoses. It is arguable that the compensation principles set out in the *Act* apply only to the latter. From this perspective, a disability resulting from an injury or disease caused by work stresses would be compensable, as long as the injury or disease had a clearly established diagnosis. That is, a psychological disorder with a clearly established diagnosis which resulted from work stresses would be compensable, but work-related “exhaustion” or “burnout” would not necessarily be compensable.

I have considered whether compensation for a recognized psychological disorder may be lawfully barred because of the difficulties in determining causality. The broader question is whether disabilities — be they psychological or physical — are not compensable, if the alleged causal mechanisms are, in a general sense, poorly understood.

The subject of work stress and its effects is an area in which causality remains very unsettled. Stress at work exists to some degree or another in all employment. The interaction between stress at work and at home is not clearly understood. The distinction between so-called positive stress factors and negative stress factors has not been clearly drawn. Nevertheless, I am of the opinion that difficulties in sorting out causal relationships cannot bar the consideration of claims. There are many areas in which claims are routinely considered, despite such difficulties. For example, post-traumatic stress is a difficult area; the existence of a trauma represents only a minimal guarantee that the stress is employment-related and yet the Board considers post-traumatic stress claims compensable. Claims for cancer, especially where they are not associated with a process or industry listed in Schedule B, have posed vexing evidentiary problems but have been viewed as compensable. While conditions with controversial diagnoses may fall outside of the scope of the *Act*, recognized disease entities and injuries cannot be barred from consideration on the basis of evidentiary problems.

In sum, the *Act* places no apparent limitations on the compensability of “physical-mental,” “mental-physical” and “mental-mental” claims. Both mental and physical conditions come within the purview of the *Act*. Both physical impact and mental stimuli may give rise to compensable conditions under the *Act*, irrespective of whether they happen suddenly or operate gradually. There is, however, some question as to whether controversial diagnoses fall within the set of injuries and diseases covered by the *Act*. In light of this and the ambiguity in the current governors’ policies concerning the compensability of claims involving mental aspects of the work environment, I have concluded that this is an appropriate issue to refer to the governors’ attention. Some questions the governors may wish to address include:

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1. Does policy item #13.20 of the *Manual* intend to exclude psychological impairment that is not traumatically induced from the definition of “personal injury”? If so, *Decision No. 7* would have to be read narrowly and confined to its facts.
  2. Does *Decision No. 102* in conjunction with policy item #31.20 of the *Manual* intend to preclude compensation for a state of physical and emotional exhaustion alleged to result from the stress of work, including barring the consideration of such claims in individual cases?
  3. Does policy item #31.00 of the *Manual* intend to bar the consideration of *any* form of psychological or emotional condition as “industrial diseases” in individual cases?
  4. When using the term “psychological impairment”, what kinds of disorders do the policies contemplate? For example, is a state of emotional exhaustion subsumed under the term “psychological impairment” within the meaning of the policies? If not, on what basis do the policies distinguish between “emotional exhaustion” and “psychological impairment”?

Should the governors wish to provide any further directives pertaining to the compensation of claims involving mental aspects of the work environment, this would certainly assist the Appeal Division in its decision-making as well as providing ongoing assistance to the Compensation Services Division staff. For example, the governors might wish to formulate policies on the compensability of so-called mental-physical claims in addition to clarifying its existing policies on so-called “mental-mental” claims. Although the categories of “physical-mental” claims, “mental-mental” claims and “mental-physical” claims are practical for descriptive purposes, the governors need not, of course, be limited to them in the formulation of their policies.

Other appeals involving these issues will undoubtedly continue to come before the Appeal Division. Subsection 91(3) requires the Appeal Division to make its decision “as soon as practicable and in any case within 90 days of the date on which the appeal is commenced. . . .” While I, as chief appeal commissioner, have a discretion under Section 91(3)(c) to designate a longer period for the making of a decision based on the complexity of the matter under appeal, I feel that it would be contrary to the legislative intent evident in this provision to suspend the consideration of such appeals indefinitely. Pending the provision of policy by the governors, the Appeal Division will decide, on a case-by-case basis, how to proceed in the context of each appeal which

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comes before it. For reasons which are evident from the foregoing analysis, however, it may be very difficult for the Appeal Division to deal consistently with such appeals without the benefit of policy clarification from the governors.

More importantly, a thorough coherent policy is required to assist all participants in the system called upon to adjudicate the merits of such claims. There is, therefore, some urgency in the need for the governors to address these issues.

