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

Number: 94-0931
Date: July 27, 1994
Panel: Connie Munro
Subject: Status of Real Estate Salespersons' #2

On behalf of the B.C. Real Estate Association ("B.C.R.E.A."), counsel has requested that the Appeal Division determine the lawfulness of a directive set out in the March 11, 1994 letter by the director of Assessments addressed to B.C.R.E.A. ("the March 11, 1994 letter"). Counsel submits that the directive contravenes the *Workers Compensation Act* (the *Act*), as well as the governors' published policies. He also submits that it is based on an error of fact. According to this directive, the Assessment Department will view licensed real estate salespersons ("the salespersons") as workers except where the salesperson is entitled to the full amount of the gross commissions and is expected to pay a fixed amount to an agency for administrative and operating costs. Only in those situations is the Assessment Department prepared to view real estate salespersons as independent operators.

The question arises as to whether counsel's request constitutes a valid appeal to the Appeal Division from a decision by the director of Assessments. The consideration of the merits of counsel's request is dependent upon this preliminary question.

Some background information pertaining to counsel's request will help put it in context. Up until January 1, 1994, workers' compensation coverage was not compulsory in the B.C. real estate industry. *The Workers Compensation Amendment Act, 1993* (Bill 63) changed this. This bill extended coverage to virtually all workers in B.C. subject to exemptions by the Board. B.C.R.E.A. took the position that coverage should not extend to salespersons, retained counsel, and instructed him to file submissions with the Board to that effect.

Counsel's submissions to the Board dated November 30, 1993 were addressed to the director of Assessments and the executive policy adviser. The argument specifically addressed to the director of Assessments was that salespersons are *not* workers for the purposes of the *Act*. The alternative argument addressed to the executive policy adviser was that the Board should exempt all salespersons working in B.C. from coverage, if they are considered workers.

Counsel described B.C.R.E.A. as follows:

The B.C.R.E.A. is a non-profit society which was incorporated in 1967. The B.C.R.E.A.'s Board of Directors is made up of volunteer representatives from the 13 regional Real Estate Boards/Associations in B.C. (hereinafter referred to jointly as the "Real Estate Boards").

The B.C.R.E.A. acts as an advocate on behalf of the approximately 19,000 licensed Salespersons in B.C. who are members of the Real Estate Boards. Although membership by a licensed Salesperson with a Real Estate Board (and with the B.C.R.E.A. through the Real Estate Board) is voluntary, the 19,000 licensed Salespersons who are members of the Real Estate Boards represent approximately 99.75% of all Salespersons in B.C.

In a letter dated December 17, 1993, the director of Assessments explained to counsel that he found it impossible to determine the status of salespersons in the abstract. In order to make a determination, he needed to look at specific contracts. The director stated:

. . . Without providing us a specific contract, you are asking us, in advance, to determine the status of real estate salespersons. The particular contract entered into between the salesperson and the real estate agent will determine whether or not the salespersons are workers. Until we have such a contract in front of us, we are not able to make any type of determination. Once we have a contract we would only be making a determination in relation to those individuals covered under that contract. We would never be able to provide a blanket decision because it is always possible that a new contract could be entered, which is different from the one presented to the Board.

The director of Assessments also stated at the end of his letter that the matter could be appealed to the Appeal Division.

In a reply dated December 23, 1993, counsel expressed disappointment over the director's unwillingness to make a determination concerning the status of salespersons. Counsel urged the director to make such a determination on the basis that it would be "far more practical for the Board to provide a general directive . . . based on the information submitted, and then to deal with an exceptional case"

A meeting was held at the Board on January 19, 1994. Counsel as well as other real estate agency representatives attended that meeting. So did the director of Assessments and the vice-president of Finance/Information Services. It is my understanding that, at the meeting, counsel agreed to provide the director of Assessments with specific contracts.

The directive set out in the March 11, 1994 letter was based on a review of these contracts. Upon reviewing these contracts, the director indicated the position the Assessment Department would take, namely, it would view salespersons as independent only where they are entitled to the full amount of the gross commissions and pay a fixed amount to the agency for administrative and operating costs.

Counsel filed a Notice of Appeal dated April 29, 1994 with the Appeal Division. B.C.R.E.A. is referred to as the employer on the notice. The notice alleges error of law, error of fact, and contravention of a published policy of the governors.

In a letter dated May 6, 1994 addressed to counsel, I raised questions as to whether the content of the March 11, 1994 letter constitutes an appealable matter and whether B.C.R.E.A. has the standing to initiate an appeal in the circumstances of this case.

Counsel responded by letter dated May 20, 1994. He argued that the content of the letter constitutes an appealable matter under Section 96(6.1) of the *Act* and the practicalities and importance of this issue to the real estate industry require the Appeal Division to exercise its jurisdiction. He also offered to have one or more real estate agencies directly affected by the letter support the appeal brought by B.C.R.E.A. and expressly authorize B.C.R.E.A. to represent their interests.

Analysis

The Appeal Division has the jurisdiction to consider appeals concerning assessment matters under two statutory provisions, namely, Sections 96(6) and (6.1) of the *Act*.

Subsection 96(6) states:

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

may, not more than 30 days after receiving the notice or within a longer period the chief appeal commissioner may allow, appeal the assessment, classification, special rate, differential or additional assessment, levy or contribution to the appeal division on the grounds of error of law or fact or contravention of a published policy of the governors.

Subsection 96(6.1) states:

(6.1) An employer who has received notice relating to

- (a) an assessment,
- (b) a classification,
- (c) a monetary penalty, or
- (d) an apportionment or shifting of cost between classes

under this *Act* not referred to in subsection (6) but designated in the policies of the governors, may, not more than 30 days after receiving the notice or within a longer period the chief appeal commissioner may allow, appeal the assessment, classification, monetary penalty or apportionment or shifting of cost between classes to the appeal division on the grounds of error of law or fact or contravention of a published policy of the governors.

Therefore, in order to be appealable to the Appeal Division, the March 11, 1994 letter must fit the terms of either Section 96(6) or (6.1) of the *Act* and the parties seeking to appeal must be an employer for the purpose of these provisions.

I note that in collecting assessments, the Board relies on procedures that have elements of an “honour system.” Real estate agencies have come under the *Act* as of January, 1994. As I understand it, they are expected to send a cheque towards payment of their assessments every quarter and do their own calculations. They were expected, therefore, to send a cheque in April, 1994. At year end, the agencies must send a report of their payroll to the Assessment Department. After receipt of that report, the Assessment Department may decide to do an audit. If, in calculating their assessments, the agencies exclude the earnings of salespersons, they may be faced with overdue assessments early next year.

Is B.C.R.E.A. an employer for the purpose of these provisions?

According to Section 1 of the *Act*, “employer” includes every person having in his service under a contract of hiring or apprenticeship, written or oral, express or implied, a person engaged in work in or about an industry.” B.C.R.E.A. fits that definition. It is an employer in the province. Nonetheless, it is not, in this instance, an employer for the purpose of an appeal under Section 96(6) or 96(6.1). Reading Sections 96(6) and (6.1) *in conjunction with* Section 96(7) indicates that these provisions contemplate employers directly affected by a decision — not any employer. Subsections 96(6) and (6.1) allow “an employer” to appeal certain matters. Subsection 96(7) provides that, on a successful Section 96(6) or Section 96(6.1) appeal, “The amount to be returned to *the employer* shall be accompanied by interest” (emphasis added). An obvious inference is that the employer mentioned in Section 96(6) or Section 96(6.1) is an employer with a direct

interest in an appeal. Also, the very language of the provisions suggests an employer who is directly affected. These provisions state that an employer may, after receiving notice of an assessment or a notice relating to an assessment, appeal the assessment. It is reasonable to assume that, in referring to employers receiving a notice of an assessment or a notice relating to an assessment, the *Act* contemplates employers who are directly affected by the notice and are expected to pay the assessment.

I note the governors' Decision No. 1 on the practice and procedure of the Appeal Division. This decision states:

The procedure of the Appeal Division shall recognize and facilitate the appearance and participation by workers and employers acting for themselves or lay advocates acting on their behalf.

Where the participation of other parties in the procedure will assist inquiry into the merits of the issues, the Appeal Division may give notice to or allow intervention by these other parties. For example, where an employer is no longer registered with the Board, the Appeal Division may give notice of an appeal commenced by a worker to the relevant industry association and the Employers' Advisor. Or in appeals commenced under Sections 96(6) and 96(6.1), the Appeal Division may give notice of the appeal to the workers or trade union representative of the workers employed by the employer who may have an interest in the appeal.

The above paragraph is consistent with the interpretation of "an employer" in the context of Sections 96(6) and (6.1) as an employer who is directly affected by a decision. In the present case, employers directly affected by the March 11, 1994 letter would be employers with a financial interest in whether salespersons are workers within the meaning of the *Act*. B.C.R.E.A. is not such an employer; it does not use the services of salespersons.

In light of the wording of Sections 96(6) and (6.1), I have come to the conclusion that B.C.R.E.A. itself does not have standing to appeal the directive set out in the March 11, 1994 letter. A necessary condition for this appeal to proceed is that one or more real estate agencies directly affected by the March 11, 1994 letter authorize B.C.R.E.A. to act on their behalf. It would be appropriate for the real estate agencies whose contracts were reviewed in the March 11, 1994 letter to grant this authorization. Of course, these agencies could directly appoint counsel to initiate an appeal, but, if they deem the intervention of B.C.R.E.A. to be preferable, they should expressly authorize such intervention.

An alternative and equally acceptable course of action would be for some other real estate agencies to ask the director of Assessments whether and to what extent his March 11, 1994 letter bears upon their own assessments. After receiving the director's response, those agencies could then proceed with an appeal and authorize B.C.R.E.A. to act on their behalf — if that is the representation they wish to have.

In summary, the wording of the applicable statutory provisions requires one or more real estate agencies to expressly authorize B.C.R.E.A. to represent their interests inasmuch as B.C.R.E.A. is to have an active role in an appeal regarding the March 11, 1994 letter. The fact that this letter was addressed to B.C.R.E.A. does not give it standing under Section 96(6) or (6.1). The directive in that letter is of financial consequence to employers with salespersons (be these salespersons characterized as workers or independent operators). B.C.R.E.A. itself is not such an employer.

Does the content of [the director's] letter constitute an appealable matter within the meaning of either Section 96(6) or 96(6.1)?

Subsections 96(6) and (6.1) go together. Subsection 96(6) applies in well-defined situations. The provision lists certain assessments, classifications, special rates, differentials and levies set out in the *Act* and grants employers the right to appeal notices of such assessments, classifications, etc. For example, it lists a notice of assessment under Section 39 or 40 as appealable. In other words, the provision confers upon employers a right of appeal *only* as far as certain types of assessments, classifications, etc. are concerned.

Subsection 96(6.1) seems to provide employers with additional appeal rights. The plain meaning of this provision is that an assessment, classification, or penalty, etc., that is not covered by Section 96(6) but is authorized by the *Act* and is listed in the governors' policies is appealable.

In Decision No. 4, the governors' interpretation of Section 96(6.1) does not accord with the plain meaning of the words used in the provision. Their interpretation of that provision is that an employer may appeal an assessment, classification, monetary penalty, apportionment, or a shifting of costs that is authorized by the *Act* but not listed in Section 96(6) *only* as long as the governors decide that it is appealable and say so in their policies. In other words, according to this interpretation, the words "designated in the policies of the governors" in the provision should read "designated [as appealable] in the policies of the governors." This interpretation assumes that, apart from the matters specified in Section 96(6), employers' appeals are at the governors' discretion as set out in the policies.

For the purpose of this decision, I do not need to decide which of these two interpretations of Section 96(6.1) is correct or whether the governors' interpretation is viable. Whichever interpretation is adopted, it is clear that, in order to be appealable under Section 96(6.1), an assessment has to be an assessment *not* referred to in Section 96(6). That is what the provision says. The provision would cover, therefore, assessments under Sections 38(3), 44, 49(2) but *not* assessments under Section 39 or 40. The assessments payable by real estate agencies are Section 39 assessments. A notice relating to a

Section 39 assessment may not be appealed under Section 96(6.1). For these reasons, I do not accept counsel's argument that the March 11, 1994 letter is appealable to the Appeal Division under Section 96(6.1).

Counsel's interpretation of Section 96(6.1) appears to have questionable consequences within the framework of the legislation. The argument that B.C.R.E.A. has the standing to initiate an appeal of the March 11, 1994 letter comes close to suggesting that employers have the right to request at any time that the Appeal Division determine the lawfulness of a governors' policy or Board practice concerning Section 96(6.1) matters. Yet the same would not hold for governors' policies or Board practices concerning Section 96(6) matters. Moreover, neither employers nor workers can request the Appeal Division to determine the lawfulness of governors' policies or Board practices concerning compensation matters, unless in the context of a specific case directly affecting such employers or workers. From this perspective, counsel's interpretation of Section 96(6.1) is, therefore, problematic.

I have considered whether the content of the March 11, 1994 letter is appealable under Section 96(6). This provision covers assessments under Section 39 or 40. Section 39 is a broad provision describing the Board's powers to assess employers for the purpose of creating and maintaining the accident fund.

Section 40, with the heading "Assessment by notice" states:

- (1) Where the board
 - (a) notifies an employer of assessment rates or percentages determined by the board in respect of the industries in which the employer is engaged; and
 - (b) informs the employer of the manner in which the assessment is calculated, and the date it is payable,the notice constitutes an assessment under section 39, and the employer shall, within the time limited in the notice,
 - (c) make a return on the form provided or prescribed by the board; and
 - (d) remit the amount of the assessment.
- (2) Every employer who neglects or refuses to comply with subsection (1) is liable for the penalty prescribed by the regulations or determined by the board, and that penalty shall be enforceable as an assessment under this Part.

It is arguable that the March 11, 1994 letter is in the nature of an assessment by notice as described under Section 40. Although the letter was not addressed to individual employers, the Board's intent was to generally advise real estate agencies of their position. The Board's expectation was that the agencies would rely on this information in calculating their assessments. As indicated earlier, real estate agencies were to send their first quarterly cheque towards the payment of their assessments in April, 1994.

Taking into account the "honour system" upon which the Board relies to collect assessments, I have concluded the content of the March 11, 1994 letter constitutes an appealable matter under Section 96(6), although not under Section 96(6.1).

Conclusions

Counsel argues that, in accordance with Section 96(6.1), B.C.R.E.A. is an employer for the purpose of appealing the March 11, 1994 letter. I disagree. As regards that letter, B.C.R.E.A. is not an employer for the purpose of an appeal under Section 96(6.1) or, for that matter, Section 96(6). To the extent that the Appeal Division has the authority to consider this application, it derives this authority from Section 96(6), not Section 96(6.1).

Counsel proposes that individual real estate agencies directly affected by the March 11, 1994 letter expressly authorize B.C.R.E.A. to act on their behalf, if his submissions failed to remove my concerns about the standing of B.C.R.E.A. This proposed step is a minimum requirement for the appeal to proceed. I realize that the real estate agencies whose specific contracts were reviewed in the March 11, 1994 letter are technically out of time to appeal this letter. The provision specifies that an appeal be initiated not more than 30 days after receipt of the notice of assessment. However, it also confers upon the chief appeal commissioner the discretion to extend the time to appeal. In view of the history of this matter, I am prepared to allow an extension of time should these agencies advise the Appeal Division of their intention to initiate an appeal within 30 days of this decision.

In sum, I reject B.C.R.E.A.'s request that the appeal concerning the March 11, 1994 letter proceed on the basis that, as an employer, it has the standing to initiate the appeal. Should real estate agencies, in their capacity as employers, become directly involved in the appeal and authorize B.C.R.E.A. to act on their behalf, the Appeal Division would have authority under Section 96(6) to consider the lawfulness of the directive set out in the March 11, 1994 letter.

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

Decision of the Appeal Division

Number: 95-0530
Date: May 12, 1995
Panel: Thomas Kemsley, Herb Morton, Hilrie Reimer
Subject: Compensable Consequences of a Work Injury

The worker appeals the January 9, 1995 Review Board finding.

The issue is whether the worker's psychological problems are a compensable consequence of his left arm injury at work on March 23, 1978. The workers' adviser submits that the worker's psychological problems were triggered by the stress of attending an examination for discovery and the stresses of pursuing his legal action for medical malpractice in the treatment received for his 1978 compensable injury. He submits, therefore, that there is "an unbroken chain of consequences flowing from [the worker's] March 1978 injury and his resultant disabling bipolar affective disorder."

The panel has considered the worker's appeal as follows:

(a) Legal Action for Compensable Injury: General

The panel has considered, first of all, the *general* issue as to whether further injury suffered by a worker, while participating in a legal action arising out of a work injury, may be a compensable consequence of the work injury. In this part of the decision, the panel has restricted its consideration to the *simplest* situation, where the worker has claimed compensation, the Board is subrogated to the worker's rights to pursue a legal action, and the legal action is in fact being pursued by the Board's legal representative.

Governors' policy provides at #22.21 of the *Rehabilitation Services and Claims Manual* (the *Manual*):

Where a worker is attending at the Board by prearranged appointment made with an officer of the Board for the purpose of an enquiry, interview or discussion in respect of a claim which has been accepted, or which is subsequently accepted, and where the worker suffers a further injury arising out of and in the course of travel to or from such an appointment, the further injury will be compensable. . . .

The policy further provides that the same rules apply to workers attending prearranged appointments to meet with the Review Board, Medical Review Panel, or to injuries occurring while the worker is undergoing treatment at the Board's rehabilitation centre "or while attending to other matters pertinent to a claim." The policy at #22.15 of the *Manual*, however, provides that "injuries arising in the course of normal travel for subsequent treatment are generally not compensable."

The panel finds that, in general, attendance by a worker at a proceeding or meeting relating to a subrogated legal action, at the request of a Board lawyer, is analogous to the situation covered by governors' policy #22.21. In such circumstances, the legal action is the Board's, and the worker is essentially a witness to assist the Board in presenting its case. The worker's participation in the legal action would be at the Board's request, and would benefit the Board firstly, and the worker only secondarily if an excess was obtained. The injured worker's participation in the legal action, and any additional injury or disability resulting from such participation, may therefore be seen as a consequence of the original work injury (subject, of course, to medical causation being established).

The panel considers this to be true whether the legal action relates to the initial injury or disability giving rise to the worker's compensation claim, or whether the legal action is in respect of negligent medical treatment provided in the treatment of the initial work injury. The panel adopts, in this regard, the reasoning expressed in Appeal Division Decision No. 93-1399 (*Section 11 Determination, Workers' Compensation Reporter*, Vol. 10(4): p. 603). As stated in that decision (at pages 608–609):

. . . The worker is undergoing treatment because of a work injury. Exposure to the risk of further injury during that treatment is due to having suffered the work injury. Otherwise, the worker would not be undergoing the medical treatment. There is a direct causal link between the two injuries. The risk in treatment is part of the original compensable injury for the purposes of compensation under Section 5(1) of the *Act*. We find that it is also part of the compensable injury for the purposes of Section 11. That is, the direct consequences of a compensable injury also arise out of and in the course of employment. . . .

An application for judicial review of Decision No. 93-1399 was dismissed in British Columbia Supreme Court on March 6, 1995 (*Frances Elizabeth Kovach v. W.C.B.*, Vancouver Registry Number A940324).

The panel notes that there are at least six sets of circumstances under which a legal action might be taken, following an election by a worker to claim compensation for a work injury:

-
- i. the legal action is pursued by a lawyer in the board's legal services department;
 - ii. the board's legal services department itself retains the services of a lawyer in private practice to pursue a legal action on behalf of the board and the worker;
 - iii. the board's legal department decides not to pursue a legal action, but authorizes the worker to retain legal counsel on the condition the board is not responsible for any fees or disbursements if the action is not successful and the lawyer undertakes to reimburse the board's costs on the claim as a first charge on the proceeds of the legal action;
 - iv. the board's legal department decides not to pursue a legal action, but authorizes the worker to retain legal counsel and pursue a legal action without making any claim on behalf of the board to any of the proceeds from the legal action;
 - v. the worker pursues the legal action with the knowledge of the board but without the authorization of the board; or,
 - vi. the worker pursues the legal action without the knowledge or authorization of the board.

Only the first three of these scenarios are contemplated by the policy of the governors set out at #111.25 of the *Manual*. The panel has not considered whether the additional three are viable. Rather, this list is simply intended to describe events which might occur, whether or not these scenarios are in accordance with the *Workers Compensation Act* (the *Act*) and governors' policy in Chapter 16 of the *Manual*.

On the basis of the general reasoning set out above, the panel considers that the "chain of causation" is clearly established in the first of the six scenarios (provided it is established medically that a worker's problems are caused by participation in the legal action). With respect to the additional five scenarios outlined, the panel does not consider it necessary to proceed to address them each separately for the purposes of this decision. In considering the worker's appeal, it is sufficient that the panel examine the particular circumstances of the worker's claim and the legal action brought in this case.

(b) The Legal Action in this Case

The panel has considered whether the medical malpractice action in this case was one in which the worker's involvement was a compensable consequence of his 1978 work injury.

Following his left arm injury at work on March 23, 1978, the worker submitted an application for compensation dated March 7 (sic), 1978, which he signed below the statement:

I declare all the information I have given on this form is true and correct and I elect to claim compensation for the above mentioned injuries or disease . . .

Governors' policy provides at #111.22 that a Form 6 application for compensation could constitute an election. This was also stated at #97.22 of the former *Claims Adjudication Manual* in effect at that time.

The worker subsequently also signed a retainer agreement with a law firm to pursue a legal action for medical malpractice. Attached to the retainer agreement was an instruction/explanation memo from the law firm, which included the following statement:

W.C.B. ELECTION: Where injury, disability or death was caused by the fault of another and out of or in the course of employment of the Plaintiff but not out of or in the course of employment of the Defendant the Plaintiff may apply for compensation then ELECT to bring proceedings in tort for damages. By so electing the Plaintiff suspends but preserves his right to compensation payments. If after trial or settlement less is recovered and collected than the amount of compensation to which the Plaintiff would have been entitled from the Worker's Compensation Board the Plaintiff may then RE-ELECT and then pay back to the Compensation Board the net amount of damages recovered and collected (i.e., after payment of legal fees and disbursements) and may then collect compensation as if no proceedings in tort had been brought.

Accordingly if you have any possible right to claim for Worker's Compensation you should make sure that your RETAINER/AGREEMENT has a tick mark in the place shown for W.C.B. ELECTION.

This instruction memo and retainer agreement were provided to the worker by letter from the law firm dated July 26, 1978. The panel notes that this instruction memo did not accurately reflect the provisions of Section 10(5) and (6) of the *Act*. A follow-up letter was sent to the worker dated October 3, 1978, and the worker appears to have signed and returned the retainer agreement shortly afterwards (together with cheques dated October 30, 1978 and December 5, 1978 as a retainer). On the retainer agreement, the worker did not place a tick beside the place shown for "W.C.B. ELECTION."

The worker received wage-loss benefits from the Workers' Compensation Board for the period March 24, 1978 until January 21, 1979, following which he was awarded a permanent partial disability pension of 15% of total disability (payable on a monthly basis for life).

In Memo #5 dated September 21, 1978, Dr. A, claims medical advisor, noted that Dr. B had called to advise that "the man's lawyer has been engaged in a medical legal suit with regard to the initial care of his forearm." No attention appears to have been paid by the claims adjudicator to this information, and the file was not referred to the Legal Services Department.

On February 2, 1979, the worker's lawyer filed a Writ of Summons in the Supreme Court of British Columbia, Legal Action Number C790514, Vancouver Registry claiming negligence in the medical treatment for the worker's March 23, 1978 injury.

As the plaintiff in the legal action, the worker underwent an examination for discovery on November 26, 27, and 29, 1979. The legal action was set for trial on January 21, 1980.

By letter dated January 3, 1980, defence counsel wrote to the Board's legal department stating:

Further to the conversation between Mr. C of your office and Mr. D of this office, a meeting between Mr. C and Mr. D is scheduled to take place on Monday, January 7th, 1980. It is our desire to establish as clearly as possible and within the legal and policy guidelines governing the Board, a history of the physio-therapy treatments administered to [the worker]. We also wish to discuss the re-training programmes and opportunities available to [the worker] given his current condition.

We thank you for your attention to our concerns and look forward to the meeting on Monday.

On January 7, 1980, the Board's assistant director, Legal Services, forwarded Memo #33 to the director, Claims, Compensation Services, stating:

I would appreciate if you would appoint a Claims Adjudicator and a Rehabilitation Consultant for the purpose of being named on a Subpoena according to our usual procedures.

I will discuss the matter with the Claims Adjudicator and Rehabilitation Consultant prior to having them discuss the matter with the lawyers before appearing in court.

There is no other record on the claim file of any involvement, or action taken, by the Board's legal department in connection with this legal action. There is no record in the claim file of any communication between the Board's legal department, and the plaintiff's lawyer, to assert that the Board was subrogated to the worker's right of legal action, or to authorize the plaintiff's lawyer to continue the legal action on behalf of the Board. Nor is there any record in the file of any question being raised with the respect to the worker's entitlement to compensation benefits from the Board for any part of his disability which might be attributable to the allegedly negligent medical treatment received for his 1978 work injury.

The legal action was settled by the plaintiff's lawyer for \$46,000.00 immediately prior to the date the trial was scheduled to begin. Following completion of all matters relating to the legal action, the worker's lawyer forwarded the legal file to the worker. These records have been provided by the worker to the Appeal Division. A review of these documents does not reveal any record of discussions or communication between the worker's lawyer and the Board's legal department concerning any aspect of the legal action.

The general framework established by Section 10 of the *Act* is that an injured worker may either sue a third party (not a worker or employer), or claim compensation. If the worker claims compensation, Section 10(6) provides that:

. . . neither the making of the application nor the payment of compensation under it shall restrict or impair any right of action against the party liable, but as to every such claim the board is subrogated to the rights of the worker or dependant and may maintain an action in the name of the worker or dependant or in the name of the board; and if more is recovered and collected than the amount of the compensation to which the worker or dependant would be entitled under this Part, the amount of the excess, less costs and administration charges, shall be paid to the worker or dependant. The board has exclusive jurisdiction to determine whether it shall maintain an action or compromise the right of action, and its decision is final and conclusive.

If the worker elects to sue, rather than to claim compensation, Section 10(5) of the *Act* provides:

If after trial, or after settlement out of court with the written approval of the board, less is recovered and collected than the amount of the compensation to which the worker or dependant would be entitled under this Part, the worker or dependant is entitled to compensation under this Part to the extent of the amount of the difference.

Current governors' policy provides at #111.24 of the *Manual*:

If an injured worker or dependant elects to claim compensation from the Board rather than take their own action, the claim is processed in the usual way and they receive the usual compensation benefits from the Board. They cannot revoke the election after any payment has been made, except by immediate repayment of all monies paid out under the claim. . . .

. . . A person cannot therefore claim both compensation benefits and pursue a court action. If the person claims compensation, the Board is subrogated to the action. If the person chooses to sue, no compensation benefits are received. There is no right to receive compensation on a temporary basis while pursuing a court action on the understanding that the benefits will be repaid following that action. If, pursuant to #111.21, a claimant receives compensation prior to making an election, the compensation is terminated immediately that an election is made not to claim compensation. . . .

The policy of the Board in effect in 1980 contained similar provisions. Item #97.24 of the former *Claims Adjudication Manual* stated:

In an injured worker or dependent elects to claim compensation from the Board rather than take his own action the claim is processed in the usual way and he receives the usual compensation benefits from the Board. He cannot revoke the election after any payment has been made, except by immediate repayment of all monies paid out under the claim.

. . . Where the Legal Department decides to pursue the claim, conduct of the action is carried out within the Department, except where an outside counsel is more practicable. Where an outside counsel is retained, the Legal Department will select and instruct him. The Department will not select a lawyer proposed by the claimant. It will be made clear to the outside counsel in his written instructions that he is acting on behalf of the Board, and that the full recovery is to be paid to the Board, subject to recognition of his lien for fees and disbursements. The Board will account to the claimant for any excess.

If the Legal Department concludes that there is no claim worth pursuing, but the claimant or his lawyer is of a different opinion, the claimant may be invited to select his own lawyer to conduct an action and the lawyer will be advised:

- (a) That the action is one that the Legal Department does not consider worth pursuing.

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- (b) That if he is of a different opinion, he may be authorized, if he so wishes, to pursue an action on behalf of the Board . . .

The general framework established by the *Act*, therefore, is that an injured worker must choose between claiming compensation, or bringing a legal action (if one lies against a third party). If the worker claims compensation, the Board is subrogated to any right of legal action of the worker, and any such legal action may only be pursued under the Board's authority. In pursuing a legal action on a subrogated claim, the Board generally seeks recovery of all its costs first, and the worker is only entitled to any excess remaining as provided by Section 10(6) of the *Act*. If the worker elects to sue, they have no entitlement to compensation unless, if after trial or after settlement with the written approval of the Board, less is recovered and collected than they would have received under the claim in which case they will be paid the difference.

The situation arising under this claim does not fit easily within this framework. The worker has received compensation benefits for his disability arising out of his March 23, 1978 injury, including any additional problems or disability incurred by reason of the medical treatment he received. At the same time he appears to have elected to sue, and to settle the legal action without the written approval of the Board. These actions are inherently contradictory.

The panel finds that the information provided to the worker by his lawyer under the heading "W.C.B. ELECTION" was incorrect in that it did not accord with the provisions of Section 10(5) and (6) of the *Act*. Even upon the basis of that information, however, it should have been apparent to the worker from this information (if it was communicated to him), that it was not open to him to pursue his own legal action for medical malpractice while claiming workers' compensation benefits for all the medical treatment and disability resulting from his work injury and medical treatment. Noting the worker's limited education, and the absence of any other documentation on the claim file concerning the requirement to make an election, the panel makes no finding as to whether the worker was actually aware of these legal ramifications.

The Board's legal department was made aware of this legal action prior to the trial date, as indicated by the January 3, 1980 letter from defence counsel. Inasmuch as the worker had claimed (and received) compensation, the Board was subrogated to the worker's right of legal action. Section 10(6) of the *Act* refers to "any right of action against the party liable," and states that "to every such claim the Board is subrogated to the rights of the worker." As the worker claimed compensation for the full extent of the disability resulting from both the injury, and the consequences of the medical treatment received for that injury, the Board was subrogated to any right of legal action relating to either the injury or the medical treatment received by the worker. Under Section 10(6), the Board had exclusive jurisdiction to determine whether it would maintain an action or compromise the right of action, and its decision is final and conclusive.

It might be inferred from the absence of any steps taken by the Board concerning either the legal action, or the worker's continuing compensation benefits under his claim, that the Board exercised its exclusive jurisdiction by choosing to allow the worker to proceed with the legal action and to receive compensation benefits. While this might be at odds with the general framework established by Section 10 of the *Act* and governors' policy, the panel considers that it would be within the discretion of the Board to consider making such a decision, in exceptional circumstances, as a departure from general policy.

In the absence of any documentation showing such a decision by the Board, however, the panel does not consider that it can conclude that such a decision was taken. Another possibility is that, for reasons which cannot be discovered from the claim file, no consideration was given by the Board to Section 10 in connection with this claim and the worker's action for medical malpractice. There is no evidence in the claim file to show that a decision has been rendered by the Board in this regard. The panel notes the reference in the claims adjudicator's letter of March 3, 1994 to the legal action being "of a personal nature." However, that appears to be a recent characterization of the events in 1979–80 relating to the legal action, rather than a formal decision of the Board concerning the effect of Section 10 of the *Act* in relation to the legal action.

As noted above, there are circumstances on this claim which involve contradictory indications as to whether the worker was claiming compensation or electing to sue "privately" for problems resulting from the medical treatment received for his 1978 work injury. The preponderance of evidence concerning the legal action however, is that this was pursued "privately," without the Board's involvement or authorization. The worker selected and retained his own lawyer. There was no request by the worker's lawyer for authorization from the Board to pursue the legal action. There was no request to the Board for "written approval" of the settlement proposal under Section 10(5) of the *Act*. No claim was made on behalf of the Board for reimbursement of its costs, nor was any part of the proceeds of the legal action paid to the Board. These factors are all consistent with an election to sue "privately." The pursuit of the legal action by the worker in this case does not come within the terms of the general reasoning expressed in the first part of this decision. While no formal election was filed with the Board by the worker concerning an election to sue privately, the worker's conduct relating to the legal action can only be seen as manifesting a decision to sue privately. In such circumstances, the panel is unable to find compensable any additional injury or disability suffered by the worker as a result of his pursuit of the legal action.

The panel finds, therefore, that any psychological problems suffered by the worker as a result of pursuing the legal action, are not a compensable consequence of his 1978 work injury. In view of the panel's conclusion on this issue, it was not necessary that the panel proceed to address the medical issue as to whether the work injury and legal

action were of causative significance to the worker's psychological problems. For the purposes of reaching this decision, the panel only considered the application of Section 10 of the *Act* to the limited extent of determining whether the worker's psychological problems were a compensable consequence of his 1978 work injury.

