WORKERS' COMPENSATION
REPORTER

WORKERS' COMPENSATION REPORTER

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Workplace safety and health is our challenge.
Quality rehabilitation and fair compensation is our commitment.
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- *Blue — Governors' Decisions*
- *Green — Appeal Division Decisions*
- *Pink — Miscellaneous*
- *Purple — Review Board Findings*
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Decision of the Governors

Number: 87
Date: January 9, 1995
Subject: Appointment of Member of the Occupational Diseases Standing Committee

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WHEREAS:

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

C. the appointment as governor of R.H. (Bob) Buckley, one of the employer representative governors on the Committee, expired on December 3, 1994, resulting in a vacancy in the membership of the Committee:

NOW THEREFORE THE GOVERNORS RESOLVE THAT:

Ray Marquis is appointed to the Occupational Diseases Standing Committee as one of employer representative governor members until the expiration of his term of appointment as governor.

Decision of the Governors

Number: 88
Date: January 9, 1995
Subject: Ratification of Medical Review Panel Fee Schedule Effective January 1, 1995

WHEREAS:

A. at the governors' meeting on February 3, 1992, the governors of the Workers' Compensation Board resolved that, for the time being, the authority for the final approval of Medical Review Panel fees would be exercised by the chair of the governors, subject to the fee schedule being presented to the governors at the next regular governor meeting after being adjusted; and

B. the chair of the governors has given final approval to the fee schedule for Medical Review Panels held on and after January 1, 1995 and has requested ratification by the governors of the fee schedule:

NOW THEREFORE THE GOVERNORS RESOLVE THAT:

they ratify the following fee schedule approved by the chair of the governors for Medical Review Panels held on or after January 1, 1995:

1. the hourly rate payable to Medical Review Panel chairs is $137.83 (formerly $137.30),

2. the flat fee payable to Panel members other than chairs is $462.24 (formerly $460.47), with an additional fee of $101.65 (formerly $101.26) per hour when the time taken on an appeal (including travelling time) exceeds 3½ hours up to a maximum of a further 4½ hours, and

3. the stenographic fee for each appeal is $69.40 (formerly $69.13).

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Decision of the Governors

Number: 89
Date: January 9, 1995
Subject: Occupational Safety and Health Regulation Review: Governors' Committee for Regulation Review and Regulation Advisory Committee to be Temporarily Chaired by Public Interest Governor Mark Thompson

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WHEREAS:

A. the governors of the Workers' Compensation Board have embarked upon a complete review of the *Industrial Health and Safety Regulations*, the *Occupational Environment Regulations*, the *Industrial First Aid Regulations* and the *Workplace Hazardous Materials Information System Regulations*;

B. the governors have adopted a process for conducting the review which is outlined in governors' Decision No. 9 dated January 7, 1992 (Review and Development of Occupational Safety and Health Regulations — Strategy Document);

C. this process includes the appointment of a Regulation Advisory Committee which, under the direction of the governors through the Governors' Committee for Regulation Review, has overseen the review for the past two years;

D. Decision No. 9 provides that both the Governors' Committee for Regulation Review and the Regulation Advisory Committee include, and be chaired by, the chair of the governors;

E. the chair of the governors resigned on December 16, 1994 and has been replaced on an interim basis; and

F. the governors consider that, for sake of continuity of experience, public interest governor Mark Thompson who has served on the Governors' Committee for Regulation Review and on the Regulation Advisory Committee since their inceptions should chair both Committees on a temporary basis until a permanent chair of the governors is appointed:

NOW THEREFORE THE GOVERNORS RESOLVE THAT:

Public interest governor Mark Thompson shall temporarily chair the Governors' Committee for Regulation Review and the Regulation Advisory Committee until a permanent chair of the governors is appointed.

Decision of the Governors

Number: 90
Date: April 3, 1995
Subject: Changes to C.P.I. Relating to Personal Care Allowances and Independence and Home Maintenance Allowance

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WHEREAS:

A. the Workers' Compensation Board pays personal care allowances and an independence and home maintenance allowance in accordance with governor policy under the *Workers Compensation Act*;

B. on October 26, 1992, the governors decided that the president and chief executive officer of the Workers' Compensation Board would be responsible for ensuring that these allowances are adjusted every January 1st in accordance with the formulas set out in the governors' policies to reflect changes in the Consumer Price Index;

C. on January 9, 1995, the governors accepted the recommendation of the president and Senior Executive Committee that the personal care allowances and the independence and home maintenance allowance not be adjusted effective January 1, 1995 in accordance with the applicable formulas because of the minimal negative change in the Consumer Price Index; and

D. the president was asked to prepare a recommendation for a dollar threshold at which changes to these allowances would be made:

NOW THEREFORE THE GOVERNORS RESOLVE THAT:

1. a threshold be set whereby any decrease to C.P.I. below .5 per cent on annual basis will not be reflected in adjustments to current payments of personal care allowances and the independence and home maintenance allowance, but will be recovered against future adjustments for C.P.I. increases, and

2. this constitutes a policy decision of the governors.

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Decision of the Governors

Number: 91
Date: April 3, 1995
Subject: Approval of Restructuring of Subclass 0621

WHEREAS:

A. all industries with workers and employers covered by the *Workers Compensation Act* are divided into classes and subclasses for assessment purposes;

B. under Section 37 of the *Act*, the W.C.B. may create and rearrange classes and, in doing so, may make the adjustment and disposition of the funds, reserves and accounts of the affected classes that is considered just and expedient;

C. under Section 42 of the *Act*, the W.C.B. shall establish subclassifications, differentials and proportions in assessment rates as between the different kinds of employment in the same class as may be considered just;

D. on October 3, 1994, the governors approved in principle a proposal from the president and Senior Executive Committee for the restructuring of subclass 0621 into two or more subclasses to reflect the differences among the retail employers currently classified in the subclass; and

E. the president and Senior Executive Committee have now presented a detailed recommendation for the restructuring of subclass 0621 with several options for the adjustment and disposition of the funds, reserves and accounts of subclass 0621 and resulting 1995 assessment rates:

NOW THEREFORE THE GOVERNORS RESOLVE THAT:

Restructuring of Subclass 0621

1. As of January 1, 1995, subclass 0621 will be restructured into three subclasses as follows:

Subclass 0671 — Supermarkets or Butcher Shops

Industry 067100 — Supermarkets

A supermarket is a retail store where 25% or more of its total sales are grocery items (including both food items and dry goods) and carries on any 2 of the following activities:

(a) cutting and wrapping of meat products,

(b) production of baked goods (includes bake-off),

(c) cutting and wrapping of fish,

(d) cutting and wrapping of deli items,

(e) operation of a fresh produce area,

(f) cutting and wrapping of dairy products.

Industry 067101 — Butcher Shops

Butcher shops are retailers of meat products where cutting and/or wrapping is done by the firm.

Subclass 0672 — Department Stores

Industry 067200 — Department Stores

A department store is a firm dealing in 3 or more lines of general merchandise such as:

> appliances, furniture, home furnishings, hardware and paint, toys and sporting goods, home electronics and photography equipment, clothing/cosmetics/footwear/jewelry, or miscellaneous other general merchandise.

The firm is organized and operates on a departmental basis but the departments and functions are integrated under a single management.

Such firms may carry out the distribution of merchandise to their own stores and sometimes to other merchants, provide their own customer credit, deliver merchandise, and provide after sales product service.

Subclass 0673 — General Retail and Services, N.E.S.

Industry 067302 — General Retail

This includes all businesses currently in existing industry 062102 other than department stores, supermarkets, or retail butcher shops.

Industry 067320 — Retail Bakery

These are firms which sell at retail bakery products which they produce from scratch or "bake off" operations.

Industry 067303 — Interior Designing or Interior Consulting

Industry 067305 — Microfilming, Photography Studios, Photographic Film Processing, Recording Studios, Motion Picture or Video Tape Production or Editing, Computer Software Mfg./Duplicating, Video Production, Photocopying Service

Industry 067307 — Barber Shops

Industry 067308 — Hairdressing Establishments or Beauty Salons

Industry 067309 — Auctioneering Establishments

Industry 067311 — Mfg. of Cigars

Industry 067314 — Supplying Clerical Workers as a Business

Industry 067316 — Mobile Home Sales

Industry 067317 — Commercial Stock Audit

Adjustment and Disposition of the Funds, Reserves and Accounts of Subclass 0621

2. The W.C.B. Administration will calculate the unfunded liability of subclass 0621 as of December 31, 1994, allocate it among subclasses 0671, 0672, and 0673 in accordance with their payroll as of January 1, 1995 and assess, levy and collect it in the usual manner.

1995 Assessment Rates

3. As of January 1, 1995, the 1995 base assessment rates for subclasses 0671, 0672, and 0673 will be as follows:

   Subclass 0671 — $2.57
   Subclass 0672 — $1.36
   Subclass 0673 — $1.01

   To each base rate will be added an amount to reflect amortization of the unfunded liability in the usual manner.

Modification to E.R.A. Program

4. There will be no modification to the application of the E.R.A. Program to subclass 0671, pending completion of the E.R.A. Evaluation Study.

Plan for Special Measures to Decrease Injuries

5. The president will bring back to the governors as soon as possible a plan, directed to subclass 0671, with special measures to decrease injuries.

Policy Decision

6. This resolution constitutes a policy decision of the governors.

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Decision of the Appeal Division

Number: 95-0165
Date: February 20, 1995
Panel: Paul Petrie, Alex S. Brokenshire, Thomas Kemsley
Subject: Section 34 and Retirement Pensions

The employer appeals the April 25, 1994 Review Board finding which concluded the Board was correct in refusing to apply Section 34 of the *Act* with respect to the worker's retirement pension. The issue is whether the amount of the worker's retirement pension should be deducted from his W.C.B. disability award and if so whether it should be paid to the employer under Section 34.

Background

The worker was a 59-year-old millwright when he injured his lower back on June 1, 1989. At the time of the injury, he was involved in lifting a 200–300 lb. fan shaft with a co-worker and experienced severe pain in his low back. The injury was witnessed by the co-worker and the foreman. He reported the injury immediately to the safety coordinator. The worker stated that the safety coordinator advised him that "his problem must be the result of his prior back claims for his degenerative problems" and sent him to the main office to fill out forms for weekly indemnity under a private insurance carrier. Apparently, the private carrier turned down the weekly indemnity claim because one of the worker's doctors indicated the injury might be W.C.B. related. As a result, the employer filed a form 7 with the Board in September 1989 and the claim was accepted.

A C.T. scan taken on August 28, 1989 revealed an L4-5 left posterolateral disc herniation with obliteration of the epidural fat on the left side and a smaller right posterolateral disc herniation also at L4-5. "Minimal degenerative changes involving the facette joints" was also reported. A Board medical advisor examined the worker in November 1989 and concluded the disc herniation was the result of the June 1, 1989 incident and recommended a graduated return to work with some restrictions. This work trial was unsuccessful and the worker was considered plateaued as of January 1, 1990. Wage-loss benefits were terminated at that time and the worker went on his employer's long-term disability benefits coverage. The claims adjudicator granted the employer relief of costs under Section 39(1)(e), effective July 28, 1989 — eight weeks post-injury.

On July 31, 1990, a disability awards medical advisor concluded the worker had a 5% functional impairment as a result of the injury under this claim. An employability assessment concluded the worker was unemployable due to the severity of the disability under this claim, his age (60), his limited education (grade 8), and his literacy problems. The worker's employability was further investigated as a result of intervention by the rehabilitation consultant's manager. The rehabilitation consultant was advised by the employer that there were no light duty jobs available to the worker and:

> . . . given the circumstances [the worker] was left with no other option but to "retire".

The rehabilitation consultant confirmed his conclusion that the worker was unemployable.

He received long-term disability benefits through his employer's plan between January 1, 1990 and January 1, 1991. He then applied for and received an early retirement pension at a reduced rate from the I.W.A.–Forest Industry Pension Plan.

The disability awards officer, in a decision dated October 24, 1991, granted a 100% loss of earnings pension under Section 23(3), amounting to $2,862.50 per month. The worker was advised that the pension amount would be reduced by 43.5% at age 65, in accordance with governors' policy. On January 8, 1992, the employer appealed the disability awards officer's decision to the Review Board, but abandoned that appeal on June 15, 1992. On January 9, 1992, the disability awards officer denied the employer's request for relief of costs under Section 39(1)(e) with respect to the worker's permanent disability award on the grounds that the incident initiating the claim was significant and the medical evidence indicated the pre-existing condition was minor in nature. The employer initiated an appeal to the Appeal Division from the January 9, 1992 decision to deny relief of costs, but abandoned that appeal on April 8, 1992.

On June 3, 1992, the employer's manager of Employer Relations and Succession Planning advised the Board the worker received a retirement pension fully funded by the employer and he requested application of Section 34. On August 17, 1992, the disability awards officer advised the worker that effective August 1, 1992, the Board would deduct the gross amount of his I.W.A.–Forest Industry Pension Plan retirement pension of $1,038.20 per month from his W.C.B. disability pension under Section 34 of the *Act*. This amount would be paid directly to his employer. The worker was also advised this would continue until his 65th birthday. The employer then requested that application of Section 34 be made retroactive to January 1, 1991 and continue beyond the worker's 65th birthday.

On August 21, 1992, the I.W.A.–Forest Industry Pension Plan administrator wrote to the Board advising that the retirement pension the worker received from the plan was at arm's length from the employer and the I.W.A. He said:

> . . . The employer is not paying the pension, it is coming from a trust fund . . .

He expressed surprise that the $1,038.20 per month was being directed to the employer:

> . . . that is a windfall for [the employer] since they are not paying the pension in the first place and have no liability to pay it. . . .

He indicated that the welfare of the persons in the plan was being infringed on and he urged the Board to restore the worker's retirement pension.

The disability awards officer sought a legal opinion on who should receive the amount of money being diverted from the worker's disability award. The Board's legal advisor concluded the *Act* specifically directs that a sum deducted may be paid directly to the employer even though that appeared inequitable in this case. The legal advisor suggested the employer may consent to repayment to the pension plan directly.

On October 19, 1992, counsel for the I.W.A.–Forest Industry Pension Plan wrote to the Board to clarify how the plan operated. Counsel advised:

> While the rates at which employers contribute to the Plan have hopefully been determined so as to fund the pension liabilities of the Plan, benefit payments to Plan members come out of the trust fund built up from the contributions of all participating employers and the income earned on the investment of those contributions. There is no direct relationship between the amount of contributions made by one participating employer on account of the pensionable service of one of its employees and the amount of the pension benefit payments made by the Plan to that employee.

Counsel for the plan also said the worker had not received any pension payment from his employer, payment was made by the plan out of the trust fund. Counsel noted that the pension payments were made at the expense of the pension trust fund directly and indirectly at the expense of all participating employers in the plan.

On November 16, 1992, the employer's representative wrote to the Board asking the Board to divert the sum deducted from the worker's permanent disability award payments to the I.W.A.–Forest Industry Pension Plan. On January 11, 1993, the pension plan administrator returned the Board's cheque to the Board advising:

> Our legal counsel has reviewed the *Workers Compensation Act* on our behalf and has stated that there does not appear to be any authority under the *Act* for the payment to be deducted as section 34 only authorizes payments to an employer. The payment by W.C.B. should not be made to the employer because the employer is not bearing the whole expense of

> providing the pension. It is the I.W.A. Forest Industry Pension Fund that bears the expense and, indirectly, all of the contributing employers to the Pension Plan.
>
> It is my conclusion that the payment should be made to [the worker]. . . .

On February 12, 1993, a manager in the Disability Awards Department advised the worker his retirement pension was not wholly funded by the employer and therefore there was no authority to divert money from his disability award to the pension plan. The worker's benefits were reinstated. The employer then appealed this decision to the Review Board.

After considering lengthy submissions from the employer and the union, the Review Board panel denied the employer's appeal. The panel concluded that the worker's pension payments are not provided wholly at the expense of the employer. They found that the worker's retirement pension:

> . . . was triggered by his years of service in the forest industry. It represents an accumulation of benefits that the worker is now entitled to receive based upon years of service in the forest industry. The worker's compensable injury should not impact upon his right to claim benefits under a retirement pension plan to which he has belonged and contributed all of his working life.

The Review Board panel also noted:

> . . . Section 34 contemplates only one possibility; that is, to pay the diverted sum to the employer. As pointed out by [the pension administrator] this would result in a windfall to the employer, given that they are not paying the pension in the first place, and further weighs against the application of Section 34 to the facts of the present case.

Submissions

The employer's representative submits there has been an error of fact and law. He contends the Review Board did not give correct consideration to the intent of Section 34 with respect to the worker's retirement pension. The representative states that the worker receives his retirement pension only as the result of a fixed contractual agreement that compels the employer to make payments to the pension plan. He says although the employer does not make pension payments directly to an employee, it does pay the premiums to the pension trust. The employer's representative argues that the worker:

> . . . is receiving a loss of income pension in contravention of the intent of Section 34 and 23(3) of the *Workers Compensation Act*.

He also submits that the employer:

> . . . is bearing the cost of the pension and the cost of the Board's disability pension. Therefore the company is paying twice which is in contravention of the intent of Section 34 and 23(3) of the *Workers Compensation Act*.

The worker's representative submits the Review Board finding is correct and should be upheld. He points out that the I.W.A.–Forest Industry Pension Plan is portable and argues the employer has no obligation to make pension payments directly to the worker. He states:

> It is the Plan Trust who makes payments to the Plan member and it is the Trustees of the Plan who set the terms and conditions of the Plan, not [the employer].

The worker's representative disputes the employer's contention that the *initial* funding for the Plan was provided by the companies which were party to the Plan at the time of conception. He contends there was no "initial funding" and the initial unfunded liability is still being paid by a portion of the premium. He states:

> That unfunded portion of [the worker's] pension, which accounts for almost half his years service, is still being paid for by all members of the Plan.

The worker's representative also takes issue with the employer's contention that the employer is paying twice. He states the Pension Plan Trust pays the pension benefit, not the employer. He also maintains the delay in granting the permanent disability award forced the worker to apply for his retirement pension because his long-term disability benefits ran out in January 1991 and he had no other source of income until the W.C.B. pension was eventually awarded in October 1991. Finally, the worker's representative argues:

> Contributory hours which are submitted by all employers who are Plan members are actually deferred wages. When pension contributions are negotiated that amount of money in essence comes off the "wage package".

We have also considered the detailed submissions presented to the Review Board on this matter by both the employer and worker. Those submissions were summarized in the Review Board finding and will not be summarized again in this decision.

Law and Policy Analysis

Section 34 of the *Act* provides as follows:

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

Governors' policy indicates that this section is permissive, not mandatory and deals with two applications. Item #34.40 of the *Rehabilitation Services and Claims Manual* provides that an employer who continues paying full wages to a disabled worker *during the period of disability* is reimbursed in amounts equal to the wage-loss compensation that would normally be paid to the worker. Item #34.42 indicates an employer's application under Section 34 will not be accepted where a worker receives termination pay required by law while also receiving compensation for the same period. This policy also indicates that other payments similar to termination pay that result from a legislative requirement or a contractual agreement will likely be exempt from a Section 34 application.

We also note policy item #40.20 which provides:

> In calculating a worker's projected loss of earnings, no account is taken of any disability or retirement pensions received from the employer to which the worker has contributed or any other source than the Board. However, the Adjudicator in Disability Awards may take into account the fact that the claimant has retired or is about to retire in deciding whether there is a projected loss of earnings in the first place.

This policy relates to the calculation of the loss of earnings pension rather than the application of Section 34.

In Appeal Division Decision No. 92-0922 (*Workers' Compensation Reporter*, Vol. 9, page 39) the chief appeal commissioner pointed out that there is no policy to apply Section 34 where a worker is in receipt of a wholly employer funded pension, or to apply Section 34 to any permanent disability award. Because the possible application of Section 34 to a worker's disability pension raised a significant policy issue, the chief appeal commissioner referred the matter to the governors for further consideration in May 1992. The governors have not provided further policy direction on this matter to date.

Because there is no specific governors' policy on the application of Section 34 to a worker's disability pension this panel has considered the legislative history of Section 34 to determine what light that background might shed on the meaning and purpose of the section. As the employer correctly points out in their December 20, 1993 submission to the Review Board, Section 34 has remained essentially unchanged since its enactment in 1916 with the exception of minor amendments in 1979 that do not affect the substance of the section.

The Board provided some documentation to the employer on the historical background of Section 34 which the employer submitted to the Review Board. That documentation states the only specific reference to the Section 34 provision found in the historical records was a submission by the Canadian Pacific Railway to the Meredith Royal Commission which provided the foundation for the Canadian workers' compensation system. The Railway pointed out that Federal legislation (*The Dominion Act*) contained a clause imposing direct liability on the Railway for accidents resulting from negligence. Because of the primacy of the Federal law, it was contended the Railway could be placed in a position of double liability for a work injury in some circumstances. As a consequence, the worker could also receive double compensation for that same injury. In response to the suggestion that an employer who was liable to pay compensation for an injury under *The Dominion Act* would not also be liable under the *Workmen's Compensation Act*, the commissioner said (at page 268) "A man could not get it twice over."

In his final report The Honourable Sir William R. Meredith recommended a provision (Section 40) which read:

> In fixing the amount of a weekly or monthly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from his employer during the period of his incapacity, including a pension, gratuity, or other allowance provided wholly at the expense of the employer.

In 1916 the B.C. legislature adopted the similar provision for inclusion in the B.C. *Act*.

On the basis of the limited historical record, it appears one purpose of the original enactment of Section 34, then, would be to prevent double liability for the employer and to avoid double compensation to the worker *for the same injury*.

This intent to protect the employer from double liability and to prevent double compensation for the worker resulting from one injury is consistent with governors' policy in item #34.40 which reimburses the employer under Section 34 when the employer continues paying the worker's wages *during the period of his disability*. It is also consistent with the exception in governors' policy #34.42 which exempts termination pay required by law from deductions under Section 34. Such termination pay is for *a different purpose* than

the disability payment for the compensable injury. As pointed out in *Reporter* Decision No. 107 ((1975), *Workers' Compensation Reporter*, Vol. 2, p. 42) a worker who has received termination payment equivalent to wages for one month is free to take another job during that month to supplement the termination pay. But if he is disabled during that period he is not in a position to take another job. Wage-loss payments may be paid to the worker to compensate for his inability to secure another job *during the period of disability*.