# REPORTER

## In the Court of Appeal for Ontario Grange, Arbour and Weiler J.J.A.

**Between:** The Workers' Compensation Board  
**And:** Mandelbaum, Spergel Inc.  
Trustee-in-Bankruptcy for the Bankrupt  
**Heard:** December 7, 1992

John A. Keefe and Soraya Farha for the appellant

Richard D. Howell for the respondent

Hart Schwartz for the Attorney General of Ontario,  
intervenor

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### Grange J.A.:

This appeal concerns, among other things, the proper interpretation and effect of s. 9 of the *Workers Compensation Act*, R.S.O. 1980, c. 539 and s. 136 of the *Bankruptcy Act*, R.S.C. 1985, c. B-3. The order in appeal held that the former section was ineffective and inapplicable on the facts of this case because it was in conflict with the latter section which was paramount.

Evelyn Stevens Interiors Limited ("the bankrupt") was a subcontractor of Trist Construction Limited and Begg & Dayk Limited ("the principals"). At the completion of the contract and at the date of bankruptcy, the principals together owed the bankrupt \$13,350.00. The Trustee sought this sum from the principals which brought into consideration the two statutes referred to.

Section 9 (3) and (4) of the *Workers Compensation Act* are as follows:

(3) Where a person, whether carrying on an industry included in Schedule I or not, in this subsection and in subsection (4) referred to as the principal, contracts with any other person, in this section referred to as the contractor, for the execution by or under the contractor of the whole or any part of any work for the principal, it is the duty of the principal to see that any sum that

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the contractor or any subcontractor is liable to contribute to the accident fund is paid, and, if any such principal fails to do so, he is personally liable to pay it to the Board, and the Board has the like powers and is entitled to the like remedies for enforcing payment as it possesses or is entitled to in respect of an assessment.

(4) Where the principal is liable to make payment to the Board under subsection (3), he is entitled to be indemnified by any person who should have made such payment and is entitled to withhold out of any indebtedness due to such person a sufficient amount to answer the same, and all questions as to the right to and the amount of any such indemnity shall be determined by the Board.

and s. 136 (1)(h) is as follows:

136. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

...

(h) all indebtedness of the bankrupt under any Workmen's Compensation Act, under any Unemployment Insurance Act, under any provision of the *Income Tax Act* creating an obligation to pay to Her Majesty amounts that have been deducted or withheld, rateably;

(This subparagraph is repealed by S.C. 1992, c. 22, s. 54(2). By the successor section, after November 30, 1992, the *Workers Compensation Act* indebtedness no longer has a priority)

The principals maintain that, by reason of s. 9 and the failure of the bankrupt to make payment as required, they are liable to make payment of the amount due to the Workers' Compensation Board and seek to set that amount off against the amount admitted to be owed to the bankrupt. The Trustee maintains that to allow the set off would amount to a breach of s. 136(1)(h) of the *Bankruptcy Act* and would give the Workers' Compensation Board a priority over that provided by the subsection.

The bankruptcy judge accepted the argument of the Trustee and ordered the principals to pay the full sum to the Trustee "free and clear of the any claim by the Workers' Compensation Board".

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No doubt because of the latter part of the order, it is not the principals but the Board that is appealing. If the order stands, the money will all go to the Trustee and the principals will not be required to make any payment to the Board under s. 9. In any event, the Board does not appeal the order relieving the principals of payment to it, but rather appeals the whole order and seeks to substitute an order requiring the principals to pay to the Trustee only the net sum after deduction of that owing to the Board under s. 9. Presumably the principals will then pay over to the Board that latter sum.

The first problem we must face is the argument of the Attorney General intervenor that the order below is a nullity because of the failure of any party to give notice that the constitutional validity or constitutional applicability of a statute was being challenged as required by s. 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C43 which provides:

109. — (1) Where the constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature or of a regulation or by-law made thereunder is in question, the Act, regulation or by-law shall not be adjudged to be invalid or inapplicable unless notice has been served on the Attorney General of Canada and the Attorney General of Ontario in accordance with subsection (2).

(2) The notice shall be in the form provided for by the rules of court and, unless the court orders otherwise, shall be served at least ten days before the day on which the question is to be argued.

It is common ground that no such notice was served on either the Attorney General of Canada or the Attorney General of Ontario at the initial stage. Notice was served on both Attorneys General in February and March of 1992, about a year and a half after the launching of this appeal. The Attorney General of Canada declined to intervene, but the Attorney General of Ontario has done so.

