WORKERS' COMPENSATION
REPORTER

WORKERS' COMPENSATION REPORTER

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- *Blue — Governors' Decisions*
- *Green — Appeal Division Decisions*
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- *Purple — Review Board Findings*
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Decision of the Governors

Number: 63
Date: April 11, 1994
Subject: Amendments to Governors' Financial Standing Committee Charter

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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), and adopted the Governors' Financial Standing Committee Charter (the "Charter"); and

B. the Committee has recommended certain amendments to the Charter to bring it into conformity with the mandate and practice of the Committee:

NOW THEREFORE THE GOVERNORS RESOLVE THAT:

the Governors' Financial Standing Committee Charter shall be amended as follows:

1. under the heading MISSION STATEMENT, "and management" is added after the word "executive,"

2. under the heading RESPONSIBILITIES, paragraph 3e is struck out and the following substituted:

   "e. executive and management compensation", and

3. under the heading RESPONSIBILITIES, the following is struck out from paragraph 5:

   The Committee shall discuss with the external auditor the impact of recent releases of the Canadian Institute of Chartered Accountants and the British Columbia Institute of Chartered Accountants and significant changes made in accounting principles and practices.

GOVERNORS' FINANCIAL STANDING COMMITTEE CHARTER
WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA

This Charter states the mission, authority, structure and responsibility of the "Governors' Financial Standing Committee" of the governors of the Workers' Compensation Board of British Columbia.

Mission Statement

The mission of the Governors' Financial Standing Committee is to assist the governors in fulfilling their oversight responsibilities relating to the insurance, investments, executive and management compensation, financial reporting, auditing and internal control of the Workers' Compensation Board, while recognizing that the primary responsibility for financial reporting, internal control and compliance with laws, regulations, and ethics by the Workers' Compensation Board rests with executive management, overseen by the governors.

Authority

The Committee shall have unrestricted access to all personnel and documents of the Workers' Compensation Board which are necessary to carry out the Committee's duties and responsibilities.

Structure

1. The governors shall appoint one worker representative, one employer representative and one public interest representative governor to serve as a Governors' Financial Standing Committee. The Committee shall be chaired by the public interest governor.

2. The chairman of the governors shall be an ex officio member of the Committee and shall act as chair of the Committee in the absence of the public interest governor.

3. A quorum of the Governors' Financial Standing Committee shall consist of the worker representative and the employer representative governors appointed under paragraph 1 and either the public interest governor appointed under paragraph 1 or the chairman of the governors, and no business shall be conducted by the Committee unless a quorum is present.

3A. The worker representative governor or the employer representative governor, appointed under paragraph 1, may designate an alternate governor from the same representative group to attend a meeting that the worker representative governor or the employer representative governor is unable to attend; and the alternate governor, if in attendance at that meeting, shall be counted as part of the quorum for the meeting.

4. The terms of the members of the Committee shall be established on a staggered basis to maintain continuity while bringing fresh perspectives to the work of the Committee.

5. The Committee shall meet at least biannually, or more frequently as required by the business of the Committee. The internal and external auditors shall be notified of meetings and may attend and be heard when the Committee is dealing with matters concerning their areas of interest.

6. The Committee may require the presence at meetings of any operating personnel considered necessary by the Committee.

7. Minutes shall be kept of all meetings of the Committee and, after being signed and initialled by the chair of the Committee, shall be forwarded to the Office of the Governors for retention.

Responsibilities

1. The Committee shall keep the governors informed of its activities on a current basis by forwarding minutes of all meetings to each governor, and as otherwise required by the governors. The chair of the Committee shall report orally to the governors at each regular governors' meeting about any business undertaken by the Committee since the previous regular governors' meeting.

2. The chair of the Committee shall make an annual report of accomplishments and work in progress to the governors for each calendar year. Included in that report shall be a review of this Charter and recommendations for any changes perceived necessary.

3. The Committee shall review and, as appropriate, make recommendations to the governors with respect to:

   a. the policies and activities of the W.C.B.'s investment committee;

b. all significant issues concerning litigation, contingencies, claims and assessments, and all material accounting issues, that require disclosure in the W.C.B.'s financial statements;

c. the consulting actuary's reports on the assessment rates and the year end actuarial liabilities and make any necessary recommendations to the governors;

d. major budgetary variances throughout the year;

e. executive and management compensation;

f. the Management's Discussion and Analysis section of the W.C.B.'s annual report;

g. the W.C.B.'s program of insurance; and

shall undertake any other responsibilities which the Committee may be directed to undertake by resolution of the governors of the Workers' Compensation Board.

4. The Committee shall oversee the internal audit and evaluation function, including:

   a. review and approve the internal audit and evaluation charter;

   b. review the reporting relationship of internal audit and evaluation;

   c. review the annual internal audit and evaluation plan, its objectives, and the resources required to attain those objectives;

   d. review the results of the internal audit and evaluation effort of the preceding period;

   e. ensure co-ordination between the internal and external auditors; and

   f. approve the appointment or removal of the internal auditor.

   The internal auditor shall report to the president and chief executive officer on a regular basis with the Committee providing oversight responsibility for the internal audit and evaluation function.

5. The Committee shall review with the external auditor the proposed scope of the annual examination to determine that management has not imposed any restrictions and that problem areas will receive appropriate attention.

6. The Committee shall discuss with the external auditor the results of its audit from the preceding year, including a review of:

    a. the annual report containing the audited financial statements;

    b. the auditor's management letter(s) and recommendations;

    c. the adequacy of the organization's control structure;

    d. the cooperation received from management on information and explanations requested; and

    e. the adequacy of the organization's accounting principles and policies and management's estimates and judgments.

7. The internal and external auditors (separately) shall be provided the opportunity to meet with the Committee, at least annually without management present, to discuss any matters.

8. The Committee shall review the extent to which major recommendations made by the internal and external auditors have been implemented.

9. The Committee shall monitor compliance with the applicable laws and regulations and the Workers' Compensation Board published standards of ethical conduct, including compliance by senior management, and shall be provided with the resources necessary to carry out its duties and responsibilities. These responsibilities include the initiation of investigations into fraud, illegal acts and conflicts of interest by W.C.B. personnel.

10. In carrying out its mission and performing its responsibilities, the Committee shall, at all times, be subject to the *Workers Compensation Act*, and the bylaws and resolutions of the governors of the Workers' Compensation Board.

This Charter of the Governors' Financial Standing Committee of the governors of the Workers' Compensation Board has been adopted by the governors of the Workers' Compensation Board on April 6th, 1992, and amended on July 19th, 1993, and April 11, 1994.

Decision of the Governors

Number: 64
Date: April 11, 1994
Subject: Change of Name of "Industrial" Diseases Standing Committee and Change of References to "Industrial" Diseases

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WHEREAS:

A. on April 6, 1992, the governors constituted the Industrial Diseases Standing Committee, pursuant to Section 81(b)(i) of the *Workers Compensation Act*, to review the industrial diseases policies of the Workers' Compensation Board and to make recommendations for change to the governors;

B. the term "industrial" in relation to diseases and injuries experienced by workers in the 1990s is arguably outdated and non-descriptive; and

C. the more modern term for "industrial disease" is "occupational disease":

NOW THEREFORE THE GOVERNORS RESOLVE THAT:

1. the Industrial Diseases Standing Committee shall be renamed the Occupational Diseases Standing Committee and the Committee's Charter amended accordingly, and

2. the INDUSTRIAL DISEASES STANDING COMMITTEE CHARTER shall be amended by striking out the words "industrial disease" or "industrial diseases" wherever they appear and replacing them with "occupational disease" or "occupational diseases."

OCCUPATIONAL DISEASES STANDING COMMITTEE CHARTER
WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA

This Charter states the mission, role, structure and responsibilities of the "Occupational Diseases Standing Committee" of the governors of the Workers' Compensation Board of British Columbia.

Mission Statement

As a standing committee of the governors, the mission of the Occupational Diseases Standing Committee is to review the occupational diseases policies of the Workers' Compensation Board and to make recommendations for change to the governors.

Role

The primary roles of the Committee are to determine whether a probable relationship exists between a disease and an industry or industrial process in British Columbia and, if so, the circumstances in which claims for compensation for that disease would be presumed valid under Section 6(4) and Schedule B of the *Workers Compensation Act*, and to determine which diseases are to be designated or recognized as occupational diseases by regulation of general application.

It is not a responsibility of the Occupational Diseases Standing Committee to make determinations with respect to individual claims. Such determinations shall remain an administrative function in accordance with Section 25.24 of the *Rehabilitation Services and Claims Manual*.

Structure

1. The governors shall appoint two worker representatives, two employer representatives and one public interest representative governor and the chairman of the governors to serve as the Occupational Diseases Standing Committee. The Committee shall be chaired by the chairman of the governors.

2. The terms of the members of the Committee shall be established on a staggered basis to maintain continuity while bringing fresh perspectives to the work of the Committee.

3. A quorum of the Occupational Diseases Standing Committee shall consist of one worker representative governor and one employer representative governor appointed under paragraph 1 and either the public interest governor appointed under paragraph 1 or the chairman of the governors, and no business shall be conducted by the Committee unless a quorum is present.

4. The Committee shall meet at least six (6) times in each calendar year, but in no case shall more than three (3) months elapse between meetings.

5. The Committee may require the assistance at Committee meetings or otherwise of any W.C.B. personnel considered necessary by the Committee. Subject to obtaining the necessary approvals for funding under paragraph 3 under RESPONSIBILITIES, the Committee may consult with stakeholders in the community, experts in the field of occupational diseases and any other persons whom the Committee considers would assist it in carrying out the Committee's responsibilities.

6. Minutes shall be kept of all meetings of the Committee and, after being signed and initialled by the chair of the Committee, shall be retained by the Office of the Governors.

7. The Committee may, with the approval of the governors, establish a secretariat or like administrative body of W.C.B. personnel to assist the Committee in fulfilling its responsibilities.

Responsibilities

1. The Committee shall, with the governors:

   a. Develop an operating procedure setting out the manner in which the Committee shall conduct its business, publish that operating procedure in the *Workers' Compensation Reporter* and ensure that the operating procedure is otherwise available, upon request, to members of the public;

   b. Within two years of being constituted:

      (i) completely review all entries currently within Schedule B and make recommendations to the governors for updating Schedule B, and

      (ii) completely review the list of diseases designated or recognized by the W.C.B. as occupational diseases by regulation of general application and make recommendations to the governors for updating the list.

   c. Prioritize the other outstanding policy issues existing at the time the Committee is constituted and consider and make recommendations to the governors with respect to those issues.

d. Consider new policy issues which may be brought to the Committee's attention by members of the Committee, the governors, W.C.B. personnel or stakeholders in the workers' compensation system and make recommendations to the governors.

e. Conduct periodic reviews of Schedule B to ensure that the Schedule remains consistent with the intent of the *Act* and advances in medical knowledge, industries and industrial processes and make recommendations to the governors.

f. Conduct periodic reviews of the list of diseases designated or recognized by the W.C.B. as occupational diseases by regulation of general application to ensure that the list remains consistent with the intent of the *Act* and advances in medical knowledge, industries and industrial processes and make recommendations to the governors.

g. Undertake any other responsibilities which the Committee may be directed to undertake by resolution of the governors of the Workers' Compensation Board.

2. The Committee shall keep the governors informed of its activities on a current basis by forwarding minutes of all meetings to each governor and as otherwise required by the governors.

3. To fulfill its mandate, the Committee may seek the approval of the governors for the funding of research projects, the constitution of expert panels, the holding of public inquiries, or the use of any other mechanism which the Committee considers would assist in obtaining information to assess the relationship between a particular industry or industrial process and a particular disease.

4. The chair of the Committee shall make an annual report of accomplishments and works in progress to the governors for each calendar year. Included in that report shall be a review of this Charter and recommendations for any changes perceived necessary.

5. In carrying out its mission and performing its responsibilities, the Committee shall, at all times, be subject to the *Workers Compensation Act*, and the bylaws and resolutions of the governors of the Workers' Compensation Board.

This Charter of the Occupational Diseases Standing Committee of the governors of the Workers' Compensation Board has been adopted by the governors of the Workers' Compensation Board on April 6th, 1992, and amended on April 11th, 1994.

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Decision of the Governors

Number: 65
Date: April 11, 1994
Subject: Approval of Recommendations of the Occupational Diseases Standing Committee Regarding Schedule B of the ***Workers Compensation Act***

WHEREAS:

A. the governors have constituted the Occupational Diseases Standing Committee (the "Committee"), pursuant to Section 81(b)(i) of the *Workers Compensation Act*, to review the occupational diseases policies of the Workers' Compensation Board and to make recommendations for change to the governors;

B. in its Charter, the Committee was directed to completely review all entries currently within Schedule B of the *Workers Compensation Act* and to make recommendations to the governors for updating the Schedule; and

C. the Committee has submitted its report and recommendations to the governors for approval:

NOW THEREFORE, ON RECOMMENDATION OF THE OCCUPATIONAL DISEASES STANDING COMMITTEE, THE GOVERNORS RESOLVE THAT:

1. with the exception of the six items referred to in paragraph 2, each of the diseases described in Schedule B and each of the descriptions of process or industry associated with the diseases (in the second column of Schedule B) shall be retained in their present form;

2. subject to the following conditions, the Committee shall undertake a further process of review (the nature of which will depend on the item under consideration) for the items numbered 3A, 5, 8, 12, 13, and 16 in Schedule B:

   (a) the cost of the further review (that is, obtaining expert medical/scientific assessments) for each item shall not exceed $2,000.00, and

(b) the principles set out in the "Protocol" adopted by the Committee and published in the *Workers' Compensation Reporter* (9 W.C.R. 429) shall apply to the review by the Committee of any medical/scientific information that may be relevant in completing this process;

3. expenditure of funds by the Committee to the maximum specified in paragraph 2(a) for each item is approved; and

4. subject to approval for further funding, a similar process of review shall take place with respect to any proposals for additions to Schedule B that the Committee may decide to consider.

Decision of the Governors

Number: 66
Date: March 7, 1994
Subject: Extension of Appointments of Members of the Industrial Diseases Standing Committee

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WHEREAS:

A. on April 6, 1992, the governors of the Workers' Compensation Board constituted the 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);

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

C. the appointments of worker representative governor Stanley J. Shewaga and public interest governor Bonnie Jean Hayes to the Committee expire on April 6, 1994:

NOW THEREFORE THE GOVERNORS RESOLVE THAT:

the appointments of worker representative governor Stanley J. Shewaga and public interest governor Bonnie Jean Hayes to the Industrial Diseases Standing Committee are extended beyond April 6, 1994 to the expiry of their respective appointments as governors.

WORKERS' COMPENSATION
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Decision of the Appeal Division

Number: 94-0194
Date: February 17, 1994
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Reconsiderations and Reopenings

By letter dated June 25, 1993, the employer is appealing the Review Board findings dated May 28, 1993.

By letter dated July 27, 1993, the worker communicated his intention to participate in the employer's appeal.

The employer's submissions are dated August 5, 1993 and September 16, 1993. Those of the worker are dated August 19, 1993 and October 18, 1993.

There is no dispute over the factual background to this claim; therefore, I shall only highlight some benchmarks in its history.

The worker applied for compensation in February, 1957, complaining of a lung condition which manifested itself in a dry cough and laboured breathing. He had been working for the employer at the Sullivan Mine in Kimberley, B.C. since 1947. He had worked underground first in various capacities then on the surface as a janitor. The employer transferred him to the surface labour crew as a result of his medical problems.

The worker retired in 1985 at the age of 60.

Dr. A's 1956 diagnosis of the worker's medical problems was allergic bronchitis, sinusitis and asthma. I note Dr. A's tentative conclusion in his report dated October 17, 1956 that the worker's problems "cannot be regarded as primarily due to oil exposure though I think we must acknowledge that the dust and vaporized oil would certainly aggravate any bronchitis and asthma from other causes as yet undetermined."

The Board rejected the worker's claim. In a decision letter dated May 29, 1957, the assistant claims agent informed the worker that, in the Board's opinion, "it has not been established that the condition of your lungs . . . arose out of or in the course of your work."

In 1985, Dr. B wrote to the Board, stating that the worker had asked him to establish a claim for the lung disease diagnosed in 1956. The worker complained of recurring bronchitis associated with bronchospasm.

In a decision letter dated May 9, 1985, the claims adjudicator agreed with the 1957 decision to reject the claim.

In a letter dated July 25, 1989, the worker's adviser requested the Board to investigate the worker's case "in order to determine the origins of his progressive restrictive lung disease." In support of this request, the worker's adviser referred to a letter dated July 17, 1989 from Dr. C which, in her opinion, contained significant new evidence regarding the worker's disease. This letter characterized the worker as "clearly . . . [having] elements of severe restrictive lung disease," concluded that the worker's disease "is more likely related to his environmental exposure than to anything else" and recommended further investigation.

By letter dated August 25, 1989, the claims adjudicator requested the worker to complete a Form 6 Application and assigned the worker a new claim number.

The worker completed the application form, describing his condition as "restrictive breathing" and attributing it to his underground work at the Sullivan mine.

In a decision letter dated November 2, 1989, the claims adjudicator disallowed the worker's claim. He stated in part:

> . . . I have reviewed your previous claim, and have noted that it was initiated for a possible pneumoconiosis — silicosis condition possibly related to your employment in the mining industry. The diagnosis of your problems under this claim was an allergic bronchitis and asthma condition. There was no evidence that you have a silicosis condition and it was not thought that the allergic bronchitis and asthma were related to your employment. Consequently, this claim was not accepted as you are aware.
>
> . . . . .
>
> Your treating physicians have indicated that you have a progressive restrictive lung disease but they have been unable to discern the etiology of this problem. In reviewing evidence presently on file, there is still no evidence that you have a pneumoconiosis — silicosis condition which might have been related to your employment in the mining industry. As was earlier mentioned, your previously diagnosed asthma condition has also not been accepted as a Board responsibility.

> Based on the information presently on file, we have no indication that your current complaints are related to your employment history. In short, we have no evidence presently on file that you have an industrial disease which could be considered by the Board as being work related. . . .

The worker appealed the November 2, 1989 decision of the claims adjudicator to the Review Board. In the Notice of Appeal dated January 7, 1990, he stated that "The W.C.B. has failed to recognize the relationship between my lung problems dating from the 1950s and my employment at the Sullivan Mine."

Dr. C examined the worker on March 1, 1990. As a result of this examination, the Board conducted a further review of the worker's claim. In a letter to Dr. B dated March 2, 1990, Dr. C changed his diagnosis of the worker's condition and concluded on the basis of the March 1, 1990 examination that the worker suffers from a severe airflow obstruction rather than a restrictive disease and that this obstruction is consistent with a diagnosis of emphysema. Dr. C also stated in this letter that the obstruction must be related to exposure to chemicals and fumes in the mine since the worker had no cigarette exposure.

In a decision letter dated May 18, 1990, the claims adjudicator confirmed that the worker's claim would remain disallowed because there was no evidence of a distinct occupational disease. The claims adjudicator rejected the contention that oil exposure caused hyper-irritability of the airways as well as the diagnosis of emphysema.

The worker appealed the May 18, 1990 decision to the Review Board. In his Notice of Appeal dated June 4, 1990, he stated that "The decision is incorrect as my obstructive airways disease is directly related to my exposure to chemicals and fumes in the mine environment."

The Review Board accepted the worker's claim in findings dated May 28, 1993. It characterized the Board's handling of the worker's claim in 1989/'90 as a reconsideration based on significant new medical and other evidence. It concluded that the worker's airflow obstructive condition and respiratory problems likely resulted from his employment at the Sullivan mine and that he was entitled to compensation from at least 1957.

The Employer's Arguments

The employer is not challenging the Review Board's determination that the worker's airflow obstructive condition and respiratory problems likely resulted from his employment at the Sullivan mine. The employer's main argument is that the Review Board lacked the jurisdiction to entertain this worker's appeal. The employer bases this argument on the governors' published policies.

The employer points out that the Review Board characterized the Board's 1989/'90 handling of this claim as a reconsideration. The governors' published policies distinguish between preliminary decisions as to whether there are sufficient grounds for a reconsideration and subsequent decisions on the merits (once it has been established that there are sufficient grounds such as new evidence or a mistake of evidence or law). The policies go on to state that, while decisions on the merits are appealable to the Review Board, preliminary decisions as to whether there are sufficient grounds for a reconsideration are not appealable. Because the claims adjudicator who rendered the November 2, 1989 decision treated the matter as a new claim instead of analyzing it from the perspective of whether there were grounds for reconsideration, the Review Board should have referred the matter back to him for that preliminary determination. As I understand it, this is the employer's reasoning concerning the Review Board's jurisdiction (or lack of it) to entertain the worker's appeal.

The employer concedes that the Review Board would have had the jurisdiction to entertain the appeal, had it characterized the worker's appeal as a new claim. However, the governors' policies dictated that it refer the matter back to the claims adjudicator, once it characterized it as a reconsideration.

The employer's second argument concerns the implementation of the Review Board findings retroactive to 1957. The employer contends that the Review Board findings ought to apply as of 1989 and not 1957 — regardless of whether the worker's 1989 application is viewed as an application for reconsideration or a new claim.

Assuming the worker's 1989 application constituted an application for reconsideration, the employer gives four reasons as to why the year 1989 should be the logical starting point for compensation. First, he submits that there must be some finality to the adjudication process and this was achieved in 1957 when the worker's claim was denied. Secondly, he submits that the 1957 Board decision was *bona fide*, implying, therefore, that it should be given effect. Thirdly, he submits that a reconsideration based on new evidence should only be implemented as of the date when the new evidence was first submitted which in this case was 1989. Lastly, he submits that the appeals before the Review Board under Section 90 of the *Act* were appeals of the 1989 Board decisions not its 1957 decision — hence, the Review Board findings overturned the former and not the latter.

Assuming the worker's 1989 application constituted a new claim filed more than three years after the date of disablement, the employer points out that Section 55 contemplates payment of compensation as of the date the application was received by the Board and not as of the date of disablement.

Analysis

The question of whether the Review Board had the jurisdiction to entertain this worker's appeal is a legal question whose answer lies in the legal instrument enabling the Review Board to act, namely, the *Act*, and not in the governors' published policies.

Subsection 90(1) of the *Act* empowers the Review Board to hear appeals from Board decisions as follows:

> 90. (1) Where an officer of the Workers' Compensation Board makes *a decision under this* Act *with respect to a worker*, the worker, or, if deceased, his dependants, or his employer, or a person acting on behalf of the worker, his dependants or employer, may, not more than 90 days from the day the decision is communicated to the worker, dependants or employer, or within another time the review board allows, appeal the decision to the review board in the manner prescribed by the regulations.
>
> (emphasis added)

The same provision was part of the legislation in force when the worker appealed the November 2, 1989 and May 18, 1990 Board decisions to the Review Board.

Decision No. 70, (1974) *Workers' Compensation Reporter*, Vol. 1, p. 287 has interpreted the limiting words "a decision under this *Act* with respect to a worker" in Section 90(1) to mean that "the decision under appeal must be a claims decision involving an issue of a kind or class that affects workers financially." That interpretation is broad enough to encompass a wide range of decisions, including decisions on the merits either in the context of new claims or reconsiderations.

The Review Board characterized the November 2, 1989 and the May 18, 1990 decision letters as a reconsideration of the 1957 Board decision. I agree and also note that the employer accepts this characterization. In 1989 the worker was simply pursuing the claim initiated in 1956 with respect to his lung problems. It is irrelevant and even misleading that the claims adjudicator who rendered the November 2, 1989 decision assigned him a new claim number. Conceptually, I can see no basis for treating the worker's 1989 request to have his case investigated as a new claim.

Admittedly, the November 2, 1989 decision shows no indication that the claims adjudicator turned his mind to whether there were sufficient grounds to warrant a reconsideration as specified in the governors' policies. Since he assigned a new number to the claim, a logical inference would be that he did not consider the reconsideration

criteria set out in the policies. Indeed he may not have, however, he did render a decision on the merits. So did the claims adjudicator in the May 18, 1990 decision which refers to Dr. C's medical report dated March 1, 1990 as new evidence.

In sum, the Review Board, a remedial body, had before it two decisions on the merits of the worker's claim to compensation for medical problems dating back to his work underground in the Sullivan mine. Nothing in the *Act* limited its jurisdiction to consider these two decisions which substantively dealt with only one issue, namely, whether the worker's chronic disability resulted from his underground work at the Sullivan mine. In light of the language of the *Act* and the remedial purpose for which it was created, it was reasonable for the Review Board to take a broad view of its jurisdiction and proceed with a consideration of the substantive issue dealt with by the claims adjudicators.

I reject, therefore, the employer's contention that the Review Board lacked the jurisdiction to consider this worker's appeal.

I cannot accept the argument that the Review Board's jurisdiction to consider the appeal depended on how the claims adjudicator framed their consideration of the claim, given that they ruled on its merits. Surely, they would have reached the same conclusion as to the merits of the case, notwithstanding a different characterization. That conclusion was a denial of the claim and that was the issue before the Review Board.

I recognize that, according to the governors' policies, a different characterization could have affected the course of the claim since the policies apparently preclude the Review Board from considering an appeal from a decision on the preliminary question of whether there are sufficient grounds for reconsideration. Hence, if the claims adjudicators had characterized their review as a reconsideration *and* had stopped short of weighing the merits because, in their opinion, there were insufficient grounds for reconsideration, the governors' policies would have had the matter end there. As pointed out by the employer, Section #108.50 of the policies provides that:

> . . . no appeal lies from a decision on the preliminary question whether any grounds for a reconsideration have been submitted in support of the application. That decision is essentially preliminary and discretionary whereas a decision on the merits (once that sufficiency of grounds has been accepted) involves an application of law and policy to the facts.
>
> It follows as well that, where sufficient grounds have been accepted and a decision made on the merits of the application, the appeal should only involve the second question. In other

> words, the preliminary question having been decided in favour of the claimant or the employer, it should be accepted that there are indeed sufficient grounds to actually reconsider the claim.
>
> If it should happen that the decision maker fails to clearly distinguish between the two questions and it is therefore unclear whether the application for reconsideration has been denied because of insufficiency of grounds or because the merits did not warrant a change in the earlier decision, it *may* be necessary to refer the matter back to the decision maker to seek clarification.
>
> (emphasis added)

However, I note that this is not a case in which the claims adjudicators decided there were insufficient grounds for reconsideration. Nor it is obviously a case in which it is unclear "whether the application for reconsideration has been denied because of insufficiency of grounds or because the merits did not warrant a change in the earlier decision." Both the November 2, 1989 and the May 18, 1990 decisions concluded that there was no evidence of a distinct occupational disease, in light of the medical reports concerning the worker's difficulties. There is no question that the post-1956/'57 medical materials showed different medical findings and opinions from those in 1956/'57. For instance, the medical materials in 1989/'90 mentioned first a restrictive then an obstructive lung disease — none of which was mentioned in the 1956/'57 medical materials. Therefore, strictly in terms of the governors' policies, the Review Board could reasonably conclude that the two decisions were dealing with the merits of the claim and proceed with their consideration.

That said, I have concerns about the wording of policy #108.50. Although these concerns are peripheral to the disposition of this appeal, I wish to record them because the employer relied heavily on this policy to argue his point.

The governors' policies appear to bar absolutely appeals of a certain type of decision, namely, a decision pertaining to the sufficiency of grounds for reconsideration. The policies seem to justify this bar on the basis that such a decision is preliminary and discretionary. The language of the *Act* does not support, however, the view that some Board decisions concerning claims may be appealed while others may not. In fact, the employer himself does not contend that the *Act* draws any such distinction. The employer merely refers to the policies in support of his argument.

The fact that a decision is discretionary does not insulate it from the appeal process. The policies themselves recognize this since they specifically contemplate appeals of a discretionary decision on the merits where the worker has requested a reconsideration. The policies also contemplate appeals of various other discretionary

decisions. The fact that a decision may, in some sense, be viewed as "preliminary" does not insulate it from the appeal process either. A decision by a claims adjudicator that there are no grounds for reconsideration is a decision under Section 96(2) of the *Act* and is, therefore, obviously a decision "under this *Act* with respect to a worker" as stipulated by Section 90(1) of the *Act*. Subsection 90(1) imposes no other conditions for a decision to be appealable to the Review Board.

