

WORKERS' COMPENSATION REPORTER

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Workers and Workplaces
Safe and Secure from Injury and Disease

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- Blue — Decisions of the Panel of Administrators
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Decision of the Appeal Division

Number: 94-1445
Date: November 30, 1994
Panel: David Van Blarcom
Subject: Penalty for Late Assessment Installments

The employer appeals a decision of the director of Assessments set out in a letter dated August 2, 1994. That letter confirmed the decision to assess the employer a penalty of \$73.44 for late filing of his quarterly remittance.

The employer has submitted the decision is wrong on two bases:

Firstly, he submits a penalty assessment on a delinquent account is interest, and that the penalty assessed amounts to interest of 281% per annum, which exceeds the rate of criminal interest set out in the Criminal Code of Canada.

Secondly, he submits the penalty should be assessed pursuant to Section 47(1), not Section 40(2), with the result that the penalty should only be \$20.76.

Both of these errors, if sustained, would be errors of law, and are therefore properly appealed to the Appeal Division pursuant to Section 96 of the *Workers Compensation Act*.

I will deal at the outset with the issue of the penalty as a rate of interest.

The definition of "interest" in Section 347 of the Criminal Code is "the aggregate of all charges and expenses. . . payable for the advancing of credit. . ." Interest is defined in *Black's Law Dictionary (abridged sixth edition)* as ". . . the compensation allowed by law or fixed by the parties for the use or forbearance of borrowed money." The *Concise Oxford Dictionary* defines interest as "money paid for the use of money lent, or for not requiring the repayment of a debt."

As defined in the Criminal Code and elsewhere, it is essential to the notion of interest that it is a charge payable for the use of money. That is not the case here. The sum levied for late payment of an assessment is a penalty for failure to comply, not a charge for allowing the employer to use the unremitted sums, and therefore the notion of a

“rate of interest,” criminal or otherwise, is not applicable. The employer’s appeal on this ground is denied.

The balance of this decision deals with the employer’s submission that the penalty is properly levied under Section 47(1) of the *Act*, not Section 40(1).

EVIDENCE

The employer had filed an “Employer’s Payroll and Contract Labour Report” (a “payroll report”) for his operation in the calendar year 1993 on April 12, 1994. That document stated “Please complete and return this report by the due date to avoid a non-return penalty assessment of \$25.49.” It was for operation in the calendar year 1993 and was originally due February 20, 1994. The sum of \$25.49 is 5% of the previous year’s assessment of \$509.72.

The payroll report had the assessment rate and the total of quarterly “assessments paid” for the year preprinted on it. The employer then calculated his assessment by multiplying the assessable earnings of his employees, which he supplied, by the assessment rate, to arrive at a “total assessment” of \$2,398.34. He then subtracted the amount of the “assessments paid” and filled in the blank for “assessment due” as \$933.30.

He returned the form and paid the \$933.30 in early April, 1994. Although that sum was late, he was not penalized for the lateness. The employer says that he then thought he was up to date in his payments.

However, the Board also required quarterly payments for assessments for 1994. Policy #40:30:30 of the *Assessment Policy Manual* states:

Those employers who have an annual assessment of \$500.00 or more are assessed on a quarterly basis. . . .

For the first three quarter periods in the year, the employer receives an Employer’s Remittance Form to use in calculating the assessment payable. After calculating the assessment payable, the employer marks this amount on the stub portion of the remittance form and mails it into the Board with the payment by the due date. . . .

The assessment system for the first three quarter periods is on a self-reporting basis; the Board requires the employer to calculate the assessment and mail in the remittance stub only with payment before the due date. . . .

At the end of each year, an employer assessed on a quarterly basis receives an Employer's Payroll and Contract Labour report to complete and return by February 20. As in the case with annual accounts, the employer must provide the assessable payroll figures for the year on this report, along with details of Principals' Earnings, Contractors' Earnings and Excess Earnings calculations. . . .

An "Employer's Remittance Form" was sent to the employer. This form (#1820) consists of two parts. The employer uses the top part as a kind of worksheet to calculate what is described as an "assessment due." The employer then detaches that part of the form and retains it for his records. The employer transfers the "assessment due" calculated to the box "assessment payable" on the bottom part of the form, (the "stub") which he returns with his cheque.

The remittance form for the first quarter (January 1-March 31) is, according to Policy #40:30:30, mailed on April 1 and payment is due on April 25. The employer did not return the remittance form stub with payment, and he was therefore sent a reminder form at the beginning of May again requesting payment. When no payment was received at the beginning of June, the employer was assessed a penalty of \$119.92, which was 5% of the yearly assessment for 1993 of \$2,398.34.

The employer wrote to the Board on June 8, 1994, and asked that the penalty be waived because of his confusion about the status of his account, which he had thought was up-to-date with the payment of \$933.30. However, he did remit the sum of \$293.76 for the quarterly payment by a cheque dated June 7, 1994, which was cashed by the Board on June 13, 1994.

By a letter dated July 5, 1994, an accounts officer declined to cancel the penalty, but reduced it by calculating it to be 25% of the required remittance of \$293.76. This resulted in a reduction of the penalty to \$73.44. That letter said:

Please note that your payment of \$933.30 was for the period of operation in 1993. As your firm is required to remit on a quarterly basis, the 1994 first quarter remittance form was mailed to you in early April.

. . .

Normally, a penalty assessment would not be cancelled for the reason that you have outlined. However, as your penalty assessment exceeds 25% of your required remittance, I have reduced the penalty assessment from \$119.92 to \$73.44. This adjustment will appear on the Statement of Account dated July 1, 1994.

This was still unsatisfactory to the employer, who requested a manager's review. In a letter dated July 11, 1994, the employer stated that the penalty assessed amounted to interest of 25% over a two month period, or 281% compounded annually. He said that this is an unheard of interest rate and represents undue hardship in any business world.

The manager upheld the July 5, 1994 decision in a letter dated July 18, 1994. That letter stated that the intent of a penalty assessment is not to charge a firm interest on an overdue amount, but is a monetary sanction against employers who do not make their payments on time. The letter said that the penalty assessment was applied under authority of Section 40(2) of the *Workers Compensation Act* and was calculated on 5% of the previous year's annual assessment. The letter went on to explain:

As your annual assessment for 1993 was \$2,398.37, you were assessed a penalty of \$119.92 (which represents 5% of last year's assessment) as your payment for the first quarter of 1994 was not received until June 13, 1994. As your firm only owed \$293.76 for the first quarter, Ms. Shin appropriately reduced your penalty down to 25% of what was owed for that quarter, thereby reducing the penalty to \$73.44. I enclose for your perusal a photocopy of Policy #40:50:10 of the *Assessment Policy Manual* on non-return penalty assessments, reasons for cancellation of a penalty assessment, and the criteria for penalty reductions.

The August 2, 1992 letter from the director of Assessments said:

The penalty is not an interest charge but rather, a penalty assessment applied for non-compliance with your reporting and remitting requirements. The penalty was made under Section 40 of the *Workers Compensation Act* by Board Minute and is 5% of the employer's previous year's assessment with a minimum penalty of \$25.00 and a maximum penalty of \$1,500.00. This was published in the British Columbia Gazette as B.C. Regulation 146/82.

In reviewing the amount of the penalty and your past history, it is my view that our staff have correctly assigned the penalty and exercised discretion by providing a reduction in that penalty in accordance with the Board of Governors' policy. It is my decision, therefore, that the reduced penalty will stand.

The employer submits that a quarterly payment was due on April 25, 1994, which was the day of default. As the sum was paid on June 13, 1994, in the second month after it

was due, he submits that the proper penalty should be 5% of the installment due, plus 1% for each of the two months, for a total of 7% of \$293.76, or \$20.56.

LAW AND POLICY

Section 39 of the *Workers Compensation Act* provides:

- (1) . . . the board shall every year assess and levy on and collect from. . . employers. . . sufficient funds. . . but the established practice of assessment and levy shall be varied only with the approval of the Lieutenant Governor in Council. . . .
- (2) Assessments may be made in the manner and form and by the procedure the board considers adequate and expedient. . . .
- (3) Assessments may, wherever it is considered expedient, be collected in. . . quarterly instalments. . . .
- (6) The board shall notify each employer of the amount of each assessment due. . . and the time when it is payable. . . .

Section 40 of the *Act* says:

- (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.

Section 47(1) of the *Act* provides that if an assessment

. . . is not paid at the time when it becomes payable, the defaulting employer is liable to and shall pay as a penalty for his default the percentage on the amount unpaid or the assessment for the preceding year, or the projected assessment for the current year, that may be prescribed by the regulations or determined by the board. . . .

Section 47(3) states:

The board, if satisfied that the default was excusable, may in any case relieve the employer in whole or in part from liability under this section.

The employer has cited B.C. regulations 146/82 and 152/87, which promulgate Board Minutes setting out the penalties which may be assessed under Sections 40(1) and 47(1).

According to the regulations, the penalty for neglecting or refusing to comply with Section 40(1) is "fixed at 5% of the employer's previous year's assessment with a minimum penalty of \$25 and a maximum penalty of \$1,500.00."

The penalty for non-payment of an assessment under Section 47(1) is "fixed at 5% of the amount unpaid at the date of default plus [1%] for each additional month of default."

These penalties were briefly considered by the commissioners in Item #351, *Re: Assessment of Employers, 1979-84 (Workers' Compensation Reporter, Vol. 5, p. 140)* which said:

It has come to the Board's attention that there may be a lack of awareness among employers regarding some of the monetary limits currently used by the Board's Assessment Department.

1. Where the yearly assessment charged to an employer is \$500.00 or less, the assessment may be paid, with some exceptions, on an annual basis. Where, however, the yearly assessment exceeds \$500.00, it must be paid in quarterly installments.
2. The minimum assessment which will be charged to an employer is \$25.00 for a year or portion of a year.
3. The penalty to which every employer is liable who neglects or refuses to make a return of a Notice of Assessment as required by clauses (c) and (d) of subsection (1) of Section 40 of the *Workers Compensation Act* is fixed at 5% of the employer's previous year's

assessment with a minimum penalty of \$25.00 and a maximum penalty of \$1,500.00.

4. The penalty to which every defaulting employer is liable for the non-payment of an assessment under subsection (1) of Section 47 of the *Workers Compensation Act* is fixed at 5% of the amount unpaid at the date of default plus 1-1/2% for each additional month of default.

Since Item #351, the monthly amount for continuing default has been reduced to 1%, by regulation.

In the *Assessment Policy Manual*, Policy #40:50:10 is titled "Section 40(2) Non-Return of Remittances," while 40:50:30 is entitled "Penalty Charges on Outstanding Assessments."

Policy #40:50:10 purports to deal with cases like this one. It says:

Under the authority of Section 40(2) of the *Act*, penalty assessments are applied to firms who fail to comply with their reporting and remitting obligations. The main purpose of these penalty assessments is to enforce the assessment regulations with a monetary sanction against defaulting employers. The secondary reason is that non-compliance represents a cost to the Board which, in fairness to the employers who do meet their obligations, must be borne by the delinquent employers themselves.

The penalty assessment amount is based on 5% of the employer's previous year's total annual assessment. . . .

The majority of penalty assessments are automatically applied to the accounts of all employers who have not made the first, second or third quarter remittance or returned the year-end payroll report by a cut-off date in the month following the due date.

It goes on to provide eight acceptable reasons for cancelling penalty assessments, and:

Cancellation of penalty assessments for non-return of remittances is to be considered in extreme cases only, and it is to be considered a matter of course that penalty assessments imposed will be sustained. . . .

When penalty cancellation is requested, consideration will be given to reducing the penalty if it exceeds 25% of the remittance required for

the period in question. No penalties should be reduced below the 25% figure.

Policy #40:50:30 says: "Every employer is liable for a penalty of non-payment of an outstanding balance under Section 47 of the *Act*. . . An outstanding balance is payable when the original Statement of Account is mailed to the employer, and becomes overdue and subject to the overdue penalty charge of 5% after 25 days."

REASONS AND DECISION

The distinction between Sections 40(2) and 47(1) is significant, as the penalties prescribed by the Board and embodied in provincial regulation are very different. I find that Section 40(2) is the appropriate penalty to apply where the employer has failed to remit a payroll report, together with the annual assessment or balance due on the payroll report, while Section 47(1) is the appropriate section for levying a penalty on a late quarterly payment.

Section 47(1) is well suited to levying a penalty for an unpaid installment. It provides that if an assessment levied is not paid when it becomes payable, then the penalty is levied on the amount unpaid, and that is the amount set by regulation. It does not require a penalty to be calculated on the last year's assessment which was paid.

Levying the penalty under Section 40(2) based on a whole year's assessment yields the rather draconian result of a penalty of \$119 being levied on a late installment of \$293. That is a penalty of about 40%, which is far in excess of the 5% which would be levied under Section 47(1). To relieve against this harshness, the Board has provided relief to the extent of 25% of the amount owing. However, this is still in excess of what would be levied by regulation under Section 47(1). Moreover, the penalty pursuant to section 40 has been prescribed by provincial regulation. The Board has presumed to vary that penalty in its policy by reducing it to 25% of the sum owing. In a conflict between the published policies of the governors and the regulations, the regulations are paramount.

The penalty under Section 40(2) is well suited to the situation where an employer has failed to pay an annual assessment or balance owing pursuant to a payroll report.

A penalty can only be levied under Section 40(2) where the Board has given the employer notice under Section 40(1) of the assessment rate and informs the employer of the manner in which the assessment is calculated and the date it is payable. The employer is then liable for a penalty if he fails to make a return on the form provided and/or fails to remit the amount of the assessment. Both Section 40 and Section 47 provide for a penalty for the failure to pay an assessment. However, Section 40 is distinct in that it is linked with the obligation to file a return, while Section 47(1) is not

linked to an obligation to file a return, but simply provides a penalty for failing to pay an assessment.

In the case of a quarterly remittance, the employer is not provided with a prescribed form on which to make a return, as it is with a payroll report. The employer does not make a return apart from remitting the amount of the "assessment" which he has calculated by filling in that amount on the remittance stub. Unlike a payroll report which is sent in with the final payment of the year, the employer does not provide any information to the Board in the sense that the word "return" is defined in *The Concise Oxford Dictionary*; namely, as: "5 a formal report or statement compiled or submitted by order (*an income-tax return*)."

Where the employer has only been late in paying a quarterly installment, notwithstanding the words of Policy #40:50:10, the Board has erred in law in assessing this penalty pursuant to Section 40(1). It should be assessed under Section 47(1).

According to regulation, the penalty should be 5% of the amount unpaid at the date of default, plus 1% for each additional month of default. Policy #40:50:30, which purports to set out the policy for applying this penalty, is also inconsistent with the regulation.

In this case, an installment of \$293.76 was due on April 25, 1994, but was not received until June 13, 1994. Section 29 of the *Interpretation Act* defines "month" as "a period calculated from a day in one month to a day numerically corresponding to that day in the following month, less one day." There is no provision in the penalty for a partial month. There is only one complete month of default therefore, from April 25 until May 24, since the installment was paid before June 24, 1994. The sum due as a penalty is therefore 5% of \$293.76, or \$14.69 at the date of default, plus 1% or \$2.94 for the month until May 24, 1994, for a total of \$17.63. Considering all the circumstances of this case, I do not find it appropriate to relieve the employer from this sum pursuant to Section 47(3).

The penalty is therefore reduced to \$17.63.

TO THAT EXTENT, THE EMPLOYER'S APPEAL IS ALLOWED.

Editor's Note: This decision has been edited for publication.

Decision of the Appeal Division

Number: 95-0668
Date: June 7, 1995
Panel: Herb Morton, James L. Tonn, Verna Ledger
Subject: Rehabilitation Costs and E.R.A.

The employer appeals the February 24, 1995 decision by the Assessment Department director.

The employer's Notice of Appeal alleges a contravention of a published policy of the governors. The April 6, 1995 submission by the employers' adviser alleges an error of law.

The issue is whether rehabilitation expenditures are properly included in the calculation of the employer's experience rating for 1994.

The rehabilitation costs which were included in the employer's experience rating arose on claim HC91—. As set out in a letter dated September 6, 1994 from the rehabilitation consultant, rehabilitation costs on this claim totaled \$75,201.01 including a lump sum payment of \$34,360.89 to assist the worker in completing a two year diploma in Business Administration. The majority of these costs were incurred subsequent to June 30, 1993, the cut-off date for inclusion in the employer's 1994 experience rating. Rehabilitation costs in the amount of \$7,136.36 were included in the calculation of the employer's 1994 experience rating. These benefits, as described in a letter from the vocational rehabilitation consultant dated January 13, 1993, were provided to assist the worker in attending a five month Financial Assistant course. This assistance included approximately \$3,380.00 for tuition, and a "top-up" to the worker of the unemployment insurance benefits he was receiving while taking this course.

The employers' adviser argues that rehabilitation expenditures are not "compensation" within the meaning of part 1 of the *Workers Compensation Act* (the *Act*), and that such expenditures cannot be included in the meaning of the phrase "cost of compensation" in Section 42 of the *Act*. She submits, therefore, that governors' policy is unlawful in including such costs for experience rating purposes.

The employer's appeal raises a complex issue of statutory interpretation. In view of the range of relevant points, the Panel has examined these different factors first separately, and then together, in considering the appeal.

(a) Governors' policy — E.R.A.

Policy #30:50:52 of the *Assessment Policy Manual* provides for the exclusion of certain types of claim costs for experience rating purposes. Number 8 in the list of excluded costs is:

Injuries during a retraining program sponsored by the Vocational Rehabilitation Department.

Rehabilitation costs in general, however, are not part of the list of excluded costs for E.R.A. purposes. While governors' policy does not explicitly state that rehabilitation costs are included for E.R.A. purposes, this is the logical inference to be drawn from Policy #30:50:52 of the *Assessment Policy Manual*, and #115.30 of the *Rehabilitation Services & Claims Manual* (the *Manual*). This interpretation is supported by the Policy #30:50:52 of the *Assessment Policy Manual* concerning E.R.A. — *Cost Inclusion/Exclusions*, which states:

As a general rule, any acceptable claim coded to a particular employer is counted for experience rating purposes and *the costs of record* within the review period are used in determining the cost of payroll ratio for the firm and the subclass. (emphasis added)

This policy further provides that the Board:

. . . will not consider an argument as to employer culpability in determining the inclusions/exclusions of claims and their costs for experience rating purposes. . . .

A January 1986 amendment to Policy #30:50:10 of the *Assessment Policy Manual* stated, with reference to the experience rating plan used by the Board prior to 1986:

. . . Costs associated with the rehabilitation of injured workers were also not considered when calculating experience rates in the Logging, Forest Products and Metal Mining plans. . . .

There was, therefore, a change in policy in 1986 to include the costs associated with rehabilitation in the calculation of experience rates.

Current governors' policy concerning experience rating is framed in terms of the costs of claims, rather than in terms of the "compensation" payable. Thus, the decision of the Assessment Department director to include rehabilitation expenditures in the calculation of the employer's experience rating was in accordance with current governors' policy. The issue in this appeal, therefore, is whether this policy contravenes the *Act*.

(b) Section 42 — experience rating

The Board's authority to establish a system of experience rating is found in Section 42 of the *Act*. This provides:

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

Section 42 authorizes the Board to adopt a system of experience rating with reference to "the relative hazard or cost of compensation. . ." The system adopted by the governors is based on the claim costs, rather than being based on the alternative ground as to the relative hazard. It is, therefore, necessary to consider whether governors' policy, which includes all "claim costs" for E.R.A. purposes accords with the authorization provided by Section 42 to base an experience rating system on the "cost of compensation."

(c) History of Section 42

The phrase "relative hazard or cost of compensation" did not appear in the *Act* until 1968. In 1916, the *Workmen's Compensation Act* provided:

s. 32 The Board shall establish such sub-classifications, differentials, and proportions in the rates as between the different kinds of employment in the same class as may be deemed just; and where in the opinion of the Board any particular industry is shown to be so circumstanced or conducted that the hazard differs from the average of the class or sub-class to which the industry is assigned, the Board shall confer or impose upon such industry a special rate, differential,

or assessment to correspond with the relative hazard of that industry; and for such purpose may adopt a system of schedule rating in such a manner as to take account of the peculiar hazard of the individual plant or undertaking of each employer. (emphasis added)

In 1932, the latter part of this section was amended as follows:

. . . to correspond with the relative accident cost or hazard of that industry or plant; and for that purpose may adopt a system of experience rating or schedule rating, or a combination of those systems, in such a manner as to take account of the peculiar accident cost or hazard of the individual plant or undertaking of each employer.

In 1968, the *Act* was amended to adopt similar wording to that contained in the present Section 42, including the phrase “to correspond with the relative hazard or *cost of compensation*” . . . (emphasis added). Thus, for the period 1932 to 1968 the Board was authorized to have an experience rating system that would take into account “the peculiar accident cost,” but since 1968 the *Act* has referred instead to the “cost of compensation.” The word “compensation” appears more limited in scope, in terms of its meaning under Part 1 of the *Act*, than the term “accident cost.” The term “accident cost” could clearly encompass all costs relating to an accident, whether or not such costs come within the meaning of the term “compensation.” In view of the present wording of Section 42, which utilizes the term “cost of compensation,” it is necessary to consider whether rehabilitation measures or expenditures are a “cost of compensation.” The Panel sees no basis for distinguishing a “cost of” compensation from the compensation itself. It is therefore necessary to consider whether rehabilitation measures or expenditures are a form of “compensation” within the meaning of Part 1 of the *Act*

(d) Section 16 — rehabilitation

Section 16 of the *Act* provides:

Vocational rehabilitation

- (1) To aid in getting injured workers back to work or to assist in lessening or removing a resulting handicap, *the board may take the measures and make the expenditures from the accident fund that it considers necessary or expedient, regardless of the date on which the worker first became entitled to compensation.*
- (2) Where *compensation* is payable under this Part as the result of the death of a worker, *the board may make provisions and expenditures*

for the training or retraining of a surviving dependent spouse, regardless of the date of death.

- (3) The board may, where it considers it advisable, provide counselling and placement services to dependants. (emphasis added)

The wording of Section 16 is unclear as to whether rehabilitation expenditures are in addition to the compensation paid on a claim, or whether they are a form of compensation. On one interpretation, rehabilitation measures or expenditures are steps the Board may take where a claim for compensation has been accepted. In other words, the requirement that compensation be payable is simply a prerequisite or pre-condition to consideration being given to the provision of rehabilitation. Alternatively, Section 16 could be read as meaning that when compensation is payable, one such form of compensation is the provision of rehabilitation. In view of this lack of clarity in Section 16, interpretative assistance must be sought from the legislative history and the provisions of the *Act* as a whole.

(e) History — rehabilitation

The original *Workmen's Compensation Act* of 1916 contained no provision for payment of rehabilitation. In a 1942 *Commission of Inquiry into the Workers' Compensation Board*, Mr. Justice Gordon McG. Sloan found (at page 125):

The principle of rehabilitating injured workmen has the full support of the industrial and labour groups represented before me. Mr. Winn [chairman of the W.C.B.] in his evidence testified concerning rehabilitation, in part, as follows:

- Q. Now there is nothing in the *Act* to provide for the expense of rehabilitation, is there?
- A. No, our *Act* to-day I think is the only *Act* in Canada that has not an amount set aside for rehabilitation, and I think in that regard, being able to start a workman in another industry and pay him for a supplementary loss of earnings until he can get trained in that industry — I think that is advisable.

The Board is, at the present time, carrying on a limited programme of rehabilitation by commuting life pensions and utilizing the lump sum thus obtained to assist handicapped men in getting re-established in some suitable occupation. Of this effort, Mr. Winn said:

. . . We know a printer who had his arm torn off. He had gone into a business and is doing better than as a printer. We provide the money out of his pension to pay for that, and that should not be. I hope that there will be a rehabilitation fund set up, and I have been hoping for it for years.

He continued:

Q. Could you give the Commissioner any idea as to the cost of the scheme that you would consider a reasonable start for rehabilitation?

A. It should be specified not to exceed a certain amount. Some years you might use considerable money and other years not so much.

Q. What would you suggest as the minimum amount to make a worth-while start?

A. Spread over the whole group I should say \$75,000 to \$100,000 annually.

Q. It would not be worth while unless the Board had as much as \$75,000?

A. Yes.

Mr. Justice Sloan concluded by stressing the “necessity of a rehabilitation scheme being set up in this Province.”

In 1943, the *Act* was amended, following closely upon the recommendation in the 1942 *Sloan Report*:

Measures to assist injured men to return to work

s. 15B. To aid in getting injured workmen back to work and to assist in lessening or removing any handicap resulting from their injuries, the Board may take such measures and make such expenditures from the Accident Fund as it may deem necessary or expedient; provided that the total expenditure under the provisions of this section shall not exceed seventy-five thousand dollars in any calendar year.

In a 1952 *Commission of Inquiry into the Workers' Compensation Board*, Mr. Justice Sloan reviewed (at pages 331 to 340) the functioning of the Board's vocational rehabilitation

program subsequent to the amendment of the *Act* in 1943. A chart on page 335 showed the annual expenditures of the department from 1943 to 1951. This showed expenditures for training, administration costs, and rehabilitation department salaries, totaling less than \$75,000 per year. It is evident from this background that rehabilitation expenditures were treated in a similar fashion to administrative expenses, as paid out of the general accident fund with the costs spread over all classes of employers.

In his 1952 report, Mr. Justice Sloan recommended that the \$75,000 ceiling be removed and that the expenditure anticipated by Section 17 be left to the discretion of the Board. This recommendation was implemented by the legislature later that same year.

As is evident from this historical overview, rehabilitation costs were from the outset treated as being different from “compensation.” This was confirmed as recently as Decision No. 60, 1974, *Re: Appeals to Board of Review (Workers’ Compensation Reporter, Vol. 1, p. 247)* which stated at page 255:

. . . there is a significant difference between rehabilitation and claims decisions. *Claims costs are shown on the monthly statement of an employer and charged to the class fund, whereas rehabilitation costs are charged to a general fund and prorated over all classes.* (emphasis added)

This history gives support to the employer’s contention that rehabilitation measures and expenditures are not “compensation.”

(f) Division heading

Part 1 of the *Act* contains six divisions:

Division	Heading	Sections
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2	Compensation	5 - 16
3	Scale of Compensation	17 - 35
4	Accident Fund and Assessments	36 - 52
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Section 16 concerns vocational rehabilitation and is contained within division 2, which has the general heading *Compensation*. These divisions were contained in the *Workmen’s Compensation Act* in 1916, and the section concerning the provision of rehabilitation has been contained in division 2 since this provision was first added to the *Act* in 1943. The initial provision for making rehabilitation expenditures was included under this heading, in a context in which such expenditures were not seen as a form of compensation.

Furthermore, the heading “compensation” is equally consistent with the two alternative interpretations of Section 16 as described above. Consequently, the heading provides little guidance to the interpretation of Section 16.

(g) Definition — Section 1

Section 1 of the *Act* defines “compensation” as including medical aid. This definition does not refer to rehabilitation expenditures. This supports the employer’s contention that rehabilitation services are not “compensation” within the meaning of part 1 of the *Act*. As this definition is inclusive, however, it does not by specific wording or logical implication necessarily exclude rehabilitation measures or expenditures from the definition of “compensation.”

(h) Compensation to be paid periodically

Section 35(1) of the *Act* provides that “payments of compensation *shall be made periodically* at the times and in the manner and form the board considers advisable” (emphasis added). Under Section 16, the Board “may take the measures and make the expenditures” necessary or expedient for the purposes of providing vocational rehabilitation. The nature of many types of rehabilitation expenditures (such as payment of tuition, purchase of equipment, or provision of a grant to assist in establishing a business) is that they would be made in a lump sum rather than periodically. Some rehabilitation expenses, such as job search allowances, or continuity of income benefits under Policy #89.11 of the *Rehabilitation Services & Claims Manual* (the *Manual*), are paid periodically. In general, however, the nature of rehabilitation services is such that they are not easily reconcilable with the statutory requirement that compensation be paid periodically. This supports the employer’s contention that rehabilitation services are not “compensation.”

The rehabilitation costs included in the employer’s 1994 experience rating included a lump sum payment for the worker’s tuition of approximately \$3,380.00.

(i) Section 39 — accident fund

Section 39 of the *Act*, which empowers the Board to levy assessments to maintain an adequate accident fund, requires the Board to collect sufficient funds to:

- (a) meet all amounts payable from the accident fund during the year;
- (c) provide in each year capitalized reserves sufficient to meet the *periodical payments of compensation* accruing in future years in respect of all injuries which occur during the year.
(emphasis added)

Whether a category of costs is properly included within the definition of “periodical payments of compensation,” therefore, would appear determinative as to whether the Board is authorized or required to establish reserves under Section 39(1)(c) for future funding of those costs in respect of injuries which occur during the year. The categorization of “rehabilitation expenditures” has significant consequences for the workers’ compensation system as to whether such costs are to be levied on employers on a “pay-as-you-go” annual basis under Section 39(1)(a) or whether sufficient assessments must be levied under Section 39(1)(c) to establish reserves adequate to meet such costs as they arise in the future on claims occurring during the present year. From a “systems” perspective, it is obviously desirable to ensure that adequate funding is in place to provide for the rehabilitation expenditures accruing in future years in respect of all injuries which occur during the year. This is in keeping with the general approach established by the *Act* of requiring that sufficient assessments be levied and collected on an annual basis to fully fund the cost of injuries occurring during the year. This lends support to a purposive interpretation of the *Act*, to resolve the ambiguity in Section 16 in favour of finding rehabilitation services to be a form of compensation.

(j) Protection from attachment — Section 15

Section 15 protects from assignment or attachment “a sum payable as compensation or by way of commutation of a periodic payment in respect of it.” It would be anomalous if rehabilitation expenditure were distinguished from compensation, with the result that compensation payments could not be attached but rehabilitation expenditures could be garnisheed by a worker’s creditors. This lends support to a purposive interpretation of the *Act*, to resolve the ambiguity in Section 16 in favour of finding rehabilitation services to be a form of compensation.

(k) Compensation — other provisions

Wage loss, pension and medical aid benefits are all clearly defined as compensation which shall be paid periodically (Sections 1, 21, 22, 23, 29, 30, and 35). The wording of Section 21 is of particular note. It provides, with reference to the provision of “medical aid,” that:

s. 21(1) In addition to the other compensation provided by this Part, the board may furnish or provide. . .

As noted above, Section 1 defines compensation as including medical aid. The use of the word “other” in the phrase “in addition to the *other* compensation,” shows a clear statutory intent that medical aid constitute a form of compensation. The absence of similarly clear statutory language to make it clear that rehabilitation services are a form of compensation also supports the employer’s contention that rehabilitation services are not a form of compensation.

(l) Current policy and practice

Decision No. 60 was amended in 1983 as set out in Decision No. 369, *Re: Appeals to the Boards of Review (Workers’ Compensation Reporter, Vol. 5, p. 169)*. Decision No. 369 forms the basis for the current policy of the governors set out at #102.26 of the *Rehabilitation Services & Claims Manual*, which provides:

Rehabilitation is a discretionary matter for the Board. There is no legal right to rehabilitation. However, appeals are permitted on other discretionary matters. Therefore, subject to the principles set out in #102.24 regarding appeals on discretionary matters, the review board has jurisdiction to consider appeals on rehabilitation matters. . . .

The *1992 Annual Report* of the Board states (Part 1, page 19), that claims costs in 1992 totaled \$952.3 million of which \$32.5 million was for rehabilitation. The report notes on page 20:

Rehabilitation costs have risen due to the increasing intervention required in assisting injured workers in this economy. . . . A significant portion of these funds relates to investment in injured workers for training programs to better allow for their reintegration into the workforce, thereby saving long-term disability costs. . . .

As indicated by this quotation, there is a linkage between rehabilitation expenditures and other compensation. Increased spending on rehabilitation can reasonably be expected to result in decreased pension costs.

The *1992 Annual Report* further states on pages 50-51 under the heading *Benefits Liabilities*:

The Board determines its liabilities at the end of each year for all injuries that have taken place to that time.

The Board appoints a consulting actuary who examines the benefits liabilities and the underlying assumptions and methods. The report of the consulting actuary is appended to these financial statements.

The benefits liabilities represent the actuarial present value of all future benefits payments expected to be made for claims which occurred in the current fiscal year or in any prior year. The benefits liabilities include provision for all benefits provided by current legislation, policies and/or administrative practices in respect of existing claims. The benefits liabilities have been discounted to present value, using a real interest rate of 2-3/8%.

As in prior years, *no provision has been made for future claims related to latent occupational disease, because it cannot be reasonably estimated, or for future expenses of administration and rehabilitation of existing claims.* (emphasis added)

Commencing in 1993, the governors made provision for future rehabilitation costs. *The Governors' Financial Standing Committee 1993 Annual Report (Workers' Compensation Reporter, Vol. 10, p. 397)* states, at page 400:

. . . the G.F.S.C. approved the recommendations of the Executive Committee, the consulting actuary, and outside experts to change the discount rate from 2 3/8 to 3 percent, to capitalize rehabilitation costs and to revise the mortality tables currently used for actuarial purposes. *The Board of Governors approved the changes to the discount rate and capitalization of rehabilitation costs.* (emphasis added)

The *1993 Annual Report* of the Board states (part 1, page 42):

A provision has been established for future rehabilitation expenditures of existing claims effective December 31, 1993. The effect of this

change has been to increase the benefits liabilities and claims costs expense by \$133 million in 1993.

It is not apparent from these passages as to whether the decision to capitalize rehabilitation costs was based upon Section 39(1)(c) of the *Act*, which gives the Board authority to levy assessments to establish “capitalized reserves sufficient to meet the periodical payments of compensation accruing in future years in respect of all injuries which occur during the year.” That issue is not before this Panel, in any event.

It is currently the case that rehabilitation costs are shown on the monthly statement of an employer and charged to the class fund in the same manner as pension and wage loss costs.

(m) Other statutory language

The *Ontario Workers Compensation Act* contains the following provision:

Rehabilitation

52. **Aid to injured workers.** To aid in getting injured workers back to work and to assist in lessening or removing any handicap resulting from their injuries, the Board may take such measures and make such expenditures as it may deem necessary or expedient, and the expense thereof shall be borne, in Schedule 1 cases, out of the accident fund and, in Schedule 2 cases, by the employer individually, *and may be collected in the same manner as compensation or expenses of administration.* (emphasis added)

The Ontario *Act* grants a discretion to the Board to collect rehabilitation expenditures *in the same manner as compensation* or as expenses of administration. The implication is that while rehabilitation expenditures under that *Act* are not compensation, the Ontario Board may treat them “in the same manner” for assessment purposes.

(n) Findings and reasons

The Panel has considered, first of all, whether the wording of Section 42 provides sufficient statutory basis for the Board to establish an experience rating plan which could take into account all costs of record on a claim, irrespective of their nature. If that is the case, it is unnecessary for the Panel to determine whether rehabilitation expenditures constitute “compensation.”

Section 42 authorizes the Board to adopt a system of experience rating “to correspond with the relative hazard or cost of compensation of that industry or plant.” As the current experience rating system is based on an employer’s claim costs, it is not based on “relative hazard.” The current experience rating system is intended to correspond with the cost of “compensation,” rather than “accident cost” as was the case prior to 1968. The Panel finds, therefore, that the definition of the term “compensation” is determinative as to which costs may be included in the calculation of an employer’s experience rating. The Panel further finds that under an experience rating system based on the “cost of compensation,” it is unlawful (contrary to Section 42) to include costs other than compensation. Including other costs would contravene the plain meaning of the wording in Section 42. The Panel accepts the employer’s argument on this issue. It is, therefore, necessary to consider whether rehabilitation expenditures are “compensation” within the meaning of part 1 of the *Act*.

The Board has not taken a consistent approach to categorizing rehabilitation expenditures. Under both Decision No. 60, and in the calculation of the Board’s reserves for 1992, rehabilitation costs appear to have been treated in the same manner as administrative expenses as being expenses to be levied on all classes of employers and paid out of the accident fund on an annual basis. Currently, however, governors’ policy and administrative practice appear to categorize rehabilitation expenditures as “compensation.” Rehabilitation costs are currently shown on the monthly statement of an employer and charged to the class fund in the same manner as pension and wage loss costs. While not explicitly stated in governors’ policy, the inclusion of rehabilitation expenditures in the experience rating system under governors’ policy necessarily means that such costs are treated as compensation under Section 42.

The Panel recognizes that there may be good reasons for the Board wishing to view rehabilitation expenditures as being in the nature of compensation. Foremost among these is the fact that, as stated in the Board’s *1992 Annual Report*, the provision of rehabilitation is an investment in injured workers which assists in their reintegration into the workforce, thereby saving long-term disability costs. There is some logic, therefore, in treating the costs of rehabilitation and disability pensions in the same fashion under the *Act*. On a purposive interpretation of the *Act*, there is merit to seeking to include rehabilitation costs within the meaning of the term “compensation.”

There has been an evolution in the Board’s approach to the provision of rehabilitation, which was originally conceived as being a purely discretionary matter on the part of the Board which did not give rise to appeal rights. For the reasons expressed in Decision No. 369, while there is no legal right to rehabilitation, workers and employers do have a legal right to ensure that the discretion to grant, terminate or refuse a specific rehabilitation service is exercised in a reasonable fashion in accordance with governors’ policy. Such decisions have financial consequences, and give rise to appeal rights. In

this limited sense, therefore, the provision of appropriate rehabilitation has come to be seen as a matter affecting rights. Rehabilitation has increasingly come to be seen as part of the compensation provided by the Board. This is reflected as well by the range of benefits which may be provided as rehabilitation, such as continuity of income.

While there has been an evolution in the Board's approach to rehabilitation, there have not been any corresponding amendments to the *Act*. The Panel finds from the history of Section 16 that the provision of vocational rehabilitation was originally conceived as being a separate matter from the periodic payment of compensation. The Panel further finds that the measures and expenditures contemplated by Section 16 cannot be reconciled with the requirement of Section 35 that compensation be paid periodically. The requirement that compensation be paid periodically is one of the distinguishing characteristics of compensation within the meaning of part 1 of the *Act*. Inasmuch as rehabilitation payments such as the lump sum payment for the worker's tuition in this case are not made periodically, they do not share this distinguishing characteristic. The Panel finds that the absence of this distinguishing characteristic provides significant assistance in interpreting Section 16 as to whether rehabilitation measures and expenditures constitute compensation. Having regard to the history of Section 16, the requirement that compensation be paid periodically, the definition of compensation in Section 1, and the difference in wording between the provisions governing "medical aid" as opposed to vocational rehabilitation, the Panel does not consider that vocational rehabilitation services are "compensation" within the meaning of part 1 of the *Act*. The Panel finds that it would unduly strain the existing wording of the *Act* to attempt to interpret rehabilitation measures and expenditures as a form of "compensation." While the Panel has considered whether a contrary conclusion is possible based upon a purposive approach to interpreting the *Act*, the Panel has concluded that such an approach would be inconsistent (i.e. not viable) with the existing wording of the *Act*. The Panel finds that, considered as a whole, the *Act* is clear in its use of the term "compensation" as a defined term which does not include rehabilitation measures and expenditures.

The Panel has found, therefore, that to include rehabilitation measures and expenditures within the definition of "compensation" under part 1 of the *Act* would require statutory amendment. The *Act* cannot be amended by policy or practice.

The Panel finds that rehabilitation expenditures do not constitute compensation. As the experience rating system of the governors has its statutory basis in the phrase "the cost of compensation," it is contrary to Section 42 of the *Act* to utilize other claim costs, which are not compensation, in calculating the employer's experience rating. In its inclusion of rehabilitation expenditures, which are not compensation, in the calculation of the employer's experience rating, governors' policy is inconsistent with Section 42 of the *Act*

In conclusion, while the decision of the Assessment Department director to include rehabilitation expenditures in the calculation of the employer's experience rating was in accordance with governors' policy, the policy contravened the *Act*. The Panel finds, therefore, that the decision was based on an error of law. The Panel finds that these costs must be removed from the calculation of the employer's experience rating.

THE EMPLOYER'S APPEAL IS ALLOWED.

Editor's Note: This decision has been edited for publication.

Decision of the Appeal Division

Number: 95-0708
Date: June 21, 1995
Panel: Herb Morton
Subject: Section 39(1)(e)
Referral to Administrators

The employer appeals the November 15, 1994 decision by the client services manager, to deny their request for relief of costs under Section 39(1)(e) of the *Workers Compensation Act* (the *Act*). The appeal is brought on the grounds of error of law, error of fact, and contravention of a published policy of the governors.

The employer's request concerns the January 24, 1989 injury of the worker. He suffered a prior compensable injury on November 26, 1986, while working for the employer. The employer's representative submits that the worker's overall disability accepted under the 1989 claim was enhanced by a pre-existing condition stemming from his 1986 claim, and requests relief of costs on this basis.

(a) Decision under appeal

By decision dated January 21, 1993, the claims adjudicator advised the employer as follows:

Claim Number SC86—

. . . The medical advisor who reviewed this file advises the worker had no pre-existing disease, condition or disability prior to the 1986 claim and for that reason, Section 39(1)(e) would not be applied to the 1986 claim. . . .

Claim Number SC89—

. . . The medical advisor who reviewed this file indicates in view of the 1986 claim, the worker had some disease which pre-existed the 1989 claim but that the pre-existing disease would be classified as

mild. The 1989 work activity, lifting heavy plates, would be classified as moderate activity. Comparing the mild pre-existing disease to this moderate injury which resulted in 75% of the disc herniation, I do not feel that relief of costs can be applied under Section 39(1)(e) of the *Workers Compensation Act*. . .

The employer requested a managerial review of this decision. In the November 15, 1994 decision now under appeal, the manager denied relief of costs stating:

. . . the Board medical advisor has reviewed the 1986 file and has offered the opinion that the worker had no pre-existing condition or disability prior to this injury which delayed his recovery from that injury. The key here is that although the worker may have had minor pre-existing disc degeneration, the medical opinion forwarded is that this pre-existing condition or disability was not sufficient enough to delay the recovery from the injury suffered under this claim. . . .

(b) Evidence and argument

The worker had worked for this employer since 1975. His November 26, 1986 injury occurred when he was going up stairs and, upon reaching a door, reached to open it. The door knob came off, causing the worker to fall backwards down the stairs, striking his back against a railing. He was seen by an orthopaedic surgeon on January 27, 1987, who diagnosed a back sprain. The worker returned to work on February 23, 1987. On April 24, 1987, the worker stopped working due to an onset of severe back pain. X-rays on April 27, 1987 were reported as normal. In a reassessment on May 20, 1987, the orthopaedic surgeon noted that the worker was suffering from acute backache with limitation of straight leg raising on both sides and painful lumbar movements and localized tenderness. A reopening of the worker's 1986 claim was initially denied. The worker appealed to the Review Board, which in a finding dated June 21, 1988 concluded that the worker:

. . . on April 24, 1987, experienced work-caused exacerbation of the pre-existing back condition related to the 1986 injury. . . .

Wage loss benefits were initially paid from November 27, 1986 to February 22, 1987. The claim was reopened for wage loss benefits from April 25, 1987 to August 9, 1987.

On January 24, 1989, the worker was stacking 50 pound metal plates at work, when he suffered back pain. His attending physician diagnosed mechanical lower back pain. The worker received treatment at the Board's rehabilitation centre, with an admission diagnosis of a low back strain, and was discharged as fit to return to work on July 24, 1989.

A C.T. scan was performed on August 22, 1989, which was reported as showing mild non-specific circumferential bulging of the L5-S1 disc with no focal herniation or nerve root entrapment recognized. A lumbar myelogram, and further C.T. scan on January 31, 1990 did not show any abnormalities.

On October 30, 1990, the worker was reassessed by Doctor A, orthopaedic surgeon, for recurring low back pain. A myelogram and C.T. scan on November 23, 1990 showed a large central herniation at L5-S1. This was not initially accepted under this claim. However, by finding dated October 16, 1992, the Review Board concluded as follows:

. . . We find that [the worker's] L5-S1 disc protrusion was causally related to his 1986 and 1989 compensable injuries. In this regard we would accept Doctor B's medical opinion that the work injuries resulted in damage to the disc covering which, over a period of time, allowed the contents of the disc material to herniate out and start pinching his nerves. . . .

Wage loss benefits were paid under the 1989 claim from January 28, 1989 until July 23, 1989, and from July 28, 1989 until January 22, 1990, at which time it was found that the worker's condition had plateaued.

In Memo #36 dated December 17, 1992, Doctor C, medical advisor, stated:

. . . He appears to have had some pre-existing disease following his injury of 1986 and I would classify that as mild. The work activity in 1989, that is lifting the heavy plates, could be classified as moderate activity. If not for the previous injury in 1986, the back pain in 1989 might have settled down more quickly. It is difficult to put a figure on this but usually a herniated disc will settle down within 3-6 months.