As stated before, the bankruptcy judge in his reasons held that s. 9, while valid in a non-bankruptcy situation, is inapplicable when bankruptcy occurs and is superseded by s. 136(1) of the *Bankruptcy Act*. Thus the Workers' Compensation Board can only rely on the priority it is given under the *Bankruptcy Act* and cannot receive the money directly under s. 9 of the *Workers Compensation Act*.

The intervenor relies on the New Brunswick Court of Appeal case of *N. (D.) v. New Brunswick (Minister of Health and Community Services)*, 93 D.L.R. (4th) 668 where that court held a similar notice under New Brunswick legislation was indeed mandatory

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and reversed a decision rendered without it. In that case, the trial judge ruled certain sections of the New Brunswick *Family Services Act*, S.N.B. 1980, c. F-2.2 unconstitutional on his own motion and without argument from any party much less the government concerned. Here, the failure to give notice was, on the part of the judge and both counsel, entirely inadvertent and full argument on the constitutional question was made in the lower court.

There also appears to be support for the intervenor's position in the short endorsement of Callaghan A.C.J.H.C. in *Roberts v. City of Sudbury*, a judgment of the Ontario High Court delivered June 22, 1987, as follows:

The appeal is allowed, the order of the Court below is set aside and the matter is committed to the District Court in Sudbury for a hearing before another judge of that Court on notice to the Attorney General of Ontario pursuant to s. 122 of the *Courts of Justice Act*.

The A.G. Ontario was not notified thereunder of hearing in appeal and wishes to make submissions on the constitutional applicability of s. 284 of the *Municipal Act*. The failure on the part of the plaintiff to comply with s. 122 renders the order in appeal one made without jurisdiction.

In two Saskatchewan cases, namely *Beare v. R.* and *Higgins v. R.*, heard together and reported at [1987] 4 W.W.R. 309, the question of service of the notice arose. In one it had been served; in the other it had not. Both cases concerned the validity of the *Identification of Criminals Act*, R.S.C. 1970, c. I-1 of the Province. In both cases, the finding of the court of first instance had upheld the validity of the Act, and the Court of Appeal rejected that finding on the ground that the Act violated s. 7 of the *Charter of Rights and Freedoms*. The relevant section of the Saskatchewan Act was as follows:

8(1) Where in a court in Saskatchewan the constitutional validity of an Act or enactment of the Parliament of Canada or of the Legislature or the validity of an order in council is brought in question, the Act, enactment or order in council shall not be adjudged to be invalid until after notice has been given to the Attorney General of Canada or the Attorney General of Saskatchewan, as the case may be.

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The court was concerned about the failure of the court below in the *Beare* case to notify the Attorney General in accordance with that section. Bayda C.J.S. had this to say at p. 332:

One procedural issue, however, does need clearing up. In the *Higgins* case, the appellant served a notice on the Attorney General of Canada pursuant to the *Constitutional Questions Act*, R.S.S. 1978, c. C-29. In the *Beare* case, the appellant did not serve such a notice. In the *Higgins* case, the appellant relied on an alleged impingement of the rights guaranteed to the defendant under ss. 8 and 11(d) of the Charter. In the *Beare* case, the appellant relied upon the rights guaranteed to him under ss. 7, 8, 9, 10 and 11(c) and (d) of the Charter. Has the Attorney General of Canada been prejudiced by the failure of the appellant to serve a notice in the *Beare* case? He, of course, was given an opportunity to present an argument in the *Higgins* case and, had he done so, that argument would have applied to the *Beare* case as well. Given the circumstances of these two cases, I find that the Attorney General of Canada has not been prejudiced by the failure to file a notice under the *Constitutional Questions Act* in the *Beare* case.

In *Citation Industries Ltd. v. C.J.A., Local 1928* (1988), 53 D.L.R. (4th) 360, the British Columbia Court of Appeal was concerned with s. 8 of the *Constitutional Questions Act*, R.S.B.C. 1979, c. 63 which is a section similar to those of Ontario and Saskatchewan. The court below had held a certain section of the *Industrial Relations Act*, R.S.B.C. 1979, c. 212 of the Province unconstitutional without notice to the Provincial Attorney General. In that case, all counsel asked that the matter be heard on the merits (an advantage we do not have here). It is, I think, important however that Seaton J.A. said, at p. 363:

At this stage nothing turns on the absence of earlier notice.