The question arises as to what it means for the Board to have a discretionary reconsideration power. Where does the discretionary element of that power reside or, how may it be exercised? Subsection 96(2) of the *Act* confers this discretion upon the Board as follows:

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

It is most reasonable to construe this discretion as giving the governors, on behalf of the Board, the power to set the grounds for reconsideration through the formulation of an appropriate policy. The governors have done this by specifying, in Section #108.10 of the *Rehabilitation Services and Claims Manual*, new evidence and mistakes of evidence or law as grounds for reconsideration. The obvious purpose of this policy is to ensure some finality to the adjudication of claims. Further, it prevents abuses of the reconsideration process by applicants who, while dissatisfied with a decision, failed to meet the statutory deadline for appealing to the Review Board. Reconsideration by the Board of its previous decisions cannot be used as a substitute for initiating a timely appeal to the Review Board; such use would defeat the legislative intent that claims be adjudicated quickly and efficiently.

The 1991 changes to the legislation intended, in part, to prevent claims from becoming protracted. The reconsideration grounds found in Section #108.10 of the *Rehabilitation Services and Claims Manual* are, therefore, consistent with this intent. A reconsideration may not proceed unless grounds such as new evidence or a mistake of evidence or law exist. But, that does not make the decisions by the claims adjudicators as to whether these grounds exist unappealable. It is entirely consistent with the legislation that the claims adjudicators' application of the policy guidelines should be appealable to the Review Board. For instance, the judgment as to whether evidence submitted constitutes significant new evidence should be appealable. What is not appealable is the requirement that there be new evidence (or a mistake of evidence or law) before a reconsideration may proceed. Simply put, if an applicant requests a reconsideration without, by presentation of evidence or argument, invoking any of the grounds specified in the governors' policies and is met with a refusal to consider the

application, there is no appealable issue. But, if the applicant relies explicitly or implicitly on one of the specified grounds and the evidence or argument presented is rejected as insufficient, there is an appealable issue; this issue is whether there are sufficient grounds for a reconsideration within the meaning of the governors' policies. Section #108.50 of the *Rehabilitation Services and Claims Manual*, which forms part of the governors' published policy, states ". . . no appeal lies from a decision on a preliminary question whether any grounds for a reconsideration have been submitted in support of the application" must be interpreted in a manner that is consistent with the foregoing. Although its wording suggests an absolute bar against appeals of decisions pertaining to the sufficiency of grounds for reconsideration, it would be incorrect to adopt this narrow interpretation.

The employer's second argument was that compensation to this worker should be paid only as of 1989 and not 1957, even if the Board's 1989 and 1990 decisions constituted a reconsideration and the Review Board had the jurisdiction to entertain appeals from these decisions. I am not persuaded by those arguments. In particular, I am not persuaded by the argument that, in the interest of finality and because it was *bona fide*, the original decision (namely, the 1957 decision) should remain effective up until submission of the new evidence that lead to its reversal.

Under the *Act*, Sections 5 and 6 entitle a worker to compensation for personal injuries arising out of and in the course of the employment and for industrial diseases. Section 5 provides that compensation is payable from the first working day following the day of the worker's injury. Section 6 provides that compensation is payable as if the disease were a personal injury and the date of disablement shall be treated as the occurrence of the injury. These provisions determine, therefore, the date as of which the Board must pay compensation to a worker. Once it is established that a worker suffered from an industrial disease or from an injury arising out of and in the course of the employment, his entitlement to compensation goes back to the date of the injury or the date of disablement. The only exception is if the worker failed to apply for compensation within the statutory time frame, in which case Section 55 of the *Act* applies. A decision resulting from a reconsideration does not fall, however, under Section 55. The principles set out in Sections 5 and 6 of the *Act* govern such a decision.

Conclusions

The Review Board was correct in characterizing the Board decisions of November 2, 1989 and May 18, 1990 as a reconsideration of the 1957 Board decision concerning the worker's lung condition.

The Review Board had the jurisdiction to entertain the appeals from these two decisions.

The *Act* requires payment of compensation to the worker retroactive to 1957, as found by the Review Board.

THE EMPLOYER’S APPEAL IS DENIED.

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

WORKERS' COMPENSATION
REPORTER

Decision of the Appeal Division

Number: **94-0331**
Date: **March 11, 1994**
Panel: **Connie Munro, Thomas Kemsley, Patrick L. Byrne**
Subject: **Dependants' Benefits — Definition of "Child"**

The widow of a deceased worker, has appealed the findings of the Workers' Compensation Review Board dated May 31, 1993.

The issue is whether it was contrary to the *Canadian Charter of Rights and Freedoms* for the Board to terminate benefits for the appellant's son when he was 21 years old and suspend benefits for her daughter when she was 18 years old.

Background

The worker died on October 21, 1982. Initially, the Board did not pay any compensation as it decided that his death did not arise out of and in the course of his employment. However, on September 28, 1987, the former commissioners allowed the widow's appeal and found the death was compensable.

The Board paid dependants' benefits under Section 17 of the *Workers Compensation Act* ("the *Act*"). Initially, this pension was based on the widow and her four children, as they all qualified under Section 17 for these benefits. The Board recalculated the pension each time one of the children no longer met the requirements of Section 17 of the *Act*.

The portion of the pension for the youngest son was terminated on September 3, 1992, when he reached age 21. He was no longer in school at that time. The portion for her only daughter was suspended as of August 31, 1992, when she was 18 and no longer in school.

Appeal to the Review Board

The widow also appealed the issue of continuing benefits for her children to the Review Board. The Review Board considered Section 17(1)(e) of the *Act*. They found that the son reached the age of 21 on September 3, 1992, and there was no evidence that the

daughter continued at school after turning 18. They found that both the son and daughter ceased to be "children" within the definition in Section 17(1) of the *Act* and, thus, were no longer entitled to dependants' benefits. Therefore, it was proper for the Board to recalculate the pension.

The Review Board also noted that the widow's counsel had suggested that the provisions of Section 17(3) were in breach of the *Human Rights Act* and the *Charter of Rights and Freedoms*. However, they noted that counsel had made no submissions in that regard and had not given notice to the Crown. The panel concluded that counsel did not wish to pursue those arguments. As a result, the Review Board made no finding regarding the application of the *Human Rights Act* or the *Canadian Charter of Rights and Freedoms*.

Appeal to the Appeal Division

Counsel argued that the definition of "child" in Section 17(1) of the *Act* is contrary to Section 15(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). He pointed to other statutes and the common law, which make a fact-based inquiry into dependency. He argued that, by defining dependency in terms of chronological age, Section 17(1) of the *Act* is contrary to Section 15(1) of the *Charter*. Counsel submitted evidence that the son and daughter are still financially dependent on their mother, and argued that benefits for them should continue until that dependency ceases.

Facts

The youngest son turned 21 on September 3, 1992 and the daughter turned 18 on February 11, 1992. According to the affidavit of the widow, both have graduated from high school and neither is currently attending school. The affidavit states that both the son and daughter would like to go to school, but they cannot afford to right now. The appellant said both the son and daughter are working, they both live at home, she does not charge them board, she pays for their clothes, and she supports them both entirely.

Workers Compensation Act

Section 1 of the *Act* states:

> "dependant" means a member of the family of a worker who was wholly or partly dependent on his earnings at the time of his death, or who but for the incapacity due to the accident would have been so dependent, and, except in section 17 (3) (a) to (h), (9) and (13), includes a spouse, parent or child who satisfies the board that he had a reasonable expectation of pecuniary benefits from the continuation of the life of the deceased worker;

Section 17 of the *Act* provides for compensation in fatal cases:

(1) In this section
"child" means
(a) a child under the age of 18 years, including a child of the deceased worker yet unborn;
(b) an invalid child of any age; and
(c) a child under the age of 21 years who is regularly attending an academic, technical or vocational place of education,

. . .

(3) Where compensation is payable as the result of the death of a worker or of injury resulting in such death, compensation shall be paid to the dependants of the deceased worker as follows:

(a) Where the dependants are a widow or widower and 2 or more children, a monthly payment of a sum that, when combined with federal benefits payable to or for those dependants, would equal the total of
   (i) the monthly rate of compensation under this Part that would have been payable if the deceased worker had, at the date of death, sustained a permanent total disability, subject to the minimum set out in paragraph (g); and
   (ii) $65 per month for each child beyond 2 in number;
(b) where the dependants are a widow or widower and one child, a monthly payment of a sum that, when combined with federal benefits payable to or for those dependants, would equal 85% of the monthly rate of compensation under this Part that would have been payable if the deceased worker had, at the date of death, sustained a permanent total disability, subject to the minimum set out in paragraph (g);
(c) where the dependant is a widow or widower who, at the date of death of the worker, is 50 years of age or over, or is an invalid spouse, a monthly payment of a sum that, when combined with federal benefits payable to or for that dependant, would equal 60% of the monthly rate of compensation under this Part that would have been payable if the deceased worker had, at the date of death, sustained a permanent total disability, but the monthly payments shall not be less than $234.36;

(d) where the dependant at the date of death is a widow or widower who is not an invalid and is under the age of 40 years, and there are no dependent children, a capital sum of $10,000, of which $1,000 shall be payable immediately and the remaining $9,000 shall be payable at a time the board determines; but the payment shall not, except at the request of the dependant, be delayed beyond 6 months after the date of death of the worker;

(e) where the dependant is a widow or widower who is not an invalid and who, at the date of death of the worker, has reached the age of 40 years but not the age of 50 years, and there are no dependent children, a monthly sum calculated under Schedule C;

(f) where there is no surviving spouse or common law spouse eligible for monthly payments under this section, and

  (i) the dependant is a child, a monthly payment of a sum that, when combined with federal benefits to or for that child, would equal 40% of the monthly rate of compensation under this Part that would have been payable if the deceased worker had, at the date of death, sustained a permanent total disability;

  (ii) the dependants are 2 children, a monthly payment of a sum that, when combined with federal benefits payable to or for those children, would equal 50% of the monthly rate of compensation under this Part that would have been payable if the deceased worker had, at the date of death, sustained a permanent total disability; or

  (iii) the dependants are 3 or more children, a monthly payment of a sum that, when combined with federal benefits payable to or for those children, would equal the total of

    (A) 60% of the monthly rate of compensation under this Part that would have been payable if the deceased worker had, at the date of death, sustained a permanent total disability; and

    (B) $65 per month for each child beyond 3 in number,

  subject, in all cases, to the minimum set out in paragraph (g);

(g) the minimum allowances payable under paragraphs (a), (b) and (f) shall be the allowances that would be payable if the allowances were calculated under those paragraphs in respect of a deceased worker with average earnings of $7,000 per annum;

(h) where there is
 (i) no dependent spouse or child entitled to compensation under this section, but a worker leaves other dependants, a sum reasonable and proportionate to the pecuniary loss suffered by those dependants by reason of the death, to be determined by the board, but not exceeding in the whole $115 per month; or
 (ii) a dependant spouse, or a dependant child or children, entitled to compensation under this section, but not a spouse and child or children, and, in addition, the worker leaves a dependent parent or parents, then, in addition to the compensation payable to the spouse or children, a sum, reasonable and proportionate to the pecuniary loss suffered by the dependent parent or parents by the death, to be determined by the board, but not exceeding $115 per month;

(i) where
 (i) no compensation is payable under the foregoing provisions of this subsection; or
 (ii) the compensation is payable only to a spouse, a child or children or a parent or parents,

 but the worker leaves a spouse, child or parent who, though not dependent on his earnings at the time of his death, had a reasonable expectation of pecuniary benefit from the continuation of the life of the worker, payments, at the discretion of the board, to that spouse, child or children, parent or parents, but not to more than one of those categories, not exceeding $115 per month for life or a lesser period determined by the board; and

(j) where the worker leaves no dependent widow or widower, or the widow or widower subsequently dies, and the board considers it desirable to continue the existing household, and when a suitable person acts as a foster parent in keeping up the household and taking care of and maintaining the children entitled to compensation, in a manner satisfactory to the board, the same allowance shall be payable to the foster parent and children as would have been payable to a widow or widower and children, and shall continue as long as those conditions continue.

. . .

(17) Where a situation arises that is not expressly covered by this section, or where some special additional facts are present that would, in the board's opinion, make the strict application of this section inappropriate, the board shall make rules and give decisions it considers fair, using this section as a guideline.

[Note: Dollar amounts changed periodically by regulation pursuant to Section 25(4).]

Thus, various parts of Section 17(3) provide for benefits to a dependant "child" or "children," as defined in Section 17(1). The son and daughter do not qualify for benefits under any of those parts of Section 17(3), as it is written. They may satisfy the definition of "dependant" in Section 1 of the *Act*, but they do not satisfy the definition of "child" in Section 17(1), as both are 18 years of age or older and do not attend school.

If the daughter returned to school while she was still under 21, her benefits would be reinstated. That is why her benefits were "suspended" at age 18. As the son had turned 21, his benefits could not be reinstated even if he returned to school. Therefore, the Board "terminated" his benefits.

The definition of "dependant" in Section 1 is limited to "a member of the family of the worker." Thus, a child of the deceased worker who turns 18, and is no longer in school, is no longer a "child" within the definition of Section 17(1), but could be a "dependant" within the definition of Section 1. Only Section 17(h)(i) provides for benefits to a dependant who is not a "child," "children," "widow or widower," "parent," or a "foster parent." Section 17(h)(i) provides for benefits to "other dependants" where there is no dependent spouse or child entitled to compensation. In this case, the widow is a dependent spouse, and thus the provisions of Section 17(h)(i) are not applicable. There is no other section under which adult children of a deceased worker can claim dependants' benefits. Section 17(17) provides general discretion to consider situations not expressly covered elsewhere in Section 17. However, Sections 17(1) and (3) do expressly consider the benefits payable to the dependent children of a deceased worker. Thus, Section 17(17) is not applicable in this situation.

Therefore, dependants' benefits are not payable for the son and daughter under the *Workers Compensation Act*, unless the coverage of the *Act* can be extended by other legislation. Counsel briefly referred to the *Human Rights Act* and more fully argued that the *Charter* should be used to extend benefits to the son and daughter, while they are actually financially dependent on their mother.

Human Rights Act

Counsel did not argue that Section 17(1) of the *Act* was contrary to the *Human Rights Act*, although this was raised briefly in an earlier submission. The *Human Rights Act* prohibits discrimination on the basis of age, with respect to certain practices. If a person has a complaint regarding discrimination, the *Human Rights Act* sets out that the person can file a complaint with the B.C. Council of Human Rights. The Council then investigates the matter. There is nothing in the *Human Rights Act* which gives the Workers' Compensation Board or the Appeal Division any authority to hear complaints or grant any relief under the *Human Rights Act*. Therefore, we deny any appeal based on the *Human Rights Act*.

Canadian Charter of Rights and Freedoms

Counsel argued that the provisions in Section 17 of the *Act*, which limit benefits on the basis of age, are contrary to Section 15(1) of the *Charter*.

Jurisdiction of the Appeal Division

In Decision No. 93-1222 (*Workers' Compensation Reporter* 10(1), p. 53), this same panel determined that the Appeal Division has jurisdiction to consider *Charter* issues and grant certain remedies under Section 52(1) of the *Constitution Act, 1982*. We adopt that analysis of our jurisdiction, and will not repeat it here.

The Charter

Section 15(1) states:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

Counsel gave notice of this appeal to the Attorney General of British Columbia and the Attorney General of Canada. Both declined to participate.

Court Decisions

In Decision No. 93-1222, the issue was discrimination on the basis of age. In that case, the panel found that the distinctions based on age in Sections 17(3)(c),(d) and (e) of the *Act* were discriminatory and violated the equality provisions of Section 15(1) of the *Charter*. In reaching that conclusion, we reviewed some of the significant Supreme Court of Canada cases regarding the interpretation and application of Section 15(1) of the *Charter*. We will repeat some of that analysis here.

First, we noted that discrimination requires more than a mere distinction. In *Andrews* v. *Law Society of British Columbia* (1989), 56 D.L.R. (4th) 1, McIntyre J. stated at page 645:

> Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies and also upon those whom it excludes from its application. . . . It will not be every distinction or differentiation in treatment at law which would transgress the equality guarantees of Section 15 of the *Charter*.

McKinney v. *University of Guelph* (1990), 76 D.L.R. (4th) 545 (S.C.C.) concerned mandatory retirement at age 65. In that case, Wilson J., in dissent on Section 1 of the *Charter* but in agreement that Section 15(1) was infringed, said, at pages 608, 609 and 610, there must be more than a mere distinction based on enumerated grounds:

> . . . the evil which section 15 was meant to protect against is stereotype and prejudice. The purpose of the equality guarantee is the promotion of human dignity. This interest is particularly threatened when stereotype and prejudice inform our interactions with one another, whether on an individual or collective basis. It is for this reason that the central focus of the equality guarantee rests upon those vehicles of *discrimination, stereotype and prejudice*.
>
> . . .
>
> The grounds enumerated in s. 15 represent some blatant examples of discrimination which society has at last come to recognize as such. Their common characteristic is political, social and legal disadvantage and vulnerability. *The listing of sex, age and race, for example, is not meant to suggest that any distinction drawn on these grounds is, per se, discriminatory*. Their enumeration

> is intended rather to assist in the recognition of prejudice when it exists. *At the same time, however, once a distinction on one of the enumerated grounds has been drawn, one would be hard pressed to show that the distinction was not, in fact, discriminatory*.
>
> It follows, in my opinion that *the mere fact that the distinction drawn in this case has been drawn on the basis of age does not automatically lead to some kind of irrebuttable presumption of prejudice*. Rather it compels one to ask the question: *Is there prejudice*? Is the mandatory retirement policy a reflection of the *stereotype* of old age? Is there an *element of human dignity at issue*? Are academics being required to retire at age 65 on the unarticulated premise that with age comes increasing incompetence and decreasing intellectual capacity? I think the answer to these questions is clearly yes and that s. 15 is accordingly infringed.
>
> [emphases added]

Tétreault — Gadoury v. *Canada (Canada Employment and Immigration Commission)* (1991), 81 D.L.R. (4th) 358 was another Supreme Court of Canada case which involved a distinction based on age — the denial of normal U.I.C. benefits to persons aged 65 and over. On the issue of Section 15(1) of the *Charter*, La Forest J. adopted the language of Lacombe J. of the Federal Court of Appeal in his analysis of discrimination:

> The most harmful and singular aspect of section 31 of the *[Unemployment Insurance] Act* is that it permanently deprives the applicant, and any other person of her age, of the status of a socially insured person by making her a pensioner of the state, even if she is looking for a new job. Regardless of her personal skills and situation, she is as it were *stigmatized* as belonging to the group of persons who are no longer part of the active population. . . .
>
> [emphasis added]

In *Andrews* (supra), which did not deal with discrimination on the basis of age, McIntyre J. stated at pages 18–19:

> The enumerated grounds do, however, reflect the most common and probably the most socially destructive and historically practised bases of discrimination and must, in the words of s. 15(1), receive particular attention. Both the enumerated grounds themselves and other possible grounds of discrimination recognized under s. 15(1) must be interpreted in a broad and generous manner.

La Forest J. stated at page 37:

> . . . the relevant question as I see it is restricted to whether the impugned provision amounts to discrimination in the sense in which my colleague has defined it, i.e., on the basis of "irrelevant personal differences" such as those listed in s. 15. . . .

Wilson J. stated at page 32:

> While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.

In the Supreme Court of Canada decision in *R.* v. *Turpin*, [1989] 1 S.C.R. 1296, which involved distinctions based on an accused person's province of residence, Wilson J., writing for the Court, discussed discrimination at pages 1331–1332:

> In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the *larger social, political and legal context*.
>
> . . .
>
> Accordingly, it is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail *a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged*.
>
> [emphases added]

Wilson J. also referred to the goal of "ensuring that equality rights are given the same kind of broad, purposive interpretation accorded to other *Charter* rights" and also referred to:

> . . . the purposes of s. 15 in remedying or preventing discrimination against groups suffering social, political and legal

> disadvantage in our society. A search for indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice. . . .

The Supreme Court of Canada in *Schachter* v. *Canada* (1992), 93 D.L.R. (4th) 1 did not analyze discrimination under Section 15(1) of the *Charter*. The *Unemployment Insurance Act* provided benefits to adoptive parents which were not provided to natural parents. A natural father challenged that provision under Section 15(1) of the *Charter*. The Unemployment Insurance Commission conceded that the provision violated Section 15(1) of the *Charter*. Thus that issue was not before the Court on the appeal. However, La Forest J. said at page 34:

> To begin with, I am by no means sure there was a violation of the *Charter* in this case. At first sight (and the Chief Justice alludes to this) it does not seem wholly unreasonable that Parliament might have good reason to encourage adoptive parents as a group, and the effect of the judicial intervention has been to divert from that group some of the moneys intended to meet the problem Parliament may have had in contemplation. This court has repeatedly stated that *Parliament may constitutionally attack one problem, or part of a problem, at a time*.
>
> [emphasis added]

Analysis

Sections 17(3)(c),(d) and (e) of the *Act* make a distinction in benefits payable to widows or widowers based on the age of 40. They also make distinctions based on ages 41 through 50, but, on the facts, it was the use of age 40 that was challenged constitutionally in Decision No. 93-1222. The panel there was unable to find that people over 40 and people under 40 exist as two distinct groups in society, other than in Sections 17(3)(c),(d) and (e). Thus, it was difficult to see how one of those groups suffered disadvantage as compared to the other, apart from the particular legal distinction being challenged.

However, that panel found that age 40 was an irrelevant personal difference and, combined with the presence of stereotyping and human dignity, those provisions of the *Act* were discriminatory.

This case is somewhat different. The definition of “child” in Section 17(1) also uses age as a distinguishing factor. However, the ages used in that definition are ages commonly used in our society to separate people who are considered adults, and have the rights and responsibilities of adults, from those who have not yet achieved that status.

Legally, children exist as a separate and distinct group from adults for a variety of purposes. While the defining line between children and adults is not always the same, nor not always precisely defined, generally that transition starts to occur around age 16 and ends by age 21. Certain statutes use specific ages. For example:

Election Act, R.S.B.C. 1979, c. 103, s. 2(1)(a).
A person must be of the full age of 18 years to vote in British Columbia elections.

Canada Elections Act, R.S.C. 1991, c. E-2, s. 51(1)(a).
At age 18 Canadian citizens may vote in federal elections.

Young Offenders (British Columbia) Act, R.S.B.C. 1979, c. 438, s. 1.
As of March 31, 1985, an "adult" is defined as 18 years old or older. A young person is defined as a person who is 12 to 17 years of age. Young offenders are treated more leniently than adult offenders in certain criminal law matters.

Age of Majority Act, R.S.B.C. 1979, c. 5, s. 1(1).
This section changed the age of majority from 21 to 19, as of April 15, 1970. The *Act* itself does not give nor remove any rights, but changes the age used with respect to all other Acts which do not specify an age limit for terms such as "infant," "minor," and similar expressions.

Infants Act, R.S.B.C. 1979, c. 196, ss. 14(1), 16.2, 33.
At age 19 guardianship ends and payments and transfers of property are made (s. 14(1)). A contract is unenforceable if made by an infant unless certain actions are taken on attaining the age of majority (s. 16.2). Money paid into court under an approved agreement and income from it are paid out at age 19 (s. 33).

Family Relations Act, R.S.B.C. 1979, c. 121, ss. 1, 56.
A child is defined as under 19 years of age (s. 1). Parents are required to provide their children with the necessary support and maintenance (s. 56).

Liquor Control and Licensing Act, R.S.B.C. 1979, c. 237, s. 1.
A minor is defined as a person under the age of majority as stated in the *Age of Majority Act.*

Motor Vehicle Act, R.S.B.C. 1979, c. 288, ss. 1, 6(1), 28, 55.
An adult is defined as a person who has attained the age of 19 years (s. 1). A parent must apply for a person over 16 but under 19 who desires a licence (s. 28). A short term driver's licence (less than the normal five-year

duration) may be issued to anyone under 19 (s. 55). Applicants for registration and vehicle licences must be 18 or over unless certain requirements are met such as the provision of a parent's signature (s. 6.(1)).

Thus, these statutes use either age 18 or 19 to distinguish the rights and responsibilities of adults from those of children, including adolescents. These statutes make the age of 18 or 19 significant in our society, without inquiring into individual characteristics. Generally, in our society, children have more restrictions and fewer individual rights than adults. However, children also have fewer responsibilities and receive more government protection than adults.

Children are treated differently from adults for many purposes. It is difficult, in the context of all the rights and responsibilities that change when a person reaches 18 or 19, to single out one of those changes and determine if it is discriminatory. While in many statutes age alone is used to make the distinction between children and adults, the transition from child to adult is more complex and gradual than that. People mature at different times. It is not possible to examine every person from age 16 through 21 to determine when that person should be given the rights and responsibilities of an adult. As well, that transition occurs at different ages for different purposes. For example, in British Columbia, people are considered old enough to vote before they are old enough to legally drink alcohol.

At least one statute uses a younger age to end state protection. The *Employment Standards Act*, S.B.C. 1980, c. 10, S. 50(1) defines a child to be a person under 15 years old, and prohibits the employment of a child without authorization of the director.

In some statutes, no age is set out. For example, the *Family Compensation Act*, R.S.B.C. 1979, c. 120 sets out procedures for legal actions to be brought for the benefit of the spouse, parent or child of a deceased person. That Act defines child to include "a person to whom the deceased stood in loco parentis, and a person whose stepparent was the deceased." The courts have used different ages for determining the benefits payable to children under the *Family Compensation Act*. In *Skelding (Guardian ad litem of)* v. *Skelding* (1992), 79 B.C.L.R. (2nd) 177 (S.C.), loss of dependency was calculated to age 22 as the court accepted that both children would have pursued post-secondary education and remained in their parents' care until that age. In *Coe Estate* v. *Tennant* (1988), 31 B.C.L.R. (2nd) 236 (S.C.), dependency benefits were calculated to age 20. In *Plant* v. *Chadwick* (1986), 5 B.C.L.R. (2nd) 305 (C.A.), loss of support was given to age 19. In *Birch* v. *Wilts*, [1992] B.C.D. Civ. 3380-03 (S.C.), benefits were given to two sons, age 25 and 23, for loss of parental guidance, although not for loss of support.

The use of different ages in these different statutes and cases does not necessarily mean that the use of any particular age is contrary to the equality provisions in Section 15(1) of the *Charter*. Equally, just because an age is used frequently to make

distinctions in society, does not mean that it is not contrary to the equality provisions of the *Charter*. In *McKinney* (supra), the Supreme Court of Canada considered the issue of mandatory retirement at age 65. The ages 60 and 65 are used commonly in our society to make distinctions. Some statutes grant new rights or entitlements at that age, while others attempt to remove rights or entitlements. The fact that age 65 is used commonly for changing rights did not protect it from constitutional scrutiny in *McKinney*. The same is true regarding the ages 18 and 21.

In *McKinney* (supra), all of the judges (except the one who did not consider the issue) found that the policies and practices of the University and Section 9(1)(a) of the Ontario *Human Rights Code, 1981* violated Section 15 of the *Charter* in allowing mandatory retirement at age 65. However, the majority of the Court found that violation was saved by Section 1 of the *Charter*.

Finding

The *Andrews* decision (supra) set out a two-part approach to the Section 15(1) analysis. In this case, there is no question that Section 17(1) of the *Act* makes a distinction based on age. Therefore, the question is whether that distinction is discriminatory as defined in the above, and other, cases. As neither the son and daughter were attending school when the benefits were suspended or terminated, only the provision relating to age 18 is relevant to this case. If the son had been attending school when the benefits for him were terminated at age 21, then the provision relating to age 21 would also be relevant to this case.

We find that the age 18 used in Section 17(1) is not an irrelevant personal difference. As set out above, children acquire significant other rights at age 18 or 19. Importantly, at age 18 they gain the right to vote, both in provincial and federal elections. Pursuant to the *Young Offenders (British Columbia) Act*, at age 18 they are adults for the purposes of criminal law. In British Columbia, most children have finished their secondary school education by age 18. They receive benefits under Section 17 of the *Act* until that age without any inquiry as to whether they are still attending school or are still dependent on their parent. If they continue in school beyond age 18, then compensation benefits will be continued. If they do not stay in school after age 18, then they may decide to enter the workforce. Some may delay entering the workforce for a variety of reasons and some may be unsuccessful in becoming self-supporting immediately. However, a significant transition occurs around this age which is reflected in the statutes set out above.

We find age 18 is not irrelevant in considering whether people should be treated as the dependent children of their parents or independent adults. Age 18 may not be the most accurate age in every case and thus it may be arbitrary to some extent. However, it is not an irrelevant personal difference.