It is likely that the claimant is now left with a permanent functional impairment and I would attribute about 75% of that to the 1989 injury which appears to have played the major role in causing the herniation. . . .

By letter dated October 11, 1994, the employer's representative requested that cost relief on the 1989 claim be applied in the three to six month range established by Doctor C.

There has not yet been consideration of a pension award under these claims. Any issue of cost relief in respect of a possible pension award is therefore not before this Panel.

By decision dated January 21, 1993, the claims adjudicator advised the employer that the 1986 claim had been accepted "for an acute lumbar contusion and 25% of a lumbar

disc herniation,” and that the 1989 claim was accepted “for 75% of the disc herniation in addition to the initial musculo-ligamentous injury.” The apportionment of responsibility between the 1986 and the 1989 claims is not in issue before this Panel. The issue for consideration involves the employer’s request of relief of costs on the 1989 claim for “that portion of the disability enhanced by reason of a pre-existing disease, condition or disability.”

The employer’s representative points out that the 1986 claim involved a specific accident, in which the worker fell down stairs and hit his back. The 1989 claim involved an onset of back pain while lifting heavy plates.

The employer’s representative objects to the reasoning expressed in the November 15, 1994 managerial review decision, stating:

. . . the [medical advisor] is only reviewing the 1986 claim and all it does is establish that there is nothing pre-existing the 1986 claim. This, of course, has never been an issue of concern. What we have been attempting to bring to the Manager’s and Adjudicator’s attention is the enhancing impact of the disability stemming from the 1986 claim. . . .

The employer submits that if not for the 1986 work injury, the 1989 work injury would have settled more quickly.

(c) Law and policy

Section 39(1)(e) authorizes the Board to collect assessments each year to:

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 employer’s appeal raises a significant issue with respect to the interpretation of governors’ policy. In a decision dated January 16, 1995 (Decision No. 95-0048 [*Workers’ Compensation Reporter*, Vol. 11, p. 303]), a Panel of the Appeal Division addressed the issue as to whether Section 39(1)(e) relief is available where a pre-existing condition results from work-related accidents with the same employer. The Panel found:

. . . 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, Sec-

tion 39(1)(e) is not applicable in the circumstances. Governors' policy is set out in Policy #114.40 in the *Rehabilitation Services and Claims Manual* and in the Decision No. 271, 1978 (*Workers' Compensation Reporter*, Vol. 4, p. 11) 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. . . .

The employer in that case requested reconsideration of Decision No. 95-0048. In a decision dated March 10, 1995, Decision No. 95-0257 (*Workers' Compensation Reporter*, Vol. 11, p. 307), the chief appeal commissioner found there is ambiguity in governors' policy on this point. She reviewed several decisions of the *Ontario Workers' Compensation Appeals Tribunal*, with respect to the reasons provided both for and against the granting of such relief to the original accident employer on subsequent claims. The chief appeal commissioner concluded that the issue raised in Decision No. 95-0048 was not one upon which either the *Act* or governors' policy provided clear unambiguous direction. She found that the Appeal Division decision did not involve an error of law going to jurisdiction. The chief appeal commissioner stated, however, that a copy of her decision would be forwarded to the governors, and that it would be open to the 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. There has, to date, been no amendment to governors' policy on this point.

The essential finding of Decision No. 95-0257, in which the chief appeal commissioner denied the application for reconsideration of Appeal Division Decision No. 95-0048, was that Decision No. 95-0048 did not involve an “error of law going to jurisdiction.” In considering the employer’s appeal in this case, however, I must apply a “correctness” test to the manager’s decision. I must consider, on a “correctness” standard, whether the manager’s decision correctly interpreted governors’ policy.

Governors’ policy with respect to Section 39(1)(e) states, in Decision No. 271 (*Workers’ Compensation Reporter*, Vol. 4, p. 10), at page 11:

. . . 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. . . .

It may be questioned whether an original accident employer might come within the meaning of the term “potential employers,” in view of the issues surrounding the re-employment of injured workers. The comments of the vocational rehabilitation consultant in Memo #52 dated September 20, 1994 are illustrative of this point. The worker’s job was eliminated due to the employer’s plant closure. However, a number of his co-workers have since been rehired at the employer’s new Annacis Island Division. The rehabilitation consultant noted that the possibility of the worker being hired at this new plant should be investigated.

Decision No. 271 also makes reference to:

. . . the need to attach some responsibility for industrial accidents to individual employers while maintaining an incentive for employers to hire disabled workers. We therefore conclude that some of the costs of the disability must be charged in all cases to the accident employer on the instant claim. The sole exception to this rule is a disability arising out of an injury suffered in the course of an on-the-job training programme. . . .

At the heart of this issue are the competing interests identified in Decision No. 271 of the *Reporter*, namely, that financial responsibility for industrial accidents attach to individual employers, but that an incentive be maintained for employers to hire disabled workers. I appreciate the strength of the arguments supporting the approach that an employer be financially accountable for an accident occurring to their worker, within the general principles of collective liability established by the *Act*. At the same time, however, the reintegration of injured workers into the productive workforce is one of the fundamental goals or values of the workers’ compensation system.

In Appeal Division Decision No. 95-0062 (*Workers' Compensation Reporter*, Vol. 11, p. 295), the chief appeal commissioner examined the history of Section 39(1)(e), with reference to the 1966 Royal Commission report of Mr. Justice Tysoe. She concluded:

. . . [subsection 39(1)(e)] 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. . . .*

. . . 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.

. . . *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. . . .* (emphasis added)

A limitation on the availability of relief of costs to new or subsequent employers would have to derive from governors' policy, as it is not contained in the wording of Section 39(1)(e) of the *Act*. For the reasons set out by the chief appeal commissioner in Decision No. 95-0062, it is open to the governors in their policies to devise certain limitations upon the application of Section 39(1)(e). I do not consider, however, that governors' policy is clear with respect to the general issue raised by this appeal.

Decision No. 75 of the governors, *Appeal Division Administration, Practice and Procedure* (*Workers' Compensation Reporter*, Vol. 10, p. 753) provides as follows (at page 756):

5.0 Application of Board Policy by the Appeal Division

The Appeal Division shall apply and interpret the *Act*, Regulations and existing Board published policy. The Appeal Division does not have the authority to create new policy. The Appeal Division must make its decisions according to the merits and justice of each case as directed in Section 99.

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

As noted by the chief appeal commissioner in Appeal Division Decision No. 95-0062, Section 39(1)(e) is silent on how the Board is to operate that reserve and apply it to individual cases. This may reasonably be taken to suggest an intent to leave the Board considerable discretion in that regard. Governors' policy is, however, ambiguous as to whether an accident employer is, in respect of a subsequent injury to their worker, eligible to seek relief of costs under Section 39(1)(e) of the *Act*. Since governors' policy must be relied upon in the application of Section 39(1)(e) to individual cases, it is important that the policies be clear. In the absence of clear policy on the issue raised by this appeal, I find it appropriate to request that the chief appeal commissioner consider seeking clarification from the governors of their policy concerning relief of costs under Section 39(1)(e), on the basis of the policy set out at Item #5.0 of Decision No. 75 of the governors.

I DEFER A DECISION CONCERNING THE EMPLOYER'S APPEAL PENDING A REPLY TO THIS REQUEST.

Editor's Note: This decision has been edited for publication.

Decision of the Appeal Division

Number: 95-0709
Date: June 21, 1995
Panel: Connie Munro
Subject: Section 39(1)(e)
Referral to Administrators

Having reviewed the preliminary reasons of appeal commissioner Herb Morton in Appeal Decision No. 95-0708 (*Workers' Compensation Reporter*, Vol. 12, p. 237), I consider it necessary the governors address the policy issue raised therein prior to a decision in the appeal.

Pursuant to the policy set out at Item #5.0 of Decision No. 75 of the governors, *Appeal Division Administration, Practice and Procedure* (*Workers' Compensation Reporter*, Vol. 10, p. 753) at page 756, I am bringing that policy issue before the governors for consideration.

Because of the complexity of the matter under appeal I designate, pursuant to Section 91(3)(c) of the *Workers Compensation Act*, a longer period for the making of the Appeal Division decision. I extend the time for making a decision in this appeal to 90 days from this date.

Editor's Note: This decision has been edited for publication.

Decision of the Appeal Division

Number: 96-0116
Date: January 26, 1996
Panel: Herb Morton
Subject: Section 39(1)(e)
Referral to Administrators

The employer appeals the November 15, 1994 decision by the client services manager, which denied their request for relief of costs under Section 39(1)(e) of the *Workers Compensation Act*.

By preliminary decision of June 21, 1995, Decision No. 95-0708, I found governors' policy ambiguous as to whether an accident employer is, in respect of a subsequent injury to their worker, eligible to seek relief of costs under Section 39(1)(e). I asked the chief appeal commissioner to consider seeking clarification from the governors of their policy, and deferred a decision on the merits of the employer's appeal. By decision of June 21, 1995, Decision No. 95-0709, the chief appeal commissioner brought this issue before the governors for consideration, pursuant to the policy set out at Item #5.0 of Decision No. 75 of the governors, *Appeal Division Administration, Practice and Procedure*, (*Workers' Compensation Reporter*, Vol. 10. p. 753), at page 756. This states:

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

Under Section 82 of the *Act*, the governors are empowered to approve and superintend the policies and direction of the Board. The powers, duties and functions of the governors are currently exercised by a panel of public administrators pursuant to Section 83.1 of the *Act* (as amended by *Bill 56, the Workers Compensation Amendment Act, 1995*, effective July 13, 1995).

The request for clarification of governors' policy concerning Section 39(1)(e) was addressed by the Panel of Administrators in two resolutions. On November 7, 1995, the Panel resolved that:

1. it confirms, as an interim policy decision, the current practice that Section 39(1)(e) relief of costs is not granted where the pre-existing disease, condition or disability has resulted from work with the same employer who is applying for the relief of costs; and
2. the question as to how long the interim policy is to remain in effect will be brought back on a future agenda for decision.

On December 7, 1995, the Panel further determined that:

WHEREAS:

1. the W.C.B. applies Section 39(1)(e) of the *Act* to relieve employers from some of the costs of a claim where the worker's disability is prolonged or made greater by reason of a pre-existing disease, condition or disability;
2. in order for the Appeal Division to make a decision on an appeal, the Chief Appeal Commissioner asked the Panel to clarify whether Section 39(1)(e) applies if the pre-existing disease, condition or disability has resulted from work with the same employer who is applying for relief of costs;
3. on November 7, 1995, after being advised by W.C.B. management that the current practice is not to grant relief of costs under Section 39(1)(e) in such circumstances, the Panel confirmed this practice as an interim policy, but deferred consideration of how long the interim policy should remain in effect;
4. the Panel has since been advised that practice with respect to the application of Section 39(1)(e) by the Compensation Services Division in these circumstances is inconsistent;
5. there are arguments both for and against this application of Section 39(1)(e), and the issues will be more properly addressed once consideration of the Strategic Plan and the results of the E.R.A. study has been completed;

6. the Panel has been advised that completion and consideration of the E.R.A. study will take approximately one year; and
7. the Panel considers it necessary for practice in this area to be consistent pending completed consideration of the Strategic Plan, the E.R.A. study and other related matters:

THE PANEL RESOLVES THAT:

1. it confirms the Panel's interim policy decision of November 7, 1995, not to grant Section 39(1)(e) relief of costs where the pre-existing disease, condition or disability has resulted from work with the same employer who is applying for the relief of costs, and
2. the interim policy will remain in effect until December 31, 1996.

The November 7 and December 7, 1995 resolutions were disclosed to the employer's representative, who provided a submission on January 15, 1996.

In this decision, I will generally refer to the decision by the administrators as "governors' policy" as that is its effect under Section 82 of the *Act*.

I have considered, as a preliminary issue, whether application of the December 7, 1995 resolution by the administrators to the employer's appeal would offend any common-law presumption against retroactivity or interference with vested rights.

Decision No. 36 of the governors, *Retroactivity of Policy Changes (Workers' Compensation Reporter, Vol. 9, p. 147)* states, at page 148:

There is a presumption in cases where a policy change occurs as a result of a reconsideration and rethinking of existing lawful policy that the change will not apply retroactively before the date on which the new policy was approved.

It is not clear from Decision No. 36 whether the current application of a new policy, to a matter originally adjudicated under a former policy, would violate the presumption that the change not apply retroactively, or whether the application of new policy is appropriate so long as the matter remains under active appeal.

The procedure set out in Item #5.0 of Decision No. 75, whereby the governors specified the authority of the chief appeal commissioner to bring a policy issue before the governors for consideration and to postpone the Appeal Division's decision in the appeal,

contemplated a situation in which an Appeal Division decision would be deferred pending the provision of policy direction from the governors. It would seem logically implicit to this procedure that, in the absence of language to the contrary in the policy, the new policy or policy clarification would normally be applicable to the appeal on which a decision had been deferred. This might, however, not be the case, if the new policy was adverse to the appellant, in view of general common-law principles concerning non-interference with vested rights. It might be argued that the December 7, 1995 resolution involved a new policy, which is detrimental to the appellant, and that the appellant is entitled to have their appeal considered on the basis of the policy previously in effect

I find, however, that this case does not involve a situation in which prior policy expressly granted "same-employers' the right to consideration under Section 39(1)(e), with that right being removed under a new policy as a result of a reconsideration and rethinking of the policy. In view of the ambiguity in the previous policy, and the interpretation of that policy expressed in the January 16, 1995 published Appeal Division Decision No. 95-0048, *Section 39(1)(e) — Prior Injuries with Current Employer*, (*Workers' Compensation Reporter*, Vol. 11, p. 303), I do not view this as a situation in which there was a reversal or change in a prior policy which had granted "same-employers" entitlement to consideration under Section 39(1)(e). Having regard to the inconsistencies in the application of the prior policy, it cannot be viewed as creating vested rights on the part of "same-employers" to consideration under Section 39(1)(e). As that was not the effect of the prior policy, I do not need to consider what the outcome might have been had there been a clear policy which previously provided for the granting of Section 39(1)(e) relief to "same-employers."

On consideration of the foregoing, I find it appropriate to apply the December 7, 1995 policy resolution of the administrators to the further consideration of the employer's appeal. I find that this is implicitly authorized by the procedure set out in Item #5.0 of Decision No. 75. It is, as well, not contrary to a prior policy of the governors as the prior policy was ambiguous. Appeal Division Decision No. 95-0048, which found that Section 39(1)(e) relief was not available in "same-employer" situations, was made under the policy which was previously in effect.

The employer's representative argues that prior to Appeal Division Decision No. 95-0048, several Appeal Division decisions had granted relief of costs on same-employer applications. He further argues that the administrators were not provided with full information concerning the extent to which practice in the compensation services division allowed for the granting of relief of costs on same-employer applications. The employer's representative submits, therefore, that the December 7, 1995 resolution of the administrators is "flawed by misleading information presented at the November 7 and December 7, 1995 meetings."

I do not find the arguments with respect to past practice or prior decisions to be significant. Appeal Division Decision No. 95-0048 (*Workers' Compensation Reporter*, Vol. 11, p. 303-307), upheld on reconsideration, was the first decision of the Appeal Division which expressly addressed the issue as to whether Section 39(1)(e) relief was available to an accident employer in respect of a subsequent injury to their worker. The ambiguity contained in governors' policy, which was identified in that decision, has now been the subject of consideration by the administrators. The administrators have provided interim clarification of the policy. In view of this clarification, I find that the past practice is of little or no relevance to the consideration of this appeal. Inherent to the policy-making authority of the governors is the discretion to change, amend or clarify their policies. The establishment, amendment or clarification of policy necessarily takes precedence over prior practice. Pursuant to Section 82 of the *Act*, governors' policy provides direction to the Board.

I do not consider the submissions with respect to the adequacy of the background information and policy arguments presented to the administrators in reaching their decision relevant to my consideration of the employer's appeal. Such submissions misconceive the role of the Appeal Division in applying governors' policy. The Appeal Division is bound to apply the policy of the governors, unless that policy is contrary to law or inapplicable to the particular circumstances of the individual case before the Appeal Division.

The employer's representative further argues that the present interim policy of the administrators "is inferior to the plain interpretation of Section 39(1)(e) and the intent of the Tysoe Commission which has been applied historically for some 20 years." He submits:

The wording of the *Act*, with respect to Section 39(1)(e), makes no reference to restrictions in same-employer circumstances; the intent of that subsection regarding which pre-existing conditions allow for application of relief is discussed in the 1966 Tysoe Commission report (pp. 200) where it is set out: ". . . it appears to me to be of no significance whatever whether the pre-existing impairment was or was not the result of a work-caused injury, let alone one which carried with it entitlement to compensation or medical aid, or both under the British Columbia *Act*." Surely, if Tysoe had envisioned 39(1)(e) application as excluding same-employer situations, he would have specified so in following text, as such intent appears to be in direct opposition to this statement. . . Additionally, same-employer denial seriously impairs the rehabilitation process, which is the primary objective of 39(1)(e).

The employer's representative further refers to the policy, now contained in Item #2.1 of Decision No. 86 of the governors, *Bylaw No. 4 — Published Policy of the Governors*, (*Workers' Compensation Reporter*, Vol. 10, p. 781), which states:

In the event of a conflict between the *Act* or Regulations and the published policies of the governors, the *Act* and Regulations are paramount.

While not expressly stated, I interpret the submission made on behalf of the employer as arguing that the current policy of the governors is contrary to the *Act*. A question for consideration, therefore, is whether the limitation applied to Section 39(1)(e) by governors' policy is one which is viable under the *Act*. As stated in governors' policy, in the event of conflict between the *Act* and a policy, the *Act* is paramount.

The discussion contained in the Royal Commission report of Mr. Justice Tysoe quoted by the employer's representative does not expressly address this issue. I note, as well, that while commission reports are helpful tools in the interpretation of statutes, they cannot be determinative. I do not view the passages cited by the employer's representative from this report as providing clear support for the view that Section 39(1)(e) must be interpreted in the fashion requested.

I find, for the reasons set out in my preliminary decision of June 21, 1995, Decision No. 95-0708, that Section 39(1)(e) is silent on how the Board is to operate Section 39(1)(e) and apply it to individual cases, and that this may reasonably be taken to suggest an intent to leave the Board considerable discretion in that regard. I adopt, on this point, the reasoning expressed at pages 296-297 of Appeal Division Decision No. 95-0062, *Section 39(1)(e) Policies*, (*Workers' Compensation Reporter*, Vol. 11, p. 295)

I would not have sought policy clarification, if on preliminary review I considered that the statutory provision admitted of only one interpretation. If the statute granted the employer an entitlement to consideration of relief of costs, a decision could have been made on the merits of the employer's request without the necessity of obtaining policy clarification. Upon further consideration of this issue, I find no basis for concluding that the current policy of the governors, as clarified by the administrators, is contrary to the *Act*. I find that the employer's appeal must be decided in light of the policy clarification which has been provided.

The employer's representative correctly points out that Section 99 of the *Act*, and governors' policy, require that consideration be given to the merits and justice of the case. In Decision No. 94-0736, *Section 39(1)(e) — Application to Fatal Claims*, (*Workers' Compensation Reporter*, Vol. 11, p. 49), the chief appeal commissioner commented at page 57:

. . . policies are merely guidelines that indicate relevant considerations and criteria; they are not binding on decision-makers. If policy guidelines were absolutely binding, decision-makers could be faulted for fettering their discretion. Such fettering would amount to an error of law and, therefore, be reviewable.

There is a dynamic tension, so to speak, in giving appropriate recognition to the policy-making authority of the governors mandated by Section 82 of the *Act*, and to the directive in Section 99 that decisions be given according to the merits and justice of the individual case.

Section 99 mandates the provision of just and equitable decisions. The development and application of general policies also serves to advance the provision of equitable decisions, inasmuch as general policies promote consistency and the deciding of like cases in like manner. I agree, in this regard, with the reasoning expressed by the B. C. Supreme Court in the case *Western Forest Products v. Workers' Compensation Board*, (1983) 8 Admin. L. R. 43, at page 48:

The petitioner cannot successfully argue that the board had established a pre-existing policy and that was enough to fetter their discretion. It is far more beneficial for a tribunal to develop policy guidelines for the sake of consistency rather than dealing on an ad hoc basis, providing the guidelines still allow flexibility and consideration of the merits.

In considering the application of a general policy to a particular case, it is necessary to consider whether the circumstances of the particular case are such that they are properly addressed under the terms of the policy. Alternatively, are there circumstances which either make the policy inapplicable to the particular case, or which require a departure from the policy?

Medical evidence has been provided which supports the conclusion that the worker's back injury in 1989 would have resolved more quickly if not for the previous injury in 1986. There would be good grounds for considering the employer's request for relief of costs, if different employers were involved in the 1986 and 1989 claims. The submissions in this case object to the policy of the governors which generally precludes such relief to "same employers." No arguments have been provided, however, as to why it would be inappropriate or inequitable to apply the policy in the individual circumstances of this particular case.

I find no basis for concluding that this case is one which falls outside the ambit of governors' policy as clarified by the December 7, 1995 resolution of the administrators. There are no particular circumstances in this case to support the conclusion that it is one

to which the policy does not apply, or that it would be inequitable to apply the policy to this case. The employer's appeal is, therefore, appropriately considered under the policy. It is not a fettering of discretion to give effect to the policy in such a case. To depart from the policy without sufficient and good justification would frustrate the intent of Section 82 of the *Act*. This would not, in my view, accord with the mandate provided by Section 99.

Upon careful consideration of the evidence and argument provided in this case, I find no error of law or fact or contravention of a published policy of the governors in the November 15, 1994 decision which denied the employer's request for relief of costs.

THE EMPLOYER'S APPEAL IS, THEREFORE, DENIED.

Editor's Note: This decision has been edited for publication.

Decision of the Appeal Division

Number: 96-0242
Date: February 20, 1996
Panel: Herb Morton
Subject: Recognition of Occupational Disease

The worker appeals the October 2, 1995 Review Board finding.

The worker was employed as a truck driver. He completed an application for compensation on November 29, 1994, for bilateral carpal tunnel syndrome. In his application, the worker advised that he had previously experienced similar symptoms in January-June, 1993 in both wrists, but that the symptoms had resolved following E.M.G. testing. The symptoms recurred in both wrists in October, 1994, and were more severe. The worker attributed his problems to using a tie-down bar to tighten loads.

The worker did not miss any time from work due to his bilateral carpal tunnel syndrome until he underwent surgery. He underwent carpal tunnel release surgery, on March 27, 1995 for his right arm, and on April 10, 1995 for his left arm. The worker advises that he was off work following his surgery for nearly two months, and has had no further problems since his recovery from surgery.

Following the worker's application for compensation (received by the Board on December 2, 1994), and prior to any decision on his claim, the governors approved new policies concerning occupational diseases. Effective January 1, 1995, the governors approved a new chapter 4 for the *Rehabilitation Services and Claims Manual*, concerning compensation for occupational disease, Decision No. 77, *Revised Chapter IV — Compensation for Occupational Disease — Occupational Disease Recognition*, (*Workers' Compensation Reporter*, Vol. 10, p. 761). By regulation dated November 7, 1994, which was effective January 1, 1995, the governors recognized carpal tunnel syndrome as an occupational disease under Section 1 of the *Workers Compensation Act*.

By decision of March 17, 1995, the claims adjudicator denied the worker's claim on the basis that his bilateral carpal tunnel syndrome was not causally related to his employment. The worker appealed to the Review Board. By finding dated October 2, 1995, the Review Board concluded that as carpal tunnel syndrome was not recognized as an industrial or occupational disease at the time of the worker's symptoms in 1993, or at

the time of his November 1994 application for compensation, his claim should be adjudicated as a claim for an injury. The Review Board found that the worker's application was out of time, as it was not submitted within one year of the date of injury.

The Review Board further noted, however, that:

. . . while [the worker's] application dated November 29, 1994 is out of time, as of January 1, 1995 carpal tunnel syndrome was recognized as an occupational disease. This change extended the time for application as set out in Section 55(2) of the *Act* to a year after the date of disablement from the occupational disease. It may not seem fair to the worker that an application made on November 29, 1994 would be too late, whereas an application made on January 1, 1995 was not. Arguably [the worker] could correct the problem by re-applying in 1995 as he was not disabled until his surgery in 1995. For this reason we emphasize that while we find that [the worker's] application is out of time, we also find that his bilateral carpal tunnel syndrome did not arise out of and in the course of his employment.

Findings and reasons

The first issue to be considered involves the Review Board finding that the workers' application for compensation was "out of time" under Section 55 of the *Act*.

It is necessary to consider, in this regard, whether the worker's claim should be adjudicated as an injury or as an occupational disease. This is important to this case, as the time limit for applying for compensation for an occupational disease only begins to run from the date of disablement. The worker's application for compensation was submitted prior to the date of disablement, but more than one year following the onset of his symptoms.

Governors' policy was amended effective January 1, 1995, to recognize carpal tunnel syndrome as an occupational disease. No decision was rendered on this claim by the claims adjudicator until March 17, 1995, at which time the claim was adjudicated on an occupational disease basis. It is necessary to consider, therefore, whether the decision of the governors to recognize carpal tunnel syndrome as an occupational disease, effective January 1, 1995, should be applied in the consideration of this appeal notwithstanding the fact that the worker's application for compensation was filed in 1994.

Decision No. 36 of the governors, *Retroactivity of Policy Changes*, (*Workers' Compensation Reporter*, Vol. 9, p. 147) provides several guidelines with respect to the application of

policy changes. With respect to policy changes which do not result from a decision that a prior policy was unlawful, the governors stated as follows on page 148:

1. There is a presumption in cases where a policy change occurs as a result of a reconsideration and rethinking of existing lawful policy that the change will not apply retroactively before the date on which the new policy was approved.

With respect to policy changes resulting from a decision that a prior policy was unlawful, Decision No. 36 includes the following guidelines at page 148:

2. There is a presumption that the retroactivity of a policy change resulting from a changed view as to the proper interpretation of the law will normally be limited.
3. In deciding the effective date of a policy change necessitated by a finding by the courts, the Appeal Division or another administrative tribunal that Board policy under the *Workers Compensation Act*, the *Criminal Injury Compensation Act*, the *Workplace Act* or other statute is unlawful, the Board will have regard to the needs of good public administration.
4. Good public administration involves a balance between fairness and the practicality of undoing prior transactions.
5. Good public administration will normally require that the new policy apply to any specific case which led to the decision to make the change, as well as to all other cases currently under adjudication or appeal. Otherwise, decision makers might be faced with having to make decisions on the basis of policy which is known to be unlawful.

It is necessary, therefore, to determine whether the application of the governors' decision to recognize carpal tunnel syndrome as an occupational disease to this claim would involve some degree of retroactivity and violate the presumption against retroactivity. If it does, the further question arises as to whether the policy change may be viewed as analogous to a policy change resulting from a changed understanding of the law in which case guidelines 2, 3, 4 and 5 set out in Decision No. 36 would apply.

- (i) Does the application of the new policy to this claim involve some retroactivity?

Professor Ruth Sullivan in the revised *Driedger on the Construction of Statutes*, third edition, (Toronto: Butterworths, 1994) discusses the retroactive application of legislation in the following terms, at page 514:

Retroactivity is defined as the application of legislation to facts that occurred before the legislation came into force. To apply this definition, it is necessary to know which facts are relevant to the legislation and to situate them in time relative to its coming into force.

At pages 514-515, Professor Sullivan adopts the model developed by Professor Côté for situating facts in time:

. . . The key step in recognizing retroactive applications is analyzing the fact-situation set out in the provision to be applied to determine whether it is (1) ephemeral, (2) continuing, or (3) successive.

Ephemeral fact situations consist of facts that begin and end within a short period of time, such as actions or events. The facts are complete and become part of the past as soon as the action or event ends; the legal consequences attaching to the fact-situation are fixed as of that moment.

Continuing fact situations consist of one or more facts that endure over a period of time, such as ownership or imprisonment or residency. . . . Where no limit is stipulated, a continuing fact continues and does not become part of the past until the fact itself — the state of affairs or condition or relationship — comes to an end. . . In keeping with sound social planning, the consequences of continuing facts should not all be fixed at the outset, once and for all; it is desirable for the law governing such facts to change from time to time in response to changing circumstances.

Successive fact situations consist of facts, whether ephemeral or continuing, that occur at separate times. . . . A fact-pattern defined in terms of successive facts is not complete and does not become part of the past until the final fact in the series, whether ephemeral or continuing, comes to an end.

Once the fact-situation in the provision has been analyzed as ephemeral, continuing or successive, it must be applied to the relevant facts. *An application is not retroactive unless all the relevant facts were past when the provision came into force. In the case of a provision that attaches legal consequences to a continuing fact, such as a relationship or state of affairs,*

the provision is not retroactive unless the relationship or state of affairs has ended before commencement. In the case of a provision that attaches legal consequences to successive facts, the provision is not retroactive unless the final fact in the series has ended before commencement. (emphasis added)

In this case, the worker completed an application for compensation on November 29, 1994 (received by the Board on December 2, 1994). The governors recognized carpal tunnel syndrome as an occupational disease effective January 1, 1995. The worker did not miss any time from work due to his bilateral carpal tunnel syndrome until he underwent surgery on March 27, 1995 (for his right arm) and on April 10, 1995 (for his left arm). The worker reports that he was off work for approximately two months due to his surgeries, and has had no further problems since his recovery from surgery.

In the circumstances of this case, I find that the worker's date of disablement may be viewed as one of a series of successive facts. Relying upon the approach set out by Professors Cote and Sullivan, a provision which attaches legal consequences to successive facts is not retroactive if the final act in the series occurs subsequent to the provision coming into force. As the worker's disablement occurred subsequent to the provision coming into force (by which the governors recognized carpal tunnel syndrome as an occupational disease), I find that application of the governors' decision (to recognize carpal tunnel syndrome as an occupational disease) in the circumstances of this case does *not* contravene the presumption that policy changes will not apply retroactively before the date on which the new policy was approved.

- (ii) If the application of the new policy to this claim involved retroactivity, would there be some justification for applying the new policy?

For the reasons set out above, I do not consider that the application to this claim of the governors' decision to recognize carpal tunnel syndrome as an occupational disease involves retroactivity. I have, however, also considered the worker's appeal on the alternative basis as to whether the new policy would apply even if this involved retroactivity.

In the case *Wigman v. The Queen* (1987) 38 D.L.R. 530, the Supreme Court of Canada considered an appeal from an accused who had been convicted of attempted murder. The judge's directions to the jury in the trial followed the law as expressed in an earlier decision (*Lajoie v. The Queen*). Subsequent to the accused's conviction, the Supreme Court of Canada had ruled in another case (*R. v. Ancio*) that the reasoning in *Lajoie* should no longer be followed. Wigman appealed his conviction, arguing that the charge of the trial judge to the jury conflicted with the new interpretation of the *Criminal Code* given in *Ancio*. The issue raised for consideration in the accused's appeal, therefore, was whether he could, in pursuing an appeal, rely on a court decision ren-

dered subsequent to his conviction. In other words, should his conviction be set aside, even though the charge by the trial judge to the jury was based upon the law as it existed or was understood at the time of trial?

The Supreme Court of Canada ruled:

The main point in issue is whether the appellant can invoke what is now considered to be the correct interpretation of the *Code*.

The appropriate test is whether or not the accused is still in the judicial system. As expressed in the Crown's factum, this test affords a means of striking a balance between the "wholly impractical dream of providing perfect justice to *all* those convicted under the overruled authority and the practical necessity of having some finality in the criminal process." Finality in criminal proceedings is of the utmost importance but the need for finality is adequately served by the normal operation of *res judicata*: a matter once finally judicially decided cannot be relitigated. (at page 538)

For reasons of fairness, the court is reluctant to decide a case on a basis which was not argued by the parties and upon which the provincial courts have not spoken. This is a far cry, however, from suggesting that any issue not contained in the leave application which may tend to support acquittal or conviction is beyond the reach of the court. . . . The court can, and not infrequently does, raise issues which did not attract the interest of the parties at the time of the leave application. In short, this case arose while avenues of redress from the judgment were still open to the accused — it was still "in the system" so to speak. . . . (pp. 540 – 541).

Provided that he is still in the system, an accused charged with an offence is entitled to have his or her culpability determined on the basis of what is held to be the proper and accurate interpretation of the *Criminal Code*. . . . This *rationale* is grounded in the principle that an accused should not be convicted on the basis of the interpretation of a statute which, at the appropriate time, is known to be wrong. (page 541)

The *Wigman* court decision involved a changed interpretation of the law. *An analogy may be drawn between changes and developments in the law, and those in medical science which result in a change in an institutional position on a generic issue in the nature of an "overruling."* I note, in this regard, Decision No. 915A by the *Ontario Workers' Compensation Appeal Tribunal* [(1988), 7 W.C.A.T.R. 269].

Governors' Policy #26.00 of the *Rehabilitation Services and Claims Manual* explains the significance of recognition of an occupational disease as follows:

To assist in adjudicating the merits of occupational disease claims, to facilitate efficiency and consistency in the decision-making process and to establish an institutional memory (with the additional benefit of providing the working community with confirmation that the Board is aware that a disease may arise as a result of employment activities), the *Act* provides a means by which the Board may designate or recognize a disease as an "occupational disease."

There are levels of designation or recognition based on the available medical and scientific evidence and on the Board's experience in dealing with these diseases. The manner in which a disease is designated or recognized is primarily based on the strength of medical and scientific knowledge about the role employment may have in its causation.

The highest level of designation or recognition of an occupational disease is by way of listing in Schedule B. Another way is by designating or recognizing a disease under Section 6(4)(b) as being a disease peculiar to or characteristic of a particular process, trade or occupation. #26.03 of the *Manual* further states:

The Board may designate or recognize a disease as an occupational disease "by regulation of general application" (Section 1). In these circumstances, the Board designates or recognizes a disease as an occupational disease but without specifying that it is peculiar to or characteristic of a particular process, trade or occupation. The desired institutional memory is thus less specific.

Carpal tunnel syndrome is included in the list of occupational diseases designated or recognized as occupational diseases by regulation. Another means by which an occupational disease may be recognized is by way of an order dealing with a specific case (#26.04).

Having regard to the framework described in #26.00, by which designation or recognition of an occupational disease in one of the various ways contemplated by the *Act* is related to the Board's experience and advances in medical and scientific knowledge, I consider that a decision to recognize a disease as an occupational disease may well be seen as being in the nature of an "overruling." As this is analogous to a changed interpretation of the law, the guidelines set out on pages 148 - 149 of Decision No. 36 of the governors would apply. *Clause 5 of these guidelines provides that the new policy will apply to any specific case which led to the decision to make the change, as well as to all other cases cur-*

rently under adjudication or appeal. On this basis, the decision of the governors to recognize carpal tunnel syndrome as an occupational disease would apply to this case.

The application to this claim of the decision of the governors to recognize carpal tunnel syndrome as an occupational disease is also supportable on a third basis.

In *The Interpretation of Legislation in Canada*, second edition, (Cowansville: Les Editions Yvon Blais Inc. 1991) Professor Pierre-André Côté states:

A statute has immediate effect when it applies to a legal situation that is ongoing at the moment of its commencement: the new statute governs the future development of this situation. If, on the other hand, the new statute does not apply to ongoing situations, because of the existence of vested rights, for example, then they remain governed by the old statute: this is the phenomenon of survival of the old statute (at page 137)

When the law changes, to the advantage of the citizen, the chances are that the courts will rule in favour of immediate application of the new statute. (at page 143)

At page 551, Professor Sullivan notes:

The claim often is made that the presumption against the retrospective application of legislation does not apply to beneficial legislation. The following passage from the judgment of MacKay J. in *Placer Dome Inc. v. R.* is typical:

Generally, legislation is applied with prospective effect only. The presumption against retrospective application is ignored where the statute is deemed beneficial in its effects, or where it is merely procedural without affecting substantive interests.

Nearly always, what is meant by such assertions is that beneficial legislation applies immediately and generally to on-going facts. Like purely procedural legislation, it applies immediately and without restriction because there is no reason to limit it. It is not retroactive and it does not interfere unfairly with existing interests or expectations. The immediate and general application of legislation is the normal state of affairs; it is only where the impact is arbitrary or unfairly prejudicial that limiting its application may be justified.

(emphasis added)

Professor Sullivan concludes at page 552:

The rules governing the temporal application of legislation may be restated as follows:

- (1) It is presumed that legislation is not meant to have a retroactive application. This presumption applies to all legislation, including procedural provisions, beneficial provisions and provisions designed to protect the public interest. The presumption is strong, but may be rebutted either expressly or by necessary implication.
- (2) It is presumed that legislation is meant to apply immediately and generally to ongoing facts unless its application would interfere with vested rights. This presumption applies to all legislation, including procedural provisions, beneficial provisions and provisions designed to protect the public interest.
- (3) It is presumed that legislation is not meant to interfere with vested rights. Where the impact of the legislation on a protected interest or expectation is arbitrary or unfair, the legislation is presumed not to apply. The greater the unfairness, the stronger the presumption. By definition, provisions that are purely procedural or beneficial do not interfere with vested rights.

Having regard to the framework by which designation or recognition of an occupational disease is related to the Board's experience and advances in medical and scientific knowledge, *and serves in establishing an "institutional memory,"* I further consider that such recognition is beneficial in nature and should generally be given immediate effect. Such an approach is in keeping with general principles of statutory interpretation, and with the inquiry approach and the *de novo* remedial jurisdiction of workers' compensation appeal tribunals.

The worker's application for compensation was filed prior to his disablement by occupational disease, and fulfilled the requirements of Section 55(2) of the *Act*. This claim is not barred under Section 55.

THE WORKER'S APPEAL FROM THE REVIEW BOARD FINDING IS ALLOWED ON THIS ISSUE.

Editor's note: This decision has been edited for publication.

Decision of the Appeal Division

Number: 96-0244
Date: February 21, 1996
Panel: Connie Munro, Paul Petrie, David Van Blarcom
Subject: Rehabilitation Costs and Experience Rated Assessments

The employer appeals the July 19, 1995 decision of the director of Assessments declining to retroactively recalculate the employer's experience rated assessment to remove any impact of vocational rehabilitation costs. The employer relied on a recent decision of the Appeal Division Decision No. 95-0668 (*Workers' Compensation Reporter*, Vol. 12, p. 221) which he said:

. . . indicates that Rehabilitation Expenditures should not be used in determining the Employer's Experience Rating.

The issue is whether the inclusion of rehabilitation expenditures in the calculation of experience rating is contrary to the *Act*.

In his decision of July 19, 1995, the director of Assessments said:

The Assessment Department feels that, in adopting the policies which underpin the experience rating plan, the Governors accepted that vocational rehabilitation costs can properly be included in the experience rating calculation to measure "the relative hazard or cost of compensation" of employers.

The Assessment Department will, therefore, not be recalculating your experience rating.

The governors' policy on which the director relied is found in #30:50:41 in the *Assessment Policy Manual*:

7. The data used for determining the experience rating will consist of the claims costs of record and the assessable payroll of record. These two pieces of data will be used to calculate a cost to payroll ratio.

8. The method of determining a firm's experience rating will be to compare the firm "cost to assessable payroll ratio" to the "cost of assessable payroll ratio" of the subclass to which they are assigned. . . .
11. The cost used in the formula will include all costs of record, including the capitalized value of pensions awarded, for claims occurring in the review period. (see 30:50:52 for exclusions)

Policy #30:50:52 does not exclude the costs of rehabilitation from the costs of the claim.

Governors' Policy #30:50:10 of the *Assessment Policy Manual*, entitled "The Concept of Experience Rating," states:

Experience rating is a mechanism which adjusts the basic assessment rate for a firm based on their actual claims experience. Experience rating was adopted to provide an incentive for injury prevention, and to provide some equity between employers in the same industrial group.

The current experience rating system takes account of only a portion of claim costs. Specified claim costs are capped at the amount incurred for the first 30 months of a claim. The experience rated assessment program does not consider the full expenditures made in relation to each claim.

Section 96(6) provides that the employer may appeal the director's decision on the grounds of error of fact, error of law or contravention of the governors' published policy. The employer alleges an error of law, arguing:

Vocational rehabilitation costs are not compensation costs. As the experience rating system of the Governors has its statutory basis in the phrase "the costs of compensation" it is contrary to Section 42 of the *Act* to utilize other claim costs which are not compensation, in calculating the employer's experience rating.

The employer is represented by an employers' advisor who submits the governors' policies which include the costs of vocational rehabilitation in experience rating are contrary to Section 42 of the *Workers Compensation Act*. We are asked to consider the position set out in Appeal Division Decision No. 95-0668. She points out that Section 16, vocational rehabilitation, uses both the terms "expenditures from the accident fund" and "compensation" and says that the legislature could not have intended the words

“expenditure” and “compensation” to mean the same thing, as this would be redundant.

The employer’s advisor submits Section 42 authorizes the Board to develop an experience rating system based on compensation, not expenditure. She says:

There is no mention in Section 42 of expenditures for rehabilitation.

She points out governors’ Policy #113.00 of the *Rehabilitation Services & Claims Manual* states in part:

The general practice followed by the Board is that the cost of any compensation paid out in the claim is charged to the class or subclass of employers, of which the claimant’s employer is a member.

She also states assessment policies #30:50:41 and #30:50:52 refer to the calculation of “claims costs” used in establishing the employer’s experience rating and says the construction of the statute and the plain meaning of the words “compensation, rehabilitation and expenditure” support the employer’s position. Finally, the employer’s advisor argues the employer’s experience rated assessment should be recalculated back to 1986 when the employer first participated in experience rating.

In Decision No. 95-0668, a Panel of the Appeal Division concluded:

. . . rehabilitation expenditures do not constitute compensation. As the experience rating system of the governors has its statutory basis in the phrase “the costs of compensation,” it is contrary to section 42 of the *Act* to utilize other claim costs, which are not compensation, in calculating the employer’s experience rating. In its inclusion of rehabilitation expenditures, which are not compensation, in the calculation of the employer’s experience rating, governors’ policy is inconsistent with section 42 of the *Act*.
(reproduced as written)

In arriving at that conclusion, that Panel examined the history of Section 42, including the original provision in 1916 and changes enacted in 1932 and 1968. The Panel also examined the history of the statutory provisions relating to rehabilitation expenditures and the prior policies relating to rehabilitation costs and experience rating. They concluded:

Having regard to the history of section 16, the requirement that compensation be paid periodically, the definition of compensation in section 1, and the difference in wording between the provisions governing “medical aid” as opposed to vocational rehabilitation, the Panel

does not consider that vocational rehabilitation services are “compensation” within the meaning of part 1 of the *Act*.

Section 42 entitled “Classification of rates” on which the experience rating system is based states:

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

This section consists of a single sentence of 113 words. For analytical purposes, we will refer to the first part of this section as the rate subclassification provision, the second part as the special rate provision, and the final part as the experience rating provision.

In 1916, the classification of rates provision (then Section 32) read as follows:

The Board shall establish such sub-classifications, differentials, and proportions in the rates as between the different kinds of employment in the same class as may be deemed just; and where in the opinion of the Board *any particular industry* is shown to be so circumstanced or conducted that the hazard differs from the average of the class or sub-class to which the industry is assigned, the Board shall confer or impose upon such industry a special rate, differential, or assessment to correspond with the relative hazard of that industry; and for such purpose may adopt a system of schedule rating in such a manner as to take account of the peculiar hazard of the *individual plant* or undertaking of each employer. (emphasis added)

The special rate provision in 1916 applied to industry groupings within a sub-class where the hazard differed from the sub-class average. The system of schedule rating applied to an individual plant or undertaking of each employer to take into account the peculiar hazard of that plant.

In 1932, the classification of rates provision (then Section 35) was amended to read:

The Board shall establish such sub-classifications, differentials, and proportions in the rates as between the different kinds of employment in the same class as may be deemed just; and where in the opinion of the Board any particular industry *or plant* is shown to be so circumstanced or conducted that the *accident cost or hazard* differs from the average of the class or sub-class to which the industry *or plant* is assigned, the Board shall confer or impose upon that industry *or plant* a special rate, differential, or assessment to correspond with the relative *accident cost or hazard* of that industry *or plant*; and for that purpose may adopt a system of *experience rating or schedule rating, or a combination of those systems*, in such a manner as to take account of the peculiar *accident cost or hazard* of the individual plant or undertaking of each employer. (emphasis added)

The special rate provision was expanded to include individual “plants” and also to include “the accident cost.” Thus, the special rate provision authorized the Board to impose or confer a special rate on an individual plant as well as an industry. The “schedule rating” clause was also amended to include the term “experience rating” with the criteria of “peculiar accident cost or hazard” applying to both.