In conclusion, the worker's appeal is denied. His psychological problems are not a compensable consequence of his 1978 work injury.

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

Decision of the Appeal Division

Number: 95-0550
Date: May 18, 1995
Panel: Herb Morton
Subject: Election to Bring a Legal Action

The worker appeals the March 13, 1995 Review Board finding.

The issue is whether the worker is entitled to workers' compensation benefits for his injury at work on February 1, 1992.

(a) Evidence

The worker is a taxi driver. He was injured in a motor vehicle accident while working on February 1, 1992. He submitted an application for workers' compensation benefits, which was received by the Board on February 20, 1992.

By letter dated March 30, 1992, the claims adjudicator advised the worker that in claims involving a possible right of legal action against a third party, compensation can only be considered if an election to claim compensation is made within three months of the date of injury or such longer period as the Board may allow. The claims adjudicator advised the worker that if he intended to claim compensation, he should complete and return the enclosed *Election to Claim* form. The worker completed and returned to the Board two copies of this form, dated March 6 and 23, 1992.

On April 23, 1992, the claims adjudicator wrote to the worker requesting additional information. She advised the worker that unless a response was received within 10 days, it would be assumed that the worker no longer wished to claim compensation and the claim would be suspended. The worker spoke to the claims adjudicator by telephone on May 8, 1992, advising that he would talk to his lawyer and call her back on May 11, 1992 as to whether or not he still wanted to claim compensation. However, the worker did not contact the claims adjudicator again, and the claim was suspended.

Nothing further was received by the Board concerning this claim until April 1994, when the solicitor for the defendants in the legal action wrote to request disclosure of the documentation on the claim file. A written *Authorization for Release of Information* was

provided from the worker, signed by him on April 18, 1994. A copy of the claim file was provided to defence counsel on April 25, 1994.

On May 5, 1994, the worker telephoned the claims adjudicator. He advised that he had received a settlement from the Insurance Corporation of British Columbia (I.C.B.C.), but that his lawyer had not given him any money. He requested compensation from the Board.

By memo dated May 11, 1994, a manager requested advice from the Board's legal department as to whether the adjudicator could consider this claim. The worker advised that he had received a settlement from I.C.B.C. in excess of \$77,000.00, which covered four motor vehicle accidents including the one on February 1, 1992 under this claim. The worker also advised that these funds were all disbursed by his lawyer to satisfy expenses and a divorce judgment, and that he had not received any money and could not return to work.

By memo of May 13, 1994, a Board lawyer advised:

Quite obviously [the worker] has chosen not to claim benefits under the *Workers' Compensation Act* but to proceed personally against I.C.B.C. in this matter. Normally in those circumstances we would not pay any benefits to him.

Section 10(5) of the *Act* allows us to in effect top up where the results of his lawsuit are less than his entitlement under the *Act*. Before he can make that claim however he must or his solicitor must get our consent to the settlement.

The fact that the monies from his motor vehicle accident under this claim ended up in the hands of his wife in a divorce settlement is irrelevant. He has chosen his remedy and he has chosen to settle without our involvement and no benefits or medical aid should be paid.

(reproduced as written)

By decision dated June 16, 1994, the compensation services manager advised the worker that he was unable to consider the payment of any benefits on this claim. The worker's appeal of this decision was denied by the Review Board on March 13, 1995.

(b) Law and Policy

(i) Election to Claim Compensation, or Bring a Legal Action

The general framework established by Section 10 of the *Workers Compensation Act* (the *Act*) is that an injured worker may either sue a third party (not a worker or employer under Part 1 of the *Act*), or claim compensation. Section 10(2) of the *Act* states:

Where the cause of the injury, disablement or death of a worker is such that an action lies against some person, other than an employer or worker within the scope of this Part, the worker or dependant may claim compensation or may bring an action. If the worker or dependant elects to claim compensation, he shall do so within 3 months of the occurrence of the injury or any longer period that the board allows.

Governors' policy provides at #111.24 of the *Rehabilitation Services and Claims Manual* (the *Manual*):

If an injured worker or dependant elects to claim compensation from the Board rather than take their own action, the claim is processed in the usual way and they receive the usual compensation benefits from the Board. They cannot revoke the election after any payment has been made, except by immediate repayment of all monies paid out under the claim. . . .

. . . A person cannot therefore claim both compensation benefits and pursue a court action. If the person claims compensation, the Board is subrogated to the action. If the person chooses to sue, no compensation benefits are received. There is no right to receive compensation on a temporary basis while pursuing a court action on the understanding that the benefits will be repaid following that action. If, pursuant to #111.21, a claimant receives compensation prior to making an election, the compensation is terminated immediately that an election is made not to claim compensation.

(emphasis added)

(ii) Decision to Claim Compensation

If the worker claims compensation, Section 10(6) of the *Act* provides that the Board is subrogated to any rights of the worker to pursue a legal action. If more is recovered and collected by the Board than the amount of the workers' compensation benefits to which the worker would be entitled, the amount of the excess (less costs and administration charges), is paid to the worker or dependant. Governors' policy at #111.25 of the *Manual* provides:

Where the Board is subrogated to an action following a claimant's election to claim compensation, it has exclusive jurisdiction to determine whether it shall maintain or compromise the right of legal action, and the decision of the Board is final and conclusive. . . . The Legal Services Division of the Board determines whether there is a cause of action against a third party, and whether it is one that is worth pursuing.

Where the Legal Services Division decides to pursue the claim, conduct of the action is carried within the Legal Services Division, except where an outside counsel is more practicable. Where an outside counsel is retained, the Legal Services Division will carry out the selection and provide written instruction. The Legal Services Division will not select a lawyer proposed by the claimant. It will be made clear in the written instructions that the outside counsel is acting on behalf of the Board, and that the full recovery is to be paid to the Board, subject to recognition of the lawyer's lien for fees and disbursements. The Board will account to the claimant for any excess.

If the Legal Services Division concludes that there is no claim worth pursuing, but the claimant or the claimant's lawyer disagrees, the claimant may be permitted to select a lawyer to conduct an action and the lawyer will be advised:

- (a) that the action is one the Legal Services Division does not consider worth pursuing;
- (b) that if the lawyer is of a different opinion, he or she may be authorized to pursue an action on behalf of the Board and the claimant on the terms that if there is a successful recovery, the full recovery is to be paid to the Board, subject to recognition of a lien for fees and disbursements; Further, that if the action is not successful, the Board will not be responsible for fees and disbursements;
- (c) of the amount of the Board's claim or, if that is not possible, of an indication that the amount of the Board's claim remains to be determined. . . .

To summarize, where a worker has claimed compensation, and a legal action is pursued by:

- a lawyer in the Board's Legal Services Division,
- outside counsel retained by the Board's Legal Services Division, or
- a lawyer selected by the worker with the authorization of the Board's Legal Services Division,

the worker receives from the Board any monies remaining (i.e. the “excess”) after the Board has deducted its costs and administration charges from the funds received under any settlement or court judgment.

(iii) Decision to Sue

If the worker elects to sue, rather than to claim compensation, Section 10(5) of the *Act* provides:

If after trial, or after settlement out of court with the written approval of the board, less is recovered and collected than the amount of the compensation to which the worker or dependant would be entitled under this Part, the worker or dependant is entitled to compensation under this Part to the extent of the amount of the difference.

(emphasis added)

Governors’ policy at #111.23 of the *Manual* provides:

If an injured worker decides to proceed with a law suit, no action is taken on the claim by the Board. The worker simply retains a lawyer to prosecute the case.

If, after trial, or after settlement out of court with the written approval of the Board, less is recovered and collected than the amount of the compensation to which the worker or dependant would be entitled under the Act, the worker or dependant is entitled to compensation to the extent of the amount of the difference. . . . Therefore, if a worker fails in the law suit or is only partially successful, the worker is able to claim the difference from the Board and thereby end up with at least as much as he or she would have received if compensation had been claimed from the Board initially. . . .

(emphasis added)

(c) Findings and Reasons

The general framework established by the *Act* is that an injured worker must choose between claiming compensation or bringing a legal action (if one lies against a third party). If the worker claims compensation, the Board is subrogated to any right of legal action of the worker and any such legal action may only be pursued under the Board’s authority. In pursuing a legal action on a subrogated claim, the Board generally seeks

recovery of all its costs first, and the worker is only entitled to any excess remaining as provided by Section 10(6) of the *Act*. If the worker elects to sue, they have no entitlement to compensation unless, if after trial or after settlement with the written approval of the Board, less is recovered and collected than they would have received under the claim in which case they will be paid the difference under Section 10(5) of the *Act*. In summary, therefore, if the worker elects to claim compensation, a legal action may only be pursued under the authority of the Board; if the worker elects to sue, they cannot request further consideration from the Board unless a court judgment is obtained in the legal action or written approval is obtained from the Board of any proposal for settlement of the legal action.

In this case, the worker initially elected to claim compensation. However, when he did not respond to inquiries from the claims adjudicator for additional information, the claim was suspended. It is evident that the worker then retained a lawyer to pursue a legal action. This was not a case where the worker's lawyer was authorized by the Board to pursue the legal action on behalf of the worker and the Board, pursuant to governors' policy #111.25 of the *Manual*. By his conduct, the worker in effect revoked his election to claim compensation. He elected to pursue a legal action rather than to claim compensation.

In choosing to sue, rather than to claim compensation, it was open to the worker to "protect" himself by requesting approval in writing from the Board of any proposed settlement of the legal action under Section 10(5) of the *Act*. This would entitle him to request compensation from the Board if the amount of the settlement in the legal action was less than the amount of compensation to which he would have been entitled under his workers' compensation claim. While the worker could not under Section 10 of the *Act* be paid twice for the same accident (i.e. by suing and claiming compensation), he could in this fashion obtain a guarantee that he would not ultimately receive less than he would otherwise have been entitled to receive under his claim. (Under Section 10(5) of the *Act*, the same protection would apply if the case proceeded to trial even without involvement by the Board.)

The worker argues in his submission that consent was given by the Board to the settlement in the legal action. He attaches, as evidence of this consent, a copy of his signed *Authorization for Release of Information* which was provided to the Board. I find, however, that this document only had the dual effects of notifying the Board that the worker was pursuing a legal action, and of authorizing the Board to disclose the worker's claim file to defence counsel in the legal action. This is no connection between this authorization provided by the worker, and his subsequent settlement of the legal action.

There is no evidence in the claim file of any request to the Board for approval of the settlement proposal in the legal action under Section 10(5) of the *Act*. Neither the worker nor his lawyer contacted the Board to request approval from the Board prior to concluding this settlement. The legal action did not proceed to trial, and was settled without the prior knowledge or approval of the Board as to its terms.

Both Section 10(5) of the *Act*, and governors' policy at #111.23 of the *Manual* require that written approval be obtained from the Board for any out-of-court settlement of the action, if the worker wishes to retain the option of seeking further consideration under the workers' compensation claim. Under Section 10(5) of the *Act*, therefore, there is no basis upon which consideration can now be given to the worker's request for compensation.

The legislative intent behind these provisions would appear to be aimed at ensuring that any potential recovery through a legal action against a third party, arising out of a compensable injury, not be prejudiced or diminished through any action of the worker prior to a claim being made for workers' compensation. If the worker wishes to be able to claim workers' compensation benefits, the Board must either be in a position to pursue a legal action, or be in a position to determine, in advance of any settlement, that the maximum recovery has been obtained from the legal action. Alternatively, the legal action must have been decided by way of a court judgment. The statute stipulates these three means as being the ones by which the Board is assured that its potential liability is limited to the difference between optimum recovery in the legal action and the amount of benefits which would normally be paid under the claim.

This legislative intent would account for the requirement that an election to claim compensation be made within three months of the injury, or the further period the Board may allow. It would also explain why, under Section 10(5) of the *Act*, approval must be obtained from the Board for a settlement of the legal action if a worker wishes to keep open the option of seeking further consideration by the Board, but that such approval by the Board is not necessary if the action proceeds to trial. The statute appears to presume, in effect, that the outcome of the trial would be the same whether or not the Board was consulted. There is, therefore, no prejudice to the Board if the action is decided by a court following a trial. As the outcome of a trial is for the court to decide, the Board's approval is not necessary in that situation.

As there was no compliance in this case with the requirement in Section 10(5) of the *Act* that written approval be obtained from the Board for the settlement of the legal action, the plain effect of this section of the *Act* and governors' policy is that the worker cannot now seek further consideration from the Board under the claim. I find, therefore, no basis for further considering the worker's request.

No information has been provided to the Board concerning the amount of the settlement in the legal action which is attributable to the February 1, 1992 accident alone. The settlement concerned four motor vehicle accidents in which the worker was involved, including the one under this claim. For the reasons explained above, even if the worker had obtained the Board's approval for the settlement, consideration could only be given to whether the worker would have received more under his workers' compensation claim than he received in the settlement for this injury. He would then be eligible to receive compensation to the extent of the difference. If the amount of the settlement was

greater than the amount to which the worker would be entitled under this claim, he would have no entitlement under the workers' compensation claim in any event. Depending on the amount of the settlement attributable to the February 1, 1992 accident, this issue might be moot in any event.

In conclusion, by pursuing a legal action against a third party in connection with his February 1, 1992 injury without the Board's authorization, the worker in effect revoked his election to claim compensation. He must be considered to have elected to sue, rather than to claim compensation benefits. As he settled the legal action without obtaining the written approval of the Board under Section 10(5) of the *Act*, he cannot now seek compensation for the difference between the amount he received in the legal action and the amount he would have received in workers' compensation benefits under this claim. Even if he had obtained such approval in writing from the Board, benefits would only be payable by the Board under Section 10(5) of the *Act* if the amount of the settlement for his February 1, 1992 work injury was less than the worker would have received under this claim. The worker cannot ask, in effect, to be paid twice for the same injury, through suing and claiming compensation. The fact that the money obtained in the legal action has been utilized towards the worker's other obligations or debts does not change the fact that these monies were obtained by him through the legal action. I agree with the Review Board finding that the worker has through his actions waived any right to seek workers' compensation benefits under this claim.

THE WORKER'S APPEAL MUST, THEREFORE, BE DENIED.

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

Decision of the Appeal Division

Number: 95-0565
Date: May 23, 1995
Panel: Thomas Kemsley, Connie Munro, Patrick L. Byrne
Subject: Status of Real Estate Salespersons' #1

This is an appeal by S Realty from the March 11, 1994 decision of the director of the Assessment Department (the director). The director determined that the licensed real estate salespersons of S Realty were its "workers" for the purposes of the *Workers Compensation Act* (the *Act*). The result is that S Realty is an "employer" under the *Act*, and must pay assessments on the earnings of its real estate salespersons and is responsible for the other obligations of employers under the *Act*. If the director had decided the salespersons were not workers of S Realty, then the salespersons would have been individually responsible for their own assessments with the Board, if they applied for personal optional coverage under the *Act*.

Therefore, the issue here is whether the real estate salespersons who work for S Realty are "workers" under the *Act*.

Section 96(6)(6.1) sets out that an employer can appeal an assessment on the grounds of error of law or fact or contravention of a published policy of the governors. S Realty relies on all of those grounds.

The decision of the director is explained in several letters to counsel for the British Columbia Real Estate Association and S Realty. As well, the submissions of S Realty are contained in several letters from counsel. The submission to the Appeal Division refers to and relies on arguments contained in earlier correspondence.

Employer — Worker — Independent Operator

The *Act* refers to three categories of people who come within the *Act*: employers, workers, and independent operators. Section 1 of the *Act* defines "employer" and "worker," but "independent operator" is not defined. It is referred to in Section 2(2)(a), which provides the Board can direct that Part 1 of the *Act* applies "to an independent operator who is neither an employer nor a worker. . . ."

The policy of the governors in Chapter 2 of the *Rehabilitation Services and Claims Manual* (the *Manual*) and policy #20:30:20 of the *Assessment Policy Manual* provide further guidance on the interpretation of “worker” and “employer” and, by inference, “independent operator.” Inherent in those policies is the recognition that it can be difficult to determine whether a person is a worker, employer, or independent operator, and the Board may have to make some fine distinctions in interpreting and applying the language and intent of the *Act* in a particular case.

If the real estate salespersons are not workers, then they are either independent operators or employers — depending on whether they employ others. The distinction between independent operators and employers is not significant to this decision; rather, the issue is whether the salespersons are workers. For convenience, we will adopt the approach of counsel for S Realty, and refer to all real estate salespersons who are not workers as independent operators.

Decision of the Director

The director made his decision in the context of deciding how all real estate salespersons should be classified under the *Act*. Therefore, he considered the position of real estate salespersons who worked for different real estate agencies, including S Realty. Slightly different contracts are used in the industry by different real estate agencies.

In looking at the relevant facts, the director said there were factors which suggest the salespersons are workers of the agency, and factors which suggest independence.

Factors which suggest an employer-worker relationship include: the agency can refuse a listing, the agency controls what the advertising looks like, the listings remain the property of the agency, and there are various features of control contained in the *Real Estate Act*.

Factors which suggest real estate salespersons are independent operators include: many of the controls in the relationship are required by legislation (the *Real Estate Act* and Regulations) and do not reflect the intention of the parties, there is minimal or no supervision in how the salespersons carry out their work, the salespersons do not have set working hours, the salespersons are not subject to overtime pay, and Revenue Canada treats salespersons as independent operators if certain conditions are met.

The director said there were valid and compelling arguments on both sides of the question and further stated:

. . . In establishing guidelines and decisions it is my view that if there is to be an error in properly determining the employment relationship, then the error should be in favour of deciding individuals to be workers and

automatically entitled to benefits under the *Act* rather than being considered independent operators and having no right to benefits unless they individually apply for coverage on a voluntary basis.

The director also said the position taken by Revenue Canada “is interesting and would be taken into account, however, it is not binding on the Board since the Board must make its own decisions for the purposes of the *Workers’ Compensation Act*.”

In reference to the argument that many of the controls in the real estate agency — salesperson’s relationship are legislatively imposed and not reflective of the intention of the parties, the director stated:

. . . we must not lose sight of the fact that the Board’s role is to determine whether or not an individual is a worker within the meaning of Part I of the *Act*. It is not our role to determine the intentions of the parties. The intention of the parties may well be relevant, however, they are not conclusive in determining the status of an individual. The Board must look at the entire relationship which would include contractual relationships and any terms of the relationship established by statute.

The director also looked at the method of payment:

The agreement with P Realty Ltd. would seem to create an independent relationship. This is because the monthly charge is not dependent upon commissions or sales. It is conceivable, therefore, that an individual salesperson could lose money over the course of a year and that amount could be more than significant. In my view, when balancing the arguments for and against an independent relationship, it is this factor, in combination with the other factors in the agreements I reviewed, which tips the balance in favour of the independent relationship.

The agreements used by S and [another realtor] do not seem to contain this provision. The payment of the “service charge” seems to depend upon the commissions earned. While there is the chance of a loss through the cost of advertising or the operation of a vehicle, it would seem that the significant charges are dependent upon the commissions earned. As well, the level of these charges depends on the amount of commissions earned rather than being a flat fee. This situation is not too dissimilar from a commissioned salesperson who may rely partially or totally on commissions as their earnings.

In reviewing all the factors and arguments, the director concluded:

We will therefore view real estate salespersons as independent only where the salesperson is entitled to the full amount of the gross commissions and the salesperson is required to pay a realistic fixed amount to an agency for administrative and operating costs. This assumes factors supporting independence exist similar to those in the contracts/agreements I have reviewed here.

Submissions

Error of Fact and Law

S Realty argues that the decision of the director is based on an error of law and fact, as it is contrary to several decisions of the Supreme Court of British Columbia, it was wrong to rely on the sole factor of method of remuneration to distinguish between independent operators and workers, the director made a faulty comparison with a commercial salesperson, and it was wrong not to follow the relevant Revenue Canada policy. The submissions refer to: *Bachynsky v. Block Bros. Realty Ltd.* (Unreported decision of Mr. Justice Lysyk of the B.C.S.C., dated March 23, 1989); *Lowe v. Rutherford Thompson McRae Ltd.* (1970), 75 W.W.R. 765 (B.C.S.C.); and *282632 B.C. Ltd. v. Ken Jansen et al* (Unreported decision of Mr. Justice Meredith, dated November 16, 1992, B.C.S.C. Vancouver Registry No. C913943).

Contravention of a Published Policy

S Realty argues the director did not properly consider and apply the various criteria outlined in item #7.44 of the *Rehabilitation Services and Claims Manual*; the director erred in determining that real estate salespersons who pay a fixed fee to the real estate agency face a greater risk of loss than salespersons who pay a percentage of their commission; many factors relied on by the director are legislatively imposed and not reflective of the intention of the parties; and, there is little or no supervision or control in the relationship.

The submission also points out that real estate salespersons sell the property of a third party, not that of the agency. They choose the hours they work, where they work, and the amount of work they will take on. They seek out their own work, they can employ others without authorization from the agency, they must have their own salesperson's licence and pay their own insurance, and they must provide their own car, which is especially important in their business. They receive none of the standard employment benefits from the agency, and are not subject to the usual employment deductions.

S Realty argues the salespersons carry on the business of salesperson as they see fit, and therefore, they have a separate business existence, which is intended and accepted by the parties and has been recognized by the courts.

Reasons

Error of Fact and Law

a) Intention of Parties — Court Decisions

We find no error in the director’s decision that the intention of the parties is relevant but not conclusive to this issue under the *Act*. While all the cases cited in the submissions deal with real estate salespersons, the cases concern areas of law other than workers’ compensation. Both the *Lowe* and *Bachynsky* cases were actions for wrongful dismissal. In *Lowe*, the judge concluded “I am of opinion that the intention of the parties was that this contract of employment could be terminated by either party at will.” Thus, while the judge said the relationship between the real estate salesperson and the real estate agency was “clearly not that of a master and servant *simpliciter*,” he referred to it as a “contract of employment” and found the rights *as between the parties* were governed by their intention.

The *Bachynsky* case also concerned a wrongful dismissal suit between a real estate salesperson and a real estate agency. The judge noted that wrongful dismissal actions are not necessarily like other actions and stated:

Turning to the principles applicable in characterizing the nature of the contractual relationship as one of service or one for services, the cases and legal commentators caution against reliance upon authority dealing with that issue other than in the context of wrongful dismissal, such as where it arises in relation to vicarious liability in tort to third parties or in relation to compliance with statutory requirements and standards, liability to taxation, and other matters hinging on applicability of legislation . . .

However, the judge did note that, “both the writers and the cases on wrongful dismissal often draw upon principles expounded in cases where the nature of the contractual relationship is under examination for purposes unrelated to wrongful dismissal.”

In dealing with the relevance of the intention of the parties, the judge said:

The last example raises a question which goes to the heart of the analysis to be undertaken when the characterization of the legal relationship arises in the context of wrongful dismissal cases. To what extent does one have

regard to the intention of the parties? In cases involving the application of statutes, and particularly revenue raising enactments such as those considered in the *Montreal Locomotive* and *Ready Mixed Concrete* cases, the parties' declaration as to the nature of the relationship, for obvious reasons, cannot be taken to be determinative. One cannot ordinarily escape the reach of legislative regulatory or revenue measures through private contractual arrangements. Similarly, for purposes of determining vicarious liability to a third party in tort, there may be compelling policy reasons for disregarding an express contractual provision which, if governing, would exempt the person employing the services of others from liability for their negligent acts.

The rationale for disregarding an express contractual provision concerning the nature of the legal relationship in a wrongful dismissal case is not so clear. Such a case does not turn on application of statutory provisions. Third parties are not involved. . . .

Later, the judge stated:

The right to recover for wrongful dismissal must be related to an implied contractual term. The neat question is this: how can a term respecting entitlement to reasonable notice be implied in the face of an express term to the contrary effect?

. . . If the root question relates to what the parties must be taken to have intended, then certain factual elements beyond the control of the parties, such as legislatively imposed requirements, will be of little significance. . . .

The judge examined the relationship between the parties, as it was necessary to determine whether or not to imply a term into the relationship. The judge said he was drawn to the same conclusion reached in the *Lowe* case and said:

. . . I conclude that the terms of the contract did not establish a legal relationship of the kind which would give rise to an implied term entitling her to notice of termination. . . .

Thus, both of the above cases were primarily concerned with the intention of the parties, as expressed by their written and actual relationship, for the purpose of determining whether a term should be implied in their relationship vis-à-vis one another. We recognize the *Bachynsky* case had regard to general factors in determining the nature of the relationship but, as noted in that decision, the purpose of the inquiry is different for wrongful dismissal than for cases involving the application of statutes.

In *282632 B.C. Ltd.*, the issue concerned the terms of the agreement between the real estate salespersons and the real estate agency. The action was for breach of fiduciary duty, and the judge found the defendants were “independent contractors” and owed no duty to the plaintiff as employees. However, that case contains little analysis of the relationship, and is solely concerned with the legal duties between the parties without reference to a statutory scheme.

Decision No. 32, (1974), *Workers’ Compensation Reporter*, Vol. 1: page 127, is part of the published policy of the governors and contains a discussion of the relevance of the intention of the parties. The issue there was whether taxi drivers were independent operators or workers under the *Act*:

The question is whether on these facts the relationship between the company and the drivers should be classified for the purposes of the *Workmen’s Compensation Act* as a relationship of employment, or as an agreement between independent contractors. The *Workmen’s Compensation Act* prescribes rights and duties both for employers and for workers, and the obligation of an employer to pay assessments under the *Act* is a public obligation. Thus the categorization of the relationships and situations that create the obligation to pay assessments must be done by the tribunal having jurisdiction to determine the issues. The matter cannot be determined by any exclusion clause or labels in any contract between two or more parties.

This view is reflected in the terms of the *Act* itself. Thus Section 13 provides:

“It is not competent for a workman to agree with his employer to waive or forgo any of the benefits to which he or his dependents are or may become entitled under this Part, and every agreement to that end is absolutely void.”

For full effect to be given to the principle of compulsory coverage contained in the *Act*, and reflected in that section, the prohibition of contractual avoidance must be applicable whether such a contract provides in express terms that no benefits under the *Act* are payable to a worker of the employer, or whether it seeks to achieve the same objective by more subtle means, such as by describing the parties as independent contractors in circumstances in which the relationship is, in substance, one of employment.

In conclusion on this point, the cases submitted by counsel do not deal with the interpretation of “worker” or “independent operator” under workers’ compensation legislation. Rather, they are concerned with the common law rights between contracting parties, which primarily turns on their intention. The cases do not stand for the proposition that the intention of the parties is determinative in statutory interpretation.

We find the director did not err in law in not following these cases and in determining that intention was not determinative of the issue under the *Act*. Since these cases concern primarily the intention of the parties, they are of limited value in interpreting words in a statutory scheme where intention is much less significant.

b) Distinction Based on Sole Factor of Method of Remuneration

We agree this is a fine or narrow point on which to make the distinction between workers and independent operators, when all other factors are the same. However, even if the director erred on this point, for reasons set out later, we find it would not benefit S Realty. The primary issue is not this distinction, but whether these salespersons are “workers” under the *Act*.

Employment relationships are no longer clearly distinct from non-employment relationships, and there are many complex contractual relationships which fall on a continuum between a clear employment relationship and a clear relationship of independence. The Workers’ Compensation Board must draw a line somewhere along the continuum for each case and, as with most such delineations, it may be hard to distinguish between two cases which fall close to the line but on opposite sides of it. The fact that distinctions are fine, or narrow, on either side of the line, does not necessarily mean the line is wrong. The line may appear to put undue significance on one or two factors which, on their own, do not appear so significant. However, as long as those factors bear some relevance to the ultimate issue, we find no error of law or fact results from making a distinction which increases the significance of those factors in the final decision. The director referred to the goal of establishing a fair degree of predictability in establishing guidelines. We agree that predictability is a desirable goal, which cannot totally override the concept of relevance but can shift the emphasis among relevant factors.

Here, we find the method of remuneration could have some relevance to the issue. Further, it was not the only factor used by the director to determine that real estate salespersons of S Realty were its workers. He also looked at other factors, including the degree of control under the *Real Estate Act* and Regulations. That is, after looking at all of the factors, the director decided the method of remuneration would tip the balance one way or another. Once the balance was tipped in favour of deciding that the real estate salespersons of S Realty were workers, then that conclusion was based on all of the supporting factors and not just that one factor.

Thus, we find no error in the director's decision that the method of remuneration could tip the balance in light of all the other factors. However, that does not mean that it was necessary for the director to put such emphasis on that factor in this industry. It is important to note that we are considering only the appeal of S Realty, and not appeals relating to real estate salespersons who are considered independent by the director. One of the memoranda from the Legal Services Division to the director said, "Based on Decision 93-0349 [*Workers' Compensation Reporter*, Vol. 9(5): p. 713] the Appeal Division would likely find that these sales associates [that is, those who pay a flat rate to the agency] were independent." That issue is not before this panel, however, there are some factual differences between real estate salespersons and taxi drivers which another panel might find relevant. For example, Decision No. 93-0349 indicated that taxi drivers collected and retained all of the money from the customers and paid the taxi owner a flat fee for the taxi, but otherwise did not have to account for or disclose to the taxi owner the amount the taxi driver earned. In contrast, under the *Real Estate Act*, all monies are paid to and held by the real estate agency, and the real estate salespersons receive their commission only after the sale is complete. Therefore, as these two occupations have some different facts, we think it is unclear whether Decision No. 93-0349 indicates the Appeal Division "would likely find" that real estate salespersons who pay a flat rate to the agency were independent operators.

The submission also argues the director erred in determining which method of remuneration created a greater risk of loss. The director was concerned with whether a real estate salesperson could actually lose significant money at the end of the year, whereas the submission discussed the possibility of not making as much profit at the end of the year. These are quite different considerations and we can find no error in the director's decision that possibly making a lower profit is not the same as a significant risk of loss.

c) Commissioned Salespersons

The submission took issue with the director's comparison of real estate salespersons with commissioned salespersons. We find this is not a significant or determinative point in his decision. The determination of whether a person is a worker or independent operator has to be made by looking at the facts, and we are satisfied the director did look at the facts and not merely rely on a comparison with another type of salesperson. Therefore, we find no error of law or fact on this point.

d) Revenue Canada

The submission states it makes little sense to have different standards under different statutes for determining when a person is a worker or independent operator.

While many statutes may use the same or similar terms, such as “employee” or “worker,” each statute has its own purpose. Thus, it is not surprising that a federal taxation statute might take a different view from a provincial workers’ compensation statute about who is an “employee” or “worker” under their own legislation. The fact that, generally, “worker” is interpreted more broadly under workers’ compensation legislation than under most other legislation, does not indicate an error. Rather, it reflects a different policy and purpose to the legislation.

Further, even if it appeared that both federal taxing statutes and provincial workers’ compensation statutes should have the same definition of “worker,” it then would be necessary to determine which definition was appropriate. In such a case, it is not obvious that the approach taken by Revenue Canada should be preferred over that of the Board. Therefore, we can find no error of fact or law in the director’s decision not to adopt the same definition as Revenue Canada in determining when a real estate salesperson is a “worker” or “independent operator.”

e) Conclusion

In conclusion, we find no error of fact or law in the decision of the director that real estate salespersons of S Realty are workers under the *Workers Compensation Act*.

Contravention of Published Policy

The submission refers to section #7.44 in the *Manual*, which was not specifically referred to in the director’s decision. That same policy does not appear in the *Assessment Policy Manual*, and has now been removed from the *Manual*, although it still exists as published policy of the governors by virtue of being contained in the reported decisions of the former commissioners. That policy lists seven factors which are considered in determinations of status.

The first factor is control, and the submission argues that the real estate agency does not have control. While we accept that real estate salespersons have considerable individual autonomy and little supervision in their work, the *Real Estate Act* and Regulations impose significant control in their relationship with the real estate agency. The real estate salesperson cannot work independently, but must work through an agency. The salesperson can only work for one agency at a time. The *Real Estate Act* consistently refers to salespersons being “employed by” the agent. The agency maintains the offices, is legally authorized to deal with the public in real estate transactions, holds all the real estate listings obtained by the salespersons, and holds all monies received from the public with respect to real estate transactions. All advertising must display the name of the agent for whom the salesperson works.

The submission points out that these statutory requirements were enacted to ensure the protection of the public and cannot be relied upon in determining the mutual intention of the parties. However, as noted earlier, intention is not the determinative factor under the *Workers Compensation Act*. If a statute regulates an industry in the interests of the public and removes certain contractual freedoms from the parties, then those limitations will not be ignored in determinations under the *Workers Compensation Act*.

The *Real Estate Act* imposes significant controls in the relationship between a real estate agency and its salespersons and we cannot see how the director acted in contravention of the policy of the governors when he took that statutory control into account.