We have also considered the purpose of Section 34 within the context of the *Act* as a whole. The authority to deduct a sum from a worker's compensation entitlement is an exceptional power in light of the foundational statutory requirement to pay compensation to the worker where the prerequisites for entitlement are met. Section 5(1) provides that where the worker's injury arises out of and in the course of employment ". . . compensation as provided by this part *shall* be paid by the board . . . " Other entitlement sections of the *Act* such as Sections 22, 23, 29 and 30 all require the Board to pay compensation where the prerequisites for entitlement have been met. In Decision No. 93-1059 (*Workers' Compensation Reporter*, Vol. 10, page 7) a panel of the Appeal Division considered the *discretion* in Section 98(3) to cancel, withhold or suspend compensation payments to a worker who is confined to jail or prison. In that decision the panel concluded that:

> The *discretion* to cancel compensation payments in Section 98(3) must be exercised consistent with the statutory provisions for entitlement to those payments.
>
> (page 16)

The Board's decision to exercise discretion under Section 34 to deduct a sum from a worker's compensation payments would be consistent with the statutory provisions for entitlement where the worker received double compensation for the same injury. Section 31 of the *Act* provides for concurrent compensation for separate compensable injuries so long as the aggregate compensation does not exceed the maximum payable for total disability. However, concurrent compensation for separate injuries is different from compensation for the same injury twice over.

Section 15 of the *Act* generally protects a worker's benefits from an assignment or deduction except for welfare payments owing to the Province or an overpayment owing to the accident fund. That section states:

> A sum payable as compensation or by way of commutation of a periodic payment in respect of it shall not be capable of being assigned, charged or attached, nor shall it pass by operation of law except to a personal representative, nor shall any claim be set off against it, except for money advanced by way of financial or other social welfare assistance owing to the Province or to a municipality, or for money owing to the accident fund.

It is generally accepted that where a worker has entitlement to workers' compensation benefits the Board is in the position of first payer. Other organizations and agencies which provide disability payments *for the same disability* may adjust their benefits to take into consideration W.C.B. entitlement or make arrangements through the worker for reimbursement of double payments. Governors' policy (#48.20) points out where another governmental or non-governmental agency pays a worker while awaiting the adjudication of the worker's W.C.B. claim, Section 15 does not permit a direct refund to such agency, but the Board may re-direct funds payable to the worker on receipt of the worker's signed authorization.

Decision and Reasons

As set out in Decision No. 92-0922 there is no governors' policy regarding the application of Section 34 to a permanent disability award. In the absence of specific governors' policy on this issue, this panel has considered the employer's appeal on the basis of the provisions of the *Act*, related governors' policy and the facts of this particular case.

The employer submits that the worker is receiving a loss of income pension in contravention of the intent of Section 34 and 23(3) of the *Act*. The issue of the worker's entitlement to a loss of earnings pension under Section 23 of the *Act* is not before this panel. That issue was decided in the Board's decision of October 24, 1991. The employer did not pursue the appeal initiated from that decision. The issue before this panel is whether a sum equal to the worker's retirement pension should be deducted from the disability award and, if so, whether the sum should be paid to the employer under Section 34 of the *Act*.

Both the employer and the worker have focused their arguments on whether the retirement pension is ". . . provided wholly at the expense of the employer." While this is a relevant consideration under Section 34 it is not the sole basis for determining the question before us. A prior question that arises in this particular case is whether Section 34 has direct application to a retirement pension paid independent of the worker's disability. Our reading of the phrase ". . . during the period of his disability" in Section 34 suggests the types of payments the Board must consider are ones related to the worker's disability resulting from the compensable injury.

We have reviewed the historical information available when this provision was formulated, examined the existing governors' policy relating to Section 34, and considered other sections of the *Act* that may relate to Section 34. On the basis of our review we conclude the intent of the legislature in enacting Section 34 was to prevent the worker from receiving double compensation for the same injury and to protect the employer from facing a double liability for one injury.

In the circumstances of this case, the worker's retirement pension does not give rise to double compensation for the same injury. While the worker may have applied early for his retirement pension to provide income continuity while awaiting his W.C.B. disability pension, he was entitled to do that even if he had not been disabled by a work injury. As in Decision No. 107, the worker is entitled to receive income from a retirement pension *and* to take another job to supplement that income for the same period. However, because of the compensable disability, this worker is prevented or restricted from taking other employment after his early retirement. The disability pension compensates the worker for his loss of earnings from some suitable occupation after the injury. As such the worker is not receiving double compensation for one injury. He receives the retirement pension for accumulated service in the Forest Industry. He receives the disability award for his compensable disability which prevents him from taking another job. Thus, these two sources of money are independent from one another, and it cannot be said that he is receiving compensation twice over for his compensable disability. We conclude, therefore, there is no basis on which to make any deduction under Section 34 from this worker's disability award. As a result, there is no issue as to whether to pay any such deduction to his employer.

THE EMPLOYER'S APPEAL IS DENIED.

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

WORKERS' COMPENSATION
REPORTER

Decision of the Appeal Division

Number: 95-0169, 95-0170
Date: February 20, 1995
Panel: Cassandra Kobayashi, Paul Petrie, Thomas Kemsley
Subject: 96(4) — Projected Loss of Earnings

This decision concerns both the worker's appeal from the Review Board findings dated April 27, 1994, and a referral to the Appeal Division under Section 96(4) of the *Workers Compensation Act* from the same Review Board findings.

The worker's claim for bilateral bicipital tendonitis in August 1991 was accepted by the Board as arising out of and in the course of his employment as a carpet and furniture cleaner. A Board medical advisor said he should not return to carpet cleaning activities. In a decision dated July 26, 1993, the worker's request for continuity of income benefits was denied on the basis that his pension would not likely be calculated on a loss of earnings basis. The worker appealed this to the Review Board.

The worker also appealed a decision dated August 13, 1993, awarding him a 2% functional disability award, calculated on his average earnings in the one year before injury of $2,678.00 per month. The decision said he would not suffer a long-term loss of earnings greater than his functional award in alternate employment. Continuity of income benefits and his pension entitlement were considered in the Review Board findings of April 27, 1994.

The Review Board unanimously denied continuity of income benefits. Regarding his pension, the majority found that the worker was entitled to an award under Section 23(3) based on the difference between his pre-injury average earnings of $2,678.00 per month, and his actual earnings in two part-time positions in the first two years after his disability became permanent. After that, they said the Board would review his projected earning capacity in the automatic two-year review, two years from the date of their decision.

The worker appealed to the Appeal Division. His Notice of Appeal states the average earnings used to calculate his pension should include pre-injury product sales as a carpet cleaner. He also asked for further training or rehabilitation. The submission from the workers' adviser asks that we determine the worker has a permanent loss of earnings, a higher permanent functional disability, and entitlement to income continuity benefits.

The Review Board findings were also referred to the Appeal Division under Section 96(4) of the *Workers Compensation Act* which states:

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

The referral letter of May 24, 1994 stated, "The Review Board has granted a temporary award that compensates you for your current and actual loss rather than a long-term loss as provided by the *Manual*." The referral letter states that until the Appeal Division renders a decision, the worker will be paid according to the Review Board majority findings from the date of their findings.

Issues

Section 96(4) Referral

1. Did the April 27, 1994 Review Board finding contain an error of law or contravention of a published policy of the governors, by awarding a temporary loss of earnings pension based on current and actual earnings rather than projected earnings?

2. If #1 is answered in the affirmative, how should that matter be redetermined?

Worker's Appeal

3. Were the average earnings used to calculate the worker's permanent partial disability correctly determined?

4. Is the worker entitled to income continuity benefits?

5. Is the permanent functional disability award correctly assessed?

Background

After his disability stabilized on March 16, 1992, the worker received assistance from the Board to obtain other suitable employment. He started a real estate sales course, but according to the Review Board after an oral hearing, he thought he would have needed more capital resources to establish himself in such a career. He tried selling carpet cleaning, but the first position ended when the worker was asked to contact former clients from his injury-employer, and he refused on the grounds that it was unethical.

The second ended after four months of telephone sales from his own home with low income on a straight commission basis.

He had job interviews with an insurance company and auto sales firm, but was not hired. While on a job search allowance, he sought work and provided lists to the Board of places where he had applied. The rehabilitation consultant suggested he apply for a warehouse position. The worker did not receive an interview because he did not have enough computer skills and the company preferred employees graduating from the Operations Management program at B.C.I.T. (Memos 39 and 40). The worker had previous warehouse experience, and had taken a six-month Warehousing Management Program at Southern Alberta Institute of Technology (Memo 49).

In March 1993, the worker located a part-time job paying $8.79 per hour with a duty-free sales operation for whom he had worked about five years before. By June 18, 1993, the worker's hourly rate did not increase, but his responsibilities were increased. By the time of the oral hearing before the Review Board in January 1994, the worker was earning $10.33 per hour. He estimated it would take from 2 to 2½ years of continuous service to reach the union maximum of $12.15 per hour. He noted there were one manager and three assistant managers, who all had six to eight years of experience with the company.

The worker also told the Review Board he was delivering newspapers starting between 2:30 and 3:00 a.m. and finishing by 6:30 a.m., seven days a week. According to Memo 54, he works only 1½ hours per day for the newspaper firm, earning $1,200 per month.

The employability assessment in Memo 49, July 26, 1993, noted the worker was 31 years old, and had worked for two years carpet cleaning on contract for a large department store. Before that, he was an assistant manager at a gas station, and in 1986–87, a warehouseman and designer for a clothing manufacturer, labourer in a carton plant, and an assistant manager in a paint store. He had left high school after grade 10, but upgraded to grade 12 in night school, and had taken a six-month warehousing management course at Southern Alberta Institute of Technology. The assessment states the worker advised he would earn the base salary of $11.63 per hour after 2½ years in the duty-free job once he became full-time.

The rehabilitation consultant said the job at the duty-free firm was not maximizing his earning potential, although it was "reasonable." The previous memo had said that it was appropriate that the worker leave carpet cleaning behind, but this memo said selling carpet cleaning at a larger company was a possibility and mentioned a job advertised in 1990. A carpet sales and estimating position with a local firm in 1991 was considered suitable and reasonably available. The worker told the Review Board he had applied there, but they wanted someone with more knowledge about types of carpet.

Regarding warehousing, the employability assessment states:

> At [the worker's] age, *with additional experience and perhaps training*, [he] certainly *would be eligible* to move into other warehousing jobs where *perhaps* the salary structure would be higher and *potentially, management or supervision*. I do think that in doing so, he would certainly be able to restore his earnings level. The Canada Employment and Immigration report noted above listed the 1990 salary skills *(sic)* of $32,032 for warehousing-material recording. This is Group 4151.
>
> (emphasis added)

In addition, the rehabilitation consultant said the worker could become an auto partsman or service writer. At the Review Board oral hearing, the worker said he had no experience or training for such positions.

The claims adjudicator, Disability Awards, determined there was no projected loss of earnings because "there is suitable employment in the areas of sales, warehousing or service writer/auto parts which are *(sic)* reasonably available to you," (decision, August 13, 1993).

Analysis of Review Board Findings

In findings dated April 27, 1994, both the Review Board majority and dissenting member agreed that the assessment of the worker's long-term earnings in the disability decision was inaccurate. Both the majority and dissenting member agreed that occupations in sales, warehousing or service writer/auto parts were suitable in relation to his physical disability, but not reasonably available.

The majority findings are set out in a number of statements which we will reproduce:

> A majority of the panel finds that the claimant is entitled to a loss of earnings award based on current earnings at [the duty-free company] and newspaper delivery. We find that Board policy with respect to using a worker's earnings at a job *actually obtained* is appropriate in this case as [the worker] has met the criteria discussed in point 1 of Item 40.12 and has maximized his earnings at [the duty-free company].
>
> (page 14, emphasis in original)

At page 15, the majority states:

> With respect to his earnings at [the duty-free company], the majority finds that [the worker's] *actual earnings* at [the duty-free company] for the period March 16, 1992, the effective date of the pension, until March 16, 1994, should be used and prorated back to the date of injury.
>
> (emphasis in original)

The majority seems to acknowledge that the actual earnings in the first two years are not the maximized earnings in the long term. At pages 15 to 17 they said:

> . . . although we have determined that the claimant has maximized his earnings potential by obtaining employment at [the duty-free company], his earnings in the first two years are considerably distorted from what his projected earnings will be over the long term. In the majority's opinion, to use the highest level of pay that [the worker] can achieve only after having worked several thousand hours, and to use the hours for a full time worker when he has been working only 20-30 hours per week on average, would be greatly unjust and would not compensate him appropriately for his loss of earnings resulting from his compensable injury. We reiterate that this is not normally the way projected loss of earnings awards are assessed by the Board; however, Section 99 of the *Workers Compensation Act* provides that *each case* must be determined according to the merits and justice of that particular case. We find that the merits and justice of this case dictate that [the worker's] loss of earnings award should be based on his earnings in the first two years of his pension, with a review of the loss of earnings aspect of his award done two years from the date of assessment, in accordance with Board policy.
>
> At that time, the Board can once again look at the worker's projected earning capacity at [the duty-free company]. . . . The yearly maximum earnings at that point would still only be $25,272.00, still considerably less than the worker's wage rate of $32,136.00 in 1991.
>
> Although general Board policy may be applicable where initially a worker's post-injury earnings are lower than the pre-injury earnings, but where there is a reasonable expectation that projected earnings over the long term will equal or exceed pre-injury earnings, this would obviously *not* be realistic over the long term (two to three years) in [the worker's] case. If the loss of earnings component of the award were to be calculated as set out by the dissenting member, [the worker] would suffer a

> permanent loss of earnings, with no likelihood of ever being compensated on either the actual *or* the projected loss of earnings resulting from the compensable injury. We do not believe that that was the intention of either the *Act or* Board policy.
>
> In calculating the claimant's loss of earnings the Board is to include his earnings as a paper carrier. . . .
>
> (emphasis in original)

The dissenting member said the worker would not obtain all possible promotions into management or supervisory work, and his long-term earnings were best represented by full-time hours at the maximum hourly rate at the duty-free company. Based on the calculations of the Review Board majority, this would likely result in projected loss of earnings award under Section 23(3).

We interpret the majority to have found the worker should be paid a pension based on his actual earnings at the duty-free company and newspaper delivery from March 16, 1992 (the effective date of the pension), until March 16, 1994, prorated back to the date of injury. They acknowledged that the "general policy" is to use the projected earning capacity, but said that "there can be anomalies" in the initial assessment. They refer to the automatic review of the award two years later pursuant to #40.30 of the *Manual*, and expect the Board will then make another assessment of the worker's projected earning capacity.

The Review Board majority awarded a pension based on actual earnings, knowing that in time, the worker will achieve a higher maximized earnings rate in the same position. To justify the departure from the policy, the majority referred to Section 99 of the *Act* saying each case must be determined according to the merits and justice of that particular case. The dissent agreed with the majority that the worker would suffer a greater actual loss of earnings in the short-term, but said "it is an inevitable consequence" of the assessment policy. He said the automatic two-year review did not justify awarding a temporary pension for the period before the two-year review, but "simply allows for a further long term projection to occur."

Law and Policy

Subsections (1) and (3) of Section 23 of the *Workers Compensation Act* provide:

> (1) Where permanent partial disability results from the injury, the impairment of earning capacity shall be estimated from the nature and degree of the injury, and the compensation shall be a periodic payment to the injured worker of a sum equal to 75% of the estimated loss of average earnings resulting from the impairment, and shall be payable during the lifetime of the worker or in another manner the board determines.

> (3) Where the board considers it more equitable, it may award compensation for permanent disability having regard to the difference between the average weekly earnings of the worker before the injury and the average amount which he is earning or is able to earn in some suitable occupation after the injury, and the compensation shall be a periodic payment of 75% of the difference, and regard shall be had to the worker's fitness to continue in the occupation in which he was injured or to adapt himself to some other suitable employment or business.

The former commissioners considered whether the Board should adopt an actual loss of earnings approach under Section 23(3), but rejected it in Decision No. 8, October 2, 1973, *Workers' Compensation Reporter*, Vol. 1, p. 27. Instead, they opted for a method utilizing *projection* of the impact of the disability on future earnings. At page 33, they stated:

> . . . Where a disability appears to have stabilized, then, absent any evidence on which to make a different projection, it could be assumed that the claimant will continue to earn indefinitely into the future at a level equivalent to what he is able to earn at the time of the evaluation. Of course *this will always be different from actual earnings*. Shifts in the condition of the labour market, improvements of skill on the part of the claimant, subsequent sickness for other reasons, and a whole range of other variables may result in actual future earnings being different from the projection. But this loss of accuracy might be considered a price worth paying to avoid the intrusion into the private lives of claimants that might be required in measuring actual earnings or earning capacity on a continuing basis, to keep administrative costs to an acceptable level, and perhaps most important of all, to avoid creating a disincentive to vocational rehabilitation.
>
> (emphasis added)

Decision No. 394, April 18, 1985, modified the "guidelines" for determining suitable and available occupations. As well, provisions were added regarding reduction of the pension at age 65, and an automatic review of the pension two years from assessment.

Much of the wording in the current *Rehabilitation Services and Claims Manual* (the *Manual*) on Section 23(3) pensions is from Decisions 8 and 394. Emphasis has been added in the quotes below. Item #40.00 states, "The Board will not make a temporary award on a projected loss of earnings basis." The policy in #40.10 of the *Manual* describes the calculation of a pension under Section 23(3):

> 1. Average earnings prior to the injury will be determined in accordance with established policies and procedures.

2. Having regard to the evidence, including the medical evidence, of the limitations imposed by the compensable disability and the fitness of the claimant for different types of work, and having regard to the evidence of the Rehabilitation Consultant about the suitability of the claimant for *jobs that could reasonably become available*, the Adjudicator in Disability Awards will arrive at a conclusion about suitable occupations that the claimant could be expected to *undertake over the long-term future*.

3. Earnings that *maximize the claimant's long-term potential* will be selected from the jobs that are suitable and reasonably available. Earnings in those occupations will be determined as at the time of the injury.

4. The possible pension will then be 75% of the amount by which the earnings level thus established is less than the average earnings prior to the injury.

5. Any increase that may be due to the claimant because of an increase in the Consumer Price Index will then be added.

6. Since the assessment on a projected loss of earnings basis aims to predict the worker's actual loss of earnings *over the future*, no award can be made when the worker is unemployed for reasons unrelated to the injury and it is determined that there will not be a potential loss of earnings.

The phrase "actual loss of earnings over the future" in the 6th "rule" gives some support to the idea of compensating a worker for the actual losses accruing over a future period. This wording could suggest that the cumulative loss is considered, not just the loss once the worker has achieved the maximized earnings rate. However, we consider the policies in #40.12 identify a range of suitable and available occupations where the worker's earnings will be considered "maximized":

> The evidence of the Rehabilitation Consultant should relate to jobs that are suitable and reasonably available to the claimant *in the long run* and the conclusion of the Adjudicator in Disability Awards should be concerned with such of those jobs as will *maximize the claimant's long-term earnings potential*.
>
> It is not satisfactory simply to take the wage rate in a job to which the claimant actually returns. For a variety of reasons, the *long-term employment prospects* of a claimant may be different from the most immediate job opportunities. On the other hand, the phrase "available jobs" does not mean any job position in which there are vacancies. An available job

> means one *reasonably available to the claimant in the long run*. For example, a city may have several theatres, and there may be occasional job vacancies for the position of theatre usher; but if there are always numerous better qualified applicants and the realities are that a worker with the particular disability is not likely to obtain such a job, that is not a reasonably available job.
>
> In advising on the suitability of the claimant for reasonably available jobs, the Rehabilitation Consultant must have regard to the limitations imposed by the residual compensable disabilities of the claimant and assess the claimant's earnings potential in light of *all possible rehabilitation measures* that might be of assistance, including the possibility of retraining or other measures that may be appropriate to the particular worker.

The time frame implied in #40.12 suggests a relatively long-term view is taken with respect to when the worker will maximize his or her earnings. However, a shorter time frame is contemplated in the first "guideline" following the above introduction:

> 1. Where the worker is doing his or her best to maximize earnings, and is following the advice of the Rehabilitation Consultant, and is presenting himself or herself in good faith to obtain a job at the highest level of earnings among the jobs that the worker is fit to undertake, then *the earnings level in the job that is actually obtained* is generally the earnings level that should be taken, unless there is evidence that this position is transitory and that jobs at another level of earnings will be available to the worker *in the near future*.

By comparison, the second guideline seems to contemplate consideration of the maximum earnings in a worker's future career:

> 2. Regard may be had to other jobs than the present one with the same employer to which the worker *might in future progress* and this is not limited to jobs which the claimant has a right to because of seniority. The fact that there is a formal or informal competition for a higher job is not a bar to its being considered. On the other hand, it would not be fair to assume that a claimant will receive all possible promotions that might theoretically be open. The Board is only concerned with *jobs that are, in practice, reasonably available*. Thus the Board will, in general, only have regard to *higher paying jobs which a person in the claimant's present job would ordinarily be expected to obtain*.

Other guidelines state that if a suitable job is not reasonably available at the time of assessment due to economic conditions, it may be considered if it is "reasonably available *over the long term*." If a worker refuses a higher paying job which is "subject to fluctuations in the economy," and takes another job paying marginally less, but it "appears more stable *in the long run*," the second job may be used for calculating the loss of earnings.

Once suitable and reasonably available occupations are identified, the policy in #40.13 states that the figure used to calculate any projected loss of earnings is "the earnings *figure which will maximize the claimant's long-term earnings potential*."

A worker or employer may initiate a review of a projected loss of earnings pension only if there has been a change in the worker's physical condition (#40.30). Changes in economic conditions are not grounds for a worker or employer seeking review of the pension. The Board, however, will automatically review a projected loss of earnings pension two years from the date of assessment to "increase the accuracy of pension assessments," (#40.30).

The policy does not *require* a change in the pension on review if the worker's actual earnings are not as predicted in the pension assessment. On the other hand, adjustments are made if the "worker's earnings or projected earnings" are 5% more or 5% less than the projected amount at the time of review. We do not interpret the review provisions as intending to compensate workers for their actual loss of earnings up to the point of review.