Secondly, we find the use of age 18 in Section 17(1) of the *Act* does not involve negative stereotype or prejudice. It promotes the transition from dependence to independence. It recognizes that a person, who has finished school, is ready to join the workforce. It has quite the opposite effect from the use of age 65 in the *McKinney* case (supra). There, age 65 indicated that people were no longer capable of the work they had been doing and were no longer valued workers. In *Tétreault — Gadoury* (supra), age 65 was used to stigmatize a person as belonging to a group of persons who are no longer part of the active working population.

Here, age 18 does not stereotype or prejudice a person in that sense. It may be used to deny them benefits which they received previously, but that is in recognition of the person's transition to adulthood and independence. It values, rather than devalues, the person's merits and capacities.

The fact that it may be somewhat arbitrary does not make it unconstitutional. It is odd that Section 17(1) of the *Act* uses age 18, while the *Family Relations Act* makes parents responsible for the support and maintenance of a child until age 19. It would seem that the same age should be used in both statutes. However, both are provincial statutes and we do not see how one can be used to make the other unconstitutional.

Therefore, we find the use of age 18 in Section 17(1) of the *Act* does not discriminate between those under 18 and those 18 and older. It is a mere distinction between the treatment of two groups which exist as reasonably distinct groups in society.

Conclusion on Charter Issue

In conclusion, we find that the use of age 18 in Section 17(1) of the *Act*, to suspend benefits for children of a deceased worker who reach age 18 and are not still attending school, is not contrary to Section 15(1) of the *Charter*. Thus, as the daughter was over the age of 18 and not attending school, the Board properly suspended her benefits under Section 17 of the *Act*. If she returns to school before she turns 21, she will be entitled to have her benefits reinstated until age 21. Further, as the son is over 21 and not attending school, he is not entitled to benefits under the *Act*.

THE APPEAL IS DENIED.

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

WORKERS' COMPENSATION
REPORTER

Decision of the Appeal Division

Number: 94-0219
Date: February 22, 1994
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Section 96(2)

In a letter dated January 21, 1992, the ombudsman requested a reconsideration of the January 6, 1989 decision by the prior commissioners to deny G.H.'s compensation claim.

In 1985, G.H. and his brother, R.H., had a trucking business. They owned one truck which they used for hauling logs as well as for other business purposes. Each of the brothers had contributed 50% towards the down payment on the truck. According to the evidence, the brothers did not employ any workers in their business.

When hauling logs in the winter months, the brothers took turns driving the truck on 12-hour shifts. They used the money earned on these "double shifts" to pay their expenses and divided the remainder evenly between themselves.

During the summer months, only single shifts were usually available. On these shifts, R.H. did the driving. G.H. looked after the business, including finding work, arranging for the maintenance of the truck and looking after the bills and "the books." When R.H. drove the truck on single shifts, he received 25% of the net earnings of the business and the balance was divided equally between the two brothers.

In the early fall of 1985, G.H. inquired of S.G. as to the availability of work in the Prince George area. Some time later in the fall, S.G. informed him that he could provide sufficient work for "double shifting." Thereupon, R.H. drove to Prince George to finalize working arrangements with S.G. and signed a contract, apparently with his brother's approval. The contract on file is between S.G. Trucking and R.H.; it is signed by S.G. and R.H. and is dated November 15, 1985. R.H. wrote his W.C.B. firm number on the contract. The express terms of this contract were:

1. Trucking sub-contractor is to meet M.O.T. and W.C.B. regulations governing equipment and safety. Trucking sub-contractor (during the term of this agreement) must carry comprehensive general liability insurance and statutory motor vehicle liability insurance. Trucks must be equipped with chains and are radio equipped with necessary road channels.

2. Trucking sub-contractor is to be responsible for the logs from the bush landing to the sawmill. Any dumped loads to be reloaded and hauled at trucking sub-contractors expense.

3. Trucking sub-contractor is to be responsible for all his own operating expenses: such as fuel, oil, tires, chains, etc.

4. There will be a 10% hold-back on the "gross" earning per pay period for performance and statutory liability. The 5% statutory liability will be payed back quarterly upon recieving W.C.B. clearance letter. The 5% performance hold-back will be paid back on pay period following job completion. There will also be a .4% hold-back on the "gross" earnings. This will be paided to [S.G.] for supervising trucks. Any dumped loads not reloaded and hauled by the trucking sub-contractor will be subtracted from the 5% performance hold-back. All dumped loads must be hauled before job completion.

5. All cheques will be paided by [S.G.] Trucking.

The Assessment files show that S.G. Trucking was never registered with the Board. S.G., on the other hand, had carried personal optional protection intermittently between April 1981 and July 1985 and steadily since. The files also show that he has at various times employed some help and was assessed accordingly.

On December 18, 1985, G.H. telephoned the Board to reinstate his personal optional protection effective December 20, 1985. G.H.'s assessment file includes a telephone memo dated December 18, 1985 which simply lists his name, identifies him as an independent operator and notes "coverage effective December 20, 1985." The file also includes an undated registered letter addressed to Mr. G.H. advising that "optional protection coverage has been accepted effective December 20, 1985 on an interim basis . . ."; a formal application for optional protection with instructions for its completion was enclosed with the letter. This application identifies Mr. G.H. as an independent operator, specifies that he telephoned on the 18th of December, 1985, and that coverage would be effective December 20, 1985. An Employer's Registration Form, date stamped December 19, 1985, provides some details of Mr. G.H.'s business. It indicates that G.H. had been previously registered with the Board. It describes the business as log hauling. It shows "0" workers under "number of workers" and "$31,224 (P.O.P. only)" under "estimate of annual payroll." It also notes "interim 'P.O.P.' coverage effective *December 20, 1985*." Although it is to be signed by the applicant, the registration form does not bear G.H.'s signature. It appears to have been completed by a Board employee.

It would appear from the Review Board findings that, on December 19, 1985, R.H. started hauling logs for S.G. some 100 miles southeast of Prince George to Prince George. It would also appear that R.H. expected his brother to join him in Prince George on the 19th to do the second shift, beginning in the evening or night of the 19th. R.H.'s personal optional protection (under Firm No. — —) was in force on December 19, 1985.

On December 19, 1985, G.H. left Salmon Arm to join his brother in Prince George. To get to Prince George, he drove his car which carried supplies needed for hauling logs. En route, he stopped for supper in Quesnel, then proceeded to drive directly to Prince George. Around 7:00 p.m., his car struck a moose on the highway. G.H. was severely injured as a result of this accident.

By letters dated January 17, 1986 and October 31, 1986, the Board rejected G.H.'s application for compensation on the grounds that he did not have personal optional protection, was not his brother's worker, and, in any case, was not in the course of employment at the time of the accident.

In findings dated July 18, 1988, the majority of the Review Board reached the conclusion that G.H. was eligible for compensation coverage. The majority found him to be a labour contractor within the meaning of Board policy (#7.42 of the *Rehabilitation Services and Claims Manual* (the *Manual*)) — that is, "an individual not employing workers but supplying one piece of major equipment." Moreover, the majority was of the view that, for this category of labour contractors, personal optional protection and registration mean one and the same thing. Because labour contractors in this category employ no workers, registration without personal optional protection is meaningless. Therefore, G.H. was not registered with the Board in any meaningful sense prior to December 20, 1985 since he was not covered by personal optional protection prior to that date. Since he was not registered, Board policy (#7.42 of the *Manual*) dictated that he be considered a worker of the prime contractor or firm with which he contracted to haul logs. According to the majority, the evidence ruled out an employer-employee relationship between R.H. and G.H. Hence, the only possible employer would be S.G. Trucking.

Taking into account the travelling distance to the job site, the majority held that, at the time of the accident, G.H. was in the course of employment; so the accident must be deemed to have arisen out of his employment. In support of this finding, the majority noted that G.H. was transporting supplies and equipment needed on the job, at the time of the accident. They also noted G.H.'s evidence at the hearing that both brothers charged travel expenses as part of their "overhead" in operating their logging truck at the rate of $100.00 per day.

The dissenting member of the Review Board panel distinguished between registration and personal optional protection. He viewed registration as a first step and the acquisition of personal optional protection as an additional and separate step. On

that basis, he found that G.H. was registered with the Board as of December, 1985, although his personal optional protection was to be effective only as of December 20, 1985. Since he was registered as a labour contractor with the Board at the time of the accident, he could not be considered either his brother's or S.G.'s worker, in light of Section #7.42 of the *Manual*.

The dissenting member of the panel agreed with the majority's analysis to the extent that he was prepared to consider G.H. as in the course of employment, at the time of the accident, had he found him to be a worker.

I note that Board policy in 1985 (#7.42 of the *Manual*) stated that:

> Labour contractors are allowed the option of registering with the Board as employers *and* obtaining personal optional protection. However, if they do not exercise this option, they are considered as workers of the person for whom they are working and the latter must register as an employer and pay assessments on the amounts he paid to them.
>
> (emphasis added)

This wording was changed very slightly in 1986. The wording in the 1986 *Manual* was:

> Labour contractors are allowed the option of registering with the Board as employers *or* obtaining personal optional protection. However, if they do not exercise this option, they are considered as workers of the person for whom they are working and the latter must register as an employer and pay assessments on the amounts he pays to them.
>
> (emphasis added)

Since 1989, the policy (today part of the governors' published policies) states that:

> Labour contractors are allowed the option of registering with the Board as employers or obtaining personal optional protection. Those labour contractors who do not elect to be registered, and any help they employ to assist them, are considered workers of the prime contractor or firm for which they are contracting, and that firm is responsible for assessments and injury reporting.

Both the majority and the dissenter on the Review Board panel applied the policy as it was worded in 1986, even though the circumstances that resulted in G.H.'s present claim occurred in 1985.

The Review Board findings of July 18, 1988 were referred to the prior commissioners under the prior Section 96(2). For the most part, the commissioners agreed with the dissenting member's conclusions and reasoning. They too considered that, even though he did not have personal optional protection, G.H. was a registered labour contractor at the time of the accident and this registration precluded any possible employer-employee relationship between him and S.G. They reasoned:

> . . . You contacted the Board to obtain registration as a labour contractor, and it was your choice to specify that your personal optional protection not commence until 20 December 1985. . . . In these circumstances, the Commissioners consider that it would be unreasonable, and contrary to Board policy, to view you as being a worker of [S.G.] Trucking for the single day you worked subsequent to registering as a labour contractor prior to your personal optional protection taking effect.

The prior commissioners also considered that the reasoning contained in Decision No. 116 (*Workers' Compensation Reporter*, Vol. 2, p. 98) was relevant to the present case. They specifically referred to the paragraph in that decision which states:

> Under the terms of the *Workers Compensation Act*, an independent operator has a choice about whether he will apply for compensation coverage. If he elects to apply for coverage and his application is accepted, he is covered. But if he chooses not to take out compensation coverage, he is not covered. An independent operator who chooses, as he is entitled to, not to pay assessments cannot then expect compensation coverage at the expense of those who have paid.

On the issue of whether G.H. was in the course of employment while travelling to Prince George, the prior commissioners disagreed with the Review Board panel. The prior commissioners reached the conclusion that, even if he had been a worker, G.H. would not have been in the course of his employment at the time of the accident. They noted that the contract with S.G. Trucking did not mention travelling expenses. They were of the opinion that workers commonly bring tools, equipment and a vehicle to the job site, but this does not bring their travel to the job site within the scope of their employment. The distance G.H. had to travel was, to their mind, irrelevant. Moreover, they discounted the fact that G.H. and R.H. determined, as between themselves, that travel expenses would be charged since this was not a determination made by S.G. They took the view that payment of travel expenses is a significant consideration, if it is based on a contractual arrangement.

The prior commissioners invoked Board policy without, however, referring to any particular policy. Since they largely adopted the analysis of the dissenting member on the Review Board panel, I can only surmise that they applied Section #7.42 of the *Manual* as it was worded in 1986.

The ombudsman's office, the workers' adviser and G.H. have made various submissions in support of the reconsideration request. On behalf of S.G., the employers' adviser argues that the prior commissioners' decision should be left undisturbed. Most of the submissions revolve around the interpretation and application of relevant Board policy. Only a few submissions consider the prior commissioners' decision, from the perspective of whether it is lawful — that is, whether it is consistent with the *Act* and general legal principles.

The Appeal Division does not have the authority to redetermine a decision by the prior commissioners on the basis that it contravened or misapplied the relevant policies.

The governors' Decision No. 8, *Workers' Compensation Reporter*, Vol. 7(4), p. 171 gives the Appeal Division the authority to "reopen, rehear and redetermine any decision by the former Commissioners . . . where the Chief Appeal Commissioner finds that the decision was based upon an error of law, involved or involves an issue under the *Canadian Charter of Rights and Freedoms*." In earlier decisions, I decided that, to determine whether a decision by the prior commissioners was based upon an error of law, the general test is whether it is so patently unreasonable that it cannot be reasonably supported by the legislation. Put somewhat differently, the test is whether the decision is viable, in light of the legislation. Where a jurisdictional question is at issue, the test is more stringent, namely, it is whether the decision correctly interpreted the legislation.

Because the prior commissioners' decision was rendered in 1989, it must be considered in light of the legislation as it was worded in 1989 (hereinafter referred to as "the *Act*"). There have been changes to some of the substantive provisions relevant to this case following the introduction of Bill 63 — 1993, *Workers Compensation Amendment Act*, *1993*.

The prior commissioners' consideration of this case involved two questions, namely, whether G.H. was "a worker" within the meaning of the *Act* at the time of the accident and whether the accident "arose out of and in the course of the employment."

As regards the prior commissioners' conclusion that G.H. was not a worker within the meaning of the *Act* at the time of the accident, I understand the main argument advanced by the workers' adviser to be that the prior commissioners misapplied the concept of registration. The workers' adviser states:

> . . . The worker submits that the Commissioners' decision adopted the reasoning of the Review Board dissent to the effect that if the worker was "registered" with the Board as a labour contractor before the accident on December 19, 1985, he will have no Workers' Compensation coverage, and that is an error of law. The *Act* makes no provision for a mechanism whereby a worker can request "registration" and thereby lose his status as a "worker" as defined by the *Act* and therefore his entitlement to benefits. The worker submits that the personal option provisions set out in section 3(3) of the *Act* can only extend benefits to a person who is otherwise not entitled to benefits. It is contrary to the *Act* to interpret the provisions relating "registration" as a labour contractor as having the effect of removing a worker's right to benefits to which he is otherwise entitled if he qualifies as a "worker" as defined within the *Act*.

While I entirely agree with the submission that a worker's right to benefits cannot be waived, lost or removed under the *Act*, the question in G.H.'s case is precisely whether the conclusion that he was not a "worker" at the time of the accident is viable, in light of the *Act*.

The *Act* contemplates coverage for three categories of persons: "employers," "workers" and "independent operators." It defines both the terms "employer" and "worker" but does not define the term "independent operator." The term "independent operator" was introduced in the legislative scheme in 1954 when the provision allowing independent operators to buy insurance was first enacted (Section 4(b) of An Act to amend the "Workman's Compensation Act" c. 54 S.B.C.). However, the definition section was not expanded to include this new term.

The *Act* defines "employer" as follows:

> "employers" includes every person having in his service under a contract of hiring or apprenticeship, written or oral, express or implied, a person engaged in work in or about an industry;

It defines "worker" as follows:

> "worker" includes
>
> a) a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise;

b) a person who is a learner, although not under a contract of service or apprenticeship, who becomes subject to the hazards of an industry within the scope of Part 1 for the purpose of undergoing training or probationary work specified or stipulated by the employer as a preliminary to employment;

c) when serving an employer specified in section 2(1)(f), a member of a fire brigade or an ambulance driver or attendant working with or without remuneration;

d) in respect of the industry of mining, a person while he is actually engaged in taking or attending a course of training or instruction in mine rescue work under the direction or with the written approval of an employer in whose employment the person is employed as a worker in that industry, or while, with the knowledge and consent of an employer in that industry, either express or implied, he is actually engaged in rescuing or protecting or attempting to rescue or protect life or property in the case of an explosion or accident which endangers either life or property in a mine, and this irrespective of whether during the time of his being so engaged the person is entitled to receive wages from the employer, or from any employer, or is performing the work or service as a volunteer;

e) further, in respect of the industry of mining, a person while he is engaged as a member of the inspection committee, appointed or elected by the workers in the mine, to inspect the mine on behalf of the workers;

f) an independent operator admitted by the board under section 3(3); and

g) a person deemed by the board to be a worker under section 3(6).

The statutory definitions of “employer” and “worker” cast a wide net over a multitude of different possible employment relationships. The definitions are not exhaustive. They contain no specific requirement as to the term of the contract or hiring or service, the method of payment or the nature of the job. The contract need not even be in writing.

I also note that the category "worker" includes independent operators but only after they have been admitted by the Board under Section 3(3). This provision states in part that:

> (3) An employer within the scope of this Part, a member of his family excluded by section 2(2)(d) or an independent operator, not being an employer or a worker, may be admitted by the board as being entitled for himself and his dependants to the same compensation as if he were a worker within the scope of this Part, but an employer shall not then cease to be an employer within the scope of this Part.

Subsection 3(4) provides further that:

> (4) Admissions under this section may be made at the time, in the manner, subject to the terms and conditions and for the period the board considers adequate and proper.

The concept of personal optional protection, namely, a person buying insurance from the Board to be treated as if he were a worker for compensation purposes, is contained in Section 3(3). The provision does not specify, however, that coverage requires an application by an employer or independent operator. The wording of the provision seems broad enough to allow the Board to admit, *on its own initiative*, employers and independent operators as being entitled to compensation. The wide discretion granted to the Board by Section 3(4) is consistent with this broad interpretation of Section 3(3).

The concept of an employer "registering" with the Board is not explicitly set out in the *Act*. However, Sections 38(1) and 3(1) of the *Act* describe a process that could be characterized as registration. Section 38(1) requires employers in a compulsory industry to provide the Board with particulars of their operations and Section 3(1) allows employers in industries that are *not* covered to apply to the Board for coverage of their business (as distinct from personal coverage).

In industries with compulsory coverage, the rights and duties of employers consist of the immunity from tort liability, the obligation to pay assessments and that of abiding by occupational health and safety regulations. But, unless they apply for personal coverage under Section 3(3), employers who also work in their unincorporated businesses are not eligible for compensation in the event of occupational disablement. However, subsection 3(3) allows them to obtain coverage as if they were workers without losing their immunity from tort liability as employers.

In industries with compulsory coverage, independent operators are not covered unless they apply under Section 3(3).

In industries with compulsory coverage, workers are automatically eligible for compensation benefits in the event of injury or industrial disease. That is so regardless of whether their employers duly notified the Board of their operations and paid the requisite assessments. The *Act* provides the Board with ways of penalizing employers who fail to pay assessments in compulsory industries.

I considered whether the legislation contemplates "an independent operator" employing workers. In the definition section, the *Act* sets out three categories, namely, "employer," "worker" and "independent operator." While the definition of "worker" includes independent operators who have been admitted by the Board under Section 3(3), the definition of "employer" makes no reference to independent operators. Moreover, Section 39(1) of the *Act* authorizes the Board to collect assessments from "independent operators and employers" in each class. And Section 3(3) of the *Act* provides for the coverage of "an independent operator, not being an employer or a worker." The most obvious interpretation of that qualifying phrase in Section 3(3) is that the term "independent operator" specifically refers to people who are neither employers nor workers. I have concluded that an independent operator is a person who does not employ workers.

The *Act* does not say what sets "independent operators" apart from workers. A reasonable inference is that the *Act* leaves it up to the Board to determine whether a person engaged in some line of employment is an independent operator or a worker. Several criteria may be used in making such a determination. The strongest indicator that the person is a worker is employment exclusively (or almost exclusively) by another person. Other tests would consider the extent to which a person can control the manner in which tasks are carried out (the "control" test) , the extent to which these tasks are part of the overall business of the other party to the contract (the "organizational" test), or the extent to which the individual's business can survive on its own (the "business reality" test). Obviously these tests are not mutually exclusive although they have different emphases. (In the current *Manual* some of these tests are outlined in policy item #7.44).

In summary, the *Act* requires employers in compulsory industries to notify the Board of the particulars of their operations, etc. (i.e. to "register" with the Board) and it allows employers in industries that are not covered to do the same. For employers in compulsory industries, failure to "register" entails penalties. Failure to "register" for employers in other industries leaves their workers without compensation. The *Act* allows employers and independent operators, both in compulsory industries and other industries, to buy their own personal protection. Without this insurance, they would not be entitled to compensation.

The *Act* does not refer to "labour contractors" — a term used in Board policy (today the governors' policies). The *Act* uses the concepts of "contractor" and "subcontractor." However, it uses these concepts in a specific context, namely, in the context of

provisions concerning the liability for assessments as between different employers (see Section 51). The reference in Section 96(1)(j) of the *Act* to the Board's exclusive jurisdiction to determine "whether a person is a worker, a subcontractor, a contractor or an employer . . ." must be understood, in that light. The *Act*'s usage of the terms "contractor" and "subcontractor" does not give rise to a fourth category comparable to the categories of "worker," "employer" and "independent operator." Conceptually, because the *Act* sets out only three categories — "worker," "employer," and "independent operator" — labour contractors must fall into one (or some) of these three categories. The prior commissioners' decision of January 6, 1989 obscured this when it stated that G.H. was a "labour contractor rather than an independent operator." The statement would suggest that "labour contractors" form a category on its own right. The *Act* however, does not contemplate this category. The concept of "labour contractor" which is policy-driven cannot create a new category under the *Act*.

With reference to the *Act*, the question that arises is whether G.H. was a worker, an employer or an independent operator at the time of the accident.

As accepted by the Review Board and the prior commissioners, the evidence is that G.H. did not employ (nor did he intend to employ) workers; he was not an employer. On these facts, the concept of "registration" that is implicit in the provision requiring employers in compulsory industries to notify the Board of their operations (Section 38.1) is irrelevant. What is relevant, however, is that G.H. informed the Board on the 18th of December, 1985 of his wish to obtain personal optional protection. In a broad sense, this amounted to some kind of "registration," namely, the "registration" of an intent to be personally covered as of a certain date. In exercising the option, G.H. represented himself as other than a worker — that is, as an "independent operator." Under the statutory terms, it is only on that basis the Board could sell him insurance since he was not an employer. Evidently his intent as reflected in the insurance price he was willing to pay was to get coverage as of December 20, 1985. It is particularly important in areas of personal coverage that people know in advance the extent of compensation coverage or the lack of it. To allow individuals who are not workers to fix the date of coverage when they purchase their insurance helps achieve this certainty. Unless he was a worker, which is not the way he and his brother represented themselves in their dealings with the Board, G.H. would have been covered only as of the date he fixed when he bought insurance from the Board.

I note that the evidence regarding the nature of G.H.'s economic activities portrays him as having acted throughout as an independent agent. He and his brother owned their equipment, sought their own contracts and had multiple employers — all indicia that suggest a status of "independent operator" as opposed to "worker." In addition, on numerous occasions, they exercised the option of obtaining personal optional protection which, within the statutory framework, suggests the status of "independent operator" to the extent that they were not employers.

Taking into account the above considerations, I find that the prior commissioners' conclusion that G.H. was not a "worker" at the time of the accident is not so patently unreasonable that it cannot be reasonably supported by the legislation. The gist of the prior commissioners' thinking on that question was that G.H. was not covered prior to obtaining personal optional protection. This is consistent with the fundamental principle underlying Section 3(3) of the *Act*, namely, a person who validly acquires personal optional protection is acquiring benefits to which he would not otherwise be entitled.

Although not necessary for the disposition of this case, I should like to consider the arguments submitted by the workers' adviser concerning the prior commissioners' finding that G.H. was not in the course of employment at the time of the accident, assuming he was a worker.

Although the *Act* provides that compensation must be paid for injuries "arising out of and in the course of the employment," it does not define the words contained in that phrase. Judicial consideration of these words has not conclusively settled the question of what these words mean. The Supreme Court of Canada decision, *Workmen's Compensation Bd.* v *C.P.R.*, [1952] 2 S.C.R. 359, [1952] 3 D.L.R. 641, suggests that the proper approach to interpreting these words is to examine them "from the standpoint of the broad conceptions underlying the legislation (per Mr. Justice Rand at p. 644 [D.L.R.])." One of these "broad conceptions" is that employers should be expected to pay for the personal injuries that are in the long run an inescapable aspect of an employer's operation — i.e., an integral part of his cost of production. Another such conception is that injuries arising in situations under the control of the employer are something for which the employer must accept responsibility.

The indicators used to determine whether an injury arose "out of and in the course of the employment" reflect such "broad conceptions." As summarized by Professor Ison in *Workers' Compensation in Canada*, these indicators include but are not limited to:

- whether the injury occurred on the premises of the employer (or the work site);
- whether it occurred in the process of doing something for the benefit of the employer;
- whether it occurred in the course of action taken in response to instructions from the employer;
- whether it occurred in the course of using equipment or materials supplied by the employer;
- whether it occurred in the course of receiving payment or other consideration from the employer;
- whether the risk to which the worker was exposed was the same as the risk to which he is exposed in the normal course of production;

- whether the injury occurred during a time period for which the worker was being paid;
- whether the injury was caused by some activity of the employer or of a fellow worker.

None of these indicators is conclusive.

A worker is not generally considered to be in the course of employment while travelling to and from work, but there are exceptions to this rule. Decision No. 26 (1974) *Workers' Compensation Reporter*, Vol. 1, p. 109 and Decision No. 50 (1974), *Workers' Compensation Reporter*, Vol. 1, p. 212 outline some of these exceptions;

- where a worker travels to and from work using transportation provided by the employer;
- where the conditions of work require the worker to travel away from the employer's premises (e.g., travelling salespersons), and the employment obliges the worker to travel at the time and place where the accident occurred;
- where an employer hires a worker from a distant city and offers travel time or travelling expenses to induce the worker to leave that city and travel to the new place of employment;
- where a worker is called to his place of work to deal with an emergency.

Decision No. 26 expands on the question of travel to distant places as follows:

> . . . where the place of employment is some distance from the available labour market, workers may arrive at the place of employment in a number of ways. If a man goes there of his own initiative looking for whatever jobs he may find, he takes the risk of travel upon himself. But if an employer extends his network of hiring arrangement to distant places, and induces a worker to leave a distant city and journey to the employer's place of work upon the promise of travel time and expenses, the journey becomes part of the employment relationship, and the hazards of the journey become risks of the employment.

On behalf of G.H., the workers' adviser submits that the prior commissioners erred in law in considering the evidence regarding the distance between Salmon Arm and Prince George to be irrelevant. More specifically, the workers' adviser states:

> . . . However, it is an error of law to make a determination that certain evidence is not relevant to the issue to be decided, when that evidence is of probative value. . . .

> . . . it is an error for a judge to confuse relevance with weight. . . .

> In this case, the distance that [G.H.] travelled is relevant to the issue of whether he was a worker at the time of the accident. This evidence should have been considered by the Commissioners and it was an error of law to decide that this evidence is not relevant. If the evidence is considered in its entirety, as was done by the Review Board, the evidence establishes that the worker was in the course of his employment at the time of his accident.

There is ample judicial support for the proposition that the concept of an error of law includes failing to take relevant considerations into account. In the view of Wilson J. delivering for the Supreme Court of Canada in *Oakwood Development LTD v. Rural Municipality of St. Francois Xavier*, [1985] 2 S.C.R. 164 at pp. 174

> The failure of an administrative decision-maker to take into account a highly relevant consideration is just as erroneous as the improper importation of an extraneous consideration.

I am not convinced, however, that the prior commissioners failed to take a relevant consideration into account when stating in their decision:

> . . . The Commissioners do not consider that the distance you had to travel to reach the location where work was available is a relevant factor in determining whether you were within the scope of your employment. The Commissioners do not consider that your travel to the jobsite would have been within the scope of your employment (assuming your employment was as a worker for (S.G.) Trucking).

Failure to take a relevant consideration into account is different from concluding explicitly, as the prior commissioners did, that a particular factor is not relevant to the matter in hand, in light of other considerations. The prior commissioners did *not* ignore the travel distance between Salmon Arm and Prince George. Upon reading their decision as a whole, it is clear that they set their minds to the issue and reached the conclusion that this distance was irrelevant because of the absence of special arrangements between S.G. and G.H. regarding this travel. In terms of the prior commissioners' own reasoning, had there been, for instance, some arrangement as to the payment of travel expenses, the travel distance might have become a relevant factor; this is consistent with Decision No. 26. In other words, when the prior commissioners stated that the distance between Salmon Arm and Prince George "was not a relevant factor,"

they were addressing the matter and saying in effect that, viewed in conjunction with other factors, this distance was not a factor that would affect the outcome of their decision. Therefore, on the issue of whether G.H. was "in the course of employment" at the time of his accident, the prior commissioners' decision of January 6, 1989 did not fail to take a relevant consideration into account. Nor did it interpret that phrase in a patently unreasonable manner, bearing in mind its inherent flexibility.