Other factors in #7.44 may point to independence — like ownership of equipment and licences, terms of work contract, independent initiative, and employment of others.

However, we cannot agree with the submission on the final factor of separate business enterprise, which is very significant in the overall analysis. Policy #7.44 provided:

The basic question asked by this test is whether one party has an existence as an independent businessperson separate from this relationship with the other party. This test largely encompasses the factors set out in (a) to (f) above.

We can see no meaningful separation between the business of the real estate agency and the work of the real estate salesperson. There is only one business — selling real estate. Without the salespersons, the agency would have no business. Without the agency, the salespersons are not allowed to carry on business. While this is prescribed by the *Real Estate Act*, that is the governing legislation for this industry and it determines the degree of independence to a large extent. It does not allow for a significant degree of independence on important business matters.

Decision No. 32 noted above also addressed the factor of separate business enterprise:

Whichever way the matter is tested, it is difficult to arrive at any conclusion except that the relationship is one of employment. A simple question that may be asked is: “Does each driver have an existence as a businessman independently of the company?” The answer is a clear, “No”. The drivers are engaged by the company in a business enterprise in which the company does the planning, the company performs the management functions, the company owns the capital and the company decides who comes and goes in the operation. The drivers do not have the management functions or business choices of an independent contractor, and they have no primary or substantial role as businessmen that is independent of their relationship to this company. We conclude, therefore, that the company is an employer, and that the drivers are workmen under the *Workmen’s Compensation Act*.

One point that has been stressed is that the drivers want to be treated as self-employed businessmen. We accept that this is a genuine desire of the drivers and that they are not being unduly influenced by the company. But to recognize the wishes of the drivers as being legally relevant would be inconsistent with the principle of compulsory coverage, and inconsistent with the terms of Section 13.

There are several reasons why social insurance coverage of this kind might be made compulsory. One may be an element of paternalism, a feeling that the choice which employers and workers might make at the time of negotiating an agreement may be different from the choice that they would make after a serious injury. There may be apprehension that in some cases, workers could be influenced by employers to waive the protection of the *Act*. Another reason may be to achieve economies of scale. Also compulsory coverage may be required to use the compensation system to create incentives for the adoption of safety measures. Another reason may be simply good social cost accounting — to assure that the costs of industrial accidents are borne by industry and not borne by workers or thrust upon taxpayers at large through the welfare system. But whatever the reasons may be, it is our responsibility to give effect of the legislative decision for compulsory coverage, not to weaken it by allowing options in situations which, in our judgment, come within the compulsory category.

The submissions again refer to the legal cases noted above, but we find those cases offer no more support here than under the ground of error of fact or law. To repeat, those cases are concerned with certain legal rights between the parties to a contract, not with the interpretation and application of the *Act*. Their focus on the intention of the parties is of very limited relevance, particularly in light of the *Real Estate Act* which prescribes significant aspects of the relationship which are considerably more relevant to the director's decision than the intention of the parties.

In conclusion, we do not agree the director used only one factor in determining that the real estate salespersons of S Realty are workers under the *Act*. We appreciate the intention of the parties may suggest a relationship of independence and, to the extent the legislation allows, the parties may conduct themselves as independent operators. However, the legislative scheme of the *Real Estate Act* is significant in this situation. In light of that statute, we find the factors of control and separate business enterprise clearly support the director's decision, and he did not contravene the published policy of the governors by deciding that the real estate salespersons of S Realty were workers under the *Act*.

Conclusion

In conclusion, we find no error of law or fact or contravention of the published policy of the governors in the director's decision that the real estate salespersons of S Realty are "workers" under the *Act*. While S Realty argued the factor used by the director in distinguishing between workers and independent operators is not sufficient justification for the distinction, we are concerned only with the S Realty case here and find no error in that decision.

Further, even if the director erred in making that distinction, we find the factor of separate business enterprise clearly points to an employer-worker relationship between S Realty and its real estate salespersons. That is the primary issue.

We find the Supreme Court of British Columbia cases submitted are not particularly relevant to this issue as they are concerned primarily with the intention of the parties, which is of limited relevance to the director's decision under the *Workers Compensation Act*, particularly in light of the provisions of the *Real Estate Act* and Regulations.

Therefore, as Section 96(6)(6.1) limits the jurisdiction of the Appeal Division in these matters to error of law or fact or contravention of a published policy of the governors, we deny the appeal of S Realty.

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



REPORTER

Decision of the Appeal Division

Number: 93-0781
Date: May 28, 1993
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Section 11 Reconsideration

By letter dated March 4, 1993, addressed to me, the applicant seeks a redetermination of a Section 11 certificate under the *Workers Compensation Act* as amended by the *Workers Compensation Amendment Act, 1989* (the "Act"). An Appeal Division panel certified this determination on April 4, 1993.

The applicant, who was a defendant in a legal action, had requested a determination of the plaintiff's status on April 7, 1990. On that day, the plaintiff allegedly suffered injuries when she was struck by a garage door at the entrance to the underground parking area in a building owned by the defendant. The plaintiff's employer was a tenant in that building.

The Appeal Division panel certified that the plaintiff was, on April 7, 1990, a worker within the meaning of the *Act* but that the injuries she suffered on that day did not arise out of, and in the course of, her employment.

The question arises as to whether the *Act* allows the redetermination of a Section 11 certificate made by an Appeal Division panel. If it does, what are the grounds for a redetermination? The above questions require consideration of the Appeal Division's authority to issue certificates under Section 11 of the *Act*.

The *Workers Compensation Amendment Act, 1989* which created the Appeal Division came into effect June 3, 1991. It made no changes to the wording of Section 11 which reads as follows:

Where an action based on a disability caused by industrial disease, personal injury or death is brought, the board shall, on request by the court or by any party to the action, determine any matter that is relevant to the action and within its competence under this *Act* and, without limiting the generality of the foregoing, may determine whether

- (a) a person was, at the time the cause of action arose, a worker within the meaning of this Part;

-
- (b) injury, disability or death of a worker arose out of, and in the course of, his employment;
 - (c) an employer or his servant or agent was, at the time the cause of action arose, employed by another employer; and
 - (d) an employer was, at the time the cause of action arose, engaged in an industry within the meaning of this Part,

and shall certify its determination to the court.

Before the Appeal Division was created, the prior commissioners made determinations under Section 11. Under the pre-1991 legislation, the prior commissioners' authority to make these determinations was clear as they were "the Board" (see Section 79 of the pre-1991 legislation). The Board had the authority to make determinations under Section 11. The Board (hence, the commissioners) also had the discretionary power "to reopen, rehear and redetermine any matter which has been dealt with by it, by an officer of the board or by the review board" (see Section 96(2) of the pre-1991 legislation). However, I understand that the prior commissioners rarely used Section 96(2) for the purpose of redetermining Section 11 matters on the basis that they were reluctant to interfere with the established rights of parties to a legal action.

Under the present legislation, the Appeal Division is not "the Board" but is part of the Board. Subsection 85(1) of the *Act* states:

There shall be an appeal division of the board consisting of

- (a) a chief appeal commissioner appointed by the governors, and
- (b) one or more appeal commissioners, appointed by the chief appeal commissioner, who are selected in accordance with the policies established by the governors.

The *Workers Compensation Amendment Act, 1989* introduced a new organizational model, consisting of a Board of Governors to superintend the general direction and policies of the Workers' Compensation Board, a president/ chief executive officer to implement the governors' policies and oversee the management of the Workers' Compensation Board and a chief appeal commissioner to coordinate the Appeal Division. Both the president/ chief executive officer and the chief appeal commissioner are appointed by the Board of Governors to which they are directly and exclusively accountable.

Although accountable to the Board of Governors for the general operations of the Appeal Division (i.e. the timely disposition of appeals, etc.), the chief appeal commissioner is not accountable for the decisions made in individual cases. The statute makes it very clear that the governors may not remove the chief appeal commissioner in a case where an appeal commissioner makes a decision with which the governors disagree (see Section 85(5)). Thus, while the Appeal Division is a part of the Board, the statute ensures its independence in decision-making. A full discussion of the legislative safeguards needed to ensure the quasi-judicial independence of an internal tribunal, such as the Appeal Division, can be found in the *Munroe Report* upon which the *Workers Compensation Amendment Act, 1989* was based. (See “Report and Recommendations to the Minister of Labour and Consumer Services by the Advisory Committee on the Structures of the Workers’ Compensation System of British Columbia” in *Workers’ Compensation Reporter*, Vol. 8(3): p. 231.)

In Decision No. 4 dated April 8, 1991, the governors assigned to the chief appeal commissioner and the Appeal Division the Board’s authority to issue certificates under Section 11. The governors pointed to Section 82 as the basis for this assignment. This section provides that the governors shall superintend the policies and direction of the Board and select and define the functions of the chief appeal commissioner. Section 82 reads in part as follows:

The governors shall approve and superintend the policies and direction of the board, including policies respecting compensation, assessment, rehabilitation and occupational safety and health and

(a) shall

(i) select and define the functions of the president and the chief appeal commissioner.

Because the Appeal Division was created in order to consider appeals, questions may be raised as to the validity of assigning to the Appeal Division determinations that are made in the first instance. The statutory scheme contemplates the chief appeal commissioner’s and the Appeal Division’s duties and discretionary powers in the context of appeals.

Several considerations have persuaded me that the Board of Governors’ assignment of Section 11 determinations to the Appeal Division is valid. In specifying that the governors “shall approve and superintend the policies and direction of the board,” the *Act* gives the governors a wide measure of flexibility in controlling the Board’s operations. The wording of the *Act* does not specifically bar the chief appeal commissioner and the Appeal Division from carrying out Board duties. The Appeal Division is internal to the Board.

A very strong case may be made that it is logical to entrust from the outset Section 11 determinations to the tribunal of last resort. These determinations raise issues that go to the heart of workers' compensation theory. They must be made expeditiously to enable the courts to determine their effect on a legal action and, therefore, do not lend themselves readily to appeal proceedings. Moreover, entrusting them to the legal department would create a reasonable apprehension of bias since the legal department pursues the Board's subrogated actions. Mr. Justice Wong discussed that point in the unreported decision *C.Y. Loh Associates Ltd. and Kosta C. Marcakis v. Workers' Compensation Board of British Columbia and Raymond Gerald Innes*, Vancouver Registry No. A912408, September 27, 1991 (B.C.S.C.) at pages 13–18. Entrusting them to claims adjudicators would result in the same problem to the extent that the claims adjudicators may require assistance from the legal department, in certifying their determinations. As for the governors themselves, the legislation did not intend to involve them in the day-to-day operation of the Board and individual files. Taking into account all of the above considerations, the governors' assignment of Section 11 determinations to the chief appeal commissioner and the Appeal Division is sound and does not offend the *Act*.

To conclude that the assignment is valid does not settle, however, the question of whether the statutory provisions dealing with Appeal Division decisions apply to Section 11 determinations by the Appeal Division. Do these determinations constitute Appeal Division "decisions" within the meaning of Section 96.1 of the *Act*? In other words, may they be reconsidered on the same terms as decisions reached in the context of appeals?

Section 11 Determinations by the Appeal Division as "Decisions of the Appeal Division"

Under this approach, any determination made by the Appeal Division constitutes an Appeal Division decision under the *Act*, regardless of whether the Appeal Division considered the matter on an appeal. This approach has intuitive appeal but is not free from difficulties. Because the legislature did not specifically contemplate the Appeal Division exercising certain powers of the Board, such as making Section 11 determinations and issuing Section 10(8) orders, it may be argued that it did not intend the requirements found in Section 96.1 to apply to the exercise of these powers. The reasoning underlying this argument is that the concept of finality found in Section 96.1 was not intended to apply to adjudication in the first instance. This argument is not as strong in the case of Section 11 determinations as in the case of other situations in which the Appeal Division adjudicates in the first instance (for example, when it reallocates claim costs between employers). As the prior commissioners apparently recognized, the nature of Section 11 determinations requires that they be final, barring some exceptional circumstance.

A more fundamental difficulty pertains to the wording of Section 96.1(2). If Section 11 determinations by the Appeal Division constitute Appeal Division decisions under the *Act*, then Section 96.1(2) operates to limit who may apply to the chief appeal commissioner for reconsideration on the basis of new evidence. This provision states that “A worker, the worker’s dependants, the worker’s employer or the representative of any of them may apply to the chief appeal commissioner for reconsideration of a decision of the appeal division” In response to a reconsideration request of an assessment decision, I found in Decision No. 93-0166 and No. 93-0182 (both at *Workers’ Compensation Reporter*, Vol. 9(3): p. 351) that, for all its problems, a literal interpretation of Section 96.1(2) was better founded than alternative interpretations. But I also suggested in that decision that the governors may wish to draw the attention of the Legislature to the interpretative problems flowing from Section 96.1(2). As regards Section 11 determinations, a literal interpretation of the words found in Section 96.1(2) would mean that an employer other than the worker’s employer would not have the right to request a reconsideration on the basis of new evidence. Hence, in the case before me, the employer who is the defendant in the legal action would not have the right to request a reconsideration on the basis of new evidence. On the other hand, the plaintiff’s employer would have had the right to request a reconsideration on the basis of new evidence, had the Appeal Division panel certified that the plaintiff’s injuries arose out of, and in the course of, her employment. There is no apparent justification for this asymmetry in reconsideration rights.

Section 11 Determinations by the Appeal Division in a Separate Category

Instead of viewing Section 11 determinations by the Appeal Division as Appeal Division decisions within the meaning of the *Act*, one might conceivably analyze them as a category on their own or *sui generis*. Counsel for the employer argues that:

The Workers Compensation Board has the discretion to allow a redetermination of a section 11 determination pursuant to section 96(2) of the *Workers Compensation Act* which provides that “the board may at any time at its discretion reopen, rehear and redetermine any matter, except a decision of the appeal division” In our view, a section 11 determination falls within the phrase “any matter” in section 96(2) for one or more of the following reasons: a section 11 determination involves an initial hearing and determination of a matter rather than an “appeal” under section 96(1) or a “reconsideration” under section 96.1 of the *Workers Compensation Act*; there is a distinction between a “decision” and a “determination” in the *Workers Compensation Act*; and, a section 11 determination is a matter determined by the Workers Compensation Board rather than a decision of the Appeal Division. Accordingly, the Workers Compensation Board has the discretion pursuant to section 96(2) to allow a redetermination of a section 11 determination.

The *Act* uses various terms to characterize the results of decision-making. These terms include a Board “decision,” a Board “determination,” a Review Board “finding,” a Medical Review Panel “certificate” and an Appeal Division “decision.” The term “determination” appears twice in the *Act*: in Section 11 but also in Section 33(8) which provides that the Board shall determine the maximum wage rate applicable for the purpose of average earnings calculations. The *Act* uses “to determine” in numerous provisions concerning the powers of the Board, of Medical Review Panels, and of the chief appeal commissioner. The *Act* uses the term “redetermination” both in the context of provisions setting out the powers to make a different determination of a matter and provisions setting out the powers to change one’s own decisions (or findings). The *Act* uses the term “reconsideration” only in the sense of changing one’s own decisions (or findings).

In light of the *Act*’s usage of the terms “decision” and “determination,” I cannot find that the statute distinguishes between the two terms. I do not accept counsel’s statement that “there is a distinction between a ‘decision’ and a ‘determination’ in the *Workers Compensation Act*.”

I note that the *Concise Oxford Dictionary* defines the word “determination” in law as “the cessation of an estate or interest” and as “a judicial decision or sentence.” *Black’s Law Dictionary* defines the term “determination” as “[t]he decision of a court or administrative agency The coming to an end in any way whatever.” These definitions provide no grounds to differentiate between “determinations” and “decisions.”

Section 11 determinations by the Appeal Division are noteworthy in that they are decisions in the first instance. Arguably, this sets them apart from the type of decision-making for which the Appeal Division was created, namely, decision-making in the context of appeals. If Section 96.1 does not apply to first instance adjudication by the Appeal Division, is there any other avenue for reconsideration (or redetermination)?

Counsel argues that Section 96(2) of the *Act* allows a redetermination of a Section 11 certificate. This provision reads as follows:

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

Obviously, for this provision to be considered in relation to a Section 11 determination by the Appeal Division, the determination must be differentiated from “a decision of the Appeal Division.” I note, however, that if Section 96(2) applies to situations in which the Appeal Division adjudicates a matter in the first instance, the wording of the provision would allow any other entity in the Board, besides the Appeal Division, to redetermine the matter adjudicated by the Appeal Division. That would be incongruous.

The assignment itself is silent on the issue of reconsideration. I considered whether it may be viewed as implicitly granting the chief appeal commissioner and the Appeal Division a discretionary power to reconsider Section 11 determinations. I do not think so. When the governors assigned to the Appeal Division the Board's authority under Section 96(2) of the *Act* to redetermine any decision made by the prior commissioners, they specified the grounds for redetermination. A tribunal has the inherent power to correct clerical mistakes and to set aside a decision that is a nullity because, for instance, required procedure was not followed. But this inherent power does not extend to reconsideration (or redetermination) on the basis of any error of law, new evidence or reweighing of the evidence.

In summary, I conclude that the governors' assignment of Section 11 determinations to the chief appeal commissioner and the Appeal Division is valid under the *Act*. It is arguable that by virtue of this assignment Section 11 determinations have become Appeal Division decisions within the meaning of the *Act*. If so, they can only be reconsidered in accordance with the terms of Section 96.1 and, as I indicated in Decision No. 93-0740 (*Workers' Compensation Reporter*, Vol. 10(1): p. 127), if there is a clerical mistake, fraud or an error of law "going to jurisdiction." The terms of Section 96.1 preclude, however, an employer who is not the worker's employer from applying for a reconsideration on the basis of new evidence. That result is admittedly illogical. It calls for legislative changes, unless Section 11 determinations by the Appeal Division are not Appeal Division "decisions" within the meaning of Section 96.1. But, on that footing, it is the assignment that leaves a gap. It fails to specify the grounds for redetermination. I do not have the authority to remedy this.

In any event, the nature of Section 11 determinations requires that the reconsideration grounds be limited. It is essential that parties and the courts be able to rely on the finality of these determinations although there must be room for some changes. I can envisage, for example, a situation in which the court may ask for a reconsideration of a Section 11 determination in light of new evidence.

Reasons and Findings

For a disposition of the case before me, it is not necessary that I decide whether Section 11 determinations constitute Appeal Division decisions within the meaning of the *Act* or, alternatively, form a category of their own. I cannot grant the employer's request in either case.

The employer does not base his request for a redetermination on Section 96.1. He has not provided new evidence. Counsel's arguments are that the Appeal Division panel misapplied the relevant statutory provisions and governors' policies and that it failed to weigh the evidence properly. More specifically, counsel submits that:

-
- (1) It was held that the parking garage was not part of the employment premises, but the parking garage was “contiguous” to [the Plaintiff’s] place of employment “as it was in the same building” and [the Plaintiff] went “directly” from the parking garage “to the inside of the building and then to her employer’s office”; and/or
 - (2) The rule set out in Item # 19.00 of The *Rehabilitation Services and Claims Manual* entitled “Use of Facilities Provided by the Employer” was not considered or not taken into account when interpreting Item 19.20 and analyzing this matter; and/or
 - (3) The second question to be answered under Item 19.20 of The *Rehabilitation Services and Claims Manual* is whether the employer had *any or some control* over the parking lot and not whether the employer had *sufficient” control* as held by the the (sic) Appeal Commissioner in this section 11 determination; and/or
 - (4) The fact that a key was required to gain access to the parking garage on the day of the accident and the employer . . . provided [the Plaintiff] with the key to the parking garage and then never retrieved the key when [the Plaintiff] changed from full-time to part-time employment was not taken into account and/or given proper weight when determining the issue of control under Item # 19.20; and/or
 - (5) It was held that the employer . . . did not have enough “control” over the parking garage to fall within Item # 19.20 of The *Rehabilitation Services and Claims Manual*, but the employer . . . was a “tenant in the building with some monthly parking spots” and the employer . . . had “some control over which of their employees had access to the parking garage”; and/or
 - (6) It was held that the “employment relationship” and the “employment premises” did not extend to cover [the Plaintiff’s] activities in the parking garage, yet [the Plaintiff] would not have been in the parking garage at the time of her accident but for the fact of her employment; and/or
 - (7) It was inconsistent to make a determination that [the Plaintiff] was a “worker” at the time of the accident, but “her injury . . . did not arise out of or in the course of her employment”.

Matters of interpretation pertaining to whether and how statutory provisions and governors' policies should be applied to particular fact patterns do not amount to jurisdictional matters. Neither does the weighing of evidence amount to a jurisdictional matter. Hence, under the theory that Section 11 determinations by the Appeal Division are Appeal Division decisions, the applicant has not provided grounds for a reconsideration. Under the theory that they are in a different category because they are the result of adjudication in the first instance, they cannot be reconsidered. The assignment does not provide for reconsideration.

I deny, therefore, the employer's request for a redetermination of the Section 11 certificate dated February 4, 1993.

Should the governors recommend legislative changes to Section 96.1, in light of Decision No. 93-0166 and No. 93-0182, they may wish to consider the consequences of such recommendations for matters such as Section 11 determinations and Section 10(8) orders.

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



Decision of the Appeal Division

Number: 94-1395
Date: November 25, 1994
Panel: Connie Munro
Subject: *Criminal Injury Compensation Act, Section 25*

[This is an application under the *Criminal Injury Compensation Act*].

In a decision dated July 29, 1994, I granted the applicant leave to appeal the appeal committee's findings (undated) with respect to the hearing held on October 19, 1993. I was persuaded to grant leave to appeal because the findings raised an issue of statutory interpretation beyond the particular circumstances of the case.

The issue before the appeal committee was whether the Board may award compensation under the *Criminal Injury Compensation Act* ("the Act"). Put somewhat differently, the issue was whether the wording of Section 25 of the Act precludes the Board from awarding compensation to the applicant. This section concerns the application of the Act. It states:

This Act applies for compensation claims arising from an injury or death resulting from an act or omission that occurs after July 1, 1972.

The appeal committee reached the conclusion that the Act does not apply to this applicant's claim because the acts or omissions, resulting in her injury, occurred before July, 1972.

The applicant was born in British Columbia on October 22, 1955. In 1993, her biological father was convicted by the Supreme Court of British Columbia of indecent assault, gross indecency, sexual intercourse with a person under the age of 14 years, sexual intercourse with a blood relative and anal intercourse. He was sentenced to five years in prison. This conviction arose out of incidents of sexual intercourse which began when the applicant was about 6 or 7 years old, and continued until age 13. Over the years there were at least 15 acts of sexual intercourse and one of anal intercourse. In about 1969, the applicant disclosed the sexual abuse to her mother. Although the sexual abuse ceased thereafter, her father began to verbally and psychologically abuse her.

The Board has declined to award the applicant compensation for the injuries suffered as a result of the above crimes. Although there is no decision letter on file with respect to her specific application for compensation (she apparently applied both in 1989 and 1993), there is a Board letter on file dated December 17, 1992 which sets out Board policy with respect to eligibility for compensation under the *Act*. The letter states in part “that the *Criminal Injury Compensation Act* does not provide coverage in respect of crimes occurring before July 1, 1972.” Following the applicant’s 1993 application, the matter of her eligibility for compensation under the *Act* was reviewed by the appeal committee which, as indicated earlier, found that she was not eligible.

Counsel for the applicant provided lengthy submissions to the appeal committee. In the final analysis, the committee as a whole concluded that the terms of Section 25 preclude the *Act* from applying in this case. However, there was disagreement among the members of the committee as to the meaning of counsel’s submissions. The majority on the committee interpreted these submissions to be saying that, for the *Act* to apply in accordance with Section 25 the injury must occur after July 1, 1972; it does not matter if the acts or omissions that caused the injury occurred before July 1, 1972. The majority rejected that interpretation and reasoned:

... Section 25 must most reasonably be interpreted as that it is the “acts and omissions” (*amounting to a scheduled criminal offence*), producing injury, which must occur after July 1, 1972 for entitlement to arise.

(emphasis added)

The minority on the committee understood counsel’s argument to be that the *Act* applies, as long as some acts or omissions related to the offence occur after July 1, 1972; it is not necessary that these acts or omissions themselves be part of or constitute an offence under the *Act*. In the applicant’s case, such acts or omissions would be her father’s name-calling, his failure to admit wrongdoing or to provide assistance in obtaining help. The minority disagreed with this interpretation of Section 25 and stated:

... for entitlement to arise, it is the acts or omissions forming the foundation of the offence itself that must occur after July 1, 1972. I acknowledge that the words of Section 25 do not specify that the injury must result from acts or omissions, that constitute the offence, which occurred after July 1, 1972. But for the section to achieve the intent of the legislature, it must be read in that way.

Section 1(1) of the *Act* does not define “acts or omissions” nor “offence” nor “crime”. Section 2(1) provides that to be compensated a person must satisfy the criteria set out in Section 2(2). That section provides that the

person must be a victim of crime and must have been injured as a result of acts or omissions resulting from the commission of a scheduled offence. This is a criminal injury compensation act.

It may be that Section 25 of the *Act* read alone is capable of more than one meaning. However, the modern approach to statutory interpretation is to construe particular provisions in the context of the purpose of the statutory scheme. This is known as the “broad, purposive” approach. The purpose of the *Criminal Injury Compensation Act* is to compensate victims of crime. Reading the *Act* as a whole, with particular reference to Section 2(2), leads me to the inevitable conclusion that the words “injury . . . resulting from an act or omission . . .” in Section 25 are referring to acts or omissions which are themselves part of or constitute the crime or offence, that is, the *actus reus*, of which the applicant claims to be a victim. These words cannot be read to mean anything else, and certainly not to mean acts or omissions which are not part and parcel of the *actus reus* of the offence or crime.

In a letter dated August 30, 1994 addressed to the Appeal Division, counsel has provided fresh submissions as to the interpretation of Section 25 of the *Act*. Counsel has also offered more general arguments in support of the position that payment of an award to the applicant may be made within the statute.

I will address counsel’s general arguments before I examine her interpretation of the specific wording used in Section 25.

Counsel submits that the reasoning in *Re: Testa and Workers Compensation Board of British Columbia* (1989) 58 D.L.R. (4th) 676 (B.C.C.A.) operates in favour of the applicant. I do not agree with that argument. *Testa* concerned the exercise of a statutory power of discretion and may be said to stand for the proposition that the discretion must be brought to bear on every individual case. Therefore, while Section 33(1) of the *Workers Compensation Act* provides a broad basis for determining the average earnings and earning capacity of a worker “as may appear to the board best to represent the actual loss of earnings suffered by the worker by reason of the injury,” it leaves the manner of calculation up to the Board. As a general policy, the Board has adopted a particular method of calculation. Yet the application of that method may constitute an unreasonable application of the statute, where it clearly fails, because of the particulars of the case, to approximate the worker’s actual loss of earnings. In other words, where the policy fails to achieve the purpose stated in the applicable provision, the policy has no application. The purpose as stated in the provision must prevail. The Board must render a decision in accordance with that purpose rather than with its general policy. That is what *Testa* illustrated. It did not concern a case where the very meaning of a statutory provision was in question. There was no question that Section 33 intended to confer upon the Board a wide discretion as to how to best estimate a worker’s loss of earnings.

In the case before me, there is no issue pertaining to the exercise of a statutory power of discretion. The issue is simply the proper interpretation of Section 25 of the *Act* which entails determining the circumstances to which the *Act* is intended to apply. The Board has no discretion in that regard — either the *Act* applies or it does not. The *Testa* decision, therefore, sheds no light on the issue before me.

Counsel submits that:

Consistency as between external statutes is an important consideration in the rules of statutory interpretation. Using the body of the law generally, it is very clear that the recent trend in obliterating *all limitation periods* when it comes to cases of sexual abuse, is consistent with the liberal interpretation of the *Act* advocated in the case.

(emphasis added)

Undoubtedly, the recent jurisprudence concerning cases of incest has established that victims of such abuse may be psychologically incapable of recognizing the existence of a cause of action until long after the abuse has ceased. Therefore, limitation periods for incest do not begin to run until the victim is reasonably capable of discovering the wrongful nature of the perpetrator's acts and the resulting injuries [see, for example, *M. (K.) v. M. (H.)* 96 D.L.R. (4th) p. 289]. That principle should apply, therefore, to Section 6 of the *Act*, which is the section setting out the limitation period. The section states:

Limitation period

6. An application for compensation shall be made within one year after the date of the injury or death but the board, before or after the expiry of the one year period, may extend the time for a further period as it considers warranted.

I do not consider, however, that the same principle has a role to play where the interpretation of a section setting out the application of the *Act* is at issue. In the case of limitation periods, a person has already established that she comes under the *Act*; the only issue is whether the person has disentitled herself to the benefits under the legislation. In the case of Section 25, the issue is whether the person comes within the terms of the *Act*. There is, therefore, a significant difference between the application of a limitation period and the application of legislation. I find that the trend in the jurisprudence towards obliterating all limitation periods when it comes to cases of sexual abuse is of no relevance to the issue before me.

Counsel makes several arguments concerning the interpretation of Section 25. I agree with the way in which the minority on the appeal committee panel summarized counsel's arguments in that regard. Counsel's position emphasizes that, for the *Act* to apply, it is enough that acts or omissions related to the crime(s) committed occur after July 1, 1972. In developing this line of reasoning, counsel discusses several statutory provisions, more specifically Sections 2(1) and (2) and Section 8.

Subsections 2(1) and (2) set out a victim's right to compensation as follows:

Right to compensation

2. (1) Every victim of crime is, or, if he has been killed, his dependants are, entitled to apply, in the manner provided in this *Act*, to the board for compensation.

(2) For the purpose of this *Act*, a victim of crime is a person injured or killed in the Province by an act or omission of another resulting from

- (a) the commission of an offence within the description of a criminal offence mentioned in the Schedule, except an offence arising out of the operation of a motor vehicle, but including assault by means of a motor vehicle;
- (b) the lawful arrest or attempt to arrest an offender or suspect offender; or assisting a peace officer in making or attempting to make an arrest; or
- (c) the lawful prevention or attempt to prevent the commission of a criminal offence or suspected offence, or assisting a peace officer in preventing or attempting to prevent the commission of the offence or suspected offence.

Section 1 of the *Act* defines "injury," "injured" and "victim" as follows:

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

... "victim" means a person injured or killed in the circumstances set out in section 2(2).

Section 8 of the *Act* concerns entitlement to compensation when a crime is not proved. It states:

Crime not proved

8. (1) Compensation may be awarded whether or not any person is prosecuted for or convicted of the offence giving rise to the injury or death but the board may, on its own initiative or on the application of the Attorney General, adjourn its proceedings pending the final determination of a prosecution or intended prosecution.

(2) Notwithstanding that a person is, for any reason, legally incapable of having a criminal intent, he shall, for this *Act*, be deemed to have intended an act or omission that caused injury or death for which compensation is payable under this *Act*.

(3) If a person is convicted of a criminal offence for an act or omission on which a claim under this *Act* is based, proof of the conviction shall, after the time for an appeal has expired or if an appeal was taken, it was dismissed and no further appeal is available, be taken as conclusive evidence that the offence has been committed.

In analyzing these provisions together with Section 25, counsel's main points are:

1. Section 25 could have been made to state that the *Act* applies to compensation claims arising from an injury or death resulting from a crime that occurs after July 2, 1972. It does not state that. Some significance must be attached to that fact. According to counsel, the wording used in Section 25 reflects an intent *not* to entirely exclude persons suffering from crimes occurring before 1972.
2. The wording of subsection 2(2) of the *Act* suggests that the acts or omissions referred to in Section 25 do not have to constitute or be part of the offence. Subsection 2(2) says that a victim of crime is a person injured or killed in the province "by an act or omission of another resulting from (1) the commission of an offence" Such language makes sense only if the acts or omissions are distinguishable from the commission of the offence. Counsel raises the rhetorical question: "If the actus reus of the offence is the act or omission, than [sic] how can we say that the act or omission 'results from the commission of an offence'?"
3. The *Act* sometimes uses the phrase "an act or omission" to refer to the offence. Section 8 uses the phrase in that sense. This, according to counsel, only shows that in Section 25 of the *Act* the phrase "acts or omissions" subsumes both cases where the acts or omissions constitute the offence (such as in Section 8) and cases where

the acts or omissions are distinguishable from the offence and may be said to “result from” the commission of the offence.

Put succinctly, as I understand it, counsel’s argument is that the wording of Section 25 is broad enough for the *Act* to cover: acts or omissions that constitute an offence and occur after July 1, 1972; and acts or omissions that result from the commission of an offence but are not themselves an offence and that occur after July 1, 1972. Therefore, according to counsel, the behaviour of the applicant’s father after 1972 (his refusal to acknowledge wrongdoing, his verbal abuse, etc.) amounts to an act or omission within the meaning of Section 25.