Error of Law or Contravention of Policy

The referral letter states the Review Board award compensated the worker for his "current and actual loss." The Review Board majority determined entitlement based on his actual earnings delivering newspapers and at the duty-free company for two years after wage loss ended from 1992 to 1994. The Review Board dissent pointed out that the worker also had some earnings from carpet cleaning sales, but the majority did not include this in the calculation of his actual earnings. Furthermore, it appears that no allowance was made for rehabilitation allowances paid during the first two years after injury. Therefore, in the first two years after wage loss ended, the worker's actual loss was lower than the pension awarded by the Review Board. Assuming, as the Review Board majority did, that the pension would be reviewed in two years from the date of their findings, that is in 1996, compensation from 1994 to 1996 would not be based on his actual earnings in that period. We conclude that the referral was incorrect in stating that the Review Board finding was to compensate for the worker's "*current* and actual loss," (emphasis added).

The majority made no finding about the worker's projected earnings level in the long term, although they said he would maximize his earnings in his employment at the duty-free company. The majority clearly intended to base his pension on a figure lower than his projected earnings level in the long term. The majority also referred to the two-year automatic review as a method to re-evaluate the worker's earning capacity. Although they did not describe this as a "temporary" pension, the effect of their decision was to pay benefits under Section 23(3) based on post-injury earnings that would likely increase; second, the award was intended to be effective for only two years from their decision. Both these findings contravene the policy of the governors.

We have considered the majority's reasoning that the policy was not intended to apply to this type of case. Nothing in the policy suggests that earnings level in the long-term were not intended to be used from the outset even though the worker will incur a short-term actual loss of earnings. To the contrary, the guidelines in #40.12 state that even if a job is not available at the time of assessment due to general economic conditions, it can still be used if it is suitable and reasonably available over the long term.

The use of Section 99 does not justify departure from the policy in this case. Section 99 states:

> The board is not bound to follow legal precedent. Its decision shall be given according to the merits and justice of the case and, where there is doubt on an issue and the disputed possibilities are evenly balanced, the issue shall be resolved in accordance with that possibility which is favourable to the worker.

Item #96.10 of the *Manual* addresses decision-making in relationship to Section 99. It states the Board is not bound to follow legal precedent in the common law sense. The policy acknowledges that "there is an infinite variety of circumstances that can arise and that it is not possible to lay down in advance policies to finally determine every conceivable situation." Through "internal directives, the Board gives general indications of how it will act when certain circumstances come before it."

We consider that the policy on projected loss of earnings contemplates the type of situation where the worker will improve his earnings over time, and will gradually reduce or eliminate his actual loss of earnings. This is not a situation where the policy fails to address the fact situation in the particular case. Within the policy, there is discretion to determine the worker's long-term earnings. Making a decision "according to the merits and justice of the case" requires application of the legislation and policy to the facts at hand. Although the approach of the Review Board majority would pay a higher pension, this does not justify contravening the policy. No adequate reasons were provided for the contravention of policy.

We have considered whether the relevant published policies of the governors on projected loss of earnings awards are supportable on the legislation. Section 23(3) provides the Board may award compensation on the basis of the formula outlined in the provision. That formula refers to the difference between the worker's average weekly earnings before and after the injury without specifying whether the difference should be measured on a continuing actual basis or, alternatively, on a projection of the worker's future earnings. The phrase, "regard shall be had to the worker's fitness . . . to adapt himself to some other suitable employment or business," supports the interpretation of the projected method using long-term future earnings, as does "average amount which he . . . is able to earn." In our view, the "projected" loss of earnings policy is a viable interpretation of Section 23(3). The prohibition of "temporary" awards under Section 23(3) is consistent with that policy. We conclude, therefore, that the majority Review Board finding contravenes governors' policy and should be redetermined in accordance with Section 96(4) of the *Act*.

Redetermination

For the following reasons, we agree with the unanimous finding of the Review Board that the occupations set out in the pension decision were not available to the worker in the long term at an earnings level to offset any loss of earnings greater than his functional award.

With respect to warehouse supervisor or manager, the assessment predicted that "with additional experience and perhaps training" the worker "would be *eligible* to move into other warehousing jobs where *perhaps* the salary structure would be higher and *potentially*, management or supervision," *(emphasis added)*. We interpret this as stating that there was a potential for higher earnings with experience and perhaps training, but this potential was phrased in uncertain terms.

In a consultation report dated March 1, 1994, Dr. A, F.R.C.P.C., reported that the worker had lifted boxes weighing 50 to 80 lb. while at the duty-free company, and this increased his pain. He was also complaining that throwing newspapers, his golf swing, and over or underarm tennis strokes all increased his pain. He also "often wakes with pain" in the area of the biceps origin. Dr. A referred the worker to Dr. B, orthopaedic surgeon, who saw the worker on July 18, 1994.

In view of Dr. A's comments, we question whether the worker would be able to obtain sufficient experience to progress in warehouse work into a higher level of pay. On the other hand, the submission to the Appeal Division mentions other factors which caused him to quit the duty-free company — largely related to his belief that he would not achieve his career objectives there. We also note that he was not considered to have the necessary computer skills to even receive an interview for the warehousing job. As well,

there is no indication that further rehabilitation benefits were about to be paid to the worker to increase his employability in warehouse systems management. Without additional experience and possibly training, a management or supervisory position is not suitable and "reasonably available." We conclude that the worker was not likely to achieve the management or supervisory warehousing positions as predicted. The likelihood of increased earnings is not sufficiently certain for those positions to be considered "reasonably available."

We agree with the Review Board that the worker has insufficient experience in sales to find he would earn the average for sales, $35,737 in 1990. The carpet product sales he made pre-injury were to customers whose carpets he had already cleaned. The automotive service writer position requires retraining which has not been offered to the worker.

Memo 56, June 15, 1994, written after the Review Board findings, indicates that the worker now has no projected loss of earnings based on his newspaper deliveries and the worker's own projections of newspaper subscription sales. He is reported to believe he could earn $400 per week on average from such sales. We have assessed this new information in light of the worker's enthusiasm and optimism for his earning potential throughout his claim. He was keen to enter real estate sales, saying he knew he would do well (see letter on file, date-stamped January 21, 1992). He thought he would become a business coordinator with the second carpet cleaning firm within two months, but ended up in telemarketing sales from his home with periods of no income at all. When he applied for the warehouse job, he said, "I feel I will land the job after my interview," but did not receive an interview. He initially thought he would obtain full-time work at the duty-free company within three months.

We recognize that the worker is highly motivated to maximize his earnings, which is commendable. We conclude, however, that the worker has consistently demonstrated an unrealistic view of his ability to obtain employment and quickly achieve high earnings. We therefore have little confidence that he could earn $400 per week or $1,738.00 per month on average over the long term from selling newspaper subscriptions, based solely on the worker's own estimates. Furthermore, as the Review Board observed, projected earnings generally are based on one full-time job, not more than one. Finally, it appears that the worker's projections were not tested; as of October 1, 1994, he began collecting outstanding subscription payments on a contract basis, rather than selling subscriptions.

We find that the best projection is that the worker would eventually maximize his earnings in full-time work at the duty-free company at the maximum hourly rate. In 1993 that rate was $12.15 per hour, but this figure should be adjusted to the date of injury.

Therefore, on the redetermination, we find the worker's projected loss of earnings pension should have been calculated on the basis of what he would earn in full-time work at the duty-free company but not at supervisory or management level. This will be effective the same date as his disability award under Section 23(1).

Worker's Appeal

The worker has been advised that his pre-injury earnings from product sales will be included in his average earnings if he submits amended income tax documents. This has not been done, and we find no error in the current calculation of his earnings.

No new information was submitted regarding the request for a higher functional disability award. Memo 46 indicated that the worker's physical condition would be reassessed in 18 months to 2 years after the initial pension decision because the disability awards medical advisor thought the worker's symptoms might dissipate over time. The 1994 information from Dr. A and Dr. B indicates deterioration in some of the ranges of motion of his shoulders since the permanent functional impairment examination. We draw this to the attention of the claims adjudicator, but make no findings on the significance of this new medical evidence. We find no error in the present functional award.

Similarly, no new argument was provided regarding entitlement to income continuity. We dismiss the appeal on that issue.

Conclusion

1. The Review Board majority contravened the published policy of the governors by making an award under Section 23(3) without any attempt to determine the worker's long-term projected earnings, intending the award to be effective for only two years from their decision.

2. We redetermined this matter and conclude the loss of earnings entitlement should be based on projected full-time earnings at the maximum hourly rate at the duty-free company pro-rated to the date of injury.

3. The average earnings were correctly calculated, and the worker's appeal on this issue is denied.

4. The worker is not entitled to income continuity benefits, and the worker's appeal on this issue is denied.

5. The permanent functional disability award was correctly assessed, and the worker's appeal on this issue is denied.

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

Decision of the Appeal Division

Number: 94-1315
Date: November 4, 1994
Panel: David Van Blarcom
Subject: Claim Costs Charged to Unregistered Employers: Section 47(2)

The employer was advised by a letter dated June 3, 1994 that it was to pay to the Board the sum of $1,000.00 on the basis that there had been a compensable claim by an employee prior to the employer becoming registered.

The employer has appealed the decision on the ground: "The penalty is excessive as there was a simple error in not getting registered on a timely basis due to the start-up of the business which was a extremely busy time." (reproduced as written). It has alleged errors of law, fact, and contravention of a published policy of the governors.

Evidence

An employee of the appellant was injured at work on July 21, 1993, resulting in a compensable claim to the Board.

The employer's registration form was received by the Board on September 17, 1993.

On November 3, 1993, the claims adjudicator wrote to the employer setting out the provisions of Sections 38(1) and 47(2) of the *Workers Compensation Act* and advising that liability under Section 47(2) would be adjudicated, as required by policy item #115.11.

The employer responded in a letter dated November 15, 1993 that it had had its first pay period on May 20, 1993. However, the principal of the company had been away from his offices and very busy overseeing the start-up of the operation and, as a result, overlooked the registration of the business with the Board.

The matter was then referred to a lawyer in the Legal Services Department of the Board, who sent a memo to the manager of assessment policy "requesting advice re penalty," enclosing the employer's correspondence and a calculation of the disbursements to date on the file as follows:

Wage Loss	$1,518.75
Medical Aid	427.94
Total	$1,946.69

The manager of assessment policy then replied to the Board lawyer advising "It is clear that this employer is Delinquent to Statement, however, in view of the size of the farming operation, I would recommend reducing the penalty assessment to $1,000.00."

On June 3, 1994, the employer was sent a letter from the Board lawyer as follows:

> This matter has been considered following our past correspondence.
>
> It has been decided after an investigation into this matter that, as you were not registered with the Board at the time of the injury to [the worker], as is required by the *Workers Compensation Act*, you are to pay the Board at its offices, the sum of $1,000.00. Please note the cost of this claim to date is over $2,946.69; however, the board has taken into consideration the size of your operation and has reduced the possible penalty to $1,000.00.

The employer was then advised of its right of appeal to the Appeal Division.

I note that the cost of the claim given in that letter is $1,000.00 more than the sum recited in the memo from the Board lawyer to the manager of assessment policy. Having reviewed the claim file, I accept the lesser sum as the correct one.

In a memo dated October 14, 1994 to the author of the June 3, 1994 letter, I wrote:

> On reviewing the policy of the governors set out in item #115.11 of the *Rehabilitation Services and Claims Manual*, I note that decisions on the employer's liability under s. 47(2) are to be made by a committee comprised of the Board's General Counsel or delegate and the Director or Manager, Assessment Policy.
>
> I do not see any evidence on file that you were the delegate of the General Counsel for these purposes at the relevant times. If there is such evidence, please provide it to me by October 20, 1994.

The Board lawyer replied:

> The authority to impose or relieve the penalty resides in the Committee. The General Counsel and Vice-President to the Board is authorized to delegate his participation in the Committee, . . . outlined in Policy No. 115.11, to the individual lawyers in Legal Services by assigning incoming files to those lawyers.

Copies of this correspondence was sent to the employer for submission, but no reply was received.

The Board lawyer has therefore provided some evidence of her authority to act as delegate of the general counsel, pursuant to item #115.11.

Law and Policy

Section 96(6.1) of the *Workers Compensation Act* permits an appeal of such a decision on the grounds of an error of law, fact, or contravention of a published policy of the governors.

Section 38 (1) of the *Act* includes:

> 38. (1) Every employer shall
> (b) cause to be furnished to the board
> (i) when he becomes an employer within the scope of this Part; . . .
> an estimate of the probable amount of the payroll of each of his industries within the scope of this Part . . .

Section 38(2) prescribes a penalty to be determined by the Board for the failure to comply with Section 38(1), and Section 38(4) provides that an employer who fails to comply with Section 38(1) commits an offence.

Section 47 of the *Act* says:

> (2) An employer who refuses or neglects to make or transmit a payroll return or other statement required to be furnished by him under section 38 (1) . . . shall, in addition to any penalty or other liability to which he may be subject, pay the board the full amount or capitalized value, as determined by the board, of the compensation payable in respect of any injury . . . to a worker in his employ which happens during the period of that default, and the payment of the amount may be enforced in the same manner as the payment of an assessment is enforced.
>
> (3) The board, if satisfied that the default was excusable, may in any case relieve the employer in whole or in part from liability under this section.

The policy of the governors set out in the *Rehabilitation Services and Claims Manual* considers the application of Sections 38(1) and 47(2) in items #115.10 and #115.11. The latter item requires that:

> Following the acceptance of a claim, the Claims Adjudicator will write to the employer and advise of the potential for liability under Section 47(2). The employer will be invited to make comments as to why he or she should not be charged with the costs of the claim. A decision on the employer's liability, and whether or not to provide relief from any liability, will then be made by a committee comprised of the Board's General Counsel or delegate and the Director or Manager, Assessment Policy, of the Assessment Department. An appeal lies to the Appeal Division under Section 96(6.1) of the *Act* as designated by the Governors.

The *Assessment Policy Manual* provides in policy no. 20:30:10:

> Section 38 of the *Act* states that a person must supply any information required by the Board when becoming an employer under the *Act*, and gives the Board the authority to establish a registration for an employer under the *Act* with or without their cooperation, and to assess the employer accordingly. An employer who fails in a duty to register with the Board for coverage is subject to heavy penalties under Section 47 of the *Act*; including the full amount or capitalized value of the compensation payable in respect of any injury or industrial disease to a worker of that employer before registering with the Board, in addition to back payments of assessments and possibly an additional penalty.

Assessment policy no. 40:50:50 is entitled: "Penalty Assessment-Cost of Injury Prior to Registration" and says:

> An employer who is not registered with the Board at the time of an injury to one of that employer's employees, and who is operating in an industry within the scope of the *Act*, is subject to a penalty assessment under Section 47(2) of the *Act* for failure to meet the registration obligations. This penalty assessment is generally the total cost of an injury. . . . The amount may be reduced or cancelled under Section 47(3); however, the amount is never greater than the total injury cost. . . .
>
> The final decision as to whether or not the delinquency charge will be levied against the employer (and the amount) is made by: A committee. . . .

Decision No. 111 of the commissioners, *Re: A Penalty for Non-registration* (*Workers' Compensation Reporter*, Vol. 2, p. 81) considered a situation similar to the present one. The employer was not registered with the Board at the date upon which an accident occurred, injuring an employee. The compensation paid as a result of the injury amounted to $7,581.80. The relevant sections then were Section 44(2) and Section 44(3), but the wording of sections is identical to the present wording of Section 47(2) and Section 47(3).

The commissioners in that decision said:

> The employer is now asking that the Board exercise its discretion under Section 44 (3) to relieve the employer from liability for the cost of the injury.
>
> The penalty provision in Section 44 (2) is based primarily on normal insurance principles rather than on enquiry into blame. Where a compensable injury occurs in a situation in which the employer has not made arrangements for paying assessments, there would be unfairness by charging the cost of that injury to other employers who are complying with the *Act*. The liability is imposed upon the employer and no doubt a primary rationale for this section is to secure compliance with the *Act* relating to assessments.

In Decision No. 111, the Board took into consideration that the company had justifiably relied on an accountant to file the registration, who had failed to do so. The commissioners concluded: "Considering these points, we have concluded that there are mitigating circumstances and therefore the penalty should be reduced to $3,000.00."

Reasons and Decision

On its face, the letter dated June 3, 1994 which communicates the decision of the committee contains errors of fact, law and policy. However, in the final result, the decision that the employer is liable to pay $1,000.00 should not be changed.

The apparent error of fact is that the costs of the claim were $1,946.69, not $2,946.69. However, going behind the June 3, 1994 letter, it is evident that the correct costs were used in the consultation of the committee, as the correct amount is recited in those memoranda. Therefore, there was not an error of fact in making the decision.

With respect to apparent errors of policy, in the June 3 letter, the decision is not expressed in terms which conform with policy item #115.11 as being one of a committee, but appears to be simply the decision of the lawyer for Legal Services. Going again behind the letter to the employer, one may see that there has been a kind of committee process, in that there has been a consultation by memo between the manager of assessment policy and the delegate for the general counsel.

The apparent error of law is that the $1,000.00 sum is expressed as a "penalty" both in the June 3 letter and in the deliberations of the committee. The sum payable under Section 47(2) is not a "penalty," but a sum "in addition to any penalty."

The *Act* gives the Board a number of courses of action in the event that an employer fails to comply with Section 38(1). Under Section 38(2), an employer is "liable to pay and shall pay as a penalty" an amount of money. Under Section 38(4), the employer can be prosecuted for committing an offence. Under Section 47(2), the employer shall "in addition to any penalty or other liability" pay the Board the amount of the compensation payable in respect of the injury.

It therefore appears clear from the structure and plain wording of the *Act*, that the sum payable under Section 47(2) is not a "penalty" but a sum "in addition to" a penalty.

The liability for claims by a defaulting employer, apart from penalties, is not unique to British Columbia. In *Workers' Compensation in Canada* (2nd ed) at page 274, Professor Ison notes:

> 10.8.2 Liability for claims. Where a claim by a worker of a defaulting employer is allowed, the employer is liable to the Board for the total cost of the claim, in addition to the ordinary assessment and the penalties for non-payment.

This was recognized in Decision No. 111 which notes that Section 47(2) is based primarily on normal insurance principles, and not on an enquiry into blame.

However, there is a punitive element associated with Section 47(2), both in the *Act* and in the interpretive policies. For example, Decision No. 111 refers to the deterrent effect of the liability and refers to it as a "penalty provision," even though it does not use it as such.

The heading of Section 47 in the *Act* also indicates an element of penalty: "Penalty for default in payment or return." While Section 47(1) clearly provides for a penalty for a default in payment, Section 47(2) does not provide for a penalty for default in return. There was no general headnote for Section 44 (as the section was numbered at the time of Decision No. 111), but the note for Section 44(2) said: "Liability to pay capitalized value of the compensation accruing." The note for Section 44(3), by which relief is granted from the sum imposed by Section 44(2) said: "Board may relieve from penalty."

The substance of Section 47(3) also imports a punitive element, in that it permits relief on the basis that the "default was excusable." This implies an element of blame worthiness which requires excuse, and is applicable to both Section 47(2) and to Section 47(1), which clearly provides a penalty.

Comparing the *Rehabilitation Services and Claims Manual* provisions in #115.10 and #115.11 with the *Assessment Policy Manual* in policies no. 20:30:10 and no. 40:50:50, the *Claims Manual* does not refer to "penalty" at all, and discusses recovery of the costs of the claim, whereas the *Assessment Policy Manual* emphasizes the punitive aspect of the such an assessment.

Whether the sum levied is characterized as a recovery or a penalty has more than semantic significance. Dussault and Borgeat in *Administrative Law: A Treatise* (2d) vol. 1 at pages 447–450 summarize the law that an administrative authority must be explicitly authorized to impose penalties; otherwise, the power to impose sanctions resides in the exclusive power of the legislature to affect the rights and freedoms of citizens.

The word "penalty" is defined in *Black's Law Dictionary (abridged sixth edition)* as "An elastic term with many different shades of meaning; it involves idea [sic] of punishment, corporeal or pecuniary, or civil or criminal, although its meaning is generally confined to pecuniary punishment."

Using the word "penalty" in considering liability under Section 47(2) could easily cause one to lose sight of the insurance principles underlying Section 47(2) and to lapse into principles of punishment. The elasticity of the word is stretched perilously close to the breaking point. One might well expect there to be different considerations taken in determining a "penalty" which has an obvious punitive element, to those taken in merely recovering costs.

However, in this case, I am not satisfied that there was a punitive element in the decision to require the employer to pay $1,000.00 of the claim costs of $1,946.69. Section 47(2) requires the full amount of the claim costs to be paid. Section 47(3) permits the Board to relieve the employer in whole or in part from liability "if satisfied that the default was excusable." The employer has submitted that the default was excusable because its principal was very preoccupied overseeing the start-up of the operation. I expect that is the case when most businesses are started. While the business started in May, and the worker was injured in July, the employer still did not register until September. Therefore, I would not disturb the decision to relieve only to the extent of $1,000.00.

THE EMPLOYER'S APPEAL IS DENIED.

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

Decision of the Appeal Division

Number: 94-1175
Date: September 29, 1994
Panel: Cassandra Kobayashi
Subject: An M.R.P. Appeal Commenced by a Representative

The worker appeals the Workers' Compensation Review Board finding dated May 6, 1994. The issue is whether the employer has met the requirements of Section 58(4) of the *Workers Compensation Act* for initiating an appeal to a Medical Review Panel. The Request for Examination form was signed by a lawyer as representative of the employer, a large corporation.

In a decision dated November 24, 1992, the Appeal Division allowed the worker's appeal. The employer commenced a Medical Review Panel appeal by sending to the Board the two forms — a Request for Examination by a Medical Review Panel signed by a lawyer in a large Vancouver law firm as the "employer's representative," and a certificate signed by a physician stating he believed there was a bona fide medical dispute. Those documents are stamped as received in the Board Medical Review Department on February 11, 1993, within the 90-day statutory time limit. Receipt of the documents was acknowledged in a letter dated April 29, 1993. In a letter dated January 31, 1994, a medical appeals officer wrote to the employer to the attention of Mr. C, stating the worker would be referred to a Medical Review Panel pursuant to Section 58(4), but asks that a new Request for Examination form be signed by Mr. D. Mr. D's name is noted on the correspondence to the Board from the lawyer. Mr. D signed the new Request and returned it to the Board on February 10, 1994.

The worker appealed to the Review Board asking that the employer's request for a Medical Review Panel examination be denied. The Review Board found the employer's Request for Examination signed by the lawyer met the requirements of Section 58(4), saying that where the employer is a corporation, "the request can properly be made by a duly authorized agent."