I deny the request for reconsideration of the prior commissioner's decision of January 6, 1989. No patently unreasonable error of law invalidates their conclusions that G.H. was not a worker at the time of the accident or that, as a worker, he would not have been in the course of the employment at that time.

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

WORKERS' COMPENSATION
REPORTER

Decision of the Appeal Division

Number: 94-0099
Date: January 27, 1994
Panel: Cassandra Kobayashi, James L. Tonn, Walter N. Peain
Subject: Section 5(5) and Crohn's Disease

The worker appeals from a Review Board finding dated September 17, 1993. The Review Board found the worker had a 15% permanent partial disability related to his "short gut" and digestive tract problems. They determined that only 5% of the disability was related to his compensable surgery and 10% related to his pre-existing Crohn's disease.

The worker states in his appeal from the Review Board finding that the Review Board did not properly weigh the evidence in denying his appeal.

The issue before this panel is whether the worker has a disability greater than 15% as a result of his intestinal condition and whether proportionate entitlement was properly applied.

Evidence

The worker was in a serious motor vehicle accident on October 12, 1989 when his motor vehicle was rear-ended by a logging truck. He was seen by his family doctor and another doctor in Golden, B.C. immediately following the accident. His family doctor accompanied the worker in an emergency airplane to the Foothills Hospital in Calgary that same day, once he was stabilized. An internal medicine specialist operated and gave a postoperative diagnosis of:

1. Splenic capsular tear
2. Avulsed terminal ileum with Crohn's Disease
3. Facial lacerations

The worker was also diagnosed as having a "(R) subcondylar fracture of temporomandibular joint."

The October 26, 1989 discharge report states:

> Laparotomy demonstrated a splenic capsular tear and this was repaired with a Dexon mesh bag. He also had an avulsed terminal ileum with Crohn’s disease. Extensive Crohn’s disease in the terminal ileum was identified. The entire terminal ileum with the exception of 10'6" was avulsed from its mesentery and the mesentery was bleeding briskly. This portion of the small bowel was also perforated. The entire segment of terminal ileum was excised and as the cecum was involved with the inflammatory process, the distal transection was performed in the mid-ascending colon. The small bowel was reanastomosed primarily.

A W.C.B. medical advisor reviewed the medical evidence on December 1, 1989. He said that it was important to note that the surgeon had recorded that the worker had a long history of Crohn’s disease which had required operations for ischiorectal abscesses, but no previous bowel resections. The medical advisor also noted that the worker also had a history of peptic ulcer disease.

The specialist performed an operation for “lysis of adhesions, repair of incisional hernia” on November 8, 1990. He stated in that report:

> Supra-umbilical portion of the incision was entirely intact and was not extended into. Small bowel was adherent to each other and to the abdominal wall by multiple adhesions and they were painstakingly taken down. . . . There is no evidence of recurrent Crohn’s disease in the bowel. Thickened mesentery is probably what is causing the filling defect. . . .

A disability awards medical advisor examined the worker on September 11, 1991 at which time he noted that the worker’s postoperative course was extremely stormy with multiple complications including pulmonary effusion and pancreatitis developing. The advisor noted that by April 1990 the worker had developed post-surgical wound dehiscence problems related to incomplete bowel obstruction secondary to adhesions. The advisor noted that at the time of the original surgery the worker had Crohn’s disease and “this portion of the bowel had to be excised in order to do the end to end anastomosis appropriately utilizing only normal ileum and colon tissue.” The advisor noted the worker had made an excellent recovery from an extremely traumatic situation but would likely have problems from recurrences of the partial obstruction secondary to adhesions and there was a good likelihood that the Crohn’s disease would continue to cause trouble.

The advisor concluded the worker had a 15% disability related to his abdominal problems of which 50% was related to his compensable injury and 50% was related to Crohn's disease.

The worker's representative submitted a letter to the Review Board dated March 8, 1993 from the attending physician which said that prior to the worker's accident on October 12, 1989 he had been seeing him as required for complications of peptic ulcer disease and symptoms of Crohn's disease. The physician said his most frequent problems seemed to be related to chronic blood loss from peptic ulcer disease which was undoubtedly aggravated by medications used to control his Crohn's disease. He said that prior to the compensable injury the worker's symptoms of Crohn's disease seemed to be in remission and he could easily control his diarrhea and cause constipation by taking one Immodium tablet every 12 hours for two consecutive occasions.

The attending physician said that the worker's main disability presently was related to his bowel surgery. He said the worker's short gut syndrome caused diarrhea and required daily medication including one scoop of Questran and two Immodium tablets to control his symptoms. He said that if the worker did not take those medications he got uncontrolled diarrhea and stool urgency, presumably with weight loss to follow. The doctor said that the further problems related to his accident were: an adhesive mesenteric inflammation which continues to be symptomatic; recurrent ventral hernias (through the operative incision) and recurrent bouts of partial small bowel obstruction. The attending physician noted that the specialist stated in his operative notes while repairing the ventral hernia that there was no evidence of recurring Crohn's disease. He said that the worker had not found it necessary to take medication for Crohn's disease to control diarrhea or cramps and he believed that the Crohn's disease was not causing any symptoms since the diseased bowel was removed at the time of the accident.

The worker's representative said that the attending physician's opinion was very different from that of two disability awards medical advisors who advised the claims adjudicator and Review Board. He said that the family doctor had direct clinical knowledge and history of the worker's multi-faceted medical condition and therefore was clearly in the best position to give a medical opinion. The worker's evidence was that he was examined by another specialist, an expert on Crohn's disease, and was informed that his disease was in remission. The representative suggested the medical advisor's statement (to the effect that had it not been for the motor vehicle accident in October 1989, the worker may have required bowel resection at some future date) is contrary to the medical evidence. He said that the family doctor, the specialist who did the surgeries, and the other specialist have indicated at different times that the worker's Crohn's disease was and continues to be in remission.

Reasons

The Board took the position that the work injury was superimposed on the worker's pre-existing non-compensable Crohn's disease, and the Crohn's disease constituted a 7.5% disability. The Review Board increased the proportion attributed to the pre-existing disability to 10%, but accepted the reasoning of the claims adjudicator in Memo #40, November 29, 1991:

> The disability awards medical advisor explained that before the incident for which this claim was accepted, this worker had Crohn's disease which is essentially an ulcerating away of the bowel. The surgery performed at the time of injury was made greater or more all-emcompassing [sic] due to the Crohn's disease. Large portions of the bowel and intestinal tract were removed as they were not healthy and had the affect of Crohn's disease. It is considered that this pre-existing disability had significant influence at the time of surgery.

We accept this medical opinion that more bowel had to be cut out due to the Crohn's disease than strictly necessary as a result of the accident. Whether this triggers the operation of Section 5(5) is not a medical question, but a question of law.

Section 5(5) of the *Workers Compensation Act* provides:

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

The policy in #44.10 distinguishes three situations in applying proportionate entitlement.

> 1. In cases where it has been decided that the precipitating event or activity, and its immediate consequences, were so severe that the full disability presently suffered by the claimant would have resulted in any event, regardless of any pre-existing disability, Section 5(5) should not be applied.

2. In cases where the precipitating event or activity and its immediate consequences were of a moderate or minor significance and there is only x-ray evidence and nothing else showing a moderate or advanced pre-existing condition or disease, Proportionate Entitlement should not be applied. . . .

3. Where the precipitating event or activity, and its immediate consequences were of moderate or minor significance, but x-ray or other medical evidence shows a moderate to advanced pre-existing condition or disease, and there is also evidence of a previously reduced capacity to work and/or evidence of a request for and rendering of medical attention for that disability, Section 5(5) should be applied.

The medical evidence about the severity of the compensable injury is somewhat contradictory. The strongest opinion supporting the Board's decision is from a Board medical advisor, who said in Memo #4:

> As noted above it is important to note that since his terminal ileum had been avulsed as a result of the injury, repair and possible resection of a portion might have been necessary, however the more extensive "resection of approx. 10 ft. of small bowel and the proximal ascending colon" was undoubtedly carried out when the extent of involvement of the bowel with Crohn's disease was discovered at operation.

On the other hand, the operation report by the assistant surgeon stated:

> Extensive Crohn's disease in the terminal ileum was identified. The entire terminal ileum, with the exception of 10 feet, 6 inches approximately, was avulsed from its mesentery, and the mesentery bleeding briskly. This portion of small bowel was also perforated. The entire segment of terminal ileum was excised using cutting G.I.A. staples and Kelly clamps for the mesentery with ligatures of 0 silk. The cecum was involved with the inflammatory process; therefore, the distal transsection was performed in the mid-ascending colon.

This report specifically states the terminal ileum had "extensive Crohn's disease." We find it significant that the rest of the ileum and ascending colon are not mentioned as having "extensive" Crohn's disease. The ileum was torn free from the mesentery, and was perforated in two places (see Intensive Care Unit discharge report).

After discharge from the Calgary hospital, the worker was readmitted to the hospital in Golden for convalescent care from October 18, 1989 to November 10, 1989. On readmission, the family doctor wrote:

> This patient is readmitted to this hospital following treatment in Calgary. He had suffered from a Motor Vehicle Accident approximately 2 weeks ago. At the time he had an obviously acute abdomen and findings with lapartomy [sic] at that time indicated that he had 1) ruptured his spleen, 2) perforated a small bowel and related mesentaric tear which devascularized a further large section of the small bowel.

This report suggests that the small bowel was damaged by having the blood supply cut off due to the perforation and tear from the mesentery.

We find that the personal injury suffered by the worker was severe. He had internal bleeding from the torn spleen and section of bowel torn from the mesentery. He lost four litres of blood, two of which were found in the abdomen on surgery. He was hospitalized almost a month. The disability awards medical advisor described the accident as “an extremely traumatic situation.” In applying the policy in #44.10, the panel finds that due to the severity of the accident, most of the worker’s abdominal injuries would have been suffered by an otherwise healthy worker. The exception is that the cecum, or beginning of the large bowel had to be removed to join intestines using healthy tissue. To this extent, the pre-existing Crohn’s disease has added to the severity of the injury.

On the other hand, there is no evidence that the worker was about to have surgery to remove the section of his bowel affected by Crohn’s disease at the time of the compensable injury. Although the medical advisor consulted by the Review Board says “The worker may have required bowel resection at some future date,” the family physician says the worker’s disease had been in remission prior to the accident. Furthermore, we have no evidence that the portion of the ascending colon which was removed was extensively affected by Crohn’s disease. Therefore, the contribution of the worker’s pre-existing Crohn’s disease was the extent of the Crohn’s disease in the ascending colon.

The medical advisor said in 1991 the worker was likely to have recurrent problems from partial obstruction of the bowel by adhesions resulting from the accident, and continuing Crohn’s disease. However, the surgeon said in an operation report of November 1990 there was no evidence of Crohn’s. The family physician said in his March 8, 1993 letter, there is no evidence that the worker’s current symptoms are due to Crohn’s disease. Rather, they are due to short-gut syndrome which produces similar symptoms to the Crohn’s, namely diarrhea.

In applying Section 5(5) to the facts as we have found them, we agree the personal injury was "superimposed" on an already-existing disability, namely, the Crohn's disease. The proportion of the disability that "may reasonably be attributed to the personal injury" is the vast majority of his symptoms: all but the section of ascending colon removed to join healthy tissue together. Furthermore, the ascending colon would not have been cut out at the time or in the foreseeable future, but for the compensable accident.

Therefore, although the worker had pre-existing Crohn's disease, we have decided that "the measure of the disability" should not be the difference between the worker's disability before the accident and his current disability. We believe the measure of compensable disability "is otherwise shown" to be attributable to the compensable accident in accordance with the governors' policy on severe compensable injuries.

In conclusion, the worker is entitled to 15% of total disability for his abdominal disability, including his recurrent adhesive mesenteric inflammation, and ventral hernias, and recurrent bouts of partial small bowel obstruction.

THE APPEAL IS ALLOWED.

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

WORKERS' COMPENSATION
REPORTER

Decision of the Appeal Division

Number: 11
Date: April 8, 1994
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Delegation by the Chief Appeal Commissioner

Section 85(8) of the *Workers Compensation Act* provides:

> The chief appeal commissioner may delegate in writing any of his powers and duties to an appeal commissioner subject to any terms and conditions set out in the delegation.

I hereby reappoint Paul Petrie, appeal commissioner, to serve as registrar of the Appeal Division on the same basis set out in Appeal Division Decision Number 2 in the *Workers' Compensation Reporter*, Vol. 7(1), p. 53.

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

I hereby delegate to appeal commissioners Sonja Hadley, Thomas Kemsley, and Paul Petrie, the same authority as was set out in Decision No. 8 (as published in the *Workers' Compensation Reporter*, Vol. 8(5), p. 331) to determine whether grounds have been provided for reconsideration of a decision of the former commissioners. This delegation is pursuant to Section 17(5) of the *Workers Compensation Amendment Act, 1989,* and Section 96(2) of the *Workers Compensation Act* and the January 6, 1992 resolution of the Board of Governors (Decision of the Governors No. 8, *Workers' Compensation Reporter*, Vol. 7(4), p. 171).

These delegations are effective from June 3, 1994 until June 2, 1995, so long as the delegate remains an appeal commissioner.

WORKERS' COMPENSATION

REPORTER

Decision of the Appeal Division

Number: 12
Date: April 11, 1994
Panel: Connie Munro, Chief Appeal Commissioner
Subject: 90-Day Time Frame for Appeal Division Decision-Making

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1. General

Section 91(3) provides:

> A decision on an appeal commenced under subsection (1) shall be made as soon as practicable and in any case within
> (a) 90 days of the date on which the appeal is commenced,
> (b) 90 days of a reconsideration by the review board under subsection (2), or
> (c) a longer period the chief appeal commissioner may designate where the appellant requests a delay in the proceedings or where the chief appeal commissioner considers the longer period necessary because of an act or omission of the appellant or because of the complexity of the matter under appeal.

This 90-day time frame for decision-making by the Appeal Division applies to:

- An appeal from a Review Board finding
- A referral of a Review Board finding by the president
- An assessment appeal
- An appeal from an additional assessment (penalty) levied by the Prevention Division
- An appeal from a decision concerning an employer's application for relief of claim costs, and

- An appeal from a decision by a Board legal officer to charge the costs of a claim to an employer who was not registered at the time of the injury

It also applies to any further consideration of an appeal by the Appeal Division, following a reconsideration by the Review Board of its finding at the direction of the Appeal Division under Section 91(2).

This 90-day time frame for decision-making does not apply to:

- A request for an extension of time to appeal
- An application for reconsideration of an Appeal Division decision
- An application for reconsideration of a decision of the former commissioners
- An application for a Section 11 Certificate for a legal action
- An application by an employer for a transfer of claim costs under Section 10(8), or
- A request for leave to appeal, or an appeal under the *Criminal Injury Compensation Act*

2. History of Section 91(3)

Section 91(3) had its genesis in the October 31, 1988 Munroe Report (*Report and Recommendations to the Minister of Labour and Consumer Services by the Advisory Committee on the Structures of the Workers' Compensation System of British Columbia*, published in the *Workers' Compensation Reporter*, Vol. 8(3), p. 231). The unanimous report of the Advisory Committee contained the following recommendation (at page 243):

> . . . suppose that an appeal *is* lodged against the finding of the Review Board. Where that occurs, retrospective payments should be withheld until completion of the appeal, provided that the disposition of the appeal is published within 90 days of the appeal being *initiated*. The 90-day period should be capable of extension where: (a) a delay has been at the request of the claimant or, in the opinion of the chief appeal commissioner, has been caused by any act or neglect of the claimant; (b) in the opinion of the chief appeal commissioner, a delay is necessary due to the complexity of the case and *not because of any systemic failure or default*.
>
> (emphasis added)

> Payments withheld from a claimant, and ultimately determined by a panel of the appeal commissioners to be due to him or her, and any payments made to a claimant by reason of the expiry of the 90-day period aforesaid (or an extension), should bear interest . . .

The Advisory Committee apparently intended the 90-day time frame to run from the "initiation" of the appeal. The Committee obviously intended to preclude any delay in decision-making due to "systemic failure or default."

The recommendation in the last paragraph quoted above, namely, that a Review Board finding entitling a worker to benefits be implemented if the Appeal Division did not make its decision within 90 days, was not specifically provided for in the *Workers Compensation Amendment Act, 1989*.

The *Official Report of the Debates of the Legislative Assembly* (*Hansard*), Volume 14, Number 1, June 15, 1989, page 7557, recorded the following statement in the legislature by the Hon. L. Hanson, then minister of labour and consumer services:

> I think what we're trying to do is expedite the process to the quickest possible way that we can get an answer to the individual who is probably sitting there waiting with anticipation for the decision . . .

The legislative history to the changes to the *Workers Compensation Act* (which lead to the creation of the new Appeal Division on June 3, 1991) provides ample evidence of a concern that the time involved in appeals to the Appeal Division be constrained. The limitation period for filing an appeal from a Review Board finding was shortened from 60 days to 30 days. The debates of the legislative assembly concerning the 90-day time frame for making a decision reinforce the importance which was attached to fulfilling this requirement. The legislature clearly intended to place limits both on the Appeal Division, and on the parties to the appeal, in terms of the time permitted for an appeal. This was, of course, made subject to time being extended by the chief appeal commissioner for the reasons enumerated in Section 91(3)(c).

3. Interpretation of Section 91(3)

(i) the "literal" interpretation

Section 91(3) opens with reference to "an appeal commenced under subsection (1)." Section 91(1) establishes a 30-day time limit for appealing a Review Board finding to the Appeal Division. Section 91(3)(a) requires that the decision be rendered within 90 days

of the date on which the appeal is commenced. Reading these provisions together could support a conclusion that the action taken by the appellant which satisfies the time limit for initiating an appeal has the simultaneous effect of "commencing" the appeal for the purposes of the 90-day time frame. This interpretation is in keeping with the plain meaning of the word "commence," which in ordinary usage means to begin. The *Munroe Report* appears to have utilized the word "initiated" in this same context.

(ii) Appeal Division Practice and Procedure — the "liberal" interpretation

The term "commencement" was discussed in Appeal Division Decision No. 1 (*Workers' Compensation Reporter*, Vol. 7(1), p. 33), as follows:

> A policy of the Board of Governors requires an appellant to outline in writing the reasons for the appeal, explaining how the Review Board finding is in error. *The appeal will be considered to be "commenced" for purposes of Section 91(3) when the Registrar's office determines that the requirement for the provision of reasons has been met* . . . Completion of a "Notice of Appeal From Review Board Finding" form will generally satisfy the requirement to provide reasons.
>
> (emphasis added)

In other categories of employers' appeals, an appellant is similarly required to outline the error of law or fact or contravention of a published policy of the governors prior to an appeal being commenced.

4. Discussion

On a strict reading of Section 91(3), in conjunction with the *Munroe Report* and the record of the Legislative debates surrounding the passage of the *Workers Compensation Amendment Act, 1989*, it might be concluded that the "commencement" of an appeal was intended to be no more than the initiation of an appeal. Under this interpretation, to regard "commencement" as a separate and subsequent date is an artificial construction which has the effect of extending the time available to the Appeal Division for making its decision. As the time involved in this process is not counted within the 90-day time frame, there is no direct accountability for it. There is less pressure to account for delay in providing a claim file to the Appeal Division where the 90-day time frame has not begun. This might be seen as contrary to the legislative intent in enacting a 90-day time frame.

I am satisfied that the application of the term "commencement" utilized by the Appeal Division to date is a viable interpretation of the statute. My concern, in reviewing the existing practice of the Appeal Division which ensures that certain preliminary procedures are complied with prior to the "commencement" of an appeal, is whether this interpretation best serves those affected. Alternatively, would the participants be better served by treating the initiation of an appeal as its "commencement," notwithstanding the consequences which would flow from this? If the Appeal Division is to continue carrying out certain preliminary procedures prior to the "commencement" of an appeal, which procedures are best dealt with as "pre-commencement" procedures?

5. Community Input

The Appeal Division sought input from the workers' compensation community, to assist in reviewing its practice and procedure concerning the 90-day time frame for the making of Appeal Division decisions. The Appeal Division's administration of appeals under the *Workers Compensation Act* must take into account the legitimate interests of the worker and employer communities.

The Appeal Division received 14 responses to the initial call for written submissions. Six were from workers' representatives, and eight from employers' representatives. I was impressed with the thoughtfulness of the submissions, and the extent to which they showed an appreciation for the competing interests inherent in these issues. I was also struck by the very large measure of agreement between workers' and employers' representatives. A draft report was prepared, which was reviewed by the governors and then disclosed to all those who had provided input as well as to the Senior Executive Committee. I had the benefit of additional input from the community, and from the Board, in my further consideration. The extent of the consensus evident in the submissions provides, in my view, a clear message.

My conclusions with respect to the issues arising out of the 90-day time frame, are as follows.

Issue A: Should the Appeal Division arrange for the automatic provision of disclosure or updated disclosure for an appeal?

There was very strong agreement in the submissions that the Appeal Division ought to continue arranging for the provision of file disclosure, prior to requesting submissions from the appellant. The Appeal Division will maintain this practice.

Issue B: At what point should an appeal be considered to have been "commenced"? What preliminary steps or handling, if any, should be completed by the Appeal Division before the 90-day time frame begins running?

The current practice of the Appeal Division, in considering appeals as not "commenced" for the purposes of Section 91(3) until certain preliminary procedures have been completed, requires a very liberal interpretation of this subsection of the *Act*. While this concern was referenced in several of the submissions, virtually all conclude by endorsing such interpretation as necessary to the fair handling of appeals.

The few submissions which expressed support for a literal interpretation of the term "commenced" indicated that the Appeal Division should continue to follow the same preliminary procedures. They argued, however, that these procedures should not prevent the completion of the appeal within a 90-day time frame from initiation, subject to additional time being designated under Section 91(3). None of the submissions expressed the view that any of the preliminary procedures followed by the Appeal Division should be sacrificed in the interest of speedier handling of appeals.

Whether favouring a "literal" or a "liberal" interpretation of the "commencement," the submissions were unanimous in urging the Appeal Division to continue to provide disclosure upon initiation of an appeal. At a minimum, this requires that the Appeal Division have received some notice of the appellant's wish to appeal, and that the Appeal Division receive the claim file.

Based on the input received from the community, and my knowledge of the workers' compensation system, I have concluded that the Appeal Division's current interpretation and practice with respect to the commencement of appeals is a practical necessity. To attempt to adhere to a 90-day time frame from the initiation of an appeal would, in the context of the present workers' compensation structure, be counter-productive. In the absence of a statutory requirement admitting of no other interpretation, the Appeal Division will continue with the current interpretation of Section 91(3). To do otherwise would result in the Appeal Division becoming overly process-driven to the extent of sacrificing procedural fairness.

Nonetheless, I appreciate the concern expressed in some submissions that differentiating between the "initiation" and the "commencement" of an appeal, and placing that period outside the 90-day time frame, could result in a lack of performance pressure in that phase of the appeal process. I do not accept, however, that this must be the inevitable result. As chief appeal commissioner, I have a responsibility to continue to work with the administration of the W.C.B. to seek improvements in that phase, where these may reasonably be obtained.

In conclusion, the existing interpretation and practice of the Appeal Division with respect to commencement of appeals will be maintained. An appeal will be commenced when:

1. reasons for the appeal have been provided (completion of a Notice of Appeal will generally satisfy this requirement);

2. the file has been reviewed by the appeals officer to identify the appealable decision;

3. disclosure, or an update to disclosure, has been provided to the appellant (note: initial disclosure of a worker's claim file to an employer requires that there have been a request for same);

4. the respondent has been notified of the appeal and has been invited to file a Notice of Participation.

The Appeal Division's practice with respect to the consideration of oral hearing requests has changed. Initially, such requests were answered prior to commencement of an appeal. For the last several months, appeals have generally been commenced prior to addressing an oral hearing request. Significant effort is required to meet the 90-day time frame when that process is incorporated, nonetheless, it has not shown itself to be an unrealistic goal. Consequently, commencement will not be delayed due to a request for an oral hearing.

Issue C: Should the Appeal Division impose time constraints on appellants for preparing submissions? Should the appellant have to justify, with reasons, their request for more time for submissions?

Under Section 91(3)(c), the power to designate a longer period for the making of an Appeal Division decision is reserved to the chief appeal commissioner. Under Section 85(8), this power may be delegated in writing to an appeal commissioner. Extensions of time for submissions which will impact on the 90-day time frame must, therefore, have the authorization of the chief appeal commissioner or an appeal commissioner exercising delegated authority.

The submissions express a valid concern that the Appeal Division's 90-day time frame for decision-making not be administered in a fashion which "railroads" appellants. Achieving production targets is of little value if, at the end of the day, the parties to the appeal do not believe they had an adequate opportunity to prepare and present their case.

Some employers' submissions argued that the Appeal Division ought to grant respondents the same rights as appellants to request additional time. This is not, however, within the Appeal Division's authority under the *Act*. Section 91(3)(c) is specific in limiting the chief appeal commissioner's authority to designate a longer period at the request of a party to the appeal to situations where "the *appellant* requests a delay in the proceedings." I accept, however, that where an appellant is granted additional time, fairness requires that consideration be given to a respondent's subsequent request for additional time.

Several submissions indicated that the requirement of providing timely submissions places a heavy burden on appellants. Consequently, I have decided to allow appellants an additional 30 days to prepare submissions, upon a simple request. Requests for more than an additional 30 days for submissions will require reasons to be submitted in writing, and will be considered by the chief appeal commissioner in each case.

In most appeals from Review Board findings, the appellant will have previously received disclosure of the claim file. They will have had up to 30 days following the Review Board finding, the time incurred in the pre-commencement period after initiating the appeal, the first 14 days, and up to 30 additional days upon request. Together, this amounts to a substantial period of time which in most cases will be sufficient for the preparation of a submission.

In conclusion, the Appeal Division will apply the following procedures with respect to the provision of submissions:

1. An appeals officer will ask the appellant to provide their submissions within 14 days from date of commencement;

2. The appeals officer or manager may grant an appellant up to an additional 30 days to provide submissions, upon request;

3. A request by the appellant, with reasons, for more than 30 additional days for submissions will be considered by the chief appeal commissioner (or an appeal commissioner exercising delegated authority);

4. On appellant requests for additional time for submissions, consideration will be given to whether the granting of additional time for submissions will prejudice the respondent. In particular, where payment of compensation with respect to the period prior to the Review Board finding has been deferred under Section 92 pending the outcome of the Appeal Division decision, the appellant will normally not be granted more than a maximum of an additional 30 days for submissions (and a corresponding period to the respondent);

5. Any extension of time for submissions over the initial 14 days will normally result in the extension of the due date for the decision to 90 days from completion of submissions;

6. Neither the appeals officer nor the manager may grant additional time to a respondent where the appellant has not been granted additional time. However, a request by an appellant for additional time will be deemed to include provision for a corresponding extension of time to the respondent, and may be granted by the appeals officer or manager upon request by the respondent;

7. Any written objections by the appellant or respondent to a determination by the appeals officer or manager on a request for additional time for submissions will be considered by the chief appeal commissioner;

8. Any written request by a respondent for additional time based upon any other "act or omission of the appellant or because of the complexity of the matter under appeal" will be considered by the chief appeal commissioner.

Issue D: Should the Appeal Division proceed with its decision where the appellant has provided no submissions within the time granted, and the appellant's request for additional time has been refused?

Submissions from both workers and employers supported the practice of having appeals decided, even where the appellant failed to provide a submission. There was, as well, support for giving the respondent the opportunity to make submissions even where no formal submission was provided by the appellant.

Some submissions argued, however, that in such circumstances the appellant should not be given an opportunity to provide rebuttal argument. Otherwise, it was argued, there is a risk that an appellant might abuse the opportunity to provide rebuttal to include new evidence and argument which would more appropriately have been contained in the initial submission. This could deprive the respondent of the opportunity for reply.

While I appreciate the basis for this concern, it is important to note that the provision of reasons is, under the governors' policy, a prerequisite for appealing. The appellant may provide their reasons for appealing by completing a Notice of Appeal. This provides notice to the respondent of the basis for the appeal. Even where no formal submission is subsequently made by the appellant, the respondent is in a position to reply to the reasons given by the appellant. Such reasons may be seen as a limited submission. I therefore consider it appropriate to allow the appellant an opportunity to provide rebuttal argument to the respondent's submissions.