Basically, counsel’s reasoning hinges on the contention that the phrase “act or omission” as it appears in Section 25 encompasses acts or omissions that are not themselves criminal in nature but “result from” the commission of an offence; after July 1, 1972. The behaviour of the applicant’s father — though not criminal in nature — may be characterized as an act or omission resulting from the offences committed during the 1960’s and, therefore, such behaviour triggers the application of the *Act* in accordance with Section 25.

For the disposition of this case, I only need to address the issue of whether the behaviour of the applicant’s father, after July 1, 1972, may reasonably be characterized as an act or omission “resulting from” the commission of the offences committed in the 1960’s. Even if, as counsel argues, the acts or omissions to which Section 25 refers need not constitute a scheduled offence, it must be shown that they at least result from the commission of a scheduled offence, consistent with the language used in Section 2(2).

The words “resulting from” refer to causation. Counsel includes in her submission definitions for the word “result” found in the *Oxford Dictionary of Current English*. The definitions state:

result **1** *n.* consequence, issue or outcome of something; satisfactory outcome (*get results*); quandry or formula obtained by calculation (in *pl.*) list of scores or winners etc. in sporting events or examinations. **2** *v.i.* arise as actual or follow as logical consequence (*from*); have outcome or end in specified manner (*resulted badly, in a large profit*). [*L. resulto spring back*].

The father’s behaviour, after July 1, 1972 cannot be said to have been the consequence of the offences he committed in the 1960s. The commission of these offences neither formed a necessary nor a sufficient condition for such acts and omissions. The verbal abuse could have occurred, even if no offences had been committed. Similarly, the failure to assist the applicant obtain therapy could have occurred, even if the sexual abuse had been perpetrated by someone else. Furthermore, as counsel herself points out, the father could have behaved very differently after committing the offences. For

example, he could have acknowledged his crime and obtained psychological treatment for the applicant or gone with her for therapy. Therefore, as broadly as it may be interpreted, the phrase “resulting from” as it appears in Section 2(2), cannot be stretched to encompass acts and omissions such as the verbal abuse and failure to provide medical treatment. The father’s behaviour after July 1, 1972 was in principle independent from the crimes he committed in the 1960s. There is neither a necessary nor a sufficient connection between this behaviour and the earlier crimes committed.

In light of the above, the father’s behaviour after July 1, 1972 does not open the door to the applicant’s claim. If they do not constitute the offence, the acts or omissions referred to in Section 25 must at least be causally related to the offence — that is, they must “result from” it. I cannot find that the father’s post-July 1, 1972 behaviour “resulted from” the offences he committed in the 1960s.

Although not necessary for the disposition of this case, I have considered the broader issue raised by counsel — namely, whether the phrase “act or omission” as it appears in Section 25 encompasses acts or omissions that are not the offence but merely “result from” it. The language of Section 2(2) would seem to support counsel’s reasoning in that respect. In referring to an act or omission “resulting from” the commission of an offence, the provision suggests that, although related to the offence, the act or omission is something other than the offence.

The wording of Section 2(2) has been acknowledged as quite problematic. In his text *Criminal Injuries Compensation* (2nd ed.) (Toronto: Butterworths 1992) at p. 46, Professor Peter Burns noted the problem with this wording. The problem arises where an act or omission in fact constitutes the scheduled offence (or is part of it). In such a case, one would have to say that the act “resulted from” itself in order to bring it under the provision. That is difficult to rationalize yet that is how Section 2(2) *must* be read, if it is to cover the typical situation in which a person is injured by an act or omission that constitutes the offence or is a part of it. Use of the phrase “resulting from or resulting in” in Section 2(2) would have avoided this interpretative problem.

In summary, while it may be that the phrase “an act or omission” in Section 25 covers more than an act or omission constituting the offence, this is of no direct bearing on the case before me. On the broadest possible interpretation of the phrase “act or omission,” this appeal must fail because the father’s conduct after July 1, 1972 cannot be characterized as consisting of acts or omissions “resulting from” the commission of a scheduled offence.

THE APPEAL IS DENIED.

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

Decision of the Appeal Division

Number: 94-1449
Date: November 30, 1994
Panel: Connie Munro
Subject: Employer Representation During Inspection

The employer, a logging company, is requesting the reconsideration of Appeal Division Decision No. 94-0409. The employer's representative invokes an error of law as grounds for reconsideration.

Appeal Division Decision No. 94-0409 upheld the imposition of a penalty on the employer for violation of the *Industrial Health and Safety Regulations*. The penalties were imposed following inspection of a worksite carried out on March 24, 1993, in the absence of either employer's or worker's representative. At the time of the inspection, the employer was not operating at the worksite.

The employer's representative submits that the March 24, 1993 inspection failed to meet certain statutory requirements and was, therefore, unlawful. More specifically, the representative submits that, because the inspector did not contact the employer when he arrived at the worksite, the employer could not exercise his right to have a representative accompany the inspector as set out in Section 72(1) of the *Act*.

According to the representative, all inspections (including spot inspections) should afford employers the opportunity to have a representative accompany the inspector during the inspection visit. In other words, even where the Board does *not* give advance notice of the visit to the employer, the onus remains on the Board to contact the employer before the inspection begins. Otherwise, the orders, directives and/or penalties resulting from the inspection are invalid.

In Appeal Division Decision No. 94-0409, the panel considered the right to representation on inspection set out in Section 72(1) of the *Act* without explicitly analyzing the provision. It is clear from the decision, however, that the panel implicitly rejected the proposition that the provision requires the Board to contact the employer before the inspection to afford him the opportunity of representation during the inspection. On pp. 5-6 of its decision, the panel reasoned:

In this case, the inspection was carried out on a spot basis. After the inspection, the Occupational Safety Officer contacted the employer to discuss the violations found. At that time, it was open to the employer to question the factual basis of the orders and to provide additional evidence or argument regarding the violations. There is no indication that the employer questioned these orders when the Occupational Safety Officer contacted the employer. If the employer had raised such a challenge, it would have been open to the Occupational Safety Officer under the Governors' Policy to arrange to continue the inspection with the employer present by appointment. There is no evidence the employer requested an opportunity to accompany the officer to the worksite, or was denied the opportunity. It was also open to the employer to go to the worksite to gather evidence to refute the orders written, but there is no evidence that the employer exercised that option.

The panel finds the employer was not prejudiced by the inspection in this case. It was open to the employer to challenge the orders or to return to the worksite to provide contrary evidence. That was not done. The panel finds the inspection, in the circumstances of this case, was in accordance with the *Act* and the Governors' Policy.

The grounds for reconsideration of an Appeal Division decision are new evidence as set out in Section 96.1 of the *Act*, an error of law going to jurisdiction (including breaches of the rules of natural justice), clerical omissions or errors and fraud.

A patently unreasonable interpretation of the applicable legislation amounts to an error of law going to jurisdiction. The phrase "patently unreasonable" indicates the degree of magnitude of the error before a decision may be reconsidered. An interpretation is not patently unreasonable simply because there are other possible or better interpretations. An interpretation may be said to be patently unreasonable, if it is *not* viable in light of the legislation.

The reconsideration request before me raises a significant issue, namely, the content of the right to representation found in Section 72(1) of the *Act*. That issue has a jurisdictional aspect: to what extent does the right to representation limit a Board officer's jurisdiction to inspect a worksite? Where a question of jurisdiction is involved, the test for reconsideration requires asking whether the statute has been "correctly" interpreted. It is not sufficient to ask whether the interpretation is viable, in light of the relevant legislation. In other words, where a question of jurisdiction is involved, the test is stricter than the "patently unreasonable" test.

I must decide, therefore, whether the panel's implicit interpretation of Section 72(1) found in Appeal Division Decision No. 94-0409, is correct. Essentially, the panel found that the Board officer had the jurisdiction to proceed with the inspection of the worksite, even though the employer was not present to accompany the officer during the inspection. The provisions in the *Act* that bear upon the question under examination are Sections 71(3), 72(1), 72(9) and 72(10).

Subsection 71(3) states:

An officer of the board or a person authorized by the board may at all reasonable hours inspect the place of employment of a worker within the scope of this Part. Immediately after each visit the person authorized under this subsection shall cause to be posted in a conspicuous place, at or near the works, establishment or premises, a statement showing what portion of the works, establishment or premises has been inspected, and the condition found to prevail there, and he shall furnish a copy of the statement to the manager of the works, establishment or premises, and, where the inspection visit is made by an industrial hygiene officer, and where it is impracticable for the statement required by this section to be posted immediately after the visit, it shall be posted as soon as possible after each visit.

Subsection 72(1) states:

On every inspection visit under section 71(3), the employer and the workers shall each have a right to have a representative accompany the officer of the board or person authorized by the board.

Subsection 72(9) states:

Nothing in this section shall be construed as

- (a) requiring the board to give advance notice of an inspection visit;
- (b) limiting the right of an officer of the board or person authorized by the board to speak to a person out of earshot of any other person; or
- (c) limiting the authority of the board by regulation of general application or by order related to a specific situation, to confer other or further rights on union officials or other workers.

Subsection 72(10) states:

Where an inspection visit involves the attendance of an officer of the board or person authorized by the board at one place of work for a period exceeding one day, the rights conferred under this section may be abridged by regulation of the board, or by direction of the officer of the board.

The *Act* confers upon employers and workers the right to have a representative accompany the Board officer during an inspection visit. It confers upon the Board the authority to conduct spot inspections. If the employers' (or the workers') right to accompany the Board officer is interpreted to require the Board to contact the employer prior to the inspection, even where the Board gave no advance notice of the visit, spot inspections may fail to accomplish their purpose. The purpose is to give the Board an accurate picture of safety hazards. On the other hand, if spot inspections are to accomplish their purpose, then the employers' (and workers') right to representation can mean no more than being allowed to accompany the inspector on his visit, in the event that such representative is present at the worksite when the inspector arrives.

It is apparent that, to reconcile Sections 72(1) and 72(9)(a), one of the two provisions must be seen as predominant. The question becomes whether it is more in keeping with the legislative text and intent to read down Section 72(1) as subject to Section 72(9)(a); or the opposite.

Accident prevention is at the heart of the Board's jurisdiction. Broad inspection rights are a necessary component of the Board's duty to fulfill its responsibility in the field of accident prevention. It is an established principle of statutory interpretation that general words in a legislative enactment can have their scope limited by the legislation considered as a whole. To the extent that one of the unquestioned purposes of the *Act* is to empower the Board to undertake accident prevention measures, it is more consistent with that purpose to limit the scope of employers' and workers' right to representation during an inspection visit than it would be to limit the scope of inspection visits. To give the right of representation found in Section 72(1) the broad meaning which the employer attaches to it would greatly undermine one of the main objects of the *Act*. It would suggest, for example, that if an employer representative, for whatever reason, could not be contacted, that no inspection could proceed.

Section 72 was enacted in 1974. The minister of labour responsible for the bill that introduced this provision stated during the parliamentary debates:

One of the other important areas that we have sought to deal with is the whole question of accident prevention. This, of course, affects the dollars that are paid out in time-loss benefits, in partial disability pensions, and so

on. I think it is essential that we take a route similar to that enunciated by my colleague, the Minister of Health (Hon. Mr. Cocke) in his preventive health care programme.

I think it's prudent to take a similar approach in workmen's compensation and *seek to control and minimize the number of industrial accidents and diseases which do in fact occur in the plants and factories of the province. So we have sought to provide more effective inspections means.*

We have, for the first time, granted plant safety committees equal right to accompany accident inspectors on their tours of plants and factories. *This means that the workers' committees as well as management will have the right to accompany the accident inspector from the Workmen's Compensation Board and to draw to his attention factors which they feel might place their safety in peril.*

Really, the whole basis of accident prevention hinges on the local plant committees. So I think that this move, which puts both management and labour on an equal footing with respect to access to the inspections, is long overdue and is something that indicates that we are indeed sincere in our attempts to minimize industrial accidents, and in our attempts to prevent noxious gases from emanating in plants and factories to the point where they could prove injurious to the health of the local work force.

We have, in addition to the better inspection methods, provided for tighter penalties for those employers who violate the standards set out by the Workmen's Compensation Board. We have had a history, particularly in the areas of excavations, of inspectors showing up on the job and finding unsafe and unshored-up excavations, of issuing closure orders only to find that within a few hours of leaving the operation was underway again with more of the safety provisions ordered by the board attended to.

I think it has to be demonstrated to employers that when the inspector issues an order for the improvement of safety mechanisms, for safety factors on job, they must receive immediate attention, it must be taken very seriously, and that failure to do so will result in the penalties that are certainly a deterrent, in my view.

(emphasis added)

Recent jurisprudence has made it clear that parliamentary debates may be used in order to ascertain “the mischief” or “evil” that a particular enactment was designed to correct (*Canada (Attorney General) v. Young*, [1989] 3 F.C. 647 (F.C.A.), 657). The excerpt from the parliamentary debates surrounding the introduction of Section 72 shows that the section was intended to provide more effective inspections and to put labour on an equal footing with employers with respect to access to inspections. It is clear from the debates that the section was not viewed as providing additional rights to employers. Rather, it was recognized that, whereas employers have *de facto* access to inspections because of their control over the worksite, workers do not. Section 72 was enacted to rectify this imbalance, with the intent of making inspections more effective. From this perspective, it would be absurd to read Section 72(1) in a way that undermines the ability of the Board to carry out spot inspections. Yet the employer’s reading of Section 72(1) would do precisely that.

I note that the heading of Section 72 is “worker representation on inspection.” The B.C. *Interpretation Act* states that headings do not form part of the enactment in which they are found (see, Section 11). However, some courts have resorted to headings, where the language of a provision is ambiguous. Kellock J. in *A.G. Canada v. Jackson* [1946] 2 D.L.R. 481 at 486–87 stated that “Where the language of a section is ambiguous, the title and the headings of the statute in which it is found may be resorted to restrain or extend its meaning as best suit the intention of the statute . . .” More recent judgments from the Supreme Court of Canada involving the *Charter* suggest, that, for purposes of interpretation, headings should be considered part of the legislation [see, for example, *Law Society of Upper Canada v. Skapinker* (1984) 9 D.L.R. (4th) 161 (S.C.C.)]. This approach to headings in the *Charter* has been applied to ordinary federal legislation and, despite the *Interpretation Acts*, to provincial legislation as well [see, for example, *Re Africian Lion Safari and Game Farm Ltd v. ONT (Min of Natural Resources)* (1987), 59 O.R. (2d) 65 at 72–75 (C.A.)]. From this perspective, a heading certainly carries some weight where there is ambiguity in the enacted words. In this case, the heading is consistent with reading Section 72(1) as simply intended to put labour on an equal footing with employers with respect to access to the inspection process.

I note that the explanatory notes to the first reading bill (Bill 119) state: “s. 37 enacts a new section 90A (now s. 72) to authorize workers and employers to have a representative accompany an officer of the Board on inspection visits.” To the extent that such notes may be relied upon in interpreting a statutory provision, this note suggests a limited right, namely, the permission to accompany the inspector but nothing more.

Finally, I note that Section 72(9) specifies “Nothing in this section shall be construed as (a) requiring the board to give advance notice of an inspection visit.” This rather strong language suggests that Section 72(1) must be read subject to Section 72(9)(a).

In light of the statutory text, the broad purpose of the *Act* and the specific “mischief” which Section 72 was intended to remedy, I have concluded that a coherent interpretation of Sections 72(1) and 72(9) requires reading Section 72(1) as subject to Section 72(9). The employers’ right to representation set out in that provision means a right to accompany inspectors as long as the employers are available. The same applies to the workers’ right to representation under that provision. The alternative interpretation, namely, that the right to representation requires the Board to contact the employers prior to commencing the inspection is incorrect. It cannot be reconciled with one of the main purposes of the *Act*, namely, accident prevention. Nor can it be reconciled with the specific purpose behind the enactment of Section 72, namely, more effective inspections.

More specifically, such an interpretation would contradict Section 72(9) — a key provision for accident prevention whose very wording gives it pre-eminence over Section 72(1).

I have given specific consideration to the argument put forward by the employer’s representative that the wording of Section 72(10) supports interpreting Section 72(1) as requiring the Board to contact employers prior to commencing inspections. I see no merit to that argument. Section 72(10) allows the Board to “abridge” the rights conferred under the section where the inspection visit lasts for more than one day. The employer’s representative submits that use of word “abridge” rather than “abrogate” (or some other similar word) indicates that the rights conferred by the section cannot be annulled. This argument does not address, however, the basic issue of what rights are conferred by Section 72(1). Use of the word “abridge” in Section 72(10) does not assist defining the content of the rights set out in Section 72(1). The definition of these rights is independent of Section 72(10). If such rights entail allowing employers and workers to have their representatives accompany the inspector on his visit, in the event that they are present at the worksite when he arrives, then Section 72(10) would allow, for example, the Board to shorten the time during which representatives may accompany the inspector. Use of the word “abridge” in Section 72(10) may easily be reconciled with an intent to confer a limited right of representation under Section 72(1).

The employer’s request for reconsideration is denied. Appeal Division Decision No. 94-0409 is “final and conclusive.” It is not based on “an error of law going to jurisdiction.” The inspection visit of March 24, 1993 was valid under the *Act*.

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



Decision of the Appeal Division

Number: 95-0062
Date: January 23, 1995
Panel: Connie Munro
Subject: Section 39(1)(e) Policies

The employer is requesting a reconsideration of Appeal Division Decision No. 93-1633, arguing that the decision misinterpreted the relevant policies and contravenes the *Act*.

Appeal Division Decision No. 93-1633 concerns a case in which the employer applied for and obtained relief of costs for the wage loss and medical aid benefits extended to one of its workers. By letter dated December 15, 1993, addressed to the employer, the manager of Compensation Services confirmed the claims adjudicator's decision that the employer would be relieved of all wage loss and medical aid benefits incurred after August 28, 1990, that is, *after* the worker had been disabled for 13 weeks. Both the claims adjudicator and the manager refused to consider relieving the employer of costs incurred prior to August 28, 1990, despite medical evidence that the worker would have recovered within 8 to 10 weeks of his injury, were it not for his pre-existing condition. The refusal to grant relief for costs incurred prior to August 28, 1990 was not based on a weighing of the medical evidence. Rather, the claims adjudicator and the manager considered that the governors' policies, more specifically item #114.40 and #114.41 of the *Rehabilitation Services and Claims Manual* (the *Manual*), contemplate the application of relief, in the case of temporary disabilities, only for those costs incurred after the worker has been disabled for 13 weeks.

Appeal Division Decision No. 93-1633 upheld the manager's and claims adjudicator's decisions. It found their interpretation of the governors' policies as set out in *Reporter* Decision No. 271 and item #114.40 of the *Manual* to be correct and consistent with the *Act*.

In a submission dated February 10, 1994 addressed to me, the employer presented an alternative interpretation of the governors' policies. According to that interpretation, the governors' policies do not preclude the application of relief for costs incurred during the first 13 weeks of a worker's disability. The policies merely stipulate that relief be first *considered* after the worker has been disabled for 13 weeks.

Moreover, the employer argues that the Appeal Division panel's interpretation of the policies may not be reconciled with the *Act*. The employer reasons:

. . . The *Act* clearly directs the W.C.B. to apply relief of costs to that portion of the disability that was enhanced by a pre-existing condition. It does not give the W.C.B. the authority to apply such relief only after 13 weeks of disability. To do so would result, in some cases, in costs being charged to an employer that were the result of ". . . that portion of the disability enhanced by reason of a pre-existing disease, condition or disability." The panel's interpretation of section 114.40 is, therefore, in conflict with the wording of the *Act* and cannot be seen to be valid . . .

The grounds for reconsideration of an Appeal Division decision are new evidence as set out in Section 96.1 of the *Act*, an error of law going to jurisdiction (including breaches of the rules of natural justice), clerical mistakes or omissions and fraud. A patently unreasonable interpretation of the *Act* amounts to an error of law going to jurisdiction. The phrase "patently unreasonable" indicates the degree of magnitude of the error before a decision may be reconsidered. An interpretation is not patently unreasonable simply because there are other possible interpretations. It is "patently unreasonable" if it is not at all viable, in light of the legislative text and intent.

I must decide, therefore, whether the panel's interpretation of Section 39(1)(e) as permitting limitations to be put on to the relief of the costs of claims of workers suffering enhanced disabilities is viable, in light of the *Act*.

Subsection 39(1)(e) reads:

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 above provision clearly requires the Board to accumulate a reserve for the broad purpose of relieving employers of the costs of claims of workers suffering enhanced disabilities. The provision is silent, however, on how the reserve is to be administered.

To require the Board to accumulate a reserve for a broad purpose is a different matter from requiring it to accomplish the purpose in specific ways. Subsection 39(1)(e) states the broad purpose for which the reserve is intended but provides no guidance as to the implementation of that purpose. It provides no guidance as to how the provision is to be applied to individual cases. It would appear that the provision calls for policies regarding the manner in which it is to be applied to individual cases. Subsection 39(1)(e) may be interpreted, therefore, as leaving implicitly a substantial amount of discretion for policy making as regards its potential application to individual cases. The history behind the provision reinforces that interpretation.

Subsection 39(1)(e) was enacted in 1968 as a result of Mr. Justice Tysoe's recommendations. In his *1966 Report on the W.C.B.*, Mr. Justice Tysoe discussed at some length the advantages of having the Board maintain a special fund to be used where industrial injuries superimposed on pre-existing disabilities or conditions have an enhanced disabling effect (see pp. 199–203 in his *Report*). The Board had specifically requested the legislative power to set up and operate such a fund. For the purpose of this decision, I do not need to go over Mr. Justice Tysoe's discussion. I find, however, his concluding remarks on p. 203 noteworthy. Upon recommending the enactment of a provision that would give the Board the power it was seeking, Mr. Justice Tysoe stated:

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 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.

(emphasis added)

Clearly Mr. Justice Tysoe considered it proper for the Board to put some limitations on the granting of relief of costs.

I recognize that recommendations and opinions in commission reports cannot be taken as evidence of legislative intent because it does not follow that the recommendations were accepted. In fact, the wording of Section 39(1)(e) does not correspond to the draft provision recommended by Mr. Justice Tysoe. That being the case, his views should certainly not be used to contradict what is clear from statutory text. Appeal Division Decision No. 94-0736 (soon to be published) illustrates that basic proposition. In that decision, I had to turn my mind to the question of whether Section 39(1)(e) contemplates relief of costs for fatalities. Despite strong indications that Mr. Justice Tysoe favoured a provision broad enough to cover fatalities, I found that the wording of Section 39(1)(e) rules out relief for fatalities. Mr. Justice Tysoe's views could not displace legislative wording clear as regards the exclusion of fatalities.

However, where there is a problem of interpretation because of omissions or ambiguities in the enacted text, the observations and recommendations contained in a commission report may be helpful. Subsection 39(1)(e) says that the Board must "provide and maintain a reserve" for the relief of the costs of claims of workers suffering disabilities "enhanced by reason of a pre-existing disease, condition or disability." The provision is silent on how the Board is to operate that reserve and apply it to individual cases which may reasonably be taken to suggest an intent to leave the Board considerable discretion in that regard. In other words, while the legislative text does not explicitly specify limitations on the relief of costs, neither does it rule out that, in operating the reserve, the Board may devise some limitations. The observations and recommendations contained in Mr. Justice Tysoe's *1966 Report* reinforce the notion that, because of what it omits to say, the wording of Section 39(1)(e) leaves the application of the provision (including possible limitations) up to the Board.

I conclude that the panel's interpretation of Section 39(1)(e) as tolerating some limitations to the granting of relief (such as a policy denying relief during the first 13 weeks of a worker's disability) is viable, in light of the wording of the provision and its historical background.

Needless to say, where a policy puts a limitation, the limitation does not constitute an absolute bar since policies are essentially guidelines — not binding rules. There must always be willingness to depart from a policy in a deserving case. On the other hand, policies are meant to ensure consistency and predictability with reference to carefully thought-out standards. This means that a departure from a policy is only warranted in exceptional circumstances.

The question arises though as to whether the governors' policies really purport to deny relief during the first 13 weeks of a worker's disability. If that is their intent, then the impugned Appeal Division decision neither misinterpreted the law nor the policies. If that is not their intent, I must decide the extent to which a misinterpretation of the

policies would vitiate the decision, given that the *Act* is silent on the application of Section 39(1)(e) to individual cases, that the policies fill the void and that a statutory ground for appealing the type of decision before the Appeal Division panel was a contravention of the governors' published policies.

The governors' published policies on the application of Section 39(1)(e) mainly consist of Decision No. 271 (1978) in *Workers' Compensation Reporter*, Vol. 4: p. 10 and item #114.40 and #114.41 of the *Rehabilitation Services and Claims Manual*.

The following excerpts from these policies are of significance:

The second issue to be considered is the timing of the decision. Should it be made at the time of initial adjudication, sometime during the period of temporary-total or partial disability or should it be made only after wage loss benefits have been terminated and a pension awarded?

It is anticipated that the subsection will be applicable most frequently in those cases where a pension award has been made, particularly where it has been determined that although the claimant appears to have suffered from a pre-existing condition or disease, that condition or disease did not amount to a disability and therefore subsection 6(5) is not applicable. However, there may well be claims where protracted temporary-total or partial disability can be said to have been enhanced by reason of a pre-existing disease, condition or disability. *Although we are satisfied that there can be no set rule for the timing of the application of the subsection, we have concluded that in cases of temporary-total or partial disability, the subsection will not be invoked until the claimant has been disabled for a minimum of thirteen weeks. This conclusion is based upon the same assumption made in respect of subsection 6(5); since the claimant was obviously fit and able to work at the time he suffered the new injury, it must be presumed that his entire disability for some time after the initiation of the claim must be attributable to that injury and to nothing else. It is only as the disability becomes more protracted that it becomes possible to allocate some measure of responsibility for it to a pre-existing condition, disease or disability.*

It will be necessary for the individual Adjudicator to make this decision on the basis of all of the information available to him following the minimum period of time loss set out above. It should be noted that since the section refers expressly to that portion of the "disability" enhances, it was clearly not intended to be applied to those claims in which medical aid only is payable.

Decision No. 271 pp. 11-12

How much disability stems from the injury and how much from the enhancement of the disease, condition or disability and therefore to what extent costs should be charged under subsection 37(1)(e), can never be more than an estimate and will always be difficult to determine. In cases of continuing wage loss and medical aid benefits, it will be appropriate for the Adjudicator to determine that all of the costs of these benefits *after a particular point in time should be charged under subsection 37(1)(e)*. In some instances, it may be appropriate for the Adjudicator to charge such costs on a percentage, rather than a time basis . . .

It has been suggested that for the sake of administrative simplicity and consistency, it would be best to establish arbitrarily a set time or percentage to be applicable to all claims where the charging of costs under subsection 37(1)(e) would be appropriate. In our view, the arbitrariness and inflexibility of this approach argues too strongly against its adoption. We are not convinced that exercising individual judgement on each claim will result in gross inequities or inconsistencies nor that the adjudication process will be slowed to any degree by reason of the need to make this decision.

Decision No. 271 p. 12

The section is applied most frequently in cases where a pension award has been made. There are, however, claims where temporary total or temporary partial disability can be said to have been protracted by reason of a pre-existing disease, condition or disability. In such cases, *no consideration will be given to the application of Section 39(1)(e) until the claimant has been temporarily disabled for a minimum of 13 weeks following the injury*. All of the costs of a claim cannot be charged under Section 39(1)(e).

Policy Item #114.40 at p. 17 of the *Manual*

There is undoubtedly an element of ambiguity in these policies. The policies could be read as referring to the timing of the relief decision when they specify a 13 weeks demarcation period. But they also very much lend themselves to the alternative interpretation that relief may not be granted for costs incurred during the first 13 weeks of a worker's disability. Decision No. 271 sketches a rationale for the latter interpretation — namely, that it is reasonable to presume that the worker's entire disability for some time after the injury is attributable to that injury and to nothing else since he was fit to work at the time he suffered the injury.

While the wording of the policies is somewhat ambiguous, it is my understanding that, historically, Board practice has reflected the interpretation that relief may not be granted for costs incurred during the first 13 weeks of a worker's disability. To that extent Appeal Division Decision No. 93-1633 falls squarely within the boundaries of a long-established practice.

Since the *Act* is silent on the application of Section 39(1)(e) to individual cases and the policies must be relied on in that respect, it is important that the policies be clear. The governors may wish to remove any ambiguity in the wording of the policies. That said, I have concluded that the Appeal Division panel's interpretation of the governors' policies is reasonable and coincides with Board practice.

Appeal Division Decision No. 93-1633, therefore, neither contravened the *Act* nor misconstrued the policies in interpreting these to mean that, in the case of temporary disability, relief may not be granted for the costs incurred during the first 13 weeks of a worker's disability. The panel could have chosen to depart from the policies, if the circumstances of the case had been exceptional. It would appear that the panel did not find the circumstances of that case to warrant such departure.

The employer's request for reconsideration is denied. The Appeal Division decision is "final and conclusive" since no error of law deprived the panel of its jurisdiction to rule as it did in the circumstances of this case.

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



Decision of the Appeal Division

Number: 95-0048
Date: January 16, 1995
Panel: Patrick L. Byrne
Subject: Section 39(1)(e) — Prior Injuries with Current Employer

The employer appeals the January 6, 1994 decision of a manager in the Compensation Services Division denying relief of costs under Section 39(1)(e). The issue is whether the employer is entitled to relief of costs under Section 39(1)(e).

The worker has worked for the employer since 1964. He had a number of back-related claims between 1967 and 1974. In September 1989, the worker injured his back while moving a photocopier. He was eventually diagnosed with an L5-S1 disc protrusion and underwent several surgeries.

The employer requested relief of costs. By letter dated August 12, 1993, a claims adjudicator denied the employer's request. The employer requested a managerial review. They said there was evidence on file of a pre-existing condition. The manager upheld the claims adjudicator's decision:

. . . in my opinion, the seriousness of the injury and two failed surgeries flowed solely from the influence and effects of the September 22, 1989, events. Under the circumstances, I feel that there is no pre-existing component which played a part in the course this claim took and I, therefore, agree that the Claims Adjudicator has reached an appropriate conclusion which I will not be altering.

The employer now appeals to the Appeal Division. They provided a submission dated October 12, 1994:

In the Jan. 6, 1994 decision it is stated that the prior back claims all resolved "with no ill effects". and "There was no recollection of significant problems prior to September, 1989." With respect, this is not consistent with the information on the file. The Consultation report of Nov. 24, 1989 states "I saw [this worker] in the office on November 24, 1989. He was a 47-year-old gentleman who presented with a *long history* of low back

pain. Occasional involvement of the left heel was noted. About seven weeks ago the low back pain recurred spontaneously." (emphasis added). Significantly, there was no mention of the work incident of Sept. 22, 1989. In the A.B. examination report of May 23, 1990, Dr. E stated "He has had previous low back pain with radiation to the heel . . .". In the A.B. examination report of November 23, 1992 Dr. F stated, in respect to the prior problems, "He had sciatica with radiation to the left heel with those claims, however, both resolved with conservative treatment. He did experience intermittent ongoing low back pain, but was able to remain at work." In respect to the work injury of Sept. 22, 1989 Dr. F stated that the worker experienced "low back pain, which radiated down the left lower leg to the heel".

The Jan. 6, 1994 decision relies on there being a very significant injury Sept. 22, 1989 and very minor past problems. Again with respect, we do not believe that the evidence on file supports this contention. We accept that a work injury did occur, however, the relative significance of it must be questioned. The worker did not lay off work until over three months later. He did not seek medical attention until over a month after the work incident. The first medial report was not submitted to the W.C.B. until five months later. The work incident is not mentioned in the initial consultation report of Nov. 24, 1989.

In addition to the evidence suggesting that the work incident was not, in itself, significant, the nature of the symptoms were the same as the worker had previously experienced. It is clear that he had sciatica before with radiation down the left leg into the left heel. The conclusion must follow that the disc was damaged before the work injury. It was this disc that was operated on under the claim.

(doctors' names removed, otherwise reproduced as written)

The manager had determined that the circumstances described by the employer did not indicate a pre-existing condition, but were indicative of the worker's "very stoic type of personality." The essence of the employer's appeal is that prior to the incident in September 1989, the worker already had a damaged disc, thus they are entitled to relief of costs.

There is little medical evidence on which to determine whether the worker had such a pre-existing condition. There is no indication on the file that suggests the worker had any pre-existing condition prior to joining his current employer. In 1967, he fell at work. The employer's report at that time states:

Investigation shows [. . . the worker] slipped on the rear steps to the premises, went down approximately five steps, felt a severe pain to his lower middle back and his left leg.

In 1970, the worker was struck by a car while at work. The employer's report of injury states that the worker suffered "fractured left leg, multiple bruises, both legs, back and neck."

In 1974, the worker had a further back injury.