Neither of the courts in Saskatchewan or British Columbia specifically dealt with the argument that the judgments under appeal were nullities. Nevertheless, both relied heavily on a lack of prejudice to the Attorney General in his argument on appeal. In the case at bar, counsel for the Attorney General was invited to show prejudice and was unable to do so. In my view, that should be the controlling factor. The failure to give notice was entirely inadvertent (and indeed the argument for constitutionality was presented by the Workers' Compensation Board in the lower court). We have heard full argument on the question. Nothing would be gained by sending it back but repetition and expense.

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I turn now to the main issue.

In my view, there is no conflict between s. 9(3) and (4) of the *Workers Compensation Act* and s. 136(1)(h) of the *Bankruptcy Act* as it formerly existed.

There is no suggestion that s. 9 of the *Workers Compensation Act* was enacted for the purpose of improving the ranking of the Workers' Compensation Board in a bankruptcy. Both sections have been with us for many years in more or less their present form. Section 9 was first enacted in 1915 (c. 24) and s. 136(1)(h) came into being with an amendment to the *Bankruptcy Act* in 1921.

This precise issue has indeed arisen before and been disposed of by this court in *Re French River Contracting Co.* 1937 O.W.N. 665. There, the Township of Etobicoke held money due the bankrupt and there came about a contest between the Trustee and the Workmen's Compensation Board of Ontario as to the disposition. Fisher J.A. for the court decided the issue as follows at p. 667:

All that s.s. 3 of sec. 9 does is to give the Board a right of action against the principal (in this case the Township of Etobicoke) if there was a failure by it to see "that any sum which the contractor or any subcontractor is liable to contribute to the accident fund is paid", and the meaning of s.s. 4 of sec. 9 is that should the principal (in this case the township) be liable to the Board "he shall be entitled to be indemnified by any person who should have made such payment, and shall be entitled to withhold out of any indebtedness due to such person a sufficient amount to answer the same".

Under *The Bankruptcy Act*, upon an assignment or a receiving order being made, all property of the debtor immediately becomes vested in the trustee. The question is whether these moneys (\$1,911.25) were property or assets of the debtor company and whether they vested in the trustee.

This Court is unanimously of the opinion that this money under the terms of the original contract, was charged or burdened in favour of the treasurer of the township with the payment to the Board of whatever amount was owing upon assessments levied or to be levied against the debtor company by the Board, and was not free and unencumbered property or an asset of the debtor company that vested in the trustee under the authorized assignment. The result, therefore, is that the Board is entitled to receive from the township the sum of \$1,911.25.

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The principle is simple. The money owing under s. 9(3) is not property of the bankrupt and never comes into the hands of the trustee. The Board is not required to make a claim under s. 136 of the *Bankruptcy Act*. The money comes to it under s. 9 of the *Workers Compensation Act*. It is the *Bankruptcy Act* itself and not the provincial legislation that recognizes rights of set-off. Section 97(3) of the *Act* is as follows:

97. (3) The law of set-off applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off is affected by the provisions of this Act respecting frauds or fraudulent preferences.

A valid set-off, as defined under provincial law, would inevitably alter the priorities in a bankruptcy but that is what the *Bankruptcy Act* itself contemplates. The set-off here is equitable set-off which Wilson J. defined in *Telford v. Holt* (1987), 2 S.C.R. 193 at 206 as follows:

Equitable set-off is available where there is a claim for a money sum whether liquidated or unliquidated: see *Aboussafy v. Abacus Cities Ltd.*, [1981] 4 W.W.R. 660 (Alta. C.A.), at p. 666. More importantly in the context of this case, it is available where there has been an assignment. There is no requirement of mutuality. The authorities to be reviewed indicate that courts of equity had two rules regarding the effect of a notice of assignment on the right to set-off. First, an individual may set-off against the assignee a money sum which accrued and became due prior to the notice of assignment. And second, an individual may set-off against the assignee a money sum which arose out of the same contract or series of events which gave rise to the assigned money sum or was closely connected with that contract or series of events.

Whether or not the money was due to the principal before the bankruptcy it most assuredly “arose out of or was closely connected with the same contract or series of events”.