With respect to the possibility that an appellant may seek (inappropriately) to introduce new evidence and argument in their rebuttal, I would note that the potential for this problem exists with all appeals. Should such a situation arise in a case, the Appeal Division panel hearing the case will deal with it in a manner consistent with the requirements of natural justice. This might, for example, involve granting the respondent a further opportunity for reply.

The Appeal Division will apply the following procedures:

1. An appeal will proceed whether or not the appellant provides a submission, so long as reasons have been provided for the appeal. In the absence of a further submission, the reasons provided by the appellant for appealing will be treated as their "submission." This is subject to the appellant advising they wish to withdraw the appeal.

2. If the time set for the provision of the appellant's initial submission expires, without an extension of time for submissions being granted, the appeals officer will proceed to invite submissions from the respondent (if they are participating).

3. If the respondent provides a submission, the appellant will be given an opportunity to reply.

4. The parties will be informed that submissions are considered complete, and that the appeal has been forwarded to the chief appeal commissioner to be assigned to a panel of the Appeal Division for a decision.

5. Consideration of any comments or submissions subsequently received will be at the discretion of the panel.

Issue E: Should a worker be entitled to retroactive implementation of a Review Board finding if the Appeal Division fails to render a decision within the first 90 days or the additional period designated under Section 91(3)?

Submissions from workers' and employers' representatives were divided on the issue of retroactive implementation of Review Board findings. I make no recommendation on this issue.

In the majority of cases, the Appeal Division is able to render decisions within 90 days of the commencement of an appeal, or, alternatively, within 90 days of the date on which submissions are completed where additional time has been requested by the appellant. In only a minority of cases is additional time designated for the making of the Appeal Division decision at the request of the Appeal Division.

Issue F: What should be done when the Compensation Services Division (or the Review Board), and the Appeal Division both require a claim file for the purpose of carrying out their respective statutory duties?

Competing needs for a file chiefly concern workers' claims. This problem commonly arises on Section 91 appeals by workers and employers from Review Board findings, as well as on employer appeals for relief of costs. Such problems seldom occur with assessment or prevention (formerly O.S.H.) files. Delay in obtaining the claim file is the distinguishing feature.

Technological solutions such as "imaging" or electronic files may be considered viable in the future. Should the Board move towards utilization of such technology, it may be worthwhile to consider beginning with files in the appeal process.

For the present, the Appeal Division will apply the following procedures:

(i) *Duplicate files*

Historically, there was a period, following the Court decision in the *Guadagni* case, when the Compensation Services Division utilized duplicate copies of the claim file for implementation purposes while the commissioners utilized the original claim file in reconsidering the Review Board finding under Section 96(2). The option of creating partial or complete duplicate claim files to facilitate ongoing adjudication, while the original claim file is being held by the Appeal Division, may merit consideration (for specific cases, rather than as a general approach). This would require the administration to develop a system for use of full or partial duplicate files for adjudication which requires use of the claim file for an extended period while the file is required by the Appeal Division. This system would have to ensure appropriate updating and eventual destruction of the copy file.

This approach was suggested as an option for use in very limited situations, rather than as a general measure involving large numbers of cases. It was not contemplated that copying entire files would be necessary in most instances. When submissions were sought regarding this proposal, some support was expressed for it although there was concern that lost documents and recording errors might result. The vice-president, Compensation Services Division, rejected the suggestion on the basis of lack of resources.

Any system involving file duplication poses serious difficulties. Moreover, it is clear that while file duplication may assist in some cases it would be unworkable without the full support, cooperation and commitment of all files users and particularly the Compensation Services Division. Given their vice-president's judgment that availability of resources is a significant problem, the Appeal Division will not at this time pursue the option of utilizing duplicate file copies.

(ii) *Priority*

In terms of the competing requirements of the various bodies in the workers' compensation system, only the Appeal Division is subject to a statutory time limit for making its decision. In view of this, I believe that where practicable, and where it makes common sense to do so, the Appeal Division should have priority in obtaining claim files.

Once the Appeal Division obtains a claim file, arrangements to lend out the file to the Compensation Services Division on request, for a limited period, have generally worked well. A continuing difficulty, however, lies in the Appeal Division obtaining the claim file in the first instance upon initiation of an appeal. Commitment to providing the Appeal Division with a claim file within a specified time frame, following initiation of an appeal and a request for the file by the Appeal Division, could greatly alleviate this problem.

On March 7, 1994, the Senior Executive Committee decided to adopt a system whereby any request for a file by the Appeal Division will be acted upon within 72 hours. Within three days of a file request from the Appeal Division, the file will be either forwarded to the Appeal Division, or the appropriate manager in the Compensation Services or other Division will contact designated Appeal Division staff to reach an agreement concerning an alternative arrangement in the particular case. This procedure will be reviewed in approximately four months time by the Senior Executive Committee, to determine if it has been effective in assisting the Appeal Division to reduce the pre-commencement period.

(iii) *Cooperation/Consultation*

The Appeal Division will be responsible for completing its decision and releasing the file in a timely fashion, as well as for cooperating with other bodies concerning access to the file in the interim where this may reasonably be accomplished. Where a claim file is the subject of concurrent appeals to both the Review Board and the Appeal Division, on different issues, issues of file management may best be addressed through consultation by the registrars of each body, taking into account the wishes of the parties.

Issue G: Adjournment/Suspension of Appeals

In Section 91(3)(c), the legislature has provided a framework for the designation of a longer period of time for specified reasons. This statutory framework requires the chief appeal commissioner to designate a longer period of time: this does not contemplate matters being held in abeyance for an indefinite period. While several submissions were received asking that appellants be given such control over the timing of the appeal, I am

not persuaded that this is necessary or authorized by the *Act*. Requests that appeals be suspended will generally not be granted.

Issue H: Withdrawal of Appeals Pending Adjudication

In some cases, the appellant advises that an issue requires adjudication by the Compensation Services Division prior to consideration of the appeal, and that the further adjudication may eliminate the need for the appeal. In such circumstances, the Appeal Division may allow the appellant to withdraw the appeal pending the further adjudication. Where the further adjudication does not resolve the matter raised in the appeal, the appellant will, upon notification in writing to the Appeal Division no later than 30 days following the further adjudication decision, be granted an extension of time to appeal without the necessity of providing reasons.

Where a request that the appeal be re-established is received beyond 30 days following the further adjudication decision, it will be considered as a request for an extension of time to appeal. In this latter event, reasons for the delay in appealing must be provided.

Issue I: Designation of a Longer Period for the Making of a Decision

If an Appeal Division panel wishes additional time for the making of its decision, the panel makes a written request for additional time, with reasons, to the chief appeal commissioner. The written request of the panel, and the signed decision of the chief appeal commissioner concerning the request, become part of the permanent file record.

The appellant and respondent are notified in each instance that a longer period is designated for the making of the Appeal Division decision at the request of the panel. The ground for this is stated, together with the amount of time by which the due date for decision has been extended.

The Appeal Division will generally not provide additional reasons for preliminary decisions such as this. The Appeal Division has finite resources, which are better devoted to the consideration of the actual merits of appeals rather than providing detailed letters of explanation as to why a longer period of time for decision-making has been designated or an oral hearing request was denied.

WORKERS' COMPENSATION
REPORTER

Decision of the Appeal Division

Number: 13
Date: July 11, 1994
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Delegation by the Chief Appeal Commissioner

Section 85(8) of the *Workers Compensation Act* provides:

> The chief appeal commissioner may delegate in writing any of his powers and duties to an appeal commissioner subject to any terms and conditions set out in the delegation.

I hereby delegate to A. Grant McRitchie, appeal commissioner/manager, authority to make decisions concerning:

1. a request for an extension of time to appeal under Section 91(1), 96(6), or 96(6.1) of the *Workers Compensation Act*;

2. an oral hearing request, prior to a case being assigned to a panel of the Appeal Division;

3. the designation of a longer period for the making of an Appeal Division decision under Section 91(3)(c):

   (i) prior to the assignment of the case to a panel of the Appeal Division, at the request of a party to the appeal pursuant to Appeal Division Decision Number 12; and,

   (ii) following the assignment of a case to a panel of the Appeal Division, at the request of the panel in the absence or inability to act of both the chief appeal commissioner and registrar.

I retain the powers and duties delegated herein, and will exercise these concurrently with the appeal commissioner/manager.

This delegation is effective from July 11, 1994 until June 2, 1995.

WORKERS' COMPENSATION
REPORTER

Special Report —
Fraud Control, Due Diligence, and Internal Controls

Date: **March 7, 1994**

Introduction

The Workers' Compensation Board has a responsibility to the stakeholders of the workers' compensation system in British Columbia to ensure the accident fund is vigorously safeguarded and preserved. Board management must take the responsibility to ensure that the appropriate internal controls are in place to detect, deter and prevent the occurrence of fraud.

In the past two years the subject of fraud has been the focus of significant media attention for the Workers' Compensation Boards of Ontario and the Northwest Territories. Concerns have been raised over the increasing exposure of Canadian workers' compensation systems to this risk.

The purpose of this report is to provide an update on the risk of fraud to the Workers' Compensation Board of British Columbia and what measures and actions are being taken in this area. Specifically, this paper will discuss the critical nature of the Board's internal control system in the role of minimizing its exposure to fraud.

Fraud Defined

The term "fraud" in financial literature has been defined as intentional deception, the misappropriation of a company's assets, or the manipulation of financial data to the advantage of the perpetrator.

These acts may be internal or external to the organization in origin or could involve collusion by parties from either or both sources.

The Board's Level of Risk

The Workers' Compensation Board receives and handles almost 200,000 new claims per year (1993 — 195,117). More than 135,000 claims were paid for the first time in 1993, and another 14,000 were reopened for payment. The Board made payments in the areas of health care benefits, rehabilitation expenditures, short-term wage-loss, long-term disability pensions, and fatal claims benefits. Short-term wage-loss is normally paid every two weeks, long-term disability pension payments are issued monthly, and the other expenditure types are generally paid as incurred. In 1993, the total amount of cash paid to claimants or third parties on their behalf was in excess of $651 million.

Additionally, cash paid for administration and other goods and services totalled a further $176 million. The Board was also involved in receipt transactions totalling more than $673 million from assessments and $357 million (net income) from investments in 1993.

In short, the Board handles a large number of individual payment and receipt transactions within any given year, involving significant sums of monies. The conclusion based on these factors is that the Board's exposure to fraud is material.

Elements of an Internal Control System

The primary defense of any organization to fraud is through its system of "internal controls." Generally, an internal control system would consist of the following elements:

- the organization structure
- standards of business and ethical conduct
- values
- trained staff
- policies, procedures, authorizations
- financial and operating information
- physical security
- planning and budgeting
- information systems security
- internal checks and balances

As can be seen above, internal controls go beyond the financial facets of the business. These controls encompass all parts of the organization including management and staff as well as the working environment and culture.

The Board's Internal Control System

The elements of the W.C.B.'s internal control system interact as follows:

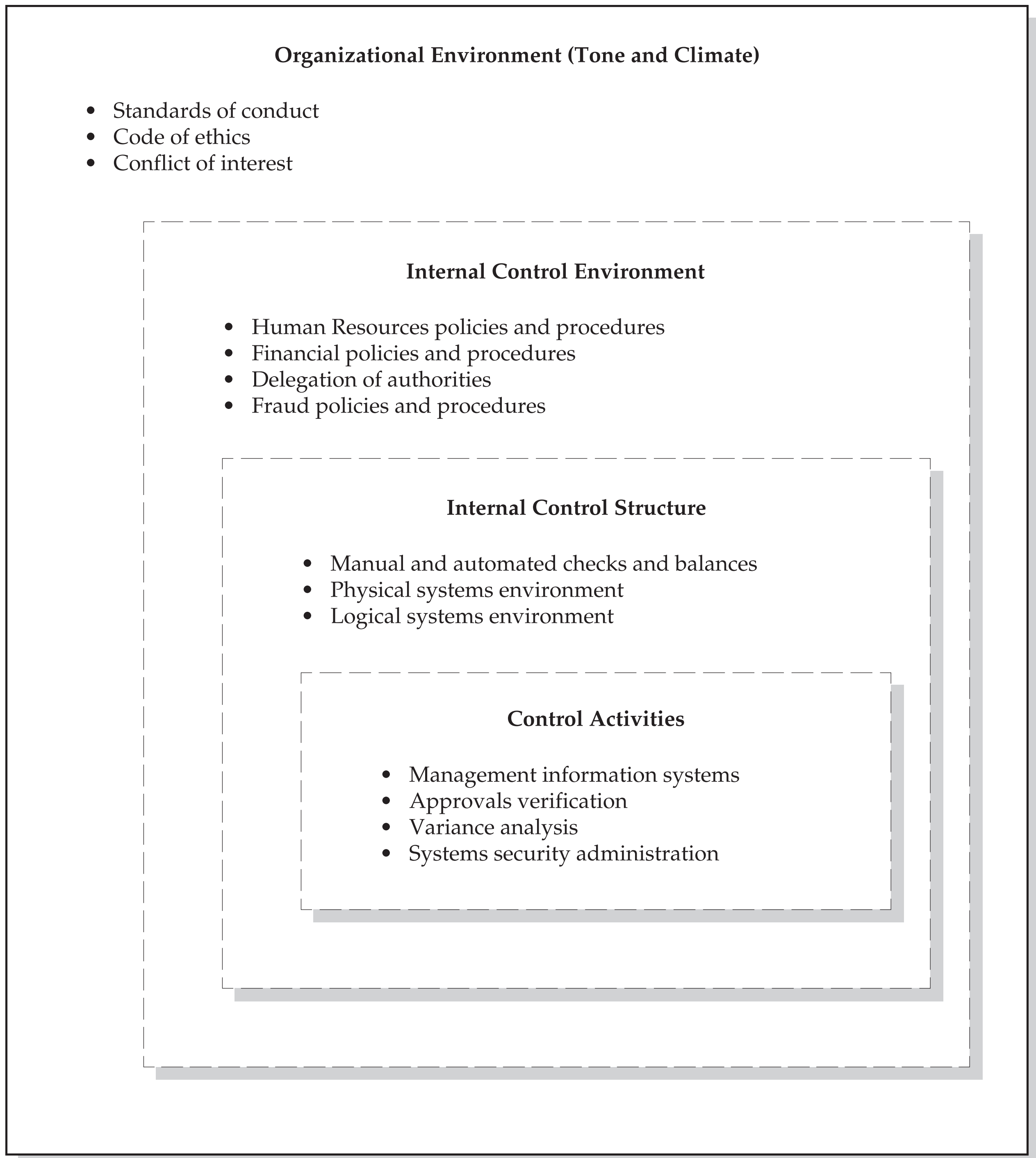


Figure 1

Logical Systems Environment

For any organization that is dependent on automated systems, one of the most prevalent exposures to fraud comes from access to those systems. For this reason, fraud control efforts must often be concentrated in this area. Expanding the illustration on the previous page (Figure 1), the following diagram shows a vertical slice of the Board's Logical Systems Environment (Figure 2):

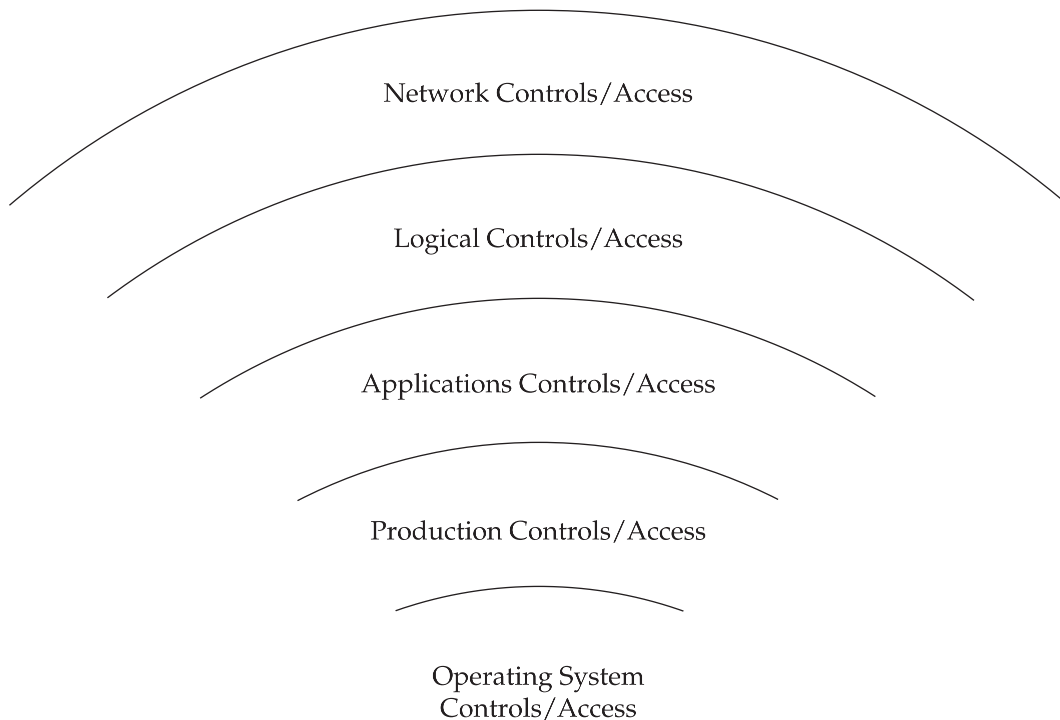


Figure 2

Control Measures

The Board has the necessary tools and framework for an effective internal control system needed to manage the risk of fraud. To date, a significant amount of work has been performed to ensure that our internal controls are adequate and functional.

In addition, the controls in our payment systems such as wage-loss, health care, disability awards, pensions, and general accounting are examined on an ongoing basis. Areas where internal control weaknesses and deficiencies are identified are brought to the attention of both the Senior Executive Committee and the Governors' Financial Standing Committee.

Cost Effective Controls

A primary consideration in the design and implementation of an internal control system is its cost effectiveness. For example, it would not be cost effective to spend a dollar for every dollar of risk. Neither would it be operationally practical nor cost effective to implement the level of internal controls needed to completely eliminate the risk of fraud.

However, cost effectiveness cannot be the only consideration: there must be a deterrent element. This deterrent takes the form of our ongoing, high-visibility tests of the Board's internal control system and business processes. These tests form an integral element of our climate and have an impact in strengthening the overall controls.

Our challenge is to balance our need for cost effective controls against our efforts to reduce this risk of fraud to the lowest possible level of exposure. The difficulty of this task is compounded by the view that the Board will have always spent too much if a fraud does not occur and never enough if a fraud occurs.

As a result, we must be cognizant that there exists and will continue to exist some potential risk for fraud at the W.C.B. as there would be in any organization of a similar nature and size.

Internal Controls and Organizational Change

Significant changes in the approach to management by decentralization, delayering and empowering employees does not eliminate the need for controls. In a rapidly changing organization such as the Board, controls must be adapted, modified and even redesigned in response to the changing needs of the organization. Organizational changes towards an integrated business unit approach will require increased "self controls" with a corresponding reduction in centralized controls. The foci for controls must be migrated to the integrated service unit level along with greater autonomy to "manage the business."

Conclusion

The subject of fraud and fraud control is both a critical and sensitive issue for all organizations. The attention that the risk of fraud commands is not without cost but is minimal compared to the price that would be paid should a fraud occur. Fraud questions an organization's integrity, accountability and credibility and erodes the stakeholders' confidence and trust in the organization and its management.

Our best defense is to ensure that we have an effective internal control system. We have a commitment and responsibility to our stakeholders to demonstrate that we exercise due diligence to the best of our ability.

Annual Report of the Freedom of Information and Protection of Privacy Office at the Workers' Compensation Board — 1993

Date: **April 7, 1994**

A. Introduction

The past year has been challenging and productive. Since January 1993, the new *Freedom of Information and Protection of Privacy Act* (*F.I.P.P.*) has come into force and the Workers' Compensation Board (the Board) has created an information and privacy system comprised of an Office and contacts to comply with the legislation's requirements. This report outlines the work and achievements of the past year and suggests future directions.

B. Legislative Framework

Without rehearsing the specifics of *F.I.P.P.*, it is useful to consider the broad parameters within which the Board must operate. The purpose of *F.I.P.P.* is to open general records of public bodies to the public and personal information to the people to whom it pertains while protecting the privacy of individuals. Openness, accountability and privacy protection are central goals of *F.I.P.P.* The *Act* establishes rules for disclosure and related exceptions and rules for collection, retention, security, and correction of personal information. *F.I.P.P.* conveys on the head of public bodies the duty of ensuring that public bodies comply with its requirements. The head of the Board, for purposes of *F.I.P.P.*, is the chair of the Board of Governors.

C. The W.C.B. F.I.P.P. System — Office and Contacts

F.I.P.P. allows the chair to delegate duties to officials to help the Board comply with its obligations. Through a policy instrument entitled Chair's Instruction Number 1, the chair has delegated authority and specific tasks to the Freedom of Information coordinator, the Executive Committee, the vice-president of Prevention, and directors and managers throughout the Board. To facilitate compliance with *F.I.P.P.*, a F.I.P.P. Office and a system of contacts of Board managers has been set up.

C.1 F.I.P.P. Office

The Freedom of Information and Protection of Privacy (F.I.P.P.) Office is located on the 5th floor of the Administration Building at the Board. The Office has been created physically, administratively and spiritually in the last year.

The Office has five permanent staff who have joined the Board at various points in the year. The staff includes: F.O.I. coordinator, a records management officer, F.O.I. officer, secretary and clerk. The year has been challenging and all staff have learned a great deal and suggested and carried out initiatives to make the office work better.

Office space, equipment such as computers, and furniture such as tables and shelving have been acquired.

As in any new office there have been start-up costs for such purchases (see Table 1 for budget/expenditure figures).

Administration of the Office has many parameters including such diverse things as staff supervision and development of file systems and methods of file review. General Management of the Office is the responsibility of the F.O.I. coordinator, who in this year has instituted a number of Office procedures to keep the Office's work flowing. Aspects of management, including hiring staff, budget preparation, initial computer systems development and the like, have been carried out or assisted by the manager of Legal Services and/or her assistants in other Legal Division departments. The role of "outside" managers should become less in the future and, hence, put less burden on the Division as a whole. The management role of the F.O.I. coordinator in the past year should not be underemphasized, and such a future role should not be underestimated.

Among the systems adopted or developed in the new Office have been a file classification system, a file review system, a request tracking system and a legal opinion collection. The Office, under the guidance of the records management officer, has adopted the provincial government's A.R.C.S./O.R.C.S. classification for records and has been successfully using it for months.

The Office keeps file lists for all of its officers and these are intended to be used for file review to ensure timely and comprehensive response to matters with which the Office has been asked to deal. The Office has a request/complaint tracking system in place but a more sophisticated system is being developed by I.S.D. in consultation with the records management officer which will help the Office meet provincial reporting requirements as well as to fulfill requests in a timely fashion. The new system's first phase should be operational in January 1994. Finally, the Office maintains a legal opinion binder which contains copies of all legal opinions prepared in the F.I.P.P. Office. This is a useful precedent and research tool for the Office.

C.2 F.I.P.P. Contacts

Throughout the Board there are directors and managers who have been designated by the heads of Offices and Divisions to act as F.I.P.P. Contacts. The Contact group was started in February of 1993 and has met regularly since then.

The functions of the Contact group are to provide a liaison between the F.I.P.P. Office and the Board's Offices, Divisions and Departments and to provide information and input into the development of F.I.P.P. policies and procedures at the Board. At its regular meetings, the group has discussed various disclosure and privacy protection matters. The group has also had various subcommittees looking at issues such as fees policy and granting of research agreements. Finally, the group has embarked on training itself and has held special training sessions led by the F.O.I. coordinator.

The concern, diligence and hard work of the F.I.P.P. Contacts have been an important part of the Board's initial steps toward compliance and no doubt will continue to be critical in the years to come.

D. Initiatives in Respect of F.I.P.P. Compliance

A variety of initiatives have been undertaken to bring the Board into compliance with *F.I.P.P.* Among them have been:

1. policy review and development,
2. creation and maintenance of the directory of records,
3. training,
4. communication, and
5. legal opinion/solicitor's work.

Full compliance has not been nor will it likely be for several years as it will take time for the values embedded in *F.I.P.P.* to become part of the corporate culture of the Board and for Board officials to become familiarized with F.I.P.P. related procedures in respect to normal course of business information disclosure, access to records under *F.I.P.P.* itself, and privacy protection.

D.1 Policy Review and Development

Policy and procedure review and development has taken place at both the Board and provincial levels.

D.1.a. Governors' Manuals

The Board of Governors undertook to ensure that the three key manuals used at the Board, that is, the *Assessments*, *Rehabilitation Services and Claims*, and *Occupational Safety and Health (O.S.H.) Manuals*, were revised in light of *F.I.P.P.* The governors approved changes to the *Assessments* and *O.S.H. Manuals* in March and July respectively but are still considering changes to the *Rehabilitation Services and Claims Manual*. Revisions to all of the *Manuals* have been prepared by the Board's Policy and Research Department. The role of the F.I.P.P. Office and, in particular, the F.O.I. coordinator has been to provide advice with respect to those changes.

The coordinator has also provided commentary on these policies directly to the chair.

D.1.b. Administrative Procedure Review

Various departments throughout the Board have asked for and received comment on their administrative procedures and the potential impact of F.I.P.P. This kind of review is ongoing and will no doubt take years to finally complete.

The F.O.I. coordinator has provided comments on various procedures and policies including those of Human Resources, Computer Security and the like. Other F.I.P.P. officers have attended meetings of groups such as the Threats Committee and the Compensation Services F.I.P.P. Committee to provide input respecting *F.I.P.P.*

D.1.c. F.I.P.P. System Procedure

The F.O.I. coordinator prepared a W.C.B. F.I.P.P. Manual which was made available to the Executive Committee and F.I.P.P. Contacts on October 4, 1993. The Manual provides guidance in respect of F.I.P.P. related procedures as well as an overview of *F.I.P.P.* itself.

D.1.d. Information and Privacy Branch Policy and Procedure Manual

The Information and Privacy Branch of the Ministry of Government Services has prepared and published a Policy and Procedure Manual which provides advice in respect to *F.I.P.P.* The W.C.B. F.I.P.P. Office has had input into the development of the Manual which, while not in any way binding the Board, serves as a valuable resource for it.

D.1.e. Interagency Agreements

Because the Medical Review Panels fall under the Ministry of Skills, Training and Labour for purposes of *F.I.P.P.*, the Board and the Ministry established a protocol to deal with *F.I.P.P.* responsibilities in respect of Medical Review Panels' records.

D.2 Creation and Maintenance of the Directory of Records

F.I.P.P. requires the government to publish a directory of all of the records held by public bodies. Contents of the directory will include: a generic list of administrative records which can be assumed to exist in all public bodies, lists of the specific operational records held by each public body (e.g., claim files, assessment firm files, first aid certification files, rehab centre treatment files), list of all the policy and procedure manuals used by each public body to organize its various functions, and lists of the Personal Information Banks maintained by each public body.

The information about what records the Board holds was collected during the first-ever inventory of records which was conducted in the winter. Throughout 1993 the data for the Board's contribution to the provincial directory was entered into a database system supplied by the Information and Privacy Branch of the Ministry of Government Services and housed on a standalone P.C. in the F.I.P.P. Office. Data was periodically sent to the mainframe system in Victoria, which houses the data for all public bodies. Primary responsibility for work on the Directory has gone to the records management officer. The Directory has not been published yet and is due to be published and available in printed and on-line forms in 1994.

D.3. F.I.P.P. Training

Board-wide training on *F.I.P.P.* , which commenced in April 1993, and which has been primarily undertaken by the F.O.I. officer, is being delivered as a two-phase program. Phase I training provided an overview of key concepts of *F.I.P.P.* The principle goal was to raise staff sensitivity to the issues of access and privacy and *F.I.P.P.*'s potential impact on W.C.B. disclosure practices. Training at this level was completed by August 1993.

Phase II training is ongoing. This level of training has been customized to meet the specific needs of a department or division. The curriculum includes scenarios and severing exercises to familiarize staff with the handling of issues and records pertinent to their operating area. The degree of participation by F.I.P.P. Contacts has had significant impact upon the needs of identification and curriculum development process.