There is little information in the file that would indicate that the worker had any non-work-related back problems. Thus, if the worker did have a previously weakened back, it was more likely due to the work-related accidents. The question, therefore, is whether Section 39(1)(e) is applicable where a pre-existing condition results from work-related accidents with the same employer applying for relief of costs. The employer was aware of the worker's previous work-related claims, but did not provide any arguments with respect to the question. In my view, Section 39(1)(e) is not applicable in the circumstances. Governors' policy is set out in item #114.40 in the *Rehabilitation Services and Claims Manual* and in the Decision No. 271, *Workers' Compensation Reporter*, Vol. 4: p. 10 which provides:

This provision is fundamentally a rehabilitation measure, giving reassurance to *potential employers* of workers with pre-existing conditions, disease or disabilities that, in employing those workers, they take no inordinate risks in respect of possible future injuries. Of secondary importance is the actual relief from a certain amount of the cost of any given claim, especially where the employer in question is assessed on the basis of an experience rating.

(emphasis added)

I cannot read governors' policies in a way that would permit relief of costs where a pre-existing condition likely resulted from a series of work-related injuries with the same employer seeking relief of costs. One of the purposes of Section 39(1)(e) is to relieve employers and the class to which they belong from certain costs of claims for which they are not responsible. It is primarily a rehabilitation measure designed to encourage employers to hire workers with pre-existing diseases, conditions or disabilities. In this case, the weight of the evidence indicates the employer was responsible for the worker's back injuries. In my view, it is not consistent with the published policies of the governors to allow relief of costs in the circumstances of this case.

I am unable to find an error of fact, error of law or a contravention of a published policy of the governors as alleged by the employer. Therefore, the employer's appeal is denied.

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



Decision of the Appeal Division

Number: 95-0257
Date: March 10, 1995
Panel: Connie Munro
Subject: Reconsideration of Decision No. 95-0048

The employer requests reconsideration of the January 16, 1995 Appeal Division Decision (No. 95-0048), which denied their appeal concerning their request for relief of costs under Section 39(1)(e) of the *Workers Compensation Act*.

The worker, with the same employer since 1964, suffered compensable back injuries between 1967 and 1974. In September, 1989, he suffered the injury under this claim, diagnosed as a disc protrusion. The employer sought relief of costs under Section 39(1)(e), on the basis of an alleged enhancement of the worker's disability by reason of a pre-existing disease, condition or disability.

This request was denied by the claims adjudicator. A manager confirmed this decision, concluding that the seriousness of the injury and the two failed surgeries flowed solely from the 1989 work injury and was not enhanced by any pre-existing disease, condition or disability.

In considering the employer's appeal, the Appeal Division panel noted there was little information to indicate that the worker had any non-work-related back problems. The panel concluded, therefore, that the central issue was whether Section 39(1)(e) applies where a pre-existing condition results from work-related accidents with the same employer. The panel found that Section 39(1)(e) is not applicable in these circumstances and denied the employer's appeal, stating:

Governors' policy is set out in item #114.40 in the *Rehabilitation Services and Claims Manual* and in Decision No. 271, *Workers' Compensation Reporter*, Vol. 4: p. 10 which provides:

This provision is fundamentally a rehabilitation measure, giving reassurance to *potential employers* of workers with pre-existing conditions, disease or disabilities that, in employing those workers, they take no inordinate risks in respect of

possible future injuries. Of secondary importance is the actual relief from a certain amount of the cost of any given claim, especially where the employer in question is assessed on the basis of an experience rating.

(emphasis added)

I cannot read governors' policies in a way that would permit relief of costs where a pre-existing condition likely resulted from a series of work-related injuries with the same employer seeking relief of costs. One of the purposes of Section 39(1)(e) is to relieve employers and the class to which they belong from certain costs of claims for which they are not responsible. It is primarily a rehabilitation measure designed to encourage employers to hire workers with pre-existing diseases, conditions or disabilities. In this case, the weight of the evidence indicates the employer was responsible for the worker's back injuries. In my view, it is not consistent with the published policies of the governors to allow relief of costs in the circumstances of this case.

It would appear from the emphasis placed upon the term "potential employers" that the Appeal Division panel attached significance to the use of these words in governors' policy as implying that Section 39(1)(e) relief is not available to employers in respect of sequential injuries to their own workers.

The employer's representative submits that the Appeal Division decision involves an error of law, arguing:

The same rehabilitation issues apply to the accident employer as other employers. If the Vocational Rehabilitation Consultant is trying to place the injured worker with the accident employer, it is easier to do so if the accident employer knows that they have the protection of section 39(1)(e) in the event of further injury. Without such protection they would have the same reluctance as any other employer in placing the worker. . .

The employer's representative argues that the restriction applied by the Appeal Division panel is contrary to the *Act* and governors' policy.

There is an ambiguity in governors' policy on this point. If, for example, a worker leaves his employment after an injury, and works for another firm for a period of time before contemplating a return to his original employment, could his original employer then be considered a "potential" employer under governors' policy? If so, is there sufficient rationale under the *Act* for excluding consideration of Section 39(1)(e) relief in cases involving prior compensable injuries with the same employer?

The issue as to relief of costs to employers in situations such as this has been the subject of consideration in other jurisdictions. In *Workers' Compensation in Canada*, Second Edition, 1989, Terence G. Ison notes at page 276 that:

In Quebec, the *Act* does not speak of a second injury fund as such, but with regard to pre-existing disabilities, it achieves a similar result in providing that where a worker was already handicapped when the employment injury appeared, the Commission may impute all or part of the cost of the benefits to the employers in all classes. *It is a discretionary matter, and the transfer of costs may be refused because, for example, the pre-existing disability resulted from a work accident with the same employer.*

(emphasis added)

The Ontario *Workers Compensation Act* contains Section 120(2), under which the W.C.B. has a discretion to create "a special fund to be laid aside and used to meet the loss arising from any disaster or other circumstance that, in the opinion of the Board, would unfairly burden the employers in any class." Under this authority, the Ontario W.C.B. has set up the Second Injury and Enhancement Fund (S.I.E.F.).

Ontario Workers' Compensation: An Employer's Guide, Second Edition, 1994, item #12.6300, at pages 12-8 to 12-10, deals with S.I.E.F. *Relief for Prior Injuries with the Same Employer*, stating:

The W.C.A.T. has considered whether an employer may be entitled to S.I.E.F. relief when an employee has suffered an earlier compensable accident with the same employer as opposed to a former employer. The decisions are inconsistent in this area.

This issue has been the subject of several published decisions of the Ontario Workers' Compensation Appeals Tribunal. In Decision No. 1069/87, dated December 7, 1987, (6 W.C.A.T.R. 259), the panel noted:

. . . this is the first time that a panel of this Tribunal addresses the issue of the applicability of S.I.E.F. relief when the pre-existing condition is the disability left over from an accident incurred while the worker was employed by the same accident employer. The panel notes that the objectives of the S.I.E.F. Fund as described in Document No. 33/28/01 of the Claims Adjudication Branch Procedures Manual, are:

to give employers financial relief where the pre-existing condition enhances or prolongs the compensable disability *so as to encourage the employer to employ disabled persons.* (W.C.A.T. panel's emphasis)

In its policies, the Board makes no distinction between the involvement of the same employer, or a different employer. We are also advised that the same situation exists in the Board's practices involving S.I.E.F. relief. The panel believes this is rightly so. The policy is designed to encourage the employment of workers who have not fully recovered from a disability resulting from a previous compensable accident. An employer is thereby encouraged to take on his own worker although he or she may not have fully recovered from a previous accident in his employ, but who can perform some useful work. To deny an employer S.I.E.F. relief because the worker's previous disability resulted from work while in his employment would discourage the employer from re-hiring the disabled worker and possibly deprive him of an opportunity to return to work in an environment with which the worker is familiar and possibly a job with which he or she is already familiar. A return to work with the same employer also assures a partially disabled worker the protection of his benefits and his seniority.

The arguments of the employer's representative in this case accord with the reasoning expressed in this Ontario W.C.A.T. decision.

In a subsequent W.C.A.T. decision dated March 9, 1988, (No. 1050/87, 8 W.C.A.T.R. 250), a panel expressed contrary reasoning (at page 251):

The objective of the Board's Second Injury and Enhancement Fund policy is "to give employers financial relief where the pre-existing condition enhances or prolongs the compensable disability, so as to encourage the employer to employ disabled workers." *Firstly, there must be a pre-existing condition and the assumption to be taken from the stated objective is that this condition pre-dates the employment with the employer seeking the relief.* Such a pre-existing condition may be compensable or non-compensable in origin.

(emphasis added)

The reasoning of the W.C.A.T. panel in this decision accords with that expressed by the Appeal Division panel, in its interpretation of governors' policy.

These issues were brought into sharp focus in a W.C.A.T. decision of August 29, 1991 (Decision No. 455/91, 20 W.C.A.T.R. 272). The panel granted relief to an employer, in connection with the worker's alleged pre-existing back complaints which apparently related back to an unreported injury suffered in 1972 while working for the same employer. In concurring reasons provided as an Addendum to the decision, however, one member noted:

While I accept the importance of the principle that an employer should be held financially accountable for conditions that arise in and out of the course of employment with the firm in question, *in this case this may not be the situation* [emphasis in original]. The pre-existing condition that was discussed during the hearing appears to have come about as a result of an earlier injury at work with the same employer that is now asking for S.I.E.F. relief. *I feel that to allow S.I.E.F. relief for a condition that is the result of earlier injuries with the same accident employer is a distortion of the intent of the S.I.E.F. relief.* It is somewhat akin to the old story about the child who has murdered both his parents and then begs the court's mercy on the grounds that he is an orphan.

While I understand that to date the policy of the Board is to award S.I.E.F. in situations in which the pre-existing condition was generated by a compensable injury with the same accident employer, it appears to me that this distorts what S.I.E.F. is all about. In fact, it results in a situation in which other employers are required to pay for conditions that are the result of compensable injuries with the same accident employer. This would be unjust.

(emphasis added)

However, because the previous injury was never actually reported to the Board and because the W.C.B. is currently in the process of an extensive review of its S.I.E.F. policies, including the payment of S.I.E.F. relief for pre-existing conditions that are the result of compensable injuries with the same accident employer, I have chosen not to dissent from the decision.

In a subsequent decision of November 10, 1993 (No. 393/92, 28 W.C.A.T.R. 49), the W.C.A.T. panel requested clarification from the Ontario Workers' Compensation Board of its S.I.E.F. policies. One of the questions posed was:

2. Is S.I.E.F. relief limited to new or second employers where the pre-existing disability is a compensable accident?

The Ontario W.C.B.'s legal counsel responded by letter, stating:

No. . . . the Board will provide 100 per cent S.I.E.F. relief as set out in Document Number 08-01-05 to any Schedule 1 employer, including the original accident employer if a previously injured worker has a minor accident which results in a new claim.

The W.C.A.T. panel granted relief to the employer, noting that the tribunal generally does not review the W.C.B.'s exercise of its discretion to make policy unless such policy is arbitrary or discriminatory.

While the terms of both the B.C. *Workers Compensation Act*, and governors' policy differ from those considered in the cases described above, the arguments considered in those cases are similar and provide useful background.

In his 1952 Royal Commission Report on the W.C.B, Chief Justice Sloan explained the application of the Second Accident Fund as follows (at page 176):

The best illustration of how the Second Accident Fund applied is the "eye cases". Assume a workman has an accident, as the result of which he becomes industrially blind in one eye. *He is re-employed in another industry*, and through another unfortunate accident loses the sight of his remaining eye. Instead of assessing the class in which he was re-employed the full sum necessary to compensate him as a total disability, that class is charged as if the man had only lost an eye. The balance is charged to the Second Accident Fund.

(emphasis added)

Chief Justice Sloan recommended that this "Second Accident Fund" should be more widely utilized, noting (at page 177):

Low back injury cases also create a definite problem in this field. The pulp and paper companies of the Province refuse, for instance, to employ a man in that industry who has suffered from such an injury unless he was a casualty of that industry. If that policy is to be adopted by other large employers, the problem of rehabilitating this type of disability case will become increasingly acute. . .

While not conclusive on the subject, the focus of Chief Justice Sloan's comments appears to have been the worker's potential for re-employment in a different industry than the one in which he was first employed at the time of injury.

In his 1965 Royal Commission Report, Mr. Justice Tysoe commented on the purpose of Second Accident or enhancement funds as follows (at page 201):

They are designed to encourage employers to employ the workman who has an impairment of some kind. By means of their use the employer and the class of which he is a member are given relief against such increased cost of compensation that may result from the existence of the pre-existing impairment, and that increased cost is taken care of by industry as a whole. Such principles are, in my opinion, quite sound and ought to be put into full force in British Columbia.

The jurisdiction of the Appeal Division to reconsider one of its decisions is defined by Section 96.1 of the *Workers Compensation Act*. An Appeal Division decision is “final and conclusive,” apart from a Medical Review Panel appeal or an application for reconsideration on the basis of new evidence not previously available as defined by this section. The chief appeal commissioner also has authority to reconsider an Appeal Division decision on the basis of clerical mistakes or omissions, fraud, or an error of law “going to jurisdiction” (including a breach of the rules of natural justice). This latter authority is based upon general common law legal principles [*Right to Reconsider Appeal Division Decisions*, No. 93-0740, *Workers’ Compensation Reporter*, Vol. 10(1): p. 127]. Unless the requirements of Section 96.1 or one of these other grounds are met, the Appeal Division has no jurisdiction to reconsider its decision.

While the employer’s representative submits that the Appeal Division involves an error of law, he has provided no comments as to whether this alleged error, if such exists, is one “going to jurisdiction.” For the reasons expressed in Decision No. 93-0740, at pages 130–131, the Appeal Division has no authority to reconsider one of its decisions on the basis of an “error of law” unless this is one which goes to jurisdiction. Even if, for example, the chief appeal commissioner were to disagree with a panel’s interpretation of law or policy, this would not provide grounds for reconsideration of the Appeal Division decision. In order to conclude that a decision involved an error of law going to jurisdiction, it would be necessary to find that the panel had exceeded its jurisdiction, or made a patently unreasonable decision.

In Decision No. 1 (*Workers’ Compensation Reporter*, Vol. 7(1): p. 7), the governors provided under #5.0, at page 10:

The Appeal Division shall apply and interpret the *Act*, Regulations and existing Board published policy.

The issue raised in this case is not one upon which either the *Act* or governors’ policy provided clear unambiguous direction. It was, therefore, necessary for the Appeal Division panel to exercise its authority to interpret the *Act* and policy. The panel provided reasons for its interpretation. I find no basis for considering that there was anything unreasonable, much less patently unreasonable, in the panel’s interpretation of governors’ policy or Section 39(1)(e) of the *Act*. I am unable to conclude that the Appeal Division decision involved an error of law going to jurisdiction. There is, therefore, no basis for reconsidering the decision of the panel in this case.

The Appeal Division panel found that governors’ policy implicitly precludes relief of costs under Section 39(1)(e) to an employer in respect of a “disability enhanced by reason of a pre-existing disease, condition or disability” resulting from a prior compensable injury with the same employer. While I do not consider it necessary to request

clarification from governors of their policy, a copy of this decision will be forwarded to the governors for their information. It is open to governors to consider amending or clarifying their policy, as to whether relief of costs under Section 39(1)(e) is restricted to new or subsequent employers.

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

Decision of the Appeal Division

Number: 95-0247
Date: March 6, 1995
Panel: Patrick L. Byrne
Subject: Prevention Penalty Beyond Recommended Schedule

The employer appeals the May 5, 1994 decision of a panel of hearing officers in the Variance and Sanction Review Section, of the Prevention Division to impose a penalty assessment of \$280,000.00. The panel concluded that the employer had violated *Industrial Health and Safety Regulations* 38.06(1), 38.02, and 4.02(5)(c) on July 13, 1993 and the circumstances warranted the penalty assessment.

The employer appeals on the grounds of error of fact, error of law and a contravention of a published policy of the governors. The issues are:

- 1) Whether the inspection procedure contravened the *Workers Compensation Act* and whether the inspection procedure contravened published policy of the governors
- 2) Whether there were violations of the regulations
- 3) Whether the penalty assessment was appropriate in the circumstances

Background

On July 13, 1993, the employer's construction worksite was inspected by two Board occupational safety officers. They issued an inspection report citing the employer for violations of the above-noted regulations pertaining to excavation work. By letter dated December 22, 1993, the employer was notified that the Board was considering a penalty assessment of \$500,000.00. They were invited to either attend an oral hearing or provide written submissions. The employer attended a divisional oral hearing on March 18, 1994. The panel concluded that the inspection was lawful, and there had been violations of the regulations, but reduced the recommended penalty assessment of \$500,000.00. By letter dated May 5, 1994, a penalty assessment of \$280,000.00 was imposed. The panel reasoned:

The panel concludes that the employer's penalty history shows a progression of increasing penalty amounts without apparent effect on the

employer's work practices. In each case, the degree of hazard to workers was considered very high. As the board tried to deter the employer's hazardous work practices, by increasingly higher amounts of penalties, it is evident that the amount of \$140,000 did not achieve the motivational impact it was hoped for. . . .

The Director of Field Services requested an amount of \$500,000 as a proposed amount for the violations of regulations discovered in December 1993.

In reviewing the employer's past history and the reasons for applying an additional penalty at this time, the panel has decided that although \$140,000 did not achieve the motivational impact as expected, the amount of \$500,000 may be excessive. The employer put workers at risk since it did not consider the water saturated soil and the fact that the excavation was adjacent to an existing structure, without having the excavation assessed by a professional engineer. The panel is of the opinion that the current penalty needs to be increased above the amount of the previous penalty in order to achieve compliance. A review of past practice indicates that in cases of repeat violations of regulations within the last five year period of an employer's activities, the amount of the subsequent penalty imposed has been double the previous amount as a general rule. The panel has not been provided with any evidence that would persuade us to deviate from this general rule.

(reproduced as written)

The employer now appeals to the Appeal Division. They are represented by counsel. An oral hearing was held on November 8 and 9, 1994.

The Appeal

Did the inspection procedure contravene the *Workers Compensation Act*?

Two Board safety officers travelled to the worksite in the early morning of July 13, 1994. The safety officers knew pipeline construction was being conducted about a two-hour drive away. The worksite was off the main highway in a remote area, accessible with the safety officers' four-wheel drive vehicle. The safety officers also knew the work was being conducted by the employer in this case. The safety officers also knew who the employer representative was. The employer had notified the Prevention Division regional manager by letter dated May 20, 1993, several months prior to the inspection that:

Subject to Sec. 72 of the *Workers' Compensation Act*, [the employer] will provide a representative to accompany the W.C.B. Inspector on all inspection visits. Mr. G, Project Safety Supervisor will be our representative. In his absence an alternate will be assigned.

The safety officers arrived at the construction site at approximately 9:30 a.m. The employer was constructing a pipeline. The process was to dig a trench approximately 12 feet deep, lay sections of pipe, connect them, and then backfill the trench. The trench is widened in areas where sections of pipe are connected.

Upon arrival, the safety officers parked their vehicle near a pile of excavated material. They said they took about ten minutes to view the site, and to decide where and how to proceed. There was no site trailer or obvious area identified as an office or headquarters. There was equipment moving about the site. The safety officers' evidence was that they approached a worker in an excavation, later identified as Ms. H. They spent about five to ten minutes with her asking a number of questions relating to her work and first-aid. They also asked who was in charge of the worksite. Ms. H pointed out the foreman, Mr. I, who was standing with a group of workers a distance away across the excavation. The safety officers said they asked Ms. H to walk over and get the foreman. Ms. H's evidence was that it was about an eight-minute walk over to the foreman, and an eight-minute walk back. The foreman came over to talk to the safety officers. The employer estimated the time between when the safety officers arrived on site and when they had a conversation with the foreman, to be approximately 45 minutes. The times are all approximations as none of the witnesses said they looked at their watches. In my view, while there are some minor differences, the employer is not substantially wrong in their estimation. The safety officers arrived on-site, spent about ten minutes getting oriented, another five to ten minutes in a discussion with Ms. H, and about 15 minutes waiting for the foreman, a range of 30–35 minutes. There is some dispute as to whether the safety officers contacted Ms. H or she contacted the safety officers and whether Ms. H was asked to contact the foreman or whether she did that on her own. However, after hearing the evidence I am satisfied that the safety officers contacted Ms. H and that she was asked to contact the foreman.

While the foreman was meeting with the safety officers, two workers were observed entering a different trench than the one in which Ms. H had been working. The safety officers thought the two workers were at risk as the excavation did not appear to meet regulatory requirements. The workers were ordered out of the excavation at that time. The safety officers asked that Mr. G, the designated employer representative, be called to the site. Mr. G was unavailable and his assistant, Mr. J, was dispatched. He arrived approximately 30 minutes later. A discussion took place and the safety officers measured the excavation. The project superintendent, Mr. K, arrived on-site. The safety officers issued the inspection report, which lists Mr. K as the firm representative that accompanied the officers and Ms. H/Mr. L as the worker representatives that had accompanied the officers. The safety officers' report shows there were 25 workers on site.

The employer's counsel contends that Prevention Division erred in finding the inspection met the statutory requirements:

[The safety officers] were observed to be on site for approximately 45 minutes, during which time they were observing the area around the hot line undercrossing and tie-in location and commenced conversation with various crew members respecting the nature of their work without ever introducing themselves to the foreman on site. Even on the best evidence for the W.C.B., these Officers were on site conducting the inspection for 10–15 minutes before approaching the foreman to give the Company the opportunity to appoint a representative.

In circumstances where a statutory requirement is mandatory, a failure to comply will render the tribunal's action void (*Principles of Administrative Law* (2d Edition) Jones & de Villiers at page 136). Section 72 of the *Act* clearly requires that the employer and the workers *each* have a right to have a representative accompany an Officer of the board upon an inspection.

On this occasion, an inspection was commenced with neither the Employer nor the Union being asked to name a person to accompany the Inspectors. The inspection is therefore void and no penalty arising from it should be upheld.

(reproduced as written)

The *Workers Compensation Act* provides:

71. (3) An officer of the board or a person authorized by the board may at all reasonable hours inspect the place of employment of a worker within the scope of this Part. Immediately after each visit the person authorized under this subsection shall cause to be posted in a conspicuous place, at or near the works, establishment or premises, a statement showing what portion of the works, establishment or premises has been inspected, and the condition found to prevail there, and he shall furnish a copy of the statement to the manager of the works, establishment or premises, and, where the inspection visit is made by an industrial hygiene officer, and where it is impracticable for the statement required by this section to be posted immediately after the visit, it shall be posted as soon as possible after the visit.

72. (1) On every inspection visit under section 71 (3), the employer and the workers shall each have a right to have a representative accompany the officer of the board or person authorized by the board.

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- (2) The representative of the employer shall be a person the employer appoints.
- (3) Where there are 2 or more employers at the place of work being inspected, the employer for this purpose shall be selected by the officer of the board having regard to the employer who appears to him to be the principal contractor, or to have the greatest number of workers, or to have the workers with the greatest exposure to hazard.
- (4) Where there is a union, the worker's 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.
- (5) In this section "union" means,
- (a) where the workers in the place of employment being inspected are all, or substantially all, one bargaining unit certified under the *Labour Relations Code*, the union certified as the bargaining agent for that bargaining unit; or
 - (b) where the worker in the place of employment are not substantially all in one bargaining unit, or where there is no union certified for that bargaining unit, the union selected by the officer of the board, having regard to the union that appears to him to have the greatest number of members at the place of employment being inspected, and the union that appears to him to have members with the greatest exposure to hazard.
- (6) Where there is no union, the workers' representative shall be selected by and from among the workers' representatives on the accident prevention committee, and, where there is no committee, or where no worker member of that committee is available, the officer of the board may select the workers' representative.
- (7) An employer may object to the selection of a worker representative on the ground that the withdrawal of that worker from his work would unduly impede production, and another worker representative shall then be chosen; but an employer may only object to one selection of that ground.
- (8) A worker representative accompanying an officer of the board or person authorized by the board shall continue to be entitled to the same wage rate or other remuneration as if he were engaged in his normal work.

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- (9) Nothing in this section shall be construed as
- (a) requiring the board to give advance notice of an inspection visit;
 - (b) limiting the right to an officer of the board or person authorized by the board to speak to a person out of earshot of any other person; or
 - (c) limiting the authority of the board by regulation of general application or by order related to a specific situation, to confer other or further rights on union officials or other workers.

(10) Where an inspection visit involves the attendance of an officer of the board or person authorized by the board at one place of work for a period exceeding one day, the rights conferred under this section may be abridged by regulation of the board, or by direction of the officer of the board.

There is no question that the officers were conducting an inspection under Section 71(3). There is also no question that the employer and the workers each have a right to have a representative accompany the Board officer on an inspection.

The employer takes the view that the right to accompany an inspector under Section 72(1) includes a requirement that Board officers request the employer and the union to name a person to accompany them, prior to commencing an inspection. The employer did not say why such a requirement ought to be read into Section 72(1). One of the broad purposes of the *Act* is the prevention of injuries and diseases. Broad inspection rights are a necessary part of the Board's responsibility in that regard. This includes the right to make spot inspections to discover workplace hazards. If the employer's and worker's right to accompany the inspector is interpreted to require the Board to contact the employers and workers prior to commencing an inspection, the purpose of the inspection, namely accident prevention, could be frustrated by the employer. I would read Section 72(1) as meaning the employers and workers each have a right to accompany the inspector during the inspection, but I do not see that the employer can delay or frustrate the inspection by demanding to be found and contacted before the inspection begins. I see nothing in the action of the safety officers that frustrated the employer's or worker's right to accompany the safety officers. Quite the opposite, the actions of the safety officers in the first 30 to 35 minutes were directed primarily at contacting the employer.

While I agree that the safety officers did not inform any of the representatives as to the primary purpose of their inspection as set out in policy 1.3.3 and some of the names on the officers' report were not likely the representatives during the inspection, there was no prejudice to the employer. I cannot find a contravention of the *Workers Compensation Act* as it relates to the inspection procedure.

Were there violations of the regulations?

Industrial Health and Safety Regulation 38.06(1) provides:

No worker shall enter any excavation over 4 feet (1.22m) in depth unless:

- (a) the sides of the excavation are sloped to a safe angle, or
- (b) the sides have been supported by the use of sheet piling, or shoring and bracing meeting the minimum standards contained in these regulations, or
- (c) the workers are protected by other effective means.

The O.S.O.'s memorandum of July 15, 1993 provides:

. . . The measurement was observed by many [B M] employees on site, and agreed to by [Mr. I, Foreman. Trench width (above the weld area) at the top of the sloped walls was 23 foot 6 inches. The estimated width at the bottom of the trench was 9 feet. Trench depth was estimated at 12 feet. An aluminum extension ladder lying against the wall on the "Hot Line" side was approximately 3 feet short of reaching grade level. This ladder was partially extended with eleven rungs showing, indicating a minimum 11 foot length. The minimum trench width at the top should have been 27 feet. The wall on the road side (South) appeared to be adequately sloped to $\frac{3}{4}$ to 1, whereas the wall on the "Hot Line" (North) side was not adequately sloped. The spoil [sic] piled on the North (Hot Line) side of the trench, was not back the required minimum 2 feet and was piled approximately 12 feet high.

There was evidence of trench (North wall) sloughing into the excavation and soil cracks were observed along the top of the North wall at the West end of the bell hole. The area was very muddy with the ground saturated from several days of steady, heavy rainfall.

The employer contends the trench did meet the requirements of Regulation 38.06(1). That is, the sides were sloped to a safe angle of $\frac{3}{4}$ horizontal to 1 vertical. Following the safety officers' inspection, the employer's pipeline engineer used a TOPCON GTS-3B Total Station and FC-1 Data Collector to determine the profile or slope of the trench. The evidence of a W.C.B. engineer was that the Topcon system provided a more accurate measurement than the system used by the safety officers. The evidence of the employer's consulting engineer was that the excavation met the $\frac{3}{4}$ to 1 standard, based on a review of the Topcon results and the available photographs.

I have reviewed the evidence with regard to the slope and conclude the trench did not meet the $\frac{3}{4}$ to 1 standard throughout. There were areas that did meet the standard, and other areas that did not. I am also convinced that the excavation was originally excavated substantially to the $\frac{3}{4}$ to 1 standard, but following several days of heavy rain, some bottom sections began to slough. Apparently, some of this material had been removed from the excavation following the sloughing. This created slopes in some areas that did not meet the $\frac{3}{4}$ to 1 standard. In my view, the Topcon results are not substantially different from the measurements taken by the safety officers. It seems that the employer's consulting engineer measured the slope by starting at a point at the base of the trench which existed prior to the sloughing. Whereas, the safety officers measured the slope starting at the base after the sloughing had occurred and material removed. In my view, the safety officers correctly measured the slope of the trench at the time the workers had entered. I find there was a violation of Regulation 38.06(1). I would note that some caution ought to be exercised in the use of the Topcon system in these cases as a person must enter the excavation to make the measurements.

Industrial Health and Safety Regulations provide:

Work standards

38.02. (1) All excavation work shall be carried out in accordance with the specifications and requirements of:

- (a) a registered professional engineer, or
- (b) the board,

(2) Without limiting the generality of regulation 38.06, the sides of excavations shall be sloped within the limits specified by regulation 38.06(2) or supported in accordance with the designs and instructions of a registered professional engineer when the excavation:

- (a) exceeds 20 feet (6,) in depth, or
- (b) is adjacent to structures or improvements, or
- (c) is subject to vibration or hydrostatic pressure, or
- (d) is of such a nature that, in the opinion of the board, the provision of such designs and instructions are necessary.

(3) A copy, signed by the designer, of the supporting or sloping plan and written instructions, complete with information on the subsurface conditions expected to be encountered during excavation, shall be kept on the jobsite available for inspection by an officer of the board.

Sloping requirements

- 38.06.** (2) Sloping of the sides of excavations may be undertaken in lieu of shoring only where the protection afforded to workers is equivalent to that provided by shoring.
- (b) Where excavation walls are sloped as a substitute for shoring, the walls shall be sloped at angles, dependent upon soil conditions, which will provide stable faces. In no case shall such a slope be steeper than $\frac{3}{4}$ horizontal to one vertical.
- (c) When a combination of sloped and vertically excavated faces is utilized, the protection for workers provided shall be equivalent to that meeting the minimum standards contained in this regulation for the overall depth of the excavation.

The panel of hearing officers concluded:

We find that by failing to recognize the requirement of an engineered excavation, given the potential hazards associated with excavating adjacent to an existing structure and the hydrostatic pressure in the soil, the employer was in violation of IH&S Regulation 38.02.

The employer contends that there was no violation of Regulation 38.02:

The opinion of [the consulting engineer] establishes that the hydrostatic pressure relied upon by the Panel to assert that a three-quarter to one slope was insufficient was on the balance of probabilities absent. [The consulting engineers'] opinion is that the slope was safe on the occasion.

In my view, there was a violation of Regulation 38.02. The regulation requires that all excavation work be carried out in accordance with the specification and requirements of *either* the Board or a registered professional engineer. As the slope did not meet the requirements of the Board, and there is no evidence that the trench had been constructed in accordance with the specifications and requirements of a registered professional engineer, there was a violation of Regulation 38.02. I appreciate that much of the discussion of whether there was a violation of this regulation concerns whether the excavation was subject to vibration or hydrostatic pressure or was excavated adjacent to a structure. However, in my view, that matter need not be resolved as Part 1 of Regulation 38.02 was not complied with.

Industrial Health and Safety Regulation 4.02(5)(c) provides:

The industrial health and safety program shall be designed to prevent injuries and industrial diseases. Without limiting the generality of the foregoing, the program shall include: . . .

Supplementary instructions

- (c) appropriate written instructions to supplement the Board's Industrial Health and Safety Regulations. Copies of the instructions shall be available for reference by all employees.

The panel of hearing officers concluded:

The panel has reviewed the evidence and accepts [the safety officer's] evidence that the workers were not aware of the tie-in procedure. Further, a review of the firm's tie-in procedure, reveals that the procedure does not sufficiently deal with issues such as hydrostatic pressure and working alongside adjacent structures. The panel finds that the written instructions were inadequate and not readily available to all employees. We, therefore, find that there was a violation of IH&S Regulation 4.02(5)(c).

The regulation requires that appropriate *written* instructions *be available* for reference by all employees. The employer contends that worker training is not part of Regulation 4.02(5)(c). I agree. The requirement for worker training is not contained in Regulation 4.02(5)(c), but is contained in other regulations such as 4.02(5)(h), 8.18 and 8.20. The hearing officer said the instructions were neither appropriate nor available to employees. Inasmuch as the written instructions do not seem to contemplate slopes other than $\frac{3}{4}$ to 1 and make no provision for a slope "dependent upon soil conditions," I find the written instructions were inadequate. The matter of whether the instructions were available need not be resolved. There was a violation of Regulation 4.02(5)(c). I appreciate that the employer thought their written instructions were adequate as they seem to have been accepted by the Board in connection with a different project. However, that matter goes to whether a penalty assessment ought to be imposed, not whether there was a violation of the regulation.