In the report of his 1942 Royal Commission, Mr. Justice Sloan reviewed the classification of rates section of the *Act* and noted there was a preferred rate applicable when accident prevention and first aid regulations had been complied with and a regular rate, higher than the preferred rate. His report stated:

With the regular and preferred rates as basic, the merit or experience rating is then erected upon that structure. (page 176)

Mr. Justice Sloan did not recommend any changes to Section 36 of the *Act*.

Mr. Justice Sloan presided over a further commission of inquiry, issuing a report in 1952. He referred to the experience rating system:

Where any particular industry or plant is shown to be so “circumstanced or conducted” that the accident cost or hazard differs from the average, the Board may adopt a system of experience rating.

From this it would appear that it was not intended that a firm should receive an experience rate solely for the reason that its ratio of accident cost was either high or low, but only when that high or low ratio was, in the Board’s opinion, the result of the manner in which the industry was “circumstanced or conducted.” (page 182)

Mr. Justice Sloan commented:

I have found this merit rating system a difficult, intricate, and perplexing business with which to grapple.

He made no recommendations with respect to Section 37 as a result of his enquiry.

The last commission of inquiry into this province's workers compensation system was conducted by Mr. Justice Tysoe, reporting in 1966:

"Experience rating" is the expression used in Section 37 [now 42] of the *Act* and that used by the Board in relation to its plans. "Merit rating" is a term sometimes used and is said to be a more general term which includes experience rating as practised by the Board. The plans hereinafter referred to include both merits and demerits.

Their purpose is simply to offer an incentive to industry to adopt and maintain safe work practices so as to obtain a reduction in assessment work, or at worst, to avoid a penalty. (page 99)

However, Mr. Justice Tysoe pointed out:

It has been stated that the only advantage of experience rating is in the effect it may have in encouraging safe practices or discouraging unsafe ones. It has many disadvantages, and even the plans so far devised after a long experience have their weaknesses. Mr. Clark, the chief assessment officer, speaking as a trained statistician, considered that even the alleged advantage was more apparent than real. (page 108)

Mr. Justice Tysoe listed the disadvantages of the experience rating plans in place at the time of his review:

- (a) it is a deviation from the collective responsibility principle of a workers' compensation type insurance scheme;
- (b) there is too great a lapse of time between the conduct and the reward or punishment, and hence the sole purpose of the plan tends to be defeated;
- (c) an employer is frequently penalized for something he cannot control;
- (d) it is not really suitable for relatively small operations;

- (e) the merits far outstrip the demerits, so that there is a considerable deficit which must be charged.

He summarized the effect of the experience rating plans:

The general tendency is to lower the cost to the larger employer and increase it to the smaller, and it is often the smaller man who is most in need of incentive. To this extent the plan defeats its own stated purpose.

Mr. Justice Tysoe quoted an authority regarding the limitations of the use of experience rating to promote safety, stating:

. . . a rate may be expected to encourage the reduction of loss. *Sound insurance principle requires, however, that this objective be kept clearly secondary to those of equity and adequacy.* Insurance after all is a device to pool risk and share losses. . . the condition definitely limits the role of the rate as a safety incentive. When safety is made the main end of the rate structure, *this end*, as in workmen's compensation schedule rating, *may indeed be achieved but at the price of so great a failure in rate equity* that (with rare exceptions) it has had to be abandoned. On the other hand, if the safety objective is kept subordinate to these other objectives, the effectiveness of the safety incentive is greatly restricted. This is because the amounts of reward and penalty that can fairly and safely be offered to the insured will not be large enough to influence his attitude toward his risk. (emphasis added) (page 110)

Mr. Justice Tysoe observed:

Perhaps at least from a statistician's point of view, the most serious disadvantage is the departure from the collective liability principle. If such a departure is warranted in the interests of safe practices, then it is obvious that *the degree of departure must be controlled*, and there must come a time when some authority must say "thus far and no further" if the whole foundation of the scheme is not to be eroded. (emphasis added)

While Mr. Justice Tysoe offered these comments and observations, he made no specific recommendations with respect to experience rating. In 1968, two years after his report, the legislature amended the classification of rates provision (then Section 40) to read:

The Board shall establish such subclassifications, differentials, and proportions in the rates as between the different kinds of employment

in the same class as may be deemed just; and where in the opinion of the Board any particular industry or plant is shown to be so circumstanced or conducted that the hazard or *cost of compensation* differs from the average of the class or subclass to which the industry or plant is assigned, the Board shall confer or impose upon that industry or plant a special rate, differential, or assessment to correspond with the relative hazard or *cost of compensation* of that industry or plant, and for that purpose may *also* adopt a system of experience rating.
(emphasis added)

In the 1968 statutory amendments to the classification of rates provision, the “accident cost” phrase in the special rate provision was changed to read “cost of compensation.” The experience rating clause was changed in three ways: the word “also” was added to the clause; the parallel criteria with the special rate provision were deleted from the experience rating clause; and, the semi-colon between the special rate provision and the experience rate provision was changed to a comma.

Although Mr. Justice Tysoe did not recommend specific changes to the classification of rates provision, his discussion of the disadvantages inherent in an experience rating system, his reference to the importance of keeping the objective of experience rating “secondary” to the objective of “equity and adequacy” of the accident fund, and his observation that some authority must say “thus far and no farther” with respect to experience rating suggest some rationale for the addition of the word “also” to the experience rating clause. “Also” has the effect of separating the experience rating system from the special rate provision by indicating it is “in addition to” the special rate provision. This effect appears to be reinforced by the legislature having deleted the direct reference to the special rate provision criteria from the experience rating clause.

A determination of whether the *Act* excludes rehabilitation expenditures from the calculation of experience rating requires an analysis of Section 42 taking into account the 1968 statutory changes. The three provisions contained in Section 42 must be read as a whole to appreciate their relationship. It is also important to consider the purpose of Section 42 in relation to the overall purpose of the *Act*.

The primary purpose of Section 42 apparent from a plain reading of its express terms, is to achieve a just subclassification of rates. The *Concise Oxford Dictionary* defines “just” as “done in accordance with what is morally right or fair.” Some Canadian cases have equated “just” with “equitable.” See for example, *Baxter v. Sun Life Assurance Co. of Canada* (1991) 131 NBR (2d) 441 (NBQB); *Smith v. Hunter* (1993) 126 N.S.R. (2d) 254 (NSSC). The subclass rate therefore, must meet the test of fairness and equity.

The special rate provision says the Board shall vary the subclass rate where the hazard or cost of compensation of an industry or firm differs from the subclass average. The

method for varying the subclass rate must correspond with the relative hazard or cost of compensation. That is, the variation in the rate must correspond with the extent to which the industry or firm varies from the subclass average in the established criteria. Any variation in the subclass rate at the industry or firm level must also meet the test of fairness and equity to coincide with the overall purpose of the section. The special rate thereby requires an equitable variation in the subclass rate based upon the criteria of hazard or cost of compensation.

To this foundation is added the provision “and for that purpose may also adopt a system of experience rating.” The meaning of this provision within the context of Section 42 and the *Act* as a whole will determine whether rehabilitation expenditures can be included in the calculation of experience rated assessments. We concur with Mr. Justice Sloan that the interpretation of the experience rating provision is a difficult, intricate and perplexing issue.

Given the statutory evolution of the classification of rates section and in light of the changes to this section in 1968, we are satisfied the *Act* provides for a system of experience rating separate from and in addition to the special rate provision. The two schemes, however, are connected by the phrase “and for that purpose.” The interpretation given to that phrase will determine the nature of the relationship between the special rate and the experience rating provision.

We see two potential interpretations of the phrase “and for that purpose.” The phrase could be interpreted as referring to the *general* purpose of Section 42 — the just subclassification of rates. Hence, for the purpose of establishing fair and equitable rates the Board may also adopt a system of experience rating. Alternatively, “and for that purpose” could be interpreted narrowly as applying only to the phrase immediately preceding it; namely, “to correspond with the relative hazard or cost of compensation of that industry or plant.” The latter approach would mean the Board may adopt a system of experience rating to correspond with the extent to which the relative hazard or cost of compensation of a particular industry or plant varies from the subclass average.

We have considered the impact of these alternative interpretations as they apply to the issue of whether the *Act* precludes considering rehabilitation expenditures in calculating experience rated assessments. Our conclusion is that either interpretation yields the same result. Rehabilitation costs may be included in an experience rated assessment calculation.

Mr. Justice Tysoe described the overall purpose of the *Act* in the following terms:

The prime mission of those who administer workmen’s compensation and the prime purpose of the *Act* is not to furnish financial benefits,

but to promote and encourage measures for the prevention of injury to workmen in the course of their work and, should any be so unfortunate as to become disabled as a result of such injury, means for their rehabilitation and return to useful employment as soon as possible. To keep work connected injuries to a minimum is the first object. Restoration of injured workmen physically and economically is the second, and to achieve it adequate medical care is to be provided. Payment of compensation while disabled is very necessary, but it is only incidental to the main purpose of restoring workmen to the point where they can again play their proper part as citizens of our province. (page 18)

Rehabilitation expenditures used to promote the objective of restoring injured workers to productive employment are very significant in the overall legislative scheme. An equitable experience rating system cannot ignore the necessity for rehabilitation expenditures. The Board's responsibility to make rehabilitation expenditures from the accident fund in order to restore injured workers to productive employment will vary with each employer's ability and willingness to accommodate re-employment of those with permanent partial disabilities. An employer's accommodation of an injured worker generally reduces the requirement for retraining and other rehabilitation expenditures from the accident fund. Accommodating partially disabled workers in suitable employment can involve direct or indirect financial expenditures by an employer. Employers unable or unwilling to make such accommodation can avoid such financial commitment. It would be inequitable to relieve a non-accommodating employer of rehabilitation expenditures for purposes of experience rating *and* to require the accommodating employer to thereby pay a higher rate because of such expenditures. We conclude, therefore that both the overall purpose of the *Act* (as described by Tysoe, J.) and the specific purpose of Section 42 (establishing equitable rates) are furthered by inclusion of rehabilitation expenditures in calculating experience rated assessments.

A narrow interpretation of the words "and for that purpose" as applying only to the phrase preceding it would mean the Board may adopt a system of experience rating varying the subclass rate only to correspond with the extent the firm's hazard or cost of compensation differs from the subclass average. This interpretation directly links the application of experience rating to the criteria for calculating a special rate. If the scope of experience rating is limited in this way the calculation of an experience rated assessment would correspond to the extent to which the firm's "hazard or cost of compensation" differs from the subclass average.

This was the principal basis upon which the Panel in Decision No. 95-0668 concluded that rehabilitation expenditures must be excluded from the calculation of experience rated assessments.

That decision stated:

Section 42 authorizes the Board to adopt a system of experience rating “to correspond with the relative hazard or cost of compensation of that industry or plant.” As the current experience rating system is based on an employer’s claim costs, it is not based on “relative hazard.” The current experience rating system is intended to correspond with the cost of “compensation,” rather than “accident cost” as was the case prior to 1968. The Panel finds, therefore, that the definition of the term “compensation” is determinative as to which costs may be included in the calculation of an employer’s experience rating. The Panel further finds that under an experience rating system based on the “cost of compensation,” it is unlawful (contrary to Section 42) to include costs other than compensation. Including other costs would contravene the plain meaning of the wording in Section 42.

The decision went on to conclude that rehabilitation expenditures are not “compensation” within the meaning of part 1 of the *Act*.

We disagree with the assumption that the experience rated assessment system is not based on “relative hazard.” Therefore, it is not necessary, for the purposes of this decision, to find whether rehabilitation expenditures are not “compensation” within the meaning of part 1 of the *Act*.

Section 16 of the *Act* authorizes the Board to make rehabilitation expenditures “To aid in getting injured workers back to work or to assist in lessening or removing a resulting handicap. . . .” The need for rehabilitation expenditures has a relationship to the relative hazard of an industry. For example, the ability of a worker with a serious knee injury to return to the difficult terrain of a logging operation may be significantly less than the ability of a worker with a similar injury to return to a sedentary office environment. Hence, the comparative or relative hazard of a particular industry or plant may have a significant impact on both the duration of wage loss and the need for rehabilitation expenditures. An employer who facilitates an early return to work by modifying the physical demands and potential hazards of a job may reduce wage loss payments *and* reduce rehabilitation expenditures. The inclusion of rehabilitation expenditures in the calculation of experience rating is, therefore, encompassed by the broad phrase “relative hazard or cost of compensation.” The cost of rehabilitation benefits can be included in a measure of “hazard” irrespective of whether they can also be included in a measure of “cost of compensation.”

We find, the inclusion of rehabilitation expenditures in the calculation of experience rating consistent with the general purpose of achieving fair and equitable assessment

rates within a subclass and also consistent with the special rate criteria of “relative hazard or cost of compensation.”

We, therefore, respectfully disagree with the preliminary finding of the Panel in Decision No. 95-0668; namely, that the experience rating system has its statutory basis in the phrase “the cost of compensation.” That Panel’s decision did not analyze the significance of the term “also” in the final part of Section 42 introduced in 1968, nor did it consider whether rehabilitation expenditures had any relationship to the term “hazard” contained in that section.

We find no error of fact, error of law or contravention of governors’ policy in the decision to include rehabilitation expenses in the calculation of experience rating.

THE EMPLOYER’S APPEAL IS DENIED.

Editor’s Note: This decision has been edited for publication.

Decision of the Appeal Division

Number: 96-0271
Date: February 23, 1996
Panel: Herb Morton
Subject: *Criminal Injury Compensation Act* — Rehabilitation Expense

By decision of June 29, 1995, Decision No. 95-0750, the chief appeal commissioner granted leave to the victim to obtain a further review by the Appeal Division of the December 19, 1994 appeal committee majority findings.

The victim, who was born in 1979, was subjected to sexual abuse at age 4 and 5 years, by different offenders. Between the ages of 8 to 12 years, she was subjected to sexual abuse by a third offender, a male neighbour who was eight years older. The abuse of the victim which occurred while she was between 8 and 12 years of age was disclosed in 1992, when, at age 12, she was admitted to hospital with self-inflicted lacerations from a razor blade, and a full thickness burn from a curling iron, to her left fore-arm. The medical reports concerning this hospitalization show that the victim was suffering from depression and suicidal ideation.

Compensation has been awarded for the abuse of the victim at age 4 and between 8 and 12 years. The incident which occurred when she was 5 years of age occurred in Alberta, and is not part of these claims.

At issue is a request for compensation for moving expenses incurred in January, 1993. By letter of February 1, 1993, the victim's mother explained her reasons for requesting reimbursement of moving expenses:

It became imperative to break away from our situation in order to escape the past, and further, people's ridicule directed at my family. My family, including [the victim's younger sister], was confronted with continued harassment from other neighbors. Some neighbor's children also presumed to call [the victim] a "slut," etc. to the point where she felt uncomfortable even taking out the garbage. Furthermore, the assailant continued to be seen in our neighborhood which left us feeling apprehensive about remaining in a situation where the assailant knew our whereabouts. This put my youngest daughter . . .

at risk as well. I was concerned about the mental health and safety of my children and I saw no other choice than to move to another living arrangement.

. . . It is important to note that we had made the cooperative our home after having lived in that housing community comfortably for over 6 1/2 years. . . . I had always been a responsible and active member in the non-profit cooperative holding various board positions. . . . After the disclosure became public knowledge the consequences went far beyond just the assault. Since that moment onward, our privacy was disregarded and all three of us were increasingly aware of the stigma attached at having been victimized. Out of concern for my children, I felt that we had no alternative than to relocate in order to be free from further harassment.

By letter dated October 11, 1992, Doctor D stated:

This is to certify that the above named and her family would benefit from a move to another housing complex away from the present location for medical reason.

In a letter dated November 17, 1992, M. Koroll, registered clinical counsellor, advised:

Last spring [this] family experienced an assault on one of its members within the housing co-op where they live. This incident created a tremendous amount of stress which has intensified since the assailant is still within the community. He has been seen in the vicinity and appears to have acquaintances who still live in the housing co-op. This, as well as other extenuating circumstances leads me to believe that staying at their present address may be detrimental to the health & welfare of the victim and her family. I feel that it is within their best interest to live in an environment where there isn't an atmosphere of fear and anxiety.

By decision dated March 29, 1993, a solicitor, Criminal Injury Section, denied the request for moving expenses, advising the victim's mother:

While there is no doubt that the moving expenses were incurred out of your desire to protect the interest of your family, these expenses are not compensable under the *Act*. These expenses are not recognized under the general or specific language of this legislation. That is, they cannot be said to be incurred "as a result of the victim's injury," as is the case with medical expenses, nor are they listed as a specific ex-

ception to this requirement that they be incurred as a result of the injury. Further, these kinds of expenses are beyond the general purpose of the *Act*, which is designed to compensate for injuries. *Thus, while these expenses were undoubtedly reasonably incurred, they are expenses which cannot be compensated under this legislation.* (emphasis added)

By further letter of August 20, 1993, the criminal injury solicitor confirmed this decision following an oral inquiry. The decision stated:

. . . compensation for moving expenses has not been awarded in the past. A reading of Section 2(3.1)(a) requires that these expenses be incurred as a result of the victim's *injury*. The same applies with Section 2(3.1)(e). (emphasis in original)

These expenses do not arise out of the victim's injury. They arise out of a desire to protect the victim. Further, the purpose of this program is to compensate victim's (sic) of crime for their loss. The compensation for moving expenses falls beyond the parameters of this program. It simply can not compensate for any and all losses, no matter how remote. There must be a sufficient connection between the injury and the expense in order for compensation to be awarded. There must be reasonable limits placed upon what is considered to be appropriate compensation for an injury. *In these circumstances the expenses submitted are beyond the scope of the legislation.* (emphasis added)

An appeal from this decision was considered by a three-member appeal committee. In the December 19, 1994 findings and report of the appeal committee, the majority denied the appeal. The majority noted that the offender had moved away from the housing complex, and reasoned:

The Appeal Committee understands that the victim is apprehensive about encountering the alleged offender by chance in the future, and indeed this has happened on a couple of occasions since the crime was reported. The majority of the Appeal Committee however consider that the expenditure of funds because of fear of becoming a victim of crime again, is not a loss resulting from the victim's injury. While it might well be a reasonable expense to incur in the general sense that a new start with fresh surroundings is invariably spiritually uplifting, it is not a reasonable expense to incur with respect to expenditures (e.g. medical treatment and therapy) which were actually necessitated by the sexual assaults accepted under [this claim].

. . .

While the majority of the Committee has no doubt that [the victim] and her mother had good reasons for moving to other accommodations, and that the move was in fact motivated by the crime, we are not satisfied that the move was necessitated by the crime.

The dissenting member of the appeal committee relied upon Section 2(3.1)(e) which allows for compensation for “other pecuniary loss or damages resulting from the victim’s injury *and any expense that, in the opinion of the board, it is reasonable to incur*” (emphasis added). She noted that this latter clause is separate from the phrase “resulting from the victim’s injury,” and that authorization of expenses on this basis is therefore not conditional on a finding that they result from the injury. She found that a request for compensation for moving expenses must be considered on its own merits irrespective of any general practice of the Criminal Injury Section of the Board. The dissenting member further reasoned that the requirement cited by the majority that the expense be “necessitated” by the injury was not contained in the legislation, and concluded that the moving expenses should be awarded under Section 2(3.1)(e) of the *Act*.

Legislation

Section 2(3.1) of the *Criminal Injury Compensation Act* provides:

Compensation may be awarded for

- (a) expenses actually and reasonably incurred or to be incurred as a result of the victim’s injury or death, . . .

- (e) other pecuniary loss or damages resulting from the victim’s injury and any expense that, in the opinion of the board, it is reasonable to incur,

Section 2(3.2) states:

Where the injury to a person occurred in the circumstances mentioned in subsection (2)(b) or (c) the board may, in addition to the compensation referred to in subsection (3.1), award compensation to the injured person for any other damage resulting from the injury for which compensation may be recovered at law, other than punitive or exemplary damages.

Subsections 2(2)(b) and (c) refer to persons injured or killed in the Province by an act or omission of another resulting from:

- (b) the lawful arrest or attempt to arrest an offender or suspected 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 3(1)(d) provides that the Board may:

where compensation is payable for expenses, pay the compensation directly to the person entitled to it.

Findings and reasons

It is necessary, in this case, to consider the proper interpretation to be given to the phrase “any expense that, in the opinion of the board, it is reasonable to incur” which is contained in Section 2(3.1)(e) of the *Act*. Does this provision convey a “plenary independent power” on the Board of the type discussed by the B.C. Court of Appeal in the case of *Caputo v. W.C.B.* (1987) 13 B.C.L.R. (2d) 145)? If so, could this discretion be utilized to pay any reasonable expense to a victim, as the dissenting appeal committee member reasoned? Alternatively, does this phrase have some narrower, more restrictive meaning, as the appeal committee majority reasoned? What was the intent of the legislature, in providing for the reimbursement of expenses *resulting from the injury* under Section 2(3.1)(a), and for reasonable expenses *not resulting from the victim’s injury* under Section 2(3.1)(e)? How should the latter part of Section 2(3.1)(e) be interpreted, if Section 2(3.1)(a) is not to be rendered superfluous?

I consider that Section 2(3.1)(e) cannot be read in isolation. It must be read in the context of the surrounding provisions in the *Act*, in order to arrive at a meaningful interpretation of this provision.

There is a paucity of policy under the *Criminal Injury Compensation Act*. The applicable policies of the governors consist of eleven decisions originally made between 1973-1976 which were published in the *Workers’ Compensation Reporter* (Decision No.’s 16, 77, 131, 132, 133, 172, 173, 178, 179, 181, and 198. The authority of the governors for approving policy under the *Criminal Injury Compensation Act* was described in Appeal Division Decision No.’s 95-0914 and 95-1476/79 (pending publication in the *Reporter*).

Decision No. 77, *Re: Criminal Injuries Compensation* (*Workers' Compensation Reporter*, Vol. 1, p. 301) concerned a claimant's request for reimbursement of legal fees. That decision states (at page 301):

Section 3(1)(d) of the *Criminal Injury Compensation Act* refers to compensation payable for expenses. That refers, however, to expenses that are the *direct* consequences of injury, not expenses incurred in pursuance of a claim. Sometimes a claimant may incur expense in producing evidence of a kind which the adjudicator would have sought himself had it not been produced by the claimant. In that situation, the expenses should be reimbursed by the Board. But this should be done as an administrative cost, not as part of the compensation. To treat such expenses as part of the compensation would create an accounting distortion. . . . (emphasis added)

That decision drew a distinction between expenses which were the "direct" consequences of an injury, and expenses incurred in pursuing a claim for compensation. This showed an intention to limit the compensation payable by excluding the indirect consequences of an injury, apart from those expenses occurred in the pursuance of a claim. This restrictive approach to considering the scope of compensation payable under the Act is consistent with the reasoning of the appeal committee majority. However, the use of the term "direct" in Decision No. 77 was not the specific focus of that decision and caution must be exercised in considering its significance. Caution must similarly be exercised in referring to this policy in view of the subsequent revisions to the Act, contained in Section 2(3.1) and (3.2).

Subsection 2(3.1) and (3.2) were added to the *Criminal Injury Compensation Act* in 1990, under Bill 62, the *Solicitor General Statutes Amendment Act, 1990*. *Hansard*, at pages 11110 – 11111, records the following debate concerning the intent of these changes:

Mr. Clark: . . . I'm trying to get a sense of whether it [the addition of subsections (3.1) and (3.2) to Section 2] expands or narrows the number of things that may be compensated for under the *Criminal Injury Compensation Act*.

Hon. Mr. Fraser: It's a straight clarification.

Mr. Clark: Perhaps the minister could say why it was required to be clarified. Was there a problem in terms of money being awarded which it was felt shouldn't be awarded under the *Criminal Injury Compensation Act*? Or is it the reverse, that certain things were ex-

empted from the *Act* and this was necessary to clarify it in order to facilitate the compensation of victims of crime?

Hon. Mr. Fraser: It identifies those types of losses and expenses for which compensation may be awarded. The existing provisions were general. In describing the types of damages eligible for award, in practice the Board has tended to refer to the categories for eligible damages for which Canada contributes to the province pursuant to the cost-sharing agreements. The new proposed categories reflect those contained in the cost-sharing agreement and will clarify the types of damage eligible for compensation.

Mr. Clark: Is it fair to say that this has the potential of decreasing the amount of compensation to victims of crime, in the sense that now what is to be compensated is specifically defined? Where the general provision may have been interpreted loosely, that option is not available. If that's the case, could he inform the House which kinds of things were compensated under the previous legislation that will not be compensated under this clarification of the *Criminal Injury Compensation Act*?

Hon. Mr. Fraser: It is my understanding that there will be no reduction.

The statements by the Solicitor General in the legislature do not appear indicative of an intent to make a significant amendment to the scope of the compensation payable under the *Act*. In this light, the reasoning in Decision No. 77 may still be of relevance.

Although Section 2(3.2) is not applicable to this case, it constitutes part of the legislative context and may provide assistance in the interpretation of Section 2(3.1). Section 2(3.2) provides that persons injured or killed in the arrest of an offender, or in an attempt to prevent an offence from occurring, may, in addition to the compensation payable under Section 2(3.1), be awarded compensation for any other damage resulting from the injury for which compensation may be recovered at law, other than punitive or exemplary damages. This provision clearly contemplates that there are categories of damage for which only a "good Samaritan" may be compensated under the *Act*. In other words, there are categories of damage, which could be claimed in a civil action, for which other victims of crime are not compensated under the *Act*. This distinction is in addition to that contained in Section 13(5) of the *Act*, which provides that the statutory maximum on the compensation payable under the *Act* does not apply to claims by "good Samaritans" under Section 2(2)(b) or (c).

In order to claim damages in a civil action, a plaintiff would have to show that the damage or loss resulted from the tort. By logical implication, therefore, the legislation clearly contemplates that there are categories of damage or loss, resulting from the crime, which would be recoverable in a civil action but for which victims other than “good Samaritans” cannot claim under the *Act*. This provides strong support for the conclusion that the scope of compensation payable under Section 2(3.1) of the *Act* is limited in scope.

A logical inference which may be drawn, therefore, which is consistent with the reasoning originally expressed in Decision No. 77, is that the damages or expenses which will be viewed as “resulting from the injury” are limited to those which are a *direct* consequence of the injury. The concept of damages or loss “resulting from the injury” must be read as being narrower than would normally be understood by such words. Consistent with this interpretation, and the reasoning in Decision No. 77, is the conclusion that the expenses which do not result from the injury, but which the Board is authorized to reimburse under Section 2(3.1)(e), are the expenses incurred in pursuing the claim for compensation.

Costs incurred in pursuing a claim for compensation would normally also be seen as resulting from the injury in a broad, general or indirect sense — to provide separate authorization for such expenses without the requirement they result from the injury reinforces the conclusion that the phrase resulting from the injury is intended to be applied in a very restrictive fashion. Reading Section 2(3.1)(e) as allowing for compensation for *any* expense or damage or loss, which does not directly result from the injury, and which does not involve an expense incurred in pursuing the claim, would seem to make Section 2(3.1)(a) superfluous or redundant. It would also negate the effect of Section 2(3.2). What would be the significance or meaning of Section 2(3.2), in providing for a greater scope of damages for “good Samaritans,” if the scope of compensation payable under Section 2(3.1)(a) and (e) was not intended to be more limited in nature?

At the time of Decision No. 77, there was no provision in the *Act* which specifically granted authority to reimburse administrative expenses separately from the victim’s compensation. Decision No. 77 may, therefore, explain the background to the changes which were made to the *Act* contained in Section 2(3.1). Section 2(3.1) may be interpreted as a codification of part of the reasoning expressed in Decision No. 77. The phrase “any expense that, in the opinion of the Board, it is reasonable to incur” may be seen as authorizing reimbursement of expenses incurred in pursuing the claim, as such expenses would not be seen as resulting from the injury. This is consistent with the conclusion that the expenses which “result” from the injury are limited to those which are a “direct” result of the injury.

The discretion granted by Section 2(3.1)(e) to pay expenses which are not a direct result of the injury may, therefore, be interpreted as allowing for payment of expenses incurred in pursuing the claim for compensation of the nature discussed in Decision No. 77. This interpretation accords in part with the approach originally stated in Decision No. 77. This supports the restrictive interpretation by the appeal committee majority, and gives meaning to these different provisions. I note, however, that inasmuch as Section 2(3.1) begins with the wording "Compensation may be awarded for. . .," the reimbursement of expenses under this provision would appear to form part of the compensation payable on a claim rather than being separate from the compensation as discussed in Decision No. 77.

In the text *Criminal Injuries Compensation*, second edition, Professor Peter Burns discusses at page 190 the provision "other pecuniary loss or damage resulting from the victim's injury and any expense that in the opinion of the Board it is reasonable to incur." He notes that this residual head is found in nine out of the ten criminal injury acts studied in Canada (Alberta, Manitoba, Newfoundland, Northwest Territories, Nova Scotia, Ontario, P.E.I., Saskatchewan, and Yukon Territory, but not New Brunswick). He suggests (at page 190):

It is obviously broad enough to permit compensation in respect of almost anything and grants the boards enormous discretion.

The ensuing discussion suggests, however, that this provision has been applied very narrowly, focussing on matters such as reimbursement of funeral and burial expenses and whether or not property damage may be reimbursed under this head. Professor Burns notes that the Ontario and Saskatchewan Boards have found that property loss (e.g. loss of a wristwatch taken by the assailant in the course of an assault) is not compensable under this head. He further notes, at page 192:

The Ontario Board has found within this residual head the power to award a claimant the costs of his appearance before it, and as a general rule the items compensated under this head are limited to those directly associated with bringing the claim before the Board, other expenses being dealt with under [another provision]. The Ontario Board once stated that, under this head "we allow the cost of obtaining the necessary evidence such as medical reports, and in some cases, transcripts of evidence, the expenses of counsel and of the claimant to attend the hearing and a legal fee to cover the preparation of documents, interviews, preparation of cases and counsel fee." Nonetheless, the Ontario Board has also compensated victims for psychiatric counselling, and hired help needed because of incapacitation due to injury, under this head.

This discussion as to how similar provisions have been interpreted in other jurisdictions lends further support to the interpretation of Section 2(3.1) outlined above, consistent with the reasoning in Decision No. 77.

Even if the general effect of Section 2(3.1) is as outlined above, it remains to be considered whether the legislature intended by the inclusion of the latter part of Section 2(3.1)(e) to grant to the Board a plenary independent power or discretion to consider the circumstances of particular cases (i.e. to prevent injustice in the individual case). Even if the phrase “any expense that, in the opinion of the Board, it is reasonable to incur,” generally refers to the costs of pursuing the claim for compensation, it may be argued that this provision still confers a residual discretion on the Board as suggested by Professor Burns.

In view of this question concerning the effect of Section 2(3.1)(e), I have further considered whether there are unusual circumstances to justify the payment of these expenses in this particular case. I note that the offender had moved away from the housing complex in which the victim lived. No evidence has been provided to suggest that the offender had tried to contact the victim again. The identity of the offender was known to the police. No criminal charges had been laid against the offender, but the possibility of such charges would tend to discourage any attempt at further contact. There is evidence that the victim had been emotionally upset at seeing the offender by chance in a public location, but there is little evidence that she was in fear of the offender.

To the extent Section 2(3.1)(e) might be read as conferring a discretion, I would not exercise that discretion to reimburse payment of moving costs under this provision of the *Act*. In the general absence of policy direction, I find for the purposes of this decision that a restrictive approach is appropriate in considering the scope of the compensation payable under this provision. In view of my conclusion on this basis, it is not necessary that I reach a final conclusion with respect to the scope of the discretion conferred upon the Board by Section 2(3.1)(e) of the *Act*.

I agree, therefore, with the decision of the appeal committee majority in concluding that the victim is not entitled to reimbursement of her moving expenses under Section 2(3.1) of the *Act*.

A further issue which remains to be considered, however, is whether the victim’s claim for reimbursement of moving expenses is one which may be considered under the *Act*, or whether these expenses are beyond the scope of the legislation as stated in the March 29 and August 20, 1993 decisions on file.

In view of the 1990 amendments contained in Section 2(3.1) and (3.2), I interpret Section 3(1)(d) as currently relating more to the method of payment rather than creating the

entitlement. On this basis, therefore, the entitlement to compensation for expenses has to be found elsewhere in the *Act* before Section 3(1)(d) applies.

Section 16 of the *Criminal Injury Compensation Act* states:

The board may, in order to assist a victim to obtain work *or to lessen or remove a handicap resulting from the injury*, take the measures and make expenditures it considers necessary or expedient.

(emphasis added)

There is no policy providing direction in the interpretation of this provision.

The wording of this provision is very similar to that contained in Section 16(1) of the *Workers Compensation Act*, which states:

To aid in getting injured workers back to work *or to assist in lessening or removing a resulting handicap*, the board may take the measures and make the expenditures from the accident fund that it considers necessary or expedient, regardless of the date on which the worker first became entitled to compensation.

(emphasis added)

The policy of the governors concerning Section 16 of the *Workers Compensation Act* has no application to the interpretation of Section 16 of the *Criminal Injury Compensation Act*, notwithstanding the similarity of wording in these provisions. It would be open to the governors to develop different policies under the separate *Acts*, notwithstanding this similarity of wording in Section 16 of both *Acts*. It is, however, of interest to note the manner in which this section has been interpreted in the workers' compensation context, to assist in considering the effect which might reasonably be given to this provision.

The guiding principles of vocational rehabilitation under the *Workers Compensation Act* are stated at #85.30 of the *Rehabilitation Services and Claims Manual*, and include the following:

3. Maximum success in vocational rehabilitation requires that different approaches be used in response to the *unique needs of each individual*.
6. The gravity of the injury and residual disability is a relevant factor in determining the nature and extent of the vocational rehabilitation assistance provided. The Board should go to greater lengths in cases where the disability is serious than in cases where

it is minor, *including measures to assist workers to maintain useful and satisfying lives.* (emphasis added)

It is apparent from this policy concerning workers' compensation that the provision of effective rehabilitation services requires consideration of a worker's unique circumstances, and that individualized solutions may be necessary to treat the "whole person" and to assist in overcoming obstacles or "lessening or removing the resulting handicap" in a particular case. The policy authorizes the provision of rehabilitation which, in some circumstances, will include measures to assist workers to maintain useful and satisfying lives even where these are not directed towards reemployment. In Decision No. 684/92 (24 W.C.A.T.R. 305), the *Ontario Worker's Compensation Appeal Tribunal* similarly reasoned (at page 311):

It is also not inappropriate, in our view, for the Board to consider that a rehabilitative purpose for a retired worker may have a different meaning than it does for a worker who may still have the potential to return to the work force. It may well be that in certain circumstances, improving the retired injured worker's quality of life may have a significant medical rehabilitative purpose.

In considering the needs of a child victim of sexual abuse, it is readily apparent that the provision of rehabilitation will likely not, at least in any direct sense, be directed to a specific vocational purpose. As in the worker's compensation context, however, rehabilitation may be necessary to assist the victim's recovery, in addition to the provision of medical treatment and therapy, which will enhance their opportunities to overcome the effects of the abuse and ultimately, to lead a productive and satisfying life.

In the circumstances of this particular case, the victim was in her formative pre-teen years at the time of the abuse. The move occurred when she was 13 years of age. The offender and victim had both lived in the same housing complex for many years, and the circumstances of the abuse became public knowledge in the complex. Most unfortunately, there is evidence of a "blame the victim" response by some persons within the complex. The evidence reveals that the victim was stigmatized by others in the housing complex because of the abuse. Evidence has been provided by the victim's physician and therapist supporting the desirability of a move to a new environment. The criminal injury solicitor characterized this expense as arising "out of a desire to protect the victim." I find, on the evidence provided, that the move away from the housing complex in which the abuse occurred had a significant potential rehabilitative benefit for the victim. I conclude that the moving expense of \$539.29 should be paid in the circumstances of this case.

In conclusion, I agree with the reasoning of the appeal committee majority in finding that the victim is not entitled to reimbursement of her moving expenses under Section

2(3.1) of the *Act*. I find, however, that such expenses should be paid as a rehabilitation measure under Section 16 of the *Act*.

THE VICTIM'S REQUEST FOR REIMBURSEMENT OF MOVING EXPENSES IS,
THEREFORE, ALLOWED.

Editor's Note: This decision has been edited for publication.

Decision of the Appeal Division

Number: 96-0727
Date: April 30, 1996
Panel: Thomas Kemsley, Patrick L. Byrne, Hilrie Reimer
Subject: Occupational Disease Adjudication — 2 Bladder Cancer

This is an appeal by J. from the findings of the Workers' Compensation Review Board dated November 5, 1992. It concerns J.'s claim for bladder cancer, which has been denied to date.

J. worked for A. Ltd. from 1956 to 1970. In March 1989, at age seventy, he was diagnosed with bladder cancer. In August 1991, J. completed an application for workers' compensation and attributed his bladder cancer to his employment at A. Ltd.

In a letter dated October 24, 1991, the claims adjudicator denied J.'s claim on the following grounds: first, the adjudicator considered Section 6(3) of the *Workers Compensation Act* (the *Act*) and noted that bladder cancer is recognized as an industrial disease listed in Schedule B of the *Act*, but said the evidence on file did not support the conclusion that J. had prolonged exposure to the chemicals listed in Schedule B so the presumption regarding work causation in Section 6(3) of the *Act* could not be applied; second, the adjudicator considered the claim under Section 6(1) of the *Act* and said J.'s estimated exposure to benzene soluble materials (B.S.M.) indicated the likelihood that his bladder cancer was due to work exposure was less than 50%; finally, the adjudicator said that, having considered all the information on file, he was unable to conclude there was sufficient evidence to establish a relationship between J.'s bladder cancer and his work activity. The claims adjudicator then said, "Furthermore, even if your claim had not been disallowed, it would not be able to be considered by the Board as per Section 55(2) of the *Workers Compensation Act*. . ." He said he was unable to identify any special circumstances which precluded J. from filing his application within the specified one year time limit.

In findings dated November 5, 1992, the Review Board allowed J.'s appeal regarding the Section 55 issue and found special circumstances existed which precluded him from making his application within the one year time limit. However, the Review Board denied the appeal on the merits and found J. had insufficient exposure to benzene

soluble materials to meet the formula in Policy #25.25 in the *Rehabilitation Services and Claims Manual* (the *Claims Manual*).

Appeal to Appeal Division

J., with the assistance of his union, filed a Notice of Appeal dated November 27, 1992 with the Appeal Division. Unfortunately, it has taken three and a half years to finally resolve this appeal. This unusually long time for an appeal was necessitated by the multiple and complex issues in this case, the Panel's request to the Occupational Disease Services of the Board to investigate further and the lengthy delay in their final reply to that request, the Panel's request for additional disclosure of material by A. Ltd. and A. Ltd.'s compliance, the Panel's request for, and disclosure of, relevant material from the Board's archives (approximately six-hundred pages), the three day oral hearing in October 1994, a change in the relevant policies of the Board during the course of this appeal, A. Ltd.'s reconsideration application to the chief appeal commissioner regarding an interim determination made by the Panel, the Panel's request to Doctor E of McGill University to respond to certain questions regarding his research into bladder cancer in aluminum smelter workers, and numerous (over fifty in total) detailed and often lengthy written submissions of counsel which included evidence, expert opinions, copies of relevant literature, and argument.

While this appeal has taken a very long time, it is an important case to J., his union, other A. Ltd. workers, and A. Ltd. Many issues have been raised in this appeal about whether or not J.'s bladder cancer is a compensable occupational disease.

Issues

The initial submissions on behalf of the worker argued that the Board had failed to conduct an independent, detailed investigation of the worker's exposure history at A. Ltd., and the worker's exposure to benzene soluble material was higher than reported by A. Ltd. A. Ltd. replied that the investigation was accurate and J.'s exposure was insufficient, according to the policy of the Board, for acceptance of his claim. Subsequently, both parties engaged legal counsel, and the issues, submissions and arguments became considerably more lengthy and complex. During the appeal, the governors amended a relevant policy, which added some difficult issues.

Independence

In his final submission, the worker's counsel raised the issue of the independence of the Appeal Division and this Panel. Thus, a preliminary issue is whether the Panel has sufficient independence to make the decision in this case.

Section 55

Even though the claims adjudicator dealt with the Section 55 issue as a secondary matter, a worker's claim must meet the requirements of Section 55(2) and (3) before the Board can consider it on its merits. The Review Board allowed the worker's appeal on this issue, and the employer did not contest that finding on this appeal. However, the worker's counsel made a submission on this point and the Appeal Division has the authority to redetermine any matter dealt with by the Review Board, so this is an issue on this appeal.

Causation

Section 6(1) of the *Act* provides for payment of compensation for occupational (formerly industrial) disease claims, where Section 6(1)(a) and (b) are satisfied. Section 6(1)(b) requires that the disease be due to "the nature of" the worker's employment. Section 6(3) and Schedule B of the *Act* create a rebuttable presumption regarding causation in certain circumstances, which is relevant to the causation requirement in Section 6(1)(b).

The first general issue on causation is whether J. is entitled to the presumption regarding causation in Section 6(3) of the *Act*. Evidence became available during the course of this appeal which indicated that at least one of the substances listed in Schedule B 4(h) (beta-naphthylamine) was detected in the workplace at A. Ltd. This issue involves consideration of the meaning of "at or immediately before the date of disablement" and "unless the contrary is proved" in Section 6(3) and the meaning of "prolonged exposure" in Schedule B 4(h). This requires consideration of Policy #25.41 in the *Claims Manual*, which the governors amended and renumbered as #26.21 during the course of this appeal. That raises the issue of the effect of policy changes made during the course of an appeal. As well, counsel argued Policy #25.25 and, later, Policy #26.21 were contrary to the *Act*, which raises the issue of the Appeal Division's jurisdiction to review policies of the governors. The worker's counsel also argued that if J.'s claim is not accepted under Section 6(3) of the *Act*, then Section 6(3) is contrary to Section 15(1) and Section 7 of the *Canadian Charter of Rights and Freedoms* (the *Charter*). Finally, consideration of this issue requires evidence about the nature and extent of J.'s exposure at A. Ltd. to the substances listed in Schedule B 4(h), and any evidence or studies which could rebut the presumption in Section 6(3).

If causation in J.'s case is not established under Section 6(3) of the *Act*, the second general issue is whether it can be established under Section 6(1)(b) of the *Act*. This requires consideration of Policy #25.25, which the governors renumbered during the course of this appeal to #30.10 but did not amend in any material way, and whether J. meets the requirements of that policy. That requires consideration of the nature and

extent of J.'s exposure to benzene soluble material, and whether the air sampling methods used at A. Ltd. and the job descriptions and average exposure ratings used to determine exposure to benzene soluble material are a reliable indicator of this worker's exposure. Counsel also raised the issue of whether Policy #25.25 (now #30.10) is consistent with the *Act* and with previous Appeal Division decisions on the standard of proof in occupational disease claims, and whether the standard in the policy is the appropriate method to determine causation in this case. Specifically, counsel questioned whether the 5.6 mg/m³ B.S.M. years cumulative exposure standard set out in Policy #25.25 (#30.10) is too high (worker's counsel) or too low (employer's counsel) for determining when a case of bladder cancer was due to the occupational exposure. The employer's counsel aggressively argued that the Appeal Division has no jurisdiction to consider the appropriateness of Policy #25.25. The worker's counsel also raised the issue of whether Section 6(1) is contrary to the *Charter*.

Disabled From Earning Full Wages

If occupational causation is established in this case, we then must determine whether J. meets the requirements of Section 6(1)(a) of the *Act*. Section 6(1)(a) provides compensation only where a worker suffers from an occupational disease and "is thereby disabled from earning full wages at the work at which he was employed. . . ." J. was seventy and retired at the time his cancer appeared and was diagnosed.

Section 99

If J.'s claim is not accepted under Section 6(1) and the above policies, his counsel argued it should be accepted pursuant to Section 99 of the *Act* and the "merits and justice" of the case. In that regard, the Panel will need to consider the relevance of material submitted by counsel, including information about the financial position of A. Ltd. and its officers.

Costs

The worker's counsel also argued the worker and his union are entitled to legal fees and costs and reimbursement of other expenses, which concerns Section 100 of the *Act*, Policies #100.40, #100.50, #100.70, #100.72 in the *Claims Manual*, and Appeal Division Decision No. 93-1687 (*Workers' Compensation Reporter*, Vol. 10, p. 211). The employer's counsel requested reimbursement for one expert opinion.

Investigation

When J. applied for compensation for his bladder cancer, the Board undertook its usual investigation. The Board asked A. Ltd. to calculate J.'s estimated cumulative exposure to coal tar pitch volatiles. Mr. W., Industrial Hygiene Supervisor at A. Ltd., calculated J.'s occupational tar exposure to have been 4 mg/m³ B.S.M. years. He said, according to the relevant studies, this level of exposure was too low to make it likely that J.'s bladder cancer was caused by his work at A. Ltd. No one at the Board investigated the calculations done by A. Ltd. Rather, a medical officer in the Occupational Health Department merely confirmed that, based on Mr. W.'s calculations and the relevant research, there was a less than 50% probability that J.'s bladder cancer was due to his work exposure.