Section 58 provides in part:

> (4) An employer or former employer of a worker is entitled to have the worker examined by a medical review panel if, not later than 90 clear days

after the making of a medical finding by the review board or a medical decision by the board, the employer or former employer

(a) writes to the board expressing that the employer or former employer is aggrieved by the medical finding or decision, and

(b) sends with the writing a certificate from a physician certifying that, in the physician's opinion, there is or may be a bona fide medical dispute to be resolved, and stating sufficient particulars to define the question in issue.

(5) The board may decide that the worker shall be examined by a medical review panel, in which case he shall be so examined in the manner provided in this section.

The governors' published policy in #103.13 of the *Rehabilitation Services and Claims Manual* provides that if either the doctor's certificate or employer's request is received within the 90-day limit, and the other is received within a "reasonable period," then "the Board considers that there is substantial compliance with the time requirements," and the Board will exercise its discretion to have the worker examined under Section 58(5).

The statutory provisions for appeals to a Medical Review Panel from a worker (Section 58(3)), an employer (Section 58(4)), or a dependant of a deceased worker (Section 63) do not make reference to a representative's right to initiate the appeal. Representatives are specifically authorized to initiate an appeal to the Review Board (Section 90) and the Appeal Division (Section 91), and seek reconsideration of an Appeal Division decision (Section 96.1). On the other hand, representatives are not mentioned in Section 96(6) and 96(6.1) which sets out employers' rights of appeal to the Appeal Division concerning assessment, classification, monetary penalty, or shifting costs between classes.

Reasons and Findings

Generally, the governors' policy in #7.00 of the *Manual* provides that the definitions of "employer" and "worker" "are treated as complementary. The question in each case is whether the relationship between two parties is to be classified as one of employment for the purposes of the *Workers Compensation Act*." Such an analysis is of little assistance in this case. There is no question that the employer's lawyer does not stand in any employment relationship to the worker. Mr. D, who did sign the form at the request of the Board is a worker of the employer. This makes him a co-worker of the worker, and the *Act* does not authorize co-workers to appeal to a Medical Review Panel. On the other hand, as the Review Board pointed out, it would be impractical to require a directors' resolution or even to trace the chain of command in each case of a corporate employer's appeal.

A literal reading of Section 58(4) suggested by the worker means only the employer can write to the Board. Such a literal reading would also require the doctor's certificate to be sent with the employer's writing. The Board has not taken a literal approach, and accepts the employer's writing and doctor's certificate in separate mailings if both are received within 90 days of the medical decision in dispute. If one is not received within 90 days or is received but is incomplete or defective, and an acceptable one is received within the next 90 days, the Board exercises its discretion under Section 58(5) to have the worker examined.

Despite this remedial interpretation of that portion of the requirements, the Medical Review Department apparently considers the writing must be from the employer and not an outside lawyer. The governors' published policy does not specify whether a representative can file an appeal, so any "practice" in this regard does not have the sanction of the governors.

The B.C. Court of Appeal considered a similar situation in *Caputo* v. *Workers' Compensation Board of British Columbia*, (1987), 13 B.C.L.R. 145. The employer sought to appeal to a Medical Review Panel. The physician whose certificate was submitted was not registered under the *Medical Practitioners Act*, as specified in the definition of "physician" in Section 1. The worker objected to the Board exercising its powers under Section 58(5) to have him examined by a Medical Review Panel. Mr. Justice Anderson upheld the Board's actions, saying at page 151:

> In my opinion, the "plenary and independent power" granted to the board in s. 58(5) was a very necessary power to enable the board to grant relief in respect of technical defects in applications made pursuant to ss. 58(3) and 58(4).

He also said it would not be open to the Board to exercise its discretion "solely for the purpose of avoiding substantial compliance with the procedural requirements of ss. 58(3) and 58(4)." He gave an example of a worker or employer attempting to commence an appeal more than a year later. The Court found the Board "has used the remedial powers granted under s. 58(5) so as to avoid an appearance of injustice which might flow from a rigid and overly technical approach."

The fact that some of the other appeal provisions in the *Act* specifically provide for representatives could suggest that the omission of representatives in Section 58 is intentional. Although Sections 96(6) and (6.1) do not refer to representatives, the Appeal Division practice has been to accept appeals from employer representatives. I conclude that the omission of representatives in Section 58 does not determine the issue.

It could also be argued that the wording of Section 58 is significantly different from the other appeal provisions in the *Act* in that it requires the worker or employer to write to the Board expressing they are "aggrieved" by the medical finding or decision. Alternatively, it could also be interpreted simply to mean the appeal must be commenced in writing.

I find that the literal interpretation advanced on behalf of the worker is not in keeping with the purpose of the *Act*. As noted in Decision 91-0802, *Workers' Compensation Reporter*, Vol. 8, p. 1:

> . . . the legislature has carved out from the Board's jurisdiction a separate appeal process before a medical review panel. The medical review panel determines its own procedure and determines what evidence it will receive. The decision of a medical review panel is binding on the Board, and there is no appeal from their decision.
>
> However, the Board controls access to medical review panel appeals: the Board determines the sufficiency of the enabling certificate, and other preliminary matters in an appeal to a medical review panel. The Board should not unduly restrict access to this appeal process. The *Act* requires the Board to ensure that the statutory requirements are met. The addition of any preliminary requirements defeats the legislative intention that employers and workers have access to this avenue of appeal outside the Board.

I agree with the employer that corporations must act through an agent, and that requiring director's resolutions authorizing a Medical Review Panel appeal is not necessary. I find that a representative may act on the employer's behalf in commencing an appeal to a Medical Review Panel under Section 58(4). There is no question in this case that the lawyer acted on instructions from the employer.

I DENY THE APPEAL.

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

Decision of the Appeal Division

Number: 94-0736
Date: June 10, 1994
Panel: Connie Munro
Subject: Section 39(1)(e) — Application to Fatal Claims

The employer appeals the refusal by the manager of Disability Awards to provide relief of costs. The employer is seeking relief under Section 39(1)(e) of the *Act* and in accordance with policy #114.40 of the *Rehabilitation Services and Claims Manual*.

The claim for which the employer is seeking relief of costs involved a fatality. One of the employer's workers died as a result of an aneurysm that ruptured as he was trying to loosen a bolt on a Sherman Edger.

The claims adjudicator initially disallowed the claim on the grounds that the worker's aneurysm constituted a pre-existing condition unrelated to the worker's customary work activities. Following further investigation, however, the claims adjudicator concluded that the worker had been engaged in an unusually stressful activity when trying to loosen the bolt. This could have caused the rupture of the aneurysm; therefore, the worker's death was compensable.

In a letter dated July 21, 1993, addressed to the claims adjudicator, the employer's representatives queried if any of the statutory relief of cost provisions were applicable to this case. In a letter dated August 18, 1993, the claims adjudicator replied that the statutory relief provisions were inapplicable and specified that relief of costs under Section 39(1)(e) is not permitted on fatal claims.

In a letter dated October 1, 1993, addressed to the claims adjudicator, the employer's representatives questioned the lawfulness of the statutory interpretation found in policy item #114.40. According to this policy, since Section 39(1)(e) contemplates the enhancement of a disability, it has no application in fatal cases or in cases where only health care benefits are payable.

The employer's representatives argued that the interpretation of Section 39(1)(e) found in policy item #114.40 yields incongruous results. If the worker had survived the ruptured aneurysm with severe handicaps, the employer would have been entitled to relief. However, because the worker died, the employer is not entitled to relief.

Moreover, the employer's representatives argued that the words "disabled" or "disabled from" are interpreted quite broadly in other sections of the *Rehabilitation Services and Claims Manual*. For example, the policies concerning Section 6 of the *Act* which sets out the conditions for compensation in industrial disease cases interpret the words "disabled from" as simply meaning "unable to." This interpretation covers a wide range of situations. It covers situations in which workers cannot go back to work because of the physical consequences of the disease they contracted, or, if the disease is infectious, because they must be isolated for the protection of other workers, or because the disease results in death.

Finally, the employer's representatives submitted that there are grounds for relieving the employer of the costs of the fatality for experience rating purposes. According to policy item #115.30, all acceptable claims coded to a particular employer are generally counted for experience rating purposes. The policy excludes, however, some types of claim costs. For example, it excludes "costs from accident substantially due to personal illness, e.g. epilepsy." The employer's representatives suggested that the worker's death from a ruptured aneurysm fits into the "illness" category on the basis that Dr. E's Autopsy Report of October 26, 1988 contains evidence of hemorrhage from the aneurysm prior to its rupture.

In a letter dated October 23, 1993, the claims adjudicator reiterated that the governors' published policies excludes relief of costs under Section 39(1)(e) in the case of fatalities. But he also stated that, even if Section 39(1)(e) applied to fatal cases, he would still have difficulty relieving the employer of costs because of the nature of the particular claim involved. In his opinion, the aneurysm was not "a pre-existing disability or a *significant underlying condition* as no one was aware of its existence prior to [the worker's] death (emphasis added)."

The claims adjudicator also ruled out relief of costs in accordance with policy item #115.30. He disputed the contention that Dr. E's report provides evidence of hemorrhage from the aneurysm prior to its rupture, pointing out that the report only raises this as a possibility. The claims adjudicator concluded that the aneurysm could not be considered a "personal illness" and, therefore, the costs of the claim must be counted for experience rating purposes.

In sum, according to the October 25, 1993 decision letter, the employer is not entitled to relief of costs on any footing because: death cannot be characterized as an enhanced disability within the meaning of Section 39(1)(e); an asymptomatic aneurysm cannot be characterized as a pre-existing disability or condition within the meaning of that provision; an asymptomatic aneurysm cannot be characterized as a personal illness triggering the application of the exceptions set out in policy item #115.30.

The employer's representatives requested a Managerial Review of the October 25, 1993 decision. The arguments presented in their November 24, 1993 submission are substantially the same as the arguments made in their October 1, 1993 submission to the claims adjudicator. In response to the claims adjudicator's finding that the aneurysm was not "a pre-existing disability or a significant underlying condition," the employer's representatives argued that Section 39(1)(e) does not require that there be a pre-existing disability and the congenital defect in the worker's intracranial wall was very significant. With respect to the applicability of policy item #115.30, the employer's representatives argued that the absence of symptoms does not mean that there was no illness. Many illnesses exist without obvious symptoms.

In a letter dated December 14, 1993, the manager, Disability Awards, upheld the claims adjudicator's decision without providing additional reasons.

By letter dated January 13, 1994, the employer's representatives signified to the Appeal Division the employer's intent to appeal the manager's decision. The Notice of Appeal dated March 8, 1994, states that the decision is wrong because policy item #114.40 contravenes Section 39(1)(e) of the *Act* and because it defines "illness" improperly with reference to policy item #115.30.

In a letter dated March 14, 1994, addressed to the Appeal Division, the employer's representatives presented additional arguments supportive of the position that relief of costs is warranted in the case of fatalities. They referred to the 1966 Royal Commission recommendations regarding the enactment of a second accident fund, pointing out that Mr. Justice Tysoe had favoured a wording that would allow relief of costs in the case of fatalities. They also submitted that Decision No. 271, *Workers' Compensation Reporter*, Vol. 4, p. 10 which formed the basis of policy item #114.40 did not itself rule out relief of costs in the case of fatalities but only explicitly ruled out relief of costs where medical aid only is payable.

On whether the aneurysm could be viewed as a personal illness, the employer's representatives quoted Dr. F in the March 10, 1994 report:

> There is ample pathological evidence that the berry aneurysm was in the process of developing prior to the work event.

On the merits of cost relief in this particular case, the employer's representatives also referred to Dr. F's report which stated:

> There is no doubt whatsoever that the pre-existing condition enhanced the severity of the disability; in the absence of the pre-existing condition, no disability would have been incurred.

The employer's representatives asserted that disqualifying an application for relief under Section 39(1)(e) because the worker died rather than being incapacitated, does not seem in keeping with the objectives of the *Act*.

The employer's representatives concluded their submission by requesting that the employer be relieved of at least 90% of the widow's pension reserve, in accordance with Section 39(1)(e), and that he be fully relieved of experience-rated charges, in accordance with policy item #115.30.

As a point of clarification, relief of costs under Section 39(1)(e) entails relief of costs not only for the individual employer, but also for his class and subclass since the costs are charged to industry as a whole. On the other hand, the exclusion of certain types of costs under item #115.30 only relieves the individual employer of possible demerit points for the purpose of experience rating. The costs of the claim are still charged to the employer's class or subclass and affect, therefore (although indirectly), the assessments levied on the employer. In fact, where the employer forms much of the class (or subclass) the effect may be substantial.

Analysis

Subsections 96(6) and 96(6.1) of the *Act* implicitly provide employers with the right to appeal relief of costs decisions to the Appeal Division. According to these provisions, the grounds for appeal are an error of law or fact or a contravention of a published policy of the governors.

In the appeal before me, both an error of law and a contravention of a published governors' policy are alleged. Specifically, it is alleged that policy item #114.40 misapplies the terms of Section 39(1)(e) of the *Act*. It is also alleged that the claims adjudicator's and manager's decisions contravened policy item #115.30.

Therefore, the issues before me are twofold:

1. Is policy item #114.40 inconsistent with the *Act*, and

2. Did the claims adjudicator's decision of October 25, 1993 and the manager's decision of December 14, 1993 contravene policy item #115.30?

Policy Item #114.40, in Light of Section 39(1)(e) of the *Act*

Subsection 39(1)(e) was enacted in 1968. The wording of that section has remained unchanged over the years. The provision states:

> **39.** (1) For the purpose of creating and maintaining an adequate accident fund, the board shall every year assess and levy on and collect from independent operators and employers in each class, by assessment rated on the payroll, or by assessment rated on a unit of production, or in a manner the board considers proper, sufficient funds, according to an estimate to be made by the board, but the established practice of assessment and levy shall be varied only with the approval of the Lieutenant governor in Council, to
>
> > (e) provide and maintain a reserve for payment of that portion of the disability enhanced by reason of a pre-existing disease, condition or disability.

The enactment of Section 39(1)(e) was discussed in Mr. Justice Tysoe's 1966 Report. Up until 1966, Section 39(1)(d) [Section 34(1)(d) in 1966] had been considered broad enough to allow the Board to relieve employers in a class of the total cost of a second accident occurring to a worker already suffering from an injury. This provision goes back to 1916 and has, ever since, instructed the Board to raise sufficient funds to:

> provide a reserve to be used to meet the loss arising from a disaster or other circumstance which the board considers would unfairly burden the employers in a class;

By 1966, questions were being raised as to whether the Board could legitimately set up and operate a second accident fund under this provision. It was felt that a separate provision explicitly conferring this power upon the Board was needed.

In his 1966 report, Mr. Justice Tysoe discussed the need for such a provision and considered alternative ways of wording same. Mr. Justice Tysoe came to the conclusion that the Board should be given the express power to set up and operate a second accident fund which he preferred to call an enhancement fund. He described that fund as "a means of redistributing the cost of compensation amongst employers which has no effect on the amount of compensation receivable by a worker. He believed the principle underlying such a fund to be sound, namely that employers should be encouraged to hire workers who have some pre-existing impairment including a pre-existing condition. He gave various examples, where the disabling effect of a work-caused injury is enlarged or "enhanced" over and above what it would be if there were no pre-existing impairment. He gave the classic examples of the loss of an eye to a man who has already lost one eye and the loss of hand to a man who has no fingers on his other hand. These examples illustrate cases of visible pre-existing impairment. But Mr. Justice Tysoe did not limit his discussion to those kinds of impairment. He also considered the possible enhancement of a disability due to some less visible impairment, such as a worker hurting

his toe but consequently losing his whole leg as a result of some vascular insufficiency due to diabetes. Mr. Justice Tysoe treated the possibility of enhancement of a disability as just as real where the pre-existing impairment is not visible as it is otherwise. Interestingly, addressing the same issue of possible enhancement of a disability, Mr. Justice Sloan had already suggested in 1952 that this concept includes enhancement due to pre-existing impairment that may not be readily noticed such as a "bad back."

There is little doubt that in discussing the enactment of a provision authorizing the Board to set up and operate an enhancement fund, Mr. Justice Tysoe analyzed the concept of enhancement of a disability in very broad terms. As I just indicated, he considered that the pre-existing impairment causing such enhancement could consist of a visible disability or a less visible disease or condition. He also thought that the wording of the provision should clearly cover fatalities and, for that reason, he expressed reservations about the wording of the provisions in force at the time in Alberta and Manitoba and favoured broader wording.

The Alberta provision stated:

> . . . to provide and maintain a reserve for the payment of such part of the cost of claims of workmen suffering enhanced disabilities because of similar or other disabilities previously suffered as, in the opinion of the Board, was due to such previous disabilities.

The Manitoba provision stated:

> enhanced disabilities—to provide a fund to be used to meet that part of the cost of claims of workmen suffering enhanced disabilities, because of similar or other disabilities previously suffered, as, in the opinion of the board, is due to the previous disabilities.

While clearly in favour of the enactment of an "enhancement fund" provision, Mr. Justice Tysoe rejected such wording and explained:

> In my view the Board should be given the express power that it seeks. I am not sure, however, that the Alberta section is broad enough in its application. It makes no mention of death cases, and it says nothing about the workmen with diabetes, vascular insufficiency, and osteomyelitis, to which Dr. G made reference in his evidence.
>
> The fact of the matter is that I have found it difficult to draft a satisfactory section in specific terms. The best I have been able to come up with is the following:—

> "To provide and maintain a fund to be used to meet and pay such part of the cost of the claims of workmen or their dependents arising out of injuries to workmen which have a greater detrimental effect because of a pre-existing disability or condition than would otherwise be the case as, in the opinion of the Board, ought to be borne by industry as a whole rather than by an individual employer or a class or subclass of employees."

I am not wedded to this wording and perhaps someone else can do better. Of course, no matter how carefully the section may be framed, the spirit in which it is administered will be of the utmost importance.

I RECOMMEND that the request of the Board be granted and that a new subsection be included in section 34 of the *Act* which has the effect of expressly empowering the Board to charge industry as a whole with such portion of the compensation costs in individual cases as, in line with what I have said above, it ought to bear. My preference is for leaving the Board with a fairly wide discretion, for the cases to which the new subsection might apply would not fit into any set mould. For instance, in one instance the increase in the disabling effect of a current injury because of a pre-existing disability or condition may be substantial and in another trivial. I do not think the Board should apply the subsection to the latter type of case. There must be some minimum increase in the disabling effect or in the length of time before recovery before the subsection is put into operation by the Board. This is a matter that I leave to the Board's judgment.

The money for the fund will have to be supplied by industry as a whole. As I have earlier said, the exercise of the power given to the Board will not increase the compensation cost of any case but will simply redistribute that cost.

The employer's representatives are, therefore, correct in pointing out that Mr. Justice Tysoe favoured the enactment of a provision with very broad application. The fact remains, however, that the wording proposed by Mr. Justice Tysoe was not adopted. The wording of the provision enacted in 1968 was more suggestive of the wording in the 1966 Alberta and Manitoba provisions, although in one respect it definitely incorporated Mr. Justice Tysoe's broader recommendations. It contemplated (as it still does) enhancement "by reason of a pre-existing disease, condition or disability," whereas the Alberta and Manitoba provisions contemplated enhancement solely due to pre-existing disabilities.

Commission reports are helpful tools in the interpretation of statutes, but they are not determinative. Moreover, where there are differences in the wording between recommendations appearing in the reports and the resulting enactment, one must use particular caution in relying on the reports as guides to statutory interpretation. Because of the difference in wording between the provision enacted in 1968 and the version recommended by Mr. Justice Tysoe, it would be wrong to equate the intent behind the enacted provision with Mr. Justice Tysoe's views on the matter. Quite the contrary, the legislature's choice of different wording may be seen as indicating an intent to distance itself from Mr. Justice Tysoe's views. I have concluded, therefore, that Mr. Justice Tysoe's discussions pertaining to a second accident fund are only of limited use in addressing the question of, whether the language of Section 39(1)(e) can support policy item #114.40. Answering that question requires focusing on the wording of the provision, in light of the rest of the statute. The statute itself does not define the word "disability."

There is an obvious flaw in the construction of Section 39(1)(e). The provision states "provide and maintain a reserve for *payment of that portion of the disability* . . . (emphasis added)." Payment usually involves payment of costs or prices — not payment of a disability (or a portion thereof)! The most logical way to read Section 39(1)(e) is, therefore, to read it as saying, "payment (of the costs) of that portion of the disability . . . ." I note that the 1966 Alberta provision mentioned "payment of such part of the cost of claims of workmen suffering enhanced disabilities . . ." while the 1966 Manitoba provision mentioned "a fund to be used to meet that part of the cost of claims of workmen suffering enhanced disabilities, . . ." Thus, grammatically, these two provisions were clearer than the provision enacted in B.C.

It is also noteworthy that the Alberta and Manitoba provisions referred to "workmen suffering enhanced disabilities." Use of this phrase explains Mr. Justice Tysoe's concern that those provisions could be interpreted as excluding fatalities. The phrase "workmen suffering enhanced disabilities" strongly suggests workmen who are alive.

The enacted provision in B.C. did not adopt the phrase "workmen suffering enhanced disabilities"; instead it used the phrase "that portion of the disability enhanced . . . ." This phrase too suggests living workers, although perhaps not quite as strongly as the phrase appearing in the Alberta and Manitoba provisions. The words "of that portion of the disability enhanced by reason of . . ." convey the notion that the affected individual is alive. One normally associates the word "disability" with some incapacity experienced by a living person. The possibility that Section 39(1)(e) could be read so as to extend to fatalities, comes as an after-thought, only upon considering some of the implications of excluding fatalities. Having regard to the words used in Section 39(1)(e), the interpretation found in policy #114.40 is, therefore, certainly viable.

To attach some meaning to the words used in Section 39(1)(e), it is not enough though to examine these words only in the context of the provision itself. One must look at the words also in the context of other statutory provisions. Use of the word “disability” to include fatalities in the rest of the statute would undermine the interpretation of Section 39(1)(e) found in policy item #114.40. The question arises, therefore, as to how the other statutory provisions use that word. I have been unable to detect a clear pattern in that regard. Several provisions seem to distinguish between the concepts of a disability (or disablement) and death [for example, Sections 5(3), 6(1)(a), 10, 17 and 35(3)]. Other provisions use the words “disablement” and “disability” broadly so as to cover fatalities [for example, Section 11 and arguably Sections 6(2) and (3)]; Section 11 refers to “a disability caused by industrial disease, personal injury or death . . .” However, an unusual use of the word “disability:” (or “disablement”) by a few statutory provisions cannot invalidate the literal meaning which policy #114.40 attaches to this word, particularly since other statutory provisions also use the word literally.