Was the penalty assessment appropriate in the circumstances?

Governors' policy 1.4.1 contained in the *Prevention Division Policy and Procedure Manual* sets out the guidelines for the application of penalty assessments. The employer argues that if there were violations of the regulations, the quantum was excessive and punitive. Further, any violations were not deliberate and there was no high risk to workers. With

respect to the risk, I cannot agree with the employer's argument. Governors' policy 1.4.3 sets out that working in an inadequately sloped excavation constitutes a high risk. The evidence in this case does not convince me to depart from that policy.

The hearing officers referred to the employer's compliance and penalty assessment history. They said that a previous penalty assessment of \$140,000.00 imposed on the employer did not achieve the motivational impact that was hoped for. Throughout the decision, the hearing officers made no distinction between B M Inc. and any predecessor companies. The employer in this case registered with the Board on April 6, 1993. The inspection leading to the penalty assessment was conducted on July 13, 1993. The compliance record referred to by the hearing officers was the record of B, a division of the F Ltd. That company was merged with M Ltd. in 1992 and B M Inc., the employer in this case, was formed. The computer form completed by the Assessment Department at the time of the registration of B M Inc. provides the following comment:

NEW SHAREHOLDERS OF THIS FIRM ARE TOTALLY NEW FROM
PREV. FIRM. THEY PU 100% OF SHARES. NO ERA TRANSFER. CALLER
DID NOT KNOW WHO THE NEW S/H ARE. B. B. INCORPORATED OF
TORONTO OWN 100% OF THE SHARES OF THIS NEW FIRM.

(reproduced as written)

Apparently, many of the staff of B, including the safety director, were further employed by B M Inc. As well, the board of directors at B became the board of directors of B M Inc.

Throughout their decision, the hearing officers assumed that B M Inc. was the same employer as B. They reasoned that as a \$140,000.00 penalty assessment on B did not create sufficient motivation to ensure compliance a penalty assessment of \$280,000.00 would be needed.

First, the hearing officers did not provide any clues as to why they thought B M Inc. was the same employer as B. I am not convinced, on the evidence, that they are the same employer for the purposes of the *Workers Compensation Act*. For assessment purposes, the Board considered B M Inc. as a "new firm" and created a new account number. The recommended schedule of sanctions listed in governors' policy 1.4.1 does not contemplate penalty assessments over \$30,000.00 and does not mention what quantum ought to be applied where there are numerous repeat violations. Part 2 of the policy says "the amount assessed will reflect the degree of hazard occasioned by the non-compliance and/or consideration of the motivational impact required." I am not convinced that a penalty assessment of the magnitude imposed in this case is reflective of the hazard or the necessary motivational impact. In my view, the hearing officers placed too great a weight on the compliance history of a predecessor company and the mechanical application of their practice of doubling penalty assessments.

The employer in this case did have procedures, although not entirely appropriate; those procedures had been accepted by the Board on a different project. The employer says they have a health and safety program, a matter not considered by the hearing officers except for the provision of supplementary instructions. The excavation had originally been properly sloped, but following a rainstorm and some cleaning out of the excavation, the slope was inadequate. There was, however, proper sloping in some areas and some sloping even in deficient areas. The violations were likely due to a complacent attitude. There was no deliberate attitude of non-compliance or any attempt to avoid the provisions of the *Act*. In those circumstances, the penalty assessment was excessive and unreasonable. I find a contravention of a published policy of the governors. Given the employer's payroll, the appropriate penalty assessment should have been \$15,000.00, consistent with governors' policy 1.4.1, as a Type III penalty assessment.

There was a contravention of a published policy of the governors. The penalty assessment is reduced to \$15,000.00. The employer's appeal is allowed in part.

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

Decision of the Appeal Division

Number: 95-0320
Date: March 27, 1995
Panel: Thomas Kemsley, Connie Munro, Patrick L. Byrne
Subject: Law Corporations as Employers

This is an appeal by a personal law corporation from the June 8, 1994 decision of the director of Assessments (the director). The issue is whether lawyers who practice law through a law corporation are “workers” under the *Workers Compensation Act* (the *Act*).

The appellant argued to the director that an incorporated sole practitioner or partner should have the same option as an unincorporated sole practitioner or partner as to whether or not to apply for personal coverage under the *Act*. The director found that law corporations should not be treated differently than other corporations, with the result that all active shareholders or principals of the corporation are “workers” under the *Act*. Thus, the director determined that incorporated sole practitioners or partners do not have the option to decline personal coverage under the *Act*.

Grounds for Appeal

Section 96(6.1) of the *Act* provides that an employer can appeal to the Appeal Division from a notice relating to an assessment on the grounds of error of law or fact or contravention of a published policy of the governors. On this appeal, the employer argues that the director made an error of fact and contravened the published policies of the governors.

The employer argued the director erred in fact by not concluding that law corporations are significantly different than other companies incorporated under the *Company Act*.

The employer further argued the director contravened the published policies of the governors by concluding the existing policies of the governors were intended to apply to a personal law corporation, and/or by concluding the rationale for the exclusion of “personal service corporations” from the Board’s registration requirement did not apply to a law corporation.

Submissions

Error of Fact

The employer points to differences between law corporations and other companies incorporated under the *Company Act*, which include that a law corporation is restricted to the business of providing legal services, the ownership of the voting shares in a law corporation is restricted to members of the law society, there are restrictions on who can hold non-voting shares in a law corporation, the lawyer's liability for professional negligence is not affected by the fact that the member carries on business as a law corporation, and carrying on practice through a law corporation does not alter the lawyer's fiduciary, confidential, and ethical relationship with his/her clients nor his/her responsibility to the Law Society.

The employer argues these differences indicate a much greater degree of interface between an incorporated lawyer and his/her law corporation than is the case with other companies incorporated under the *Company Act*. The employer submitted that a proper consideration of all these differences leads only to the conclusion that an incorporated lawyer should not be considered a "worker" of his/her law corporation for the purposes of workers' compensation. The employer argues that the restrictions placed on a law corporation by the *Legal Profession Act* effectively erode the general principle that an incorporated company is considered to be an independent entity which is separate and apart from its principal.

Contravention of the Published Policy of the Governors

The employer notes that the policies applied by the director pre-date January 1, 1994 — the date the *Act* was amended to include virtually all employers, including law firms, within the compulsory coverage of the *Act*. The employer argues it was inappropriate for the director to apply pre-existing policy to the newly included industry of law firms. The employer argues the director was required to consider whether an incorporated lawyer was more like a "worker" or an "independent operator" under the *Act*, without relying significantly on pre-existing policies.

The employer also points to the exception in No. 20:30:20 in the *Assessment Policy Manual* regarding a "personal service corporation" and argues that, while that policy on its words does not apply to law corporations, the director erred by not examining the intent of the policy to determine if it was applicable to law corporations.

The employer argues it makes little sense to draw a distinction between unincorporated and incorporated lawyers for the purposes of their own coverage under the *Act*.

Reasons and Findings

Error of Fact

The director was not mistaken about nor did he overlook any significant facts. Further, he recognized there were some significant differences between law corporations and other companies incorporated under the *Company Act*.

The director noted that law corporations are incorporated under the *Company Act*, and the *Legal Profession Act* puts certain restrictions on them. He said those restrictions do not denigrate [sic] from the status of being incorporated and do not completely erode the fundamental status of the corporation. He pointed out the *Legal Profession Act* does not modify the contractual liability of the corporation or the ability of its creditors to pursue a corporate debt against a director or officer of the corporation. He examined Section 85(4)(5) and (6) of the *Legal Profession Act* and said these subsections seem to support the view that it is the law corporation carrying on the business even though the lawyer may continue to have personal liability for professional negligence. He noted that Section 86(2) of the *Legal Profession Act* allows the Law Society to reprimand the shareholder and fine the law corporation, which appears to acknowledge that a law corporation is distinct from its directors and shareholders. The director also noted that even associate lawyers who are clearly employees of a law firm are subject to personal liability for professional negligence.

We are unable to find the director made an error of fact in coming to his conclusion. He considered the relevant facts, appreciated the differences between law corporations and other corporations, and decided there was a distinction between a law corporation and its active shareholders. While there is an arguable case, there is clear support on the facts for the director's conclusion. As well, we note the distinction between a law corporation and its active shareholders exists for purposes not specifically mentioned by the director; most notably perhaps, taxation and succession. Thus, the distinction between a law corporation and its active shareholders is maintained for several purposes, although the *Legal Profession Act* restricts or removes the distinction for certain other purposes.

Law corporations are incorporated under the *Company Act* and retain all of the distinctions provided by that *Act* and by other legislation and the common law, except as restricted or removed by the *Legal Profession Act*. The *Legal Profession Act* does not remove all of the distinctions between a law corporation and its shareholder, nor does it effectively negate the general principle that an incorporated company is considered an independent entity separate and apart from its principal. While that separation is diminished for some purposes by the *Legal Profession Act*, we find it was not an error of fact for the director to conclude, on balance, that a lawyer practicing through a law

corporation is, for the purposes of workers' compensation, a "worker" of that firm in the same way that active shareholders of any other incorporated business are "workers" of the company.

Contravention of the Published Policy of the Governors

Applying Existing Policies

The director applied the policies of the governors which provide that the active shareholders or principals of a corporation are "workers" of the corporation for the purposes of workers' compensation.

There are many businesses which operate through an incorporated company. Many of those are small businesses, where the proprietors become the shareholders on incorporation and continue to be active in the business of the corporation. Often in small corporations which deal with the public, there may appear to be little distinction in practice between the active principal and the business. However, the Workers' Compensation Board does not examine these companies to determine if the principal operates more like an owner than a worker. Rather, once a business incorporates, the former proprietors are now "workers" of the company for the purposes of workers' compensation. At that point, the principal becomes a "worker" and loses the option of whether or not to apply for personal coverage as an "independent operator." The corporation is required to register with the Board as an employer and must pay assessments on the wages of all of its workers, including its principal. The Board can investigate and disregard the distinction between the corporation and its principal if the incorporation is being used to avoid the provisions of the *Act*.

It is difficult to see why these policies should not apply to law corporations, once it is determined there is some distinction between a law corporation and its active shareholders. The fact that the policy predates the mandatory inclusion of law firms in the coverage of the *Act* is not particularly relevant. The *Assessment Policy Manual* was amended in 1994 in response to the amendments to the *Act*, and no changes were made to the policies under consideration here. Thus, the only question is whether the policy produces an untenable result when applied to the facts.

We find the policy does provide a tenable result. Lawyers choose to incorporate and carry on the practice of law through a law corporation. Undoubtedly, they do this for certain advantages, perhaps relating to succession or tax planning. They do not gain all the advantages of other incorporated businesses, but there must still be some advantages or there would be no reason to incorporate. This is no different than other business people who incorporate. They do it for certain advantages. However,

incorporation also gives rise to certain obligations. In workers' compensation, one of the obligations is that the corporation must pay assessments on the wages or remuneration of its active principals. Thus, the principals lose the ability to opt out of personal coverage under the *Act*, but they receive entitlement to no-fault compensation coverage and the protection of the bar against legal action in Section 10(1) of the *Act* in appropriate circumstances.

We find nothing untenable with the decision to treat active principals of law corporations the same as active principals of other corporations. They have voluntarily opted for incorporation and the advantages and obligations which go with incorporation. Therefore, we find the director did not contravene the published policies of the governors when he applied the policies to law corporations and determined that active principals of a law corporation are "workers" under the *Act*.

Personal Service Corporation

The director found the exception for "personal service corporations" in No. 20:30:20 of the *Assessment Policy Manual* did not apply as it exists only for the purpose of disallowing registration in those cases where the individual owning the company would be considered a worker. He noted why that did not apply to incorporated law partners, but would apply to an incorporated associate who worked for the incorporated partnership.

The exception for "personal service corporation" does not, on its words, apply to law corporations, except where the active principal is the only employee of the law corporation and that principal/lawyer, in reality, is employed by another employer under the *Act*. In that case, the lawyer is imposing a "personal service corporation" between him/herself and the true employer, and the policy of the governors provides the personal service corporation will not be registered. The result is that, for workers' compensation, the lawyer is the "worker" of the true employer, not of the personal service corporation.

Part of the rationale for this policy is to prevent employers from avoiding the provisions of the *Act*. If an employer required its employees to contract with it through personal service corporations, and the Board recognized those corporations, then the true employer could effectively make each of its workers become their own employer and thereby avoid paying assessments for them. That is contrary to the *Act*, and this policy is consistent with the *Act*.

The director had regard to the rationale for the policy on "personal service corporations" when he said it did not apply to a law corporation which employs others. That is, a "personal service corporation" is ignored so that the employee will be considered the "worker" of the true employer. That rationale is not applicable to this case, nor to other

law corporations with employees. If the law corporation is ignored, the principal would be the “worker” of no one. That would not accord with the language or the purpose of the policy on “personal service corporation.”

Therefore, we find the director did not contravene the published policies of the governors when he decided the personal service corporation exemption did not apply to a law corporation with employees.

Conclusion

The employer argued it makes little sense to require an incorporated lawyer (who does not wish to be covered as a “worker” under the *Act*) to choose between the rationale for his/her incorporation and becoming a worker for workers’ compensation purposes. As set out above, lawyers, like other business people, voluntarily choose to incorporate and gain rights and responsibilities as a consequence. We see no error by the director when he decided that lawyers, like all other active principals who incorporate, become workers under the *Act* of their incorporated business. There was no error of fact in the director’s decision, nor was there a contravention of the published policy of the governors. No error of law was alleged.

As our jurisdiction on appeals in assessment matters is limited to error of law or fact or contravention of a published policy of the governors, we deny the appeal.

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

Decision of the Appeal Division

Number: 14

Date: June 1, 1995

Subject: Delegation by the Chief Appeal Commissioner

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

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

I hereby delegate the following powers and duties to the appeal commissioner appointed by me, from time to time, to serve as registrar. This delegation replaces the delegation contained in Appeal Division Decision Number 2 in the *Workers' Compensation Reporter*, Vol. 7(1): p. 53. I retain the powers and duties delegated by me to the registrar and will exercise these concurrently with the registrar, except in the event of my determining that I am or would be exposed to a possible or actual conflict of interest or appearance of bias with respect to a given case. In these latter instances, I delegate all necessary powers to the registrar to act in my place. I also delegate to the registrar the power to act in my absence.

The following powers are delegated to the registrar:

1. Under Section 85.2, the power to establish one or more panels of the Appeal Division, to refer a matter that is before the Appeal Division to a panel or a matter that is before a panel to the Appeal Division or another panel, to terminate a designation to a panel, or to fill any vacancy on a panel;
2. Under Section 91(1), the power to grant an extension of time for an appeal from a Review Board finding;
3. Under Section 91(3), the power to designate a longer period for the making of a decision by the Appeal Division where the appellant requests a delay in the proceedings or where the registrar considers the longer period necessary because of an act or omission of the appellant or because of the complexity of the matter under appeal;

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4. Under Section 96(6), the power to grant an extension of time to an employer for an appeal from an assessment, classification, special rate, differential or additional assessment, levy or contribution;
 5. Under Section 96(6.1), the power to grant an extension of time to an employer for an appeal from a notice relating to an assessment, classification, monetary penalty or apportionment or shifting of cost between classes for which no appeal to the Appeal Division is specifically provided in Section 96(6).
 6. Under Section 96.1(3) or Section 17(5) of the *Workers Compensation Amendment Act, 1989*, the power to direct that the Appeal Division reconsider the matter or that the applicant may make a new claim to the Board with respect to the matter;
 7. Under Section 22(3) of the *Criminal Injury Compensation Act*, the power to grant leave for a further review of the decision of an officer of the Board, or the findings and report of an appeal committee;
 8. Under Section 22.1 of the *Criminal Injury Compensation Act*, the power to direct that the Appeal Division reconsider the matter or that the applicant may make a new claim to the Board with respect to the matter.

In matters where I am unable to act due to:

- (a) my absence, or
- (b) a possible or actual conflict of interest or appearance of bias,

I also delegate to the registrar the following additional power:

9. Under Section 85(7)(c), the power to preside at hearings or meetings of the Appeal Division.

In exercising these delegated powers, the registrar shall implement the policies of the governors with respect to the administration of the Appeal Division pursuant to Section 85(7).

I hereby appoint Sonja Hadley, appeal commissioner, to serve as registrar of the Appeal Division on the basis set out above from June 3, 1995 to June 7, 1996.

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

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

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

1. a request for an extension of time to appeal under Section 91(1), 96(6), or 96(6.1) of the *Workers Compensation Act*;
2. an oral hearing request, prior to the assignment of the case to a panel of the Appeal Division;
3. the designation of a longer period for the making of an Appeal Division decision under Section 91(3)(c):
 - (i) prior to the assignment of the case to a panel of the Appeal Division, at the request of a party to the appeal pursuant to Appeal Division Decision Number 12 (as published in the *Workers' Compensation Reporter*, Vol. 10(3): p. 365); and,
 - (ii) following the assignment of a case to a panel of the Appeal Division, at the request of the panel, in the absence or inability to act of both the chief appeal commissioner and registrar.

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

The delegations to named individuals are effective from June 3, 1995 until June 7, 1996, so long as the delegate remains an appeal commissioner.

The delegation to Paul Petrie as registrar, set out in Appeal Division Decision Number 11 in the *Workers' Compensation Reporter*, Vol. 10(3): p. 363, continues so that he may carry out and complete his duties and responsibilities and continue to exercise his powers as registrar in relation to those matters assigned to him prior to June 2, 1995, until those matters are completed.



Occupational Diseases Standing Committee Third Annual Report

Date: January 10, 1995

The mission of the Occupational Diseases Standing Committee (O.D.S.C.) is to review the occupational diseases policies of the Workers' Compensation Board and to make recommendations for change to the governors. It is one of only two permanent committees of the governors.

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

During the past year the O.D.S.C. Charter was amended:

1. To change the name of the committee from the "Industrial Diseases Standing Committee" to the "Occupational Diseases Standing Committee" and to substitute the more modern and descriptive term "occupational disease" in the place of the term "industrial disease" wherever it appeared in the Charter. Similar amendments were made in the statute.
2. To change the structure of the O.D.S.C. by adding the president/C.E.O. of the Board as an ex-officio non-voting member. This addition was made, in part, in recognition of the importance to the Board's operations of the matters that are within the mandate of the committee.

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

Committee Members

The governor members of the O.D.S.C. during 1994 and their terms of appointments to the committee are as follows:

Worker Representatives:

Leif Hansen	(to January, 1996)
Stanley J. Shewaga	(to December 3, 1996)

Employer Representatives:

Robert Hugh Buckley	(to December 3, 1994)
Horst Sander	(to December 6, 1996)

Public Interest Representative:

Bonnie Hayes	(to May 23, 1996)
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Chairman:

James E. Dorsey	(to December 16, 1994)
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Bylaws

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

Summary of Public Hearing

In February 1994 the O.D.S.C., through its Secretariat, issued a "Summary of Public Hearing on Occupational Disease Policy" following the public hearing in December 1993 surrounding a redraft of Chapter 4 of the *Rehabilitation Services and Claims Manual* (the *Manual*). The summary document integrated many of the key points made in the submissions with a reproduction of the redrafted chapter. More than 400 copies of the summary document were sent to interested members of the compensation community. It serves as a useful index to the many detailed submissions which were made.

New Chapter 4 — Compensation for Occupational Disease

The main expression of the governors' published policy on compensation for occupational diseases is contained in Chapter 4 of the *Manual*. In 1992 the O.D.S.C. began a consultative process which had as its goal the upgrading of that policy statement. The public hearing held in December 1993 was a significant step in that consultative process.

To carry that process forward the O.D.S.C. established an Ad-Hoc Committee (A.H.C.) of:

- Suromitra Sanatani, director, Provincial Affairs for B.C. and the Yukon, Canadian Federation of Independent Business;
- John Weir, director, Occupational Health and Safety, B.C. Federation of Labour; and
- Dennis Campbell, co-ordinator of the O.D.S.C. Secretariat.

Mr. Grant McMillan, vice-president, O.S.H., Council of Construction Associations, participated in the A.H.C. in the place of Ms. Sanatani when she was unavailable. As such there was strong representation of the views of employers, workers, and of those within the compensation system who are responsible for administering the policy.

In April 1994 the A.H.C. began a process of reviewing the redraft of Chapter 4 in light of the input received from the public consultations, and of revising the text where improvements in language could be made or where specific concerns could be addressed. Although most changes to the text were aimed at clarifying the language of existing policy and practices, the A.H.C. also made recommendations which involved substantive changes. A.H.C. members presented their recommendations at regular meetings of the O.D.S.C. and, where necessary, received O.D.S.C. direction. Through this consultative process involving the members of the O.D.S.C., and after many hours of work, the A.H.C. had by October 4, 1994 made recommendations with respect to the entire chapter.

On October 4, 1994 the O.D.S.C. passed a unanimous resolution to recommend adoption of the rewritten chapter as governors' published policy. At the governors meeting held on November 7, 1994 that recommendation was unanimously approved, and a new Chapter 4 was adopted with an effective date of January 1, 1995.

The O.D.S.C. and the governors consider this to be a major accomplishment which will benefit all members of the compensation community. In addition to making occupational disease policy more understandable, the new chapter among other things:

- adds 15 diseases to the list of occupational diseases recognized by regulation, including a number of activity- or motion-related soft tissue disorders previously treated as personal injuries;

- articulates for the first time a framework for the adjudication of the diverse group of activity-related soft tissue disorders sometimes referred to as “R.S.I.”;
- removes several absolute bars to the consideration of certain disease claims.

The O.D.S.C. and governors are indebted to the members of the A.H.C. and the community who made representations for their candid and constructive participation in this process.

Schedule B Review

Since shortly after it was established, the O.D.S.C. has carried out a review of each of the items listed in Schedule B of the *Workers Compensation Act*. This review has included discussion of existing Board policies and practices in the administration of claims for each of the diseases listed. Consideration has been given to representations from the public, to the number of claims experienced, to the degree to which the schedule has been utilized, and to medical, scientific, and other information relative to each such item.

Based on this review, the O.D.S.C. recommended to the governors that, until otherwise recommended by the committee, Schedule B be retained in its present form, subject to a further process of assessment and review to be undertaken with respect to six items, namely:

Item #	Description of Disease (Current)
3A	Bilateral diffuse pleural thickening or fibrosis, over 5 mm thick and extending over more than a quarter of the chest wall.
5	Heart injury or disease including heart attack, cardiac arrest or arrhythmia, disease of the pericardium, heart muscle or coronary arteries.
8	Respiratory irritation.
12	Bursitis.
13	Tenosynovitis, tendinitis.
16	Vascular disturbances of the extremities.

That recommendation was approved by the governors along with the O.D.S.C.'s request for funding to obtain expert medical/scientific assessments with respect to each of these six items of Schedule B.

Arrangements were made to obtain expert medical/scientific assessments based on a review of current literature, and dealing with causative relationships between the scheduled disease and occupational activities, as follows:

Item #	Expert
3A and 8	Dr. Moira Yeung (respirologist, professor of medicine, Occupational and Environmental Lung Diseases Unit and Occupational Hygiene Program, U.B.C.)
5	Dr. Henry F. Mizgala (cardiologist, professor of medicine, U.B.C.)
12 and 13	Dr. William D. Regan (orthopaedic surgeon, Allan McGavin Sports Medicine Centre, U.B.C.)
16	Dr. Henry K. Litherland (vascular specialist)

Comprehensive reviews of those assessments, including independent peer reviews, will be undertaken in the near future. Further recommendations will be developed with respect to these six items following appropriate consultations and discussions, including, in some cases, representations from affected members of the compensation community.

Claims Information

With the support of the O.D.S.C., the Board initiated a claims statistics program commencing August 16, 1993. Attached as Table 1 is the Occupational Disease Services Claims Summary for the period January 1, 1994 to December 31, 1994, and as Table 2 is a summary of payments by disease category for the same period.

The O.D.S.C. has also reviewed information on the 25 employers producing the highest number of occupational disease claims where more than health care benefits were paid. Those 25 employers, listed in Table 3, accounted for 16 percent of all claims administered in O.D.S. in 1993.

Amendments to the *Workers Compensation Act*

The O.D.S.C. entered into discussions regarding possible amendments to:

1. Section 55 of the *Act*, which deals with time limits for making an application for compensation, as it relates to claims for occupational diseases; and
2. Section 7 of the *Act* in regards to transferring authority from the Legislature to the Board to make regulations to amend Schedule D of the *Act* (in terms of the ranges of hearing loss, methods or frequencies for measuring hearing loss, and percentages of disability).

On August 26, 1994, Bill 13 (*Workers' Compensation Amendment Act, 1994*) was proclaimed, effecting a number of amendments to the *Act* including amendments to Sections 7 and 55, and substituting the term "occupational disease" in the place of "industrial disease" wherever it appeared in the *Act*.

The committee will continue to discuss possible amendments to Section 6 of the *Act*.

Workplace Stress Claims

The O.D.S.C. and the governors have acknowledged that a comprehensively developed statement of policy on workplace stress claims is a matter of priority in order to assist all members of the compensation community and in particular those called upon to adjudicate such claims. At the same time, there is recognition that complex issues are involved which will require ongoing consultation with the community.

The O.D.S.C. has reviewed and discussed materials on the approach taken with respect to such claims in all Canadian jurisdictions and a number of U.S. jurisdictions, focusing on the policy development process undertaken in the province of Ontario. At the request of the O.D.S.C., the Board's Policy and Research Department is preparing materials dealing with the deficiencies and ambiguities of present policy in this area, and identifying options for policy development.

Prevention

Over the past year, the O.D.S.C. has continued to have the benefit of the participation of Dr. Neva Hilliard, director of Central Operations, Prevention Division. Her experienced counsel and expert advice were greatly appreciated and respected.

Vocational Rehabilitation

Dr. Christopher Cooke of the Board's Functional Evaluation Unit reported to the O.D.S.C. on the progress of the "R.S.I. — Early Intervention Pilot Project" being conducted in conjunction with O.D.S. Dr. Cooke will be compiling the results of the project in the early part of 1995 and will be presenting these results and his recommendations to the committee.

The O.D.S.C. also acknowledges the regular participation at its meetings of Len McNeely, vice-president, Compensation Services, Dick Hurst, director of Central Client Services, and Diane Gerwin, Client Services manager, Occupational Disease Services. Mr. Hurst and Mrs. Gerwin frequently report to the committee on initiatives and service outcomes in O.D.S. The O.D.S.C. also continues to monitor the new structure adopted by the Board for the administration of claims for pneumoconiosis.

Other Issues

The O.D.S.C. has over the past year considered materials on a variety of matters including gastric cancers, cancer among firefighters, silica and lung cancers, Meniere's disease, and the adjudication of claims for occupational asthma. Discussion of these and other issues will carry forward into 1995.

Independent Research

The O.D.S.C. did not commission any research or other work in 1994 requiring funding approval from the governors other than the expert medical/scientific assessments on the six items of Schedule B referred to earlier.

Secretariat

The activities of the O.D.S.C. continue to be supported by the O.D.S.C. Secretariat. Dennis Campbell (co-ordinator) and Sharon Slobodian (administrative/secretarial support) continued to staff the Secretariat throughout the past year. The Secretariat is attached to Occupational Disease Services and can be reached at:

O.D.S.C. Secretariat
Attention: D. Campbell
Workers' Compensation Board of B.C.
6951 Westminster Highway
Richmond BC V7C 1C6

Telephone: 604 279-8103 Fax: 276-3014

The O.D.S.C. is especially indebted to Dennis Campbell for the leadership he has taken in the Secretariat and in support of the committee's work, particularly in relation to the adoption of the new Chapter 4 of the *Manual*.

Priorities and Work in Progress

Much of the O.D.S.C.'s work in 1995 will focus on the six items of Schedule B identified earlier. Further priorities will include workplace stress and Schedule D (compensation for non-traumatic hearing loss). Consultation with the community will be an integral part of that work. The O.D.S.C. also looks forward to the participation of the Board's president/C.E.O., Mr. Dale Parker, as a new member of the committee.

Conclusion

In calendar year 1994, the O.D.S.C. met seven times and facilitated the work of its Ad-Hoc Committee; unanimously recommended the adoption of a new statement of policy on compensation for occupational diseases which was adopted by the governors (Chapter 4); formulated recommendations with respect to Schedule B and identified six items that required further assessment; took steps to obtain expert medical/scientific assessments with respect to those six items of Schedule B; continued discussions which contributed to several important amendments to the *Act* which impact occupational disease compensation; and generally continued to lay the foundations for the fulfilling of its ongoing mandate.

Table 1**O.D.S. CLAIMS SUMMARY — January 1, 1994 to December 30, 1994**

Disease Description	Total Claims	Disallow	Accept	Info Only	Reject	Suspend ¹	S/C'd Out	W/L Paid	H.C.B. Only
Allergy	113	26	41	0	5	39	2	28	13
Asthma	101	22	59	3	0	14	3	35	24
Bursitis	314	38	184	0	2	70	20	131	53
Cancer	16	12	0	0	0	3	1	0	0
Carpal Tunnel	1,063	230	582	1	11	156	83	360	222
Decompression	8	1	4	0	0	3	0	4	0
Dermatitis	453	22	300	0	1	119	11	169	131
Epicondylitis	1,085	119	709	3	6	148	100	354	355
Exposure	402	154	54	119	6	54	15	24	30
Ganglion	6	5	0	0	0	0	1	0	0
H.A.V.S.	44	6	23	0	0	13	2	3	20
Heart	53	33	7	0	0	13	0	6	1
Infectious Disease	61	21	30	1	1	6	2	25	5
Inhalation	118	13	74	1	1	26	3	38	36
Nerve Entrapment	32	14	13	0	0	1	4	7	6
Other	509	173	90	6	1	174	65	44	46
Plantar	95	48	22	1	1	8	15	18	4
Poisoning	17	5	8	1	0	2	1	7	1
Respiratory	124	38	63	2	0	16	5	29	34
R.S.I.	286	55	90	0	2	61	78	44	46
Scabies	31	5	13	1	0	9	3	10	3
Stress	322	290	2	0	3	13	14	2	0
Tendonitis	3,339	393	2,089	12	18	590	237	1,360	729
TOTALS	8,592	1,723	4,457	151	58	1,538	665	2,698	1,759
% Of All Claims		20.05%	51.87%	1.76%	0.68%	17.90%	7.74%	31.40%	20.47%

¹ September 1994 — Suspend category was separated to include: (a) No reply from client; (b) Client does not wish to claim; (c) other _____. Monthly reports from September 1994 include the new categories.

Table 2

O.D.S. CLAIMS SUMMARY — January 1, 1994 to December 30, 1994

Disease Description	Money Paid on A.W.L.
Allergy	\$ 22,061.46
Asthma	77,343.38
Bursitis	220,854.94
Cancer	0
C.T.S.	1,180,440.10
Decompression	11,296.69
Dermatitis	229,700.75
Epicondylitis	871,483.89
Exposure	9,963.74
Ganglion	0
H.A.V.S.	0
Heart	14,018.14
Infectious Disease	22,985.41
Inhalation	19,186.89
Nerve Entrapment	23,261.89
Other	64,664.13
Plantar Fasciitis	39,730.26
Poisoning	11,749.97
R.S.I.	55,284.93
Respiratory	22,263.87
Scabies	1,291.30
Stress	7,346.12
Tendonitis	1,958,250.20
TOTAL	\$4,863,178.06

Table 3**FIRMS PRODUCING THE 25 HIGHEST TOTAL
NUMBER OF O.D.S. CLAIMS IN 1993**

Top 25 Rank — O.D.S.	Top 25 Rank — Trauma	Firm Number	Firm Name	No. of O.D.S. Claims Accepted in 1993 ¹ (excludes H.C.O. claims)	O.D.S. Cost ²	O.D.S. Cost/ Claim
1	1	8467	Canada Safeway Ltd.	100	\$540,870	\$5,409
2	4	461892	Great Pacific Industries Inc./Overwaitea	45	\$233,576	\$5,191
3	3	4000	Provincial Government	38	\$152,578	\$4,015
4	5	103400	MacMillan Bloedel Ltd.	29	\$164,559	\$5,674
5	6	7016	Canadian Airlines International Ltd.	27	\$61,854	\$2,291
6	10	2580	Cominco Ltd.	26	\$170,198	\$6,546
7	-	336609	Lilydale Co-operative Ltd.	26	\$83,776	\$3,222
8	11	1299	B.C. Tel	24	\$49,552	\$2,065
9	8	5275	Vancouver General Hospital	24	\$37,853	\$1,577
10	-	22429	Prince Rupert Fishermen's Co-op Assn.	21	\$36,066	\$1,717
11	-	32268	Weldwood of Canada Ltd.	21	\$104,896	\$5,245
12	-	398303	Colander Restaurant Ltd.	18	\$6,386	\$355
13	2	1770	City of Vancouver	17	\$100,336	\$5,902
14	-	202512	Fleetwood Sausage Ltd.	17	\$75,923	\$4,466
15	7	355094	Greater Victoria Hospital Society	16	\$27,509	\$1,719
16	-	34725	Fletcher Challenge Canada Ltd.	15	\$89,009	\$5,934
17	-	137251	Green River Log Sales Ltd.	14	\$31,502	\$2,250
18	-	395721	Pacific Regeneration Technologies Inc.	14	\$14,232	\$1,017
19	15	9406	Liquor Distribution Branch	13	\$39,583	\$3,045
20	-	1290	B.C. Packers	12	\$12,639	\$1,053
21	22	5400	Government of Canada	12	\$76,074	\$6,339
22	-	114907	Weyerhaeuser Canada Ltd.	12	\$56,355	\$4,696
23	-	223098	B.C. Fruit Packers Co-operative	12	\$47,642	\$3,970
24	-	423074	Pacific National Group Ltd.	12	\$11,618	\$968
25	-	468606	J.D. Sweid Ltd./Hampton House	12	\$44,131	\$3,678
TOTAL				577	\$2,268,717	

¹ Includes only claims first paid in 1993. Also excludes all claims for hearing loss.