The bankruptcy judge was of the view that the trilogy of cases in the Supreme Court of Canada namely, *Deputy Minister of Revenue v. Paul Rainville*, [1980] 1 S.C.R. 35, *Deloitte Haskins and Sells Limited v. The Workers' Compensation Board*, [1985] 1 S.C.R. 785, and *British Columbia v. Henfrey Samson Belair Ltd.* (1989), 59 D.L.R. (4th) 726, had changed the law so that s. 9 of the *Workers Compensation Act* has no application after bankruptcy. I cannot agree. As I said earlier, the matter is complicated by the fact that it

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is the Board which is appealing not the principals, but the money is in the hands of the principals. While it is owing to the bankrupt, part of that money is charged with an equitable set-off. That part is not owed to the Board but to the principals to indemnify them for the money they are liable to pay the Board. This is not a device of the Province to defeat the *Bankruptcy Act* scheme of distribution. In the Supreme Court trilogy, each case was concerned with the Crown or Crown agency's claim against money in the hands of the Trustee for distribution. The money in the case at bar has never (or should never have) come into the hands of the Trustee. It is money that has been (and should remain) in the hands of the principals to compensate them for money that they are (or will be) bound to pay to the Board.

I would allow the appeal, set aside the order of the bankruptcy judge, and dismiss the Trustee's application. The principals will be required to pay to the trustee only the amount owing less the amount they are required to pay to the Board under s. 9(4), something they have always been prepared to do.

In these circumstances we understand no one is asking for costs and there will be no order with respect thereto.

**Arbour J.A. (dissenting)**

I have read the reasons of my colleague Grange J.A. and I agree with his analysis and disposition of the issue arising under the *Workers Compensation Act*, R.S.O. 1980, c. 539 and under the *Bankruptcy Act*, R.S.C. 1985, c. B-3. I respectfully disagree with his treatment of the preliminary issue raised by the intervenor, the Attorney General of Ontario, namely, the effect of the failure to comply with s. 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

Section 109 must be read in full:

- (1) Where the constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature or of a regulation or by-law made thereunder is in question, the Act, regulation or by-law shall not be adjudged to be invalid or inapplicable unless notice has been served on the Attorney General of Canada and the Attorney General of Ontario in accordance with subsection (2).
- (2) The notice shall be in the form provided for by the rules of court, and unless the court orders otherwise, shall be served at least ten days before the day on which the question is to be argued.

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(3) Where the Attorney General of Canada and the Attorney General of Ontario are entitled to notice under subsection (1), they are entitled to notice of any appeal in respect of the constitutional question.

(4) Where the Attorney General of Canada or the Attorney General of Ontario is entitled to notice under this section, he or she is entitled to adduce evidence and make submissions to the court in respect of the constitutional question.

(5) Where the Attorney General of Canada or the Attorney General of Ontario makes submissions under subsection (4), he or she shall be deemed to be a party to the proceedings for the purpose of any appeal in respect of the constitutional question.

As mentioned by Grange J.A., it is common ground that no notice was served on either the Attorney General of Canada or the Attorney General of Ontario at any stage of the trial. The Attorneys General were first served one and a half years after the commencement of the appeal, more than one year after the appeal had been perfected. We were informed by Mr. Schwartz, counsel for the Attorney General of Ontario, that the Attorney General's office learned by chance of the decision under appeal, some two years after it had been delivered. No one suggested that the Workers' Compensation Board is an adequate substitute for the Attorney General for the purpose of the notice provision. The Board is an independent entity which does not represent, and is not represented by, the Attorney General.

By virtue of s. 109(4) and (5) of the *Courts of Justice Act*, the Attorney General was entitled to adduce evidence and make submissions before the trial court, and was deemed to be a party for the purpose of any appeal with respect to the constitutional question. As it turns out in this case, a provincial Attorney General was not given the opportunity to be heard before a provincial statute was declared inapplicable in bankruptcy situations. In my opinion, the absence of further prejudice is not relevant, given the mandatory wording of s. 109(1). An adjudication made in violation of that mandatory language must be considered a nullity.

My colleague Justice Grange has reviewed the various authorities on the consequence of the failure to comply with the requirements for notice of a constitutional question. None of the authorities referred to us is binding upon this court. The absence of prejudice to an Attorney General who has not been served with a notice that the constitutionality of his statute was being litigated, was noted by Bayda C.J.S. in *Beare v. R.*, which is reported together with *Higgins v. R.* at [1987] 4 W.W.R. 309. The cases involved two challenges to the constitutional validity of a federal statute, the *Identification of Criminals Act*, R.S.C. 1970, c. I-1. The Attorney General of Canada had been