D.4 F.I.P.P. Communications Strategy

Communication materials have been developed to meet internal and external informational needs. A pamphlet entitled *Access to Information and Protection of Privacy at the W.C.B.* is now available. To coincide with proclamation of the legislation on October 4, 1993, a special issue of the *W.C.B. Bulletin* was prepared by the F.I.P.P. Office.

In addition, F.I.P.P. staff were interviewed for an article in the September 1993 issue of *Board Talk*.

A F.I.P.P. Bulletin Board has been established and a basic description of *F.I.P.P.* has been posted. Future use of the Bulletin Board will include discussions of F.I.P.P. issues in a question-and-answer format.

D.5 Legal Opinions

The F.O.I. coordinator has provided a variety of legal opinions to many departments at the Board. In addition to formal legal memos, the coordinator has taken part in a wide range of discussions of *F.I.P.P.* matters in various sectors of the Board.

E. Activities in Respect of F.I.P.P.

F.I.P.P. itself permits requests for information, allows researchers to seek access to personal information under research agreements, facilitates complaints concerning privacy protection and sets up a scheme under which people may seek review of decisions made by public bodies. The F.I.P.P. Office has received F.O.I. requests, privacy complaints, research agreement requests, and correction requests. All F.I.P.P. Office officers and support staff have played a role in answering requests and answering complaints.

E.1 F.O.I. Requests

After *F.I.P.P.* came into force, there were 81 formal F.O.I. requests (Table 2). Most of these requests involved personal information (Table 3). Indeed many have been requests by individuals for access to claims files pertaining to themselves. This kind of request should diminish as Claims units begin to disclose claims information to claimants in the normal course of business. Increasingly, there are demands for O.S.H. information and this is likely to continue.

Of 81 requests, only three in 1993 resulted in review by the information and privacy commissioner. Mediation has occurred on one and action on the others is still pending.

Among the requests were four test requests initiated by the chair who had asked the F.O.I. coordinator for suggestions as to examples of requests and then asked several people in the communities that the Board serves to make similar requests. These tests were useful in revealing issues concerning records management and *F.I.P.P.* procedures. While problems were detected, the tests showed, as have all the requests, the Board's willingness to comply with *F.I.P.P.* Critical appraisal of the Board's performance in respect of F.O.I. requests is no mean task. Among the variables which one might consider are timeliness, internal and external cooperation, and requester satisfaction. The average time for a response in cases where extensions were not required was 19.21 days (Table 4). While it would be worthwhile to try to reduce this, it is not a bad turn-around time, especially in the initial period of compliance. To function effectively, there must be cooperation between the F.I.P.P. Office and other Board staff (especially the F.I.P.P. Contacts) and for the most part there has been a high degree of cooperation. Externally the F.I.P.P. Office's relations with requesters have been cordial and cooperative. Measuring requester satisfaction is difficult. Only three out of 81 requests being brought to the review stage might be a measure although it may be due to other factors besides satisfaction. In the future, it may be appropriate to conduct surveys of requesters to ascertain their satisfaction.

E.2 Privacy Complaints

Prior to *F.I.P.P.* coming into force, there were nine privacy complaints and since then there have been six, three of which have been initiated through the Office of the Information and Privacy Commissioner (Table 2). The focus of such complaints has been primarily employer misuse of claims information obtained through the Appeals Disclosure process. While such misuse is the responsibility of the employer, the Board is aware of and sensitive to the privacy concerns of claimants. One of the complaints focused on potential illegal access to Board records and another centred on the placing of a criminal record on a claims file.

Privacy Complaints may be lodged in the F.I.P.P. Office or directly with the Office of the Information and Privacy Commissioner. Upon reviewing a complaint, the F.I.P.P. Office has investigated in some manner, usually getting in touch with the relevant F.I.P.P. Contact and, once, utilizing the Field Services unit. Upon receiving privacy complaints through the Office of the Information and Privacy Commissioner, the F.I.P.P. Office has waited for that Office to specify what it wanted to see and do and then responded.

E.3 Research Agreements

Two research agreements were sought prior to October 4, 1993, and none thereafter (Table 2). This is likely to be a more active area for the Board in the years to come.

E.4 Correction Requests

There was one correction request prior to October 4, 1993 and none thereafter (Table 2).

E.5 Reviews

Three requests resulted in reviews by the Office of the Information and Privacy Commissioner (Table 2). One has been resolved through mediation and two reviews are ongoing.

The Office of the Information and Privacy Commissioner has not published procedures with respect to reviews or complaints. The F.O.I. coordinator has requested that this be done.

F. Cost/Impact Evaluation

While the direct costs of *F.I.P.P.* are relatively easy to ascertain (see Table 1), such is not the case with indirect costs. *F.I.P.P.* has a variety of impacts and requires the time and effort of many Board employees. Time is spent by the F.I.P.P. Contacts and their staff answering questions raised by the F.I.P.P. Office, retrieving records, copying records and the like. Training also takes time. A serious appreciation of the impact will be gained over time as collection and analysis of relevant data takes place as mandated in the F.I.P.P. Manual.

G. Future Directions

A great deal has been accomplished in the first year of the F.I.P.P. Office and F.I.P.P. System but there is still work to do. Policy and procedure review will continue through the next year and beyond. Phase II training should be completed in 1994. The Directory of Records should be altered to reflect changes in Board structure. Procedures for privacy audits must be developed and F.I.P.P. Office privacy audits should be carried out throughout the Board in the coming year and beyond. Enhancement of F.I.P.P. Offices procedures, notably with respect to request tracking, will take place in the coming year. Requests, complaints and reviews will of course continue to be a part of F.I.P.P. Office activities. The Board can look forward to encountering new information and privacy challenges having established a working F.I.P.P. Office and Contact system.

TABLE 1 — Summary of Expenditures — Cost Centre 1104

For the period January 1,1993, to December 31, 1993

Administration Costs		Actuals 1993	Budget 1994
Salaries and Payroll	(1)	$176,306	$264,381
Travel Expenses	(2)	10,536	8,100
Supplies and Stationery		3,554	6,170
Buildings and Services		Nil	Nil
Communications		2,100	4,800
Equipment Costs	(3)	42,391	19,370
Other Costs	(4)	1,913	3,400
Recoveries		-30	
Total Expenditures		$236,855	$306,221

1. The section was comprised of five employees in 1993 (one coordinator, one records officer, one training officer, one secretary and one request file clerk). However, the incumbents for these positions assumed their positions at different times throughout the year and, accordingly, the total of salaries for 1993 does not reflect a full year's salary.
2. The coordinator and the training officer visited various area offices during the 1993 year.
3. P.C.'s were purchased and a L.A.N. implemented for the office.
4. Membership fees to the Law Society for the coordinator was paid in 1993.

TABLE 2 — Requests, Complaints, and Reviews

	Jan. 11 to Oct. 4	Oct.	Nov.	Dec.	Total
# of Requests	31	31	32	18	106
# of Complaints	9	1	3	2	15
# of Research Agt. Requests	2	0	0	0	2
# of Corrections Requested	1	0	0	0	1
# of I.P.C. Reviews	0	1	2	0	3
Total Activities	42	33	37	20	132

TABLE 3 — Nature of Requests — October 4 to December 31, 1993

Types of Requests	
Personal	74
General	7
Copies of Records Requested	80
Access to Records Requested	1

TABLE 4 — Character of Responses To

Post October 4, 1993 Requests

Full Disclosure	34
Severed	27
Records Not Available	2
Denials	1
In Progress	17
Average # of Response Days (excluding extensions)	19.21
Average # of Response Days for Extensions	46.25

WORKERS' COMPENSATION
REPORTER

Governors' Financial Standing Committee 1993 Annual Report

Date: **March 1, 1994**

Mandate

The mandate of the Governors' Financial Standing Committee ("G.F.S.C.") is to "assist the Governors in fulfilling their oversight responsibilities relating to insurance, investments, executive compensation, financial reporting, auditing and internal control of the Workers' Compensation Board of British Columbia ("W.C.B."), while recognizing that the primary responsibility for financial reporting, internal control and compliance with laws, regulations, and ethics by the W.C.B. rests with the executive management, overseen by the Governors."

Background

The G.F.S.C. was constituted on April 6, 1992, by resolution of the governors pursuant to Section 82(b)(1) of the *Workers Compensation Act* and Section 8 of the governors' Bylaw No. 3 (Board of Governors' Procedural Bylaw) — *Workers' Compensation Reporter*, Vol. 7, p. 161. The G.F.S.C. Charter is published in the *Workers' Compensation Reporter*, Vol. 8, p. 131.

The Charter requires that the chair make an annual report of the G.F.S.C.'s "accomplishments and works in progress" each calendar year. This second annual report will cover the activities of the G.F.S.C. for 1993.

Amendment to Charter

From time to time, G.F.S.C. members are unable to attend committee meetings and the requirement for a quorum is not met. As a result, the G.F.S.C. Charter was amended by adding the following paragraph after paragraph 3 under the heading "STRUCTURE:"

> 3A. The worker representative Governor or the employer representative Governor, appointed under paragraph 1, may designate an alternate Governor from the same

representative group to attend a meeting that the worker representative Governor or the employer representative Governor is unable to attend; and the alternate Governor, if in attendance at that meeting, shall be counted as part of the quorum for the meeting.

G.F.S.C. Members

The governor members and the duration of their appointments to the G.F.S.C. are as follows:

Workers' representative governor	–	Maureen Whelan	–	to December 3, 1994
Employers' representative governor	–	John St. C. Ross	–	to December 3, 1993
Public interest governor (and chair of the G.F.S.C.)	–	Dr. Mark Thompson	–	to May 23, 1994
Chairman of the governors	–	James E. Dorsey	–	to April 30, 1995

After the conclusion of John St. C. Ross' term as governor, Bob Buckley served as the employers' representative for the final meeting of 1993 on December 6.

The Board's president and chief executive officer attends G.F.S.C. meetings. Kenneth M. Dye served in this position up until August 1993, when James E. Dorsey assumed responsibility for the Office of President and Chief Executive Officer.

William F.R. Evans, vice-president, Financial Services, attended G.F.S.C. meetings for the first quarter of 1993. The Board's current vice-president, Finance/ Information Services Division, Sidney O. Fattedad, has attended G.F.S.C. meetings since November and will continue to do so on a regular basis. In addition, the director of Internal Audit and Evaluation, Tom Hum, regularly attends the G.F.S.C. meetings.

No issues of conflict of interest or of any other ethical nature concerning G.F.S.C. members arose.

Meetings Reports and Records

The G.F.S.C. met on six occasions in 1993 — February 1, April 5, June 7, September 7, October 4, and December 6. As required by the G.F.S.C. Charter, minutes of each meeting in 1993 were distributed to the governors after approval. The chair of the G.F.S.C. also reported verbally on G.F.S.C. activities at the Board of Governors' meetings.

Investments and Investment Performance

The G.F.S.C. Charter requires the G.F.S.C. to review the policies and activities of the Board's Investment Committee. The Board's Investment Committee determines, within the policy guidelines, the current deployment of investment capital to maximize long-run returns. Members include the president and chief executive officer, the vice-presidents of Finance/Information Services, and Compensation Services, the treasurer, and three external investment experts.

The Investment Committee meets quarterly and Ministry of Finance officials routinely attend. The minister of finance approves all investment strategies, pursuant to Section 67(2) of the *Workers Compensation Act.* The G.F.S.C. receives minutes of all Investment Committee meetings.

The G.F.S.C. reviewed and discussed the Board's investment activities on several occasions. A number of presentations were made highlighting the goals and objectives of the Investment Committee, the merits of portfolio diversification, historical investment performance and the Board's progress in diversifying into the U.S. equity markets. The G.F.S.C. was kept apprised of current portfolio valuations, asset allocations and investment returns. The G.F.S.C. noted the underperformance of a Canadian Indexed Fund in which the Board participated, and the corrective action undertaken to ensure that this asset class more closely reflects the returns of its assigned benchmark, the Toronto Stock Exchange 300 Index.

After discussions within the G.F.S.C., the Board of Governors at their September retreat, approved the Investment Committee's strategy to diversify a portion of the current investment portfolio into the U.S. equity markets. The Investment Committee will prepare a statement regarding screens and ethical investing for the G.F.S.C. and the Board of Governors.

The W.C.B. is contemplating further diversification of its assets. Specific proposals will be made by asset class and will include amounts, timetables, and diversification rationale for consideration by the G.F.S.C., the Ministry of Finance and the Board of Governors.

Annual Report/Financial Statement

The G.F.S.C. is required to review the Board's annual financial statements including all significant issues concerning litigation, contingencies, claims and assessments, and all material accounting issues that require disclosure in the financial statements and management's discussion and analysis section of the *Annual Report*. The statements were discussed and concern was expressed over the increase with the Board's unfunded liability.

Actuarials

The Charter requires that the G.F.S.C. review the Consulting Actuary's report on the assessment rates and year-end actuarial liabilities.

At its April 5 meeting, the G.F.S.C. met with the Board's external actuary, Jack Levi of Eckler Partners Ltd., to discuss his December 31, 1992, Actuarial Report. Among the issues considered were the impact of rising short-term liabilities, the problem of lag time between current injuries and the setting of assessment rates, mortality rates, the discount rate and the rate of change of the unfunded liability. The actuarial assumptions currently used by the Board were also reviewed.

After considerable discussion, the G.F.S.C. approved the recommendations of the Executive Committee, the consulting actuary, and outside experts to change the discount rate from 2⅜ to 3 percent, to capitalize rehabilitation costs and to revise the mortality tables currently used for actuarial purposes. The Board of Governors approved the changes to the discount rate and capitalization of rehabilitation costs.

Budgetary Variances and Remuneration

The Charter requires the G.F.S.C. to review executive remuneration and benefits. During 1993, a number of changes were made at the executive level of the Board.

Restructuring at the executive level of the Board and changes at senior management levels caused salary anomalies. As an interim measure, a recommended management salary increase of 2.5 percent, effective October 1, 1993, was accepted by the G.F.S.C. A full review of the management salary scale, including performance measurements based upon various corporate goals and objectives, is planned in 1994.

Risk Management Committee

The president's Risk Management Committee meets regularly. The minutes of these meetings are provided to G.F.S.C. members to assist the G.F.S.C. in carrying out its responsibility to monitor the Board's insurance program and to ensure the Board's compliance with all applicable laws and regulations.

The Risk Management Committee presented its Annual Report to the G.F.S.C. The report included a review of the work carried out during 1994 such as disaster recovery, insurance, laboratory services, and statutory compliance. The G.F.S.C. also reviewed and commented on the Risk Management Committee's list of priorities for 1994.

Internal Audit and Evaluation

The G.F.S.C. Charter requires it to oversee the Board's internal audit and evaluation function.

The G.F.S.C. received reports by the Internal Audit and Evaluation Department. Issues and policies, among which included standards of conduct, code of ethics, land acquisition and disposal and public tendering of high dollar purchases, were discussed. Responsibility for addressing these issues was reviewed or assigned to members of the Executive Committee.

External Auditor

The G.F.S.C. Charter requires that it review with the external auditor the proposed scope of the annual examination to determine that management has not imposed any restrictions and that problem areas will receive appropriate attention. It requires that the G.F.S.C. discuss the results of the previous year's audit with the external auditor. The G.F.S.C. is also to review the extent to which major recommendations of the external auditors have been implemented.

The *Workers Compensation Act* provides that "the accounts of the Board shall be audited by the Auditor General, or by an auditor appointed by the Lieutenant Governor in Council for that purpose and whose salary or remuneration shall be paid by the Board." The accounts of the W.C.B. are audited by the provincial auditor general.

The auditor general, Mr. George Morfitt, together with one of his officials, Brian Jones, met with the G.F.S.C. The auditor general recommended meeting with the G.F.S.C. to discuss financial statements in advance of their release, and to hold a mid-year meeting to plan for the current year's audit. It was agreed that the committee would meet with the auditor general on March 7, and October 3, 1994.

The auditor general has had very few concerns over the last several years and is very pleased that management continues to take action on observations and recommendations. Management's response to the auditor general's 1992 audit observations and recommendations was discussed. A follow-up will ensure that corrective actions have been completed.

1994 Budget

The G.F.S.C. began preliminary discussions regarding the 1994 budget at its December 6 meeting.

Divisional budgets were prepared on scenarios of 85% and 90% of 1993 budget, using the new budget module. A subcommittee of the Senior Executive Committee (S.E.C.) identified various excessive costs and inconsistencies and the S.E.C. then examined the bigger picture for 1994. Each Division proceeded to forecast its cost of mandatory service levels and activities. Several items which exceeded the available resources were eliminated.

The governors will be presented with a draft of the 1994 budget in March with finalization to take place in April.

Other Matters

At the request of the Executive Committee, the G.F.S.C. considered changes to the existing system of deposit accounts. After reviewing this issue, the Committee decided that the risk to the W.C.B. was insufficient to warrant any change in the deposit account system.

Conclusion

The mandate of the G.F.S.C. is to "assist the Governors in fulfilling their oversight responsibilities relating to insurance, investments, executive compensation, financial reporting, auditing and internal control of the W.C.B." As described in this report, the G.F.S.C. reviewed a variety of policy and procedural issues in an effort to meet their mandate. The results of this examination continue to be generally positive. The auditor general and an independent actuary examined the Board's financial records and approved the reporting procedures, assessments, and financial controls.

While the Board has moved into a slightly unfunded position, the performance of the Investment Portfolio continues to enable the Board to maintain one of the country's lowest assessment rates while providing generous benefits and services to injured workers. A number of deficiencies in Board policies were identified and the Committee is committed to monitoring progress in addressing these issues. Efforts to improve efficiencies and to streamline operations while improving services will ensure that administrative costs are minimized. Closely monitoring the rate of change of costs versus income will enable the Board to effectively manage its financial status, ensuring it remains virtually fully funded.

WORKERS' COMPENSATION
REPORTER

Industrial Diseases Standing Committee Second Annual Report

Date: **February 7, 1994**

Editors' note: The name of this committee was changed to "Occupational Diseases Standing Committee" in April 1994, to reflect updated workplace and literature terminology.

As one of two permanent committees of the governors, the mission of the Industrial Diseases Standing Committee (I.D.S.C.) "is to review the industrial diseases policies of the Workers' Compensation Board and to make recommendations for change to the Governors."

The I.D.S.C. Charter provides that "the Chair of the Committee shall make an annual report of accomplishments and works in progress to the Governors for each calendar year." Such report is to review the Charter and make recommendations for any changes perceived necessary.

The I.D.S.C. Charter has served the I.D.S.C. and the governors well over the past year and no changes are necessary. No issues of conflicts of interest or of any other ethical nature concerning I.D.S.C. members arose.

Committee Members

The governor members of the I.D.S.C. during 1993 and their terms of appointment to the Committee are as follows:

Worker representatives:

Leif Hansen	(to April 6, 1995)
Stanley J. Shewaga	(to April 6, 1994)

Employer representatives:

Robert Hugh Buckley	(to April 6, 1995)
Murray A. Farmer	(term as a governor expired December 3, 1993)

Mr. Farmer was replaced on the I.D.S.C. effective December 3, 1993 by newly appointed employer representative governor Horst Sander for a term to expire December 6, 1996.

Public interest representative:

Bonnie Hayes	(to April 6, 1994)

Chairman:

James E. Dorsey	(to April 30, 1995)

Bylaws

The operating protocol set out in Bylaw No. 1 of the I.D.S.C. (published in the *Workers' Compensation Reporter*, Vol. 8, page 613) has served the I.D.S.C. and the governors well and no changes are considered necessary.

Methodological Standards

Section 12.12 of Bylaw No. 1 provides in part that:

> The Committee may establish minimum acceptable methodological standards for any research that the Committee may rely upon in making recommendations to the Board of Governors.

On March 2, 1993, the I.D.S.C. approved and adopted a "Protocol for the Assessment of Medical/Scientific Information" which is published in the *Workers' Compensation Reporter*, Vol. 9, page 429. The Protocol attempts to describe in a reasonably concise manner the sort of medical/scientific information that is useful in deciding questions about occupational causation of disease. This founding document is the first of its kind adopted by any of the Compensation Boards in Canada.

Two-Year Review

The I.D.S.C. Charter charges its members with the responsibility of reviewing by April 1994 all entries within Schedule B and the list of diseases designated or recognized by the Board by regulation, for the purpose of formulating recommendations to the governors. During 1993, the I.D.S.C. completed a comprehensive review of this lengthy list of diseases/medical conditions that it began in 1992. To complete this considerable undertaking, the members of the I.D.S.C. have been on a steep learning curve while

they have familiarized themselves with these health problems and the Board's policies and practices for the adjudication/administration of claims made by workers who suffer from them.

The Charter also charges the members of the I.D.S.C. with the responsibility of recognizing and prioritizing "the other outstanding policy issues existing at the time the Committee is constituted." This further responsibility has caused the members of the I.D.S.C. to initiate a review of a number of other policy issues including:

- a review of Schedule D of the *Act* (non-traumatic noise-induced hearing loss);
- requests for certain grants and awards;
- possible amendments to Sections 6(1) an 55(3) of the *Act*;
- compensation for "occupational stress."

The activities of the I.D.S.C. since April 1992 have been aimed at laying the foundation for the long term. The laying of that foundation includes the full understanding of existing policy, practices and issues. The inherent complexities, difficulties and controversies associated with determining whether probable relationships exist between a disease and an occupational activity have meant that the I.D.S.C. has acted in a measured manner to ensure that it acts correctly.

Public Hearing

The commitment of the I.D.S.C. through the Bylaw adopted by the governors is to operate in a "fashion that is participatory, consultative, open, accessible, comprehensive and fair, with a view to fostering the greatest possible confidence in its recommendations."

The main expression of the governors' published policy on compensation for occupational diseases is Chapter IV of the *Rehabilitation Services and Claims Manual*. In order to foster discussion and policy development, Chapter IV was redrafted and reorganized to express the current policies and practices in the administration of disease claims in more readable, current, gender-neutral language. In particular, the redraft articulated existing practice with respect to claims for conditions due to repetitive motion, something not dealt with in the current Chapter IV.

The redraft of Chapter IV formed the focus for the first public hearing of the I.D.S.C. which was held in the Rehabilitation Centre auditorium on December 15, 1993. Over the full day of this hearing, members of the I.D.S.C. (along with other governors who attended the proceedings) heard 19 presentations on matters related to Chapter IV.

Presenters included representatives of the medical, employer and worker communities. By December 31, 1993, the Secretariat had received 34 written briefs/submissions (including those prepared by the presenters at the hearing).

A report summarizing the submissions made to the I.D.S.C. will be made available to the public.

There will be similar forums for face-to-face exchange in the future as the I.D.S.C. moves on to address more substantive, some would say more important or even urgent, matters. The December 15 public hearing was another beginning — not an end.

Claims Information

In its review of disease policy, the I.D.S.C. has reviewed available claims experience information. However, as noted in the first annual report: "regrettably, the experience information that the Committee requested was not as completely available as we would have liked."

In 1993, the I.D.S.C. welcomed two initiatives undertaken by the Board's Compensation Services Division:

1. the restructuring effective August 16, 1993 of the former "Special Claims Unit" into a service delivery area dedicated solely to the administration of claims for occupational diseases — known as "Occupational Disease Services".

2. the establishment by Occupational Disease Services of a statistics-gathering program which will capture detailed disease claims statistics from August 16, 1993 onwards. Information produced by this program will be made available to interested parties upon request.

These initiatives will allow interested parties, including the I.D.S.C., to monitor developments and trends in service delivery in this area of the Board's operations. Tables showing some historical data are appended.

Secretariat

The activities of the I.D.S.C. continue to be supported by the I.D.S.C. Secretariat. Dennis Campbell (co-ordinator) and Sharon Slobodian (administrative/secretarial support) continued to staff the Secretariat throughout the past year. The Secretariat resides in Occupational Disease Services. Its current address is:

I.D.S.C. Secretariat
Workers' Compensation Board of British Columbia
6951 Westminster Highway
Richmond, BC V7C 1C6

Attention: Dennis Campbell

Tel: (604) 279-8103 Fax: (604) 276-3014

Priorities: Cumulative Trauma Disorders

Feedback from the compensation community, by way of the public hearing and otherwise, continues to cause the I.D.S.C. to consider policy development in the area of conditions due to repetitive motion/cumulative trauma as its ongoing first priority. Many of the initiatives in 1994 will focus on this complex issue.

Prevention

The Committee's operating protocol provides that it will ensure that the Prevention Division of the Board is consulted on all matters related to the content of its recommendations. Over the past year, the Committee has continued to have the benefit of the participation of Dr. Joe Nearing of the Board's Occupational Health Department, and from August 1993 of Dr. Neva Hilliard, director of Central Operations, Prevention Division. Their experienced counsel and expert advice were greatly appreciated and respected by the Committee.

Vocational Rehabilitation

Occupational diseases often present difficult and challenging tasks for Board staff who provide vocational rehabilitation services. The issues associated with the provision of such services was canvassed during one of the Committee's meetings which included a presentation by the director of Vocational Rehabilitation Services. Initiatives include the Early Intervention Pilot Project which involves staff from Occupational Disease Services and the Functional Evaluation Unit.

The Committee also acknowledges the regular participation at its meetings of Len McNeely, vice-president of Compensation Services, Dick Hurst, director of Central Client Services, and Diane Gerwin, Client Services manager, Occupational Disease Services.

Independent Research

The Committee did not commission any research or other work in 1993 requiring funding approval from the governors.

Conclusion

In calendar year 1993, the I.D.S.C. met seven times and at an eighth meeting conducted its first public hearing; completed the development and adoption of a Protocol for the assessment of medical/scientific information; completed a comprehensive review of the diseases/conditions included in Schedule B and the list of diseases designated or recognized by the Board by regulation; initiated a review of other outstanding disease policy issues including a consideration of the merits of several statutory amendments; initiated a review of Board policy on claims for occupational stress; facilitated a redrafting of Chapter IV of the *Rehabilitation Services and Claims Manual* and obtained community input on that redraft through the public hearing; and generally continued to lay the foundations for the long term.

Our work in progress includes formulating recommendations to the Board of Governors regarding Schedule B and the list of regulated diseases; completing a summary of the December 15 hearing; prioritizing matters where recommendations have not been formulated and pursuing steps including public consultations to facilitate policy development; continuing the establishment of an appropriate policy development process regarding claims for occupational stress; continuing to address the highest priority issue of policy on cumulative trauma disorders; continuing to co-ordinate with the Board's initiatives in the area of prevention and in particular with the development of Ergonomics Regulations.