I conclude that the wording of Section 39(1)(e) lends support to the interpretation of the provision found in policy item #114.40. I note that the policy offers no rationale as to why relief of costs excludes fatalities. Also part of the governors’ published policy, Decision No. 271 which specifically precludes the application of Section 39(1)(e) to cases where only medical aid benefits are payable is silent on the application of the provision to fatalities and, therefore, does not suggest possible reasons for excluding fatalities. It might be desirable for the policies to articulate such reasons. If the only reason for excluding fatalities is the wording of the provision, then the governors might consider drawing the legislature’s attention to the incongruous result pointed out by the employer’s representatives, namely, that an employer may get relief if the injured worker remains in a coma but not if he dies. The logic behind this result is not apparent. Further, I am uneasy about the fact that some governors’ policies use the words “disability” and “disablement” more broadly than others. Consistent use of language is a desirable objective which the policies should strive to ensure.

Possible Contravention of Policy Item #115.30

The concept of contravention of the governors’ published policy must be analyzed with care. On the one hand, the *Act* contemplates redetermination of decisions on the basis of contravention of policy. Section 96(4) allows the president of the Board to refer a finding of the Review Board to the Appeal Division for redetermination on the basis of contravention of a published policy of the governors; and Sections 96(6) and (6.1) confer upon employers the right to appeal certain Board decisions to the Appeal Division on the grounds of such contravention. On the other hand, policies are merely guidelines that indicate relevant considerations and criteria; they are not binding on decision-makers. If policy guidelines were absolutely binding, decision-makers could be faulted for fettering their discretion. Such fettering would amount to an error of law and, therefore, be reviewable.

In other words, the concept of contravention of a governors' policy cannot be interpreted to mean that a deviation from a governors' policy will never be tolerated. Not only would such an interpretation be simplistic but it would also be inconsistent with the basic common law principle against the fettering of discretionary powers. The principle embedded in Section 99 of the *Act* that the Board shall give decisions according to the merits and justice of the case lends further support to the notion that the policies cannot be absolutely binding on decision-makers.

To my mind, a contravention of a published policy involves a failure to consider the policy as opposed to a failure to reach the end results contained in the policy. Policies should be viewed as providing the starting point of the analysis much more so than as providing conclusive answers. From this perspective, examples of contraventions of policies would include rendering a decision without turning one's mind to the relevant policy; that would occur if, for example, the decision-maker did not know that a relevant policy existed. Examples of contraventions would also include departing from the relevant policy without giving reasons, even if one shows some awareness of the policy.

In light of the above, the question arises as to whether the claims adjudicator and the manager contravened policy item #115.30 in refusing to grant the employer relief for experience rating purposes.

Section 42 of the *Act* confers upon the Board the discretion to adopt a system of experience rating. Where experience rating is used, the rate of assessment payable by an employer may vary above or below the standard rate applicable to the subclass or rate for groups, mainly according to the claims cost experience of the employer.

Policy item #115.30 states the general rule that all acceptable claims coded to a particular employer are counted for experience rating purposes except some types of claims costs. It then proceeds to list these costs. One such type are "costs from accidents substantially due to personal illness, e.g. epilepsy."

According to the employers' representatives, the decisions by the claims adjudicator and manager contravened the governors' policy because the costs of the claim at issue were not excluded as "costs from accidents substantially due to personal illness." I cannot accept that argument.

The claims adjudicator and the manager considered whether, in the circumstances of this case, the worker's underlying condition (namely, the aneurysm) constituted a personal illness and reached the conclusion that it did not. The claims adjudicator specifically discussed medical evidence regarding the possibility of hemorrhage from the aneurysm prior to the work event that triggered its rupture and decided that the evidence does not necessarily support viewing the aneurysm as an illness.

Therefore, when considered together, the decisions by the claims adjudicator and the manager cannot be characterized as contravening a published governors' policy. Neither were these decisions rendered in ignorance of a possibly relevant policy since they both addressed the issue raised by the employers' representatives. Nor can they be characterized as departing from the policy without attempting to provide some reasons.

In conclusion, the language of Section 39(1)(e) supports policy item #114.40. Moreover, the decisions by the claims adjudicator and manager are not in contravention of the governors' published policy, more specifically, policy item #115.30. I deny, therefore, the employer's appeal on both counts. Neither can it be said that the denial to grant relief to the employer and his class was based upon an error of law nor can it be said that the denial to grant relief to the employer for experience rating purposes was in contravention of the relevant governors' published policy.

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

WORKERS' COMPENSATION
REPORTER

Decision of the Appeal Division

Number: 94-1375
Date: November 24, 1994
Panel: Lorna A. Pawluk
Subject: Section 23(5) — Cosmetic Disfigurement and Impairment of Earning Capacity

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The worker appeals a Review Board finding dated July 7, 1994. The issue is whether he is entitled to an award for disfigurement under Section 23(5) of the *Act*.

On May 11, 1984, the worker suffered severe fractures to both of his legs and was left with a permanent functional impairment, now assessed at 16.25%. Surgery has been performed on the worker's legs some 25 times; there is no doubt that his legs are seriously disfigured. The claims adjudicator denied the claim for disfigurement since the worker's scars would be covered by long pants and therefore not be visible. The worker then appealed this to the Review Board which also denied the claim.

The worker told the Review Board that his disfigurement has affected his earning capacity. He said that, in the past, people have expressed shock upon seeing his legs and have told him that while they were aware of his disability, they were unaware of its extent until they saw his scars. His concerns arise primarily because he lives in a small community where it is difficult to maintain anonymity and because his disfigurement, though normally concealed by long pants, is sometimes visible at work. He elaborated further by explaining that his doctors require him to swim as frequently as possible to maintain the condition of his legs and that the only place he can swim is the community pool. He also plays softball and coaches his son's baseball team, which means that sometimes he wears shorts to the games. He concedes that for most of his employment, he is required to wear pants only, but when fishing, he can wear shorts and frequently does when it is hot, as do other crew members. (He admitted that he is supposed to avoid strong sun because of the sensitivity of the scar tissue, but sometimes it is simply too hot.) This is not true when he works in the bush and must wear pants for protective reasons; at the time of the assessment by the claims adjudicator, in Memo #161, he was working in the bush.

He feels very strongly that potential employers would have seen his legs and that this affects his job prospects. His last employer seemed shocked and surprised by the severity of the scar and told the worker that his legs looked "terrible." He said that if he

had known the extent of the injuries prior to hiring, he would not have hired the worker. While the employer said it was now clear that the worker could perform the duties the disfigurement would have created sufficient doubt in the worker's abilities to prevent him from being hired in the first place. The worker stated that while no one has ever said it to him directly, he believes that even those who know him well do not hire him because the scarring leads them to believe he cannot perform all aspects of a job, especially those in the bush.

The Review Board agreed with the claims adjudicator, that it would be speculative to conclude there would be a loss of earnings or employment directly related to the permanent disability or permanent disfigurement:

> *There is no evidence before the panel that the presence of this disfigurement has directly affected [the worker's] ability to earn a living in his pre-injury occupations since the date of the injury*. While there is evidence that he has suffered periods of temporary total and temporary partial disability associated with his injuries, and there is evidence that the need for treatment has interfered with his ability to retain permanent employment, *there is no evidence that the permanent disfigurement has impaired his earning capacity from the date of injury to the present*. . . .
>
> [The worker] receives a permanent partial disability award for the permanent functional impairment that is present. He was given this award in January 1993. He does not receive a loss of earnings award. The permanent functional impairment is judged to not prevent him from performing his pre-injury occupations. As conceded by the worker, he does wear long pants while performing most of his jobs. While presenting for job interviews and in the presence of prospective employers the deformity would not normally be identified. *Given that there is no history of either: a loss of earnings, or a loss of employment directly relatable to his permanent disability or permanent disfigurement, the panel must deny the appeal*.
>
> (emphasis added)

The Review Board thought that the worker's concerns about small town living and his use of the public recreation facilities were speculative in their effect on his ability to earn a living. They found that his concerns arising from the discussion with his former employer missed the point since the worker had a job at the time of the conversation and "the employer was talking about the seriousness of the injuries, in general, of which the disfigurement was only one element."

On behalf of the worker, the workers' adviser argued that the disfigurement is visible since the worker wears shorts on certain fishing jobs and must share shower facilities and bunkhouses when in forestry camps. His disfigurement is also seen when he uses the community swimming pool. The disfigurement meets all three criteria of item 43.10: it is permanent, serious and, over the long run, affects the worker's earning capacity. The fact that the worker's income is not being affected today is not relevant as policy is concerned with the long-term impact.

Analysis and Reasons

Section 23(5) of the *Act* sets out an injured worker's entitlement for physical disfigurement:

> Where the worker has suffered a serious and permanent disfigurement which the board considers is capable of impairing his earning capacity, a lump sum in compensation may be paid, although the amount the worker was earning before the injury has not been diminished.

Section 43.10 of the *Manual* sets out relevant governors' policy and begins with the requirement that the disfigurement be serious and permanent. It also confirms the economic component of a disfigurement award, by emphasizing that even though disfigurement awards are concerned with the body's appearance and not loss of function, they are nevertheless concerned with a loss of earning capacity.

The *Act* requires the Board to determine whether the disfigurement "is capable of impairing" a worker's earning capacity. The Board cannot be arbitrary in its determination of the question under Section 23(5), but rather must be reasonable in its approach. (See *R. ex. re. Wilson* v. *Holmes* [1931] 3 D.L.R. 218 (Sask C.A.) where the court considered the limits of legislation which permitted a question to be determined "in the opinion of" certain officials. In such a case, the court did "not think it intended that such an opinion should be made arbitrarily, but upon reasonable grounds.") Section 43.10 of the *Manual* outlines some factors that can be taken into account:

> The disfigurement must be one that the Board considers capable of impairing the worker's earning capacity. This is normally assumed in cases of the head, neck and hands. In other cases, a decision must be made which has regard to the age and occupation of the worker, the visibility and extent of the disfigurement and any other relevant circumstances. Since Section 23(5) states that the amount the worker is currently earning does not have to be diminished, this requirement is concerned with the worker's long-term earning capacity.

Care must also be taken to ensure that the worker is not compensated twice for the same injury so that the disfigurement award cannot cover something directly covered by a P.P.D. award.

This worker, now 33 years old, has been left with a serious permanent scar covering the front and inside of both legs, from the knee down to his ankle. Scarring has resulted from the incision marks, and indentations have resulted from muscle atrophy. The scars are discoloured and noticeable and anyone seeing these scars for the first time would wonder how they affect this worker's life. But the effect on his life is not the test under Section 23(5), rather it is the impact on his earning capacity. This worker believes that other persons, after seeing the scarring, doubt his ability to adequately perform his job, a belief reinforced by the statement of a former employer that the legs "look terrible." The worker also says that he cannot hide his disfigurement from potential employers in the small town where he lives, and that his scarring is visible in the bush when he is sharing bunkhouse facilities, and when he is fishing and it is too hot to wear long pants. As he told the Review Board, he believes that this means potential employers will be aware of his disfigurement and will be reluctant to hire him. He is not, however, aware of having lost any jobs because of the scarring and cannot demonstrate a loss of earnings as a result of the disfigurement.

However, Section 23(5) simply requires that the disfigurement "be capable" of impairing earning capacity; proof of an actual loss of income is not called for, as in the determination of a loss of earnings pension. This is implied by use of "capable," defined this way in *The Compact Edition of the Oxford English Dictionary*:

> **Capable.** Able to be affected by; of a nature, or in a condition to allow or admit of; admitting, susceptible.

In other words, if the worker's earning capacity is susceptible to impairment because of the disfigurement, Section 23(5) authorizes the payment of an award. It need not be actually affected. There is, of course, a fine line between what is "capable" of occurring and speculation, but it is a distinction drawn by Board policy, in keeping with the requirements of Section 23(5). Certainly, the past record of the worker is one factor to be considered and where there has been an actual impact, the economic aspect of Section 23(5) has been met. But this is not the only factor that can be considered. I believe that the Review Board overemphasized the need to show an actual loss of income or employment as a result of the disfigurement and failed to properly consider the future impact.

There are several aspects of this case that lead me to think that this worker's earning capacity could be adversely affected by his disfigurement. This is not a case of a worker complaining of a minor and faint scar; rather, he is claiming that his earning capacity is affected by extensive scarring and disfigurement. While not ordinarily visible to

prospective employers, as for example at a job interview, the disfigurement is nonetheless visible and could be significant in this man's working environment. The type of work which he carries out, in industries requiring physical strength, places a premium on physical conditioning and the extent of the disfigurement would naturally lead an observer to wonder whether his legs could withstand the physical demands of his job. Where this worker resides, in a small town where many prospective employers also reside, and where he works, on fishing vessels where he sometimes wears shorts or in bush camps where he sometimes lives in close quarters with co-workers, could also affect his ability to secure work, as the knowledge of his disfigurement spreads throughout the community. Because the disfigurement could make him less employable, it is also capable of impairing his earning capacity. He thus meets all the criteria of Section 23(5).

For these reasons, the worker's appeal is allowed. The file shall be referred to Disability Awards for determination of the amount of the award according to item #43.20 of the *Manual*.

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

WORKERS' COMPENSATION
REPORTER

Decision of the Appeal Division

Number: 94-1233
Date: October 17, 1994
Panel: Cassandra Kobayashi, Paul Petrie, Thomas Kemsley
Subject: Section 96(4) — Referral

The vice-president of Compensation Services of the Workers' Compensation Board referred the Review Board findings of December 31, 1993 to the Appeal Division under Section 96(4) of the *Workers Compensation Act*. The Review Board had allowed the worker's appeal, finding he was entitled to a 100% loss of earnings pension "unless and until the board undertakes further rehabilitation measures which would reduce or eliminate [the worker's] loss of earnings."

Section 96(4) provides:

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

The vice-president considers the Review Board finding contradicts the policies of the governors. He points to published decisions of the former commissioners rejecting the calculation of pensions based on actual loss of earnings, in favour of pensions based on a one-time projection of a worker's future loss. Reference is made to reviews of the projected loss of earnings, and the policy prohibiting temporary loss of earnings pensions in #40.00 of the *Rehabilitation Services and Claims Manual.*

Background

On January 11, 1989, while working as a steel fabricator, the worker fractured his left index finger when he hit it with a hammer. The worker is right-handed, and at the time of injury was age 48.

Wage loss was paid until April 23, 1989. The worker returned to the workforce in 1989 until a non-compensable right ankle injury in September 1989. He was on wage indemnity benefits through his employer until January 1990 when further surgery was

performed on the left index finger to attempt to graft the ununited fracture. In October 1990, Dr. H cut out the area of non-union and fused the joint. The worker was referred to the Board rehabilitation clinic where he attended from December 5, 1990 to March 28, 1991. On discharge, Dr. I said the worker had full range of motion of the left index finger, sensation was intact, strength in the left hand was at least 70% of the right, and pinch power was equal on the left and right. Dr. I said the worker could return to his pre-injury employment. Wage-loss benefits were paid from January 19, 1990 to March 31, 1991.

While the worker was in the clinic, the Board rehabilitation consultant had said that the duties of a steel fabricator involved “a fair bit of lifting which could be considered heavy, up to 100 pounds,” (Memo #47, February 14, 1991). A team meeting on April 9, 1991 concluded there were “no medical contraindications to preclude the claimant to return to pre-injury work activity on a full-time basis,” (Memo #54, April 16, 1991).

Based on the medical opinion that the worker could return to his pre-injury occupation, the rehabilitation consultant offered the worker up to eight weeks of job search allowance (Memo #56, April 18, 1991). The letter dated April 18, 1991 said that Section 16 of the *Workers Compensation Act* provides that rehabilitation allowances are discretionary, and if he is unable to locate a job within the eight weeks, no further benefits would be paid. This decision was not appealed.

The worker found employment as a supervisor. According to the letters from the new employer on file dated July 6, 1992 and September 30, 1993, they had two major projects at the time, employing between 20 and 80 shop workers. In December 1991, their projects were completed, and they asked the worker to do fabrication. Even when jobs were specially selected for the worker, he was unable to work reliably “because the strength of his hand was so unpredictable that he was a danger not only to himself but other workers as well.” The vice-president of the new employer also states that “in most shops like ourselves, the supervisors must be able to perform the work themselves, when the shop work slows down . . . It would be extremely difficult for him to get a supervisory position with another employer for the same reason.” According to Memo #76, December 15, 1993, the worker said he was hired initially because he is a close friend of the owner. That employment terminated in June 1992.

Following a permanent functional impairment examination on November 28, 1991, the disability awards medical advisor found 1.04% of total impairment (Memo #64, November 28, 1991). The disability awards officer determined the disability including subjective complaints was 1.2% of total. During a manager’s review in May 1992, the disability awards medical advisor said “some consideration could be given to the weakness which the worker demonstrates which would include the subjective problem in the wrist.” The manager notes “significant weakness” in the left hand — 35 kilograms grip strength compared to 61 on the right; and 3 kilograms pinch grip compared to 8.25

on the right. She recommended an additional 1%, plus age adaptability for a total of 2.33%. No further consideration was given to the possibility of the worker not being able to do the fabricating work, even though the rehabilitation consultant had previously said the worker would need sufficient strength to handle "heavy" work.

Dr. I reviewed the file. He said that he considered the worker able to return to steel fabricating "because of the performance of the worker in the sheet metal department of the Board which was not bothering him and he performed well in it," (Memo #70, November 26, 1992). That memo also acknowledges Dr. H's opinion of April 1991 stating the worker could not return to fabricating because of the finger shortening and loss of the distal interphalangeal joint.

Following an oral hearing on July 5, 1993, the Review Board vice-chair requested the rehabilitation consultant provide information about the availability of supervisory positions for a worker unable to do the actual work of a fabricator. Memo #76 dated December 15, 1993 describes the worker's experience including 36 years experience in steel fabrication, and eight years as a production supervisor before the recession of 1982. The rehabilitation consultant spoke to a business agent of the Iron Workers Union, who said that "things were pretty active in the industry" in the spring of 1992, and the worker would "stand a pretty good chance" of finding supervisory work, but now they were generally on a "down-swing."

Two union shops said supervisors must hold formal B.C. trade qualifications. The rehabilitation consultant confirmed that in his experience this was true. The worker said he does not have those qualifications. The three smaller non-union shops who gave information said they employ one supervisor each, and have had no turnover in the supervisory positions for many years now. They also said they could not guarantee the supervisors would not be required to do hands-on work as required. The rehabilitation consultant concluded work as a supervisor, not including actual fabrication, was not reasonably available in the spring of 1992.

The Review Board said the worker testified that he experienced unbearable pain from maintaining lifts of very heavy objects up to 100 pounds for any significant period of time. The Review Board concluded the worker could not reasonably be expected to return to his pre-injury work as a steel fabricator. They also found the job of supervisor was suitable. Based on the rehabilitation consultant's report they found that supervisory work "was not reasonably available to him *at the time that his pension was reconsidered and recalculated by the Board in the Spring of 1992*," (emphasis added). They awarded a 100% loss of earnings pension "unless and until the Board undertakes further rehabilitation measures" to reduce or eliminate the loss of earnings.

Law and Policy

Section 23(1) of the *Workers Compensation Act* provides:

> Where permanent partial disability results from the injury, the impairment of earning capacity shall be estimated from the nature and degree of the injury, and the compensation shall be a periodic payment to the injured worker of a sum equal to 75% of the estimated loss of average earnings resulting from the impairment, and shall be payable during the lifetime of the worker or in another manner the board determines.

Section 23(3) provides:

> Where the board considers it more equitable, it may award compensation for permanent disability having regard to the difference between the average weekly earnings of the worker before the injury and the average amount which he is earning or is able to earn in some suitable occupation after the injury, and the compensation shall be a periodic payment of 75% of the difference, and regard shall be had to the worker's fitness to continue in the occupation in which he was injured or to adapt himself to some other suitable employment or business.

The governors' policy in #40.00 and following of the *Rehabilitation Services and Claims Manual* addresses the calculation of loss of earnings pensions. The established average earnings prior to the injury (up to the maximum) are compared to suitable and available jobs maximizing the worker's earnings. The possible pension is calculated as 75% of the difference. The policy provides the earnings in the suitable and reasonably available jobs are calculated "as at the time of the injury," (see #40.10, "Assessment Formula").

The policy describes in various ways how the availability of a job should be considered (emphasis added):

- suitable occupations that the claimant could be expected to undertake *over the long-term future*. (#40.10)

- the assessment on a projected loss of earnings basis aims to predict the worker's actual loss of earnings *over the future*. (#40.10)

- the phrase "available jobs" does not mean any job position in which there are vacancies. An available job means one reasonably available to the claimant *in the long run*. For example, a city may have several theatres, and there may be occasional job vacancies for the position of theatre usher; but if there are always numerous better qualified

applicants and the realities are that a worker with the particular disability is *not likely to obtain such a job*, that is not a reasonably available job. (#40.12)

- Where the worker is doing his or her best to maximize earnings and is following the advice of the rehabilitation consultant, and is presenting himself or herself in good faith to obtain a job at the highest level of earnings among the jobs that the worker is fit to undertake, then the earnings level in the job that is actually obtained is generally the earnings level that should be taken, unless there is evidence that this position is transitory and that jobs at another level of earnings will be available to the worker *in the near future*.
- Regard may be had to other jobs than the present one with the same employer to which the worker *might in future progress*. . . . On the other hand, it would not be fair to assume that a claimant will receive all possible promotions that might theoretically be open. The Board is only concerned with jobs that are, *in practice, reasonably available*. Thus, the Board will, in general, only have regard to higher paying jobs which a person in the claimant's present job would ordinarily be expected to obtain. (#40.12)
- A reasonably available job must be one that the worker is fit to undertake, and which would not involve adverse health consequences either immediately *or in the long run* compared with other jobs. (#40.12)
- Where a suitable job is reasonably available *over the long term*, it is taken into consideration even though it is not reasonably available at the time of assessment because of general economic conditions. (#40.12)
- The hourly rate, the stability of the job and susceptibility to economic fluctuations should all be considered to determine "the better-paying job *in the long run*." (#40.12)

Error of Law and Contravention of a Published Policy

The Review Board finding contains an error of law. Section 23(3) requires that in awarding compensation on a loss of earnings basis, the Board consider "the average amount he is earning or is able to earn in some suitable occupation after the injury" and "regard shall be had to the worker's fitness to continue in the occupation in which he

was injured or to adapt himself to some other suitable employment or business." To award a 100% loss of earnings pension, the Review Board would have had to find the worker was unemployable.