² Includes short-term disability benefits and any pension reserves or cash awards established on these claims in 1993. Costs do not include health care benefits or vocational rehabilitation payments.



1994 Annual Report of the Freedom of Information and Protection of Privacy Office at the Workers' Compensation Board

Date: February 10, 1995

A. Introduction

The *Freedom of Information and Protection of Privacy Act* ("F.I.P.P.") came into force on October 4, 1993. Thus 1994 was the first full year of operation under the new legislation for the W.C.B.'s Freedom of Information and Protection of Privacy ("F.I.P.P.") Office. As might be expected with any new legislation, the F.I.P.P. statute posed some interesting and unexpected challenges for the W.C.B.'s F.I.P.P. office. The F.I.P.P. office has experienced a highly productive year in what has been a tremendous learning experience. This report outlines the learning experience of the F.I.P.P. office during the last year, explains the achievements of the office, provides information, including statistics, about the types of requests and other work performed by the staff, and proposes goals for the future.

B. Legislative Framework

The purpose of the F.I.P.P. legislation is to make public bodies, such as the W.C.B. (the "Board") more accountable to the public by disclosing general records to the public and personal information to people to whom it pertains. The statute also has the purpose of protecting personal privacy and other privacy interests. Openness, accountability and privacy protection are central goals of F.I.P.P. The statute establishes rules for disclosure and related exceptions, as well as rules for collection, retention, security, and correction of personal information. F.I.P.P. confers on the heads of public bodies the duty of ensuring that public bodies comply with its requirements. Under F.I.P.P. legislation, it is the chair of the W.C.B. Board of Governors that is the head of the public body.

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

Chair's Instruction Number 1, included as Appendix "A" to the 1993 *F.I.P.P. Annual Report*, establishes a F.I.P.P. system throughout the Board to facilitate compliance with

the F.I.P.P. legislation. Under Section 66 of F.I.P.P., the chair has delegated authority and specific tasks to the Freedom of Information coordinator, the Executive Committee, the vice-president of Prevention, and directors and managers throughout the Board.

The core of the F.I.P.P. system throughout the Board are “F.I.P.P. contacts” in each department who have the responsibility of responding to requests for records and information from the F.I.P.P. office. In this way, the F.I.P.P. office has the ability to comply with the statutory deadlines in responding to requests for records under the legislation. The F.I.P.P. office identifies the type of records it requires to satisfy the request made under the statute, requests those records from the F.I.P.P. contact in the appropriate department at the Board, and seeks advice from that person as to the manner in which the F.I.P.P. legislation might apply to the records in question.

The F.I.P.P. office has achieved success in responding to requests in a speedy and efficient manner; in large part this success is due to the efforts of the F.I.P.P. contacts.

However, particularly in the last several months of 1994, F.I.P.P. staff have noticed increasing difficulty with obtaining accurate and timely response to their requests for records from some departments in the Board. An increasing number of requests from the F.I.P.P. Department places a burden on the F.I.P.P. contacts throughout the Board. The burden on F.I.P.P. contacts is passed on to the F.I.P.P. staff, who must have complete and accurate records, in timely fashion, in order to respond to requests within the deadlines specified in the legislation.

As requesters gain experience with the legislation, they become increasingly sophisticated and learn to frame their requests in the broadest possible terms, thus increasing the potential number of records that must be searched and reviewed by both the F.I.P.P. contacts and the F.I.P.P. staff. It is management’s view that the most effective way to deal with the potentially unmanageable workload is to firmly apply the fee provisions of the statute wherever possible. To illustrate the added demands made on staff the workload in January 1995 alone is estimated to be in the 12 to 15 F.T.E. range.

The F.I.P.P. contact group is a valuable source of information and input into the development of policies and procedures with F.I.P.P. implications at the Board. There were two F.I.P.P. contact group meetings held in 1994. At the second meeting, the F.I.P.P. contacts participated in a review of a proposed “Information Asset Protection Policy,” offered information and suggestions regarding the implications to Board operations of social insurance numbers collected by health care bodies (included in the definition of public bodies under F.I.P.P. legislation in November of 1994), and provided information to assist in the development of protocol agreements with the Office of the Chief Coroner and the municipal police departments.

Given the critical connection between the F.I.P.P. contacts and the success of the F.I.P.P. Department, regular F.I.P.P. contact meetings are a necessity. The lack of a full-time F.O.I. coordinator for most of 1994 caused a hiatus in the regular meetings. The goal for 1995 is to schedule more F.I.P.P. contact meetings.

D. The F.I.P.P. Office — Change and Growth

The F.I.P.P. Department is part of the Board's Legal Services Division.

Before the F.I.P.P. legislation was proclaimed in October of 1993, it was not possible to predict the workload requirements which the new legislation would produce or to forecast accurately the staff requirements for the F.I.P.P. office.

In 1993, the office had five permanent staff who joined at various points during the year. That staff was comprised of: an F.O.I. coordinator, a records management officer, a training officer, a secretary and a clerk. The plan was to have the F.O.I. coordinator deal with most of the requests and also to develop freedom of information policies for Board departments, provide legal opinions to Board staff where required, conduct privacy audits, develop inter-agency protocol agreements, and so on. The records management officer and training officer were to focus on their respective specialties by developing and keeping up to date the public records index, directory of records and other records management requirements for the Board, and to train Board staff on the interpretation and application of F.I.P.P. legislation. The records management officer and training officer were also to act as analysts in assisting the F.O.I. coordinator to respond to F.O.I. requests.

The original F.O.I. coordinator, Greg Levine, left in January of 1994. The F.I.P.P. office was fortunate to obtain Mr. Mark Powers, a barrister and solicitor with the Board's Legal Services Division, as a part-time F.O.I. coordinator from February through August of 1994. Ms. Heather McDonald was appointed to the position in August 1994.

Early in 1994 it became apparent that the number and the nature of the requests far exceeded the forecast amount of time required to respond. The reality of the situation is that a typical request requires substantial time to acknowledge, locate and retrieve the records, analyze the records with the requirements of the legislation in mind, interpret and apply the legislation, make any required consultations with third parties, perform any necessary severing of information, and write a decision letter to the requester. While some requests may require only several hours to complete, other requests involving a large number of records may take several weeks, full-time, to complete. We have estimated that on average it takes seventeen hours of analyst time to respond to a request plus a yet undetermined amount of time by the designated F.I.P.P. contact.

The impact of the workload generated by the proclamation of the F.I.P.P. legislation in 1993 meant that in 1994, the F.O.I. coordinator and F.I.P.P. officers were required to devote virtually all of their time to responding to F.I.P.P. requests. This meant that very little time could be spent in meeting other demands such as policy development, training, privacy audits, and so on.

Confronted with this reality, steps have been taken to change the staffing complement of the F.I.P.P. Department. The job descriptions of the records management officer and training officer positions have been amalgamated into a "F.I.P.P. analyst" position. Susanne Lloyd and Susan Chew are the two analysts; their expertise and dedication have been instrumental to the success of the F.I.P.P. office. The F.I.P.P. office will continue to benefit from Ms. Lloyd's records management expertise and Ms. Chew's training skills.

The F.I.P.P. office is in the process of adding two analysts and a secretary. This should provide adequate staff to meet Board needs including the holding of training sessions, conducting privacy audits and participating in policy development.

E. F.I.P.P. Office Systems

The F.I.P.P. office continues to use its file classification system, file review system, request tracking system and a legal opinion collection. The office employs the provincial government's A.R.C.S. classification for records. The Senior Executive Committee has recently approved the establishment of a Records Management Committee to review the Board's records management as a whole. Ms. Lloyd of the F.I.P.P. Department is chair of that committee. The goal is to have a Board-wide records management system that will comply with provincial government legislative standards. This will, in the long term, make for more efficient and effective responses to F.I.P.P. requests for records.

The F.I.P.P. Department's computerized request tracking system is a sophisticated system which the F.I.P.P. office has found to be essential in tracking and responding to requests. There has been interest expressed by other public bodies and thus there is a potential for marketing it to other agencies.

Because of the workload requirements in 1994, no time could be spent on documenting office procedures in a written manual for the use of present and future F.I.P.P. staff. A goal for 1995 is to develop such a manual.

The budget/expenditures for the F.I.P.P. office in 1994 are set out in Table 1.

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

The 1993 *F.I.P.P. Annual Report* pointed out that full compliance with F.I.P.P. legislation will take some years to achieve. It takes time for interpretation of the legislation to be developed and settled by the Office of the Information and Privacy Commissioner and the courts. It also takes time for the values embedded in the F.I.P.P. legislation to become part of the Board's corporate culture and for Board staff to become trained in and familiar with procedures regarding normal course of business disclosure, disclosure which should be dealt with by the F.I.P.P. office, and privacy protection. A brief summary of the areas of initiative to bring the Board into compliance with F.I.P.P. is now provided:

Policy Review and Development: The F.I.P.P. office participated in reviewing disclosure policies in the *Assessments Manual*, the *Rehabilitation Services and Claims Manual*, and the *Prevention Division Manuals*. The F.I.P.P. office also assisted in the development of a normal course of business disclosure policy for the Statistics Department.

Changes to the *Assessments Manual* disclosure policy may be necessary, depending on the outcome of a judicial review proceeding scheduled for March of 1995. Otherwise, the disclosure policy was considered to be working well.

The disclosure policy in the *Prevention Division Manual* was also considered to be working well. A need was identified for better communication between officers of the operating divisions and the F.I.P.P. office, so that F.I.P.P. requests could be responded to accurately and efficiently. In 1994, initiatives were taken to improve and those will continue in the coming year.

A committee of eight people, including the F.O.I. coordinator, met in November and December of 1994 to review and evaluate the disclosure policy in the *Rehabilitation Services and Claims Manual*. The committee concluded that only minor changes should be made to the disclosure policy itself, although it identified problems in applying the policy which could be cured through such measures as adequate training on F.I.P.P. issues. Its report to the Senior Executive Committee was delivered on January 11, 1995.

Administrative Procedure Review: On an ongoing basis, various departments throughout the Board routinely contact the F.I.P.P. office for advice on their administrative procedures and the impact of the F.I.P.P. legislation. The F.O.I. coordinator and analysts have met with department representatives, including those from Human Resources, Computer Security, Facilities, Compensation Services and the Appeal Division, to provide suggestions and advice on various policies and procedures.

The F.I.P.P. Policy Manual: The F.I.P.P. policy manual, developed in 1993, has been updated in 1994. It provides guidance in respect of F.I.P.P. procedures as well as an overview of the legislation. In 1993, it was made available to the Executive Committee and F.I.P.P. contacts. In 1994, the manual was provided to Workers' and Employers' Advisors and other members of the public on request. In 1995, the manual will be available through the Films and Posters department of the Board.

Information and Privacy Branch Policy and Procedure Manual: This two-volume manual is published by the Information and Privacy Branch of the Ministry of Government Services. It provides specific direction and advice on the interpretation and application of the F.I.P.P. legislation. It was updated in 1994. The advice in this manual is in no way binding on public bodies, but it is a valuable resource for the F.I.P.P. staff when responding to complicated or unusual requests. F.I.P.P. staff also regularly attend meetings with other public bodies held under the auspices of the Information and Privacy Branch. In this way, we can learn from the F.I.P.P. experiences of other public bodies.

Inter-agency agreements: The F.I.P.P. coordinator drafted a protocol to deal with the exchange of records between the Board and the coroner's office; each party recognizes the other's statutory authority to compel the production of information. The parties are working together to finalize the language in the protocol so that it can be signed and implemented in 1995.

As well, the F.I.P.P. coordinator arranged a meeting with representatives of the municipal police forces, which forces became public bodies under the F.I.P.P. legislation in November of 1994. A protocol between the Board and municipal police forces is in the draft stage.

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

The Information and Privacy Branch is planning to issue a new edition of the Directory of Records in 1995.

F.I.P.P. Training: Board-wide training on F.I.P.P. issues commenced in April of 1993. It was intended to be a two-phase program, with Phase I training providing an overview of key concepts of the F.I.P.P. legislation. The main goal was to raise staff sensitivity to

the issues of access and privacy and F.I.P.P.'s potential impact on W.C.B. disclosure practices. Phase I training was completed in August of 1993. Phase II training is focused on a customized application of F.I.P.P. issues to specific records in a particular department or area of the Board. The curriculum deals with scenarios and severing exercises to familiarize staff with issues pertinent to their operating area.

While some training was undertaken in 1994 much remains to be completed in 1995.

Once the necessary staff is in place, refresher/enhancement training will be delivered to all areas of the Board, as well as training for new Board employees.

F.I.P.P. Communications Strategy: The F.I.P.P. Bulletin Board continues to provide a basic description of F.I.P.P. The F.O.I. coordinator also provided advice to update the pamphlet provided to workers, in the area of their rights to disclosure of their claim files.

Legal Opinions: The F.O.I. coordinator has provided numerous legal opinions to many Board departments, both by way of formal legal memoranda and verbal advice.

G. F.I.P.P. Activities

The F.I.P.P. legislation permits requests for records in the custody or control of a public body, allows researchers to seek access to personal information under research agreements, facilitates complaints concerning privacy protection and sets up a scheme under which people may seek review of decisions made by public bodies. In this regard, a summary is provided of the activities of the F.I.P.P. office in 1994:

F.O.I. Requests

In 1994, the F.I.P.P. office received 356 requests for disclosure of records. See Table 2. Most of the requests are in the following general categories: next-of-kin requesting claim files of or accident reports regarding their deceased relatives; requests for records of expense accounts and terms of employment (including severance arrangements) of Board officers and employees; requests for statistical information regarding injury rates and related information about employers; requests for assessment information about employers; claimants requesting their own claim records for purposes other than appeal when ordinary course of business disclosure would not provide them with all records; claimants requesting disclosure of their criminal injury files for purposes other than appeal; vendors requesting tender information; and community stakeholders requesting records related to Board activities.

The number and variety of requests in 1994 is in sharp contrast to the 1993 experience, in which there were only 82 requests after the legislation came into effect, with more than half of those requests being made by individuals for their own claim files. As predicted in the 1993 annual report, providing disclosure of claims information to claimants in the normal course of business by Compensation Services has meant that the F.I.P.P. office now focuses on requests for other types of Board records.

Table 4 provides a breakdown of the 356 requests and the type of disclosure (full disclosure, partial disclosure, etc.) provided by the F.I.P.P. office. It also indicates that for requests that did not require extensions as contemplated by Section 10 of the legislation (228 of the 356 requests) the F.I.P.P. office was able to respond to the requests, on average, within 22.3 days. This is only three days longer than the average response time for 1993 requests, and still well within the statutory deadline of 30 days. The 1994 requests were generally far more complex to deal with than the 1993 requests, and given the large number of requests, the requests were responded to within statutory deadlines at the expense of significant overtime.

Table 2 indicates that the trend appears to be toward a growing number of requests. For example, from August to December of 1994, the number of requests per month was markedly higher than in the first half of the year. In December of 1994, there were 62 requests, contrasted with 25 requests made in January of 1994.

Reviews

In 1994, the F.I.P.P. office received 33 review applications to the Office of the Information and Privacy Commissioner. Ten reviews are still pending, twenty-two were resolved through mediation, and one review was the subject of an oral hearing and formal written decision by the commissioner (Order #22 — September 1, 1994).

Order #22 of the Information and Privacy Commissioner

The F.I.P.P. office received a request from a third party for specific assessment information about certain employers. Some employers were public bodies under F.I.P.P., and in relation to such firms the information was released, as Section 21 of F.I.P.P. does not apply to public bodies. With respect to the other firms, the F.I.P.P. office did not release their experience-rated assessment rate, nor the total assessments charged and collected for them. The F.I.P.P. office was willing to disclose the total claims costs charged for assessment rating purposes for the firms. The requester objected about the refusal to disclose information, and an employers' organization objected about the decision to disclose the total claims costs for assessment rating purposes. A hearing was held on August 12, 1994. In his decision of September 1, 1994, the commissioner ordered the W.C.B. to disclose the specific assessments information which had not been disclosed.

Further, the commissioner upheld the decision to disclose the total claims costs charged for assessment ratings purposes.

In overturning the decision to refuse to disclose certain assessments information, the commissioner did not accept that W.C.B. assessments constituted “taxes” within the meaning of F.I.P.P., and did not accept the position of the employers’ organization that disclosure of the information in question would harm the business interests of the firms.

The employers’ organization has applied for judicial review of the commissioner’s decision and therefore, pursuant to Section 59 of F.I.P.P., the commissioner’s decision has no legal effect until a court otherwise orders. The judicial review hearing is scheduled for February 23, 1995.

Privacy Complaints

Seventeen privacy complaints were made in 1994. Nine of those complaints were initiated through the Office of the Information and Privacy Commissioner, the remaining complaints being dealt with by the F.I.P.P. office directly with the persons making the complaints. Most complaints were resolved through mediation or through direct response by the F.I.P.P. office. Five complaints were still outstanding at the end of 1994.

Six complaints dealt with the issue of appeals disclosure. The Office of the Information and Privacy Commissioner is involved in two of those complaints, and as part of its investigation requested a written submission from the F.I.P.P. office regarding the Board’s appeal disclosure policy and the application of F.I.P.P. The F.I.P.P. office provided a comprehensive written submission which in essence points out that under F.I.P.P. legislation, the commissioner lacks the jurisdiction to direct a change to the Board’s appeal disclosure policy. The commissioner has not yet responded to that written submission.

Of particular importance was a complaint made by a victim of sexual assault, whose home address and unlisted telephone number were inadvertently disclosed to the accident employer, who was also the alleged perpetrator of the assault. In response, the Board established the Sensitive Claims Area in the Disability Awards Section. In recognition of the sensitive nature of sexual assault claims, these files are held in the Sensitive Claims Area with special security precautions. Disclosure of these claim files for appeal and other purposes will not be dealt with by the Disclosure Department, but rather will be dealt with by a manager in the Sensitive Claims Area. The Office of the Information and Privacy Commissioner became involved in this particular complaint, and conducted an investigation of the situation and the Board’s response. No formal decision has been issued by the commissioner’s office, although the investigator stated that she was impressed by the Board’s response to the complaint.

Another complaint of interest involved an objection to the collection and use of social insurance numbers by the Board's Hearing Conservation Program. The Office of the Information and Privacy Commissioner conducted an investigation and the commissioner concluded, in a letter dated December 2, 1994, that the collection and use of social insurance numbers by the Hearing Conservation Program is not in accordance with F.I.P.P. and is not necessary for the operations of the program. The commissioner has asked the Board to begin taking steps to phase out, within a reasonable time frame, the collection and use of social insurance numbers for the purpose of verifying the identity of individuals participating in Hearing Conservation Program hearing tests. The Board is currently considering its response to the commissioner.

Of the several complaints in which the Board was in error, the F.I.P.P. office investigated the problem and took steps to educate staff to prevent future disclosure problems, as well as responding by way of explanation and apology to the individual making the complaint. These complaints involved matters such as direct disclosure of claimant information to third parties (without the proper written authorization from the claimant) and clerical errors such as sending claimant information to the wrong accident employer in an appeal situation.

Research Agreements

Under Section 35 of F.I.P.P., the Board may disclose personal information for a research purpose. One application was made in 1994 for information for research purposes. The application was made by a researcher from the University of British Columbia's Faculty of Medicine and was approved by the Senior Executive Committee of the Board.

Correction Requests

There were no correction requests received in 1994.

H. Cost/Impact Evaluation

Table 1 provides a breakdown of the costs to operate the F.I.P.P. office. Because the response system depends on the time and effort of F.I.P.P. contacts and their colleagues in departments throughout the Board, there is also a significant associated cost in that regard. Moreover, time spent by the F.I.P.P. staff in answering enquiries, training and developing policy, is also a cost associated with administering the F.I.P.P. legislation.

F.I.P.P. contacts are asked to keep track of the time they spend in responding to requests from the F.I.P.P. office. In due course a study of the overall impact on the F.I.P.P. legislation to the Board, with a special emphasis on costs, will be undertaken.

I. Future Directions

The introduction to this report indicates that 1994 was a highly productive and challenging year for the Board's F.I.P.P. office. The new demands created by the legislation meant that we responded to the unpredictably high number and the unpredictably complex nature of requests with the resources available, and were able to satisfy the legal requirements of responding within the framework of the legislation. However, this challenge hampered progress in policy development, training, records management, legal advice, inter-agency agreements and privacy audits — initiatives which are intended to increase the Board's efficiency in complying with F.I.P.P.

In 1995, the F.I.P.P. office will benefit from the addition of two analysts and a secretary, bringing our staff complement to one coordinator, four analysts and three secretaries. We will commence training for employees throughout the Board, so that there will be an educated awareness of the special issues raised by the F.I.P.P. legislation, and the impact of the legislation on Board operations. Further, we intend to undertake more initiatives in policy development throughout the Board.

Fees: An important step will be for the F.I.P.P. office to make requesters aware that under the F.I.P.P. legislation, fees may be charged for access to information that is not the requester's personal information. While the Board has a discretion to waive fees in certain circumstances, and will certainly do so in the appropriate cases, we must make requesters aware of the costs of freedom of information legislation, and in particular, of the significant labour expended by the Board in responding to freedom of information requests.

The goal in 1995 is to employ our resources productively, to both meet the immediate workload demand created by requests for records, and to undertake the demands that a long-range vision of F.I.P.P. compliance requires.

Table 1

SUMMARY OF EXPENDITURES — Cost Centre 11-04

For the period January 1, 1994, to December 31, 1994

Administration Costs	Actuals 1993	Forecast 1994³
Salaries and Payroll	\$176,306 ¹	\$255,861
Travel Expenses	10,536	12,367
Supplies and Stationery	3,554	2,965
Communications	2,100	4,027
Equipment Costs	42,391 ²	16,884
Other Costs	1,913	2,965
Miscellaneous Revenues	-30	-1,646
TOTAL EXPENDITURES	\$236,855	\$293,423

The 1994 Forecast includes actuals from January to November inclusive. The December actuals have not yet been released by Accounting.

¹ The F.I.P.P. office comprised of five employees in 1993 who assumed their positions throughout the year. The 1993 actuals did not reflect a full year's salary. The coordinator resigned his position in January of 1994 and a new coordinator did not join the office until August 1994. Accordingly, the 1994 actuals do not reflect a full year's salary.

² P.C. equipment was purchased in 1993 to open the F.I.P.P. office and additional P.C. equipment and furniture will be purchased in 1995 for the additional staff.

³ Expenditures include direct costs of F.I.P.P. office but does not cost occupancy, indirect or costs incurred by other areas of the Board who invested significant time in gathering requested information.

Table 2

REQUESTS, COMPLAINTS AND REVIEWS — 1994

Description	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
Number of Requests	26	15	19	18	17	23	22	42	34	29	49	62
Number of Privacy Complaints	0	1	3	1	2	1	2	1	2	2	2	0
Number of Research Agmts.	0	0	0	0	0	0	0	0	0	0	1	0
Number of Correction Requests	0	0	0	0	0	0	0	0	0	0	0	
Number of I.P.C. Reviews	2	1	5	1	6	1	4	2	3	3	5	0
TOTAL ACTIVITIES	28	17	27	20	25	25	28	45	39	34	57	62

Table 3

REQUEST TYPES AND METHOD OF ACCESS FOR REQUESTS

Description	Number of Requests
Personal	213
General	143
Access to Copies of Records Requested	354
Access to Original Records Requested	2
TOTAL NUMBER OF CLOSED REQUESTS	356

Table 4

CHARACTER OF F.I.P.P. RESPONSES TO REQUESTS

Description	Number of Requests
Full Disclosure	120
Partial Disclosure	124
Access Denied	26
Records Do Not Exist	13
Refused to Confirm/Deny	1
Request Withdrawn	13
Request Abandoned	7
Request Cancelled	1
Undetermined (in progress)	51
Average Number of Response Days Excluding Extensions	22.3
Average Number of Response Days for Extensions	54.6



Governors' Financial Standing Committee 1994 Annual Report

Date: February 6, 1995

Mandate

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

Background

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

A basic requirement of the G.F.S.C. chair is to prepare an annual report of the committee's achievements and work in progress for the calendar year. This third report will include all activities of the Board for the 1994 calendar year.

Amendments to Charter

The committee Charter was revised to add management compensation to executive compensation as part of the committee's responsibilities. The Board of Governors deleted also from the Charter the committee's responsibility of discussing with the external auditor the impact of recent releases of the Canadian Institute of Chartered Accountants and the British Columbia Institute of Chartered Accountants and any significant changes made to the Workers' Compensation Board's accounting principles and practices. The committee concluded that this responsibility was no longer relevant.

G.F.S.C. Members

The following is a list of the governor members and the duration of their appointments to the G.F.S.C.:

	Governor Member	Duration of Appointment
Workers' Representative Governor	Maureen Whelan Colleen Jordan	To December 3, 1994 From December 5, 1994 to January 31, 1996
Employers' Representative Governor	Richard Baker	To December 3, 1996
Public Interest Governor (and chair of the G.F.S.C.)	Dr. Mark Thompson	To May 23, 1997
Chairman of the Governors (interim chair of the governors)	James E. Dorsey Claude Heywood	To December 16, 1994 From December 16, 1994

James E. Dorsey resigned as chairman of the governors on December 16, 1994.

Claude Heywood, deputy minister of Skills, Training and Labour, was appointed interim chairman and assumed his position as an ex officio member of the G.F.S.C.

In addition to the above G.F.S.C. members' attendance, the Board's president and chief executive officer also attends these meetings. Up until the November 14, 1994 appointment of Dale Parker as president and chief executive officer, James E. Dorsey attended as acting president and C.E.O. In addition, Sidney O. Fattedad, vice-president, Finance/Information Services Division, and Tom Hum, director of Internal Audit and Evaluation also attended on a regular basis throughout the year.

Meetings, Reports, and Records

During 1994, the G.F.S.C. met 8 times — February 7, March 7, April 11, June 6, August 8, October 3, December 5 and December 14. In accordance with the G.F.S.C. Charter, minutes were compiled for each of the above meetings and, once approved by the committee members, were distributed to the governors. In addition, the chair reported verbally to the Board of Governors on the work of the G.F.S.C.

Investments and Investment Performance

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

The Investment Committee meets quarterly and Ministry of Finance officials routinely attend. The minister of Finance approves all investment strategies, pursuant to Section 67(2) of the *Workers Compensation Act*. The G.F.S.C. receives minutes of all Investment Committee meetings. Rates of return on Board investments fell considerably. The third quarter year-to-date investment yield was 8.46 percent.

The committee approved a Protocol Agreement between the Board and the Ministry of Finance to cover W.C.B. participation in an Indexed Equity Fund. The purpose of this document is to formalize the terms and conditions of the Board's participation in investment pools managed by the provincial government. The Board committed 10 percent of its investment portfolio to the fund.

The committee also monitored the Investment Committee's diversification of 8 percent of the investment portfolio into U.S. equities beginning in March 1994. These assets are managed in cooperation with the Ministry of Finance. A study of further diversification is under way in cooperation with the Ministry of Finance.

Annual Report/Financial Statements

As required by its Charter, the G.F.S.C. reviewed the Board's 1993 annual financial statements including all significant issues relating to litigation, contingencies, claims and assessments, and all material accounting issues that require disclosure in the Board's financial statements. In addition, the committee reviewed the Management's Discussion and Analysis Section of the Board's Annual Report suggesting revisions where necessary. Since there were significant changes in accounting methods that occurred in 1993, the committee recommended highlighting these changes in the report.

Consulting Actuary Reports

The Board's consulting actuary, Jack Levi, of Eckler Partners Ltd. attended the August meeting to discuss the Actuarial Report Related to the Valuation as at December 31, 1993. His report identified several issues including the continued increase in the deficit,

the unusually high rates of return on investments in recent years and the declining injury rates. If current year trends continue unabated, Mr. Levi warned that the Board's use of a five-year average for estimating future costs may result in a significant understatement of the unfunded liability. Growth in unfinalled claims for long-term disability benefits also presents a risk of future increases in liabilities.

Revision of the mortality tables started in 1993 was to be complete by year end. This will permit the actuaries to make final adjustments to these tables.

As required in the Charter, the G.F.S.C. also reviewed the actuarial report on assessment rates for 1995. The report confirmed the Board's calculation of the pension liability as at December 31, 1993. In addition, the report pointed out that the actual rates adopted will result in a 2 percent funding deficiency.

The committee inquired about the appropriateness of a five-year amortization of unfunded subclass liabilities. Given the short life-span of companies in certain industries, a five-year amortization policy would result in the transfer of unfunded costs from one generation to another. The Board will address this issue for those subclasses considered to be in distress.

Budgetary Variances and Remuneration

In early 1994, the provincial government established the Public Sector Employers' Council (P.S.E.C.) and various sectoral employer associations to develop appropriate guidelines for compensation in the public sector for employees not covered by collective agreements. Mr. Ron Buchhorn, vice-president, H.R./Corporate Development advised that any future employment contract, including the new president's, would first have to be approved by the Council.

In preparation for collective agreement negotiations in 1995 and a review of salaries, Mr. Buchhorn presented a Collective Agreement Costing Report to the G.F.S.C. The report listed straight-time average wage rates for each permanent and temporary pay group under the collective agreement.

In December, a special meeting was held to discuss the proposed salary increase for management employees. A thorough analysis highlighted various issues including the historical relationship between management and unionized salary increases, the recent salary compression between management and bargaining union employees, recent P.S.E.C. approved salary increases for other Crown Corporations' management groups and external salary comparisons prepared by compensation consultants. The G.F.S.C. recommended an increase effective October 1, 1994, subject to approval of the P.S.E.C.

During the year, a management job evaluation steering committee was struck to supervise the review of the management job evaluation plan. The goal of this study was to confirm internal equity amongst management positions, to ensure that pay equity exists throughout all management jobs and to create broader salary ranges in order to better integrate performance management with pay practices. The plan is expected to be completed by the end of March 1995. Mr. Buchhorn kept the committee informed on progress of the job evaluation study.

Risk Management Committee

At the June/94 meeting, the G.F.S.C. moved that the Risk Management Committee be disbanded as their mandate was seen to be within the responsibility of the vice-presidents and Internal Audit.

Internal Audit and Evaluation

As required by the Charter, the G.F.S.C. reviewed the 1994 Internal Audit and Evaluation plan. A total of 27 audits were scheduled for 1994. The major objectives for Internal Audit in 1994 included a pilot Value for Money audit, the completion of the Board's first program evaluation study on Vocational Rehabilitation, and the audit of the nine regional Compensation Services service delivery locations.

These efforts marked the department's shift to its long-term goal of auditing the Board's operations based on efficiency, effectiveness and economy.

The G.F.S.C. has the responsibility to oversee the internal audit and evaluation function and receives audit reports, updates and status reports regularly.

External Auditor

As required by the Charter, the committee met with a representative of the provincial auditor general to discuss the 1993 audit of the annual report. In addition, the committee discussed the 1994 audit plan.

The 1993 auditor general's report noted few problems despite changes to accounting estimates and methods made. The A.G.'s office advised that the audit went smoothly and management was cooperative. Management has been following up on issues of concern brought up in the last few management letters including pursuing the possibility of performing quality control claim file reviews and setting in place controls in the automated wage-loss system to prevent duplicate payments.

For the 1994 audit plan, the A.G. has established an allowable risk of 2.5 percent and the magnitude of risk at 1 percent of net assets. These are very conservative parameters, given that industry uses between 5 percent and 10 percent allowable risk when performing an audit. There are plans to use the services of the Internal Audit and Evaluation Department once again to perform some of the audit testing. The audit will concentrate on compensation issues with a focus on health care costs. The auditor general's office expressed confidence in the work of the Board's external actuary.