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notified in the *Higgins* case and had chosen not to intervene. The Attorney General did not receive notice of the *Beare* case, which was based, in part, on different sections of the *Charter*. Before concluding that the Attorney General suffered no prejudice due to the lack of notice, Bayda C.J.S. noted that the Crown did not object to the procedure adopted by the defendants to bring the issues to the court below and to the Court of Appeal. The Chief Justice then remarked that certain procedural questions had been raised by the bench during argument and, as a result, had not been fully argued by the parties. It is not clear whether the failure in the *Beare* case to serve a notice on the Attorney General of Canada pursuant to the *Constitutional Questions Act*, R.S.S. 1978, c. C-29 was an issue raised by the court during the hearing of the appeal. Be that as it may, Chief Justice Bayda seemed to conclude that the absence of prejudice was sufficient to displace any concern about the absence of notice to the Attorney General. It is arguable that, in *Beare*, the mandatory requirements of the applicable Saskatchewan statute were not infringed by the absence of notice in the court below since the Chambers judge refused to give effect to the constitutional challenge. Section 8 of the Saskatchewan Act, which is quoted by Grange J.A., provides that an enactment shall not be adjudged to be invalid until after notice has been given to the Attorney General. Although notice may not have been required in the court below, I would have thought that it should have been given before the Court of Appeal arrived at its disposition.

The case which, in my view, is the closest to the case at bar is *Citation Industries Ltd. v. C.J.A., Local 1928* (1988), 53 D.L.R. (4th) 360 (B.C.C.A.). The trial judge in that case had declared certain sections of a provincial statute *ultra vires* the province, on his own motions and without notice to the Attorney General. Notice, however, had been given by the time the case reached the Court of Appeal. All parties agreed that notice should have been given to the Attorney General before the statute was declared unconstitutional in the court below. However, all parties were properly convened in the appeal and, as indicated by Seaton J.A., all counsel asked the court to deal with the merits of the appeal. Esson J.A., in his concurring opinion, dealt more fully with that point. Referring to all parties' willingness to have the Court of Appeal deal with the merits despite the absence of notice to the Attorney General in the court below, he said at p. 369:

The court's agreement to deal with the ground in that way should not be seen as supporting the view that an order holding legislation unconstitutional is a valid order if made without compliance with the *Constitutional Questions Act*, R.S.B.C. 1979, c. 63, s. 8.

....

The questions, in substance, is one of parties. When the constitutional validity of a statute of the province is called into question, the party with the clearest interest in being heard on that

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question is the province represented by the Attorney General. When a decision is made without the requisite notice, it follows, in my view, that the proceeding is bad for want of parties.

I share the view expressed by Justice Esson. Like the British Columbia Court of Appeal, I would have been prepared to proceed with the merits of this appeal with the consent of all parties. Absent such express consent by the Attorney General, who is merely an intervenor in the appeal but is, in law, entitled to have participated in the proceedings below and to be a party in this court, this option is not open to us. In my opinion, the absence of prejudice does not alter this conclusion.

I can find nothing in the language of the *Courts of Justice Act* which purports to dispense with the notice requirements where there is no prejudice. The usual approach is to treat an adjudication as non-binding on someone who should have been, but was not, a party to the litigation; this is not a satisfactory remedy in a case such as the present one. Until reversed on appeal, the trial judgment in this case was binding on all lower courts in the province. The lower courts did not have the option of treating it as *per incuriam* (*Leroux v. Co-operators General Insurance Co.* (1991), 4 O.R. (3d) 609 (C.A.)). In my opinion, counsel for the Attorney General is correct in his contention that a decision made in contravention of the mandatory terms of s. 109 of the *Courts of Justice Act* must be considered a nullity.

I add that counsel for the Attorney General did not *enthusiastically insist* that a new trial be held in this matter and he candidly conceded that the Attorney General had no evidence to tender on the constitutional issue. However, the larger issue is that of the remedy for failure to comply with the mandatory requirements of s. 109 and, on that point, I must conclude that a trial court is without jurisdiction to adjudicate the constitutional validity or the constitutional inapplicability of a statute without notice to the appropriate Attorney General. Since we had the benefit of full argument by all parties, including the Attorney General, I would think that this is an appropriate case in which to express our opinion about the merits of the constitutional issues, albeit in obiter form since the intervenor is correct that the decision below is a nullity (see *R. v. Seaboyer and Gayme* (1987), 61 O.R. (2d) 290 (C.A.))

As indicated earlier, I am in agreement with my colleague Grange J.A. as to the merits of the appeal.

For these reasons, I would allow the appeal and order a new trial.