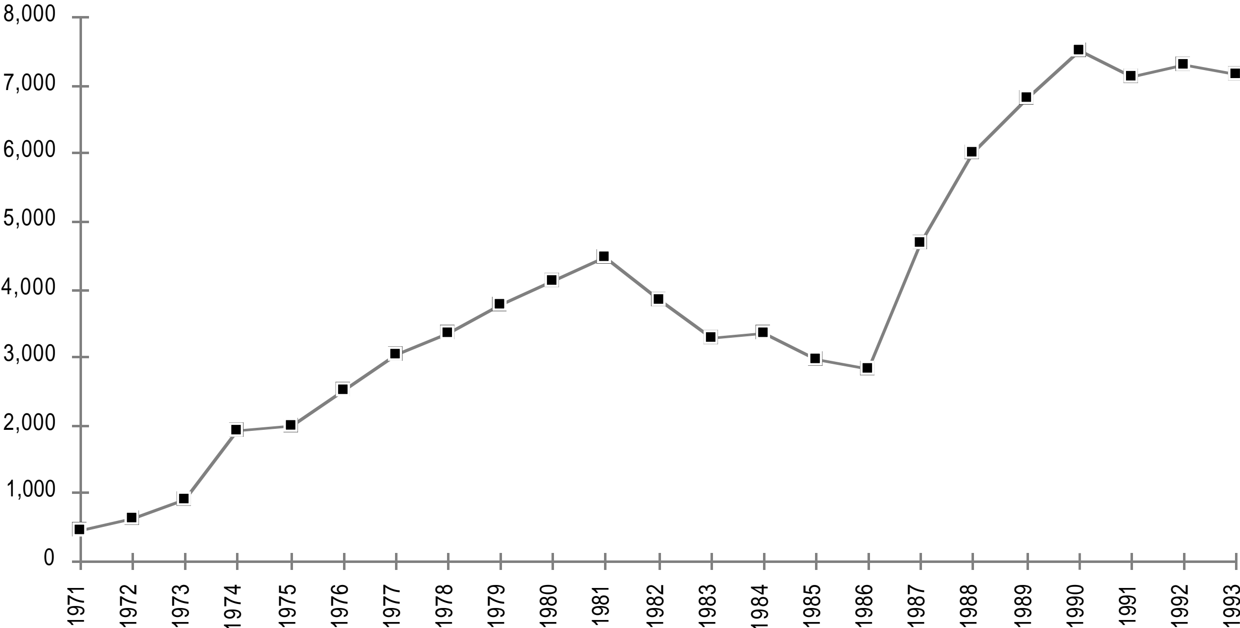
Industrial Disease	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993
Asphyxia (CO poisoning pre-1974)	8	5	2	6	3	20																	
Chemical Burns	297	316	361	420	444	536	608	607	496	374	396	423	419	451	554	555	614	526	515	426			
Conjunctivitis	2	16	81	70	66	50	46	63	48	44	30	13	15	21	21	9	18	15	15	10	5	6	
Dermatitis	163	179	253	253	282	290	287	269	297	371	363	318	242	253	218	232	210	207	252	254	216	222	200
Hearing Loss	17	31	4	224	579	586	484	364	353	280	261	189	297	325	509	882	889	1,076	789	594	596		
Infected Blisters	21	30	24	22	34	22	25	32	33	23	15	19	14	15	8	10	13	9	3	5	2	5	
Infectious Diseases	6	11	59	71	28	27	64	40	29	29	38	56	86	124	82	74	97	59	61	72	93	88	
Inflammation, Irritation of Joints, Tendons, etc.																							
Bursitis	31	58	62	143	242	359	241	380	463	590	705	625	576	554	315	338	752	1,001	1,065	1,253	1,244	1,301	1,182
Tenosynovitis	178	260	354	503	460	619	683	784	887	1,038	1,268	1,106	1,032	1,148	752	750	1,785	2,167	2,454	2,753	2,824	3,062	2,804
Carpal Tunnel Syndrome	71	103	127	103	103	122	123	107	143	257	310	361	404	536	469								
Other	14	2	2	1	3	2	2	1	4	10	7	4	9	0	0								
Pneumoconiosis																							
Asbestosis	2	3	1	6	6	6	11	11	7	10	15	12	20	18	30	18	30	41	46	27			
Silicosis (Mining)	13	14	15	12	16	9	10	4	5	7	12	7	7	8	9								
Silicosis (Not mining)	2	3	3	3	0	1	3	2	1	3	1	1	2	5									
Poisoning Systemic	16	22	28	80	67	61	70	81	162	161	142	150	87	88	107	116	127	129	156	121	154	84	95
Radiation Effects																							
Welding Equipment, Electric Arc		413	455	498	382	281	235	254	217	305	357	421	388	326	266	249							
Other	15	6	2	2	3	6	1	3	12	5	8	3	3	5	4								
Respiratory Irritation	24	60	118	122	121	130	148	202	161	183	200	189	159	141	167	118	148	174	247	304	278	261	214
Temperature Extremes																							
Cold	15	18	27	19	34	48	57	32	42	22	35	54	32	33	31	43	36	52	21	47			
Heat	3	3	3	8	6	12	2	8	6	12	7	15	5	14	6	11	19	8	16	10			
Vibration White Finger Disease (Raynaud's)		0	1	5	5	4	3	6	4	10	6	9	16	7									
Other	12	7	15	26	77	82	93	126	81	42	48	39	31	25	27	67	63	73	115	148	260	291	
Diseases not yet coded (Estimated)	47	183	90	416																			
Total Identified above	445	596	907	1,654	1,756	2,283	2,654	3,053	3,789	4,120	4,480	3,844	3,303	3,344	2,962	2,827	4,684	6,013	6,800	7,514	7,126	7,315	7,150
Total in Table E	465	641	915	1,927	1,994	2,512	3,031	3,359	3,789	4,120	4,480	3,844	3,303	3,344	2,962	2,827	4,684	6,013	6,800	7,514	7,126	7,315	7,150

Note: Categories are based on current classifications. Previous years' figures have been assigned to these categories although definitions may have changed.

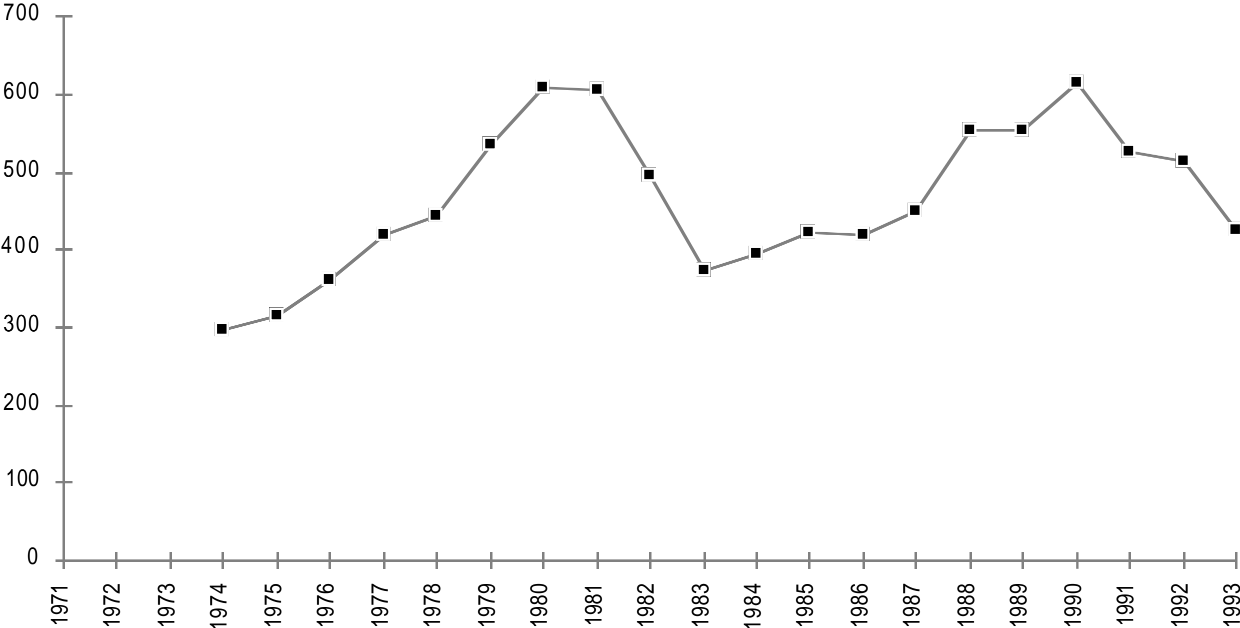
Source: W.C.B. Statistics Publications

Note: 1993 totals for some categories will increase once all claims that were uncoded (estimated at 416) are coded.

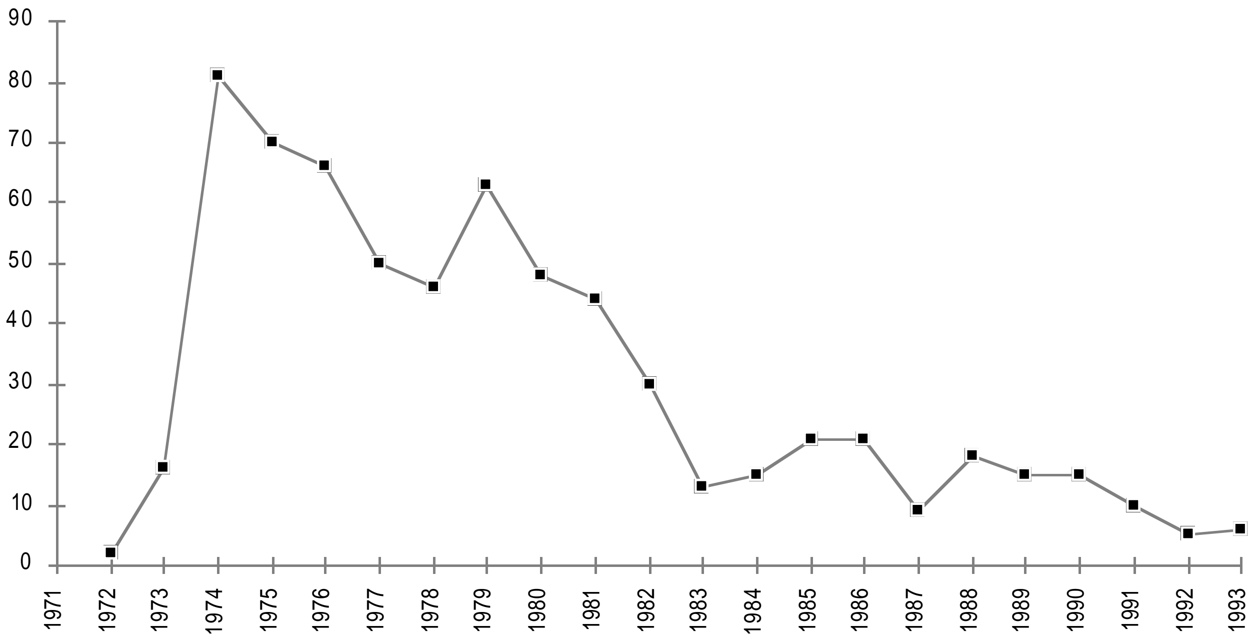
Total in Table E — Wage-loss Industrial Disease Claims First Paid



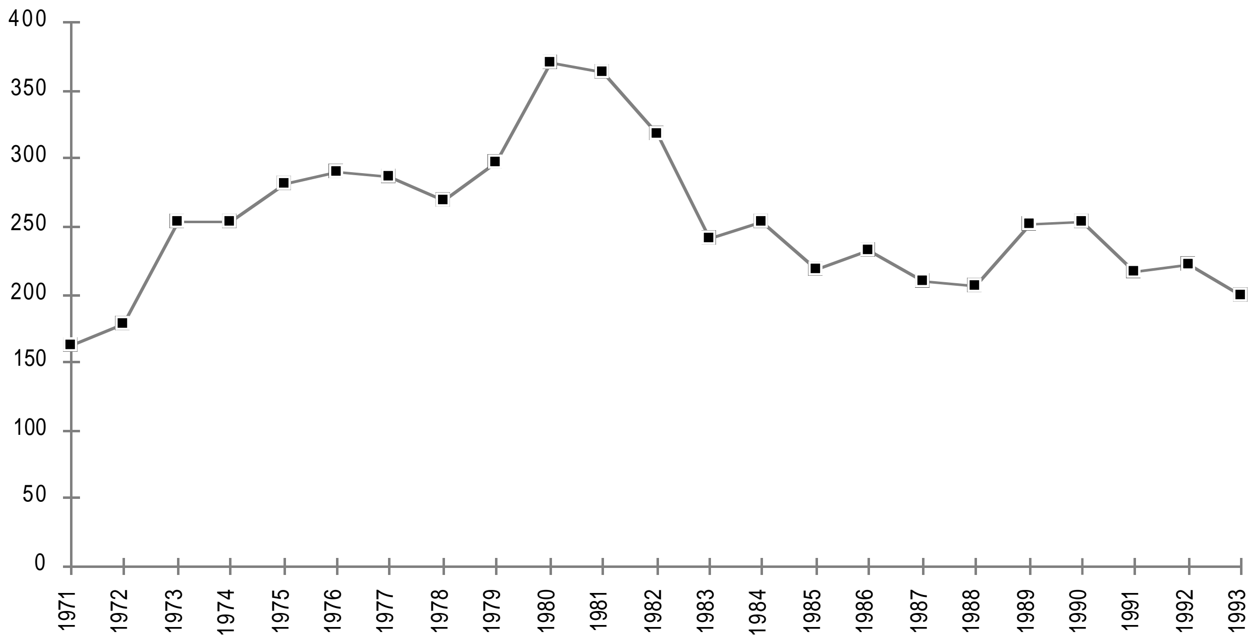
Chemical Burns



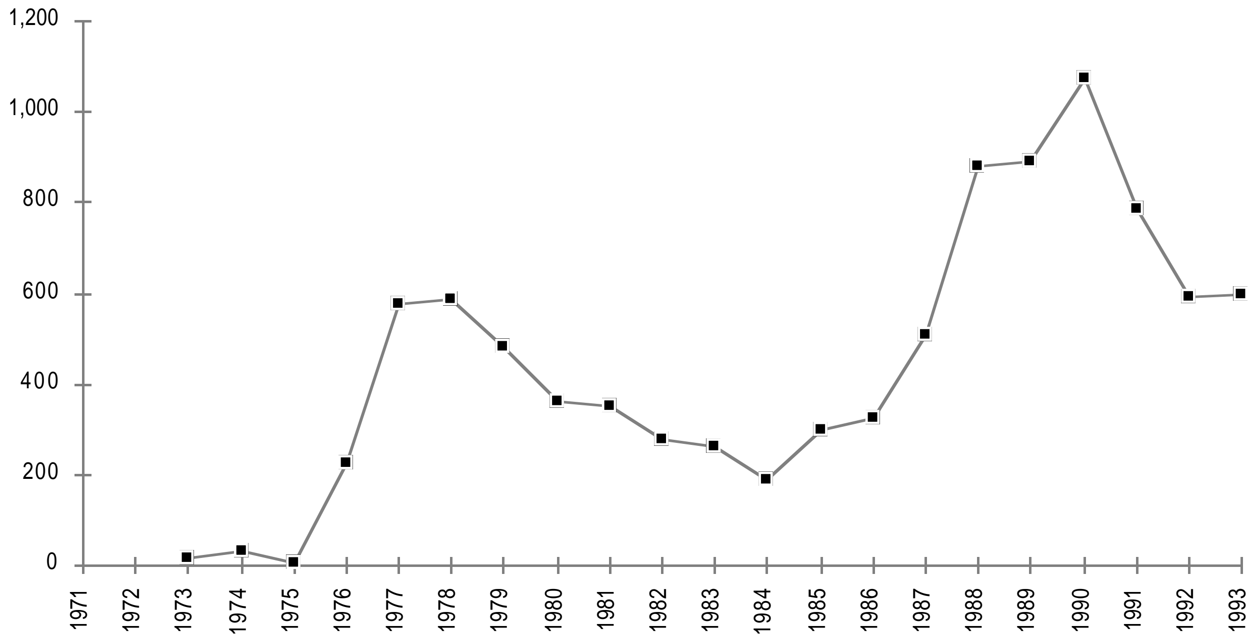
Conjunctivitis



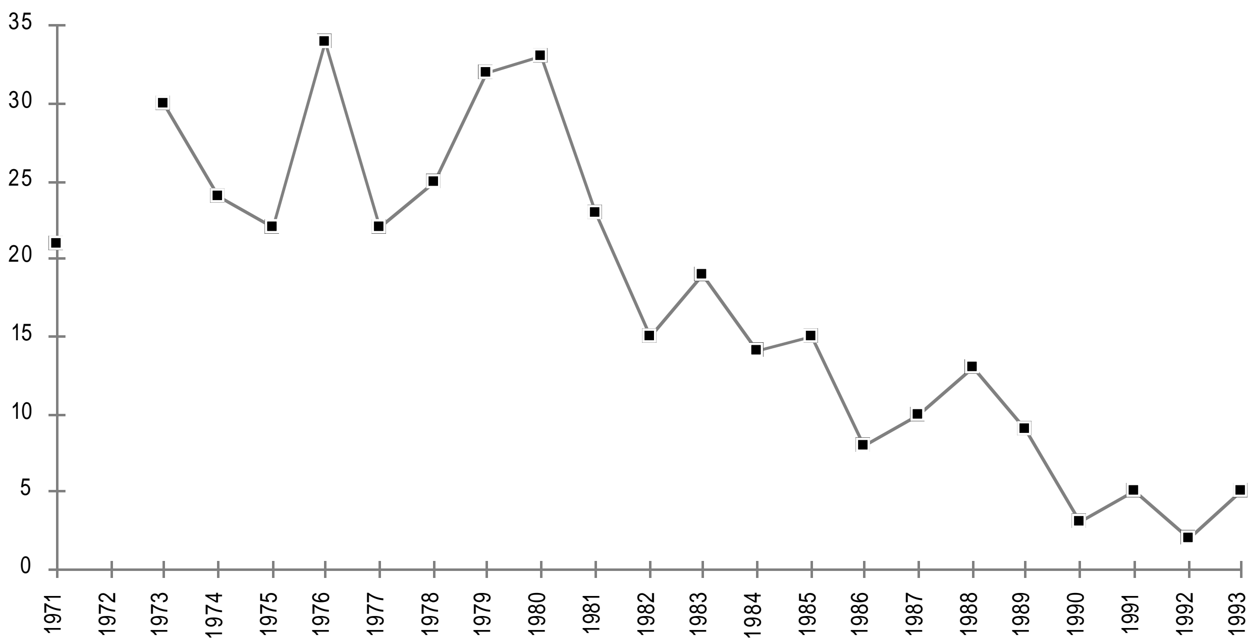
Dermatitis



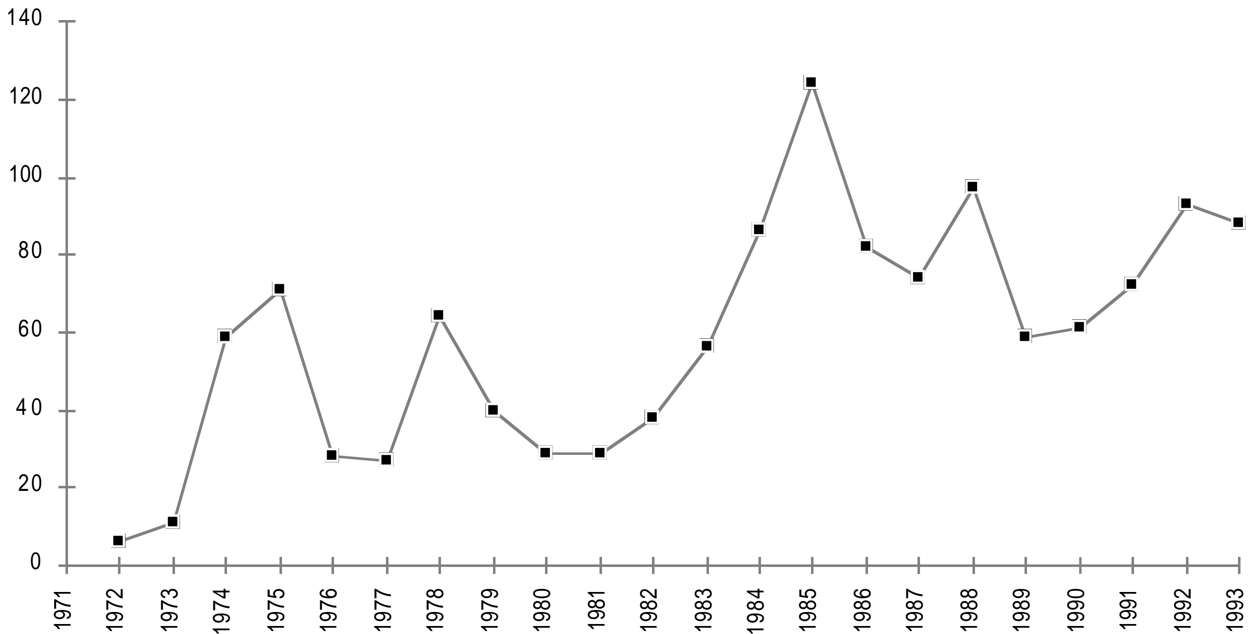
Hearing Loss



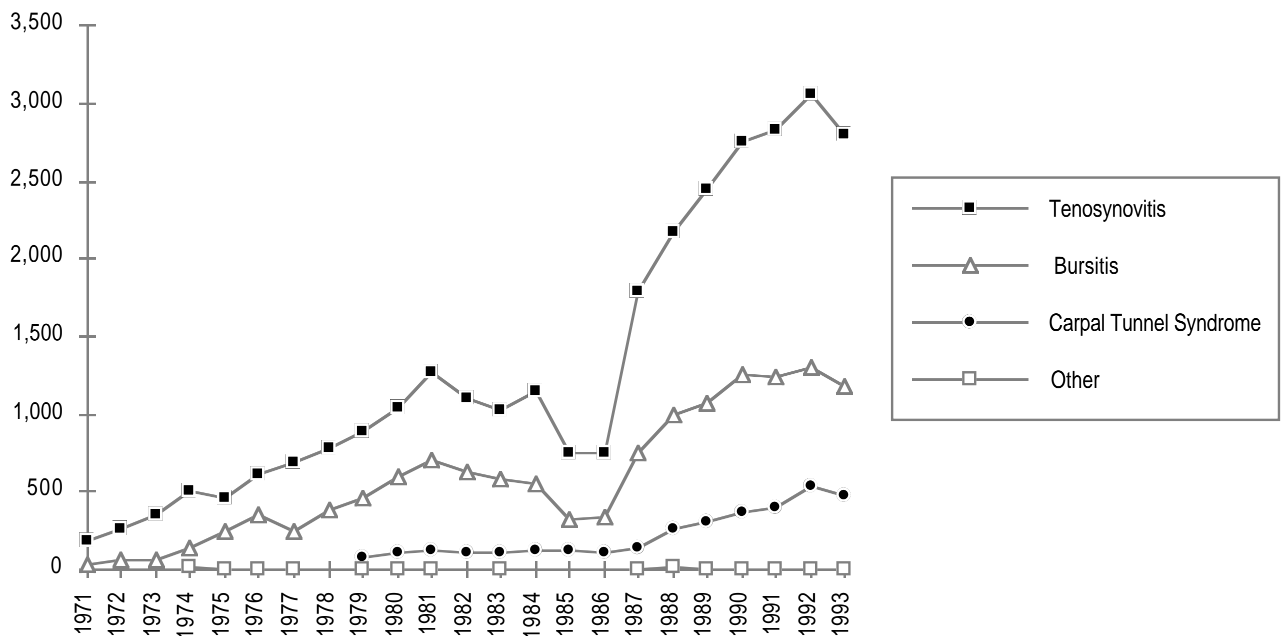
Infected Blisters



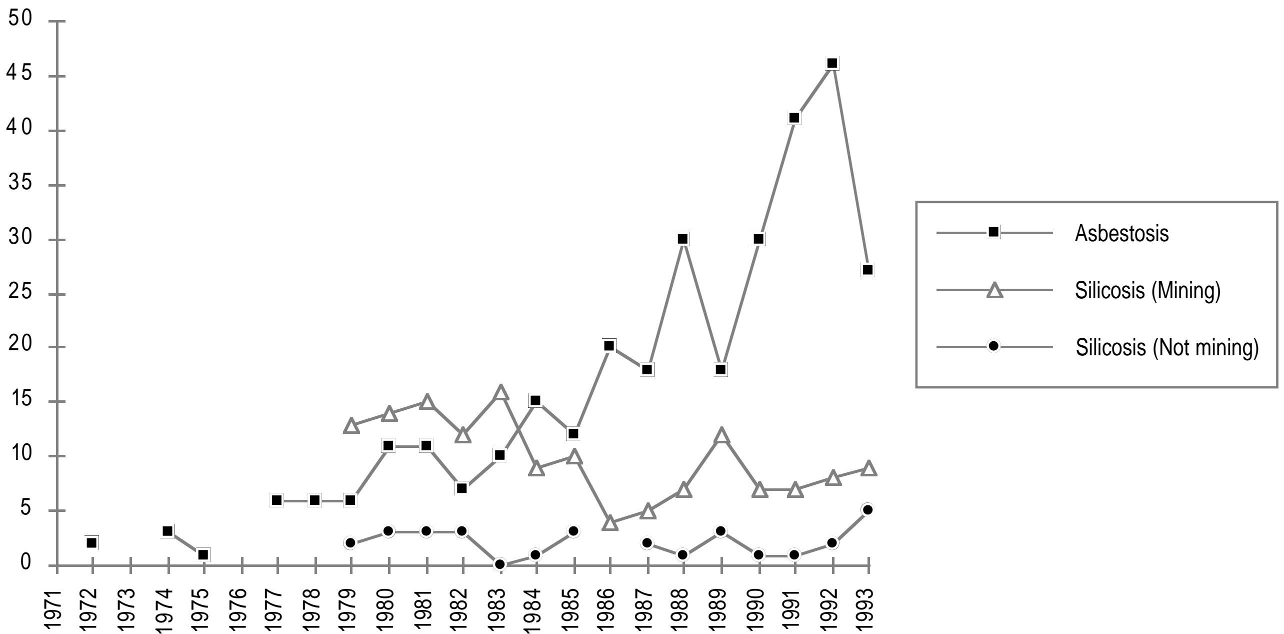
Infectious Diseases



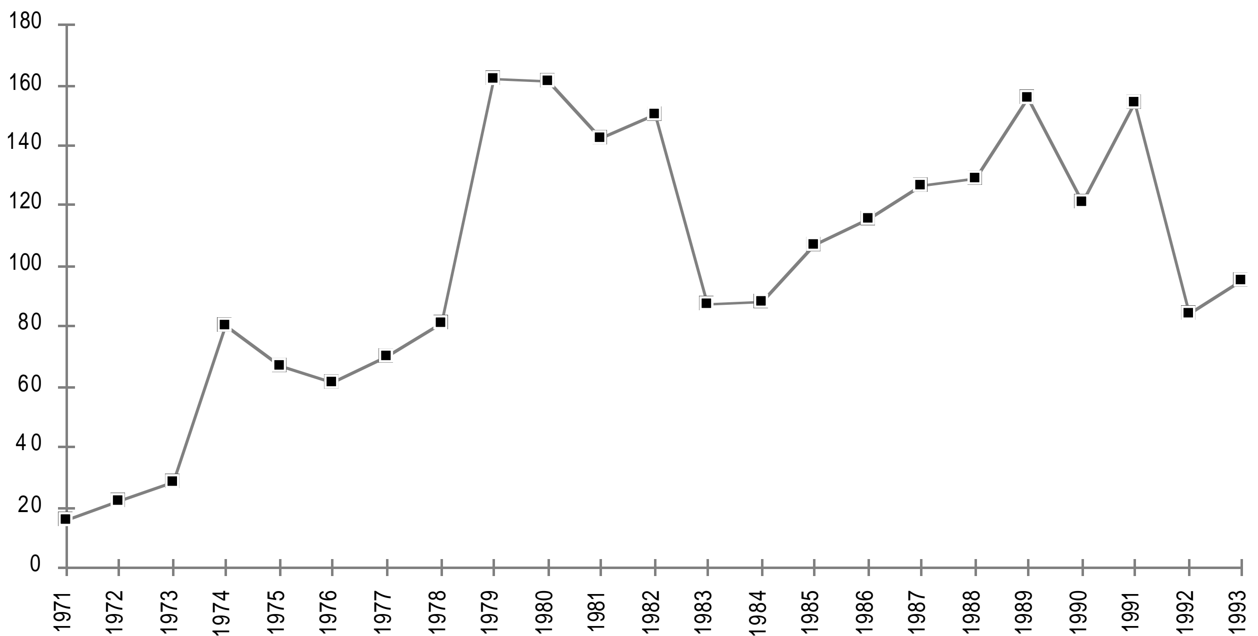
Inflammation, Irritation of Joints, Tendons, etc.