We have considered the representative's argument that the Review Board did find the worker unemployable. We find no such statement in the findings, and can make no inference supporting this conclusion. The Review Board appears to have rejected both fabrication and supervision and then awarded the 100% loss of earnings pension without regard to other suitable occupations as required by Section 23(3).

The Review Board finding also contravenes the published policy of the governors in determining entitlement based on the availability of supervisory work "at the time that his pension was reconsidered and recalculated by the Board, in the Spring of 1992." The policies require a suitable occupation be available over a period into the future — the availability at the time of assessment is not determinative.

We have considered whether this policy is consistent with the legislation. Section 23(3) contemplates a comparison between the "average weekly earnings" before the injury, and "the *average* amount which he is earning or *is able to earn* in some suitable occupation after the injury," *(emphasis added)*. In addition, the section requires "regard shall be had to the worker's fitness to continue in the occupation in which he was injured or to adapt himself to some other suitable employment or occupation." The references to "average" and "is able to earn" suggest a projection of earnings, as does the reference to fitness to adapt to other employment. The legislation does not preclude use of the job and earnings to which the worker returns after the injury, but requires consideration of the worker's fitness to adapt himself to some other suitable employment or occupation. Insofar as the policies concur with this approach, they are consistent with the legislation.

The vice-president also referred to the policy in #40.00 against temporary loss of earnings pensions. The Review Board awarded the 100% loss of earnings pension "until" the Board concluded rehabilitation measures. Given our conclusion that the Review Board finding contravened the law and policy on loss of earnings pensions, it is not necessary to explore the issue of temporary loss of earnings pensions. We observe that the Review Board could not make any finding regarding entitlement to rehabilitation because there was no rehabilitation decision before them. Furthermore, the rehabilitation consultant's letter dated April 18, 1991 advised the worker he was entitled to only eight weeks of job search allowance regardless of the success of that job search, and the worker did not appeal that decision.

Redetermination of the Merits

Section 96(4) provides the appeal division "redetermine" the Review Board finding if there was an error of law or contravention of the published policy of the governors.

The panel finds that the information before the Review Board provides sufficient evidence that the work of fabricator was not suitable. Although the employer alleges the worker worked as a fabricator in 1989 after the injury, this was before the final surgery fusing the finger joint. The increased functional award for loss of left hand strength supports the worker's own description of his difficulties with fabrication. It is established that such work is categorized as "heavy."

We agree with the Review Board that the occupation of steel fabrication supervisor was suitable. The fact that the worker did this work for over a year lends support. While it was suitable, the supervisory work was not reasonably available — not only in the spring of 1992, but also into the foreseeable future. We accept the information provided by the rehabilitation consultant that union employers require B.C. certification for supervisors, and non-union employers have only one supervisor each, and very low turnover in that position. The evidence indicates that the smaller non-union shops cannot employ a full-time supervisor who would never be required to do hands-on fabrication during slower economic cycles to which the industry is regularly subject.

On the information before us, there is insufficient evidence to determine with confidence what occupations if any are both suitable and reasonably available to the worker. Therefore, we cannot determine loss of earnings entitlement under Section 23(3). This will have to be determined by the Board following the rehabilitation efforts which have already begun.

Summary

The Review Board finding contained an error of law and contravention of the policy of the governors in that it awarded a loss of earnings pension without regard to the worker's fitness to adapt himself to some other suitable employment or business as required by Section 23(3) of the *Act*. The Review Board did not find the worker was unemployable.

The Review Board finding contravened the published policies of the governors in finding the loss of earnings entitlement was based on the availability of a particular occupation at the time of assessment and without considering the future availability.

We find the occupation of steel fabricator is not suitable. The occupation of steel fabrication supervisor is suitable, but not reasonably available in the long term. There is insufficient information for this panel to determine if there is any loss of earnings. Therefore, the file will be returned to the Disability Awards Department to complete a loss of earnings assessment under Section 23(3). This will require the Disability Awards Department carry out an employability assessment to determine both suitable and available occupations for the worker in the long run. In the interim, consideration should be given to appropriate rehabilitation benefits in accordance with the governors' published policies.

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

Decision of the Appeal Division

Number: 94-1296
Date: October 31, 1994
Panel: Sonja Hadley
Subject: A Medical Decision

The worker appeals Review Board findings dated June 17, 1994. The Review Board denied the worker's appeal with respect to a decision by a medical appeals officer dated July 15, 1993. In that decision, the medical appeals officer determined that Dr. J had provided sufficient particulars to define the medical question in issue and that the worker would be referred to a Medical Review Panel for examination. This decision was in regard to the employer's appeal of a Appeal Division decision dated October 8, 1992 to a Medical Review Panel.

The Review Board determined that the Appeal Division had clearly made a medical decision accepting the medical condition of epicondylitis as related to the worker's activities as a machinist. They found that the Appeal Division's conclusion was based upon the medical opinions of Doctors K and L. The Review Board found that this was a diagnosis of the worker's condition and a decision as to the cause of his condition. They found the Appeal Division decision was a medical decision and appealable to a Medical Review Panel.

The worker submits that the Appeal Division decision was not a medical decision appealable to a Medical Review Panel. In a submission dated August 30, 1994, the worker's representative refers to his original submission to the Review Board dated December 17, 1993. He also states that the Review Board's analysis and application of policy is flawed in that the Review Board did not fully consider the full and complete policy. He states that they appear to have overlooked item 103.11B (3) which indicates that the determination of whether a personal injury or industrial disease ought to be accepted under the *Act* as arising out of and in the course of employment is a non-medical decision, not appealable to a Medical Review Panel. He submits that the Appeal Division in its October 8, 1992 decision determined this exact issue. He submits that it cannot be said that the medical issues were solely determinative regarding the acceptance of the claim. He therefore concludes that Dr. J's certificate does not meet the statutory requirements regarding an appeal to a Medical Review Panel.

The accident employer has participated in this appeal. In a submission dated September 13, 1994, the representative refers to his submissions dated February 23, 1994 and June 24, 1992.

Issue

The issue on this appeal is whether the decision of the Appeal Division dated October 8, 1992 was a medical one appealable to a Medical Review Panel.

Evidence

In a decision dated October 8, 1992, the Appeal Division considered the worker's appeal of a Review Board finding dated February 20, 1992. The Appeal Division, in its reasons and analysis, stated:

> This panel allows the worker's appeal. We find that the worker's epicondylitis is caused by his work as a machinist.
>
> The weight of the medical evidence supports this view. Both attending specialists, Dr. K, Neurologist, and Dr. L, orthopaedic surgery and sports medicine, support the worker's contention that his elbow symptoms are compensable. In a report dated April 3, 1991, Dr. K said:
>
>> . . . [the worker] has recurrent lateral epicondylitis (tennis elbow) at the right elbow. I believe that this is related directly to the type of work he does and I feel that he should appeal this relatively disabling condition to W.C.B.
>
> This is also the view of Dr. L who stated:
>
>> . . . This 44 year old machinist has a two year history of chronic right lateral epicondylitis. This in all likelihood comes from his work. He works as a machinist with a lot of repetitive heavy work involving the right arm (he is right hand dominant) . . . .
>
> We rely on these carefully considered medical opinions. Both practitioners are specialists in their respective fields and have had extensive dealings with the worker. They are familiar with him, his work and his condition. The Board medical opinion as set out in Memos #2 and #5, did not convince us to the contrary since they relied almost exclusively on the fact

> that [the worker's] work was not unaccustomed. As noted in Appeal Division Decision No. 91-0014, Volume 7, *Workers' Compensation Reporter* No. 57, this by itself is insufficient to deny a claim. We also note that Dr. M, Medical Officer, Occupational Health Department, found [the worker's] work was frequently repetitive and forceful. Dr. M was considering the right shoulder claim and did not specifically disagree with the medical opinions expressed by the Board under this claim.
>
> In the result, we are convinced by the medical evidence that there is a causal connection between the work activities and the worker's condition. The appeal is allowed.

On January 6, 1993 the employer submitted a request for examination by a Medical Review Panel with respect to the Appeal Division decision dated October 8, 1992. They attached a letter from Dr. J, dated January 5, 1993. Dr. J subsequently completed a certificate for appeal to a Medical Review Panel dated January 22, 1993, in which he disputed the medical decision that the worker's right elbow symptoms were work related. He believed a medical dispute existed because "tennis elbow can occur without any history of injury or overuse." The medical appeals officer, in a decision dated July 15, 1993, determined that Dr. J had provided sufficient particulars to define the medical question in issue. She was of the opinion that there was a bona fide medical dispute to be resolved and so decided the worker would be referred to a Medical Review Panel for examination. It was stated that the Medical Review Panel would be asked to determine whether the worker's right elbow condition, diagnosed as epicondylitis, is as a result of his work activities.

Law and Policy

Section 58(4) of the *Workers Compensation Act* provides:

> Whenever the employer or former employer of a worker, not later than 90 clear days after the making of a medical decision by the board, expresses himself in writing to the board as being aggrieved by that medical decision and sends with that writing a certificate from a physician certifying that in his opinion there is or may be a bona fide medical dispute to be resolved, with sufficient particulars to define the question in issue, the worker shall be examined by a medical review panel appointed in the manner provided in this section.

Item 103.11 of the *Rehabilitation Services and Claims Manual* (the *Manual*) sets out the governors' policy with respect to the major types of medical decisions. It is stated that an appeal under this section lies from a "medical decision" of the Board or a "medical

finding" by the Review Board. It is stated that one of the types of medical decisions includes:

> B. What is the cause of the claimant's condition?
>
> 1. The first issue concerns what is usually termed the "non-medical facts". The non-medical facts are all the events and circumstances which surround and lead up to the worker's claim. They include, for instance, the circumstances of an accident occurring at work, the degree of exposure of the claimant to certain industrial pollutants, and the circumstances of any incident or exposure of the claimant outside of work which may have had some bearing on the condition. Determinations of the non-medical facts are not medical decisions, although medical opinions may be of relevance in ascertaining them.
>
> 2. Once the non-medical facts have been determined, a decision may be made as to the medical cause of the claimant's condition. From the medical evidence, the decision maker will learn of the range of possible circumstances that could lead to the claimant's condition. For instance, the decision maker will know that silicosis is caused by exposure to silica dust, or that a torn cartilage in the knee may be caused by twisting the knee joint while the foot is fixed to the ground. *The non-medical facts will be examined to see if there is anything in them which could reasonably result in the claimant's condition*, for example, exposure to silica dust or an accident in which the claimant's knee twisted. *A decision will then be made as to the actual cause of the claimant's condition*. Where there is more than one possible cause, this may involve selecting the most likely or attributing the condition to two or more causes acting together or in succession. *This is a medical decision*.
>
> (emphasis added)
>
> 3. *Having determined the non-medical facts and made a medical decision as to the cause of the claimant's condition*, it remains to be considered whether those decisions bring the condition within the terms of the *Act*. For example, it must be considered whether the injury arose out of and in the course of the employment under Section 5(1), or the industrial disease was due to the nature of the employment under Section 6(1). This determination is a non-medical decision which is not appealable to a Medical Review Panel. For instance, suppose the non-medical facts are that the claimant fell down the steps of the bunkhouse provided by the employer and injured a shoulder. The medical decision is that the claimant has strained a muscle in the shoulder due to the fall. The determination

> whether a worker is acting within the course of employment when going down the steps of the bunkhouse is a non-medical decision involving questions of policy and legal interpretation.
>
> (emphasis added)

Item 103.54 of the *Manual* deals with the requirement under Section 61(1)(d) for a Medical Review Panel to certify as to the cause of the disability. It is stated in part:

> Under Section 61(1)(d), a Medical Review Panel is required to certify as to the cause of the disability. But "cause" refers to the etiology of the condition. It means "cause" insofar as it is a matter of medical science, but not "cause" insofar as it is a matter of moral value judgments, of law, or of non-medical fact.
>
> Suppose, for example, a worker suffers a hand injury by catching it in machinery at work and, during subsequent medical treatment in hospital, suffers an infection. The infection results in a disability far greater than would have resulted from the original injury. Suppose then that the question raised is whether the ultimate disability was "caused" by the work injury. That is a broad issue that really incorporates several questions, some medical and some non-medical. The responsibility of the panel in a case of this kind is to consider whether the Board or review board has arrived at correct conclusions on the medical aspects of the matter, i.e. correct conclusions on how and where the infection was contracted, and the medical significance of the infection. But whether the consequences of the infection should be treated as consequences of the original injury for compensation purposes is a question of law and policy that the Board or review board must decide for itself . . .

Reasons and Findings

I find that the Appeal Division made a medical decision which is appealable to a Medical Review Panel. In coming to this conclusion, I find it significant that the Appeal Division panel found "the worker's epicondylitis is caused by his work as a machinist" and relied on the medical opinions of Doctors L and K who both related the worker's lateral epicondylitis to the type of work he performed. They noted Dr. M's statement that the work was frequently repetitive and forceful, and Doctors L's and K's familiarity with the worker, his work and his condition. They stated they were convinced by the medical evidence there is a causal connection between the worker's work activities and his condition. It would appear from the above findings, that the Appeal Division panel made a decision as to the cause of the worker's condition. That cause was determined to be the nature of his work activities as a machinist. The argument that the medical issues

were not *solely* determinative of the acceptance of the claim does not take account of the fact that item 103.11B (2) of the *Manual* anticipates that a medical decision will include an examination of the non-medical facts.

In this case, the medical decision is that the worker suffered his epicondylitis due to his work activities as a machinist. That is the medical decision which is appealable to a Medical Review Panel. If the panel had gone on to explicitly make a finding as to whether the worker's injury arose out of and in the course of his employment under Section 5(1), that finding would not have been appealable to a Medical Review Panel. However, the fact that a non-medical decision may be made regarding, for example, whether the claim is acceptable under Section 5(1), does not mean that the medical decision made as to the cause of the condition is not appealable to a Medical Review Panel. Item 103.11B (3) recognizes this distinction in its opening sentence: "Having determined the non-medical facts *and made a medical decision* as to the cause of the claimant's condition, it remains to be considered whether those decisions bring the condition within the terms of the act." As noted by item 103.54, the question of whether the disability was "caused" by the work injury incorporates several questions, some medical and some non-medical, and the responsibility of the Medical Review Panel is to consider whether the Board has arrived at correct conclusions on the medical aspects of the matter.

THE WORKER'S APPEAL IS DENIED.

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

In the Court of Appeal for British Columbia

Between: City of Vancouver
And: Workers' Compensation Board of British Columbia
And: June Mowat

Oral Reasons for Judgment Before
The Honourable Mr. Justice Carrothers,
The Honourable Mr. Justice Gibbs,
The Honourable Madam Justice Ryan

February 10, 1995
Vancouver, B.C.

A. Winter	appearing for the City of Vancouver
S.A. Nielsen and R.M. Powers	appearing for the Workers' Compensation Board
J.J. Steeves and G. Coustalin	appearing for June Mowat

GIBBS, J.A.: On a petition for judicial review the trial judge made an order setting aside a decision of the Appeal Division of the Workers' Compensation Board. This is an appeal against the order.

The issue before the trial judge was, in her words, "whether the appropriate standard of proof was applied by the Appeal Division in its consideration of the statutory rebuttable presumption contained in s.6(3) of the *Workers' Compensation Act*, [R.S.B.C., 1979, c.437]." Her decision is reported in (1994) 88 B.C.L.R. (2d) 381.

The background facts are simple and undisputed. Victor Mowat was a fire fighter employed by the City of Vancouver. He developed malignant melanoma. He applied to the W.C.B. for compensation. The compensation was declined by a claims adjudicator. Mr. Mowat died. His widow, June Mowat, applied for dependant's benefits. Her application was denied by a claims adjudicator. Both of the claims adjudicator decisions

were taken to the Workers' Compensation Review Board and denied. An appeal was then taken to the Appeal Division which allowed the appeal. The petition for judicial review which brought the matter before the trial judge followed.

The trial judge set aside the decision of the Appeal Division and referred the matter back for reconsideration. In my respectful opinion she erred in doing so.

At p. 385 of 88 B.C.L.R. the trial judge redefined the issue before her in these words:

> There seems to be no dispute that the Appeal Division's determinations did indeed involve questions of fact and law under Part 1 of the *Act* and that the decision is therefore, by definition, one made within the exclusive jurisdiction of the Board. The issue, however, is whether the Appeal Division's interpretation of the statutory presumption found in s. 6(3) of the *Act* is so patently unreasonable that that tribunal can be said to have embarked on a inquiry which was in excess of its jurisdiction and thus subject to a review by this Court.

The reference in that redefinition to the exclusive jurisdiction of the board is an application of s.96(1) of the *Act*. Section 96(1) is the privitive clause which vests in the board "exclusive jurisdiction to inquire into, hear and determine all matters of fact and law arising under this Part." There can be no doubt that when adjudicating upon the Mowat claims the Appeal Division was performing the functions vested in it by the authorizing statute: *Omineca Enterprises v. B.C (Ministry of Forests)* (1994) 85 B.C.L.R. 85 at p. 90. That finding by the trial judge is not, therefore, open to challenge, and it is not challenged.

The second sentence of the redefinition invokes the patently unreasonable test with specific reference to a statutory presumption in s.6(3) of the *Act*. The first three subsections of s.6 provide that:

> 6. (1) Where
>
> (a) a worker suffers from an industrial disease and is thereby disabled from earning full wages at the work at which he was employed or the death of a worker is caused by an industrial disease; and
>
> (b) the disease is due to the nature of any employment in which the worker was employed, whether under one or more employments,
>
> compensation is payable under this Part as if the disease were a personal injury arising out of and in the course of that employment. Medical aid may be paid although the worker is not disabled from earning full wages at the work at which he was employed.

> (2) The date of disablement shall be treated as the occurrence of the injury.
>
> (3) If the worker at or immediately before the date of the disablement was employed in a process or industry mentioned in the second column of Schedule B, and the disease contracted is the disease in the first column of the schedule set opposite to the description of the process, *the disease shall be deemed to have been due to the nature of that employment unless the contrary is proved*.
>
> (trial judge's emphasis)

It was the way the Appeal Division dealt with the presumption and the burden of proof in this case that led the trial judge to find, in her words, "an error in law" and "a serious misapprehension" towards the end of her reasons. The focus was upon these findings at p. 12 of the Appeal Division decision:

> It has been accepted that malignant melanoma is a primary cancer of the skin. Because of this acceptance and our finding that he had prolonged contact with coal tar products, arsenic or cutting oils, Mr. Mowat is entitled to the presumption contained under Section 6(3) of the *Act* and Schedule B, Item 4(g). The Review Board found that the evidence was sufficient to rebut a Schedule B presumption on the basis that there was insufficient medical evidence to support a causal relationship between such exposures and malignant melanoma. However, Section 6(3) of the *Act* provides that the disease shall be deemed to have been due to the nature of the employment unless the contrary is proved. The panel finds that the contrary has not been proved. Rather, the evidence on this question is best described as uncertain. The epidemiological studies have not proven that there is no relationship between malignant melanoma (a primary cancer of the skin) and prolonged contact with coal tar products, arsenic or cutting oils. In fact, the average SMR/PMR relating to an association between fire fighters and risk of death from malignant melanoma was 1.73, which both Drs. Howe and McDiarmid indicated was significant. Dr. McDiarmid's evidence was that there was an argument of biological plausibility.

On her review of the Appeal Division reasons, with particular attention to that paragraph, the trial judge summarized her views at p. 394:

> On a consideration of the language of the decision as a whole, but more particularly the language found at page 12 (which I have highlighted earlier), I am satisfied that what occurred here amounts to an error in law on the Appeal Division's part. In my view, the language used leads to the

> inescapable conclusion that the Appeal Division applied a standard of proof akin to certainty or approaching certainty, in determining whether the statutory presumption was rebutted. Accordingly, I must conclude that the Board acted upon a serious misapprehension of the burden of proof provision contained in s. 6(3) and thereby misdirected itself during the course of its inquiry.

What is strangely absent from the decision of the trial judge is any reference to the reported cases on curial deference to the decisions of administrative tribunals. The reason would appear to be that she was persuaded to the view that if the Appeal Division applied the wrong standard of proof when determining whether, in the words of s.6(3), "the contrary is proved" it thereby exceeded its jurisdiction. That was the position of the City of Vancouver before the trial judge and on the appeal. It is so stated at p. 387 of 88 B.C.L.R. under the sub-heading "Appellant's Position":

> As I noted earlier, the appellant does not submit that this evidence either does or does not support the respondent's claim for dependant's relief. It concedes that such a finding lies within the exclusive jurisdiction of the Board. Rather, the appellant submits that by virtue of the language used in its written decision, one must conclude that in weighing the biological and the epidemiological evidence, the Appellate Division of the Board applied a standard of proof far greater than a balance of probabilities and rather applied a burden of proof either akin to certainty or approaching certainty. In so doing, the appellant says that the Appellate Division acted outside its jurisdiction, thus justifying the Court's intervention.

It is worth noting however, that the legislature did not impose any particular standard of proof to the contrary in s.6(3), that the Appeal Division made no reference to the standard of proof, and that the p. 12 determination is expressed in language which tracks the wording of s.6(3). One could only conclude therefore that the Appeal Division applied "a standard of proof akin to certainty or approaching certainty" by way of inference, and I am unable to draw that inference from the record or from the reasons of the Appeal Division.

Even if the inference could be fairly drawn I have grave doubt that there would be grounds for intervention by the Court. Section 6(3) seems to leave to the board the discretion to determine whether the evidence tendered in opposition to the claim is of sufficient weight to discharge the burden of overcoming the presumption that the industrial disease was due to the nature of the employment.

In any event, when it became apparent that there was evidence which the Appeal Division could rely upon in reaching its conclusion, and when it became apparent that the substantive issue was whether the weight of the evidence led by the City of

Vancouver overcame the combination of other evidence plus the presumption, the contention that there was an issue of jurisdiction ceased to be a tenable proposition. With respect to the trial judge, the case ought then to have been disposed of by the application of the principles of curial deference.