Further, while the claims adjudicator said the evidence on file did not support the conclusion that J. had prolonged exposure to the substances listed in Schedule B 4(h), there is no evidence on file that the Board investigated, or seriously considered, this matter.

On his appeal to the Review Board, J.'s union argued that the Board had not conducted their own independent, detailed investigation as required in Policy #25.25 of the *Claims Manual*. At the Review Board oral hearing, J. gave evidence that he worked a lot of overtime in the potrooms at A. Ltd., which increased his exposure to coal tar pitch volatiles.

The Review Board found that Mr. W. at A. Ltd. had conducted a detailed investigation into J.'s job history. The Review Board did not seriously consider J.'s argument that, due to his particular jobs and overtime at A. Ltd., his exposure was higher than average. Rather, the Review Board stated, ". . . it is doubtful that any adjustments resulting from fine tuning of J.'s employment history would result in the required exposure to make his claim an acceptable one."

Policy #25.25 in the *Claims Manual* stated that, when the application of the formula in the policy gives a total exposure of less than 5.6 mg/m³ B.S.M. years, "a detailed investigation will be carried out into the worker's job history to determine whether the amount of exposure allowed by the classification referred to above is reasonable." Both the claims adjudicator and the Review Board relied on A. Ltd.'s application of the formula in Policy #25.25. Neither the claims adjudicator nor the Review Board conducted a detailed investigation into J.'s job history.

The Panel on this appeal requested the Special Unit, now Occupational Disease Services, to conduct a detailed investigation into J.'s work history at A. Ltd. That investigation noted that beta-naphthylamine was detected at A. Ltd. in 1987, but offered no opinion on whether J.'s exposure to that substance was "prolonged." The investigation also considered J.'s overtime hours, the specific jobs he did, the lack of sampling data

for the relevant period of time, and concluded, "In summary, it is not possible to determine J.'s actual exposure to C.T.P.V. [coal tar pitch volatiles]." The report also stated that J.'s exposure would exceed 5.6 mg/m³ B.S.M. years if his potlining experience was rated as a high exposure. J. and his counsel argued that this investigation did not meet the requirements of Policy #25.25, and requested an oral hearing.

The Panel requested further information from A. Ltd., including personnel and medical records of J. and more general information about sampling results at A. Ltd. and the exposure classification list used to determine individual exposures. This information provided by A. Ltd. indicated that beta-naphthylamine, listed in Schedule B 4(h), had been detected at A. Ltd. Further, A. Ltd. provided the exposure classification list, which classifies the degree of exposure to benzene soluble material per job category for approximately 26,000 job categories at A. Ltd. This document is approximately four hundred pages long. We had attempted to obtain a copy of this document from Occupational Disease Services at the Board, but they could not produce it. It appears they did not have a copy of this document even though it is crucial in the adjudication of A. Ltd. bladder cancer claims under Board policy.

The Panel also requested information from the Board about the development of Policy #25.25 and the standard used to adjudicate these bladder cancer claims. This produced voluminous material which was disclosed to the parties.

The Panel decided to hold an oral hearing, as the worker wanted an opportunity to present more information about his work history and exposure at A. Ltd., and the Panel wanted to hear evidence from A. Ltd. on the calculation of exposure levels.

At the oral hearing, J. gave evidence about his work history at A. Ltd., his work since 1970, and his smoking history. Mr. B., Supervisor of Compensation Claims Benefits at A. Ltd., gave evidence about pay periods and overtime. Mr. W. from A. Ltd. gave lengthy and detailed evidence about the exposure classification list used for determining exposure, area and personal sampling conducted by A. Ltd., comparisons between A. Ltd.'s process in B.C. and its process in Quebec, and a number of other matters. Mr. W.'s evidence was transcribed by a court reporter and amounts to about three hundred and eighty pages of sworn testimony. At the end of the hearing, the Panel requested further historical testing data from A. Ltd., which Mr. W. had referred to in the hearing.

Given the complexity of the epidemiological studies on causation of bladder cancer, the Panel requested the assistance of Doctor E at McGill University. In the 1980's, Doctor E with others had conducted research on bladder cancer cases in aluminum smelter workers in Quebec and had produced papers which were the basis of Board Policy #25.25. The Quebec Workers' Compensation Board continues to consult Doctor E on

causation in individual cases. The Panel sent a number of questions to Doctor E, who made a detailed response dated November 1, 1995.

In addition to these investigations conducted by the Panel, the parties filed extensive submissions which added considerably to the material available to the Panel.

The Panel is satisfied that it has conducted as detailed an investigation as possible into J.'s work history. Our investigation was limited though, as A. Ltd. does not retain complete records and, of course, memories fade after twenty-five to forty years. For reasons set out below, the Panel has not fully investigated the presence of the materials in Schedule B 4(h) at A. Ltd. We know that beta-naphthylamine has been detected at A. Ltd., but it appears the Board has never considered the significance of that in light of Schedule B 4(h).

Finally, the Panel has carefully considered the material relevant to the question of whether J.'s bladder cancer "is due to the nature of" his employment at A. Ltd. We have considered the model and standard set out in Policy #25.25 and compared it with the alternative models. We have also considered the other relevant arguments raised by the parties.

Analysis of Issues

Independence

In his final submission, which was supposed to be a final reply to material on epidemiology submitted by the employer's counsel, the worker's counsel raised new issues of "Objectionable Conduct" and "Is the W.C.B. and The Appeal Division Truly An Independent Quasi-Judicial Appellate Tribunal?" Under "Objectionable Conduct," the worker's counsel referred to the employer's counsel's February 8, 1996 letter "addressed to 'Mr. Thomas Kemsley' directly" and said, "This unfortunate tone has dominated the correspondence on this appeal" and, "It's unfortunate that Mr. Kemsley has been placed in such an awkward situation by [A. Ltd.] and by [the employer's counsel]."

The Panel finds this submission by the worker's counsel frivolous and vexatious. The employer's counsel was responding to a letter sent to both counsel directly by Mr. Kemsley. Usually, the Panel corresponded with the parties through the appeal officer, and the employer's counsel directed any replies from that correspondence to the appeal officer. The worker's counsel's reference to A. Ltd. having a "direct line" to Mr. Kemsley or the "unfortunate tone" which "has dominated the correspondence" does not reflect the pattern of correspondence in this case.

On the matter of the independence of the Workers' Compensation Board and the Appeal Division, the worker's counsel refers to the "chilling effect" on the Appeal Division of the attacks by the official opposition Liberal Party on the chief appeal commissioner; the British Columbia Court of Appeal Decision in *Majer v W.C.B.*; *Bill 56*, the *Workers' Compensation Amendment Act* (1995), which replaced the Board of Governors with cabinet appointed "administrators"; and the nature and tenure of the employment contracts of appeal commissioners. He concludes, "These circumstances, taken together, create the real danger that "politics" decides issues and cases, rather than law, a danger endemic to the W.C.B., according to many long-time observers."

There is no doubt the W.C.B., like many administrative agencies, is not completely isolated from "political" attention. While administrative agencies are set up to be, primarily, independent of government, they are, unlike the courts, part of the administrative branch of government. However, that does not mean these administrative agencies lack independence, and the courts have acknowledged the difference between administrative agencies and the courts in considering questions of independence and apprehension of bias. Within that context, the principles of independence and unbiased decision-making apply to adjudicative administrative tribunals.

Worker's counsel says the W.C.B. is not truly independent of the Provincial Government and the Appeal Division is not truly independent of the W.C.B. It is unclear what goal worker's counsel seeks with this argument. He does not say the Appeal Division lacks sufficient independence to hear this case, nor does he cite any judicial decision which says the lack of complete independence is grounds to disqualify a tribunal from hearing a case. He says this raises a legal issue, but he makes no argument for any remedy or action. Thus, while the worker's counsel raises the issue of independence and notes the obvious "political" context in which the W.C.B. operates, his arguments seem more "political" than legal.

This Panel is aware of the political context in which the Workers' Compensation Board, the chief appeal commissioner and Appeal Division operate. However, we are unaware of any court decision which says that political controversy about an administrative agency or tribunal fatally compromises the independence of the agency or tribunal. There may be situations in which this could occur, but each situation must be considered on its own facts. In this case, this Panel of the Appeal Division considers the public attacks on the chief appeal commissioner and the government's alteration of the governance system in the *Act* do not create a reasonable apprehension of bias in the Panel nor a lack of independence in the Panel sufficient to prevent the Panel from hearing and deciding the issues. We have reviewed the Supreme Court of Canada decision in *Canadian Pacific Ltd. v Matsqui Indian Band*, [1995] 1 S.C.R. 3 in this regard, although that concerned different facts than those alleged here.

While the worker's counsel says there is a real danger that politics, rather than law, will decide the case, we are satisfied we are able to make the decision in this case in accordance with the *Workers Compensation Act*, the published policies of the governors, and any other applicable law. We are satisfied that "politics" will not influence the Panel in this case.

Section 55

J. ceased working at A. Ltd. in 1970. He was diagnosed with bladder cancer in March 1989, and completed an application for compensation approximately twenty-nine months later, in August 1991. The claims adjudicator said he would have denied J.'s application under Section 55(2) of the *Act*, as his application for compensation was filed more than one year after the date of injury, death or disablement from an industrial disease as then required by Section 55 of the *Act* (now amended). The claims adjudicator was unable to identify any special circumstances which precluded J. from filing an application within the specified time.

The Review Board allowed J.'s appeal on this point as his bladder cancer was not diagnosed until "20 years" after he left A. Ltd. and J. was unaware of recent Board policy which provided for acceptance of bladder cancer claims from exposure to coal tar pitch. Further, he was not in a position to have any knowledge of recent medical studies linking bladder cancer with coal tar exposure or that other workers from A. Ltd. had had claims accepted for bladder cancer.

We agree with the Review Board on this issue. Around 1987, the Board developed a policy for the adjudication and acceptance of bladder cancer claims in A. Ltd. workers. That policy was based on research results published in the 1980's. J. retired in 1970 and there is no evidence he was aware of the Board policy, the research, or cases of other A. Ltd. workers whose claims for bladder cancer had been accepted for workers' compensation benefits. We find this satisfies the requirement in Section 55(3) of "special circumstances which precluded the filing of an application" within the specified time. Therefore, we confirm the Review Board decision on this point.

Causation

Section 6(3) and Schedule B

Section 6(3) of the *Act* establishes a rebuttable presumption regarding causation in cases where the relevant provisions in Schedule B are satisfied. J. has bladder cancer and there was evidence that, while he was employed at A. Ltd., he was exposed to at least one of the substances listed in Schedule B 4(h) of the *Act*. These provisions state:

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

...

Schedule B

4. Cancer:

(h) Primary cancer of the epithelial lining of the urinary bladder, ureter or renal pelvis

Where there is prolonged exposure to beta-naphthylamine, benzidine, or 4-nitrodiphenyl.

Analysis of “At or Immediately Before the Date of Disablement”

The first issue is whether J.’s exposure to any of the substances in Schedule B 4(h) occurred “at or immediately before the date of disablement” from his bladder cancer. J. retired from A. Ltd. in 1970. In 1989, he was diagnosed with primary cancer of the epithelial lining of the urinary bladder (bladder cancer). According to his evidence, his first symptoms of bladder cancer appeared shortly before he sought medical attention for it in 1989. Thus, nineteen years elapsed between the time he stopped work at A. Ltd. and the diagnosis and any disablement from his bladder cancer.

This issue was complicated by a change in the relevant policies of the governors during the course of this appeal. Prior to 1995, Policy #25.41 in the *Claims Manual* discussed the presumption in Section 6(3) and stated:

. . . The words “immediately before” are intended to deal with those situations where someone who has been employed for a long period of time in the applicable process or industry under Schedule B, and who has left that employment a very short time prior to the onset of the related disease or injury, might still be entitled to compensation.

Under that interpretation, the gap of nineteen years between J.’s retirement from A. Ltd. and the appearance and diagnosis of his bladder cancer would not meet the requirements of Section 6(3).

J.’s counsel argued that “at or immediately before” should be interpreted to include known latency periods. He argued the legislative intent was not to render Section 6(3) and Schedule B inapplicable if the worker left the industry. He argued that would affect many people and would be contrary to Section 99 of the *Act*. He argued it was meaningless if the worker needed “prolonged” exposure under Schedule B 4(h) and also still had to be working in the industry when his disease appeared. He said it was absurd for a worker to be worse off for leaving an industry out of fear of getting an occupational disease, than if he stayed and continued his exposure. He said the employer cannot escape responsibility just because conditions were so bad that workers quit. The worker’s counsel also argued that the “date of disablement” is open to interpretation, as “disablement” is not defined in the *Act*. He referred to the requirement of a large and liberal interpretation of Section 6(3) in favour of workers, consistent with the general purpose of the *Act*. He also gave notice to the Attorneys-General of Canada and British Columbia of a constitutional challenge to Section 6(3) and said, if it was determined J. did not meet the requirements of Section 6(3) of the *Act*, that section was contrary to Section 15(1) and Section 7 of the *Charter*.

The employer’s counsel focused on the words “at or immediately before” and Policy #25.41 which referred to a “very short time.” He said both the *Act* and policy are clear and unambiguous, and do not include a gap of nineteen years. He also said the legislative intent in Section 6(3) was to create a presumption based on a “proximity” requirement, and if that is not satisfied in a particular case, the case is then adjudicated under Section 6(1). He said Section 99 cannot override the clear language of Section 6(3) and the Appeal Division cannot change Section 6(3) of the *Act*. He argued the legislative intent was clear and unambiguous — to limit the presumption in Section 6(3) to a very short time as set out in Policy #25.41. Finally, he said the worker’s counsel provided no reasons on the *Charter* issue and it was not a serious argument.

In November 1994, after counsel made the above submissions, the Panel advised the parties that, as a preliminary matter, it had decided Section 6(3) was not applicable to this case and Section 6(3) was not contrary to the *Charter*. The Panel said there was no need for the parties to make further submissions on the other issues which would arise if causation was being adjudicated under Section 6(3) of the *Act*. Shortly after, the Panel received a copy of governors' Policy #26.21, which replaced #25.41. This policy gave an extended interpretation to "at or immediately before the date of disablement":

. . . The words "immediately before" used in Section 6(3) are intended to deal with those situations where someone has been employed in the process or industry described in the Schedule, and has left that employment a very short time prior to the onset of the disease. An exception to this is where the medical and scientific evidence has established that there is a long latency period between exposure to the process, agent or condition of employment and the time the disease first becomes manifest. Individual judgment must be exercised in the circumstances of each claim to determine the meaning of "immediately before" having regard to the medical and other evidence available. For example, the manifestation of an infection caused by staphylococcus aureus or of a respiratory irritation resulting from the inhalation of an irritant gas can be expected to occur within a short period of time following the relevant exposure. In the circumstances of such a claim, the presumption would normally be considered only where the condition became manifest within a short period of time following the exposure. However, in a claim filed by a worker who suffers from a recent onset of a cancer listed in Schedule B but who has not worked in the process or industry described opposite such cancer for a number of years, it may be appropriate to conclude that such worker was employed in such process or industry "immediately before the date of disablement" by virtue of the long latency period which is known to exist with respect to such a cancer.

The Panel provided this new policy to the parties and asked for further submissions. A. Ltd. sought a reconsideration of the Panel's decision to continue with this issue, and argued the Panel had made a final determination on the Section 6(3) issue and had no jurisdiction to reconsider its own decision. After receiving submissions from the parties, the chief appeal commissioner in Decision No. 95-0377 determined the Panel had not made a final determination on the Section 6(3) issue and could proceed to consider the effect of the change in the governors' policy.

Counsel then made further submissions to the Panel. The employer's counsel said Policy #26.21 was an unlawful interpretation of Section 6(3) of the *Act* and, in any

event, could not be applied retroactively in this case. He argued the Appeal Division has the authority to declare policies of the governors unlawful, and said the words “at or immediately before” cannot reasonably bear an interpretation which includes long latency periods. He said those words had remained the same since the *1916 Act* and could not be changed through policy.

The worker’s counsel argued the new policy was lawful, and the previous policy had been unlawful as it interpreted Section 6(3) too narrowly. He emphasized the requirement in Section 99 of the *Act* to decide on the “merits and justice” of the case, and the nature of the “no-fault” compensation system. He argued it was not retroactive to apply Policy #26.21 to J.’s case and pointed to *Decision No. 36* of the governors entitled “Retroactivity of Policy Changes.” The worker’s counsel again made arguments about the interpretation of “disablement” and said J. likely developed the disease while he was working at A. Ltd.

Finding on “At or Immediately Before the Date of Disablement”

We find it is not viable in this case to interpret the words “at or immediately before the date of disablement” to include the gap of nineteen years between the end of J.’s employment with A. Ltd. and the appearance of his bladder cancer. It may be appropriate, and even desirable, to give workers the benefit of the presumption in Section 6(3) whenever disablement from an occupational disease listed in Schedule B occurs within the known latency period for the relevant occupational exposure. However, we find that cannot be accomplished here by policy given the language of Section 6(3) of the *Act*.

The “at or immediately before” provision in the presumption clause was first introduced in the *British Columbia Act* in 1916, and in the *Ontario Act* in 1914. The requirement of “immediately” was removed from the *Ontario Act* in 1984, which now requires the relevant industrial exposure to be “at or before the date of the disablement” for the benefit of the presumption. There has been no similar amendment to the *British Columbia Act*.

The *Concise Oxford Dictionary*, (8th Edition, 1990) defines:

Immediately

1. without pause or delay.
2. without intermediary.

Blacks Law Dictionary, (6th Edition), defines:

Immediately:

Without interval of time, without delay, straightway, or without any delay or lapse of time. . . . When used in contract is usually construed to mean “within a reasonable time having due regard to the nature of the circumstances of the case,” although strictly, it means “not deferred by any period of time. . . .” The words “immediately” and “forthwith” have generally the same meaning. They are stronger than the expression “within a reasonable time” and imply prompt, vigorous action without any delay. . . .

Thus, the usual meaning of “immediately” focuses on the factor of time — “without delay,” although a second meaning considers other intervening events — “without intermediary.” Policy #26.21 says individual judgment must be exercised in each case to determine the meaning of “immediately before.” It then refers to a cancer with a long latency period — which concerns only the time factor. The policy does not consider other intervening events or potential exposures.

The words “immediately” or “immediate” appear eight other times in the *Act*. Section 8(1) deals with compensation for workers working outside of British Columbia, and Section 8(1)(d) imposes a requirement that the worker’s employment out of the province “has immediately followed his employment by the same employer within the province and has lasted less than six months. . . .” Policy #112.13 of the *Claims Manual* says that “immediately” in Section 8(1)(d) “can mean “without intervening employment” as well as considerations of time.” Section 17(3) of the *Act* sets out the Board’s obligation, in fatal cases, to pay certain compensation “immediately,” and Policy #55.32 in the *Claims Manual* appears to interpret that as without delay. Section 17(11) contains “immediately” and Section 21(3) contains “immediate,” but there is no corresponding policy interpretation. Section 54(3) of the *Act* sets out the requirement on employers to report the death of a worker “immediately” to the Board, and Policy #94.10 in the *Claims Manual* appears to interpret that to mean with no delay. Sections 70(1)(c) and 74(1) set out the Board’s authority to order an employer to “immediately” close down the employment in certain situations, but there is no corresponding policy. Finally, Section 71(3) concerning inspections sets out the requirement of the Board officer to “immediately” after each inspection visit furnish and cause to be posted certain notices, but “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.” Prevention Division Policy #1.3.3-1 says orders are to be issued the same day, or if that is not practical, the next working day, and Industrial Health & Safety Regulation #2.14 says reports must be posted “forthwith”.

Thus, with the exception of Policy #112.13, the words “immediately” or “immediate” in the *Act* are interpreted to refer to a short period of time. Policy #112.13 interprets Section 8(1)(d) of the *Act* to include considerations of time and other intervening em-

ployment. Under that policy, a gap in the worker's employment with the same employer will be ignored for Section 8(1)(d) if there was no intervening employment.

Some of the literature indicates there is a minimum latency period of ten years for bladder cancer caused by exposure to benzene soluble materials. However, since some potential causes of bladder cancer are unknown, it is not possible to know whether this minimum latency period applies to all causes of bladder cancer. Further, J.'s cancer appeared nineteen years after his employment at A. Ltd. Thus, even if there was a known minimum latency period of ten years for all causes of bladder cancer, J. still had potential relevant exposure for nine years after leaving A. Ltd.

This issue also raises the question of the standard of review applied by the Appeal Division to policies of the governors. Appeal Division decisions have referred to the authority of the Appeal Division to determine whether policies of the governors are contrary to the *Act*, and have also stated that deference will be applied to policy decisions of the governors, given the policy-making authority delegated to the governors in the *Act*. The Appeal Division previously has determined a governors' policy will not be contrary to the *Act* if it is a viable interpretation of the *Act*; therefore, governors' policy does not have to be the best or most reasonable interpretation of the *Act* to be given deference by the Appeal Division.

In this case, however, we find it is not viable to interpret "immediately" in Section 6(3) of the *Act* to include a gap of nineteen years between the end of the potential occupational exposure and the onset of the bladder cancer. The usual or normal meaning of "immediately" refers to a short period of time. Another possible meaning of "immediately" connotes no intervening events. The nineteen year time gap in this case does not meet either of those interpretations. That is, unlike Policy #112.13, Policy #26.21 does not interpret "immediately" as meaning either a very short time or a longer time provided there were no relevant intervening events. Policy #26.21 simply extends the time factor without consideration of other relevant factors.

We find the clear and unambiguous meaning of the word "immediately" in Section 6(3) does not include the nineteen year time gap in this case. As noted, that requirement has remained in the *Act* since 1916, and we find it cannot be effectively removed by policy.

We also find that "date of disablement" in Section 6(3) cannot be interpreted in such a way to find that the date of disablement in this case occurred at the time J. stopped work at A. Ltd. We cannot see how "disablement" could retroactively be deemed to have occurred nineteen years prior to the appearance of any symptoms of his bladder cancer. Therefore, we cannot ignore the nineteen year gap here.

The worker's counsel also argued that the *Charter* applies to the *Workers Compensation Act* and, if J.'s claim is not accepted under Section 6(3), that section discriminates

against occupationally diseased workers who leave the exposure prior to the date of disablement. We agree the Appeal Division has jurisdiction to consider *Charter* arguments, see Appeal Division Decision No. 93-1222 (*Workers' Compensation Reporter*, Vol. 10, p. 53). However, counsel's substantive argument on discrimination was a mere assertion with virtually no reasons or authorities cited in support. We are unable to find Section 6(3) of the *Act* discriminates against J. contrary to Section 15(1) of the *Charter*. We also find no support for counsel's assertion that Section 6(3) is contrary to Section 7 of the *Charter*.

We further find that Section 99 and the "merits and justice of the case" are not relevant to the interpretation of the word "immediately" in Section 6(3). Section 99 would apply only to the adjudication on the particular facts of the case. J.'s case does not fit within a viable definition of "immediately," and Section 99 cannot change the clear meaning of that word.

In light of our finding here, it is not necessary for us to decide whether Policy #26.21 can be applied retroactively.

The submission on behalf of the worker appears, in part, to distort the true purpose of Section 6(3). That submission suggests Section 6(3) creates entitlement to compensation for occupational diseases. However, Section 6(3) creates only a rebuttable presumption which is relevant to the causation requirement in Section 6(1)(b). Even if Section 6(3) is satisfied, a worker is not entitled to compensation for an occupational disease unless he or she meets the other requirements of Section 6(1) as well. If Section 6(3) is not applicable in a particular case, the worker is still entitled to have their entitlement to compensation considered under Section 6(1). While Section 6(3) makes that easier in some cases, all workers must satisfy Section 6(1) in order to be entitled to compensation for occupational diseases which are not otherwise specifically provided for in Sections 6 or 7 of the *Act*. Therefore, while J. is not entitled to the presumption in Section 6(3), we must still consider his claim for bladder cancer under Section 6(1) of the *Act*.

Section 6(1)(b)

As we have found the presumption in Section 6(3) does not apply, we must decide the question of causation under Section 6(1)(b) without any presumption for or against the worker. Section 6(1) of the *Act* provides:

6. (1) Where
 - (a) a worker suffers from an occupational disease and is thereby disabled from earning full wages at the work at which he was employed or the death of a worker is caused by an occupational disease; and

- (b) the disease is due to the nature of any employment in which the worker was employed, whether under one or more employments,

compensation is payable under this Part as if the disease were a personal injury arising out of and in the course of that employment. A health care benefit may be paid although the worker is not disabled from earning full wages at the work at which he was employed.

Scope of Inquiry

The Board's Policy #25.25 of the *Claims Manual* was strictly applied by the claims adjudicator and the Review Board. However, there are several factors which made us question the application of the Board's policy in the adjudication of bladder cancer claims. For example, based on the same research and the same general industrial process involving the same employer, the Quebec Workers' Compensation Board (C.S.S.T.) uses substantially different criteria. In 1988, Doctor I, PhD, Claude Tremblay, MSc, and Gilles Thériault, MD, DrPH published a paper entitled, "Compensating Bladder Cancer Victims Employed in Aluminum Reduction Plants." According to that paper the Quebec Workers' Compensation Board accepts bladder cancer cases from aluminum smelter workers who have a cumulative exposure of $19 \mu\text{g}/\text{m}^3$ B.a.P. years (or about $2.4 \text{ mg}/\text{m}^3$ B.S.M. years). In contrast, the B.C. Workers' Compensation Board policy accepts cases at an exposure of $5.6 \text{ mg}/\text{m}^3$ B.S.M. years. Further, the research on which the Board's policy is based suggests several causation models. The Board did not choose the model that the researchers suggested was the best causation model.

The parties were notified that we intended to determine whether the standard in Policy #25.25 met the requirements of the *Act*. The employer's counsel argued that we must strictly apply Policy #25.25 and attempted to block any further inquiry:

In our submission, the *only* jurisdiction which the Appeal Division has in this appeal, with respect to the application of Section #25.25 of the *Claims Manual*, arises from point #5 of that policy:

Where the application of the above formula gives a total exposure of less than $5.6 \text{ mg}/\text{m}^3$ years or the information required to apply the formula is not available, a detailed investigation will be carried out into the worker's job history *to determine whether the amount of exposure allowed by the classification referred to above is reasonable*. If, following this investigation, it is concluded that the total exposure was less than $5.6 \text{ mg}/\text{m}^3$ years, it will be considered that there is a less than 50% probability of the condition be-

ing caused by the exposure and that the claim is not an acceptable one. (emphasis added)

As can be readily seen, the above excerpt of Section #25.25 does not provide the Appeal Division with any authority to consider the appropriateness of the standard of 5.6 mg/m³ years. The authorization of any such review lies solely within the discretion of the Governors of the Board. In fact, it would appear that [worker's counsel] has also recognized this point in his March 18, 1993 letter to [the union] (which was subsequently submitted to the Appeal Division) on page 5:

Finally, I think the Union should openly and firmly repudiate *Manual* Policy #25.25 with the B.C. W.C.B. and ask the Board of Governors' Industrial Diseases Sub-Committee to review, amend or scrap it.

A copy of this letter is being forwarded to the chief appeal commissioner and to the chairman of the Board of Governors (whom we would request circulate this letter to all of the governors). If the Appeal Division Panel does not on its own initiative withdraw from its intended inappropriate intrusion into this appeal, we would request the chief appeal commissioner to direct the Panel to limit its consideration to the issues which are within its jurisdiction (as discussed in this letter). Failing such a direction from the chief appeal commissioner, in our submission it is the responsibility of the Board of Governors (in their supervisory role over the Appeal Division) to immediately direct the chief appeal commissioner and the Appeal Division Panel to refrain from considering any issue concerning Section #25.25 of the *Claims Manual* other than that identified in point #5 of that section .

We were not contacted by either the chief appeal commissioner or any of the governors concerning this matter. Further, any such intervention might have affected the independence of this Panel. In addition the worker's counsel said he did not support the employer's position here. Finally, the employer's counsel said the Appeal Division had the authority to find policy contrary to the *Act* when Policy #25.41 was changed to allow the word "immediately" in Section 6(3) to include long latency periods.

Our authority to determine the viability of policy or whether to apply the policy in an individual case is not found in Policy #25.25, or in other Board policy. Our authority is grounded in the *Act*. While it is clear the governors have the responsibility to make policy, the role of the Appeal Division in individual appeals is to interpret and apply the policies and the *Act*. However, the *Act* is paramount. Inasmuch as the employer

interprets the bladder cancer policy as restricting the evidence we can hear in this case, we would find the policy in conflict with Section 99 of the *Act*. However, our view is that the policy does not specifically restrict consideration of all relevant evidence. Governors' Policy #96.10 (Precedent and Policy) in the *Claims Manual* provides:

. . . there is the obligation on the Board to decide each case in accordance with its merits and justice and the right of individual persons affected under the rules of natural justice to present argument and evidence on their own behalf. Therefore, regard must always be had to the particular circumstances of each claim to determine whether an existing policy should be applied or whether there are grounds for a change in or departure from a policy. There will also be situations arising from time to time which are not covered by existing policy.

The Board's obligation to decide each case in accordance with the merits and justice of a case is grounded in Section 99 of the *Act*. The Appeal Division's general approach to the application of policy is set out in Appeal Division Decision No. 91-1085 (*Workers' Compensation Reporter*, Vol. 8, p. 13):

The Board's Practice and Fettering of Discretion

A general principle in administrative law is that administrative bodies must not fetter their discretion. In other words, a body entrusted with a discretion must not disable itself from exercising its discretion in individual cases by adopting a fixed rule of policy. As summarized by Jones and de Villars in *Principles of Administrative Law* (Vancouver, 1995):

. . . the existence of discretion implies the absence of a rule dictating the result in each case; the essence of discretion is that it can be exercised differently in different cases. (at p. 137)

Or, as stated by Lord Denning M.R., in *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997 at 1008 (H.L.), the Board ought not to make up its mind in advance.

This principle is, however, sensibly applied. It does not bar administrators from formulating policies in advance to guide their determination of particular types of application. Such policies may themselves engender administrative justice by ensuring greater consistency

of decision-making. If properly announced, they may prove of great value to citizens planning their affairs.

What this principle tries to prevent, however, is the failure to exercise discretion by the purely mechanical application of a general policy without any willingness to consider any special circumstances of the individual case that might warrant departure from the general policy.

In *British Oxygen Co. Ltd. v. Minister of Technology* [1971] A.C. 610 (H.L.), a leading decision of the House of Lords, Lord Reid stated explicitly at p. 625 that there can be no objection to the formulation of “a policy so precise that it could well be called a rule. . . provided the authority is *always willing to listen to anyone with something new to say*. . . (emphasis added).” The Supreme Court of Canada adopted a similar position in *Capital Cities Communication Inc. v. Canadian Radio-Television Commission* [1978] 2 S.C.R. 141. Both cases suggest that guidelines, policies and rules cannot be so rigid as to deny an affected party the opportunity to question them and their applicability to the individual case.

The case law on fettering of discretion provides numerous examples of courts striking down policies where there was never any inquiry into or consideration given to the situation of the person aggrieved by the official charged with discretionary powers. See, for instance, *Lloyd v. Superintendent of Motor Vehicles* (1971) 20 D.L.R. (3d) 181 (B.C.C.A.); *Lewis v. B.C. Supt. of Motor Vehicles* (1979) 18 B.C.L.R. 305 (S.C.); *Dep-tuck v. Law Society of Sask.* [1985] 2 W.W.R. 433 (Sask. C.A.).

Admittedly, in *Western Forest Products Ltd. v. Workers' Compensation Board* (1983) 8 Admin. L.R. 43, the B.C. Supreme Court upheld a general policy of the Workers' Compensation Board that an experience rating is not transferable if the ownership of the employer changes. This decision appears to relax considerably the judicial test for fettering. It is significant, however, that in rendering her decision, Madam Justice Proudfoot emphasized the existence of a privative clause in the legislative scheme. Her reasoning suggests that her conclusion on the issue of fettering of discretion was influenced by the fact that the impugned policy was within the protection of a privative clause.

It is also noteworthy that, in weighing the advantages of allowing administrative bodies to formulate policies, Madame Justice Proudfoot stated that:

The petitioner cannot successfully argue that the board had established a pre-existing policy and that was enough to fetter their discretion. It is far more beneficial for a tribunal to develop policy guidelines for the sake of consistency rather than dealing on an ad hoc basis, *providing the guidelines still allow flexibility and consideration of the merits*. For the case at Bar, the board considered the merits. (emphasis added)

The Appeal Division need not adopt the test for fettering as formulated in the context of judicial reviews where the courts have had to give regard to the existence of a privative clause. The Appeal Division is not constrained by this conclusion.

In light of the general principle against the fettering of discretion, I have come to the conclusion that the proper way to view a policy or rule such as the Board's practice is as a default rule. The Board must give parties affected by this default rule the opportunity to rebut it. Where there is some dispute as to the applicability of the default rule to a particular set of circumstances, there should be some investigation into the nature of the operation or the firm that is being assessed. The Board cannot "shut its ears" to a disagreement as to the applicability or fairness of the default rule in a particular case.

We find that neither the policies nor the *Act* restricts our ability to look at all of the evidence concerning causation in this case. All relevant evidence must be weighed in determining the question of causation.

Bladder Cancer in Aluminum Smelter Workers

The employer has operated an aluminum smelter in British Columbia since about 1954. The employer's production of aluminum is referred to as a vertical stud Soderberg process. Aluminum is derived from alumina by a reduction process which involves electrolytic decomposition of the alumina into metallic aluminum and gaseous oxygen. The electrolytic cell in which reduction takes place is called the pot and the buildings containing the pots are called the potrooms. Workers in the potrooms are exposed to a number of air contaminants such as fluoride, sulfur dioxide, carbon monoxide, carbon and coal-tar pitch volatiles (C.T.P.V.).

Coal tar pitch volatiles contain a number of components. One part of C.T.P.V. is the material that is soluble in the solvent benzene. This fraction of the C.T.P.V. is referred to as the benzene soluble material (B.S.M.). The B.S.M. itself contains at least thirty

different polycyclic aromatic hydrocarbons (P.A.H.), as well as several amines and other compounds. One of the P.A.H.s in the B.S.M. is benzo-a-pyrene (B.a.P.).

Prior to 1986, studies had found an excess of bladder cancer at an aluminum smelter in Quebec. The excess risk was among the potroom workers and was related to the duration of employment in the potrooms. The authors thought the excess was "most likely to be due to exposure to coal-tar pitch volatiles, given off from the anodes in the Soderberg electrolytic reduction process." In 1986 Doctor I, P.h.D., Claude G. Tremblay, M.S.c., Diane Cyr, M.A., Gilles P. Thériault, M.D., D.r.P.H., C.S.P.Q., published a research paper entitled, "Estimating the relationship between exposure to tar volatiles and the incidence of bladder cancer in aluminum smelter workers," *Scand J. Work Environ Health* 12 (1986) 486-493, [the 1986 Quebec paper].

The authors of the 1986 Quebec paper conducted a case control study at an aluminum smelter in Quebec. They looked at bladder cancer cases in relation to a number of different exposure indices. The authors found that cumulative exposure to B.S.M., cumulative exposure to B.a.P. and "years worked in the potroom" were all "highly statistically significant" in relation to bladder cancer. However, the authors did not recommend "years worked in the potroom" as a causation model:

. . . Although years spent in the potroom is as effective a predictor of observed bladder cancers as the B.S.M. or B.a.P. indices (judged by likelihood ratio), it is unlikely to be useful for predicting risk in the future or in other smelters, since, where environmental conditions differ, risk per year exposed is unlikely to be the same.

The B.S.M. Model

The authors of the 1986 Quebec paper found a linear relationship between cumulative B.S.M. exposure and the relative risk of developing bladder cancer. The authors determined worker exposure to B.S.M. in the following way:

The time-weighted average (T.W.A.) concentrations of B.S.M. were estimated for each of 297 groups of occupations by industrial hygienists working at the plant. The estimates were based on routine air measurements going back to the 1950s. Where concentrations had changed over time, separate estimates were made for each quinquennium. All environmental sampling was for particulate solids; therefore gaseous hydrocarbons were excluded. Mostly personal sampling has been carried out since 1972, and stationary sampling before then. Estimates of T.W.A. concentrations based on the stationary samples accounted for the differences observed between these and the

personal samples in the overlap period. For time periods for which no measurements relating to a job were made, estimates were extrapolated from those for later time periods and other jobs, changes in anode material, operating conditions, and building ventilation being taken into account.

The results are set out in figure 1B at page 489 of the 1986 Quebec paper. For a cumulative exposure of about 5.6 mg/m^3 B.S.M. years the results show a relative risk of 2. The 1986 Quebec paper showed that at an exposure of 5.6 mg/m^3 B.S.M. years there was a range of relative risks between 1.39 and 3.30, within the 95% confidence interval. Doctor E was asked by the Panel whether there is, “. . . a greater probability that the true relative risk for an exposure of 5.6 mg/m^3 years B.S.M. is 2 rather than any other relative risk between 1.39 and 3.30?” Doctor E answered:

Bias is a statistical property of *point estimates*. We discussed possible biases in our point estimates (such as 5.6), due, for example, to systematic error in exposure measurements, in the 1986 paper. A confidence interval is not a point estimate, and so cannot be said to have bias.

Under the standard (frequentist) statistical approach, we cannot make probability statements about the “true relative risk.” The method we used was based on a technical concept known as “likelihood.” The estimate of a risk of 2 at 5.6 mg/m^3 was found to have the highest likelihood, given our data, and likelihood declined in curves as we moved away from this value in either direction, reaching points conventionally regarded as importantly lower at the 95% confidence limits (1.39 and 3.30). This is technically not the same as making an equivalent statement about *probability*. To do so would require one to specify one’s views about likely risks prior to carrying out the study, under the “Bayesian” statistical approach. The 95% confidence interval has the property that if you repeat the analysis 100 times on 100 different samples of the source population, the true risk will lie on average within 95 of the 100 intervals calculated. . . .

. . . The solid line is the best estimate of the risk. As explained in Question 4, all the other estimates within the 95% confidence interval carry less likelihood than the risk expressed by the solid line.

The solid line shows a relative risk of 2 at a cumulative exposure of 5.6 mg/m^3 B.S.M. years. Thus, the 1986 Quebec paper proposed a model of causation for bladder cancer in which the best estimate of a relative risk of 2 was at a point where workers had a cumulative exposure of about 5.6 mg/m^3 B.S.M. years. The paper also set out the

relative risks for other cumulative B.S.M. exposures but, as will be seen, a relative risk of 2 has particular significance in this case.

The B.a.P. Model

The authors of the 1986 Quebec paper found a linear relationship between cumulative exposure to B.a.P., measured in $\mu\text{g}/\text{m}^3$ B.a.P. years and the relative risk of developing bladder cancer in aluminum smelter workers. The authors determined worker exposure to B.a.P. in the following way:

As B.a.P. measurements were available only from 1976 on, the estimates of B.a.P. were made indirectly. First, an estimate of the proportion of B.a.P. exposure in B.S.M. (B.a.P.:B.S.M. ratio) was obtained from B.a.P. and B.S.M. measurements made between 1976 and 1983 for each of 9 broad occupational groups. Second, these proportions were used to convert the B.S.M. concentrations, including those relating to the period before 1976, to B.a.P. concentrations. This procedure implicitly assumes that the B.a.P.:B.S.M. ratio did not change over the time of operation of the smelter. The assumption could not be tested empirically, but, since the processes did not change qualitatively, it is likely that the B.a.P.:B.S.M. ratios were fairly constant.

The B.a.P.:B.S.M. ratio varied for different occupations at the Quebec smelter and the individual values are set out in the 1986 Quebec paper. The authors found the best estimate of a relative risk of 2 was at a cumulative exposure of $43.48 \mu\text{g}/\text{m}^3$ B.a.P. years.

The authors preferred the B.a.P. model over the B.S.M. model for estimating relative risk:

B.S.M. is an estimate essentially of all tar exposure. B.a.P. was used in addition to B.S.M. not because it was thought that B.a.P. itself was likely to be the actual causal agent, but in the hope that it might be better correlated to the causal agent(s) than B.S.M. overall. In particular, B.a.P. is often taken as an indicator of total P.A.H. More than 30 different P.A.H. have been identified in the work environment in aluminum smelters, many of them known to be carcinogenic in animals. However, the most plausible agents for bladder carcinogenesis known to be present in tar volatiles appear not to be the P.A.H. but the aromatic amines (in particular 2-naphthylamine), which have been associated with bladder cancer in animal and human studies. The relation of concentrations of aromatic amines to B.S.M. and B.a.P. is not known. . . .

Fitting a model with both B.a.P. and B.S.M. gives a likelihood ratio of 27.6 (compare 22.3 for B.S.M. alone), giving a formal likelihood ratio test for B.a.P. accounting for B.S.M. of 5.3 on 1 df ($p < 0.02$). Thus there is some empirical evidence in these data that B.a.P. is a better indicator of bladder cancer risk than B.S.M., but this evidence is not strong enough to be conclusive. . . .

We have mentioned many uncertainties and limitations in the models which we have estimated from our data, suggesting caution in predicting risks from them. However, partial ignorance is no excuse for avoiding the important practical question of what risk follows from what exposure. In the preceding discussion we argued that, for prediction, the linear model assuming a 10-year minimum latency be preferred. . . .

We have commented that we are particularly cautious in predicting risk from B.S.M. exposure. An alternative to using the model for B.S.M. directly in predicting risk for a B.S.M. concentration in a given environment is to estimate an average proportion of B.a.P. in B.S.M. in that environment and use the B.a.P. model.

(references deleted)

The Cancer Control Agency of B.C. Study

In October 1989 the Cancer Control Agency of B.C. published a report entitled the "Mortality and Cancer Incidence in workers at the Alcan Aluminum Plant in Kitimat, B.C.," by John Spinelli, M.S.W.c., Pierre Band, M.D., Richard Gallagher, M.A., Diane Oleniuk, Laurence Svirchev, O.H.S.T. This was a retrospective cohort study which had the following objectives:

The primary objectives of the study were to determine:

- 1) whether workers at the [A. Ltd.'s] aluminum plant in Kitimat, B.C. are at increased risk of:
 - a) cancer incidence or mortality,
 - b) mortality from causes other than cancer,
- 2) whether there is a relationship between mortality or cancer incidence from specific causes and exposure to coal tar pitch volatiles (C.T.P.V.).

The secondary objectives were to determine:

- 1) whether there is a relationship between mortality or cancer incidence from specific causes and exposure to electro-magnetic fields (E.M.F.),
- 2) whether specific occupational groups within the plant had increased mortality or cancer incidence from specific causes.

Although the study looked at the mortality and cancer incidence in relation to a number of different contaminants, in this appeal, we are concerned with bladder cancer. The results of the study with regard to bladder cancer are as follows:

The primary finding of this research study is the elevated incidence rate of bladder cancer in the cohort, and the trend toward larger risk with greater lifetime exposure to C.T.P.V. This finding confirms the results of Doctor E et al (1981, 1983) who found an elevated bladder cancer risk in aluminum potroom workers in Quebec. Anderson et al (1982), Rockette and Arena (1983) and Gibbs (1985) also found elevated bladder cancer rates, but in each case the excess was non-significant.

The observed trend of bladder cancer risk with C.T.P.V. exposure confirms the results of the re-analysis of Doctor E's data by Doctor I et al (1986). The observed 5-fold risk for workers with high cumulative C.T.P.V. exposure (10 or more B.S.M. years) corresponds with the risk predicted from Doctor I's model of 4.5 for a worker with 20 B.S.M. — years of exposure.

The trend of increasing risk for bladder cancer with increasing C.T.P.V. exposure was not due to smoking and did not vary when different latent intervals were utilized. It is difficult, if not impossible, to determine the latency period to onset of disease or mortality from an epidemiological study. It is likely that latency from exposure to disease varies from individual to individual.

Worker exposure to coal tar pitch volatiles (measured as B.S.M.) was estimated in the following way:

A joint committee of union and company members were formed to assign exposure to coal tar pitch volatiles (C.T.P.V.) and electro-magnetic fields (E.M.F.). The committee included company industrial hygienists and union health and safety representatives. They assigned

a level of exposure to C.T.P.V. and determined whether there was exposure to E.M.F. for each job identified from the employee records. The time period of plant operation, from start of production in 1954 to 1985, was divided into 13 intervals, which corresponded to the union contract periods. A separate exposure assignment was made for each of over 26,000 job title-time interval combinations.