Asbestosis and Silicosis

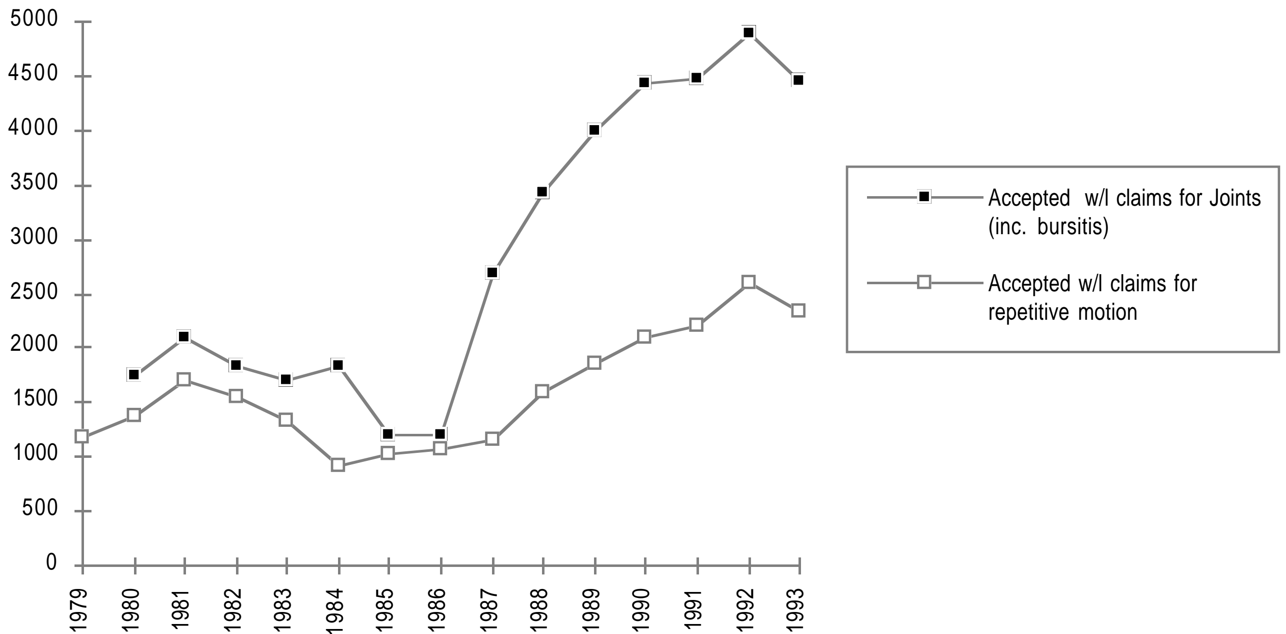


Poisoning Systemic

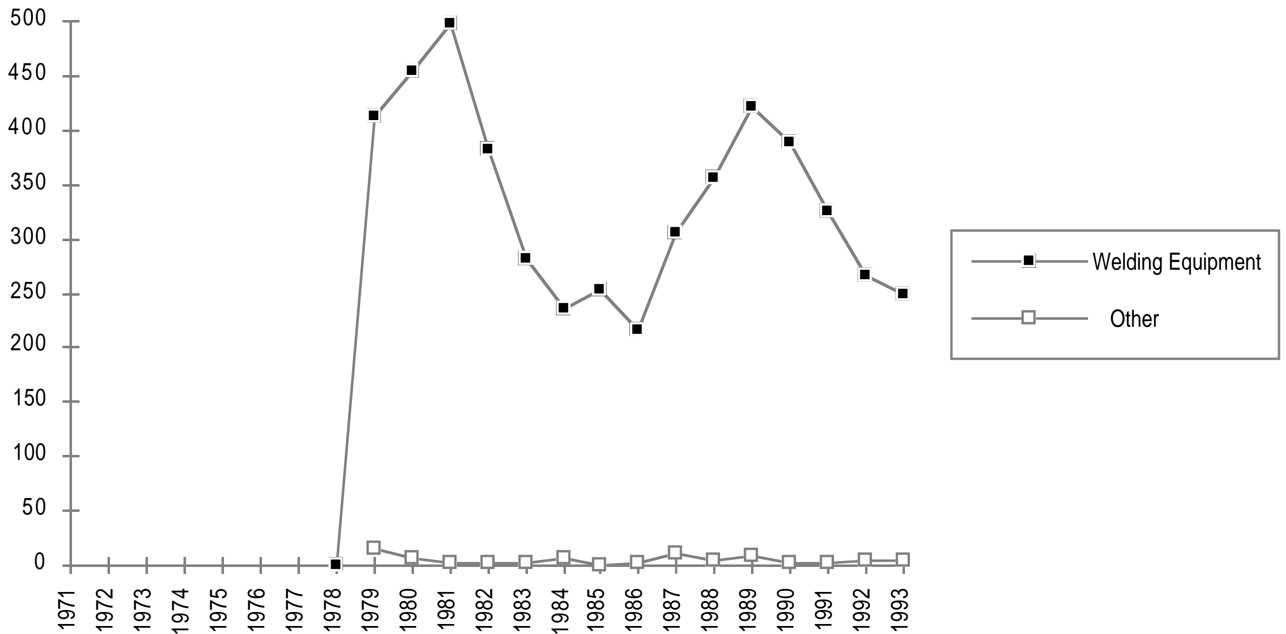


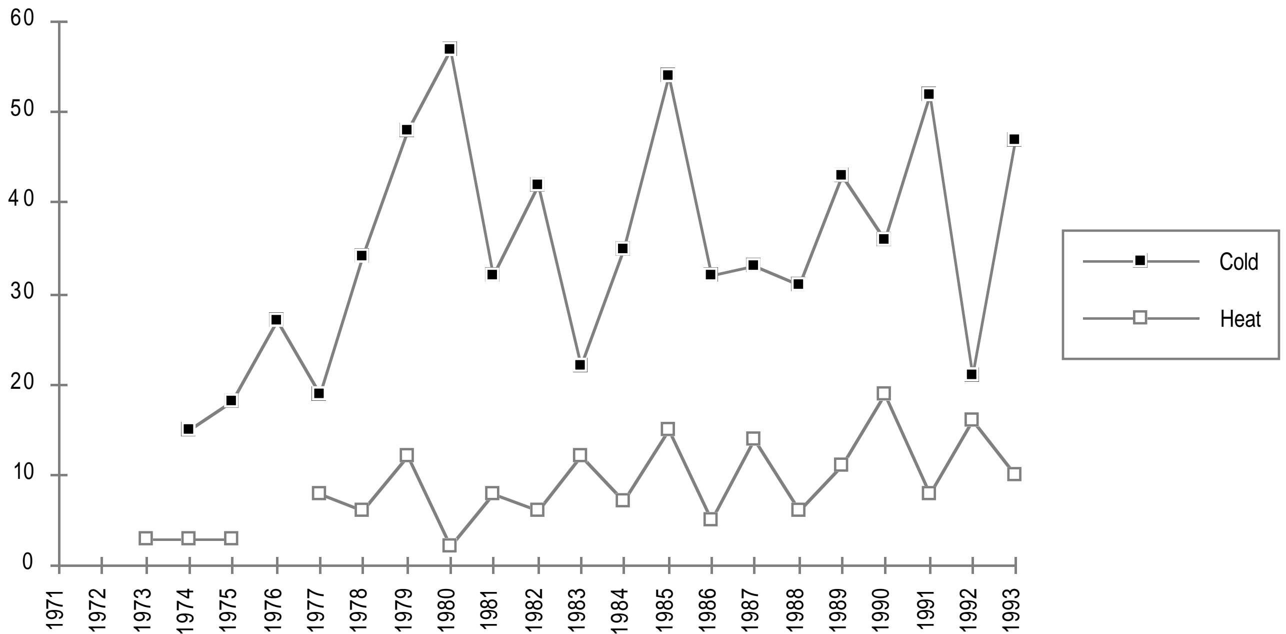
Joints Claims Analysis
for Industrial Diseases Standing Committee

Industrial Disease	*1971*	*1972*	*1973*	*1974*	*1975*	*1976*	*1977*	*1978*	*1979*	*1980*	*1981*	*1982*	*1983*	*1984*	*1985*	*1986*	*1987*	*1988*	*1989*	*1990*	*1991*	*1992*	*1993*
Joint Claims Analysis																							
Accepted w/l claims for Joints (inc. bursitis)										1746	2108	1844	1711	1828	1202	1200	2680	3432	3996	4437	4481	4899	4455
Accepted w/l claims for repetitive motion								931	1174	1384	1706	1562	1339	925	1018	1078	1158	1603	1864	2099	2203	2602	2348
NOT RPTV MOTION																							
Adhesive Capsulitis												1	3				3	2	3	4	5	8	
Rotator Cuff and RLT												8	42	162	15	3	362	417	535	272	606	616	
Epicondylitis												55	89	181	39	27	209	276	285	382	346	341	
Enthesop. Wrist												3	23	134	15		220	244	292	336	314	358	
Other Peripheral Enthesop.												4	31	112	11	5	254	349	421	423	470	425	
Tenosynovitis												6	24	124	23	5	177	183	196	233	180	183	
Bursitis												207	151	172	72	78	278	320	376	368	340	349	
Carpal Tunnel Syndrome													7	15	9	4	17	25	18	9	14	10	
Other Joint Related												1	2	3			2	13	6	11	3	7	
REPETITIVE MOTION																							
Adhesive Capsilitis												7	3	3	5	2	4	1	1	2	1	3	
Rotator Cuff and RLT												132	165	99	103	133	156	191	260	256	303	328	
Epicondylitis												290	264	139	179	191	151	242	270	364	354	424	
Enthesop. Wrist												340	283	187	228	238	285	394	443	493	507	630	
Other Peripheral Enthesop.												256	209	160	155	177	207	284	308	360	324	389	
Tenosynovitis												337	298	218	221	219	208	237	246	225	291	280	
Bursitis												46	15	5	7	13	11	17	15	28	18	14	
Carpal Tunnel Syndrome												109	99	113	119	104	129	231	315	361	390	526	
Peripheral Nerve Damage																					3	0	
Other Joint Related												6	3	1	1	1	7	6	6	10	12	8	



Coding procedures changed in 1987 so that some injuries previously reported as contusions or strains are now classified as tenosynovitis. Traumatic Tenosynovitis cases are excluded for 1978–83 and 1985/86.


Radiation Effects
500
450
400
350
300
250
200
150
100
50
0
1971
1972
1973
1974
1975
1976
1977
1978
1979
1980
1981
1982
1983
1984
1985
1986
1987
1988
1989
1990
1991
1992
1993
Welding Equipment
Other


Temperature Extremes
60
50
40
30
20
10
0
1971
1972
1973
1974
1975
1976
1977
1978
1979
1980
1981
1982
1983
1984
1985
1986
1987
1988
1989
1990
1991
1992
1993
Cold
Heat

Disallowed Special Unit Claims by Year of Registration

Registration Year	Total Claims Registered	Total Claims Disallowed	Percentage of Claims Disallowed
1984	5,080	911	17.93%
1985	5,518	917	16.62%
1986	5,415	1,062	19.61%
1987	6,395	1,211	18.93%
1988	7,276	1,362	18.72%
1989	7,627	1,188	15.58%
1990	7,528	1,200	15.94%
1991	6,961	1,355	19.46%
1992	7,423	1,154	15.54%
1993	6,067	760	12.50%

* Note: 1993 figures include data up to and including September 30, 1993.
Special Unit statistics include data from claims other than Occupational Diseases.
As of August 16, 1993, the Special Unit changed its focus to the handling of Occupational Disease claims only.

WORKERS' COMPENSATION
REPORTER

Recommendations of the Occupational Diseases Standing Committee Regarding Schedule B of the *Workers Compensation Act*

Date: **March 21, 1994**

Decision Requested

Approval and adoption of the following recommendations of the Occupational Diseases Standing Committee (O.D.S.C.) regarding Schedule B of the *Workers Compensation Act*.

O.D.S.C. Recommendations

1. With the exception of the six items referred to in paragraph 2, and until otherwise recommended by the Committee, each of the diseases described in Schedule B and each of the descriptions of process or industry associated with such diseases (in the second column of Schedule B) be retained in their present form.

2. Subject to the approval of the Board of Governors for funding, the Committee undertake a further process review (the nature of which will depend on the item under consideration) for the items numbered 3A, 5, 8, 12, 13, and 16 in Schedule B. These items in Schedule B should be retained in their present form pending completion of this process and pending further recommendations by the Committee to the Board of Governors. The principles provided for in the "Protocol" adopted by the Committee will apply to a review of any medical/scientific information that may be relevant in completing this process.

3. A similar process of investigation and review take place with respect to any proposals for additions to Schedule B that the Committee may resolve to consider.

4. The Board of Governors approve in principle the funding of the expert medical/scientific assessments for the six Schedule B items referred to in paragraph 2.

Background

The O.D.S.C. was constituted by resolution of the governors on April 6, 1992. The mission, structure and responsibilities of the O.D.S.C. are set out in its Charter, published as Decision of the Governors No. 19, *Workers' Compensation Reporter*, Vol. 8(3), p. 135.

The O.D.S.C. Charter provides in paragraph 1(b) under the heading "Responsibilities":

> b. Within two years of being constituted:
>
> (i) completely review all entries currently within Schedule B and make recommendations to the Governors for updating Schedule B, and
>
> (ii) completely review the list of diseases designated or recognized by the W.C.B. as industrial diseases by regulation of general application and make recommendations to the Governors for updating the list.

Paragraph 3 under the same heading provides:

> 3. To fulfill its mandate, the Committee may seek the approval of the Governors for the funding of research projects, the constitution of expert panels, the holding of public inquiries, or the use of any other mechanism which the Committee considers would assist in obtaining information to assess the relationship between a particular industry or industrial process and a particular disease.

The mission of the O.D.S.C. is "to review the industrial diseases policies of the Workers' Compensation Board and to make recommendations for change to the Governors." A review of Schedule B represents only a part of the Board's policies on occupational diseases, although a significant part of which has drawn considerable attention from the compensation community.

The significance of Schedule B is drawn from Section 6(3) of the *Act* which provides:

> If the worker at or immediately before the date of the disablement was employed in a process or industry mentioned in the second column of Schedule B, and the disease contracted is the disease in the first column of the schedule set opposite to the description of the process, the disease shall be deemed to have been due to the nature of that employment unless the contrary is proved.

The effect of this provision, as under the British Act from which it originated, was described in a 1981 report of the Industrial Injuries Advisory Council (U.K.) as follows:

> Instead of the workman having to prove that the disease was due to the nature of his employment, as he would have been obliged to do under the provisions of the *Act*, he was given the benefit of a presumption that it was so due if he was employed in one of the processes specified in the *Act* in relation to the disease "at or immediately before" the date of his disablement.

In other words, the most significant aspect of Schedule B is with respect to satisfying the basic requirement for compensability that "the disease is due to the nature of any employment in which the worker was employed."

The fundamental purpose of Schedule B (when read with Section 6(3) of the *Act*) is to provide a mechanism for streamlining or "fast-tracking" decisions on individual claims in an administrative environment where there are limited resources available to make these decisions. Where there is a sufficient association between a disease and a particular process, agent, or condition of employment and where as a result the disease is listed in Schedule B, a rebuttable presumption arises, negating the further investigation/analysis that is necessary in case-by-case adjudication. Repeated establishment of "work-relatedness" becomes unnecessary, and the limited resources of the Board can then be utilized in dealing with other issues such as "return to work."

The amendment of Schedule B is dealt with in Section 6(4)(a) which provides:

> 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.

There is no statutory guidance when or on what criteria Schedule B is to be amended. Amending responsibility is assigned to the Board but with no statutory direction on the process to be followed.

Mr. Justice Tysoe in the Report of the 1966 Royal Commission described the general test historically used by the Board as follows:

> The Board makes an addition to the Schedule . . . whenever it is satisfied from the advice it receives from the Board's Medical and Industrial Hygiene Departments that there is a substantially greater incidence of a particular disease in a particular employ-

> ment than there is in the general population. Mr. Eades said: “I think the test generally is: Is it common in that particular industry, and not common amongst the general public? Is it something specific to the industry?

Later on he states:

> There should be no presumption that it has been so caused unless it is recognized by persons qualified to pass upon the question that there is a greater incidence of the particular disease in the particular employment than there is in the general population.” “. . . . the matter is really one for doctors and experts in industrial hygiene who have available to them statistics and other information to enable them to determine whether the appropriate test is made.

Attached as Appendix A (p. 426) is a copy of the current Schedule B. The last major revision occurred in 1980.

Where available data indicates 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 process or industry than elsewhere, the Board may designate or recognize the disease under Section 1 “by regulation of general application.” The presumption afforded by Schedule B and Section 6(3) of the *Act* does not apply to claims for such diseases. Hence the decision on whether the disease is due to the nature of any employment in which the worker was employed is determined based on the available evidence without the benefit of any presumption.

Attached as Appendix B (p. 433) is the list of diseases currently recognized by regulation. The last additions to the list occurred in 1975 with the recognition of bronchitis and emphysema.

The Work of the O.D.S.C.

Over the past two years, the O.D.S.C. has reviewed materials on each of the diseases listed in Schedule B of the *Act* and on each of the diseases recognized by regulation under Section 1 of the *Act*. Those materials have included information on the nature and etiology of the diseases, on current Board policy and practice in the administration of claims for those diseases, on input from the compensation community as a result of various public consultations (both internal and external to the Board) regarding the appropriateness of Board policies on occupational diseases including the provisions of

Schedule B, on claims statistics, on relevant Review Board, Appeal Division, and Medical Review Panel decisions, on recent medical/scientific publications, and the like. This has been a steep but necessary learning curve for the fulfilling of the O.D.S.C. mandate.

The O.D.S.C. has concluded that Schedule B should continue to be used as a basic tool for evaluating occupational disease claims. Its administrative value has been to produce efficiencies and consistency. Its social value has been to establish an institutional memory in a highly specialized area of scientific knowledge. Its political value has been to draw attention to certain work processes and their consequences for the health of workers and society. This in turn should bring attention to and create responsibilities and action for prevention by employers, workers, the Board and government.

The O.D.S.C. has further concluded that for a majority of the items listed in Schedule B, there is low utilization and/or no, or very little in the way of concern or controversy over their appropriateness or application. There is a sufficient level of comfort with such items such that no changes are indicated at this time. However, there are a number of items in Schedule B where significant concern has been raised over their appropriateness and/or application. For such items, there was an absence of a level of comfort which would lead to a recommendation that such items remain as is over the longer term. The six items which are of immediate concern are as follows:

Item No.	Description of Disease	Description of Process or Industry
3A.	Bilateral diffuse pleural thickening or fibrosis, over 5 mm thick and extending over more than a quarter of the chest wall	Where there is exposure to airborne asbestos dust and the claimant has not previously suffered collagen disease, chronic uremia, drug-induced fibrosis, tuberculosis or other infection or trauma capable of causing pleural thickening or fibrosis.
5.	Heart injury or disease including heart attack, cardiac arrest or arrhythmia, disease of the pericardium, heart muscle or coronary arteries	Where the worker is employed as a firefighter.

Item No.	Description of Disease	Description of Process or Industry
8.	Respiratory irritation . . .	Where there is excessive exposure to a gas, vapour, mist, fume or dust of a chemical or other material ordinarily causative of respiratory irritation.
12.	Bursitis . . .	Where there is excessive friction, rubbing or pressure on the bursa involved.
13.	Tenosynovitis, tendinitis . . .	Where unaccustomed and repetitive use of the affected arm, hand, leg or foot is required.
16.	Vascular disturbances of the extremities	Where there is prolonged exposure to excessive vibrations at low temperatures.

One of the themes or overriding concerns that was apparent to the O.D.S.C. from the public consultations which have been conducted was that certain portions of the policy needs to be re-visited to ensure that it is scientifically and otherwise sound. Specifically, there is concern whether these six items are consistent with the current state of knowledge and to what extent they are appropriate and/or deficient.

The O.D.S.C. has concluded that further assessment and consultation is required before these issues can be adequately dealt with. Although some members of the compensation community have expressed impatience with the pace of the work of the O.D.S.C., it is the conclusion of the Committee that to develop policy which will endure, the work must be done right.

Reviewing each of these items, with their own unique elements and complexities, will involve a separate process. Some will be dealt with more quickly than others. However, in each case the process must begin with an expert medical/scientific assessment with the best information available being considered in keeping with the "Protocol" earlier adopted by the O.D.S.C. Such assessments require the approval of the governors for funding.

Regulated Diseases

On December 15, 1993 the O.D.S.C. conducted a public hearing on occupational disease policy. The principal statement on such policy is contained in Chapter IV of the *Rehabilitation Services and Claims Manual*. The focus for the public hearing was a redraft of Chapter IV. As a policy proposal the redraft calls for the recognition of the following additional diseases by regulation:

- Herpes Simplex
- Lyme Disease
- Toxoplasmosis
- Head Lice (Pediculosis Capitis)
- Legionellosis
- Red Measles (Rubeola)
- Yersiniosis
- Campylobacteriosis (Diarrhea caused by Campylobacter)
- Epicondylitis
- Carpal Tunnel Syndrome
- Cubital Tunnel Syndrome
- Radial Tunnel Syndrome
- Thoracic Outlet Syndrome

The policy set out in the redraft of Chapter IV, which includes the list of diseases recognized by regulation, is the subject of ongoing review by the O.D.S.C. Recommendations regarding that policy will be presented to the Board of Governors for approval once that process has been completed.

APPENDIX A

Schedule B — Section 6(4)

	Description of Disease	Description of Process or Industry
1.	Poisoning by:	
(a)	Lead	Where there is an exposure to lead or lead compounds.
(b)	Mercury	Where there is an exposure to mercury or mercury compounds.
(c)	Arsenic or arsine	Where there is an exposure to arsenic or arsenic compounds.
(d)	Cadmium	Where there is an exposure to cadmium or cadmium compounds.
(e)	Manganese	Where there is an exposure to manganese or manganese compounds.
(f)	Phosphorus, phosphine or due to the anti-cholinesterase action of organic phosphorus compounds	Where there is an exposure to phosphorus or phosphorus compounds.
(g)	Organic solvents (n-hexane, carbon tetrachloride, trichloroethane, trichloro-ethylene, acetone, benzene, toluene, xylene and others)	Where there is exposure to organic solvents.
(h)	Carbon monoxide	Where there is exposure to products of combustion, or any other source of carbon monoxide.
(i)	Hydrogen sulphide	Where there is excessive exposure to hydrogen sulphide.
(j)	Nitrous fumes (including silo-filler's disease)	Where there is excessive exposure to nitrous fumes including the oxides of nitrogen.

	Description of Disease	Description of Process or Industry
(k)	Nitriles, hydrogen cyanide or its soluble salts	Where there is exposure to chemicals containing -CN group including certain pesticides.
(l)	Phosgene	Where there is excessive exposure to phosgene including its occurrence as a breakdown product of chlorinated compounds by combustion.
(m)	Other toxic substances	Where there is exposure to such toxic gases, vapours, mists, fumes or dusts.
2.	Infection caused by:	
(a)	Psittacosis virus	Where there is established contact with ornithosis-infected avian species or material.
(b)	Staphylococcus aureus, Salmonella organisms, Hepatitis B virus	Employment where close and frequent contact with a source or sources of the infection has been established and the employment necessitates (1) the treatment, nursing or examination of or interviews with patients or ill persons; or (2) the analysis or testing of body tissues or fluids; or (3) research into salmonellae, pathogenic staphylococci or Hepatitis B virus.
(c)	Brucella organisms (Undulant fever)	Where there is contact with animals, carcasses or animal by-products.
(d)	Tubercle bacillus	Employment where close and frequent contact with a source or sources of tuberculous infection has been established and the employment necessitates (1) the treatment, nursing or examination of patients or ill persons; or

Description of Disease	Description of Process or Industry
	(2) the analysis or testing of body tissues or fluids; or (3) research into tuberculosis by a worker who, (i) when first engaged, or, after an absence from employment of the types mentioned in these regulations for a period of more than one year, when re-engaged in such employment was free from evidence of tuberculosis; and (ii) continued to be free from evidence of tuberculosis for 6 months after being so employed (except in primary tuberculosis as proven by a negative tuberculin test at time of employment). In the case of an employee previously compensated for tuberculosis, any subsequent tuberculosis after the disease has become inactive and has remained inactive for a period of 3 years or more shall not be deemed to have occurred as a result of the original disability for the purpose of the Act, unless the worker is still engaged in employment listed above or the Board is satisfied that the subsequent tuberculosis is the direct result of the tuberculosis for which the worker has been compensated.

	Description of Disease	Description of Process or Industry
3.	Pneumoconiosis:	
	(a) Silicosis	Where there is exposure to airborne silica dust including metalliferous mining and coal mining.
	(b) Asbestosis	Where there is exposure to airborne asbestos dust.
	(c) Other pneumoconioses	Where there is exposure to the airborne dusts of coal, beryllium, tungsten carbide, aluminum or other dusts known to produce fibrosis of the lungs.
3A.	Bilateral diffuse pleural thickening or fibrosis, over 5 mm thick and extending over more than a quarter of the chest wall	Where there is exposure to airborne asbestos dust and the claimant has not previously suffered collagen disease, chronic uremia, drug-induced fibrosis, tuberculosis or other infection or trauma capable of causing pleural thickening or fibrosis.
4.	Cancer:	
	(a) Carcinoma of the lung when associated with:	
	(i) asbestosis	Where there is exposure to airborne asbestos dust.
	or	
	(ii) bilateral diffuse pleural thickening or fibrosis, over 5 mm thick and extending over more than a quarter of the chest wall	Where there is exposure to airborne asbestos dust and the claimant has not previously suffered collagen disease, chronic uremia, drug-induced fibrosis, tuberculosis or other infection or trauma capable of causing pleural thickening or fibrosis.
	(b) Mesothelioma (pleural or peritoneal)	Where there is exposure to airborne asbestos dust.
	(c) Carcinoma of the larynx or pharynx associated with asbestosis	Where there is exposure to airborne asbestos dust.

	Description of Disease	Description of Process or Industry
(d)	Gastro-intestinal cancer (including all primary cancers associated with the oesophagus, stomach, small bowel, colon and rectum [excluding the anus], and without regard to the site of the cancer in the gastro-intestinal tract or the histological structure of the cancer)	Where there is exposure to asbestos dust if during the period between the first exposure to asbestos dust and the diagnosis of gastro-intestinal cancer there has been a period of, or periods adding up to, 20 years of continuous exposure to asbestos dust and such exposure represents or is a manifestation of the major component of the occupational activity in which it occurred.
(e)	Primary cancer of the lung	Where there is prolonged exposure to (1) aerosols and gases containing arsenic, chromium, nickel or their compounds; or (2) bis (chloromethyl) ether; or (3) the dust of uranium, or radon gas and its decay products; or (4) particulate polycyclic aromatic hydrocarbons.
(f)	Leukemia or pre-leukemia	Where there is prolonged exposure to benzene or to ionizing radiation.
(g)	Primary cancer of the skin	Where there is prolonged contact with coal tar products, arsenic or cutting oils or prolonged exposure to solar ultra-violet light.
(h)	Primary cancer of the epithelial lining of the urinary bladder, ureter or renal pelvis	Where there is prolonged exposure to beta-naphthylamine, benzidine, or 4-nitrodiphenyl.
(i)	Primary cancer of the mucous lining of the nose or nasal sinuses	Where there is prolonged exposure to dusts, fumes or mists containing nickel or the dusts of hard woods.

	Description of Disease	Description of Process or Industry
	(j) Angiosarcoma of the liver	Where there is exposure to vinyl chloride monomer.
5.	Heart injury or disease including heart attack, cardiac arrest or arrhythmia, disease of the pericardium, heart muscle or coronary arteries	Where the worker is employed as a firefighter.
6.	Asthma	Where there is exposure to (1) western red cedar dust; or (2) isocyanate vapours or gases; or (3) the dust, fume or vapours of other chemicals or organic material known to cause asthma.
7.	Extrinsic allergic alveolitis (including farmers' lung and mushroom workers' lung)	Where there is repeated exposure to respirable organic dusts.
8.	Respiratory irritation	Where there is excessive exposure to a gas, vapour, mist, fume or dust of a chemical or other material ordinarily causative of respiratory irritation.
9.	Metal fume fever	Where there is exposure to the fume of zinc or other metals.
10.	Fluorosis	Where there is exposure to high concentrations of fluorine or fluorine compounds in gaseous or particulate form.
11.	Neurosensory hearing loss	Where there is prolonged exposure to excessive noise levels.
12.	Bursitis	Where there is excessive friction, rubbing or pressure on the bursa involved.

	Description of Disease	Description of Process or Industry
13.	Tenosynovitis, tendinitis	Where unaccustomed and repetitive use of the affected arm, hand, leg or foot is required.
14.	Decompression sickness	Where there is exposure to increased air pressure.
15.	Contact dermatitis	Where there is excessive exposure to irritants, allergens or sensitizers ordinarily causative of dermatitis.
16.	Vascular disturbances of the extremities	Where there is prolonged exposure to excessive vibrations at low temperatures.
17.	Radiation injury or disease:	
	(a) Due to ionizing radiation	Where there is exposure to ionizing radiation.
	(b) Due to non-ionizing radiation:	
	(i) conjunctivitis, keratitis	Where there is exposure to ultra-violet light.
	(ii) cataract or other thermal damage to the eye	Where there is excessive exposure to infra-red, microwave or laser radiation.
18.	Erosion of incisor teeth	Where there is exposure to acid fumes or mist.

APPENDIX B

#25.23 Diseases Designated or Recognized by the Board by Regulation

Pursuant to Section 1 of the *Act*, the Board has recognized the following as industrial diseases by regulation:

Chicken Pox
Food Poisoning
Infectious Hepatitis
Serum Hepatitis
Giardia Lamblia Infestation
Meningitis
Mononucleosis
Mumps
Ringworm
Rubella
Scabies
Shigellosis
Staphylococci Infections
Streptococci Infections
Typhoid
Disablement from Vibrations
Whooping Cough
Bronchitis
Emphysema