In that connection we have the advantage, which the trial judge did not have, of the Supreme Court of Canada judgment in *Pezim v. B.C. (Superintendent of Brokers)* (1994) 114 D.L.R. (4th) 385. At p. 404 the Court described the principles of judicial review, opening the discussion with these two paragraphs:

> From the outset, it is important to set forth certain principles of judicial review. There exist various standards of review with respect to the myriad of administrative agencies that exist in our country. The central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the administrative tribunal. In answering this question, the courts have looked at various factors. Included in the analysis is an examination of the tribunal's role or function. Also crucial is whether or not the agency's decisions are protected by a privative clause. Finally, of fundamental importance, is whether or not the question goes to the jurisdiction of the tribunal involved.
>
> Having regard to the large number of factors relevant in determining the applicable standard of review, the courts have developed a spectrum that ranges from the standard of reasonableness to that of correctness. Courts have also enunciated a principle of deference that applies not just to the facts as found by the tribunal, but also to the legal questions before the tribunal in the light of its role and expertise. At the reasonableness end of the spectrum, where deference is at its highest, are those cases where a tribunal protected by a true privative clause is deciding a matter within its jurisdiction and where there is no statutory right of appeal.
>
> (case authority cited)

These are case authorities cited in the judgment to support the spectrum concept and the elements present in cases where deference is at the highest. All of the elements are present in this case. Furthermore, the Appeal Division is a specialized tribunal. It was performing a function at the heart of its special jurisdiction calling for the application of its expertise. The record does not disclose anything unreasonable in the interpretation of the *Act* by the Appeal Division or in the exercise by it of its jurisdiction.

Given the principles of curial deference propounded by the Supreme Court of Canada, in my respectful opinion the trial judge erred when she granted the relief requested in the petition.

For all of these reasons I would allow the appeal; I would set aside the order made by the trial judge; and I would restore the decision of the Appeal Division.

CARROTHERS, J.A.: I agree.

RYAN, J.A.: I agree.

CARROTHERS, J.A.: The appeal is allowed and it is ordered accordingly.

Consumer Price Index Adjustments

Date: **November 23, 1994**

WHEREAS Section 25 of the *Workers Compensation Act* requires the Board to determine as of January 1, 1995, a ratio by comparing the Consumer Price Index for October 1994 with the Consumer Price Index for April 1994 and by applying that ratio to adjust those periodical payments of compensation referred to in subsection (2), and to adjust each dollar amount mentioned in the *Act*, except those referred to in subsection (5);

AND WHEREAS the Board is advised that the Consumer Price Index for October 1994 was 130.7 and for April 1994 was 130.2, giving a ratio of 1.00384025;

THE BOARD HEREBY DETERMINES that the ratio applicable under Section 25(1) is 1.00384025;

AND THAT all periodical payments of compensation described in Section 25(2) shall be adjusted by applying that ratio as of the 1st day of January, 1995;

AND THAT the British Columbia Regulation numbered 170/94 be repealed as of the 1st day of January, 1995;

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

Section No.	July 1, 1994 Dollar Amount	Change to	January 1, 1995 New Dollar Amount
3(5)(c)	88.30		88.64
13(2)	17,660.39		17,728.21
	3,532.12		3,545.68
17(2)	2,119.19		2,127.33
	706.41		709.12
	706.41		709.12
17(3)(a)(ii)	229.51		230.39
17(3)(c)	741.61		744.46

Section No.	July 1, 1994 Dollar Amount	Change to	January 1, 1995 New Dollar Amount
17(3)(d)	35,320.60		35,456.24
	3,532.12		3,545.68
	31,788.49		31,910.57
7(3)(e)	741.61		744.46
17(3)(f)(iii)(B)	229.51		230.39
17(3)(g)	24,724.47		24,819.42
17(3)(h)(i)	406.17		407.73
17(3)(h)(ii)	406.17		407.73
17(3)(i)(ii)	406.17		407.73
17(13)	1,766.10		1,772.88
18(1)	307.32		308.50
	95.38		95.75
22(2)	1,147.99		1,152.40
29(2)	264.90		265.92
33(5)	1,147.99		1,152.40
35(5)	158.29		158.90
71(8)	17,660.39		17,728.21
73(2)	35,320.60		35,456.24
74(3)	176,603.17		177,281.37
75(2)	35,320.60		35,456.24
75(3)	3,532.12		3,545.68
77(2)	3,532.12		3,545.68
SCHEDULE C	741.61		744.46

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

WORKERS' COMPENSATION
REPORTER

Consumer Price Index Adjustments

Date: January 23, 1995

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

Apart from the figures in the *Act*, the policies of the governors contain various dollar allowances or amounts. The governors have decided to adjust the amounts referred to in this decision on January 1 for each year in accordance with the Consumer Price Index ratios determined under Section 25 for this January 1 and the preceding July 1.

On January 9, 1995, the governors decided that, because of the minimal negative change in the Consumer Price Index, the Personal Care Allowances and the Independence and Home Maintenance Allowance should not be adjusted effective January 1, 1995.

As a result of the governors' decisions, the rates set out below will be effective as of January 1, 1995.

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

Disfigurements Maximums/Minimums (#43.20)

	Minimum Old Rate	New Rate	Maximum Old Rate	New Rate
Head and Neck				
1.	$ 0		$ 4,074.71	$ 4,068.48
2.	4,074.71	$ 4,068.48	8,149.42	8,136.97
3.	8,149.42	8,136.97	24,753.85	24,716.03
4.	24,753.85	24,716.03	41,256.42	41,193.39

	Minimum Old Rate	New Rate	Maximum Old Rate	New Rate
Each Hand				
1.	$ 0		$ 1,324.28	$ 1,322.26
2.	1,324.28	$ 1,322.26	2,750.43	2,746.23
3.	2,750.43	2,746.23	8,149.42	8,136.97
4.	8,149.42	8,136.97	13,752.14	13,731.13
Each Arm				
1.	$ 0		$ 1,018.68	$ 1,017.12
2.	1,018.68	$ 1,017.12	2,037.35	2,034.24
3.	2,037.35	2,034.24	6,213.93	6,204.44
4.	6,213.93	6,204.44	10,288.64	10,272.92
Each Leg				
1.	$ 0		$ 713.07	$ 711.98
2.	713.07	$ 711.98	1,324.28	1,322.26
3.	1,324.28	1,322.26	4,074.71	4,068.48
4.	4,074.71	4,068.48	6,825.14	6,814.71
Torso				
1.	$ 0		$ 713.07	$ 711.98
2.	713.07	$ 711.98	1,324.28	1,322.26
3.	1,324.28	1,322.26	4,074.71	4,068.48
4.	4,074.21	4,068.48	6,825.14	6,814.71

Personal Care Allowance (#80.20)

	Daily Old Rate	New Rate	Monthly Old Rate	New Rate
Level 1	$11.61	$11.61	$ 349.40	$ 349.40
Level 2	19.76	19.76	611.30	611.30
Level 3	29.42	29.42	882.93	882.93
Level 4	38.07	38.07	1,144.84	1,144.84
Level 5	46.97	46.97	1,407.01	1,407.01

Independence and Home Maintenance Allowance (#81.00)

The amount remains at $184.69.

Kilometre Allowance (#82.20)

The amount remains at 26 cents per kilometre.

Meal Allowance (#83.20)

	Old Rate	New Rate
Breakfast	$ 8.66	$ 8.64
Lunch	10.69	10.67
Dinner	18.34	18.31
TOTAL	37.69	37.63

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

The amount will be decreased from $15.28 to $15.26.

Cost Shifting between Classes (#114.11)

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

The amount will be decreased from $32,346.98 to $32,297.56.

Memorandum

To: Board of Governors
From: Connie Munro, Chief Appeal Commissioner
Date: December 12, 1994
Subject: Appeal Division Community Feedback Report

In concluding the 1993 Appeal Division annual report, I committed to initiating a project during 1994 to elicit feedback from the community as to how well the Appeal Division is meeting its goals.

Since June, 1991, the Appeal Division has held 590 oral hearings, issued 6,426 decisions, and had 171 of its decisions published in the *Workers' Compensation Reporter*. We have gained experience in our efforts to render quality decisions within a 90-day time frame. Advocates in the workers' compensation community have, similarly, had three years' experience in dealing with the Appeal Division in individual cases, and in utilizing decisions of the Appeal Division published in the *Workers' Compensation Reporter*.

I considered it timely to hear from the community how well the Appeal Division is achieving its decision-making goals. I also sought feedback concerning the preliminary handling of appeals, and the conduct of hearings where an oral hearing has been held.

A two-part approach was taken in obtaining feedback from the community:

- **Community meetings**

  During May and June, 1994, appeal commissioners met with 13 groups in the community representing worker and employer interests. This provided an opportunity for direct discussion and communication.

- **Questionnaire**

  A questionnaire was sent out in mid-September, 1994, to all appellants (and their representatives) who had oral hearings before the Appeal Division during the previous 12 months. Input was sought concerning a number of specific aspects of the Appeal Division's functioning.

Feedback was also received in the form of letters and phone calls to the Appeal Division. In addition, I reviewed decisions rendered on applications for reconsideration of Appeal Division decisions.

While the primary purpose in undertaking this initiative was to seek specific improvements which the Appeal Division could undertake, this process also identified areas where the Appeal Division has achieved some measure of success. Where quality performance has been achieved, it should be identified and nurtured. Where I concluded that the Appeal Division should continue with an approach, despite expressed concerns, I believe it useful to address such concerns and explain the reasons for continuing with the current course of action.

The objective of this exercise was not to give the Appeal Division a "report card." It was aimed at identifying and addressing specific topics of concern of the community relating to the Appeal Division. In this report, I set out the conclusions I have reached on these topics based upon all the input received, on the following terms:

- criticism voiced — action taken to achieve improvements; or, alternatively, explanation given for current course of action;
- approval voiced — acknowledged as reinforcing current efforts.

PART ONE: COMMUNITY FEEDBACK

Appeal commissioners were generally very well received in meetings in the community.

An exception to this was the meeting with the Employers' Adviser's Office. The employer-representative appeal commissioners who attended the meeting expressed concern that the director of the Employers' Advisory Services appeared unduly adversarial in his approach. He described the Employers' Adviser's Office as a "watchdog" over the Appeal Division's work. The representatives attending further expressed the view that this approach did not appear typical of all of the employers' advisers, but was primarily the director's. Another expression of dissatisfaction, at a meeting with the employers' W.C.B. Claims Advisory group, was from a former Board employee now acting for employers in making applications for relief of claim costs under Section 39. He took exception to the Appeal Division's initiative to invite feedback, in reference to the fact that I had previously asked him to desist writing directly to appeal commissioners concerning their decisions in particular cases.

Apart from these instances, the tone of meetings with both worker and employer groups was generally positive and supportive of the Appeal Division's work. There was a high level of satisfaction with the conduct of oral hearings. The Appeal Division is seemingly perceived as open and fair in its decision-making. There was also praise for

the efficient and courteous work of appeal officers and other support staff, in the preliminary handling of appeals. Appeal Division decisions were described as generally consistent, understandable, well-reasoned and responsive to the issues posed.

Several specific topics arose, which I have addressed as follows:

1. Assessment Appeals

Appeal Division Decision No. 1 ["Practice and Procedure," *Workers' Compensation Reporter*, Vol. 7, p. 33], established the following practice for assessment appeals (at pages 49–50):

> An appeal may be initiated within 30 days after a decision by a Manager or Director. An employer should exhaust all internal avenues of review within the Assessment Department prior to bringing an appeal to the Appeal Division.
>
> Where written submissions are provided, a response may be obtained from the Assessment Department. *This will be done in all cases where the employer has not exhausted the avenues of review within the Assessment Department*. Any such response will be disclosed to the parties, who will have the opportunity to provide rebuttal or comment prior to the matter being considered by the Appeal Division.

This practice was intended to ensure that reasons were given for decisions by the Assessment Department, to provide employers with an explanation of the basis for the decision so they would be better able to respond. This was considered necessary as many assessment decisions, which are appealable directly to the Appeal Division, are "bare" notices (often computer generated), which contain no reasons or explanation for the decision.

This practice was criticized by some employers in cases where the assessment officer had already provided a decision letter which set out fully the reasons for the decision. Sending the employer's submission to the Assessment Department for further comments was seen as inviting the department to critique the employer's appeal submissions. This was seen as anomalous and unfair, as no comparable procedure is used in other types of appeals. There have, as well, been improvements in the provision of written reasons for decisions made by assessment officers, making it unnecessary in many cases to seek such reasons after the filing of an appeal.

On reviewing the matter, therefore, I find that the practice set out in Decision No. 1 should be modified in response to the employers' concerns. Where an employer appeals an assessment decision to the Appeal Division, the appeal officer will not invite input from the Assessment Department on a preliminary basis in all cases. Such input will

only be invited if it is considered necessary to elicit reasons for the decision. It will, however, always be open to the Appeal Division panel considering an appeal to obtain additional input from the Assessment Department, should the panel find it necessary. Any input from the Board concerning an appeal will continue to be disclosed to the appellant, with an opportunity to reply.

2. Notice Issues

(a) Employers' Advisors

The employers' advisers complained that the actual practice of the Appeal Division did not conform to Appeal Division Decision No. 1 on *Practice and Procedure*. They were not being notified of appeals in situations where notice was being provided to industry associations. Appeal Division Decision No. 1 stated [at p. 42] that where an employer is no longer registered with the Board, the chief appeal commissioner may give notice of an appeal commenced by a worker to the relevant industry association *and the employers' advisers*. The failure to provide such notice resulted from an oversight in setting up our internal procedures.

Clarification has now been provided to Appeal Division staff that the employers' advisors should also be notified, whenever notice is given to an industry association. The feedback was useful in bringing to light a situation requiring correction.

(b) Union Participation in Employers' Penalty Appeals

(i) Direct Notice to Unions

Several unions requested more direct and timely notice of employer appeals concerning penalties levied by the Prevention Division for breaches of the *Industrial Health and Safety Regulations*.

Although the Appeal Division provides notice to the "worker representative," and the industrial health and safety committee (where one exists) it has generally not been practicable to provide notice directly to unions as their identity and mailing address are usually not included in the prevention file.

Section 72(4) of the *Workers Compensation Act* provides:

> where there is a union, the workers' representative shall be selected by the union from among the members of the accident prevention committee, the shop stewards or other union officials, employed at the place of work being inspected.

Governors' policy provides, under No. 1.4.1-1 (revised July 1994) of the *Occupational Safety and Health Division Policy and Procedural Manual*:

> *Notice of the penalty assessment will be given to the trade union representing the workers affected and the Chair and* Secretary of the Industrial Health and Safety Committee.
>
> (emphasis added)

I am advised that prevention officers have been instructed to provide information in the inspection report as to the local union. I am further advised that under the computerized Accident and Injury Reporting System (A.I.R.S.) under development by Prevention, the employer will provide one report which will serve as both a Form 7 *Employer's Report of Injury* and an accident investigation report. This report will also include information regarding any certified bargaining unit.

Where information as to the union identity and address are provided in the prevention file, the Appeal Division will give notice directly to local unions of appeals from penalties levied under Section 73 of the *Act*.

(ii) Indirect Notice to Unions

An employer objected to the notice letter sent by the appeal officer to the workers' representative concerning the employer's penalty appeal, which requested that the worker representative "bring this matter to the attention of the relevant Trade Union." The employer complained that this wording presupposed workers' membership in a trade union, and that it showed a "callous disregard" for non-union firms.

For the reasons expressed in the previous section, the Appeal Division attempts to notify unions where they are present at the place of employment. I accepted, however, the employer's complaint concerning the wording of the notice letter. Where the Appeal Division has no information as to whether or not a union is present, notice to the worker's representative will state: "If workers at your place of employment are represented by a trade union, please bring this letter to the union's attention."

(d) Natural Justice

A reconsideration application was made on behalf of a worker, concerning an Appeal Division decision to deny his claim. He had appealed a Review Board finding that his claim was barred under Section 55 (i.e. an application for compen-

sation had not been filed within one year of the date of injury). The Appeal Division panel found that the requirements of Section 55 were met, but denied the worker's claim on the merits. His representative complained that the worker had no notice that the Appeal Division would be considering the merits of the worker's claim.

The appeal commissioner considering this application concluded that in the circumstances of this case there was no breach of natural justice. A published decision of the Appeal Division illustrates that the Appeal Division may, on an appeal concerning Section 55, proceed to consider whether compensation is payable. The reconsideration application was, therefore, denied.

On reviewing this matter, however, I recognize that even though there was no breach of natural justice the appellant was left with a sense of dissatisfaction as to the procedure followed.

The Appeal Division takes a broad remedial approach to its jurisdiction. This is essential to getting files off the appeal treadmill. An overly constrained single-issue approach to jurisdiction can result in multiple appeals, over several years, to the detriment of all concerned.

The Appeal Division is also subject to statutory requirements with respect to the 90-day time frame for decision-making, which makes it desirable for the Appeal Division panels to move quickly to a decision which resolves all the issues before it. The Appeal Division must, however, be mindful of the requirements of procedural fairness and natural justice. There is a risk that in exercising its remedial jurisdiction, the Appeal Division may move beyond the issues addressed in the submissions of the parties to the appeal. Governors' policy provides [Decision No. 1, *Workers' Compensation Reporter*, Vol. 7, p. 7] that:

> The Appeal Division will adopt a procedure that ensures the issues in an appeal are identified during the course of the appeal so that all parties may understand and have an opportunity to respond.

The Appeal Division must be attentive to whether the parties have notice of the issues which will be addressed in its decision. Where, for example, an appeal concerning Section 55 (the time limits for filing an application for compensation) is allowed, an Appeal Division panel will, if it intends to proceed to address the merits, consider whether the parties have notice that the merits may be addressed in the Appeal Division decision. Where this issue has not been addressed in the submissions, the Appeal Division panel may advise the parties that they will consider the merits, and invite additional submissions prior to making a decision on the merits.

As stated in Appeal Division Decision No. 1 (at page 42):

> All matters raised in the decision letter which was appealed to the Review Board, and in the Review Board finding, may be considered issues in the appeal.

Where an appeal is filed from a Review Board finding, parties will generally be assumed to have notice that all matters raised in the Board officer's letter, and in the Review Board finding, may be considered issues in the appeal.

3. Policy

Some employer representatives expressed concerns that the Appeal Division was engaging in "policy reviews." One example provided was the Appeal Division discussion paper on stress [*Psychological Disabilities and Workplace Stress*, *Workers' Compensation Reporter*, Vol. 10, p. 257]. It was alleged that the Appeal Division was infringing on the authority of the governors to make policy. I consider that this concern is based on an incomplete understanding of the duties of the Appeal Division. Some explanation may be helpful.

Clearly, responsibility under the *Act* for approving and superintending policy is vested in the Board of Governors. It would, however, be unlawful for the Appeal Division to apply policy blindly. The Appeal Division has the obligation to apply and interpret the *Act*, regulations and existing published policy of the governors, and to give its decision according to the merits and justice of the case. The Appeal Division must, in applying the policy of the governors, satisfy itself that the policy is lawful under the *Workers Compensation Act* and the *Charter*, and that there are no unusual or special circumstances in the particular case warranting a departure from the general policy. A failure to exercise such authority would justify intervention by the courts on a petition for judicial review of an Appeal Division decision.

An Appeal Division decision, that a policy of the governors is contrary to law, does not create a new policy. It remains open to the governors to consider the range of policy options open to them in making new policy under the *Act*.

The Appeal Division has rendered several decisions with significance to governors' policy. Twenty-one such decisions were listed on pages 36–43 of the *1993 Annual Report of the Appeal Division*. It should be recognized, however, that the Appeal Division has no control over the issues coming before it. The Appeal Division is obliged to address the issues properly raised by appeals within the requirements of the 90-day time frame. The volume of cases before the Appeal Division results in significant decisions issued on an ongoing basis. Key Appeal Division decisions are published in the *Workers' Compensation Reporter* to provide guidance on the interpretation of the *Act*, the Regulations and Board policies, practices and procedures.

These are decisions made in the context of individual cases. In developing general policies, which must cover a wide spectrum of situations, the governors must consider a broad range of factors including input from the community. Such consideration by the governors will normally, therefore, involve a longer time frame. In exercising the Appeal Division's more limited authority, to render lawful decisions in individual cases, and to bring to governors' attention decisions which have significance to governors' policy, the Appeal Division plays a supportive role to the governors. I am confident that, over time, a better understanding will develop in the community of the complementary roles of the Appeal Division and governors.

I would also note that the chief appeal commissioner specifically has a role to play in policy development as a non-voting governor. The governors have defined the *Functions of the Chief Appeal Commissioner* [*Workers' Compensation Reporter*, Vol. 7, p. 27] as including the specific responsibility to (at page 27):

> Keep(s) Governors apprised of critical developments in terms of decisions on claims and trends in claims decisions.

With respect to *Planning and Policy*, I am charged to (at page 28):

> Participate(s) in the development of policy as a non-voting Governor.

And, with respect to *Legislation*, I have a responsibility to (at page 29):

> Recommend(s) changes or comment(s) on proposed changes in legislation, as they may affect injured workers and the Appeal Division process.

Part of the rationale for the chief appeal commissioner sitting as a non-voting governor is to facilitate such communication, which includes alerting the governors where their policies may require attention. That was the intention of the paper I prepared, "Psychological Disabilities and Workplace Stress." Any suggestion as to the direction policy development ought to take was distinctly avoided. Rather, I set out the relevant considerations regarding statutory interpretation which would impact policy development.

4. Outcomes

An employer representative requested that the Appeal Division annual report on disposition of appeals from Review Board findings provide information separated by worker appeals and employer appeals. He complained that the acceptance rate for appeals from Review Board findings had gone from about 15%, under the former commissioners, to about 35% by the Appeal Division. In response to this inquiry, the following information was compiled:

APPEALS FROM REVIEW BOARD FINDINGS
Decisions by former Commissioners, and by the Appeal Division

YEAR	1988 %	1989 %	1990 %	1991 %	1992 %	1993 %
By Worker or Dependant						
Allow	7	8	8	26	33	34
Deny	84	84	86	62	53	55
Partial	8	6	5	8	13	11
Misc.	1	2	1	4	1	0
By Employer						
Allow	24	36	53	21	16	16
Deny	67	54	33	76	75	83
Partial	7	8	14	0	7	1
Misc.	2	2	0	3	2	0
Worker/Dependant and Employer Appeals (in total)						
Allow	9	12	12	26	31	33
Deny	82	79	81	63	55	56
Partial	8	7	6	7	13	10
Misc.	1	2	1	4	1	1

Note: All figures are given in percentages, rounded off to total 100%. Percentages calculated from decisions only, not taking into account withdrawals or preliminary rejections.