Data on C.T.P.V. exposure from plant monitoring and knowledge of historical operational and engineering changes were utilized to assign exposures. The following coding system, based on the threshold limit value (T.L.V.) for C.T.P.V. of .2 mg/m³ of benzene soluble material (B.S.M.) average d over 8 hours, was adopted.

Z - no exposure to C.T.P.V.

L - low exposure to C.T.P.V. (<.2 mg/m³ of B.S.M.)

M - medium exposure to C.T.P.V. (.2 - 1.0 mg/m³ of B.S.M.)

H - high exposure to C.T.P.V. (>1.0 mg/m³ of B.S.M.)

...

For C.T.P.V., cumulative B.S.M. — years of exposure was calculated by multiplying the total number of years employed by a “weight” representing the B.S.M. exposure. The “weights” used were the mid-point of each exposure category (in mg/m³ of B.S.M.), and were as follows:

- a) 0 for no exposure,
- b) .1 for low exposure,
- c) .6 for medium exposure,
- d) 1.5 for high exposure.

Thus, for the Cancer Control Agency study, four exposure categories were established and each of the 26,000 job title-time interval combinations was fit into one of those four exposure categories. Mr. W., who was involved with the committee that established the exposures for the study, said:

We were using data from 1975 to 1985, personnel [sic] sampling results. We were using about 50 people, we had the names of about 50 people that had significant workplace experience and we would use them as consultants to go and describe to us the procedures that they would carry out in those occupations at the different times. We did

not use area samples from — the first area samples taken in Kitimat Works. Those do not represent exposures.

We asked Doctor E “. . . To what extent, if any, does the 1989 Cancer Control Agency study limit the applicability of your studies with respect to establishing causation in individual cases for workers at the Kitimat smelter?” Doctor E responded:

Thank you for sending me Doctor F’s report. I looked at it carefully. With regard to bladder cancer resulting from exposure to coal tar pitch volatiles, I think Doctor F’s study is completely compatible with our results. There are many reasons that can be invoked to explain the differences, although these differences are remarkably minor. Doctor F’s study was limited to workers with five years or more at the plant (ours included workers with one year and more); Doctor F’s study is a cohort study, ours is a case-control study. I am not sure that Doctor F’s tracing was complete: from page 9 of Doctor F’s report, I understand that cancer registration started in 1970. Some cases diagnosed before 1970 may have been lost. Doctor F’s numbers were much smaller than ours. Doctor F used a cruder exposure estimate scheme than we did. I am, however, surprised that Doctor F did not observe an association between smoking and bladder cancer; such an association was strong in our study and is well recognized from the scientific literature.

Overall, I do not see in what way the 1989 cancer control agency study limits the applicability of our observations to the Kitimat workers.

In response to a further question Doctor E said:

. . . I can consider that Doctor F did not have enough cases to arrive at as refined a probability of causation scale as ours. When the scale is built up, it can be applied to any aluminum worker exposed to coal tar pitch volatile, including the Kitimat workers. Doctor F’s results are compatible with our scale.

Board Policy #25.25

In November 1987 a W.C.B. claims policy committee made the following recommendation to the Board:

The Claims Policy Committee has considered the question of the recognition of bladder cancer as an industrial disease resulting from ex-

posure to coal tar pitch volatiles such as those found during the aluminum smelting process. To assist us in this matter, the committee received submissions from Doctor G and Doctor H plus a research paper by Margaret Marchioli, one of our Claims Training Officers. The committee is aware that bladder cancer is recognized in Schedule B of the *Act*, but this recognition is limited to a range of chemicals that does not include coal tar pitch volatiles, and as such the matter should be addressed by the Board. The committee therefore recommends:

That bladder cancer be recognized as an industrial disease resulting from exposure to coal tar pitch volatiles containing benzene soluble materials (B.S.M.). It is further recommended that such recognition be by way of Regulation and not by inclusion in Schedule B of the *Act*. There are a number of reasons in support of this approach. Primarily we do not feel that a presumption should apply since bladder cancer is a disease common to the population at large. We, however, recognize that other diseases in the Schedule fit this description, but because of this, require the inclusion of limiting criteria such as "excessive" or "unaccustomed." Such limiting terminology inevitably produces problems which we feel should be avoided if another more suitable approach is available. The fact that the "relative risk" formula has only recently been developed is a further reason to suggest that recognition by regulation at this early stage would be preferable. This is seen as a better option than using the word, "excessive" in the Schedule and then having to possibly modify our interpretation of that word should experience or scientific advancement suggest the need for a change. It would seem preferable to start with a regulation and when time and experience either supports or modifies our present formula, consideration can then be given to its inclusion in the Schedule.

That in adjudicating claims for this disease the acceptability should be determined on the basis of exposure to benzene soluble materials, being a constituent of coal tar pitch volatiles and measured in mg/m^3 years. The formula is simply a method of measuring concentrations or intensity multiplied by time. This involves measuring the dose of B.S.M. per cubic meter of air multiplied by the years of exposure. Where such exposure equals $5.6\text{mg}/\text{m}^3$ years of B.S.M, this will be deemed a 50% probability as being the causative agent in the onset of the disease and claims recording

this degree of exposure or more should be automatically accepted.

Using the same formula and recognizing that the length and severity of exposure will be computed from a combination of data supplied by management, union and worker estimates, where the degree of exposure is 40% or less, such claims should be denied on the basis that it is most likely to be of non-occupational origin.

Where, using the above formula, when the probability is computed to be in the 40% to 50% range, using once again, exposure estimates provided by management, union and the worker, and in recognition of the borderline nature of such findings, further research into the claimant's work history to determine length and severity of exposure will be carried out with the assistance of management and the union.

In determining exposure estimates, recognition will be given to the severity of exposure rating classified by a committee comprised of management and union representatives at [A. Ltd.] in Kitimat for a survey carried out by the B.C. Cancer Control Agency. The estimate exposure categories are as follows:

Category	B.S.M. (mg/m)
Zero	0
Low	0.1
Medium	0.6
High	1.5

The committee recommended that cigarette smoking not be considered a factor in measuring the acceptability of a claim. This recommendation recognizes the statistical anomalies inherent in attempting to equate cigarette smoking to disease incidence and it furthermore recognizes the undoubted difficulties in determining the amounts and types of smoking involved. It is further noted that the original research in developing relative risks was based on populations containing a majority of smokers. . . .

(reproduced as written)

The former commissioners adopted the following guidelines for the acceptance of bladder cancer cases:

You have raised the question whether bladder cancer should be recognized by the Board as an industrial disease caused by coal tar pitch volatiles found during the process of smelting aluminum. This question has been considered by the commissioners.

Medical and epidemiological research has shown that the risk of developing bladder cancer is increased for aluminum smelter workers who have had exposure to coal tar pitch volatiles. The amount of the increase in risk is dependent on the concentration of the exposure. The concentration is estimated by measuring the air concentration of benzene soluble material (B.S.M.) which is then used as an indicator.

Bladder cancer is already listed as an industrial disease in the first column (Disease No. 4.(h)) of Schedule B of the *Workers Compensation Act*. However, since exposure to coal tar pitch volatiles is not listed opposite the second column, the presumption contained in Section 6(3) of the *Act* does not apply. The Commissioners consider that there should at this time be no change to Schedule B, but that the Board should through its policy recognize the increased incidence of the disease for aluminum smelter workers.

Claims for bladder cancer resulting from exposure to coal tar pitch volatiles will be adjudicated in accordance with the following guidelines:

1. If the disease develops within 10 years of the workers' first exposure to coal tar pitch volatiles, it will not be considered to have resulted from that exposure.
2. In determining the severity of a worker's exposure, regard will be given to the classification of jobs at [A. Ltd.] in Kitimat according to the degree of exposure criteria previously recommended by a committee comprising management and union representatives for the purposes of a survey conducted by the B. C. Cancer Control Agency. This classification contains the following job categories:

Category	Exposure to B.S.M (mg/m)
Zero	0
Low	0.1
Medium	0.
High	1.5

3. To determine the total exposure of a worker in the course of his employment over the years, the years which he has spent in each job will be multiplied by the concentration of exposure determined for that job by the classification referred to above. For example, 5 years in a high risk job will produce a total exposure to B.S.M. of 7.5 years mg/m (5 multiplied by 1.5).
4. Where the application of the above formula gives a total exposure to B.S.M. of 5.6 mg/m years or more, it will be considered that there is at least a 50% probability of the condition being caused by the exposure and that the claim is an acceptable one.
5. Where the application of the above formula gives a total exposure of less than 5.6 mg/m years, a more detailed investigation will be carried out into the worker's job history to determine whether the amount of exposure allowed by the classification referred to above is reasonable. If, following this investigation, it is concluded that the total exposure was less than 5.6 mg/m, it will be considered that there is a less than 50% probability of the condition being caused by the exposure and that the claim is not an acceptable one. (reproduced as written)

Those guidelines essentially became Policy #25.25. The June 1991 version of Policy #25.25 applicable at the time of J.'s claim contained a sixth paragraph which provided:

Where the employer and the claimant, through his union, reach an agreement as to the total exposure of the claimant in mg/m³, the Board is not bound to accept this amount and may follow the investigation and determination procedures outlined in paragraphs 2, 3 and 5 above. The amount agreed by the employer and the union may, however, be accepted in lieu of the investigation and determination procedures set out in paragraphs 2, 3 and 5 if the agreed amount appears reasonable in the known circumstances of the case.

Policy #25.25 was further revised effective January 1, 1995, and renumbered #30.10. The 1995 policy added consideration of "special work assignments, hours of overtime, individual work practices, and any other characteristics of the workplace or work environment which may have had an impact on the duration and intensity of the exposure" to Policy #25.25.

In effect, the policy adopted the B.S.M. model from the 1986 Quebec paper but used the exposures to B.S.M. established by the joint committee formed to assign exposures for

the B.C. Cancer Control Agency's study. The further revisions to Policy #25.25 modified somewhat the assignment of a cumulative B.S.M. exposure.

The joint committee recommended against using their exposure criteria for occupations to adjudicate bladder cancer claims. The union continued their opposition to the use of the data in that way. In a letter dated May 3, 1988 to the B.C. Cancer Control Agency, Mr. W., the employer's industrial hygienist, said:

. . . For purposes other than this cohort study on mortality and cancer incidence, and especially those of an "individualized" nature, these exposure classifications must be used cautiously.

Later, the employer agreed to the Board's proposed method of assessment for bladder cancer claims. In a memo dated July 3, 1987 to the former commissioners, the Board's former director of the occupational health department, Doctor H, said:

I have chosen B.S.M. as the indicator of the dose of exposure to coal tar pitch volatiles because B.S.M.'s have been measured by [A. Ltd.] in their Kitimat smelter since the mid-1960's and the levels measured are similar to those described in the paper by Doctor I, et al, and are also similar to the levels which have been found by Industrial Hygienists of the W.C.B.

Because of a survey being carried out at the [A. Ltd.] smelter in Kitimat by the B.C. Cancer Control Agency, the vast majority of job titles have already been classified as having high, medium low or zero exposure to B.S.M. by a committee comprising of management and union representatives. Both the Cancer Control Agency and I are convinced that these estimates are as accurate as could be hoped for, and are certainly better than any estimate by the Workers' Compensation Board.

In August 1994, the Panel posed the following question to the then vice-president of Compensation Services, "Why did the Board choose cumulative B.S.M. exposure when the authors preferred the cumulative B.a.P. over B.S.M. to assess the probability of causation?" He replied:

The former Commissioners of the Board sought a medical assessment on the issue of bladder cancer to assist the establishment of a bladder cancer policy. Doctor H's assessment document, dated July 3, 1987, provided bladder cancer policy recommendations. I have attached this document for your reference.

Doctor H stated that there were two methods of measuring exposure to coal tar pitch volatiles and thus the risk of developing occupational bladder cancer. Doctor H said:

“The dose is measured by estimating the cumulative exposure to benzene soluble matter (B.S.M.) measured in mg/m^3 years, or as measured by cumulative exposure to benz-alpha-pyrene (B.a.P.) measured in $\mu\text{g}/\text{m}^3$ years, both being constituents of coal tar volatiles.”

The choice between these two options was explained as follows:

“I have chosen B.S.M. as the indicator of the dose of exposure to coal tar pitch volatiles because B.S.M.’s have been measured by [A. Ltd.] in their Kitimat smelter since the mid-1960’s and the levels measured are similar to those described in the paper by Doctor I, et al, and are also similar to the levels which have been found by the Industrial Hygienists of the W.C.B.”

It should be pointed out that there are no measurement records of B.a.P. in British Columbia aluminum smelters. Doctor H asked one of the authors, Doctor I, about whether the Quebec study could be applied to the Kitimat smelter. Doctor I was of the opinion that the results could be used as the industrial process was essentially the same. The Occupational Health Department considered doing their own study but this idea was rejected as the B.C. worker population was too small (compared with Quebec) to make a statistically valid study.
(emphasis added)

Mr. W. said A. Ltd. did not measure B.S.M. until the mid-1970s and thought the director’s comments might have contained a misprint. We reviewed a March 1981 W.C.B. publication entitled “An Evaluation of Occupational Health Hazards at Aluminum Company of Canada Ltd., Kitimat Operations.” That publication was available in the Board’s library and showed numerous B.a.P. measurements taken by the Board at A. Ltd.’s aluminum smelter between October 1979 and May 1980. Further, the employer disclosed to us, in this appeal, numerous other B.a.P. measurements as well as B.a.P.:B.S.M. ratios taken at their smelter in the late 1970s. The work of Doctors E and I show that actual B.a.P. measurements for individual workers are not necessary to apply the B.a.P. model of causation. B.S.M. estimates can be converted mathematically to B.a.P. estimates if the B.a.P.:B.S.M. ratio is known. These matters will be discussed later.

J.'s Work History

J. was born on April 23, 1918 and, as an adult, worked as a farmer until he began employment at A. Ltd. on January 17, 1956. He left A. Ltd. on March 9, 1970 and moved to Langley. There he worked at a mushroom farm until 1983 when he turned age sixty-five. Later he worked two summers as a truck driver and was involved in some part-time truck maintenance work. The focus of J.'s work history in relation to his bladder cancer is his work at A. Ltd.. There is no evidence his other employment might be implicated in the cause of his bladder cancer. The employer provided a "viz" card, which J. confirmed, setting out J.'s work history at A. Ltd.:

EMPLOYMENT RECORD				
Effective	Change	Job Title	Department	Code No.
17.01.56		Potroom Spare	Pot. Services	77
06.02.56		Pot Digger	Cath. Lin.	76
24.02.56		Gangleader		
03.04.56		Potliner		
13.06.56		Potman	Potrooms	272
05.07.56		Stud Puller Class 2		
26.10.56		Crust Breaker Op.		
20.02.57		Floorman	Rectifiers	25
09.06.58		Helper Trades		
09.06.58		Helper	Pot Service	77
13.06.58		Helper	Remelt	30
06.07.59		Op. Cast. Mach. Assist.		
15.02.60		Op. C. C. P. Assist.		
19.09.60		Op. Cast. Mach.		
19.12.60		Op. Cast. Mach. Assist.		870-00
12.03.61		Op. C. M. Assistant	Remelt	870-00
10.04.61		Op. Cast. Machine		
14.04.61		Op. Cast. Mach. No. 3 Asst.		
19.06.61		Op. D. C. Assist.		
23.09.61		Op. D. C. M. Assist.		870-00
11.11.62		Furnaceman Assist.		
20.05.63		Op. D.C. Machine		870-96
29.12.63		Op. Cast. Machine		
27.01.64		Op. D. C. Mach.		
15.11.65		Potliner Learner 1	Pot Serv.	830-81
14.01.66		Potliner Learner 2		
10.06.66		Potliner		
26.09.66		Potliner Crew Leader		
09.03.70		Quit		

J. filed a Form 6, application for compensation, on August 12, 1991. A claims adjudicator wrote to the employer on September 6, 1991:

As per our telephone discussion of September 5, 1991 I will require from you a completed Form 7 in addition to a listing of the worker's job classifications over time and an estimated cumulative exposure to cold [sic] tar pitch volatiles.

There is no Form 7 (employer's report of injury or disease) on file and it appears the Board did not pursue that matter. The employer wrote to the claims adjudicator on October 7, 1991:

As requested in your letter of 6 September 1991, attached listing of [J.'s] job classifications during his time with [A. Ltd.].

We have estimated [J.'s] cumulative exposure to coal tar pitch volatiles to be 4 mg/m³ B.S.M. years.

Using the procedure outlined in Section 25.25 of the *Rehabilitation and Services Claims Manual*, it is our opinion [J.'s] bladder cancer cannot be related to his employment with [A. Ltd.]. (reproduced as written)

A copy of the worker's "viz" card as set out above was attached. Mr. W. determined that the worker had high exposure to B.S.M. from January 17, 1956 until February 20, 1957. That work included the first seven occupations listed on the "viz" card. The employer's industrial hygienist multiplied the approximately thirteen months of high exposure by the assigned exposure of 1.5 mg/m³ for high exposures set out in Policy #25.25. The result was a value of 1.6 mg/m³ B.S.M. years

The second group of exposures was assigned a zero value. That was for work in the casting area between February 20, 1957 and November 15, 1965. The third group of exposures was assigned a value of 2.6 mg/m³ B.S.M. years. This was based on medium exposure work between November 15, 1965 and March 9, 1970 in the potlining area. Mr. W. said the cumulative exposure amounted to 4.2 mg/m³ B.S.M. years. The claims adjudicator and Review Board accepted that value and denied the claim as the worker's cumulative exposure did not meet the 5.6 mg/m³ B.S.M. years standard set out in policy.

Application of Policy #25.25

The employer's counsel contends that J.'s cumulative exposure of 4.2 mg/m³ B.S.M. years best reflects his actual exposure. Counsel for the worker argues that J. meets the 5.6 mg/m³ B.S.M. years standard and his claim ought to be accepted. He contends that

work in the casting area involved some exposure to B.S.M., thus the worker's exposure should have been rated at least low, but not zero. In addition, he argues that some of the work in potlining involved high, rather than medium exposure. He also argues that J. worked overtime during various periods which would raise his cumulative exposure.

The parties agreed the policy permits moving an occupation from one exposure category to another but does not permit assessing a higher exposure within a specific category. For example, the medium category allows the assignment of an exposure of 0.6 mg/m^3 . If it could be shown that a worker had an actual higher or lower exposure, he would still be assigned an exposure of only 0.6 mg/m^3 unless the exposure was sufficiently different to move him into a higher or lower category, as defined by policy. While there might have been some variation in the worker's exposures, we find any variations were insufficient to allow a change in exposure category. Further, on the evidence of J. and Mr. B. at the oral hearing, we find J. did not work significant overtime. Thus, we find no basis for varying the duration or intensity of the worker's exposures as set out in policy. On the strict application of Board policy, J.'s appeal would fail as his cumulative exposure of $4.2 \text{ mg/m}^3 \text{ B.S.M. years}$ does not meet the standard of $5.6 \text{ mg/m}^3 \text{ B.S.M. years}$ as the cut-off point for causation.

Application of the B.S.M. Model

While the Board policy essentially applied the B.S.M. model, there is an important difference between the B.S.M. model and how the Board applied it. The B.S.M. model as set out by the authors of the 1986 Quebec paper requires an estimate of the worker's B.S.M. exposure based on exposures assigned to occupations during certain time periods. Doctor E commented that the estimates in B.C. are "cruder" than those used in his study. The B.C. estimates were made by fitting various occupations into four established groupings. Personal sampling data and experience were used as a guide. Mr. W. said that earlier area sampling was not used as it did not represent personal exposure. However, in the Quebec study they were able to make estimates of personal exposures based on area samples. There are some differences in the exposure estimates for similar jobs at similar times between the Quebec study and the B.C. study. For example, Policy #25.25 would assign a maximum value of $1.5 \text{ mg/m}^3 \text{ B.S.M.}$ for "high" exposure whereas the 1986 Quebec paper would assign a value of about twice that exposure for certain occupations in certain years. Mr. W. said the differences might be due to a slightly different process and the age of the plant in Quebec. However, we are not convinced those factors could account for such a difference in the assignment of exposure values for some occupations.

In applying the B.S.M. model, even using the higher exposure values assigned for the occupations in the Quebec study, we find that J.'s exposure to B.S.M. while raised slightly from the $4.2 \text{ mg/m}^3 \text{ B.S.M. years}$ would not meet the standard of 5.6 mg/m^3

B.S.M. years. The Panel was unable to apply the various sampling results from the Board's files as there was little accompanying data that would allow us to relate the results to J.'s employment.

The authors of the 1986 Quebec paper set out the B.S.M. and the B.a.P. models of causation as described above. While the authors preferred the B.a.P. model, Doctor E, one of the authors, said to us, "B.S.M. remains a reasonable way of assessing the relative risk and the probability of causation and, in the absence of B.a.P. estimates, using B.S.M. is reasonable."

Although not necessary to decide this appeal, Mr. W. made an argument that ought to be addressed here. Mr. W. said that a worker's assigned exposure could not be varied unless the cut-off point of 5.6 mg/m^3 was also varied. Mr. W. considered the assigned exposures from the B.C. Cancer Control Agency (B.C.C.C.A.) study to be inextricably linked to the cut-off point of 5.6 mg/m^3 derived from the 1986 Quebec paper. However, that approach reads too much into the B.C.C.C.A. study. That study did not provide sufficient data to apply a causation model. Doctor E said the B.C.C.C.A. study "did not have enough cases to arrive at as refined a probability of causation scale as ours." While the results of the two studies are not incompatible, the B.C.C.C.A. study does not provide sufficient support for the argument by Mr. W.

Application of B.a.P. Model

The Board said the B.a.P. model was not used as they did not have B.a.P. measurements. The Board did have some B.a.P. measurements but there are no B.a.P.:B.S.M. ratios in the Board's file. B.a.P. estimates are made by estimating the B.a.P.:B.S.M. ratio and then converting B.S.M. to B.a.P., mathematically. The authors of the 1986 Quebec paper set out the various B.a.P.:B.S.M. ratios for different occupations. They found the average proportion of B.a.P. in B.S.M. at the Quebec smelter to be 0.8%. The 1986 Quebec paper reported the B.a.P. in B.S.M. ratios in the potrooms to be 1% and noted that was close to a figure of 1.3% reported in a Swedish study. Doctor E's letter to the Panel explains:

Here in Québec, each worker's exposure is spelled out for each job occupied during the work at [A. Ltd] in terms of both B.S.M. and B.a.P. . . . The proportion of B.a.P. in B.S.M. varies for different jobs performed by the worker and this is taken into consideration in assessing exposure received at each specific job. Overall, the average proportion of B.a.P. in B.S.M. for our study is 0.8%. It will be preferable to use the proportion of B.a.P. in B.S.M. specific to each job or job category in converting from B.S.M. to B.a.P. When this is not possible, we recommend that 0.8% be used as a surrogate.

The employer provided an internal “confidential” memo dated May 1, 1987 in which the employer’s industrial hygienist, Mr. W., said, “We have measured Benzo alpha pyrene (B.a.P.), another carcinogen, and found it to be around 1% of B.S.M.” He said at the oral hearing they had fifty samples taken in the late 1970’s and analyzed for both B.a.P. and B.S.M., and he reported the following results:

There is a range of in — one sample, you could report a B.a.P. to B.S.M. ratio of 1.0 per cent, you could report it down to 0.6 per cent you could report up to 3.0 per cent. The averages in [A. Ltd.] is roughly, in my recollection of these samples, is roughly 1.2 per cent. But there’s a range on that. And, yes, I do not consider that a significant difference, and I don’t think anybody familiar with sampling of hydrocarbons would consider it a significant difference.

The employer was asked to produce the results of those fifty samples taken in the late 1970s. The employer produced the results of twenty-seven samples. Mr. W. said, “I believe that we had more, but I have been unable to find it.” The information provided by the employer shows, in the twenty-seven samples, the average proportion of B.a.P. in B.S.M. at the employer’s smelter to be about 1.3%.

Doctor E was asked to calculate the relative risk or probability of causation for a cumulative B.S.M. exposure of 4.2 mg/m^3 years and a B.a.P. in B.S.M. ratio of 1%. Doctor E reported a relative risk of 1.97 (confidence interval 1.38 - 3.18). Using the same formula provided by the authors a cumulative exposure of 4.2 mg/m^3 B.S.M. years and a B.a.P.:B.S.M. ratio of 1.3% would yield a relative risk of 2.25. Thus, for a cumulative exposure of 4.2 mg/m^3 B.S.M. years the B.a.P. model would yield a relative risk of 1.97 or greater if the B.a.P.:B.S.M. ratio is 1% or higher. It is clear, contrary to the evidence of Mr. W., that a small difference in the percentage of B.a.P. in B.S.M. makes a significant difference in the estimate of relative risk. Doctor E was asked to explain the difference in outcome for an exposure of 4.2 mg/m^3 B.S.M. years applying the two models of causation:

If we use your example given in Questions 7 and 8, you may have realized that there is indeed a difference in relative risk and probability if you use B.S.M. vs B.a.P. For B.S.M., the relative risk estimate is 1.74 and the probability of causation is 42.64. When you use a correcting factor of 1% B.a.P. averaging B.S.M., you arrive at a relative risk estimate of 1.97 and a probability of 49.14.

As we indicated in our paper, the B.a.P. — B.S.M. ratio varied between occupations and we took into consideration this variation. In our 1988 paper, we stated that “If risk or probability of causation is to be predicted from B.S.M. where B.a.P. concentrations are unavailable,

the average proportion of B.a.P. in B.S.M. of 0.8% found in our study or an estimate of this proportion thought more suitable for the workplace concerned may be used to estimate B.a.P. from B.S.M. exposure.

Had you used this correcting factor (0.8%) instead of 1% as the average proportion of B.a.P. in B.S.M., you would have obtained (using B.a.P. model) a relative risk of 1.77 and a probability of 43.59, which would have been closer to your estimate based on B.S.M.

Therefore, we can conclude that differences in arriving at relative risk and probability of causation using the B.S.M. vs the B.a.P. model rests essentially on the estimate used for the proportion of B.a.P. in B.S.M. *We acknowledge that this can vary from one workplace to another and it lies completely upon you to decide what this ratio is in British Columbia.*

Having a higher risk ratio and predicting value will be totally correct if your ratio is higher than 0.8% B.S.M./B.a.P. (emphasis added)

The employer points to a statement by Doctor E where he recommends a ratio of 0.8% B.a.P. in B.S.M. be used where estimated ratios are unknown. That statement, however, was made in relation to the Quebec plant where the overall ratio was 0.8%. In British Columbia the evidence indicates the ratio is at least 1% and Doctor E is clear in recommending that an estimate of the B.a.P.:B.S.M. ratio for the actual workplace be used.

Relying on the data provided by the employer we find that the average B.a.P.:B.S.M. ratio at the employer's smelter is at least 1% and likely higher. Applying the B.a.P. model of causation we find the relative risk to be at least 1.97. Thus, the probability of causation in this case would be near or greater than 50% applying the estimate of exposure of 4.2 mg/m³ B.S.M. years. In the Panel's view, that exposure is likely the minimum experienced by J., as there is some evidence his exposure was actually higher.

Probability of Causation

The Governors' Industrial Diseases Standing Committee published a "Protocol for the Assessment of Medical/Scientific Information" (*Workers' Compensation Reporter*, Vol. 9, p. 429), in which they discussed attributable risk:

Attributable Risk Technique

The key to this method is that the relative risk in exposed workers is subdivided according to severity and duration of the exposure. Each

relative risk is then converted to an *attributable risk* to provide a measure of the probability that an individual case is work-related.

This approach was developed in the United States to deal with claims for radiation. It has been adapted by researchers in Quebec and B.C. for the use in handling of claims for bladder cancer in aluminum workers (see Example 8 in the Appendix). The approach can be extended to some other job/disease situations, and offers potential for:

- Fine-tuning the exposure/disease assessment to allow for duration and severity of exposure, rather than using a simple cut-off of exposed/not exposed for a certain minimum number of years.
- Resolving the dilemma of how to fairly handle claims in situations that are just above or just below the “balance of possibilities” threshold of 50% (equivalent in epidemiological terms to a relative risk of 2.0). If an appropriate formula can be developed that includes more than simply the relative risk shown by the total exposed group, an estimate of work-attributable risk can be made with more precision. The process of compensation should gain in credibility and perception of fairness if we can vary the cut-off point with degree of exposure, and if we can set the cut-off point so that it is most fair to both the individual and society (presumably after all-party negotiations).

The B.a.P. and B.S.M. models are examples of the application of attributable risk. There is also evidence that J. was exposed to beta-naphthylamine, a known bladder cancer causing agent. The employer provided information that beta-naphthylamine was contained in the B.S.M. at their plant. However, we are unaware of any study that provides a causation model linking specific exposures of beta-naphthylamine to specific relative risks. As the attributable risk technique provides a more appropriate method of deciding causation in this case and since beta-naphthylamine is contained in the B.S.M., it is not necessary to consider beta-naphthylamine as a separate cause of J.’s bladder cancer.

The employer’s counsel provided a report from Doctor J in which he compared J.’s risk of developing bladder cancer from smoking and his workplace exposure to beta-naphthylamine. Doctor J’s opinion was in relation to the rebuttable presumption in Section 6(3). He said that J.’s smoking history was more likely to have caused his cancer, rather than any exposure to beta-naphthylamine at work. However, the B.S.M. and B.a.P. causation models already account for cigarette smoking and the models apply regardless of any history of cigarette smoking. Therefore, it is not necessary to consider Doctor J’s opinion here.

The employer makes the argument that the B.S.M. model compensates fairly and even over-compensates bladder cancer victims:

(2) Based on the scientific evidence provided to the Board, it must be accepted as a fact that bladder cancer is a common disease in the general population, particularly among the older (age 60 and over) male population. A significant number of employees and ex-employees of [A. Ltd.] will be expected to contract bladder cancer regardless of their employment exposures. What Section #25.25 of the *Claims Manual* was intended to do was to set a reasonable standard for the Board's use in determining whether any particular [A. Ltd.] employee's bladder cancer arose from occupational or non-occupational causes. The Appeal Division Panel may well have a belief that the standard set in Section #25.25 should be lower (or higher, as [A. Ltd.] would advocate), but that belief cannot result in the finding that the existing standard is illegal.

(3) The fact of the matter is that the Board's application of Section #25.25 has resulted in a very favourable treatment of [A. Ltd.] employees and ex-employees who have developed bladder cancer. As the Panel is aware, the B.C. Cancer Control Agency conducted a cohort study at [A. Ltd.'s] Kitimat Smelter. The C.C.A.'s final report was released in October 1989. The study found an increased incidence of bladder cancer among the 4,213 males included in the study than would be expected to occur in the general population.

In particular, the C.C.A. study expected to find 9.47 cases of bladder cancer among the 4,213 males in the cohort. The actual observed number of bladder cancer cases among this group was 16. This led to a Standardized Incidence Ratio (S.I.R.) of 1.69. (In other words, 6.5 of the 16 bladder cancer cases were found to be occupationally related to the workers' employment at [A. Ltd.].)

We have been advised by [A. Ltd.] that approximately 20,000 people have worked for [A. Ltd.]. Approximately 4500 of these people were employed for more than 5 years. From this total group, [A. Ltd.] is aware of 31 people who have contracted bladder cancer. Using the C.C.A.'s S.I.R. of 1.69 for bladder cancer, this would suggest that approximately 13 of the 31 bladder cancer cases were related to occupational causes, while the remaining 18 cases would be expected to occur due to non-occupational causes.

However, based on the application of Section #25.25 of the *Claims Manual*, the Board has accepted 20 of the above-noted bladder cancer cases as being occupationally related, and therefore compensable. Three of the 31 bladder cancer cases are awaiting initial adjudication by the Board. We are advised by [A. Ltd.] that in each of these three claims, the worker's total B.S.M. exposure exceeded 5.6 mg/m^3 years. Accordingly, it is anticipated that each of these three claims will be accepted by the Board as being compensable, thereby bringing the total number of accepted bladder cancer claims under Section #25.25 to 23. This total acceptance rate (of 23 out of 31 bladder cancer cases) by the Board is approximately 177% times the number that would be expected if the results of the C.C.A. study were applied.

In our submission, these numbers clearly indicate that the probability cut-off of 5.6 mg/m^3 is significantly lower than it should be. However, in our submission the Appeal Division similarly would not have the jurisdiction to deny an employee's claim for bladder cancer, where the total B.S.M. exposure is greater than 5.6 mg/m^3 years, if it believed that the existing standard in Section #25.25 was too low (thereby providing compensation to a worker who should not be entitled to receive such benefits).

In the 1988 research paper entitled "Compensating Bladder Cancer Victims Employed in Aluminum Reduction Plants," referred to earlier, the authors discussed the probability of causation:

The estimation of probability of causation is a scientific question. The way probability of causation is used (or indeed whether it is used at all) in determining whether or how much a worker with cancer is to be compensated involves social, political, and legal arguments. Consequently, no prescription is given here as to how compensation should be decided, but an outline of a variety of possible approaches is suggested.

In legal tort cases, at least in the United States, establishing a minimum 50% probability of causation ("more probable than not") as a requirement for civil litigation seems to correspond most closely to legal precedent. However, legislation on workers' compensation does not usually require the same degree of proof of causality, the benefit of doubt being granted generally to the worker. This still leave considerable freedom to compensation boards as to how to interpret this. "Safety margins" granting the benefit of doubt to the worker can be incorporated in choice of estimates of model parameters, in lowering

the requirement for probability of causation to less than 50%, and/or in estimating an upper bound of past exposure in the worker applying for compensation.

An alternative to adopting a cutoff point for P on a priori grounds is to estimate the number of cancer cases due to exposure in the exposed population and to compensate that number, chosen as being those with the highest exposure index and hence the highest probability of causation. Margins to allow “benefit of doubt” can again be incorporated. This procedure is particularly suggested when very many workers have a moderately increased (less than twofold) risk and it is impossible to identify a subgroup at particularly high risk. In such situations a substantial total of cases may be attributable to the exposure but no individual worker with cancer may have a probability of causation greater than 0.50. However, this procedure is only possible if information is available on the distribution of exposure in all cases in the population at risk, and for this reason runs into particular problems when setting a criterion for workers applying in the future.

In the case-control study of Quebec aluminum smelter workers, 39.4 of the 85 case patients (46%) are estimated to be attributable to exposure to coal tar pitch volatiles, if b is taken at its point estimate (0.023). Compensating this number would be achieved by setting a criterion at about $70 \mu\text{g}/\text{m}^3$ years. *However, those in the study do not constitute all workers with cancer among Quebec aluminum smelter workers.* If the upper 95% confidence limit, 0.052, of b is used, the figures 39.4, 46%, and $70 \mu\text{g}/\text{m}^3$, above, should be replaced by 46.5, 55%, and $35 \mu\text{g}/\text{m}^3$ years, respectively. (emphasis added)

We acknowledge that the worker’s counsel does not necessarily accept the employer’s data here. However, even if the employer’s data is accurate, we do not accept their conclusions concerning its application to causation. As in the Quebec studies, the Cancer Control Agency of B.C. study does not seem to represent all workers with cancer among B.C. aluminum smelter workers. Doctor E pointed out in his letter of November 1, 1995 that the Cancer Control Agency of B.C. study did not have complete tracing of bladder cancer cases. Doctor E said, “. . . I understand that cancer registration started in 1970. Some cases diagnosed before 1970 may have been lost.” The employer’s aluminum smelter in B.C. started in 1954. Further, the Cancer Control Agency of B.C. study did not include workers with less than five years work at A. Ltd. The Quebec study only excluded workers with less than one year exposure. Theoretically, a B.C. worker could have had a cumulative exposure to B.S.M. at or greater than $5.6 \text{ mg}/\text{m}^3$ years (3.7 years at “high” exposure) and not have been included in the study. If

the worker developed bladder cancer, his exposure would meet the criteria for work relatedness, but the worker would not have been included in this study. Further, the employer's counsel points out the study only included 4,500 of the approximately 20,000 workers who ever worked at A. Ltd. In our view the Cancer Control Agency of B.C. study does not confirm the employer's argument that the B.S.M. model of causation is the most appropriate model or that the policy over-compensates bladder cancer victims.

The Board had taken numerous samples in 1979 and 1980 and analyzed them for B.a.P. However, there are apparently no reports of these samples being analyzed for both B.S.M. and B.a.P. Thus, the Board's data did not yield any B.a.P.:B.S.M. ratios.

It is clear from the file that the Board was unaware at the time the policy was developed that B.a.P.:B.S.M. ratios had been calculated by this employer from their sampling in the late 1970's. Mr. W. said the information was not secret and he imagined even the union had copies. However, there is no indication that the employer's data was ever shared with the Board until disclosure in this case, even though the employer was involved in discussions with the Board which led to the development of the policy. The 1994 memorandum of the former vice-president of compensation services seems to indicate that the Board, even at that time, was unaware that such information was available. Disclosure of the B.a.P.:B.S.M. ratios at the time the policy was being developed would have allowed the Board to apply the B.a.P. model, preferred by the authors of the 1986 Quebec paper. While we appreciate that the Board has a fundamental responsibility to inquire into these matters, it is disturbing that the employer did not share their data with the Board.

Finding on Causation

The relevant research provides two viable models of causation, the B.S.M. and the B.a.P. models. The researchers preferred the B.a.P. model. The Board chose a modified version of the B.S.M. model as they did not know information was available to apply the B.a.P. model. The employer had that information but did not share it with the Board.

As can be seen by this case, the B.a.P. and the B.S.M. models produce roughly similar results when the B.a.P.:B.S.M. ratio is 0.8%. However, when the percentage of B.a.P. in B.S.M. is found to be greater, as in this case, the models produce different results. Applying the B.S.M. model, and the policy, leads to a conclusion that J.'s bladder cancer was unlikely caused by his exposures at A. Ltd. The B.a.P. model, using a minimum B.a.P.:B.S.M. ratio of 1% and a minimum exposure of 4.2 mg/m³ B.S.M. years, leads to a conclusion that J.'s bladder cancer was likely due to his exposure at A. Ltd. There is evidence that both the B.a.P.:B.S.M. ratio and J.'s exposure to B.S.M. are

actually higher. However, it is not necessary to decide how much higher as J.'s claim would be acceptable at the lower levels.

Section 99 is relevant to adjudication in individual cases. In this case, it is arguable, that even using the B.a.P. model, J.'s exposure falls marginally short of the level required to accept his claim. If the calculation establishes a relative risk of 1.97 rather than 2, we find that sufficiently close for accepting this claim. The merits and justice of the case would require such a conclusion, given the uncertainties in assessing individual exposure and causation here.

The Board's policy uses only the B.S.M. model. However, as stated above, policies are only guidelines and cannot exclude consideration of relevant evidence. The *Act* is paramount, and Section 6 requires us to determine if J.'s bladder cancer is "due to" the nature of his employment. Section 99 requires us to decide according to the merits and justice of the case. While J.'s claim is not acceptable under the B.S.M. model, it is acceptable under the B.a.P. model. Both Sections 6(1)(b) and 99 require us to use the B.a.P. model in this case.

Therefore, we find, based on the results of applying the B.a.P. model, J.'s bladder cancer was due to the nature of his employment at A. Ltd.

Other Comments

Although not necessary to dispose of this appeal, we have some comments concerning Policy #25.25 (#30.10). The policy does not acknowledge that the tar fumes and the B.S.M. fraction contain beta-naphthylamine (2-naphthylamine). Beta-naphthylamine is mentioned in Schedule B in relation to bladder cancer.

The 1986 Quebec paper said ". . . the most plausible agents for bladder carcinogenesis known to be present in tar volatiles appear not to be the P.A.H. but the aromatic amines, (in particular 2-naphthylamine), which has been associated with bladder cancer in animals and human studies." Thus, the Board should have been alerted to the possibility that the tar fumes at this employer's aluminum smelter could have contained, and likely contained, beta-naphthylamine. The employer disclosed to the Panel a "confidential" internal memo dated May 1, 1987, referred to earlier, in which Mr. W. reported:

Our first test in Kitimat was to take samples immediately above the anode surfaces in the various potroom areas, and in the cathode during a tamping operation. We wanted to check that our sampling and handling procedures worked, as well as see if any of these aromatic amines were present. The samples were stabilized in the lab here, and

sent to the Research Centre in Arvida. G.C.M.S. analysis was carried out to assess levels of 1-naphthylamine, 2-naphthylamine or beta-naphthylamine, 4-aminobiphenyl, and benzidine. No benzidine was detected, but the others were present, and in some cases in relatively high concentrations. Results are shown in the attached table.

(reproduced as written)

In a later internal "confidential" memo dated July 30, 1987, Mr. W. reported the results of a second set of sampling data for beta-naphthylamine.

These levels are very low. As a comparison, recent results for "potmen" in Arvida were about 1.0 ug/m^3 , ranging from 0.060 to 0.550. We appear to be lower, but the exposure levels are in the same ballpark.

This information was disclosed, on request, during this appeal. However, Mr. W. said at the oral hearing, the Board does not have access to their experimental data:

Q. Okay, can you tell us, [Mr. W.], why your letter of the 1st of May was not sent to the Workers' Compensation Board?

A. I believe I already answered that question. This is experimental data. We didn't understand it. We didn't understand the implications of it and, therefore, we wouldn't be passing it outside the company until such time as we did understand it.

Q. Didn't you think the Board would be interested in that?

A. They may have been interested in it, but — I mean, how can you give somebody information, and what does this mean? We don't know. We didn't know what this meant.

While the levels of beta-naphthylamine in the employer's tar fumes may have been "experimental" it does not seem that the presence of beta-naphthylamine, at any level, was "experimental." The employer knew the tar fumes contained beta-naphthylamine by 1989 but they were unsure as to the level. Prolonged exposure to beta-naphthylamine was listed in relation to bladder cancer in Schedule B in 1980. Further, the B.C. Court of Appeal decision in *Re Evans and Workers' Compensation Board* (1982), 138 D.L.R. (3d) 346, was decided in 1982. That decision involved a judicial review of a former commissioner's decision concerning the industrial disease silicosis:

I turn next to the commissioners' consideration of whether the appellant was employed in a process where there is exposure to silica dust.

They said that Sch. B required “at least a reasonable period of continuous and fairly full exposure.” That approach was wrong. It placed a burden on the appellant that was neither authorized by nor consistent with Section 6. Some of the other parts of Sch. B require “excessive exposure,” “close and frequent contact,” and “prolonged exposure to excessive vibration.” The provision with which we are concerned only requires exposure.

In the first step that is directed to be taken by Section 6(3) it is improper to consider whether the exposure was sufficient to cause disease. What matters at that stage is whether there was any exposure. The extent of the exposure is a matter to be weighed only after the tests in Section 6(3) have been applied. Then it is to be weighed with the strong presumption that “the disease shall be deemed to have been due to the nature of that employment unless the contrary is proved.” In prematurely moving to the consideration of the extent of the exposure, the commissioners defeated the scheme envisaged by the legislation. The presumption was rendered ineffective. If the worker shows evidence of exposure that would likely cause pneumoconiosis, as the commissioners seem to require, there would be no need for the presumption that the employment was the cause.

The *Evans* case said that the Board must not add conditions to Schedule B which have the effect of changing or removing the presumption in Section 6(3). With regards to bladder cancer, Schedule B requires *prolonged* exposure to beta-naphthylamine. That concerns the length of exposure not the intensity or quantity of the exposure. If a worker had bladder cancer and had prolonged exposure to *any* level of beta-naphthylamine, the worker would be entitled to the presumption in Schedule B. In addition, by 1979 both B.a.P. and beta-naphthylamine were listed in the Board’s Industrial Health & Safety Regulations as “carcinogens with no Established Permitted Concentration. Exposure to be carefully controlled and minimized.” Therefore, it seems reasonable that the Board would have been interested in any information that workers generally, and certainly workers with bladder cancer, might be exposed to beta-naphthylamine. Further, failure to provide such information to the workers likely violated a number of Board regulations (e.g. 12.01, 4.06(2)), although that matter is not before us. It is unclear why the Board did not request full disclosure from the employer of all their sampling data at the time the policy was being developed. The Board had some reason to believe the employer had been less than cooperative in the past. In an August 13, 1982 memorandum from the Board’s operations manager in the Industrial Hygiene Department, to the chairman of the Board, the manager said:

Relationships between the W.C.B., I.H. [Industrial Hygiene] Department and [A. Ltd.] have traditionally been polite and friendly, but not entirely cooperative. For years [A. Ltd.] has been performing self-inspection in the form of conducting their own industrial hygiene and occupational health monitoring programs but have not shared their data with either the W.C.B. or [the union].

While [A. Ltd.] has always been receptive to I.H. Department inspections they have generally been slow to comply with orders of major significance and frequently have been content with compliance best described as minimal. They have worked on solutions to their various problems in secrecy from the W.C.B. and [the union] and have done little to generate a truly cooperative atmosphere.