Other Matters

A presentation was made summarizing the impact of reinstating the widows' pensions and the various options available to allocate the \$115 million cost to the subclasses. The G.F.S.C. forwarded a recommendation to the Board of Governors in support of the pooling method which most closely models what actually would have been had Section 19 of the *Workers Compensation Act* not existed.

The committee approved a new policy on land and building acquisition and disposal to ensure that the Board's interests are protected in real estate transactions. In addition various other policies were reviewed including the Standard of Conduct and Expense/Travel Policies. With the introduction of the Abbotsford office lease, there was concern as to whether the G.F.S.C. should be reviewing the matter before it went to the Board of Governors. This issue will be addressed in 1995.

Mr. Sid Fattedad, vice-president, Finance/I.S.D. briefed the committee on the future benefits of the direct deposit of pensions which is expected to generate savings of \$50,000 by way of reduced postage and other administration expenses.

The committee reviewed and recommended approval of the president's contract. This review is in keeping with the G.F.S.C.'s responsibility to review any major Board contracts.

On December 19, the Board of Governors instructed the G.F.S.C. to review the chief appeal commissioner's contract and expense payments to her on an expeditious basis. The internal auditor was seconded to the committee to assist in the review.

Conclusion

During the year, the G.F.S.C. reviewed a wide variety of matters in order to fulfill their responsibilities to the Board of Governors relating to financial and control issues of the Workers' Compensation Board. As is outlined in the report, the committee discussions included a review of the *1993 Annual Report* to ensure the external auditors were able to

complete their audit successfully and that full management cooperation was given both during the audit and subsequently to follow up issues that were outlined in the annual management letter provided by the auditors.

The Workers' Compensation Board continues in an unfunded position which is a concern to all stakeholders. However, the Board is attempting to address these concerns by focusing attention on cost waste in compensation payments, health care costs and vocational rehabilitation effectiveness. In addition, diversification of the investment portfolio is an attempt to optimize portfolio risk, improve returns and take advantage of investment opportunities not available in domestic markets. These undertakings all attempt to solidify the Board's financial position and to keep it one of the most financially strong workers' compensation boards in the country.



REPORTER

The 1994 Annual Report of the Medical Review Panel Department

Date: February 20, 1995

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Current M.R.P. Chairs and Dates of Appointment

Name	Date of Appointment
Dr. Nigel H. Clark	January 30, 1975
Dr. Stanley L. Sunshine	January 30, 1975
Dr. Victor Dirnfeld	July 13, 1978
Dr. Peter J. Banks	April 25, 1986
Dr. R. Cameron Harrison	April 25, 1986
Dr. Darryl G. Morris	April 25, 1986
Dr. Geoffrey L. Nanson	April 25, 1986
Dr. J. Trevor Sandy	April 25, 1986
Dr. Peter Allen	March 1, 1990
Dr. Beverley Barron	March 1, 1990
Dr. Ian D. Connell	March 1, 1990
Dr. Robert S. Purkis	March 1, 1990
Dr. John P. Sloan	March 1, 1990
Dr. John S. Smith	March 1, 1990
Dr. Leonard C. Jenkins	September 8, 1993

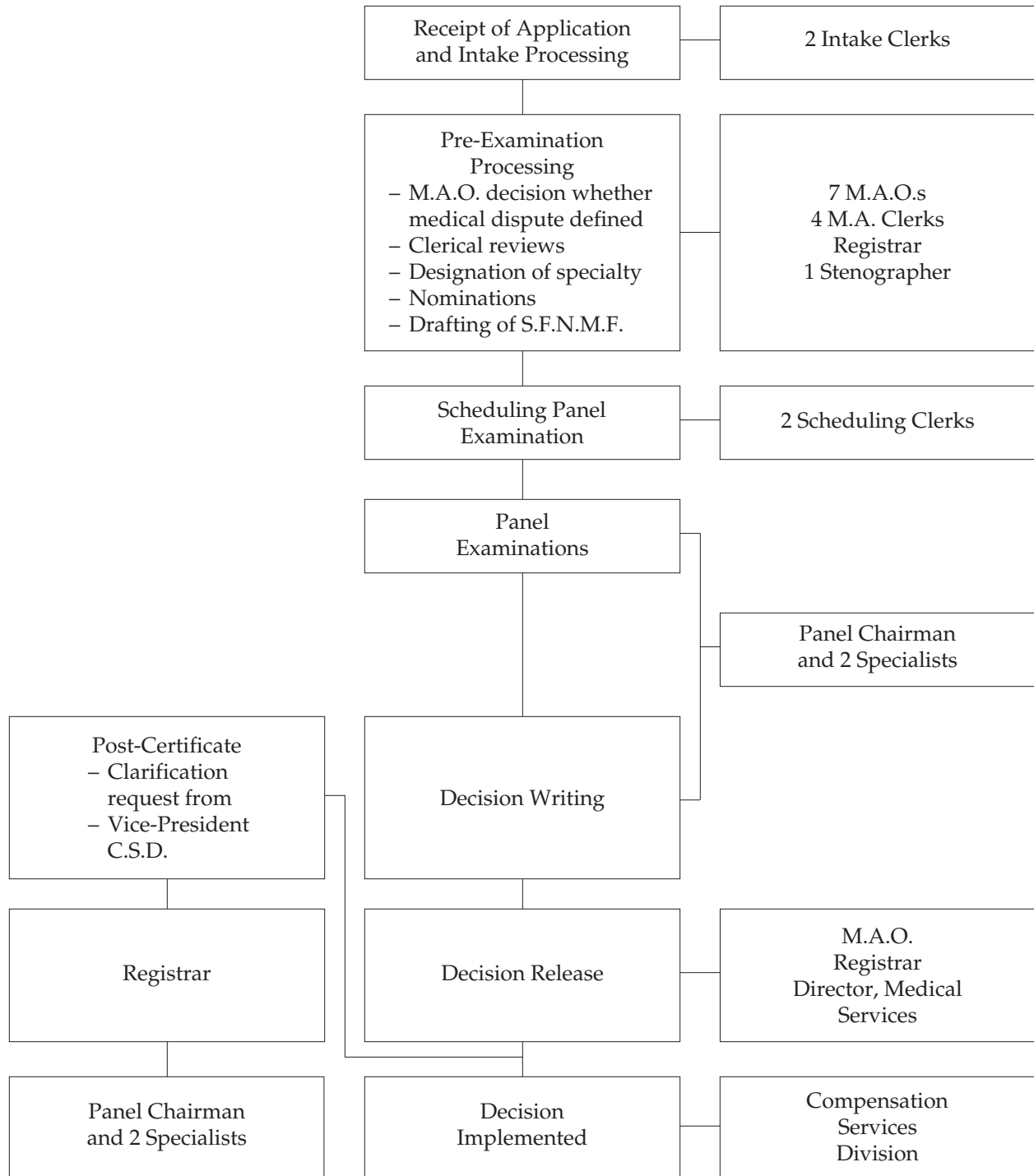
Chairs are appointed at pleasure by the lieutenant-governor-in-council.

These appointments are not fixed terms.

Current M.R.P. Department Staff and Position Descriptions

Name	Position	Date of Appointment (with M.R. Process)
BRAKE, Weldon	Registrar	July 11, 1994
OLSON, Judy	Senior Medical Appeals Officer	September 1, 1987
BRETT, Dianna	Medical Appeals Officer	April 1988
NEWMAN, Kristine	Medical Appeals Officer	April 1988
HARWOOD, Bev	Medical Appeals Officer	March 1990
CAMERON, Nora	Medical Appeals Officer	November 12, 1992
HUGHES, Gwenda	Medical Appeals Officer	Acting M.A.O. Dec. 1991 Permanent M.A.O. July 1992
SHEA, Margaret	Medical Appeals Officer	March 1, 1994
DICKSON, Lisa	Medical Appeals Clerk	August 6, 1986
CHARRON, Barb	Medical Appeals Clerk	April 1991
MYKYTIW, Faye	Medical Appeals Clerk	September 1991
UKRANITZ, Helen	Medical Appeals Clerk	January 9, 1992 Acting Appeals Officer 1991
TUASON, Ben	Medical Appeals Clerk	November 22, 1994
McCULLOUGH, Francine	Scheduling Clerk	April 1987
MEDFORD, Diane	Scheduling Clerk	February 27, 1995
GANNON, Christine	Secretary to the Registrar	October 18, 1994
INGRAM, Marjorie	Secretary	July 13, 1992
MANG, Ada	Clerk Steno	November 24, 1994
PERONI, Susan	Intake Clerk	December 22, 1994
VIJAYARATNAM, Vasuki	Intake Clerk	January 9, 1995
COOPER, Susan	Scheduling Clerk	February 13, 1995

The M.R.P. Appeal Process



MEDICAL REVIEW PANEL DEPARTMENT ANNUAL REPORT — 1994

Acknowledgments

Medical Review Panels have been favoured throughout their history with a complement of exceptionally talented and committed chairs, specialists, and staff. It is this, more than any other factor, which accounts for the Medical Review Panels' achievements.

A number of changes took place in the Medical Review Panel Department in 1994 and it is appropriate to recognize the special contribution of three particular individuals who have moved on to other responsibilities.

Dr. Leonard C. Jenkins was the Medical Review Panel Department's first part-time registrar. He was retained in September 1991 to conduct an independent study of the M.R.P. process. The results of this study were presented to the governors on August 17, 1992. Dr. Jenkins subsequently worked with the M.R.P. chairs and staff to implement his administrative recommendations.

After the appointment of a full-time registrar in mid-1994, Dr. Jenkins remained with the department as medical advisor to the registrar. This arrangement ceased at the end of 1994, and in 1995, Dr. Jenkins will assume his responsibilities as a Medical Review Panel chair.

Judy Olson, acting manager of the department, elected to return to her previous position as senior medical appeals officer in May 1994. As manager, Ms. Olson's special contributions included developing the new department, overseeing the M.R.P.'s interactions with the worker/employer communities, and building a constructive working relationship between the Medical Review Panels and the staff. Judy Olson continues to be a major positive influence in the administration of the Medical Review Panel process.

Dianna Brett, acting senior medical appeals officer, elected in 1994 to return to her previous position as medical appeals officer. As senior medical appeals officer, Ms. Brett was responsible for providing expert advice to other medical appeals officers. Her role as a significant resource person to the staff continues.

Introduction

The purpose of the Medical Review Panels is to resolve in a fair and impartial manner appeals from medical decisions of the Workers' Compensation Board or the Appeal Division, medical findings of the Review Board, and referrals by the Appeal Division or W.C.B. president. Each panel consists of three community-based physicians who are independent of the W.C.B.

In 1994, there were 14 part-time panel chairs and 208 specialists eligible to serve on panels. Forty-three of the specialists practise outside the Lower Mainland.

There are 24 specialties (listed in Table 1). The frequencies with which specialties were used in panels from 1992 to 1994 are depicted in Table 2.

The Medical Review Panel Department provides administrative support to the Medical Review Panels. In July 1994, the Board of Governors appointed A. Weldon Brake for a three-year term as the department's full-time registrar. As of the end of December 1994, the department consisted of 16 permanent staff and 3 temporary staff.

The department received 452 new applications in 1994, compared to 526 in 1993, and 574 in 1992. Of the 452 new applications, 61.28% were from Appeal Division decisions, 19.91% were from Board officer decisions, 16.15% were from Review Board findings, and 2.66% were referrals under Section 58(5) of the *Workers Compensation Act* (Table 3). 93.14% of new appeal applications in 1994 were initiated by workers and 4.20% were initiated by employers.

In 1994, the overall time for processing Medical Review Panel appeals continued to increase. The process — from filing the appeal to implementing the decision — took an average of 723 days compared to 637 in 1993 and 486 days in 1992. However, improvements were achieved in certain areas.

The registrar is pleased to report that, in 1994, the M.R.P.s achieved the year's goal of examining 300 workers. An average of 25 examinations were held each month, compared to 19 in 1993.

There were 289 M.R.P. certificates (decision outcomes) issued in 1994, compared to 236 in 1993, and 212 in 1992. On average, panel chairs completed certificates within six weeks of M.R.P. examinations. In 1994, the average release time for all decisions was 40 days, which represents a 50% improvement over the average of previous years.

The Compensation Services Division implemented 258 certificates in 1994, up from 228 in 1993 and 189 in 1992. Of the 258, 50% confirmed the decisions or findings, 47% did not, and 3% confirmed the decisions or findings in part. This is consistent with decision outcomes in previous years.

As a result of a 16.37% decrease in the number of applications and an increase in output during 1994, some progress was made in reducing the case backlog. As of the end of December 1994, 608 cases were in the system, compared to 715 at the end of 1993 and 649 at the end of 1992. The shortest time for processing an individual appeal in 1994 was 181 days. As of December 31, 1994, there were 40 M.R.P. applications held in abeyance pending further adjudication or consideration of an appeal to the Review Board or Appeal Division on a preliminary matter.

Further improvements must be made. Eighty-three percent of the time in the M.R.P. process is taken up by its initial stages, from receiving applications to scheduling the M.R.P. examination.

In 1994, the medical appeals officers successfully reduced the time in determining whether a bona fide medical dispute exists from 28 days in 1993 to 6 days. In statistical terms, the number of appeals awaiting this decision was reduced from 361 in 1992 to 20 in 1994. In 1992, the waiting period was over 12 months. Presently, the medical appeals officers are current in this area of responsibility.

However, other measures must be instituted in 1995. A priority is to reduce the time it takes to prepare Statements of Foundational Non-Medical Facts and schedule panel examinations. A three-year strategic plan and a quality assurance program for the department will be developed.

The registrar has developed a questionnaire to seek feedback from the community on the preliminary handling of appeals, scheduling of examinations, professional conduct of the M.R.P.s, and clarity of the certificates issued. The panel chairs and medical specialists have also been asked to provide input on how to eliminate the backlog and reduce delays in the process.

In response to concerns about both delays in the M.R.P. process and maintaining its adjudicative integrity, the registrar has continued to work with community representatives on general changes to modify the existing system. They include a new policy section on M.R.P.s for the W.C.B. *Rehabilitation Services and Claims Manual*, proposals for statutory amendments and regulations, and proposals to the lieutenant governor in council and the Joint Medical Committee about matters within their respective areas of responsibility.

The registrar has also contacted the British Columbia Medical Association to request additional specialists to serve on M.R.P.s.

A new computer system will be developed to facilitate the scheduling process, and M.R.P. examinations will be held throughout the province starting in 1995.

Time Phases Through the M.R.P. Process

Figure 1 illustrates the Medical Review Panel process and the time flows associated in days from initiation of the application to implementation of the M.R.P. certificate.

Figure 1 outlines the average time of 723 days to complete the process as follows:

- 8% – from receipt of the application to receipt of the Physician’s Enabling Certificate;
- 12% – from receipt of the Physician’s Enabling Certificate to decision on Bona Fide Medical Dispute;
- 53% – from Bona Fide Medical Dispute decision to scheduling of panel (includes drafting of Statement of Foundational Non-Medical Facts);
- 10% – from time panel scheduled until panel held;
- 6% – from time panel held until certificate received;
- 11% – for implementation of the certificate.

The initiation of an application and the provision of an enabling certificate are largely within the control of the appellant and the attending physician. To facilitate this process and educate workers and employers on what is to be expected at the panel examination, a pamphlet has been prepared and is currently being printed.

The implementation of Medical Review Panel certificates is not within the jurisdiction of the Medical Review Panels. It is a responsibility of the W.C.B. Compensation Services Division. Table 4 indicates significant improvement in this area since 1992.

If these two phases are not included in the total time, from initiation to implementation, the average time for the M.R.P. process decreases to 585 days.

Initiatives to Resolve Delays in the M.R.P. Process

(a) Intake Functions

The intake process was completely reviewed and staff responsibilities realigned to enable the creation of two new intake clerk positions. The transfer of the clerical review processes (e.g. requesting x-rays and medical reports) from the medical appeals officers to the medical appeals clerk positions was considered. A Case History format has been introduced to index and sort claim file documents for the Trial Project.

(b) Preparation of the Statement of Foundational Non-Medical Facts and Issues

In 1994, the medical appeals officers drafted 375 Statements of Foundational Non-Medical Facts, compared to 335 in 1993 and 208 in 1992. This is a 12% increase over 1993 and a 80% increase over 1992. Table 5 provides more detailed comparative statistics.

As of December 31, 1994, there were 193 applications awaiting drafting of the Statement. Medical appeals officers were working on Statements of Foundational Non-Medical Facts in cases where a decision as to bona fide medical dispute was defined as far back as November/December 1993.

The preparation of the Statement of Foundational Non-Medical Facts in the current format in all cases was an issue of considerable debate within the M.R.P. Department, the M.R.P. chairs and the community in 1994. Figure 1 indicates that 53% of the total time from initiation of an appeal to the implementation of a M.R.P. certificate is taken for preparation of the Statement, receiving medical reports, obtaining nominations and scheduling of the panels.

The Case History format, being implemented on a trial basis, will be used in conjunction with a modified Statement of Foundational Non-Medical Facts. The Advisory Committee, which consists of four chairs, will be involved with this trial project. Feedback will be obtained from these chairs to determine whether the proposed system or the current system is preferred.

Two senior medical appeals officers have been assigned the task of developing a process to reduce the number of applications awaiting Statements. The officers' first initiative was to review all of the applications in the M.R.P. process to determine which cases will require a modified Statement and which cases will require a detailed Statement. As part of this task, the officers have reviewed the complexity of the issues involved to obtain a complete picture of the backlog problem.

Further consideration will be given to the effect of the Statement preparation on the delay problem and possible solutions in 1995.

(c) Scheduling

Scheduling problems were given particular attention in 1994. The following measures were adopted or considered:

1. Realignment of staff responsibilities to enable the creation of a second scheduling clerk position.

-
2. Implementation of a more integrated scheduling approach, centralized in the scheduling clerk positions. Goals have been established for each participating group and will be monitored.
 3. Designation of specialty by the registrar at the beginning of the process as soon as the medical appeals officers decide that a bona fide medical dispute has been defined.
 4. Initiation of employer/worker nominations for specialists at the beginning of the process as soon as the designation is made. This will allow a sufficient lead time for specialists to be notified of a panel examination. Attempts will be made to have a four-month lead time for specialists in order to accommodate their schedules.
 5. Scheduling of the panel examination date as soon as the nominations have been completed.
 6. Holding panel examinations in other parts of the province where appropriate.
 7. Development of a new computer system to facilitate the scheduling process.
 8. Consultation with M.R.P. chairs, M.R.P. specialists and the community, via questionnaire, regarding scheduling improvements.
 9. Contact with the Joint Medical Committee and the B.C.M.A. to request additional specialists to serve on Medical Review Panels throughout the province.

(d) New Computer System

A Development Services Proposal for the new Medical Review Panel computer system was approved in November, 1994, with work to be completed in 1995.

This computer system will support daily operations and reporting, and replace a number of functions currently performed manually or with difficulty using the current outdated computer system. In particular, the new computer system will:

- track information relating to the overall M.R.P. process.
- track requests for examination by Medical Review Panels and their processing by Medical Review Panel staff.
- track specialist availability and frequency with which specific specialists are nominated.
- track assignment of appeals to Medical Review Panels, time spent and billings.

-
- enable identification of appeals that are exceeding their expected time in the process.
 - maintain a list of “contact parties.”
 - report M.R.P. information to the Board of Governors.

(e) Delays in Decision Writing

Delays in the decision-making process after the panel examination has been held is no longer a significant problem. Beginning in 1992, the M.R.P. chairs agreed to attempt to issue M.R.P. certificates, on average, within six weeks of the panel examinations. The average time in 1994 was 40 days — an improvement of 50% over the average for previous years.

The Chairs’ Advisory Committee

The Chairs’ Advisory Committee consists of four M.R.P. chairs and is chaired by the registrar. The committee is responsible for providing advice to the registrar and for approving and supervising practice and procedure developments in the M.R.P. chairs’ area of responsibility. Advisory Committee recommendations on practice/procedural matters are sent to the chairs as a group for final approval. There were four Advisory Committee Meetings held in 1994.

Education Day

The Fifth Medical Review Panel Education Day was held on May 12, 1994. The program was intended to assist in upgrading the knowledge of the Medical Review Panel chairs, specialists and Medical Review Panel Department staff in the field of occupational and environmental health. The primary topic of discussion was occupational diseases. Subjects discussed included:

- Occupational Diseases Overview
- Asthma and Reactive Airway Disease (R.A.D.)
- Environmental Air Quality
- Multiple Chemical Sensitivities (M.C.S.)
- Annual Report 1993 M.R.P. Process

The Sixth Medical Review Panel Education Day was held on November 24, 1994. The focus was occupational stress. Subjects discussed included:

- Perspectives on the Review Board from the Chair of the Review Board
- Occupational Stress Overview
- Occupational Stress: Perspective from the W.C.B.
- Occupational Stress: Perspective from the Community
- Chronic Fatigue Syndrome
- Forensic Psychiatry — Some Reflections on Violence in the Workplace

1994 Costs

The following chart sets out the 1994 Costs Per M.R.P. Panel Based on Number of Certificates Received:

**1994 Costs Per M.R.P. Panel
Based on Number of Certificates Received
(As of December 31, 1994)**

Budget Information M.R.P. Department	Totals	Cost Per Panel
Capital	\$18,090	\$63
Operating	\$1,066,810	\$3,691
1. Salaries Payroll	\$903,265	
2. Travel Expenses	4,625	
3. Supplies and Stationery	4,273	
4. Communications	15,700	
5. Furniture and Equipment	51,116	
6. Publications and Advertising	83	
7. Other	9,111	
8. Consulting Fees	73,870	
9. Building and Services	4,767	
Chair and Specialist Fees	\$838,415	\$2,901
TOTAL	\$1,923,315	\$6,655
M.R.P. Certificates Received	289	

The total cost of \$1,923,315 is up from \$1,218,779 in 1993. However, the cost per certificate has decreased from \$7,044 in 1993 to \$6,655 in 1994.

Challenges for 1995

A statement of purpose, goals and objectives was developed for the Medical Review Panel process in 1994:

- a) The purpose of the Medical Review Panels is to examine, determine and resolve in a fair, impartial and independent manner, appeals by workers and employers from medical decisions, referrals or findings of the Workers' Compensation Board, Review Board, or Appeal Division, in any matters or issues expressly conferred upon the Medical Review Panels by the *Act*.
- b) It is the objective of the Medical Review Panels to hear appeals or applications as expeditiously and efficiently as possible in order to ensure an appellant or applicant is given a decision without undue delay, while giving due consideration in each case to the need to identify the issues, prepare the non-medical facts, ensure the availability of necessary relevant medical and other evidence, and be bound by the non-medical facts and the decision of the Medical Review Panels.

The Medical Review Panel chairs and the staff of the Medical Review Panel Department are committed to improvements in the M.R.P. process.

Among the initiatives to be undertaken and challenges to be addressed in 1995 are:

1. Demonstrating that the Medical Review Panel chairs and the staff of the Medical Review Panel Department are capable of disposing of the backlog and remaining current in 1995;
2. Developing a three-year Strategic Plan and a Quality Assurance Program for the Medical Review Panel Department;
3. Installing a new computer system. This project will start in March 1995;
4. Reducing the time it takes to prepare the Statement of Foundational Non-Medical Facts;
5. Reducing the time it takes to schedule panel examinations;
6. Reducing the time it takes to issue a decision after the panel examination;
7. Providing panel examinations throughout the province.

The commitment to a high standard of quality continues to be challenged by the competing interests in efficiency and timeliness. The tension between these interests will continue to be the major influence in determining the agenda for further evolution of the Medical Review Panel Process in 1995.

APPENDIX

STATISTICAL INFORMATION

Table 1

SPECIALTIES AVAILABLE FOR MEDICAL REVIEW PANELS

Anaesthesia
Cardiology
Cardiovascular and Thoracic Surgery
Dermatology
General Practice
General Surgery
Gynaecology
Immunology / Allergy
Internal Medicine
Nephrology
Neurology
Neurosurgery
Pathology
Physical Medicine
Ophthalmology
Orthopaedic Surgery
Otolaryngology
Plastic Surgery
Psychiatry
Radiology
Respirology
Rheumatology
Urology
Vascular Surgery

Note: Total Number of Specialists = 208
Total Number outside Lower Mainland = 43

Table 2**FREQUENCY OF SPECIALTIES USED IN MEDICAL REVIEW PANELS
1992, 1993, AND 1994**

Specialty	1992		1993		1994	
	Nos.	%	Nos.	%	Nos.	%
Orthopaedic Surgery	161	72.5	153	66.2	201	67
Neurology	22	9.9	17	7.4	19	6.3
Rheumatology	6	2.7	10	4.3	9	3
Respiratory Disease	7	3.2	9	3.9	3	1
Psychiatry	3	1.3	8	3.5	12	4
Neurosurgery	0	0	8	3.5	14	4.7
Physical Medicine	0	0	6	2.7	15	5
Otolaryngology	4	1.8	5	2.2	6	2
Cardiology	3	1.3	4	1.7	0	0
Vascular Surgery	0	0	3	1.3	0	0
Ophthalmology	1	0.5	3	1.3	3	1
Immunology/Allergy	0	0	1	0.4	3	1
Internal Medicine	3	1.3	1	0.4	2	0.7
Plastic Surgery	3	1.3	1	0.4	2	0.7
Dermatology	1	0.5	1	0.4	1	0.3
General Surgery	0	0	1	0.4	6	2
Neurology and Neurosurgery	6	2.7	0	0	0	0
Psychiatry and Neurosurgery	0	0	0	0	0	0
Urology	1	0.5	0	0	2	0.7
Orthopaedic and Neurosurgery	1	0.5	0	0	0	0
Nephrology and Renal Disease	0	0	0	0	1	0.3
Orthopaedic Surgery and Psychiatry	0	0	0	0	1	0.3
TOTALS	222		231		300	

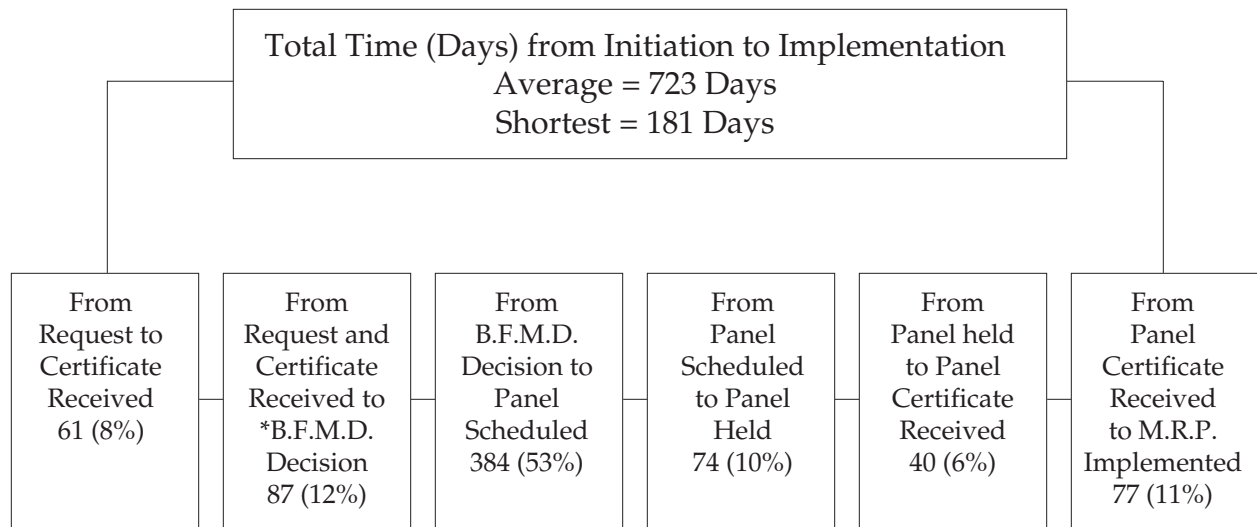
Table 3

**SOURCE PATTERNS FOR
NEW MEDICAL REVIEW PANEL APPLICATIONS
(FOR 1992, 1993, AND 1994)**

Decision Maker	1992	1993	1994
Board Officer	114 (19.9%)	86 (16.3%)	90 (19.91%)
Workers' Compensation Review Board	105 (18.3%)	102 (19.4%)	73 (16.15%)
Appeal Division Decision	340 (59.2%)	328 (62.4%)	277 (61.28%)
Referrals by Appeal Division	15 (2.6%)	8 (1.5%)	7 (1.55%)
Referrals by President	0	2 (0.4%)	5 (1.11%)
TOTALS	574 (100%)	526 (100%)	452 (100%)

Figure 1

MEDICAL REVIEW PANELS — TIME FLOWS
1994 (JANUARY 1 TO NOVEMBER 30)



* Bona Fide Medical Dispute

Table 4

MEDICAL REVIEW PANEL STATISTICS — 1992–1994

	1992													1993													1994												
	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	TOTAL	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	TOTAL	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	TOTAL
Number Applications Received	67	51	65	64	45	35	56	36	48	36	43	28	574	50	50	47	55	34	49	42	38	50	40	39	32	526	42	42	51	39	34	47	39	34	37	39	27	21	452
Number Applications Considered	37	47	38	33	23	36	45	16	32	28	42	41	418	30	45	132	67	69	70	81	53	62	88	66	44	807	56	27	70	41	51	45	56	34	37	33	45	40	535
Number S.F.N.M.F. Completed	25	11	24	20	22	10	10	24	9	17	17	19	208	33	26	25	22	34	27	21	27	25	33	38	24	335	32	18	25	28	25	12	17	39	40	65	50	24	375
Average Number Applications Considered Per M.A.O. (Annual)													105													154													107
Average Number S.F.N.M.F. Completed Per M.A.O. (Annual)													52													64													75
Number Panels Held	16	18	17	19	14	15	12	11	29	25	24	22	222	18	9	10	18	20	17	21	16	26	22	33	21	231	19	9	20	26	23	27	27	34	20	29	43	23	300
Number Certificates Received	22	12	18	15	15	15	14	15	25	14	24	23	212	23	17	16	14	13	19	19	18	21	23	28	25	236	28	10	14	20	23	19	23	31	33	22	32	34	289
Number Certificates Implemented	20	14	23	16	11	12	16	15	10	19	12	21	189	15	27	29	13	9	21	13	19	18	20	27	17	228	32	27	17	14	21	26	24	21	26	16	25	9	258
Average Number Panels Per Chair (Annual)													15													16													20
Average Number Certificates Per Chair (Annual)													13													16													19

* M.A.O. means medical appeals officer

** S.F.N.M.F. means Statement of Foundational Non-Medical Facts

Table 5**MEDICAL REVIEW PANEL STATISTICS — MEDICAL APPEALS OFFICER WORK**

														AVERAGE NUMBER PER OFFICER
1992	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	TOTALS	
Medical Dispute Defined	18	22	20	16	12	19	23	9	14	14	27	14	208	(4 Officers)
Medical Dispute Not Defined	6	7	6	5	2	3	5	1	3	5	6	15	64	
Out of Time	3	4	6	1	3	4	5	2	5	4	1	3	41	
Withdrawn/Dispute Resolved	10	14	6	11	6	10	12	4	10	5	8	9	105	
Applications Considered	37	47	38	33	23	36	45	16	32	28	42	41	418	105
Statements Completed	25	11	24	20	22	10	10	24	9	17	17	19	208	52
1993	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	TOTALS	
Medical Dispute Defined	17	40	103	49	51	60	61	39	48	60	47	24	599	(5.25 Officers)
Medical Dispute Not Defined	2	3	22	8	11	8	14	8	10	19	12	15	132	
Out of Time	5	1	4	4	5	0	1	1	0	7	3	2	33	
Withdrawn/Dispute Resolved	6	1	3	6	2	2	5	5	4	2	4	3	43	
Applications Considered	30	45	132	67	69	70	81	53	62	88	66	44	807	154
Statements Completed	33	26	25	22	34	27	21	27	25	33	38	24	335	64
1994	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	TOTALS	
Medical Dispute Defined	44	24	49	32	28	30	31	19	26	19	24	17	343	(5 Officers)
Medical Dispute Not Defined	8	2	12	3	12	10	18	7	6	8	19	14	119	
Out of Time	2	0	5	3	7	2	1	4	3	3	2	3	35	
Withdrawn/Dispute Resolved	2	1	4	3	4	3	6	4	2	3	0	6	38	
Applications Considered	56	27	70	41	51	45	56	34	37	33	45	40	535	107
Statements Completed	32	18	25	28	25	12	17	39	40	65	50	24	375	75

REPORTER

*1994 Annual Report of the Appeal Division (pages 393 to 464)
is not currently available in Acrobat PDF (portable document format).*