There has been an increase in the percentage of appeals by workers/dependants from Review Board findings which have been allowed. The lower percentage of appeals allowed in the past, however, was primarily in respect of appeals by workers and their dependants. In 1990, for example, 8% of appeals by workers/dependants were allowed, while 53% of appeals by employers were allowed. Similarly, in 1989, 8% of appeals by workers/dependants were allowed, while 36% of appeals by employers were allowed.

During that time period, the Board was mired in protest, controversy, and judicial reviews. Several of the judicial reviews were successful. It was, in part, the criticism by the courts of the Board's claims handling at the highest levels which lead to the unanimous report of the Munroe committee and the structural changes to the Board contained in Bill 27. It would be surprising if such fundamental changes to the appeal structures did not have an effect on the nature of the decisions rendered.

From 1987 to 1991, there were 33 judicial reviews involving decisions of the former commissioners, of which 8 were successful. [Since 1991, there have been] nine decisions rendered on judicial review of Appeal Division decisions. To date, only one judicial review of an Appeal Division decision [was initially] successful. An appeal of that decision [was allowed by] the B.C. Court of Appeal in February, 1995.

With respect to the actual percentages of appeals allowed from Review Board findings, I would simply note that the Appeal Division makes its decisions on an individual basis and after weighing the evidence in each case. For that reason, I am not convinced that there is a great deal to be gained from this division of the figures. Nonetheless, in view of the interest expressed, the Appeal Division annual report for 1994 will include separate statistical information on appeals by workers and employers from Review Board findings.

Of interest, is that there have been 12 Medical Review Panel certificates issued on employer appeals from Appeal Division decisions. The Medical Review Panel Department advises that of those 12 cases, the Appeal Division decision was confirmed in seven cases, and partially confirmed in another. The Appeal Division decision was not confirmed in four cases. During the same period, there were 241 Medical Review Panel certificates issued on Medical Review Panel appeals by workers from Appeal Division decisions. Of these, 127 confirmed the Appeal Division decision, 8 partially confirmed, and 106 did not confirm the Appeal Division decision.

The greatest number of appeals to the Appeal Division, and from Appeal Division decisions, are made by workers rather than employers. In percentage terms, the Medical Review Panels allowed more appeals by workers (44%) than by employers (33%), from Appeal Division decisions. Current data shows that more workers than employers appeal Appeal Division decisions to Medical Review Panels, and that of those appeals, a higher percentage of workers than employers are successful in such further appeals.

Also of interest is the number of employers' appeals allowed concerning penalties levied by the O.S.H. or Prevention Division of the Board, since the creation of the Appeal Division. The allow rate of those appeals has also increased despite the fact that since 1991 the grounds for review/appeal have been narrowed by statutory change.

APPEALS FROM O.S.H. / PREVENTION PENALTIES
Decisions by former Commissioners, and
by the Appeal Division

YEAR	1988 %	1989 %	1990 %	1991 %	1992 %	1993 %
Allow	7	4	4	20	30	12
Deny	84	83	87	70	62	84
Partial	9	12	8	9	7	4
Misc.	0	1	1	1	1	0

I am reluctant to engage in any analysis of "allow" and "deny" rates which might be interpreted as an attempt to influence the independence of the decision-makers in the Appeal Division. As stated, all cases must be judged on their individual merits. Considering all of the foregoing data, however, there is nothing which would suggest that employers and workers are being dealt with other than fairly and impartially.

5. Appointments

(a) Terms

A representative for an employers' organization complained that the renewal terms for some of the appeal commissioner contracts were too long. In particular, he objected to the renewal of one contract for a six-year term.

Such contracts currently range from six months to six years. This information is published in the Appeal Division annual report, in addition to reports to the governors at the time of each new contract.

Under Section 81(3) of the *Act*, "a voting governor shall be appointed for a term of up to 6 years and is eligible for reappointment or extension of his appointment." There is no reference in the *Act*, however, to the length of terms for appeal commissioners.

The selection process for appeal commissioners has been in accordance with the policy of the governors set out in their Decision No. 2 ["Policy for Selection of Appeal Commissioners," *Workers' Compensation Reporter*, Vol. 7, p. 13]. I believe there is value in having staggered contract expiry dates, to provide a balance of flexibility and stability in the Appeal Division. It is certainly open to the governors to provide further direction as to the length of such contracts in relation to future appointments. I believe it important, however, in attracting and keeping qualified people to serve as appeal commissioners, that the chief appeal commissioner be able to enter into contracts of some duration. Appeal commissioners are, in my view, entitled to some security of employment. It is also important that we get away from the expectation that "political" change at the provincial level will lead to wholesale changes of personnel in the appeal structures. That kind of politicized environment is ultimately damaging to the credibility of the workers' compensation system. Part of the goal of the 1989 Munroe report was to avoid those type of shifts.

(b) Backgrounds of Non-Representational Appeal Commissioners

A complaint was voiced that too many non-representational appeal commissioners have backgrounds as worker or union advocates. In fact, only three (including myself) of the 16 non-representational appeal commissioners appointed since June, 1991, have such backgrounds. The Appeal Division annual reports have provided information concerning the diverse backgrounds of the appeal commissioners [see *Workers' Compensation Reporter*, Vol. 8, at page 644–646].

The primary consideration must be the selection of properly qualified individuals from the ranks of those interested in serving in this quasi-judicial capacity. The backgrounds of the "non-representational" appeal commissioners cannot be determinative in the appointment process. A non-representational appeal commissioner must, in any event, put aside any partisan identification in fulfilling their quasi-judicial responsibilities.

(c) Conflict of Interest

A concern was expressed as to the number of former Board employees acting as advocates or consultants on workers' compensation claims. The question was raised as to whether there was any established code of ethics concerning ex-Board employees moving immediately to work as advocates in the workers' compensation system.

All appeal commissioner contracts include "post employment restrictions." Appeal commissioners have agreed, in their employment contracts, not to act as advocates in connection with workers' compensation claims for a substantial period follow-

ing resignation or the expiry of their appointment. These restrictions are based on a formula of a six months' period for each year of service as an appeal commissioner, to a maximum of 18 months (after three or more years of service as an appeal commissioner). Appeal commissioners are not restricted from continuing in employment with the Board. These post employment restrictions have been respected by appeal commissioners whose contracts have expired.

PART II: QUESTIONNAIRE

On September 16, 1994, questionnaires were mailed to all appellants and their representatives who had oral hearings within the previous year. From September 1993 to August 1994, the Appeal Division held 155 oral hearings in the following categories:

• Claims issues (workers and employers)	129
• Prevention penalty appeals by employers	19
• Assessment appeals by employers	2
• Section 11 determinations for court actions	5
TOTAL	155

One questionnaire was sent to each person, regardless of the number of hearings they attended (duplications were eliminated prior to mailing). 241 questionnaires were mailed out, of which 11 were returned due to address changes. Of the 230 actually distributed, 104 were completed and returned by October 18, 1994 (a response rate of 45%).

The questionnaire contained 26 questions, as well as space for respondents to add comments. Extensive comments were received.

Respondents were asked to complete the questionnaire anonymously, but to identify themselves by category (Question #1). Set out below are the numbers of questionnaires returned by respondents in each category:

Number	Category
42	Worker who appealed a Review Board finding to the Appeal Division
1	Dependant of a deceased worker who appealed a Review Board finding to the Appeal Division

Number	Category
10	Employer who appealed to the Appeal Division
37	A representative primarily or solely representing workers or their dependants, with one or more appeals to the Appeal Division
8	A representative primarily or solely representing (an) employer(s), with one or more appeals to the Appeal Division
1	A representative acting for both workers and employers, with one or more appeals to the Appeal Division
5	Other
104	TOTAL

The meetings in the community provided direct feedback to the Appeal Division. The questionnaire was used to supplement this, to obtain additional input in a different form. Respondents were asked to complete the questionnaire on an anonymous basis, so they could feel free to make any criticisms which they might have felt uncomfortable in providing in face-to-face meetings in a group situation. The questionnaire also provided an opportunity for direct feedback from individual workers and employers.

The intent was to provide an additional opportunity for input which would be helpful to the Appeal Division, rather than to look for an "evaluation." The analysis of the results, in terms of the percentage "approval ratings," was used to identify "attention points," as well as those areas where the Appeal Division is functioning well. It was not designed to provide a statistically meaningful evaluative report on the functioning of the Appeal Division. The number of questionnaires completed (by employers and employers representatives, in particular) involved a relatively small sample. As well, the written comments revealed that in some instances there was confusion between the actions of Board officers, the Review Board, and the Appeal Division. Some written comments clearly referred to the Board, or the Review Board, rather than the Appeal Division.

Notwithstanding these limitations, the questionnaire did provide useful feedback. The results are discussed in general terms below.

The final issue in the questionnaire was:

		Very Satisfactory	*Satisfactory*	*Not Satisfactory*
26.	Overall, my assessment of the performance of the Appeal Division since June, 1991, is:	VS	S	NS

Representatives (of both workers and employers) expressed greater satisfaction with the performance of the Appeal Division than individual workers or employers. 100% (35/35) of worker representatives, and 86% (6/7) of employer representatives, described the performance of the Appeal Division since June, 1991, as very satisfactory or satisfactory. Paradoxically, 51% (19/37) of individual workers, and 40% (4/10) of individual employers, found the Appeal Division's performance to be *not* satisfactory.

Throughout the questionnaire, it was generally the case that worker and employer representatives expressed a higher level of satisfaction than individual workers and employers. This difference may be due to evaluations by individual workers or employers being more closely linked to the outcome of their particular cases, whereas representatives have a broader basis for arriving at an assessment. As well, representatives are in a better position to evaluate more objectively the performance of the Appeal Division, against their experience with other components of the workers' compensation system, the former commissioners, or other administrative agencies. As noted above, some of the comments also concerned the actions of Board officers or the Review Board, rather than the Appeal Division. That is not, however, to discount the value of the views expressed by individual workers and employers.

The second issue in the questionnaire concerned the number of oral hearings before the Appeal Division, which the person completing the questionnaire had personally participated in before the Appeal Division *since June, 1991*. The responses were:

Number of Oral Hearings	**Number of Responses**
0	14
1	26
2 to 3	32
4 to 5	10
6 to 9	9
10 or more	10
TOTAL	101

As the questionnaire was only sent to appellants who had oral hearings, and their representatives, it was surprising that 14 respondents stated they had never had an oral hearing. However, some representatives were shown on the interested parties list and thus received notice of the hearing, a copy of the decision, and subsequently a questionnaire, but did not actually attend the oral hearing with the appellant.

The questionnaire sought feedback on four general topics. The results are described in four sections below, together with selected quotations which illustrate the feedback received:

A. Preliminary Handling of Appeals

The questionnaire stated:

> This refers to the procedures carried out by Appeal Division staff before the case was assigned to an Appeal Division panel. Please circle the response which best represents your opinion concerning your contacts with Appeal Division staff.

Question 3. Prompt replies to inquiries

100% (37/37) of worker representatives stated they found the promptness of replies by appeal officers to inquiries to be either very satisfactory or satisfactory. Significantly, 88% (7/8) of employer representatives found this to be *very* satisfactory. 82% (31/38) of workers, and 70% (7/10) of employers , expressed satisfaction (VS or S).

Question 4. Fair procedures

97% (36/37) of worker representatives, and 88% (7/8) of employer representatives, were very satisfied or satisfied. 72% (28/39) of workers expressed satisfaction (VS or S).

However, 60% (6/10) of individual employers stated they were *not* satisfied. The reasons for this dissatisfaction by individual employers are not clear, particularly in light of the satisfaction expressed by 88% (7/8) of employer representatives, of which 63% (5/8) were *very* satisfied.

Question 5. Courteous

95% (92/97) of all respondents found the degree of courtesy shown by Appeal Division staff to be very satisfactory or satisfactory. This question elicited the highest measure of responses in the “very satisfactory” category, amounting to 60% (58/97) of all respondents.

Question 6. Non-bureaucratic

97% (36/37) of worker representatives, and 75% (6/8) of employer representatives were very satisfied or satisfied. However, only 58% (21/36) of workers, and 50% (5/10) of employers, were very satisfied or satisfied.

Based on comments written in the questionnaires, complaints concerning the "bureaucratic" nature of procedures seemed largely to relate to matters such as refusals of requests for suspensions of appeals, oral hearings, or additional time for submissions.

Appeal Division Decision No. 12 (April 11, 1994), concerning the *90 Day Time Frame for Appeal Division Decision-Making*, is pending publication in the *Workers' Compensation Reporter*. Issues relating to requests for suspensions of appeals, additional time for submissions, withdrawal of appeals pending adjudication, and the general practice of not providing reasons for preliminary decisions on oral hearing requests or on requests for additional time for submissions, are addressed in that decision. I expect that with publication of that decision in the *Reporter*, the Appeal Division practice in these areas will be better understood. I will not repeat here the contents of that decision — in essence, it addressed the legal and practical ramifications of implementing the 90-day time frame for decision-making required by the *Act*. That decision did provide for some additional flexibility with respect to the time frames for submissions.

Question 7. Clear letters

97% (36/37) of worker representatives, and 100% (8/8) of employer representatives, were very satisfied or satisfied. As well, 79% (31/39) of workers and 80% (8/10) of employers were very satisfied or satisfied with the clarity of letters from Appeal Division staff. These results indicate that the appeal officers' letters are, for the most part, clear to the parties.

B. Oral Hearings

Question 8. Consultation in setting date

93% (92/99) of all respondents expressed satisfaction with the process of consultation in setting a date for an oral hearing.

Question 9. Convenience of location

90% (90/100) of all respondents expressed satisfaction (VS or S) with the convenience of the location for the oral hearing held by the Appeal Division.

Question 10. Preparedness of panel

100% (37/37) of worker representatives, and 88% (7/8) of employer representatives, expressed satisfaction (VS or S) with the preparedness of Appeal Division panels for oral hearings. However, only 66% (25/38) of workers, and 44% (4/9) of employers, expressed satisfaction (VS or S).

Question 11. Courtesy to participants

Overall, 84% (83/99) of all respondents expressed satisfaction with the courtesy of appeal commissioners in oral hearing. This question received a high measure of responses in the "very satisfactory" category [55% (54/99) of all respondents]. For example, 60% (6/10) of employers stated that this was "very satisfactory," and a further 20% (2/10) found this satisfactory.

The lowest level of satisfaction was by individual workers, of 68% (26/38 VS or S). However, this must be seen in light of the fact that 100% of worker representatives expressed satisfaction [78% (29/37) very satisfactory, and 22% (8/37) satisfactory]. 88% (7/8) of employer representatives, and 80% (8/10) of employers expressed satisfaction (VS or S).

Question 12. Clarity of explanations

100% (36/36) of worker representatives, and 88% (7/8) of employer representatives, expressed satisfaction (VS or S) with the clarity of explanations given by appeal commissioners in oral hearings. The level of satisfaction for workers was 71% (27/38, VS or S). Individual employers were evenly divided (5/5) between those who answered "Very Satisfactory," and those who answered "Not Satisfactory."

Question 13. Ability to really listen / attentiveness

100% (37/37) of worker representatives, and 75% (6/8) of employer representatives, expressed satisfaction with the attentiveness of panels in oral hearings. However, 41% (15/37) of individual workers, and 50% (5/10) of individual employers, said they were "not satisfied."

Question 14. Even-handed treatment of parties

100% (37/37) of worker representatives, and 75% (6/8) of employer representatives, expressed satisfaction (VS or S). 63% (22/35) of workers, and 67% (6/9) of employers, expressed satisfaction (VS or S).

Question 15. Allowed adequate time for presentation of evidence and argument

100% of both the worker representatives (37/37) and employer representatives (8/8) expressed satisfaction. 79% (30/38) of workers, and 70% (7/10) of employers expressed satisfaction (VS or S).

C. Written Decisions

Question 16. Decision issued within 90 days of hearing

93% (96/103) of all respondents expressed satisfaction (VS or S) with the issuance of a decision within 90 days of the date of the oral hearing.

Question 17. Decision set out factual and medical evidence on which it was based

97% (35/36) of worker representatives, and 88% (7/8) of employer representatives, expressed satisfaction (VS or S) with the manner in which the Appeal Division decision set out the factual and medical evidence on which it was based. 55% (21/38) of workers, and 50% (5/10) of employers, expressed satisfaction (VS or S).

Question 18. Decision addressed all relevant issues

92% (33/36) of worker representatives expressed satisfaction (VS or S), as to whether the Appeal Division decision addressed all relevant issues. However, 51% (20/39) of individual workers, 80% (8/10) of individual employers, and 50% (4/8) of employer representatives, stated they were "not satisfied."

Overall, 38% (38/99) of all respondents replied "not satisfactory" on this issue. This was the highest level of dissatisfaction shown on any issue.

The Appeal Division has sought to provide concise and clear reasons for its decisions. Not all arguments raised in submissions have necessarily been specifically addressed in written reasons provided for a decision, however. It seems that where reasons are not given concerning all of the arguments raised in the appeal, the unsuccessful party may feel that their arguments were not heard.

To respond to this concern would likely require Appeal Division panels to provide lengthier reasons for decisions, to explain both the reasons for their decision on the central matter in issue, and to explain their reasoning with respect to the each argument raised in the case. This could lead to a loss of clarity, focus, and readability in the decision.

Where it is reasonably feasible to do so, without unduly complicating the decision, it is generally desirable to explain both the basis on which the panel reached its conclusion, and the reasons as to why the unsuccessful party's arguments were not accepted.

Given these competing concerns, and in light of the independence of Appeal Division panels, I do not consider it appropriate to suggest to appeal commissioners specifically how they resolve this conflict. However, this is clearly an area of concern. In response to this finding, the Appeal Division will hold a session on decision-writing which will emphasize the importance of providing reasons which respond to all the issues raised in the appeal (and, particularly, to the arguments raised by the unsuccessful party). Consideration will also be given to encouraging a "plain language" format where feasible.

Question 19. Decision clearly analysed applicable law and policy

91% (31/34) of worker representatives expressed satisfaction (VS or S), as did 88% (7/8) of employer representatives, with the clarity of analysis of applicable law and policy in Appeal Division decisions. 53% (21/40) of individual workers and 60% (6/10) of individual employers, expressed satisfaction (VS or S).

Question 20. Overall readability

100% of both worker representatives (35/35) and employer representatives (8/8) expressed satisfaction (VS or S) with the overall readability of Appeal Division decisions. 71% (27/38) of workers, and 90% (9/10) of employers, expressed satisfaction (VS or S).

D. Published Decisions

Apart from the section of the questionnaire dealing with the published decisions of the Appeal Division, the response rate for each question averaged about 94% (of the 104 completed questionnaires). However, only 60% of those who completed the questionnaire replied to the three questions concerning the published decisions of the Appeal Division. Many workers commented that they could not answer these questions as they had not heard of the *Workers' Compensation Reporter*. They expressed concerns as to its lack of availability.

Of the 104 completed questionnaires, 54 respondents (52%) stated they had read at least one published Appeal Division decision.

Question 21. **How many unpublished Appeal Division decisions have you read?**

0	33
1	9
2 to 10	24
11 to 20	10
21 to 50	5
more than 50	5
TOTAL	86

Question 22. **How many Appeal Division decisions have you read published in Volumes 7 to 10 of the *Workers' Compensation Reporter*?**

0	38
1 to 5	16
6 to 20	16
21 to 50	8
more than 50	14
TOTAL	92

Question 23. **Clarity of analysis of applicable law and policy**

97% (33/34) of worker representatives, and 63% (5/8) of employer representatives, expressed satisfaction (VS or S) with the clarity of analysis of applicable law and policy in decisions of the Appeal Division published in the *Workers' Compensation Reporter*. 64% (9/14) of workers, and 86% (6/7) of employers, expressed satisfaction (VS or S).

Question 24. **Overall readability**

100% (34/34) of worker representatives, and 88% (7/8) of employer representatives, expressed satisfaction (VS or S) with the overall readability of published Appeal Division decisions. The level of satisfaction for individual workers was 69% (9/13), and 86% (6/7) for individual employers (VS or S).

Question 25. **Usefulness as a source of guidance to the Board and the workers' compensation community**

85% (53/62) of all respondents expressed satisfaction (VS or S) with the usefulness of Appeal Division decisions published in the *Workers' Compensation Reporter* as a source of guidance to the Board and the workers' compensation community. This was highest

among worker representatives (97%, 32/33) and workers (75%, 9/12). 71% (5/7) of individual employers expressed satisfaction (VS or S), while 63% (5/8) of employer representatives stated they were "satisfied."

CONCLUSION

It is not possible to summarize in this report all of the feedback which was received and considered, and which contributed to this report. The various forms in which comments were provided were all productive. The initiative provided useful information concerning those areas requiring further attention, or on which specific changes were required. The feedback also confirmed that the Appeal Division has succeeded, in many concrete ways, in establishing itself as a credible appeal body for the workers' compensation system.

It was, however, instructive to identify the dissatisfaction on the part of some *individual* workers and employers. While the worker and employer *representatives* who have the most involvement with the workers' compensation system seem, in large measure, to approve of the methods of operation of the Appeal Division, this was less so with individual workers and employers. This points, in my view, to a need to improve communication with individual workers and employers.

Bearing in mind the historical background to the creation of the Appeal Division in June, 1991, the fact that it has in three years succeeded in establishing some measure of credibility is no small achievement. Clearly, however, the Appeal Division must continue to build on what has been accomplished. It might be argued that the unhappiness or distrust manifested in the comments from some workers and employers are inevitable in a system where a case before the Appeal Division has a "winner" and a "loser." I believe, however, that better communication with the affected individuals, both workers and employers, can be achieved. The satisfaction expressed by both worker and employer representatives concerning many aspects of the Appeal Division's functioning supports the conclusion that, where achieved and understood, quality service will be recognized and respected. This positive feedback is also useful, in conveying to those working within the Appeal Division that their efforts can make a difference. Overall, the feedback received reinforces our efforts towards building an Appeal Division which adjudicates fairly individual appeals, and in so doing, provides interpretive guidance to the workers' compensation system.

[Note: A copy of this decision is located in the W.C.B. library, together with the following appendices:

1. *list of meetings with worker and employer groups, attended by appeal commissioners during May–June, 1994;*

2. *Appeal Division questionnaire;*

3. *summary of court decisions on petitions for judicial review of decisions by the B.C. Workers' Compensation Board;*

4. *transcript of comments provided in the comments sections of the 104 questionnaires returned by October 18, 1994.]*

Appeal Division Annual Reports for 1992 and 1993 (pages 117 to 228) are not currently available in Acrobat PDF (portable document format).