Further, as the 1986 Quebec paper made reference to beta-naphthylamine in tar fumes, the Board ought to have been alerted to that possibility and could have conducted their own sampling. Certainly the current policy has to recognize that the tar fumes and B.S.M. contain beta-naphthylamine and in some cases workers might be entitled to the presumption in Section 6(3).

The policy assigns to “medium exposure” an average exposure level of 0.6 mg/m^3 . This was derived from an average of the range $0.2 - 1.0 \text{ mg/m}^3$ used in the Cancer Control Agency of B.C. study. It seems that the term “medium” underestimates the risk to workers as the permitted exposure in the Board’s regulations is 0.2 mg/m^3 . Thus, a “medium” exposure refers to a level at or 5 times the permitted exposure.

The Panel mentioned earlier that the Quebec Workers’ Compensation Board accepts bladder cancer cases where workers have had about half the exposure required in B.C. That difference is due substantially to the use of the B.a.P. model and a cut-off point for causation at a point where the upper 95% confidence limit of the probability of causation is at least 50%. The Quebec criteria is not directly applicable here except for the use of the B.a.P. model. The Panel makes no finding as to the appropriateness of using the upper 95% confidence level.

Disabled from Earning Full Wages

We have found his claim satisfies the causation requirement in Section 6(1)b). However, J. must satisfy the requirements of both Section 6(1)(a) and (b) before he is entitled to compensation, other than health care benefits. Therefore, it is necessary to consider whether he meets the requirement in Section 6(1)(a) that he suffers from an occupational disease and “is thereby disabled from earning full wages at the work at which he was employed.” This will depend on whether “the work at which he was employed”

refers to his work at A. Ltd. or the work he was doing when he was disabled by his bladder cancer. Since J. was retired and not employed in 1989, he had no work at that time.

The wording of Section 6(1)(a) makes a clear connection between the occurrence of an occupational disease and the inability to continue working. The same wording formerly applied to silicosis and hearing loss claims, but no longer. Compensation for silicosis is provided for in Section 6(8) and compensation for hearing loss is provided for in Section 7 of the *Act*.

In his 1942 report relating to the Workmen's Compensation Board in B.C., Mr. Justice Sloan was considering a proposal to change the wording that applied to silicosis claims. At page 159, he stated:

The distinction must be kept clear between loss of expectation of continuing life and loss of expectation of continuing income. A man's normal expectancy of life is a thing which the law regards as of temporal value so that any lessening of it gives rise to an action for damages quite apart from any loss of anticipated future earnings. The actual loss of future earnings due to an incapacitating or fatal disease is now indemnified to a degree under the *Act* by compensation payments to the disabled workman or his dependents. To extend the benefits of the *Act* to compensate a man or his dependents "for the loss of a measure of prospective happiness" is to introduce a principle quite foreign, in my opinion, to those fundamental concepts upon which workmen's compensation laws are founded. Nor can I recommend the idea of paying a man compensation before disability upon the anticipation of a probable future loss of earning capacity.

It is my view, subject to suggestions I will make later, that the present system of compensating silicotics — that is, *on the basis of loss of earning capacity* — should not be changed. (emphasis added)

However, the system of compensating silicotics was eventually changed. In 1942, the section of the *Act* that provided compensation to silicotics contained the phrase "disabled from earning full wages. . . ." That phrase was removed and is not part of the current Section 6(8) which deals with silicosis. That phrase is still part of Section 6(1)(a), which applies to J.'s case, and thus Mr. Justice Sloan's statement would appear to be relevant to the interpretation of that section.

Section 6(8) of our *Act* requires only that a worker be "disabled" from silicosis to be entitled to compensation. Policy #29.42 of the *Claims Manual* notes:

The restrictions contained in Section 6(1) do not apply to silicosis. It is, therefore, not a requirement of a claim for silicosis that there should be a lessened capacity for work, or that the worker should be disabled from earning full wages at the work at which he or she was employed. (emphasis added)

Thus, both the *Act* and the *Claims Manual* establish silicosis as a special case that is treated differently from other occupational diseases.

In Mr. Justice Tysoe's 1966 report on the *Workmen's Compensation Act* in B.C., he made statements which supported the idea that, with some noted exceptions, entitlement under the *Act* is a function of earning capacity. At p. 229, in discussing industrial disease in general, Mr. Justice Tysoe emphasized that:

It must be recorded that, to entitle a workman to compensation for an industrial disease, the disease contracted must have disabled him "from earning full wages at the work at which he was employed."

At pages 238-239, in discussing industrial deafness, Mr. Justice Tysoe stated in part:

. . . as I read subsection (2) of Section 7 of the *Act*, there is no entitlement to compensation (other than medical aid) unless the injury disables the workman from earning full wages at the work at which he was employed for longer than three days.

Some Unions advanced the proposition that there should be compensation for what they called "social loss of hearing" by which I think they meant the loss of the social pleasures that in ordinary cases flows from deafness. I must reject this. I think it is the wrong approach. Workmen's compensation is not intended to compensate for that sort of thing and, in my opinion, should not be enlarged to do so. I think the wisest thing to do is to stay in step with the existing principles of the scheme.

However, the *Act* was changed to create a different rule for loss of hearing claims. Section 7 now provides for compensation even where there is no loss of earnings resulting from the loss of hearing. Section 7 is different from Section 6(1)(a) of the *Act* in that regard.

In the workers' compensation legislation of some other provinces, the phrase "disabled from earning full wages at the work at which he was employed" is not part of the requirement for entitlement to compensation due to industrial or occupational diseases. In Ontario, until 1973, the section in the *Workers Compensation Act* dealing with indus-

trial diseases included that same phrase. In 1973, the *Ontario Act* was amended and that phrase was removed with the result that the section now only requires the worker to be disabled. The explanatory note accompanying the amendment pointed out that the amendment was intended to provide for workers suffering from industrial disease regardless of a reduction of earning capacity. Terence G. Ison in his book *Workers' Compensation in Canada* (second edition — 1989) stated at page 53:

In some other jurisdictions. . . entitlement to periodic payments of compensation depends upon the claimant being *disabled* by the disease *from earning full wages at the work at which he was employed*. In these jurisdictions, disablement from disease is an *economic rather than a physical concept*. Though there may be physical impairment, *pension benefits are not payable unless the impact of the disease requires the worker to withdraw from employment, or to take a lower paying job*.

(emphasis added)

J.'s claim comes under Section 6(1)(a). As pointed out, that section requires the worker to be "disabled from earning full wages at the work at which he was employed." While our *Act* was changed to remove this requirement for silicosis and hearing loss, there has been no change to Section 6(1)(a), which covers other occupational diseases.

Policy #26.30 in the *Claims Manual* notes this requirement in Section 6(1)(a) and states, "This means that there must be some loss of earnings from such regular employment as a result of the disabling affects of the disease, and not just an impairment of function."

It is important to note that Section 6(1) of the *Act* provides for some forms of compensation even when the occupational disease does not disable the worker from earning full wages. In fatal cases, compensation may be payable under Section 17. Section 6(1)(a) states that compensation is payable where ". . . the death of a worker is caused by occupational disease. . . ." There is no requirement that it was the worker's death from the occupational disease which terminated his or her employment in order for compensation to be payable to his or her dependents. As well, the last part of Section 6(1) reads, "A health care benefit may be paid although the worker is not disabled from earning full wages at the work at which he was employed." This clearly distinguishes the entitlement to health care benefits from the entitlement to other benefits, such as temporary or permanent disability benefits.

We interpret the phrase "is thereby disabled from earning full wages at the work at which he was employed" to mean the work at which the worker was regularly employed on the date he or she was disabled by the occupational disease. This seems to most reflect the economic test in Section 6(1)(a), as described by Professor Ison. As well, Section 6(2) provides some guidance by identifying the date of disablement as the occurrence of the injury. Section 6(2) does not connect the occurrence of the injury with

the time during which the worker was exposed to the substances that caused the occupational disease.

Thus, in the case of a worker whose occupational disease arose while he or she was working at the same work that caused the occupational disease, it would be that work which would be considered for Section 6(1)(a). If the worker was temporarily unemployed, out of the work force or doing some other type of work when the occupational disease arose, it would be necessary to consider the worker's regular or normal employment for the purposes of Section 6(1)(a). In contrast, Section 6(1)(b), in dealing with causation, refers to "any employment in which the worker was employed" to identify the work that caused the industrial disease. This is broader language than found in Section 6(1)(a).

At the time J.'s occupational disease arose, he was retired. He had been employed but was fully retired with no intention of becoming employed. Thus, there was no work at which J. was regularly employed when his disablement occurred. He was not temporarily out of work nor expecting to be re-employed at some future date. His disablement did not cause him to stop employment, nor require him to take a lower paying job nor prevent him from starting or returning to any planned employment. We appreciate that he was working on his own small farm, but we find that was not work or employment for the purposes of the *Act*, as he was not generating earnings.

It may seem unfair that J. worked for fifteen years at a job which later caused him to develop bladder cancer, but receives no compensation for that disease, other than health care benefits. He may have planned to do things during his retirement that he can no longer do because of his cancer. However, Section 6(1)(a) of the *Act* is based on the concept of compensation for loss of earnings. That is not the same concept that underlies Sections 6(8), 7 or even 23(1). This may appear to be unfair, particularly to retired workers. The *Ontario Act* was amended to remove the economic test for all industrial diseases. Our *Act* was changed to remove the economic test for silicosis and hearing loss claims only. It is beyond our jurisdiction to interpret the *Act* as if it had been amended to remove the economic test for all occupational diseases.

The worker's counsel provided no analysis or authority on the constitutionality of Section 6(1)(a), and we are unable to find it is contrary to the *Charter*. We cannot agree with the argument that J. meets the requirement in Section 6(1)(a) because his cancer prevents him from working in the potrooms at A. Ltd. He had not worked there for at least nineteen years when his cancer appeared. Again, we find Section 99 does not assist on a matter of statutory interpretation.

Therefore, while J. meets the requirements of Section 6(1)(b), he does not meet the requirements of Section 6(1)(a). Pursuant to Section 6, he is entitled to health care benefits (formerly medical aid) but not to other forms of compensation.

Section 99

The requirement in Section 99 to decide “on the merits and justice of the case” does not assist with questions of statutory interpretation. However, it is relevant to adjudication in individual cases. We have used Section 99 above in the adjudication of this case, especially in regard to using the B.a.P. model. Otherwise, we find Section 99 cannot be used to create entitlement or override clear language in the *Act*. We find the worker’s counsel’s submission about A. Ltd.’s financial position and the price of its stock are not relevant to the merits and justice of the case.

Costs

The worker’s counsel repeatedly ask for reimbursement of expenses and payment of legal fees and costs. The employer’s counsel opposed the payment of legal fees but asked for reimbursement for one report.

Section 100 of the *Act* provides for reimbursement of expenses in certain circumstances. Several policies of the Board in the *Claims Manual* deal with different kinds of expenses. Policy #100.50 states; “The cost of medical reports obtained by a claimant or employer will also be paid by the Board where, following the inquiry or appeal, it appears reasonable for them or their representative to have assumed, prior to the inquiry or appeal, that the provision of the report was necessary.”

We make no order for the reimbursement of any medical, medical/legal, or expert report in this case. We did not want this appeal to become “a battle of the experts.” While the parties were fairly restrained in that regard, we do not consider it was reasonable for the parties to think it was necessary for them to produce any expert reports

Policy #100.40 in the *Claims Manual* states, “No expenses are payable to or for any advocate.” However, in Decision No. 93-1687, the Appeal Division found that Section 100 of the *Act* was broad enough to authorize the Board to award legal costs out of the accident fund or order them paid by one of the parties. The Appeal Division said the Board had used Policy #100.40 as a guideline, and occasionally departed from that policy. The Appeal Division found that was an appropriate exercise of discretion, as per *Testa v. British Columbia (Workers’ Compensation Board)* (1989), 58 D.L.R. (4th) 676 (B.C.C.A.). The Appeal Division said payment of costs by the Board would arise only in unusual or extraordinary circumstances, where there had been “flagrant abuse by a Board officer of a worker’s, or claimant’s or employer’s rights under the *Act* or governors’ policy, which was clear on the face of the file.”

Policy #100.70 of the *Claims Manual* notes the Board’s authority in Section 100 of the *Act* to award costs “to the successful party to a contested claim for compensation or to any

other contested matter to meet the expenses he has been put to by reason of or incidental to the contest. . . .” The policy states, “An award under Section 100 might be made on an appeal but only in unusual cases. . . . The section is limited to cases where the worker or employer abuses their respective rights under the *Act*. . . . An award will not likely be made under Section 100 in favour of a successful appellant. . . . Since the appeal will be proceeded with and resolved whether or not it is opposed by the other party, it cannot normally be said that the expenses of the appellant are due to the other party’s ‘contest’ of the appeal.”

This is a complex case, with some troubling aspects; in particular, the Board’s decision to rely solely on the B.S.M. model and A. Ltd.’s lack of cooperation in sharing potentially relevant test results with the Board. However, we are unable to find that the Board committed a flagrant abuse of the worker’s rights under the *Act* or policy. The Board could have pursued A. Ltd. more vigorously regarding its B.a.P. testing, or could have conducted tests itself to determine the B.a.P.:B.S.M. ratios. Its failure to do that was not a flagrant abuse under the *Act*.

Further, A. Ltd. has not abused their rights under the *Act* in regard to this appeal. A. Ltd. could have been more cooperative with the Board in the past. On this appeal, A. Ltd. has vigorously opposed J.’s claim, but has been cooperative in providing information requested by the Panel. We find this conduct is not an abuse under the *Act*. The complexity and duration of the appeal is not a basis for awarding costs.

Therefore, we deny J.’s request for the payment of legal fees and costs, and all other disbursements.

Conclusion

We find the Panel has sufficient independence to make the decision in this case.

We agree with the Review Board that J. met the requirements of Section 55 of the *Act*. While his application for compensation was received more than one year after the diagnosis of his bladder cancer, there were special circumstances which precluded him from filing within the prescribed one year.

On the issue of causation, we find J. is not entitled to the benefit of the presumption in Section 6(3) of the *Act*. We find the phrase “at or immediately before” in Section 6(3) cannot be interpreted to include the nineteen year gap between the end of J.’s employment at A. Ltd. and the appearance of his bladder cancer.

However, we find causation is established under Section 6(1)(b) of the *Act*. We make this finding based on the application of the B.a.P. model, as described above. The

Board's policy relies solely on the B.S.M. model. The Board relied heavily on the research of Doctor E and others in developing that policy. That research identified the B.a.P. model and the B.S.M. model as the primary models for determining causation, and preferred the B.a.P. model if the relevant data was available. In the 1980's, the Board chose the B.S.M. model as it thought the relevant data did not exist regarding the B.a.P. model. During this appeal, we found that this data has been in the employer's possession since the late 1970s. Therefore, there is sufficient data to apply the model preferred in the research. Pursuant to Sections 6(1)(b) and 99 of the *Act*, in adjudicating this case we must consider all the relevant evidence on causation. That includes consideration of the causation model preferred by Doctor E and others. Board policy cannot exclude consideration of the B.a.P. model. Under that model, causation is established here and J. meets the requirements of Section 6(1)(b) of the *Act*.

We find J. is entitled to health care benefits only, as he does not meet the requirements of Section 6(1)(a) of the *Act* for other benefits. We make that finding on the basis that his bladder cancer did not disable him from "earning full wages at the work at which he was employed" at the time it appeared, as he was permanently retired at that time.

Finally, we deny the parties' request for reimbursement of expenses, including the cost of medical and expert opinions. We also deny J.'s request for the payment of legal fees and costs.

We thank the parties and their counsel for their cooperation, assistance and patience in this appeal. We encourage the Panel of Administrators and Occupational Disease Services to consider the consequence of the presence of beta-naphthylamine in the workplace at A. Ltd., in light of Schedule B 4(h) and Section 6(3) of the *Act*. We further encourage the Panel of Administrators and Occupational Disease Services to review policies #26.21 and #30.10 in light of this decision. The extended definition given to "immediately" in #26.21 may require a legislative amendment, and the sole reliance on the B.S.M. model in Policy #30.10 must be reviewed in light of information obtained during this appeal, including the very helpful response of Doctor E. Finally, we will forward a copy of the exposure classification list used by A. Ltd. in assessing these claims to the Occupational Disease Services. While we found no error in A. Ltd.'s calculations in this case, Occupational Disease Services should have a copy of this document so that, if necessary, it can provide informed advice in the adjudication of individual cases.

IN CONCLUSION, WE ALLOW J.'S APPEAL TO THE EXTENT SET OUT ABOVE.

Editor's Note: This decision has been edited for publication.

Decision of the Appeal Division

Number: 96-0797
Date: May 16, 1996
Panel: Herb Morton
Subject: Section 5(4) Accident Presumption

The worker appeals the January 19, 1996 Review Board finding.

At issue is whether her February 20, 1995 left leg injury, diagnosed as a muscle tear of the left calf, was caused by her employment.

The worker had been off work from November, 1994 to January 2, 1995 due to an elbow problem. She returned to work in the hospital on January 3, 1995 as a nurse coordinator, covering two wards. These two wards were approximately 90 yards apart.

On February 20, 1995, she was walking between the two wards at approximately 2:00 p.m. She was carrying a thin file in her hand. She was walking down a ramp-style corridor, in which there was a slightly sloped section leading to a flat section, and then sloping again. After walking about 15 feet on this flat section, and while still on the flat section, the worker felt a sharp "pop" and then pain in her left calf. She was walking at a brisk pace, but did not catch her foot, slip, trip or fall. She reported that she did not place her foot in any awkward manner. There was no observable occurrence or incident associated with the worker's sudden onset of symptoms.

In Memo #3 dated March 9, 1995, the medical advisor stated to the claims adjudicator:

. . . Although I cannot provide you with a specific cause for this worker's symptoms, it would not appear that the fact that it occurred while at work has any causative significance.

By decision dated April 10, 1995, the claims adjudicator denied this claim. She found that the fact the worker's injury occurred while the worker was at work was merely coincidental, and that the worker's employment was not of causative significance to her injury. By finding dated January 19, 1996, the Review Board denied the worker's appeal.

Law and Policy

Workers Compensation Act

Section 5

- (1) Where, in an industry within the scope of this Part, personal injury or death arising out of and in the course of the employment is caused to a worker, compensation as provided by this Part shall be paid by the board out of the accident fund.
- (4) In cases where the injury is caused by accident, where the accident arose out of the employment, unless the contrary is shown, it shall be presumed that it occurred in the course of the employment; and where the accident occurred in the course of the employment, unless the contrary is shown, it shall be presumed that it arose out of the employment.

Section 1

In this *Act*

“accident” includes a wilful and intentional act, not being the act of the worker, and also includes a fortuitous event occasioned by a physical or natural cause;

Governors’ policy — *Rehabilitation Services and Claims Manual*:

#14.10 Presumption

. . . the presumption only operates when the injury results from an “accident.” This term is defined in Section 1 to include a “. . . wilful and intentional act, not being the act of the worker. . .” and a “. . . fortuitous event occasioned by a physical or natural cause.” This is not an exclusive definition of the term, but *the word has been interpreted in its normal meaning of a traumatic incident*. It has not, for example, been extended to cover injuries resulting from a routine work action or a series of such actions lasting over a period of time. The broad definition given to the term “accident” for the purpose of Section 4(1) of the *Government Employees Compensation Act* does not apply to Section 5(4) of the *B.C. Act*.

#14.20 Occurrence or Non-Occurrence of a Specific Incident

Where an injury occurs at work as a result of any *traumatic experience or external cause*, it is usually from an accident to which the presumption in Section 5(4) applies. Thus, once it is established that the injury was caused by accident, and that the accident arose in the course of employment, the injury is presumed to have arisen out of the employment unless there is affirmative evidence that the injury was caused by factors external to the employment.

. . . Where there is no “accident,” there is no presumption under Section 5(4) and the evidence must support a conclusion that the injury arose out of the employment as well as a conclusion that it arose in the course of the employment. (emphasis added)

#15.00 Natural Causes

It is necessary to distinguish between injuries resulting from employment (which are compensable), and injuries resulting from purely natural causes (which are not compensable).

An injury is not compensable simply because it happened at work. It must be one arising out of and in the course of employment. If it happened at work, that usually indicates that it arose in the course of the employment. But it must also have arisen “out of” the employment. This means that there must have been something in the employment relationship or situation that had causative significance in producing the injury.

But if the injury was one arising out of purely natural phenomena – the internal workings of the human body – the employment situation may then be an irrelevant coincidence, and if so, the injury is not compensable.

Findings and Reasons

It is necessary to consider, first of all, whether the presumption contained in Section 5(4) of the *Act* is applicable to the facts of the worker’s case. Her injury occurred while she was in the course of her employment — if the injury was due to an *accident*, a rebuttable presumption arises that it arose out of the employment.

Governors' Policy #14.10 states that the word "accident" in Section 5(4) has been interpreted in its normal meaning of a *traumatic incident*. The wording of governors' Policy #14.20 further appears to generally equate the word "accident" with a "traumatic experience or external cause," although somewhat ambiguously stated. The policy is clear in providing that disablement by the employment, without such a traumatic incident, does not constitute an accident for the purposes of Section 5(4) of the *Act*.

The issue as to whether an "accident" requires some external cause, or whether it may also include a sudden or unexpected injury occurring in the course of employment but not known to have been associated with any unexpected external causal event, has been the subject of contention in the Ontario Workers' compensation system. I have examined certain published decisions from that jurisdiction to consider whether they assist in interpreting Section 5(4) of the *British Columbia Act* [i.e. a decision of the *Ontario Workers' Compensation Appeals Tribunal*, number 42/89, published at 12 W.C.A.T.R. 85; a decision by the Ontario W.C.B. board of directors, *Review of Decision No. 72*, 12 W.C.A.T.R. 152, and a decision by the Ontario Court of Appeal, *Re Kuntz and Workers' Compensation Board, Re Dagenais and Workers' Compensation Board*, (1986) 31 D.L.R. (4th) 630]. I find, however, that the legislative history of the *British Columbia Act* is sufficiently different that the analysis in those decisions is not directly applicable to the B.C. legislation.

A difference between the *B.C. Workers Compensation Act*, and both the federal *Government Employees Compensation Act* and the *Ontario Workers Compensation Act*, is that both these latter statutes require that personal injury be *by accident* in order to be compensable. This is not true of the current Section 5(1) of the *B.C. Act*. In the face of such a threshold requirement for establishing eligibility for compensation in those two other statutes, there are strong reasons for interpreting the words "by accident" very broadly so as to provide compensation in situations where there is no traumatic incident or external event. Since the current *B.C. Act* does not have a threshold requirement for an accident in Section 5(1), the term "by accident" in Section 5(4) can have a more particularized and narrow meaning as contemplated by governors' policy.

In a decision by the B.C. Appeal Division Decision No. 92-0743, *The Government Employees Compensation Act* (*Workers' Compensation Reporter*, Vol. 8, p. 165), the Panel noted that it had no difficulty reconciling a broad interpretation of the phrase "personal injury by an accident" in the *Government Employees Compensation Act* (for federal workers), with a narrow interpretation of the word "accident" under Section 5(4) of the *British Columbia Workers Compensation Act*. The Panel noted (at page 194):

The fact that the meaning of the word "accident" as it appears in [subsection 5(4) of the *Workers Compensation Act*] is narrow should pose no problem. A broad interpretation of "accident," when it ap-

pears in an entitlement provision, can be easily reconciled with a narrow interpretation of this word when it appears in a presumption provision.

This reasoning supports a narrow interpretation of the term “accident” in the Section 5(4) presumption, while recognizing the need for a broad interpretation of the phrase “injury by accident” where this is a threshold requirement for obtaining compensation in other statutes.

A review of the history of the *B.C. Workers Compensation Act* reveals that commencing in 1916, the general provision concerning entitlement to compensation referred to “personal injury *by accident* arising out of and in the course of employment.” In 1959, the definition of the term “accident” was expanded to include “a chance event occasioned by a physical or natural cause as well as disablement arising out of and in the course of the employment. . . .” In 1968, following the Royal Commission report of Mr. Justice Tysoe, the words “by accident” were removed from the general entitlement provision, so that compensation was payable for “personal injury arising out of and in the course of the employment” without any requirement for the occurrence of an accident whether broadly or narrowly defined. Also in 1968, the definition of the term “accident” returned to the wording utilized in 1916, which is essentially the same as the current wording.

It is apparent from the Royal Commission report of Mr. Justice Tysoe that the term “by accident” had been applied by the Board in the traditional restrictive sense of a traumatic external event. At pages 184 –185, Mr. Justice Tysoe reviewed the numbers of cases which were disallowed by the Board on the basis of “insufficient proof of accident.” For example, 2,923 such cases were disallowed in 1963. Mr. Justice Tysoe commented:

In looking at these figures one must remember that all of them relate to the period subsequent to the amendment to the definition of accident in 1959. It seems to me from Mr. Wright’s evidence that at least his department continued to think in terms of accident in its narrow sense rather than in its wider sense. And these reports were for the Commissioners.

. . . Although I think that in some instances the Board regards disablement arising out of and in the course of employment as being “injury by accident,” within the meaning of subsection (1) of Section 7 of the *Act*, I am left with a serious doubt that it does this in all cases.

. . .

The doubt which besets me as to whether the Board is consistently applying the basic compensation formula set out in subsection (1) of Section 7 of the *Act* in combination with the definition of “accident” in a proper manner gives me some concern. There should be no room for error in this regard, for any such error means that some workmen are being treated unjustly. . . .

I feel that some of the trouble has arisen from the placement of the words “disablement arising out of and in the course of the employment” in the definition of “accident.” To make “accident” include such as thing as that can make for confused thinking. . . . (emphasis added)

Mr. Justice Tysoe quoted from a commentary by Dean Larson (at page 187):

In the very early days of workmen’s compensation, it might have been thought in some jurisdictions that the concept of industrial injury should be limited to the popular picture of a traumatic bang, crash or smash. The realities of contemporary employment life, however, make this concept seem out of date. The job of workmen’s compensation is to take care of work-connected injuries of all kinds, and the elimination of the “by accident” limitation is a major step toward achievement of this basic role.

Mr. Justice Tysoe concluded (at page 187):

It seems to me that under our legislation as it now stands, “accident” is no longer an essential element of the right to compensation and that the test is simply “was the workman’s disability truly work-caused?” It further appears to me that the retention of “accident” in the basic coverage formula has made for confusion in the administration of the *Act*. I am unable to see that such retention serves any useful purpose. Even if I disregard the 1959 amendment to the definition of “accident” and direct my attention only to the trend of the jurisprudence, I must come to the conclusion that the time has gone by when a workman’s right to compensation should be limited to “injury by accident” in the narrow sense of that term.

I have come to the conclusion that the words “by accident” in the second line of subsection (1) of Section 7 of the *Act* should be struck out and that the 1959 amendment to the definition of “accident” should be withdrawn, leaving the definition as it was prior to the said amendment. I so RECOMMEND.

Mr. Justice Tysoe then went on to address the presumption clause, having regard to the change recommended by him in deleting the term “by accident” in the entitlement provision. He concluded (at pages 188 – 189):

I can visualize some semblance of reason behind creating the presumption in favour of a workman set up by subsection (4) of Section 7 where “accident” is an element of the compensation coverage. *I cannot, however, see any sound reason why those presumptions should be granted in cases of injury or disablement without accident.* Certainly the evidence before me does not provide a reason.

Accordingly, I RECOMMEND that subsection (4) of Section 7 be prefaced with the words “In cases where the injury is caused by accident.” *The use of the word “accident” in this subsection (4) makes it necessary that the original definition of “accident” be retained.*

(emphasis added)

The legislative changes recommended by Mr. Justice Tysoe were in fact implemented. His report provides a clear indication as to the intent behind these changes. It is plainly evident from Mr. Justice Tysoe’s comment that he could see no sound reason for applying the presumption in cases of injury or disablement without accident, and from his recommendation that the original definition of accident be maintained for the purposes of the presumption clause, that this use of the word “accident” in Section 5(4) was intended to be in the narrow traditional sense of an external traumatic incident.

This interpretation of the word “accident” as it is used in Section 5(4) is consistent with other uses of the word “accident” in the *Workers Compensation Act*. The majority of references to “accident” in the *Act* are as part of the term “accident fund.” However, in two sections in which the word accident stands alone, the wording of the provision distinguishes between the accident and the injury. Thus, the injury itself cannot be considered as the accident, but must involve some external traumatic event.

Section 21(8) provides:

The board may assume the responsibility of replacement and repair of

- (a) artificial appliances, including artificial members damaged or broken as the result of an accident arising out of and in the course of the employment of the worker; and
- (b) eyeglasses, dentures and hearing aids *broken as a result of an accident arising out of and in the course of employment if that breakage is accompanied by objective signs of personal injury, or, where there is no personal injury, if the accident is*

otherwise corroborated and the board is satisfied the worker was not at fault.

(emphasis added)

Section 71(8) provides:

An officer of the Board may investigate an *accident resulting in injury to, or the death of, a worker*, and may inspect and inquire with respect to health and safety matters at any place of employment, and may make the inquiries and inspect the documents he considers necessary for these purposes. . . .

(emphasis added)

Upon consideration of the wording of the *British Columbia Workers Compensation Act*, together with a review of the history of the *Act* and consideration of the Royal Commission report of Mr. Justice Tysoe, I am satisfied that current governors' Policy #14.20 properly reflects the intent of the legislature. Some external traumatic incident is required in order for the Section 5(4) presumption to be applicable. The reasoning expressed by the Ontario W.C.A.T. in coming to a different interpretation is not applicable in view of the different wording and history of the B.C. *Act*.

In considering the worker's appeal, I am guided by the interpretation of Section 5(4) provided in governors' Policy #14.20. In this case, there was no external traumatic incident giving rise to the worker's muscle tear. I find that there was no accident, and that the Section 5(4) presumption is not applicable to the worker's claim.

The worker's attending physician expresses support for the worker's appeal. He advises, however, that a forceful action is required to cause a muscle tear of this nature. Doctor J states that an external force is required, such as sudden stretch or lunge, and that muscle tears do not occur spontaneously.

The difficulty presented in this case is that there is no evidence of any sudden stretch or lunge. The worker's evidence is that nothing unusual or untoward occurred apart from the actual onset of symptoms. It would appear, therefore, that it is coincidental that this injury occurred at work. While Doctor J's report provides some evidence in support of a causal relationship to the worker's employment, I find that the possibilities of a work relationship are less than evenly balanced. I agree with the Review Board in finding that there is insufficient evidence to support the conclusion that the worker's muscle tear was causally related to her employment.

IN CONCLUSION, THE WORKER'S APPEAL IS DENIED. HER FEBRUARY 20, 1995 LEFT LEG INJURY, DIAGNOSED AS A MUSCLE TEAR OF THE LEFT CALF, WAS NOT CAUSALLY RELATED TO HER EMPLOYMENT.

Editor's Note: This decision has been edited for publication.

Decision of the Appeal Division

Number: 16
Date: July 12, 1996
Panel: Connie Munro
Subject: Practice and Procedure Regarding Assessment Appeals

Appeal Division Decision No. 1, 1991, "Practice and Procedure" (*Workers' Compensation Reporter*, Vol. 7, p. 33) established the following practice for assessment appeals (at pages 49-50):

An appeal may be initiated within 30 days after a decision by a Manager or Director. An employer should exhaust all internal avenues of review within the Assessment Department prior to bringing an appeal to the Appeal Division.

Where written submissions are provided, a response may be obtained from the Assessment Department. *This will be done in all cases where the employer has not exhausted the avenues of review within the Assessment Department.* Any such response will be disclosed to the parties, who will have the opportunity to provide rebuttal or comment prior to the matter being considered by the Appeal Division

(emphasis added).

In 1994, the Appeal Division undertook a community feedback project to elicit comment from the community as to how well the Appeal Division was meeting its goals. The Appeal Division changed an aspect of its practice related to assessment appeals as a result of information received in the course of this project.

As indicated in the *Appeal Division Community Feedback Report*, Decision No. 1, 1994, (*Workers' Compensation Reporter*, Vol. 11, p. 93) at page 95, the above-referenced practice established in Appeal Division Decision No. 1 was intended to ensure that reasons were recorded on the file for decisions by the Assessment Department. This was considered necessary at that time as many assessment decisions, which are appealable directly to the Appeal Division, are "bare" notices (often computer generated), which contain no reasons or explanation for the decision.

During the community feedback process some employers criticized this practice. Sending the employer's submission to the Assessment Department for further comment was seen as inviting the department to critique the employer's appeal submissions. It was contended this was anomalous and unfair, as no comparable procedure was used in other types of appeals. In many cases the assessment officer had already provided a decision letter setting out the reasons for the decision. On considering these criticisms I noted some improvements had occurred in the provision of written reasons for decisions made by assessment officers in the first instance, making it unnecessary in many cases to seek such reasons after the filing of an appeal.

Consequently, I modified the practice set out in Appeal Division Decision No. 1 in response to the employers' concerns. The new practice found at Decision No. 1 (*Workers' Compensation Reporter*, Vol. 11, p. 93), at pages 95-96 was then established that, where an employer appeals an assessment decision to the Appeal Division, the appeal officer would not invite input from the Assessment Department on a preliminary basis in all cases. Such input would only be invited if it was considered necessary to elicit reasons for the decision. The change in practice acknowledged it would always be open to the Appeal Division Panel considering an appeal to obtain additional input from the Assessment Department, should the Panel find it necessary. Any input from the Assessment Department concerning an appeal would continue to be disclosed to the appellant, and an opportunity provided for reply.

The *Appeal Division Community Feedback Report* was presented and discussed at the January 9, 1995, Board of Governors' meeting. The governors accepted the change in practice noted in my report as within the purview of the chief appeal commissioner. This was consistent with the governors' established approach to leave the operational aspects of practice and procedure before the Appeal Division (eg. time for making submissions, procedures on adjournments, etc.) to the chief appeal commissioner, while establishing as governors' policy broad practice and procedure direction for the Appeal Division (eg. establishing the functions of the chief appeal commissioner, establishing the policy for selection of appeal commissioners, etc.). Section 85.1 states:

Subject to any policies of the governors and any bylaws enacted or resolutions passed under Section 82, the chief appeal commissioner may determine the practice and procedure for the conduct of appeals by the Appeal Division under this *Act*.

Unfortunately, both the governors and I overlooked the fact that the original practice established by the Appeal Division and set out in Appeal Division Decision No. 1, 1991, "Practice and Procedure" (*Workers' Compensation Reporter*, Vol. 7, p. 33) on May 31, 1991, had been incorporated into the *Assessment Policy Manual* at Policy #10:40:00 by governors' resolution dated June 1, 1992. Some months following the practice change made as a consequence of the feedback project it was brought to my attention by an appeal

commissioner that the *Assessment Policy Manual* contained the reference to the prior Appeal Division practice. I, therefore, requested on July 10, 1995, that the governors formally amend Policy #10:40:00. My report containing that request stated as follows:

I request an amendment to governors' policy in the *Assessment Policy Manual*.

Attached as Appendix F is an excerpt of Appeal Division Decision No. 1, "Practice and Procedure" (*Workers' Compensation Reporter*, Vol. 7, p. 33) at 49-50 concerning assessment appeals. This decision established the practice of obtaining a response from the Assessment Department when an appellant provides written submissions but has not exhausted the avenues of review within the Assessment Department. This practice was intended to ensure that reasons were given for decisions by the Assessment Department. This Appeal Division practice was subsequently included in the *Assessment Policy Manual* at Policy #10:40:00, attached as Appendix G.

My December 12, 1994 Appeal Division community feedback report (submitted to the governors' with my monthly report of the same date) noted employer concerns with this aspect of Appeal Division practice (page 5). Sending an employer's submission to the Assessment Department for response after the assessment officer already provided a decision letter was said to be anomalous and unfair, as no comparable procedure is used in other types of appeals. Attached as Appendix H is the relevant excerpt from the community feedback report.

Consequently, I directed that Appeal Division practice be modified in response to the employers' concerns. The modified practice is set out in Appendix H. Where an employer appeals an assessment decision to the Appeal Division, the appeal officer no longer invites input from the Assessment Department on a preliminary basis in all cases. Such input is only invited if it is considered necessary to elicit reasons for the decision. It is always open to the Appeal Division Panel, however, to obtain additional input from the Assessment Department, should the Panel find it necessary. Any input from the Board concerning an appeal is disclosed to the appellant, with an opportunity to reply.

The *Assessment Policy Manual* has not been adjusted to take account of this change in Appeal Division practice. Until the *Manual* is changed the modified Appeal Division practice is technically inconsistent with governors' policy.

Policy #10:40:00 of the *Assessment Policy Manual* ought, therefore, to be amended to reflect the modified Appeal Division practice.

Since the commitment regarding the change in practice had been made to the employer community, and in light of the governors having been aware of the practice change set out in the *Appeal Division Community Feedback Report* since January, 1995, I advised

appeal commissioners informally that the altered Appeal Division practice should be followed until such time as the governors had an opportunity to consider the *Assessment Policy Manual* amendment I had requested.

At its May 31, 1996, meeting, the Panel of Administrators considered a discussion paper from the interim Director General, Policy and Regulation Development Bureau, entitled "Appeal Division Practice in Relation to Employer Appeal of Assessment Decisions — Policy #10:40:00 of the *Assessment Policy Manual*." The discussion paper provided four options for consideration by the Panel of Administrators in response to my request. Three of the options did not reflect the change in Appeal Division practice adopted in the *Appeal Division Community Feedback Report*.

By resolution dated May 31, 1996, the Panel of Administrators approved and adopted option 3 which states as follows:

Status Quo

This option would retain the essence of the policy set out in Policy #10:40:00 of the *Assessment Policy Manual*. Governors' published policy would recommend, rather than require, that appellants exhaust all available avenues of review within the Assessment Department before appealing to the Appeal Division. This policy would be coupled with a provision that when this recommendation is not followed, the Assessment Department would be invited to respond to the employer's submission in all such cases (Appendix F).

Appendix F of the discussion paper was a draft of Policy #10:40:00 of the *Assessment Policy Manual* intended to reflect option 3 presented to the Panel of Administrators, and is attached to this practice directive. The Panel of Administrators' resolution approving and adopting option 3 stated that "the *Manual* should be amended accordingly," presumably meaning Appendix F of the discussion paper is now Policy #10:40:00 of the *Assessment Policy Manual*.

The specific adoption of this policy by the Panel of Administrators renders the practice binding on the Appeal Division.

In light of Section 85.1 of the *Act*, the Appeal Division practice will forthwith be modified to comply with Policy #10:40:00 of the *Assessment Policy Manual*, as amended by the Panel of Administrators' May 31, 1996 resolution.

From the date of this practice directive, any new appeal from an Assessment Department decision, or any appeal already initiated in the Appeal Division but not yet assigned to a Panel for consideration, will be conducted in accordance with the

amended Policy #10:40:00 of the *Assessment Policy Manual*, as amended and articulated in Appendix F to the discussion paper presented to the Panel of Administrators. Appeals already assigned to an Appeal Division Panel before the date of this practice directive will continue to completion on the basis of the existing Appeal Division practice.

Decision of the Appeal Division

Number: 20
Date: November 29, 1996 (amended January 17, 1997)
Panel: Maureen S. Nicholls
Subject: Delegation by the Chief Appeal Commissioner

1. 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.

2. I hereby delegate the following powers and duties to the appeal commissioner appointed by me, from time to time, to serve as deputy chief appeal commissioner. Subject to paragraph 13 in this delegation, this delegation replaces those contained in Appeal Division Decisions No. 17 (1 August 1996) and No. 18 (31 October 1996). I retain the powers and duties delegated by me to the deputy chief appeal commissioner and will exercise these concurrently with the deputy chief appeal commissioner, 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 deputy chief appeal commissioner to act in my place. I also delegate to the deputy chief appeal commissioner the power to act in my absence.
3. The following powers are delegated to the deputy chief appeal commissioner:
 - a. 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;
 - b. under Section 91(1), the power to grant an extension of time for an appeal from a Review Board finding;

- c. 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 deputy chief appeal commissioner considers the longer period necessary because of an act or omission of the appellant or because of the complexity of the matter under appeal;
 - d. 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;
 - e. 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);
 - f. 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;
 - g. under Section 85(7)(c), the power to preside at hearings or meetings of the Appeal Division; and
 - h. under Section 96.1(3), or pursuant to the common law grounds for reconsideration articulated in Appeal Division Decision No. 93-0740, 1993, *Right to Reconsider Appeal Division Decisions (1993)*, (*Workers' Compensation Reporter*, Vol. 10, p. 127), the power to direct that the Appeal Division reconsider a matter or that the applicant may make a new claim to the Board with respect to a matter.
4. In exercising these delegated powers, the deputy chief appeal commissioner shall implement the policies of the governors with respect to the administration of the Appeal Division pursuant to Section 85(7).
 5. I hereby appoint Cassandra Kobayashi, appeal commissioner, to serve as deputy chief appeal commissioner of the Appeal Division on the basis set out above from December 1, 1996 to November 30, 1998.
 6. I hereby delegate to Judith Williamson, appeal commissioner, the powers and duties as are delegated to the deputy chief appeal commissioner in paragraph 3

above, but limited to situations where the deputy chief appeal commissioner is absent or has determined herself 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 Paul Petrie, appeal commissioner, the same powers and duties as delegated in this paragraph to Judith Williamson, but limited to situations where Judith Williamson is absent, or has determined she is exposed to a possible or actual conflict of interest or appearance of bias with respect to the given case.

7. I hereby delegate to appeal commissioners Cassandra Kobayashi, Sonja Hadley, Paul Petrie, Jill Callan, and Anne-Marie Drosso, the same authority as set out in Decision No. 8, 1992 (as published at *Workers' Compensation Reporter*, Vol. 8, 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 No. 8, 1992 (*Workers' Compensation Reporter*, Vol. 7, p. 171).
8. I hereby delegate to A. Grant McRitchie, appeal commissioner/manager, authority to make decisions concerning:
 - a. a request for an extension of time to appeal under Section 91(1), 96(6), or 96(6.1) of the *Workers Compensation Act*;
 - b. an oral hearing request, prior to the assignment of the case to a panel of the Appeal Division;
 - c. 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 No. 12, 1994 (*Workers' Compensation Reporter*, Vol. 10, 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 deputy chief appeal commissioner.
9. I retain the powers and duties delegated herein to A. Grant McRitchie, and will exercise these concurrently with the appeal commissioner/manager.

10. I hereby delegate to Anne-Marie Drosso, appeal commissioner, under Section 96.1(3), or pursuant to the common law grounds for reconsideration articulated in Appeal Division Decision No. 93-0740, 1993, *Right to Reconsider Appeal Division Decisions*, (*Workers' Compensation Reporter*, Vol. 10, p. 127), the power to direct that the Appeal Division reconsider a matter or that the applicant may make a new claim to the Board with respect to a matter. I retain the powers and duties delegated herein to Anne-Marie Drosso, and will exercise these concurrently with that appeal commissioner.
11. I hereby delegate to all non-representational appeal commissioners of the Appeal Division, 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.
12. The delegations to named individuals, and the delegation in paragraph 11 above, are effective from December 1, 1996 until November 30, 1998, so long as the delegate remains an appeal commissioner.
13. Any assignment of matters to an appeal commissioner prior to December 1, 1996, pursuant to any of the delegations of the chief appeal commissioner published in the *Workers' Compensation Reporter*, or in Appeal Division Decisions No. 15, 1996, No. 17, 1996, or No. 18, 1996, continues so that the appeal commissioner may carry out and complete his or her duties and responsibilities, and continue to exercise the powers, contemplated in the delegation, until those specific matters are completed.
14. Any written delegation in a specific matter to an appeal commissioner by the chief appeal commissioner of the chief appeal commissioner's authority to reconsider Appeal Division decisions, including authority derived from the common law grounds for reconsideration, made prior to December 1, 1996, continues until that matter is completed or the matter is reassigned, and is adopted as part of this delegation decision.

Decision of the Review Board

Number: 951557-A
Date: October 2, 1996
Panel: P. Michael O'Brien, Janice Hight, G. Douglas Strongitharm
Subject: A Widow's Entitlement Under Section 17 and the *Charter*

Introduction

The widow of a deceased worker appeals the Workers Compensation Board's decision on her entitlement to benefits under Section 17 of the *Workers Compensation Act*. As the widow had no children and was under the age of forty at the time of the worker's death, she was granted a lump sum under Section 17(3)(d). She claims this discriminates against her on the basis of age contrary to the *Canadian Charter of Rights and Freedoms*. She asks for the level of benefits payable to a widow without children over the age of fifty: a monthly pension calculated under Section 17(3)(c).

Method of Appeal

A Chair's Panel was established to determine all appeals raising issues about the constitutionality of the *Workers Compensation Act*. Several appeals with respect to the constitutionality of Sections 17(3)(d) and (e) were assigned to this Panel for determination. We researched the issue of the Review Board's jurisdiction to apply Section 52(1) of the *Constitution Act 1982*, and specifically, the doctrine of severance. On the basis of this research, we decided to review the Review Board's jurisdiction to apply Section 52(1). We now set out the results of our review.

Issues

The issues arising out of this appeal are:

- I. Does the Review Board have jurisdiction to apply Section 52(1) of the *Constitution Act, 1982* and determine whether Section 17(3)(d) of the *Workers Compensation Act* violates Section 15 of the *Canadian Charter of Rights and Freedoms*?

- II. If so, does Section 17(3)(a) discriminate on the basis of age contrary to Section 15 of the *Charter*?
- III. If Section 17(3)(d) does discriminate, is it a reasonable limit that can be demonstrably justified in a free and democratic society under Section 1 of the *Charter*?
- IV. If there is discrimination which is not saved by Section 1 of the *Charter*, what is the appropriate remedy?

Jurisdiction

(a) Legislation

Section 90(1) of the *Workers Compensation Act* provides:

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

Section 24(1) of the *Canadian Charter of Rights and Freedoms* provides:

Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Section 52(1) of the *Constitution Act, 1982* provides:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(b) Three Types of *Charter* Arguments

Professor Philip L. Bryden, Associate Dean, Faculty of Law, University of British Columbia, in a paper titled, "Judicial Review and the *Charter*" delivered at a 1995 B.C.

Continuing Legal Education Course on Judicial Review, set out three types of *Charter* arguments that might be made before an administrative tribunal. The first is:

. . . that counsel can seek to persuade the tribunal to interpret its statutory mandate or exercise its authority in ways that are consistent with the rights guaranteed by the *Charter* . . . There has never been any doubt that it is possible to make this type of constitutional argument before an administrative tribunal because counsel is not inviting the tribunal to distort the meaning of its governing statute but rather is using the *Charter* as a tool to assist the tribunal in identifying the proper scope of its statutory duties or obligations.

We have no difficulty accepting Professor Brydon’s assertion that the Review Board has jurisdiction to apply the *Charter* this way. However, this is not what we are asked to do in the present appeal.

The second way in which an administrative tribunal can be asked to address an issue arising under the *Charter*, is on the basis that the tribunal is a “court of competent jurisdiction” for the purpose of granting remedies under Section 24(1) of the *Charter* for infringements of rights protected by the *Charter*. Its application would arise in a claim that a tribunal has failed to exercise its powers under otherwise constitutionally valid legislation in accordance with the *Charter*. This is a much more difficult question, and as it is also not what we are asked to do in the present appeal, we leave the determination as to whether the Review Board is a “court of competent jurisdiction” to another day.

We note for the record the Supreme Court of Canada’s decision in *Weber v. Ontario Hydro*, (1995) 125 D.L.R. (4th) 583, which considers the meaning of the words “court of competent jurisdiction” under Section 24(1) of the *Charter*. The Court held this could include an administrative tribunal provided it has jurisdiction over the parties, the subject matter and power to grant the remedy sought.

The third way in which an administrative tribunal might apply the *Charter* is that it may be asked to find some aspect of its governing statute inconsistent with the *Charter* such that the legislation must be treated as invalid to the extent of the inconsistency under Section 52(1) of the *Constitution Act, 1982*. This is what we are asked to do in the present case.

(c) The Trilogy

The Supreme Court of Canada, in a well known trilogy of cases, has dealt extensively with the authority of administrative tribunals to apply Section 52(1) and find a statutory provision to be inoperative for the purpose of a particular appeal. This trilogy of cases consists of:

Douglas College v. Douglas/Kwantlen Faculty Association
(1990) 77 D.L.R. (4th) 94

Cuddy Chicks Ltd. v. Ontario Labour Relations Board et al. (1991) 81 D.L.R. (4th) 121

Canada Employment and Immigration Commission et al. v. Tetreault-Gadoury (1991) 81 D.L.R. (4th) 358

It is clear from the trilogy that at least some administrative tribunals have jurisdiction to apply Section 52(1) and treat a statutory provision as inoperative in a particular appeal. While the determination as to whether a particular tribunal has jurisdiction to apply Section 52(1) is not straightforward, the following key principles are apparent:

1. Section 52(1) does not function as an independent source of a tribunal's jurisdiction to address constitutional issues and cannot be said to confer jurisdiction. Jurisdiction must be expressly or impliedly conferred on a tribunal by its enabling statute.
2. A tribunal has jurisdiction to apply Section 52(1) if it has jurisdiction over the parties, the subject matter and the remedy.
3. The question is whether the legislature intended to confer on the tribunal the power to interpret and apply the *Charter*.
4. The express mandate given to a particular tribunal by the Legislature will normally be the most important factor in determining whether the tribunal has the power to find a legislative provision to be inconsistent with the *Charter*. Where the Legislature has not spoken definitely on the question, it is necessary to examine other practical considerations.
5. Even if a tribunal has jurisdiction to apply Section 52(1), it has no jurisdiction to make general declarations that enactments of Parliament or of the Legislature are invalid as this is a high constitutional power which flows from the inherent jurisdiction of the superior courts. The tribunal's ruling on a constitutional issue is effective only in the matter before it.
6. A tribunal can expect no curial deference with respect to a constitutional decision.

The trilogy has been the subject of much commentary by constitutional and administrative law practitioners and scholars. Peter Hogg, in his book, *Constitutional Law of Canada*, 3rd edition, (Carswell, 1992), submits:

Once it is accepted that all administrative tribunals have an implied power (and duty) to decide questions of law, it is hard to justify placing limits on the body of law that the tribunal must consider. It is clear that the tribunal must respect not only its own empowering statute, but also other applicable legislation. If that is so, then surely the tribunal should not be able to ignore the Constitution, which according to s. 52, is "the supreme law of Canada." [at page 37-25]

Kent Roach, in his book, *Constitutional Remedies in Canada*, (Canada Law Books, 1995), suggests that a presumption that all administrative tribunals should have jurisdiction to apply the *Charter* should not be treated as an absolute as it may be unworkable in particular administrative contexts. He notes:

As Professor Evans has argued: "the narrow definition of a tribunal's statutory grant of jurisdiction, its rudimentary procedures, the sheer volume of its caseload, the absence of legal argument, and the existence of an appellate administrative tribunal" may all be valid reasons why it should not apply the *Charter*. [at page 6-31]

Margot Priest, in her article, "*Charter* Procedure in Administrative Cases: the Tribunal's Perspective," (1993-94) 17 C.J.A.L.P. 151, lists twelve factors distilled from the trilogy by the Workers Compensation Appeals Tribunal [Decision No. 534/90, (1992) 23 W.C.A.T.R. 121]. W.C.A.T. used these factors to determine whether the legislature intended to give it jurisdiction to apply Section 52(1). These twelve factors are:

1. Is the tribunal granted authority to provide a "final and conclusive" settlement of the dispute?
2. In accomplishing its ordinary tasks, is the tribunal explicitly or implicitly empowered to determine questions of law — that is, to interpret and apply any *Act* bearing on the issues before it?
3. How strongly do considerations of "practicality and convenience" argue against the tribunal's having the jurisdiction to deal with the *Charter* challenge when compared to the advantages of the tribunal's being seen to have such jurisdiction?
4. Is the tribunal's caseload such that it is primarily involved only in fact-finding, or is its work more adjudicative in nature? That is,

does its usual business involve the resolution of issues concerning the outcome of applying complex legislative rules or regulations to findings of fact?

5. Is the interpretation and application of the *Charter* “vastly different” from the tribunal’s “ordinary” responsibilities?
6. Do the remedies ordinarily available to the tribunal come naturally into play and would they be effective if identification of a *Charter* violation were seen to render a provision of a statute of no force or effect?
7. Will the assertion before the tribunal of the *Charter* rights in question provide parties with a speedy determination of those rights?
8. Does the tribunal have a “specialized competence” or “calibre” that would allow it to make an especially valuable contribution to the constitutional interpretation in question?
9. Would the experience of the tribunal be highly relevant to the *Charter* challenge, “particularly at the Section 1 stage where policy considerations prevail?”
10. Is it apparent that “at the end of the day the legal process will be better served” if the tribunal “makes an initial determination of the jurisdictional issue arising from the constitutional challenge?”
11. Is there an alternative tribunal with better credentials for dealing with the *Charter* challenge?
12. Does the applicant have other options outside the court system for pursuing the *Charter* challenge?

On the basis of the answers to these twelve questions in the context of the Review Board, we find the Review Board has jurisdiction to apply Section 52(1) and treat a statutory provision as invalid in a particular appeal. Our analysis is set out below.

Section 90(1) of the *Workers Compensation Act* sets out the Review Board’s jurisdiction but does not include an express power to determine questions of law. The Review Board has historically interpreted its mandate as including questions of law and statutory interpretation as the Review Board is routinely called upon to determine questions of law. While those questions are generally restricted to matters of interpretation under the *Workers Compensation Act*, the Review Board does consider a variety of legal questions in the course of determining appeals. It would be difficult to conclude the Review

Board does not have jurisdiction to consider questions of law, as without it, we would be unable to decide most of the appeals which come before us.

While there is a further level of appeal above the Review Board, the Review Board's finding is final and conclusive unless an appeal is commenced or the matter is referred to the Appeal Division by the President of the Workers' Compensation Board under Section 96(4) of the *Act*. The Workers Compensation Board cannot overturn a Review Board finding through its own process of reconsideration.

The Review Board's caseload is adjudicative in nature. We are generally faced with making findings of fact and then applying those facts to our enabling statute, the *Workers Compensation Act*, or policy set out by the *Rehabilitation Services and Claims Manual*. While the interpretation and application of the *Charter* is certainly different from the Review Board's ordinary responsibility of determining entitlement under the *Workers Compensation Act*, both tasks require similar skills and expertise.

The Review Board adjudicative staff includes a wide variety of people with multiple areas of expertise. The members are appointed on the basis of a management or labour background and generally have considerable experience in workers compensation claims. However, the vast majority of members are not legally trained. The vice chairs also come from a wide variety of backgrounds but most are legally trained and many have spent time practising law. The adjudicative staff as a whole have many combined years of experience in compensation at both a practical and theoretical level, and accordingly, may well have a valuable contribution to make to constitutional interpretation. The Review Board can easily compose a panel to include the legal training necessary for constitutional adjudication. The adjudicative staff's experience in matters of workers compensation may well be helpful at the Section 1 stage where policy considerations prevail.

There are, however, considerations of practicality and convenience which weigh against the Review Board having jurisdiction to deal with *Charter* challenges. The Review Board receives a huge volume of appeals and, in order to keep up with this volume, we must be able to deal with appeals expeditiously. An appeal which raises a constitutional challenge is likely to take longer to determine than an appeal which does not. The Review Board can, however, as we have done in this case, convene a special panel to consider appeals raising constitutional challenges. However, the members of this special panel may be required to apply many hours to one appeal raising a constitutional challenge — hours that could otherwise be used to determine many other appeals.

On the other hand, the legal process may well be better served if the Review Board makes an initial determination of the constitutional issue. If the Review Board has jurisdiction to determine constitutional challenges, it is the first opportunity the worker

or employer has to raise such an argument as the Review Board is the first level of appeal from a decision of a Board officer. Once the Review Board conclusively resolves the jurisdiction question as to whether it has the authority to apply Section 52(1), the assertion of a *Charter* right before the Review Board may well result in a speedy determination of that right.

While there is an alternative tribunal to deal with *Charter* challenges, the Appeal Division, the question as to whether that tribunal has “better credentials” is open to debate. Several of the present appeal commissioners in the Appeal Division once sat as members or vice chairs at the Review Board. Other appeal commissioners have similar credentials to members and vice chairs.

As the background of the members of both tribunals is essentially the same, an initial analysis of a constitutional challenge can probably be effectively carried out by either tribunal. One might ask whether there is any point in both tribunals taking the time to consider the constitutional challenge. If only one tribunal need undertake this analysis, it might be argued that it makes more sense for it to be the final appellate tribunal — the Appeal Division. On the other hand, it might also be argued that it should be the tribunal which functions independently of the Workers’ Compensation Board — the Review Board.

While appellants can also pursue their *Charter* challenge at the Appeal Division, the statute does not provide for an appeal directly to the Appeal Division. Its jurisdiction arises out of Section 91 of the *Workers Compensation Act* which provides for an appeal to the Appeal Division from Review Board findings. Thus, an appellant wishing to raise a constitutional argument at the Appeal Division must stop at the Review Board along the way.

The question which causes the most difficulty is whether the remedies ordinarily available to the tribunal come naturally into play and whether they will be effective if a *Charter* violation renders a particular provision to be of no force or effect. The remedy ordinarily available to the Review Board is a finding that benefits are payable. Most appeals involve some type of request for further benefits. In order to be able to grant further benefits in this case, the Review Board must also be able to grant a constitutional remedy — the doctrine of severance.

In this appeal, we are not just considering our jurisdiction to treat a legislative provision as invalid in a particular appeal. If we were to simply treat Section 17(3)(d) as invalid, the widow would be left without benefits altogether. The question we face is whether the Review Board has jurisdiction to apply the doctrine of severance which the widow submits should be applied to Sections 17(3)(d) and (e) and the words “who, at the date of death of the worker, is 50 years of age or over” in Section 17(3)(c).

Consideration of this question brings us to the Supreme Court of Canada decision in *Schachter v. The Queen*, [1992] 2 S.C.R. 679. Before we proceed to that case, we look briefly at other tribunal and court decisions on other tribunals' jurisdiction to apply Section 52(1) and treat a statutory provision as invalid for the purpose of a particular appeal.

(d) Other Tribunals

Many other tribunals, and courts upon review of their decisions, have now considered the trilogy, and found jurisdiction to apply Section 52(1) where the remedy involved simply disregarding the impugned section of the legislation. These include:

- (a) The Ontario Workers Compensation Appeal Tribunal (Decision No. 34/9213).
- (b) The Newfoundland Labour Relations Board [*Central Newfoundland Health Care Board v. Newfoundland Assn. of Public Employees* (1994) N.J. #99 (Nfld. T.D.)].
- (c) An "eligibility and credible basis tribunal" consisting of an adjudicator and member of the Refugee Division under the *Immigration Act*. [*Minister of Employment and Immigration v. Agbasi*, [1993] 2 F.C. 620 (T.D.)].
- (d) The Ontario Securities Commission [*Canadian Shareowners Association and Canadian Shareowner Magazine Inc.*, (1992) 15 O.S.C.B. 617].
- (e) The Civil Aviation Tribunal [*Canada (Attorney General) v. Gill and Civil Aviation Tribunal*, (1992) 52 F.T.R. 81 (F.T.D.)].
- (f) The Immigration and Refugee Board of Canada, Convention Refugee Determination Division [*L.(O.I.)(Re)* [1992] C.R.D.D. #484].
- (g) An Immigration Inquiry adjudicator [*Armadale Communications Ltd. v. Canada (Minister Of Employment & Immigration)*, (1991) 14 Imm. L.R. (2d) 13 (F.C.A.)].
- (h) The Social Assistance Review Board [*Director of Income Maintenance Branch v. Sophia Mohamed et. al.*, (1992) court file #338/91 (Ont. Div. Ct.)].

The Review Board itself has found it has this jurisdiction. In Appeal No. 881083-B, dated January 27, 1993, a Review Board Panel found it had jurisdiction to apply Section 52(1) and treat Section 98(3) of the *Act*, which provides for the withholding of compensation benefits while a worker is confined to jail or prison, as invalid for the purpose of the appeal before it.

Other tribunals, and courts upon review of their decisions, have found they are without jurisdiction to apply Section 52(1) and treat a statutory provision as invalid for the purpose of the matter before it. These include:

- (a) The Minister and his representative ruling under Section 14(2) of the *Bankruptcy Act*. [*LaFlamme v. Canada (Superintendent of Bankruptcy)*, (1995) 3 F.C. 174 F.T.D.].
- (b) The Minister of National Revenue ruling under Section 147.1(4) of the *Income Tax Act*. [*C.U.P.E. v. Minister of National Revenue*, [1993] 1 C.T.C. 185 (F.C.A.)].
- (c) An adjudicator appointed by the Public Service Staff Relations Board [*Latimer v. Canada (Treasury Board)*, (1991) 87 D.L.R. (4th) 333 (F.C.A.)].
- (d) A psychiatric Review Board appointed under the Ontario *Mental Health Act*. [*C. (J.), Re*, (1992) 3 Admin. L.R. (2d) 223 (Ont. Gen. Div.)].

In all of these cases the determination turned on a consideration of the tribunal's own authority under its enabling legislation. Therefore, the reasoning in each case is not necessarily helpful in answering the question for the Review Board as our determination must also turn on an analysis of our authority under our enabling legislation. Nevertheless, these authorities show that more tribunals than not are finding jurisdiction to apply Section 52(1) to find a legislative provision invalid for a particular appeal.

(e) Schachter

In considering *Schachter*, it is important to remember that the question is whether the Review Board has jurisdiction to apply the doctrine of severance — not whether its application is appropriate given the facts of this case. Whether severance is an appropriate remedy is something that need be addressed only upon a finding that we have jurisdiction to grant that remedy if we find there is discrimination which is not saved by Section 1. Our analysis here goes to whether we are *able* to grant the remedy of severance — not whether we *should* grant it in this case.

It is also important to note that *Schachter* concerned the remedial powers of a superior court upon a finding of constitutional invalidity under Section 52(1). Therefore, the Supreme Court of Canada did not address whether an administrative tribunal has the same remedial powers as a court in that case. Unfortunately, the Court has yet to determine whether the expanded remedial options under Section 52(1) are available to administrative tribunals.

In *Schachter*, the Court considered the appropriate remedy upon a finding that Section 32 of the *Unemployment Insurance Act*, which provided for 15 weeks of parental benefits for adoptive parents, was contrary to Section 15 of the *Charter*. The Court did not consider whether Section 32 was discriminatory as this point was conceded by the parties to the appeal. After expressing considerable dissatisfaction with this approach, the Court set out the following remedial options upon a finding of invalidity under Section 52(1):

A court has flexibility in determining what course of action to take following a violation of the *Charter* which does not survive s. 1 scrutiny. Section 52(1) of the *Constitution Act, 1982* mandates the striking down of any law that is inconsistent with the provisions of the *Constitution*, but only “to the extent of the inconsistency.” Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in. [at page 695]

While most of the Court’s decision in *Schachter* deals with determining the appropriate remedial choice under Section 52(1), not whether an administrative tribunal has jurisdiction to grant these remedies, it is helpful to review the Court’s reasons for expanding the remedial options under Section 52(1).

With respect to the doctrine of severance, the Court noted this is not a new development in Canadian constitutional law and has always been used by the courts to strike down laws only to the extent of the inconsistency. Severance is used so as to interfere with the laws adopted by the legislature as little as possible and is an ordinary and everyday part of constitutional adjudication. The Court suggested this test for the application of severance:

Where the offending portion of a statute can be defined in a limited manner it is consistent with legal principles to declare inoperative only that limited portion. In that way, as much of the legislative purpose as possible may be realized. However, there are some cases in which to sever the offending portion would actually be more intrusive to the legislative purpose than the alternate course of striking

down provisions which are not themselves offensive but which are closely connected with those that are. [at page 697]

With respect to both reading in and severance, the Court noted the primary purpose was respect for the role of the legislature and to be as faithful as possible, within the requirements of the *Constitution*, to the legislation. With respect to benefit schemes, the Court cautioned:

In some cases, it will not be a safe assumption that the legislature would have enacted the constitutionally permissible part of its enactment without the impermissible part. For example, in a benefits case, it may not be a safe assumption that the legislature would have enacted a benefits scheme if it were impermissible to exclude particular parties from entitlement under that scheme. [at page 700]

The Court noted that the secondary purpose of reading and severance is to respect the purposes of the *Charter*. If the only option available is to treat the particular provision as inoperative, this can result in the complete nullification of benefits to even the group the legislature intended to benefit amounting to “equality with a vengeance.” This is precisely what would happen in the present case if the only remedial option available to the Review Board in applying Section 52(1) is to treat the impugned provision as invalid. Section 17(3)(d) would be treated as invalid and the widow would get no benefits at all.

The Court also noted that an individual remedy under Section 24 of the *Charter* will rarely be available in conjunction with an action under Section 52(1):

Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available. It follows that where the declaration of invalidity is temporarily suspended, a s. 24 remedy will not often be available either. To allow for s. 24 remedies during the period of suspension would be tantamount to giving the declaration of invalidity retroactive effect. Finally, if a court takes the course of reading down or in, a s. 24 remedy would probably only duplicate the relief flowing from the action that court has already taken. [at page 720]

The majority reasons in *Schachter* were written by Chief Justice Lamer. La Forest J., who wrote the majority reasons in all three of the trilogy cases, added his own remarks, with which Madame Justice L’Heureux-Dube concurred. La Forest J. expressly stated that he was not convinced there was a *Charter* violation. He too expressed dissatisfaction with

the parties' agreement to the contrary and noted the difficulty this created in setting down rules with respect to the appropriate remedy. He also noted:

The simple fact is, as I noted before, that it is for Parliament and the legislatures to make laws. It is the duty of the courts to see that those laws conform to constitutional norms and declare them invalid if they do not. This imposes pressure on legislative bodies to stay within the confines of their constitutional powers from the outset. Reliance should not be placed on the courts to repair invalid laws. In social assistance schemes, there is perhaps more room (and certainly more temptation) for judicial intervention. . . [at page 728]

The next step is to review the authorities which have considered the issue of whether the expanded remedial options outlined in *Schachter* are available to administrative tribunals.

(f) Review Board

Various Review Board Panels have considered this issue and generally concluded the Review Board does not have jurisdiction to apply the doctrine of severance in applying Section 52(1).

In Appeal Number 924597-A, dated January 13, 1994, the Panel considered *Schachter* and pointed out that it set out the remedies available to a superior court and not administrative tribunals. The Panel found these remedies were only available to the superior courts. After reviewing *Schachter* at some length, the Panel concluded the remedy of severance could only be used as an exception to a declaration of invalidity which clearly an administrative tribunal has no jurisdiction to grant. Accordingly, it found a tribunal also has no jurisdiction to sever.

In Appeal Number 934339-A, dated September 19, 1994, the Panel essentially adopted the reasons of the previous Panel but added that the only clear role for an administrative tribunal applying Section 52(1) is to decline to enforce unconstitutional enactments. The Panel found we should be slow to purport to exercise greater powers than that, particularly in a case such as this, without knowing how the Legislature might otherwise respond. The Panel noted that if the Legislature were to amend Section 17 to delete references to age it might at the same time make a change in the level of benefits payable.

In Appeal Number 943674-A, dated March 25, 1996, the Panel wrote:

Regardless of the precise remedy in this case, the task of severing/reading in resembles legislative reform and the question which

needs to be asked is whether, given the caution urged by the Supreme Courts [sic] for courts of higher jurisdiction, this task is one which administrative tribunals should undertake. We find that it is not.

In summary, given the carefully limited jurisdiction of administrative tribunals with respect to constitutional issues, the authority of administrative tribunals to offer remedies involving severing/reading in pursuant to s. 52 must be questioned. It is difficult to answer the three questions posed by Chief Justice Lamer in *Schachter* when there is no power to offer declaratory remedies. The guidelines set out in *Schachter*, in particular with respect to a determination of whether a declaration of invalidity should be temporarily suspended, further suggest that the remedy of severing/reading in is not within the jurisdiction of an administrative tribunal. As Chief Justice Lamer noted consideration of whether a declaration of invalidity should be delayed turns on considerations of the effect of the immediate declaration on the public. While the effect of any decision of an administrative tribunal is limited to the specific appeal, one effect, as noted above, might well be to diminish the system in the eyes of the public. In *Egan* the remedy of severing/reading in was referred to by Mr. Justice Iacobucci as “ambitious.” The question which must be asked is whether this ambition exceeds the jurisdiction of the Review Board given that the Review Board cannot either declare the legislation to be invalid or suspend this declaration, if such suspension was deemed appropriate.

The Panel found it did not have jurisdiction to apply the doctrine of severance. In the alternative, the Panel found that even if it could apply the doctrine of severance, the extent of the inconsistency was not sufficiently defined nor were the objectives sufficiently obvious to warrant the remedy of reading in or severance. The Panel concluded the evidence did not support a conclusion that severing portions of Section 17(3) was an acceptable intrusion into the legislative domain.

In summary, the Review Board position to date has been that the Review Board does not have jurisdiction to grant the remedies outlined by the Supreme Court of Canada in *Schachter*.

(g) The Appeal Division

The Appeal Division considers that it has jurisdiction to apply the doctrine of severance in applying Section 52(1). The widow’s submission in this appeal is that this requires a simple application of the Appeal Division decisions on this point. In our view, it is not that straight-forward.

In Decision No. 93-1222, 1994 (*Workers' Compensation Reporter*, Vol. 10, p. 53), the Appeal Division found it had jurisdiction to grant the remedy of severance on the basis of this interpretation of *Schachter*:

It clarified the remedial jurisdiction of administrative tribunals as including not only the power to sever unconstitutional provisions but also to "read in" or "read up" legislation in certain cases. Otherwise, the court said that a power to sever without a power to "read in" would result in the illogical situation where the power to grant a remedy would be based solely on the legislative drafting. [at page 81]

With respect, we cannot agree with this interpretation of *Schachter*. The Supreme Court did not address whether administrative tribunals have the same range of remedial options available as the superior courts upon a finding of invalidity under Section 52(1). We do not agree that we can simply assume that *Schachter* applies equally to administrative tribunals. We consider it necessary to at least address the differences between the superior courts and administrative tribunals with a view to determining whether these remedies are included in the remedial powers of an administrative tribunal. We are not prepared to follow the Appeal Division and simply assume we have jurisdiction to grant "*Schachter* remedies."

The Appeal Division went on to determine that if the Legislature had been faced with choosing between giving no benefit to all widows, giving the same lump sum to all widows under Section 17(3)(d), or giving the same pension to all widows under Section 17(3)(c), it would have chosen the third option. This conclusion was based upon the fact that from 1986 to 1992, 227 widows were compensated under Section 17(3)(c), 62 widows were compensated under Section 17(3)(e) and 46 were compensated under Section 17(3)(d). The Appeal Division concluded this remedy best adhered to legislative intent and any other remedial option involved more interference with legislative intent and jeopardized the benefits payable to the largest group of claimants.

The Appeal Division went on to state that this decision applied only to the case before it and it was not an attempt to rewrite the *Workers Compensation Act* or indicate what should be done if the sections were rewritten by the Legislature. The Appeal Division noted its decision was valid only until constitutionally valid legislation was drafted.

In Appeal Division Decision No. 94-0433, 1994 (*Workers' Compensation Reporter*, Vol. 10, p. 617), the Appeal Division reviewed the previous decision noting the Review Board was taking the position that it did not have the jurisdiction to apply the doctrine of severance. The Appeal Division acknowledged that the Supreme Court of Canada did not specifically deal with the remedial authority of administrative tribunals in *Schachter*. However, on the basis that the Supreme Court said nothing on this point, the Panel suggested it was open to argument that the same judicial reasoning applied to

tribunals subject to any specific limitation on administrative bodies such as their lack of jurisdiction to make general declarations of invalidity.

The Panel noted it was also possible to take the position adopted by the Review Board:

In each case, the lower court or tribunal must concern itself with its own jurisdiction. Thus, while the Review Board has disagreed with the Appeal Division on this issue, each are doing what they think is appropriate and supported by law. It is for the Review Board to determine its remedial jurisdiction under the *Charter*, and I doubt if I have any authority to review that issue on this appeal. However, it is for the Appeal Division to determine its remedial jurisdiction under the *Charter*. While I have considered the different views of the Review Board Panel, I find the Appeal Division does have the remedial authority as set out in Appeal Division Decision No. 93-1222. That is, it can read down or sever in this case. [at page 620]

In Appeal Division Decision No. 94-1257, the Appeal Division concluded it could apply the doctrine of severance but noted a formal declaration of invalidity was not a remedy available to an administrative tribunal. On this basis, the Panel concluded:

We can only treat the impugned provision as invalid for the purposes of the specific matter before us. Consequently, our decision is limited in its applicability solely to this particular case.

(h) Ontario Workers Compensation Appeal Tribunal

In Decision No. 534/90, decided August 7, 1992 and cited above, W.C.A.T. determined it did not have the jurisdiction to apply Section 52(1) because it did not have the authority to fashion a suitable remedy. The tribunal was asked to find that Section 127 of the *Ontario Workers Compensation Act*, which excludes from coverage any workers not employed in an industry mentioned in Schedule 1 or 2, was contrary to the *Charter*. The worker sought coverage under the *Ontario Act* despite the fact that she worked in an industry not covered by it. On the issue of an appropriate remedy, the Panel, relying on Decision No. 534/90I, (1990) 17 W.C.A.T.R. 187, wrote:

It would seem, therefore, that merely finding s. 127 to be of no force or effect would lead to a result which, from an overall point of view, could not be considered appropriate or just. It would appear that it would provide the worker with compensation benefits, but it would not establish a corresponding obligation on the part of the worker's employer to contribute to the accident fund, and it would not bar the worker from access to the civil courts. Other unpredictable, anoma-

lous consequences might also be reasonably expected from so arbitrary and singular an excision in such a complicated statute.

From both the worker's and the system's perspectives, the remedy that would seem to be most desirable, should the worker's constitutional challenge succeed, would be an order directing the Board (and the Lieutenant Governor in Council) to add the banking industry to Schedule 1.

Having regard to the nature of the issue, the problem with the remedy and the tribunal's conclusion that it was not a court of competent jurisdiction under Section 24(1) of the *Charter*, the majority of the tribunal concluded it was not reasonable to infer that the Legislature intended to confer upon the tribunal the jurisdiction to deal with the *Charter* issue presented in that case.

Although *Schachter* was issued almost a month before this W.C.A.T. decision, it was not brought to the tribunal's attention and was not considered by the tribunal in reaching its conclusions. It subsequently agreed to reconsider its decision, and in Decision No. 534/90R, issued on November 20, 1995, concluded the *Schachter* remedial regime is equally available to an administrative tribunal:

On its facts, *Schachter* is dealing with the remedies available to the Federal Court Trial Division, but nothing in the analysis turns on whether the adjudicator in question is a court per se or a tribunal or another adjudicative body that has jurisdiction to rule on a constitutional inconsistency under Section 52(1).

W.C.A.T. elaborated on this conclusion:

It is important to acknowledge that an adjudicative body that is not a court does not have a court's inherent power to declare what the law is in a general way, nor to make general findings of invalidity, nor to suspend a decision concerning the invalidity of a law to give the Legislature time to deal with the problem through legislation. And it is reasonable to expect that there may be some restrictions concerning the *Schachter* remedies as they apply to non-court adjudicators because of those missing elements in the arsenal of remedial tools. On the other hand, the fact that a tribunal's reading-in of people excluded from an underinclusive benefit law can affect only the parties to the case with which it is dealing, means that its exercise of that remedy will not have the systemic and budgetary implications that a court's reading-in might. Thus, the absence of a power to suspend a finding

of invalidity to give a legislature an opportunity to deal with that finding, might not present the same problems as it would a court.

In summary then, in this Panel's view, there can be no question that Schachter makes it very clear that the power to read in is available to this Tribunal. It is acknowledged to be an unusual power which needs to be applied with great care with the various limitations outlined in the above quoted passages from Chief Justice Lamer's judgment being kept carefully in mind. But it is a power that is available to the Tribunal.

W.C.A.T. went on to explore the potential impact of extending coverage to the worker in her claim. W.C.A.T. pointed out this might prompt claims from other banking employees "which the W.C.B. board of directors would no doubt review in light of the Tribunal's decision." The Panel noted the Board had a right of review available under Section 93 of the legislation and, if it was satisfied the tribunal's decision was wrong, to direct the tribunal to reconsider its decision in light of the Board's different conclusion on the law. In the alternative, the Panel noted the Board might seek to make submissions to subsequent Panels of the tribunal considering the issue or conduct its own policy review or seek public input. W.C.A.T. further noted:

In the meantime, the Board would have to make its own decisions on the individual claims from other bank employees that might now be brought, and if, pending a final policy decision by the Board, these claims were rejected on the basis of the traditional view of the matter, these rejected claims would find their way to the Tribunal, and in due course other Tribunal hearing panels would be called upon to decide the same issue in light of this Panel's decision. Those subsequent panels would not be bound by this Panel's decision, but, in light of the submissions received in those cases, the decision would be considered.

One can reasonably anticipate, of course, that all of this activity might well be influenced, and perhaps, ultimately forestalled, by the application for judicial review of such a decision and the decisions from various courts including, possibly the Supreme Court of Canada, which might follow.

The Panel went on to note the decision in this appeal would not have immediate systemic implications because it would not apply in any other cases. It suggested it might serve as a vehicle for the issue to be finally decided on a system wide basis by the courts.

As for the appropriateness of the remedy, the Panel noted the problem of funding for the worker's claim given that banking is an excluded industry and the employer does not pay into the accident fund. The Panel suggested the employer bank might be responsible for paying for the workers' claim on a dollar for dollar basis. The Panel also indicated they could leave the issue of funding to be dealt with by the Board just as the courts do when reading in extended benefit coverage into an underinclusive law.

In the end, the Panel concluded it was not appropriate to determine the appropriate remedy in the absence of argument on the Section 1 justification. It decided it would proceed on the basis that it had jurisdiction to address whether the legislation violated Section 15 of the *Charter* and, if so, whether the breach was justifiable. If the breach was not justifiable, the Panel would consider the issue of the remedy. The Panel reserved the right to revisit the jurisdiction question at that time if it found there was no effective or appropriate remedy. W.C.A.T. has yet to complete its reconsideration in this appeal.

(i) Other Tribunals

In *KMart Canada Ltd. and U.F.C.W., Local 1518*, (1994) 24 C.L.R.B.R. 1, the British Columbia Labour Relations Board considered its jurisdiction to apply Section 52(1). The union asked the tribunal to find the prohibition against picketing contained in the *Labour Relations Code* was contrary to Section 2(b) of the *Charter*. The majority of the tribunal found the definition of picketing, which captures leafleting of struck goods, to be too broad. In considering the appropriate remedy, the majority reviewed *Schachter* at some length and specifically the remedy of reading down. Then, on the basis of *Schachter*, it read down the definition of picketing to permit attending at the site of a secondary employer for the purposes of persuading consumers not to purchase struck goods. The majority simply assumed it had jurisdiction to provide the remedy of reading down on the basis of *Schachter*.

The union brought an application for judicial review and, in unreported reasons dated November 8, 1995 (B.C.J. #2324), Madame Justice Huddart of the B.C. Supreme Court expressly declined to review the Board's jurisdiction to read down the legislation on the basis that it was not necessary to dismiss the application on other grounds.

In *P & S Investments Ltd. v. Newfoundland (Human Rights Commission)*, (1994) 2 C.C.E.L. (2d) 286, the Newfoundland Supreme Court found the Human Rights Commission did not have jurisdiction to read in the words "family status" into the prohibited grounds of discrimination under Section 9 of the *Human Rights Code*. In making its decision, the Court considered *Cuddy Chicks* and *Schachter*. The Court's decision was primarily based upon a finding that it was not appropriate for the Human Rights Commission to raise of its own volition what amounted to a Section 15 *Charter* application on behalf of the two complainants. However, the Court also found:

The Commission does not have the authority to read “family status” into the Newfoundland *Human Rights Code*. The Commission is attempting to avail itself of a constitutional remedy only available upon the finding of *Charter* violation in a court of competent jurisdiction.

The Court distinguished this case from *Cuddy Chicks* on the basis that the *Human Rights Code* did not contain a provision permitting the Commission to “determine its own jurisdiction.”

In *Nancy Law v. The Minister of Employment and Immigration*, (1995) C.E.B. & P.G.R para. 8574, P. 6073, the Pension Appeals Board established under the Canada Pension Plan determined that both the Review Tribunal and Pension Appeals Board were administrative tribunals with jurisdiction to decide questions of law including whether legislation conflicted with the *Charter*. In this case, the legislation expressly provided that both tribunals had the authority to determine any question of law and fact with respect to six particular questions.

The Pension Appeals Board then considered whether Sections 44(1)(d) and 58 of the Canada Pension Plan, which provide for the payment of survivor benefits to surviving spouses depending upon age, disability, and whether the spouse was maintaining any dependant children, were contrary to the *Charter*. As the Pension Appeals Board found the legislation was not discriminatory it did not consider what remedy it could have provided upon a finding of constitutional invalidity. In order to provide the widow with benefits upon a finding of discrimination, however, the tribunal would have had to either sever or read in. Therefore, implicit in this decision is a finding that both tribunals had jurisdiction to grant *Schachter* remedies. We discuss this case further under the second issue, namely discrimination, below.

In *Leshner v. Ontario No. 2*, (1992) 16 C.H.R.R. D/184, a Board of Inquiry under the *Ontario Human Rights Act* found it had jurisdiction to apply Section 52(1) and “read down” the definition of marital status by reading out the phrase “of the opposite sex.” In interpreting *Schachter*, the tribunal concluded the Supreme Court “found that there are five remedies available under s. 52” including striking down, severance, either of these coupled with temporary suspension of the declared invalidity, reading down, and reading in. The tribunal did not consider that *Schachter* dealt with the jurisdiction of a superior court and took for granted that these remedies are equally available to a tribunal applying Section 52(1).

In *S. (S.I.) (Re)*, [1992] C.R.D.D. #350 #M92-01124, the Convention Refugee Determination Division of the Immigration and Refugee Board of Canada considered its jurisdiction to apply Section 52(1). This tribunal also accepted, without explaining on what basis, that it had jurisdiction to grant the constitutional remedies outlined in *Schachter*.

The tribunal rejected the motion on the basis that there was no appropriate *Schachter* remedy.

(j) Commentary

Many academics and practitioners have considered whether the constitutional remedies outlined in *Schachter* are also within the jurisdiction of administrative tribunals applying Section 52(1).

Kent Roach, in his book, *Constitutional Remedies in Canada*, cited above, specifically addresses this point:

Once a tribunal has been found to have the jurisdiction to apply the *Charter* under s. 52(1), then, in light of *Schachter v. Canada*, it may have jurisdiction to extend underinclusive legislation by striking down restrictions or reading in terms. It could be argued that tribunals cannot extend legislation because they do not have the power to make formal declarations of constitutionality. In my view, it is better to allow administrative bodies the full range of remedial options under s. 52(1) and to correct errors through judicial review. [at page 6-36]

Peter Hogg, in his book, *Constitutional Law of Canada*, cited above, says that Section 52(1) appears to authorize only a holding of invalidity, leaving it to the general law to authorize the particular remedy. He notes the courts have developed a number of variations on a simple declaration of invalidity and have assumed the power to choose from a range of remedial options. After identifying the six choices, striking down, temporary validity, severance, reading in, reading down and constitutional exception, he emphasizes that each "is authorized" by Section 52(1) and does not require the authority of the remedy clause of Section 24(1).

While Professor Hogg does not expressly address whether these remedies are available to administrative tribunals vested with the authority to apply Section 52(1), he suggests they are in noting that Section 52(1) as a whole can be applied by a tribunal with power to decide questions of law. In his article, "Judicial Amendment of Statutes to Conform to the *Charter* of Rights," (1994) 28 R.J.T. 553, Hogg concludes:

There is no escape from the conclusion that judicial review under the *Charter of Rights* casts upon the courts the power and the duty to play a role in the legislative process. [at page 544]

The question is whether the Supreme Court of Canada, in issuing its decisions in the trilogy and *Schachter*, contemplated that administrative tribunals would have the same power and duty.

Oonagh E. Fitzgerald, in her book, *Understanding Charter Remedies*, (Carswell, 1994), considers the relationship between the courts and the government:

Whether a court strikes down constitutionally underinclusive legislation or extends it, Parliament or the Legislature may feel compelled to consider amending it anyway to modify or clarify the effect of the judicial ruling, and to reassert legislative control. Normally, the mere fact that the court declares a law to be constitutionally underinclusive would be sufficient to prod the Legislature into making appropriate amendments. In Canada, there appears to be a tradition of mutual respect and deference between judiciary and Legislature, such that the judiciary has declined to assume quasi-legislative functions, and legislatures have generally moved to remedy judicial findings of unconstitutionality. [at page 6-48]

Unfortunately, as the experience of the Appeal Division in these cases demonstrates, an administrative tribunal may not enjoy the same type of relationship with the legislature as the courts.

Professor John Evans, in a recent address at the 1996 conference of Canadian Council of Administrative Tribunals, titled "Administrative Tribunals and *Charter* Challenges," made the following statement about *Schachter* remedies:

When the Supreme Court of Canada outlined these ways of handling an unconstitutional provision in a statute, it did so in the context of a *Charter* challenge made in a court. However, like the W.C.A.T., I believe that, for the most part, they are equally applicable when the inconsistency has been identified by an administrative tribunal with jurisdiction to decide *Charter* challenges.

Philip Anisman, in his article, "Jurisdiction of Administrative Tribunals to Apply the Canadian Charter of Rights and Freedoms," L.S.U.C., *Administrative Law: Principles, Practice and Pluralism* (Carswell 1993) p. 99, submits that *Schachter* creates a potential for administrative tribunals to amend their legislation to make it consistent with *Charter* norms. He says:

This potential may lead the court to reconsider *Douglas College* and *Cuddy Chicks* and to adopt a more restrictive approach to legislative intent. The jurisprudential difficulties presented by legislative

amendment by courts are compounded if administrative tribunals have power to apply the *Charter* in the same manner.

Nevertheless, the considerations that underlie the *Douglas College* and *Cuddy Chicks* decisions also apply in this context. The policies underlying a statute are likely to be most fully understood by the agency administering it. Indeed, the agency is likely to be significantly involved in, if not the major contributor to, the development of amendments to the statute, including any amendments required to bring it into compliance with the *Charter*. The agency will also be able to assess the budgetary and administrative consequences of reading a corrective provision into the legislation. In these circumstances, an agency with expertise will be in the best position to develop a full record and analysis for consideration by the court on judicial review.

Balanced against these considerations is the possibility that an agency will seek to expand its jurisdiction or to implement policy goals of its own which have been previously rejected by the legislature or by subsequent governments. The jurisdiction already granted to such agencies by the court, however, authorizes a tribunal to read a limitation out of its statute. As the *Leshner* case demonstrates, "reading in" may not be different than a declaration that a particular provision of an act is of no force or effect, at least with respect to budgetary and other legislative considerations. In view of the accepted jurisdiction of administrative agencies and the lack of curial deference accorded their constitutional decisions, the most reasonable solution would be to accept the results of the court's holding and allow tribunals to apply *Schachter*. [at page 118]

Robert G. Richards, in his article, "Charter Procedure in Administrative Cases: General Principles and Concerns," (1993) 7 C.J.A.L.P. 135, also submits *Schachter* remedies are available to an administrative tribunal:

However, there seems to be no convincing reason in principle to think that an administrative tribunal, which is otherwise properly authorized to consider the validity of a statutory provision, should not have resort to the full range of remedial options described in *Schachter*. Reading down, reading in, and the like are of no more legal consequence than a simple finding of invalidity. That is particularly so when, as the Supreme Court said in *Douglas College*, the authority of an administrative tribunal in that regard is restricted to the parties

actually before it and does not involve the power to make general declarations as to the status of a legislative provision. [at page 141]

Debra McAllister, in her article, "Administrative Tribunals and the Charter: A Tale of Form Conquering Substance," L.S.U.C., *Administrative Law: Principles, Practice and Pluralism* (Carswell, 1993) p. 131, also suggests that *Schachter* remedies are available to administrative tribunals:

The Supreme Court's trilogy on administrative tribunals dealt only with situations where the tribunal was asked to ignore unconstitutional statutory provisions. However, there seems to be no reason in principle that the same tribunals could not engage in reading down or reading in, particularly given Chief Justice Lamer's comments on the close relationship between these remedies. This would still not permit a tribunal to make a general declaration which is binding in other cases, since declaratory relief remains within the exclusive jurisdiction of a superior court. [at page 146]

Ms. McAllister does not necessarily see this as a positive step:

The main problem with focusing on s. 52(1) is that it minimizes the impact of a tribunal's decision. The Supreme Court has said that a tribunal which finds a provision unconstitutional is not making a declaration of invalidity, but is merely treating the impugned law as having no force or effect for the purpose of the case before it. This understates the effect on the parties, which will be the same, regardless of whether the provision is ignored or declared unconstitutional. In addition, the validity of the provision will be uncertain to both the government body which administers the legislation, and to differently constituted panels of the same tribunal, until a court finally disposes of the issue. This problem is compounded by the *Schachter* decision, which expands the scope of s. 52(1) well beyond what was contemplated at the time the trilogy decisions were made. [at page 148]

Ms. McAllister takes the view that administrative tribunals should have a more circumscribed function when constitutional issues are raised in matters properly before them.

(k) Reasons and Findings

We find the Review Board has jurisdiction to apply Section 52(1) of the *Constitution Act, 1982*, including the authority to apply the doctrine of severance, and address whether Section 17(3)(d) of the *Workers Compensation Act* violates Section 15 of the *Charter*.

Section 90(1) of the *Workers Compensation Act* defines the Review Board's jurisdiction and does not give the Review Board any express authority to apply the *Charter*. This is not surprising given that the Review Board was constituted as an appeal body long before the *Charter* was brought to life. It is difficult to determine whether the government intended the Review Board to have jurisdiction to apply the *Charter*, as this question would not even have arisen at the time the Review Board was created.

Section 90(1) also does not contain any express authority to consider questions of law. However, there can be little question that the Review Board has implied authority to consider questions of law. As noted above, without this authority, we would be powerless to determine the majority of appeals which come before us. In terms of the practical considerations that must be considered when a tribunal has no express authority to consider the *Charter*, the answers to the twelve questions set out by W.C.A.T. lead us to conclude the Review Board has this jurisdiction.

The obstacle to the Review Board assuming this jurisdiction in the past has been the remedy — applying the doctrine of severance. Previous panels of the Review Board have concluded the Review Board can apply Section 52(1) where the remedy involves only treating the impugned statutory provision as invalid. With respect, if the Review Board has jurisdiction to apply Section 52(1) and treat a provision as invalid, it is our view that it must also have the jurisdiction to apply the doctrine of severance.

While the Supreme Court of Canada has yet to consider whether an administrative tribunal has the authority to grant the range of remedial options identified in *Schachter*, we agree with W.C.A.T. that the reasoning of the Court in *Schachter* supports a finding that a tribunal also has this jurisdiction except for the power to issue a general declaration of invalidity or to suspend such a declaration. As noted by the Court, reading in and severance are not substantially different than treating a provision as invalid. Indeed, all three remedies have the same legal consequence.

In addition, the purpose of applying the doctrine of severance in the context of Section 52(1), as outlined in *Schachter*, applies equally whether the decision-maker is a court or an administrative tribunal. The doctrine of severance seems to go hand in hand with finding a statutory provision to be invalid. It allows the decision-maker to respect the role of the Legislature and be as faithful as possible, within the confines of the Constitution, to the legislation. It also allows the decision maker to respect the purpose of the *Charter*. As noted in *Schachter*, if the decision-maker can only treat the legislative provision as invalid, the effect can be to nullify benefits entirely resulting in "equality with a vengeance."

In finding the Review Board has jurisdiction to apply the doctrine of severance under Section 52(1), we have considered the previous Review Board findings to the contrary. However, the law has certainly evolved since the first findings on this issue were made

in 1994. The Panel which issued its findings on this issue at the beginning of this year, unfortunately, did not have the benefit of the legal research which was available to this Panel.

In any event, in reviewing the previous Review Board findings on this issue, we note the main concern of previous panels has been that it is not *appropriate* to apply the doctrine of severance, in the manner requested by the widow, in this type of case. We agree that there are compelling reasons why the doctrine of severance should not be applied in this case. However, that is a different question from whether the Review Board has jurisdiction to apply the doctrine of severance in the first place. In finding the Review Board is able to grant this remedy, we are in no way saying it is an appropriate remedy in this case. This question only arises upon a finding that Section 17(3)(d) violates Section 15 and is not saved by Section 1.

We have also considered the fact that the Appeal Division has found it has jurisdiction to grant *Schachter* remedies. While it is true that the Appeal Division has jurisdiction over a greater range of matters than the Review Board, including matters of assessment, relief of costs, and occupational safety and health, in matters of compensation and benefit entitlement under Part I of the *Act*, our jurisdictions are essentially the same. We agree with the Appeal Division that, given that the Supreme Court does not address whether *Schachter* remedies are available to administrative tribunals in that case, it is open to argument that they are.

We are also persuaded by W.C.A.T. Decision No. 534/90R, in which that tribunal concluded *Schachter* remedies, except for the power to issue a general declaration of invalidity or suspend a declaration, are available to administrative tribunals. We agree with W.C.A.T.'s analysis of this issue especially with respect to the implications of a finding that the remedy of reading in should be granted in the case before them. We are cognizant of the fact that W.C.A.T. has not yet finally determined that it has jurisdiction to read in but decided to hear the merits of the discrimination case before reaching a final conclusion on that point.

Finally, it is clear that many other tribunals have also found that jurisdiction to apply Section 52(1) includes jurisdiction over the range of remedial options set out in *Schachter*, save for a formal declaration of invalidity. Almost all of the commentary we found suggests that an administrative tribunal vested with the authority to apply Section 52(1) should also have the authority to grant the additional remedies outlined in *Schachter*.

All of these authorities taken together lead us to the conclusion that if an administrative tribunal has jurisdiction to apply Section 52(1) of the *Constitution Act, 1982*, this should include the authority to apply the doctrine of severance and reading in. Given our finding that the Review Board has jurisdiction to apply Section 52(1) and treat a statu-

tory provision as invalid, we find the Review Board also has jurisdiction to apply the doctrine of severance. In the result, the Review Board has jurisdiction to consider the constitutional question raised in this appeal.

Discrimination

(a) The Legislation

Section 17 of the *Workers Compensation Act* sets up a complicated scheme of benefits that are payable to the surviving dependants of a worker who is fatally injured. Surviving dependants include widows, widowers, common law spouses, children, parents, and other potential dependants. Eligibility is established by different factors including the number of children, disability, age, and whether the dependant had a reasonable expectation of pecuniary benefit from the continued life of the worker. "Children" includes children under 18 years old, invalid children of any age, and children under 21 years old who are regularly attending school.

Subsections 17(3)(c), (d) and (e) provide for three levels of benefits for invalid and childless widows and widowers:

- (c) for a widow(er) over the age of 50 with no children or an invalid widow(er): a monthly pension that, when combined with federal benefits payable for those dependants, would equal 60% of the amount that would have been payable if the worker had sustained a permanent total disability;
- (d) for a non-invalid widow(er) under the age of 40 with no children: a lump sum of \$36,704.10;
- (e) for a non-invalid widow(er) between the ages of 40 and 50 with no children: a monthly pension of \$770.66 plus a proportion of the difference between \$770.66 and the monthly payment payable to a childless widow(er) over the age of 50, with the proportion increasing by 1/11 from the ages of 40 to 49.

The widow in this appeal contends Section 17(3)(d) discriminates against her on the basis of age and is contrary to Section 15 of the *Charter* which provides:

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

(b) The Supreme Court of Canada

With the passage of Section 15 now dating back over ten years, there are several Supreme Court of Canada decisions which interpret and apply this law to various facts. The starting point for any analysis of discrimination is the court's decision in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

In *Andrews*, the Supreme Court of Canada struck down a British Columbia law that prevented non-citizens from practising law by excluding them from admission to the Law Society. All three judgments suggest that disadvantage or powerlessness is a characteristic of the groups protected by Section 15. McIntyre J. discussed the concept of equality:

It is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises. It must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality. [at p. 164]

Further in his judgment, he elaborated:

It is not every distinction or differentiation in treatment at law which will transgress the equality guarantees in s. 15 of the *Charter*. It is, of course, obvious that legislatures may — and to govern effectively — must treat different individuals and groups in different ways. Indeed, such distinctions are one of the preoccupations of legislatures. The classifying of individuals and groups, the making of different provisions respecting such groups, the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society. As noted above, for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions. [at page 168]

He noted the right to equality before and under the law, and the right to equal protection and benefit of the law, were granted with the direction that they be “without discrimination.” He then went on to give his seminal definition of discrimination:

I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual

or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classified. [at page 174]

In her reasons for judgment, Wilson J. noted the importance of context to the question of discrimination:

I emphasize, moreover, that this is a determination which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others. [at page 152]

The view that systemic disadvantage and political powerlessness are essential characteristics of the groups protected by Section 15 can be traced to a famous footnote in the American case, *United States v. Caroline Products Co.* (1938) 304 U.S. 144. Stone J. of the United States Supreme Court pointed out that "prejudice against discrete and insular minorities" could have the effect of distorting "those political processes ordinarily to be relied upon to protect minorities." Wilson J. referred to non-citizens as an example of a "discrete and insular minority" and "a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated." La Forest J. described non-citizens as "an example without parallel" of a group "who are relatively powerless politically, and whose interests are likely to be compromised by legislative decisions." The Court unanimously agreed the law discriminated contrary to Section 15 although the dissenting minority of two found the discrimination could be justified under Section 1.

In *R. v. Turpin*, [1989] 1 S.C.R. 1296, a case decided shortly after *Andrews*, the Court affirmed that the dimension of disadvantage should be determined externally to the legislation. This case involved a Section 15 challenge to a provision of the *Criminal Code* that stipulated certain serious offenses, including murder, were to be tried by a judge and jury with no right to elect trial by judge alone. Another provision of the *Criminal Code*, applicable only in Alberta, gave an accused the right to elect a trial by judge alone for all indictable offenses including murder. In *Turpin*, three accused charged with murder in Ontario argued that the failure of the *Criminal Code* to give them the right to

elect trial by judge alone was discriminatory because the right was available to an accused in Alberta.

The Supreme Court of Canada rejected this argument. Writing for a unanimous court, Wilson J. said it was not sufficient for the claimant to show that he or she was disadvantaged by the impugned law. That, obviously, was necessary, but was not sufficient. The claimant had to go further and show that the distinction employed by the statute was one that defined a group that was disadvantaged in other respects. As Wilson J. put it:

Accordingly, it is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged. [at page 1331]

Wilson J. went on to write that it would be “stretching the imagination to characterize persons accused of one of the crimes listed in s. 427 of the *Criminal Code* in all the provinces except Alberta as members of a discrete and insular minority.” She noted that a search for “indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice” would be fruitless in this case. The claim would not, Wilson J. said, “advance the purposes of s. 15 in remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society.” The Court concluded that although there was a denial of equality before the law, it was not discrimination because persons charged with an offence outside Alberta did “not constitute a disadvantaged group in Canadian society within the contemplation of s. 15.”

In *McKinney v. Universite de Guelph*, [1990] 3 S.C.R. 229, and *University of B.C. v. Harrison*, [1990] 3 S.C.R. 451, the Supreme Court of Canada determined mandatory age 65 retirement provisions to be contrary to Section 15. In *McKinney*, Wilson J. elaborated on the test for discrimination being developed by the Court:

The grounds enumerated in s. 15 represent some blatant examples of discrimination which society has at last come to recognize as such. Their common characteristic is political, social and legal disadvantage and vulnerability. The listing of sex, age and race, for example, is not meant to suggest that any distinction drawn on these grounds is per se discriminatory. Their enumeration is intended rather to assist in the recognition of prejudice when it exists. At the same time, how-

ever, once a distinction on one of the enumerated grounds has been drawn, one would be hard pressed to show that the distinction was not in fact discriminatory.

It follows, in my opinion, that the mere fact that the distinction drawn in this case has been drawn on the basis of age does not automatically lead to some kind of irrebuttable presumption of prejudice. Rather it compels one to ask the question: is there prejudice? Is the mandatory retirement policy a reflection of the stereotype of old age? Is there an element of human dignity at issue? Are academics being required to retire at age 65 on the unarticulated premise that with age comes increasing incompetence and decreasing intellectual capacity? I think the answer to these questions is clearly yes and that s. 15 is accordingly infringed.

In *R. v. Swain*, [1991] 1 S.C.R. 933, a two step process for analyzing discrimination was crystallized by Chief Justice Lamer:

The court must first determine whether the claimant has shown that one of the four basic equality rights has been denied (i.e., equality before the law, equality under the law, equal protection of the law and equal benefit of the law). This inquiry will focus largely on whether the law has drawn a distinction (intentionally or otherwise) between the claimant and others, based on personal characteristics. Next, the court must determine whether the denial can be said to result in “discrimination.” This second inquiry will focus largely on whether the differential treatment has the effect of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to opportunities, benefits and advantages available to others. Furthermore, in determining whether the claimant’s s. 15(1) rights have been infringed, the court must consider whether the personal characteristic in question falls within the grounds enumerated in the section or within an analogous ground, so as to ensure that the claim fits within the overall purpose of s. 15; namely, to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society. [at page 992]

The recent Supreme Court of Canada cases on Section 15, *Miron v. Trudel*, [1995] 2 S.C.R. 418, and *Egan v. Canada*, [1995] 2 S.C.R. 513, continue the evolution of the *Andrews* analysis with a split in the Court.

In *Miron*, the Supreme Court of Canada held, in a 5-4 decision, that the exclusion of common law spouses from accident benefits available to legally married spouses under the Ontario Standard Automobile Insurance Policy infringed Section 15 and could not be justified under Section 1. In *Egan*, again in a 5-4 decision, the majority concluded the refusal to provide a spousal benefit available to married and common law couples under the *Old Age Security Act* to same-sex couples infringed Section 15. However, as one of the five judges found this discrimination could be justified under Section 1, the legislation was left intact. In any event, three different approaches to analyzing discrimination were offered by various members of the Court.

Sopinka, Cory, McLachlin and Iacobucci JJ. continue to apply the traditional *Andrews* approach to discrimination. This approach focuses primarily on whether the legislative distinction is drawn on the basis of an enumerated or analogous ground. As discussed earlier, the question which must ultimately be addressed under this approach is whether the distinction has a prejudicial effect on the individual or group in light of Section 15's fundamental purpose.

L'Heureux-Dube adopted a new approach to discrimination which focuses on the impact of the distinction assessed in terms of the affected group and the affected interest. She alone rejected the restriction of Section 15 to listed and analogous grounds. She held the question as to whether discrimination exists should be determined on a case-by-case basis by analyzing the nature of the group affected by the distinction and the nature of the interest affected by the distinction.

Lamer C.J.C., La Forest, Gonthier and Major JJ. also rely on *Andrews* as the starting point of analysis but place added emphasis on the concept of relevance and effectively draw some of the consideration that was previously undertaken in the Section 1 analysis back into the Section 15 analysis. Their approach involves three steps: (1) does the law draw a distinction between the claimant and others? (2) does it result in disadvantage? (3) and is it based on an irrelevant personal characteristic shared by a group that is enumerated or analogous? If the distinction imposes a disadvantage but is relevant to the functional values of the legislation, assuming those values are not themselves discriminatory, the claim of discrimination is not established.

(c) Other Authorities

In *Silano v. The Queen in Right of British Columbia*, (1987) 42 D.L.R. (4th) 407, the British Columbia Supreme Court considered whether a provision of the *Guaranteed Available Income for Need Regulations*, which provided that a single recipient under the age of 26 years received \$25 less a month than those over 26 years of age for the first eight months of support, was contrary to Section 15 of the *Charter*. In reaching its decision,

the Court relied upon this definition of discrimination, set out by the British Columbia Court of Appeal, in its decision in the *Andrews* case:

The question to be answered in determining whether or not a law is discriminatory is whether the law is reasonable or fair, having regard to its purpose or effect. Involved in this approach there is the consideration that a law may be discriminatory if it treats some persons unduly prejudicially. [at page 412]

The Court concluded the legislation was neither reasonable nor fair on the basis that there was no logical basis for the ground of distinction of 26 years of age. The Court concluded the qualities of mobility and the potential for family support attributed to all persons under the age of 26 may or may not be present. Furthermore, many persons under the age of 26 might be in the same position as a person over the age of 26. The Court noted this age had no connection with any other recognized age limit accepted by society as a recognized watershed in people's lives.

In *Schachtschneider v. Canada*, (1993) 105 D.L.R. (4th) 162, the Federal Court of Appeal considered an anomaly in the *Income Tax Act* that operated to the disadvantage of a married couple who lived together and had a child, as compared to unmarried couples or married couples living apart who have children. The Court held that there was no discrimination and no violation of Section 15. In his concurring reasons for judgment, Linden J. stated that one must distinguish between the ground of discrimination, marital status, and the group affected, married persons. Whether the group is advantaged or disadvantaged, a claimant must show discrimination in the context of the social, political and historical circumstances of the group. In Linden J.'s view, the process for doing so is affected by the nature of the group:

For historically disadvantaged groups, evidence that a law further disadvantages them will normally support a claim almost automatically under s. 15(1), whereas, for an advantaged group to succeed, a clear indication of prejudice will be necessary. In other words, in order to establish the indicia of discrimination, a member of an advantaged group would have to show direct or immediate prejudice and stereotyping, although not necessarily intentional discrimination. The prejudice or stereotyping against an advantaged group cannot be assumed. Mere disadvantage under the legislation in question is not sufficient for advantaged groups, although it may be for disadvantaged groups. [at page 188]

In *War Amputations of Canada v. Canada*, (1994) 111 D.L.R. (4th) 286, the issue was whether widows of seriously disabled war veterans were discriminated against on the basis of sex because they received up to 25% less pension following the death of their

husbands, than their husbands had received prior to death. The Ontario Divisional Court found the legislation did not offend Section 15 in that there was neither inequality nor was the legislation discriminatory. It held the soldier's pension was based on a concern about the impact of injury on income earning capacity. In contrast, the spousal pension was paid because it was deemed the disabled veteran, because of his injuries, would be unable to make adequate provision for his dependents following his death. This differential treatment, the Court found, was not tied to an irrelevant personal characteristic. Looking at the legislation as a whole, the Court concluded:

. . . I find difficulty with the assertion that the impact of the differential is discriminatory in circumstances where some widows receive the same pension their husbands received, some receive more and others receive less, and where the treatment of widows' pensions is based on factors of degree of disability, ability to earn a living, ability to provide for the future and on attribution. [at page 301]

In *Nancy Law v. The Minister of Employment and Immigration*, cited above, a very similar issue was raised in the context of survivor benefits under the Canada Pension Plan [C.P.P.]. The widow applied for a survivor's pension after the death of her husband in 1990, however, benefits were restricted to widows over 35, widows with dependent children, and widows who were disabled. Ms. Law's application was refused because she was under the age of 35, had no dependent children, and was not disabled. She appealed to the Review Tribunal arguing that the provisions of the Canada Pension Plan which restricted survivor's pensions to persons over the age of 35 constituted age discrimination under the *Charter*. The appeal was denied and she further appealed to the Pension Appeals Board. The Pension Appeals Board also denied the appeal.

In reaching its decision, the Pension Appeals Board quoted from a report written by the Chief of Legislative Development in the Policy and Legislation Division of Income Security Programs:

The original, and subsequent legislators, felt that entitlement to a survivor's pension depended on circumstances in which the widow could not reasonably be expected to become self-supporting. In other words, the benefit was intended to provide long-term support for those surviving spouses for whom self-self-sufficiency [sic] was not a realistic goal in the future. For example, young widows had less difficulty in finding employment and many of them remarried and so a widow under age 35 who was not disabled, nor had dependent children, was not eligible for a survivor's pension. The fact that a surviving spouse was maintaining dependent children or was disabled also limited the survivor's ability to undertake paid employment and therefore there was a need for a survivor's pension.

Similarly, the probability of attaining self-sufficiency decreased as the women's age (and the length of her dependent status within the marriage) increased. Accordingly, younger women who were married for only a short period of time were expected to have reasonable success in achieving self-sufficiency because their pattern of dependency was less developed. It was further assumed that the probability of remarriage decreased as age increased. [at page 6080]

The report also noted that in the C.P.P., benefits payable from age 35 to 45 are reduced by 1/120th for each month the survivor is under age 45 at the time of the contributor's death to avoid the "unfairness of the 'notch' problem that would be created by an abrupt watershed at age 45." The report further reviewed some of the labour force participation rates listed below. Finally, the report noted the eligibility criteria for survivor benefits were but one of the many limitations contained in the C.P.P. which were required to ensure the Plan was affordable for all Canadians:

Being a social insurance scheme, and like all social insurance programs, the C.P.P. embodies a degree of cross-subsidization among contributors in order to keep overall costs reasonable while, at the same time, providing the fairest level of coverage. [at page 6080]

In reviewing the law on the interpretation of Section 15 of the *Charter*, the Board stated:

There are many provisions of our law which create legal distinctions. Not all amount to discrimination within the meaning of Section 15 of the *Charter*. Here, while it is true that a person's age is a factor in eligibility for any or a partial benefit, age is not the whole criterion. It is age, healthful employability and freedom from the responsibility of dependent children, which in combination, lead to exclusion from some benefits. Moreover, even to the extent that age is one of the factors in the equation, this is not the kind of distinction in which age is a factor, which has been characterized as "discrimination" in a constitutional sense. . .

In cases involving Section 15 of the *Charter* the Supreme Court has sought to use the provision as protection for discrete and insular minorities or to shield defined and vulnerable groups against patterns of stigmatization, stereotyping and prejudice. The authorities have involved use of the section to strike down schemes that are triggered by use of an irrelevant personal characteristic of members of such groups and place a burden or detriment on them as a result of that irrelevant characteristic. . .

There is nothing in the evidence to suggest that [the widow] is in a group that suffers discrimination as it is understood in *Charter* terms, nor that able bodied and young surviving spouses without responsibility for dependent children are treated differently, on the basis of an irrelevant characteristic, from those who get survivor's pension benefits. Indeed, relative youth is a very relevant characteristic to be taken into account as one factor in determining relative need for survivor benefits. Admittedly, the degree to which need is a factor has become seriously diluted by amendments to the original legislative scheme and more will be said about that in the next part. Suffice it to say that Parliament and provincial governments have endeavoured to address the needs for minimal support in certain circumstances, including following the loss of a contributing spouse, and have used relative youth in combination with other relevant factors to gradually reduce the survivor's pension benefits from age 45 to age 35 such that the 35 year old whose health permits gainful employment and who is free from the responsibility of child-rearing may receive a very minimal pension benefit (\$2.05 per month according to [expert's] evidence) and below that age there is no pension benefit, only the other contingent benefits noted by [the expert]. In any event, the class of persons of which [the widow] is a member in the context of this case can hardly be said to be a traditionally disadvantaged group, an insular minority or a segment of society that is or may be stigmatized, stereotyped or subjected to prejudice. [at page 6083]

After noting that age is somewhat different from the other grounds contained within Section 15 in that all people can possess the age characteristic at some stage of life, the Board concluded:

Courts must be careful to delineate the basis on which an age-related distinction in an enactment could give rise to the detrimental and repugnant discrimination against which the values reflected in Section 15 of the *Charter* are designed to protect. The provisions under attack here, constitute a legislative scheme that makes distinctions in which the age of the person may be a relevant factor but the scheme does not constitute discrimination of the legal kind which is in conflict with the *Charter of Rights and Freedom*. [at page 6084]

On judicial review, the Federal Court of Appeal, (April 17, 1996) F.C.J. #511 upheld the Board's finding and expressed "substantial agreement" with the reasons of the Board that the legislation did not violate Section 15. At the time of this finding, Mrs. Law's

application for leave to appeal to the Supreme Court of Canada had not yet been decided.

In *Sutherland v. The Queen in Right of Canada*, (1994) 115 D.L.R. (4th) 49, the Federal Court Trial Division considered whether two different pieces of federal pension legislation were contrary to the *Charter*. In the first case, the legislation denied survivor benefits to a spouse who married the pensioner after the pensioner turned 60, unless the pensioner continued to contribute to the fund. In the second case, the legislation denied survivor benefits to a spouse who married the pensioner after the pensioner turned 60 or after the pensioner retired.

In rejecting the claim, the Court concluded that in designing pension plans, the objective of meeting employee needs is constrained by the necessity of keeping costs within an acceptable range, minimizing administrative complexities, and avoiding features which might enable members to take undue advantage of the plan. The Court found that the restrictions on eligibility were not based on irrelevant personal characteristics but on the need to contain costs and fix the plan's liability as of a certain date. The Court noted there was no evidence to show that women who marry post-retirement pensioners are a disadvantaged group subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society.

(d) The Review Board

As noted in the first section on jurisdiction, several other Review Board Panels have considered the issues raised in this appeal. However, as the majority of panels concluded the Review Board did not have jurisdiction over the remedy in this type of case, very few considered whether Section 17(3)(d) contravened the *Charter*. Many panels did, in obiter, suggest the legislation was, on its face, discriminatory. However, those panels, having found they were without jurisdiction to offer the remedy, did not fully consider the issue of whether there was, in fact, discrimination contrary to Section 15 of the *Charter*.

However, in Appeal #943084-A, the Review Board Panel rejected the argument that the application of Section 17(3)(d) to a widow under the age of 40 amounted to discrimination under the *Charter* and gave these reasons:

We must remember that we presently live in a society of age limitations, restrictions, and entitlements. Examples of age limitations, restrictions and entitlements are licensed driving age, legal drinking age, elector voting age, and age qualifications for Old Age Security and Canada Pension Plan. Certainly two of the most contentious age

limitation examples in the society at present involves the *Young Offenders Act* and compulsory retirement.

It would therefore seem appropriate that the legislature make distinctions regarding the financial needs of a widow and it therefore uses age, the dependency of children, and invalidism, as governing factors.

Obviously it is much more difficult for an invalid, or a mother with children or an older aged widow, to provide a monthly income, and therefore the *Act* reflects this to provide monthly support income.

(e) The Appeal Division

The Appeal Division has consistently concluded Section 17(3)(d) is contrary to Section 15 of the *Charter*. In Decision No. 93-1222, cited above, the Appeal Division suggested the factor of age was different than the other grounds enumerated in Section 15 as it might not identify a group that is distinct in Canadian society. The Panel noted the factors of race, national origin, colour, religion, sex and disability identified groups that have distinct existences in society separate and apart from a challenged law. With respect to age, the Panel wrote:

The age of majority creates an identifiable, distinct group in Canada as the age of majority is used for various purposes. The ages of 60 or 65 are also commonly used to make distinctions and, to that extent, establish an identifiable group. However, distinctions based on other particular ages are not common and do not identify groups that are otherwise distinct groups in society. [at page 72]

The Panel went on to note that it found no material establishing the distinctions of under 40 years, 40 to 50 years, and over 50 years outside of Section 17 of the *Workers Compensation Act*.

The Panel also noted that since 1985 the vast majority of claims under these three categories of compensation had been made by widows and not widowers. All of the claims accepted under Section 17(3)(d) were made by widows. On this basis, the Appeal Division concluded:

Thus, in that light, the issue is whether younger women suffer social, political or legal disadvantage. That may be difficult to determine in comparison to older women, although there is not much doubt that at the time of the 1974 amendments, women generally were at a social, political and legal disadvantage as compared to men. However, the

age distinction does not appear to reinforce any disadvantage between younger and older widows.

Does the age distinction involve stereotyping or prejudice? From one perspective, the higher benefits to older widow(er)s seems based upon a stereotype that older people have greater financial dependence on their spouse. The submissions argued that may not be true as older widow(er)s may have greater capital wealth than younger widow(er)s.

More fundamentally, it seems to involve a stereotype about likelihood of remarriage. That is, that younger women can remarry much more easily than older women. Therefore, younger women are able to secure their economic future by entering into another marriage. The prospects for older women, lacking the attractiveness of youth emphasized in our society and being past their prime reproductive years, are not as good. The age distinctions in Section 17(3) reinforce that stereotype. The message is that young widows can remarry — so they are given only a relatively small lump sum. If they want to avoid poverty and/or replace the true financial value of their deceased husband, then they can remarry. On the other hand, Section 17(3) does not expect older widows to remarry. . . Of course, it is not necessarily true that a widow under 40 can, or would want to, remarry. It is a stereotype that does not fit everyone. It is prejudicial as it puts less value on the financial independence of younger widows as compared to older widows.

Furthermore, the continuation of financial support after the death of a spouse can raise an element of human dignity, particularly for women, as a sudden or significant reduction in income can result in poverty.

The Panel went on to note the nature of the historic compromise in workers compensation precludes a young widow from suing an employer for the death of her spouse. The Panel suggested that in common law actions for wrongful death, younger widows receive higher damage awards than older widows and the contingency of remarriage is having less impact in determining awards. The Panel notes that courts have granted higher awards to younger widows based upon the length of the time the husband would have likely remained in the workforce as opposed to what is done by Section 17.

In the end, the Panel concluded:

Overall, we find that the facts here meet the basic definition of discrimination as set out by McIntyre J. in *Andrews*. As well, based on the analysis of stereotyping, they satisfy some of the more stringent tests of discrimination found in some of the Supreme Court of Canada judgments. While distinctions based on age are not, per se, discriminatory, distinctions based on the enumerated grounds in Section 15(1) of the *Charter* must receive special scrutiny. At this point, age appears as an irrelevant personal factor which produces a large disparity in benefits between groups. The factors of stereotyping and human dignity distinguish this from a “similarly situated” type situation. [at page 74]

In Decision No. 95-1062, 1995 (*Workers’ Compensation Reporter*, Vol. 11, p. 533), a different Panel expanded upon the reasons of the previous Panel relying heavily upon the case of *Silano* discussed above. The Panel wrote:

In the *Silano* case, justifications for the impugned regulation were expressed which, in an abstract sense, may have been meritorious. Their fallacy, however, as pointed out by the court, was that there was no sufficient justification for making a delineation at age 26 years. In an abstract sense, it might be argued that younger single persons might be more mobile, or might be more likely to avail themselves of familial assistance. In reality, however, the specific age distinction did not withstand judicial scrutiny under the *Charter* as the effect of the age distinction was “unreasonable and unfair and unduly discriminatory” . . . [at page 539]

The Panel went on to conclude that the same was true for the age distinctions in this case. The Panel noted that while it might be argued that younger widows have a greater number of years available to them to overcome the financial effects of losing their spouse, no sufficient basis had been established for the distinctions made at ages 40 and 50. Quoting from Decision No. 93-1222, the Panel referred to these examples as revealing the unreliability and arbitrariness of the age distinctions:

Generally, while there may be differences in the extent of widow(er)s’ financial dependency on their deceased spouse, we are unable to find that age is a sufficiently reliable factor on its own on which to make a distinction. The death of a husband may have a much more negative effect financially on a widow of 35 who has been married for 15 years, who is fully trained but works in a low paying occupation, has a large mortgage and had little life insurance on her husband, than on a widow of 55 who had been married for two months prior to the death of her husband, is fully trained and works in a high paying occupa-

tion, has no debts and had significant life insurance coverage on her husband. One can adjust those facts in different ways to show that age alone is not a reliable factor. That is, age does not necessarily subsume nor outweigh other relevant factors.[at page 539]

(f) The Purpose of the Legislation

Workers compensation is based on an historical compromise — workers receive no-fault compensation for work-related injuries and death and in return lose their right to sue their employers at common law for their injuries. The harsh realities of the workplace called for the development of a new social philosophy to deal with industrial accidents and to provide a more efficient and dignified system of prompt and assured benefits for all workers.

Survivor benefits have been available under the *Act* since its inception. Over the years, the amount of benefits payable has changed as a result of equality and family law considerations as well as societal attitudes. The first legislation, passed in 1916, provided for a monthly pension for all widows and invalid widowers. Prior to the 1974 amendments, all childless widows and childless invalid widowers received a flat-rate monthly benefit for life. That amount was the same for all widows and widowers in this class and was not based on the deceased worker's earnings. Permanent disability benefits to injured workers, however, were based upon a percentage of their pre-injury average earnings.

In 1974, Section 17 was extensively rewritten. The scheme of survivor benefits set up at that time remains largely intact today with two exceptions. In 1985, the benefits provided to widows under Sections 17(3)(c), (d) and (e) were extended to widowers to bring the legislation in line with Section 15 of the *Charter*. Widows and widowers were no longer treated differently. In 1993, the legislation was amended so that survivors would no longer lose their entitlement to monthly benefits due to remarriage.

The 1974 amendments were made to reflect the thinking that entitlement to survivor benefits should be a form of "income insurance." A review of Board archival material reveals this objective. The report, *Widows' and Dependents' Study*, dated December 1973, discusses the proposals which, at that time, suggested different levels of benefit based upon the ages of over 45, between 35 and 45, and under 35. This report states:

The following proposals for change regarding widows and dependents of fatally injured workers will require a change in philosophy from the subsistence concept to one of income insurance. This is accomplished by relating pension benefits to family income loss in such a manner as to maintain a standard of living for the survivors of a worker which is consistent with that which he was providing up to

the time of his death. While this concept will be a change in the area of benefits in fatal claims it is in keeping with the method used to determine the scales of benefit in other areas of compensation.

Another consideration is that the original concept of compensation was that the workman would relinquish the right to recover damages from his employer in return for a virtual guarantee of income security in the event of a work caused injury. In effect, while the worker's family has waived the same right they are not entitled to the same benefits under the present system.

The other major change contained in the proposals is to recognize that all widows are not necessarily affected to the same extent or for the same duration at least in a financial sense. The approach to this problem was to establish broad categories with varying benefit levels. This is reasonable as a compromise between the present system, which considers all widows to be equal in terms of eligibility, and a system of case by case means tests.

For widows over forty-five, the study states:

For widows over forty-five remarriage possibilities begin to become remote; these widows have been married longer than most and have firmly established social patterns which would be difficult to change. Reliance on previous work history becomes questionable as these women may not have pursued careers as aggressively as a spinster of the same age. There may also have been the feeling that security depended on her husband's income not her own. Those who had not worked previously would have difficulty with training and placement and, even if employment was obtained, earning potential would be severely limited.

For widows between thirty-five and forty-five, the study states:

The situation of widows between the ages of thirty-five and forty-five will vary. While remarriage is still a good possibility, work history is probably the most significant factor. A widow who has a history of continuous employment in this groups does not differ too much from a widow under thirty-five in the same situation.

For widows under thirty-five, the study states:

Widows in this category, in good health, are generally the least dependent on the widow's pension for their basic needs. Many have steady employment and those who do not would have little trouble fitting into the paid labour force. There may be some debts and financial obligations incurred by the couple which now become the responsibility of the widow. There may also be arrangements to be made relating to the couple's home.

This report is the best available evidence of the 1974 change in philosophy from the subsistence concept to one of income insurance based on family income loss. The legislative objective was to provide graduated benefits recognizing the potential for employment while supplying a continuous income supplement. The legislation further sought to recognize that not all widows are financially affected by the death of their spouse to the same extent. In summary, the legislative was designed to provide a system of income insurance based on the likelihood of financial dependence. While the likelihood of remarriage was certainly one factor taken into consideration, the legislative drafters decided upon eligibility criteria of age, disability, and the presence of dependent children.

(g) Labour Force Participation Statistics

The existing benefit structure assumes the financial need of surviving spouses is determined in part by their ability to participate in the paid labour market. This in turn is affected by the age of the spouse at the time of the worker's death and whether he or she is disabled or maintaining dependent children. Recent Statistics Canada reports indicate that a statistical correlation exists between these criteria and labour force participation. In particular, the studies show that labour force participation is adversely affected by age and disability, and that for women, participation is affected by the presence of children.

The studies on labour force participation rates show that both men and women over 45 are considerably less likely than their younger counterparts to be working (*The Labour Force*, Statistics Canada, June 1996; *Labour Force Activity*, Statistics Canada, 1993). The 1996 study showed the following participation rates [the total labour force expressed as a percentage of the population 15 years of age and over]:

Age	Women	Men
25 to 34	78.6%	92.9%
35 to 44	78.1%	92.2%
45 to 54	72.1%	89.5%
55 to 64	38.0%	59.6%

65 to 69	7.0%	18.4%
>70	1.8%	6.6%

While couples may establish a division of labour that works for them, it is largely at the expense of the continuity of women's employment. Studies show that marriage increases the number of labour force interruptions for women, while it decreases it for men, and that young women have shorter work interruptions than older women (*Family over the Life Course*, Statistics Canada, 1995).

This data suggests that younger survivors without dependent children have more opportunity to maintain and improve their standard of living in the long term as compared to older survivors. As noted in a consultation paper, *Survivor Benefits under the Canada Pension Plan*, (Ministry of Supply and Services, 1987):

In comparison with older age groups, younger women appear more likely to have lifetime patterns of work activity characterized by work before marriage, more continuous employment throughout their working years, and a greater likelihood of combining homemaking activities with work outside the home. Consequently, the social and economic situations of survivors may be expected to vary among different generations during the foreseeable future.

A 1993 *Labour Force Activity* study by Statistics Canada gives the following labour force participation rates for widowed women with no children at home versus the general female population:

Age	Widows	All Women
15 to 24	33%	66%
25 to 34	74%	91%
35 to 44	73%	85%
>45	10%	28%

Statistics on the labour force activity of disabled persons show that people with disabilities are far less likely than people without disabilities to be employed in all age groups. In 1991, both men and women aged 55-64 with disabilities were only about half as likely as those in this age range without disabilities to be employed. There were also differences of around 25% between employment levels of men and women aged 35-54 with and without disabilities and around 15% among 15-34 year-olds.

In 1991, the percentage of disabled men and women living in households who were employed were [*A Portrait of Persons with Disabilities*, Statistics Canada, 1995; *1991 Health and Activity Limitation Survey*, Statistics Canada, 1993]:

Age	Women	Men
15 to 34	51%	58%
35 to 54	49%	65%
55 to 64	17%	39%

As for the presence of children, the most recent statistics reveal that women with and without children at home participated in the labour force more than ever before. The participation rates for women with and without children at home were:

Age	With Children	Without Children
25 to 34	70%	91%
35 to 44	78%	85%
>45	57%	28%

The participation rates for women with children at home was below that of women without children at home in all age groups except for women aged 45 years and older. This may be attributed in part to the definition of “children” used in the study which included all sons and daughters regardless of their age who had never married and who were living in the same dwelling as their parent. Under the *Workers Compensation Act*, children cease to be dependents when they turn 18 or at age 21 if they are regularly attending school.

In addition, the employment of female parents is very much influenced by the age of the children. Studies show that, regardless of the presence of a spouse, women with pre-school age children tend to have lower labour force participation rates than those with older children. Female single parents are considerably less likely than women in two-parent families to be employed. The authors of one study note: “[t]his decline can be traced largely to substantial drops in employment levels among lone mothers during the recessions in both the early 1980’s and the early 1990’s, a trend contrary to that observed among women in two-parent families” (*Women in Canada*, 3rd ed., Statistics Canada, 1995).

A 1991 study revealed these participation rates for the general population of women with children at home and widowed women with children at home (*Labour Force Activity of Women by Presence of Children*, Statistics Canada, 1993):

Age	Widows	General Female Population
25 to 34	60%	70%
35 to 44	74%	78%
>45	28%	57%

(h) Reasons and Findings

We find Section 17(3)(d) does not discriminate on the basis of age and is not contrary to Section 15 of the *Charter*.

Subsections 17(3)(c), (d) and (e) cannot be examined in a vacuum. These provisions must be considered in the context of the scheme of benefits established for surviving dependents of fatally injured workers. Although the widow in this appeal points to only the age factor as being discriminatory, disability and the presence of children are other factors which affect entitlement. Eligibility turns upon the interplay of these factors — and is not based solely upon age but on one’s individual situation.

Laws are made to create distinctions. Distinctions are necessary to the governance of society. Not every differentiation in treatment will amount to discrimination under Section 15. In this case, there is no question that the Legislature clearly made a distinction between widow(er)s under the age of 40, widow(er)s aged 40 to 50, and widow(er)s aged 50 and over. Thus, the widow has been denied equal benefit of the law and the first hurdle of the test is overcome. However, that does not establish the case.

The second part of the test is to determine whether this denial of equal benefit of the law amounts to discrimination. Section 15 has been used by the courts to protect discrete and insular minorities and vulnerable groups from stigmatization, stereotyping and prejudice. As noted by Wilson J. in both *Andrews* and *Turpin*, the impugned law cannot be considered on its own but must be considered in the context of the group’s place in the larger social, political and legal fabric of our society. That is, one must consider whether the group is disadvantaged in other respects — outside the operation of the legislation under attack.

It is important to correctly define the group under consideration. We do not agree with the Appeal Division that, because all of the applications for compensation under Section 17(3)(d) from 1985 to the date of Decision No. 93-1222 were by widows, the issue is whether younger widows suffer social, political or legal disadvantage. Since 1985, Section 17(3)(d) has applied equally to both widows and widowers. In deciding whether that section discriminates, the question is whether able bodied, childless widows and widowers, under the age of 40 suffer discrimination. Two similar appeals presently before the Review Board were launched by widowers under forty. The

question as to whether Section 17(3)(d) discriminates in their appeals must be the same as the question in this appeal.

Able bodied, childless widows and widowers under the age of 40 can hardly be said to be a traditionally disadvantaged group, an insular minority, or a segment of society that is or may be stigmatized, stereotyped or subject to prejudice. It is difficult to think of any situation where this group is singled out for a particular treatment outside of Section 17. There is no evidence this group suffers any sort of differential treatment outside the context of the *Workers Compensation Act*. Therefore, a finding of discrimination would not advance the purpose of Section 15 in remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society. In our view, like the group in *Turpin*, this group is not a disadvantaged group within Canada as contemplated by Section 15.

Furthermore, as opposed to being disadvantaged, this group would appear to be better classified as advantaged. While we accept that claims by advantaged groups are not excluded from Section 15 altogether, according to Linden J. in *Schachtschneider*, in order to establish the indicia of discrimination, an advantaged group would have to show direct or immediate prejudice or stereotyping. In our view, there is no evidence of this in the present case.

While we have considered the Appeal Division's conclusion that the legislation is based upon a stereotype about the likelihood of remarriage, we cannot agree. In our view, the legislation is based upon considerations of financial independence and self-sufficiency. It is true that the likelihood of remarriage was one of the factors considered in determining this larger question, however, equally important was the ability to participate in the labour force. Even if we agreed that stereotyping with respect to the likelihood of remarriage was the main premise of the legislation, this does not make the group presently under consideration one that has traditionally been subject to stereotyping in Canadian society.

We also cannot agree with the Appeal Division's reliance upon *Silano* which was decided almost ten years ago before the first Supreme Court of Canada decision in *Andrews*. With respect, the test of discrimination employed by the Court in *Silano* is not the same as the test articulated by the Supreme Court of Canada. With respect to the Appeal Division's note that a widow under the age of 40 could well find herself in a more difficult financial situation than a widow over the age of 50, with respect, this does not mean the legislation amounts to discrimination under Section 15.

The decision of the Pension Appeals Board in *Nancy Law*, upheld by the Federal Court of Appeal, is much more relevant to the question raised in this appeal. As was found in *Nancy Law*:

There is nothing in the evidence to suggest that [the widow] is in a group that suffers discrimination as it is understood in *Charter* terms, nor that able bodied and young surviving spouses without responsibility for dependent children are treated differently, on the basis of an irrelevant characteristic, from those who get survivors pension benefits. Indeed, relative youth is a very relevant characteristic to be taken into account as one factor in determining relative need for survivor benefits.

This decision of the Pension Appeals Board is strongly persuasive.

Furthermore, in our view, the categories of compensation set out by Sections 17(3)(c), (d) and (e) are not based upon irrelevant personal characteristics. The labour force participation rates clearly show the factors of age, presence of children and disability are variables that are rationally related to financial independence. If the ability to achieve self-sufficiency and financial independence is the underlying premise of these provisions, the statistics clearly support the distinctions.

In enacting Sections 17(3)(c), (d) and (e), the Legislature addressed the need for support following the loss of a spouse and used relative youth in combination with other relevant factors to gradually reduce survivor benefits from age 50 to age 40 such that those below age 40, being healthy and unencumbered by children, receive the lowest survivor benefits. In making this distinction, the Legislature chose to pay certain benefits, not on a universal basis, but rather on a selective basis, having regard to the nature of the legislation and available resources. In granting lesser benefits to younger childless survivors, the Legislature was recognizing that individuals in this group have more opportunity to improve and maintain their standard of living in the long term. In our view, this does not amount to discrimination within the meaning of Section 15 of the *Charter*.

For these reasons, we find the impugned provision of the *Workers Compensation Act* does not infringe Section 15 of the *Charter*.

Section 1 of the *Charter*

In view of our finding that Section 17(3)(d) does not violate Section 15 of the *Charter*, it is not necessary for us to determine whether any violation would be saved by Section 1.

Remedy

In view of our finding that Section 17(3)(d) does not violate Section 15 of the *Charter*, it is also not necessary for us to determine whether the appropriate remedy, upon a

finding of discrimination, is to apply the doctrine of severance and grant the widow the amount of benefits payable to an invalid or childless widow over the age of 50 under Section 17(3)(c).

Conclusion

In summary, we find the Review Board has jurisdiction to apply Section 52(1) of the *Constitution Act, 1982* including the authority to apply the doctrine of severance. However, we further find that Section 17(3)(d) does not violate Section 15 of the *Charter*.

The issue of survivor benefits is one of the issues to be considered in the upcoming Royal Commission into workers compensation. Despite our finding that there is no discrimination, we agree that the time has come to review entitlement under Section 17 for all surviving dependants.

