

# WORKERS' COMPENSATION REPORTER

---

Volume 13, Number 1

May 1997

published by the  
WORKERS' COMPENSATION BOARD  
Province of British Columbia



*Workplace safety and health is our challenge.*

*Quality rehabilitation and fair compensation is our commitment.*

*World leadership is our goal.*

---

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

For subscriptions to the *Workers' Compensation Reporter*, call the Films and Posters section of the WCB at 604 276-3068. For more information about this publication, call Hugh Legg at 604 279-7594. The *Workers' Compensation Reporter* is color-coded in the following way:

- Blue — Decisions of the Panel of Administrators
- Green — Appeal Division Decisions
- Pink — Miscellaneous
- Purple — Review Board Findings
- Orange — Court Decisions



# Contents — Volume 13, Number 1

---

## Decisions of the Appeal Division

Section 23(3) – Whether a Section 23(3) Pension can be cancelled when worker incarcerated (95-1514) .....	1
Section 6 – Whether disability resulting from adverse reaction to treatment is compensable (96-0019) .....	7
Section 35 (1) – Reimbursement to worker (96-0144).....	15
Rehabilitation training-on-the-job allowance (96-0225) .....	27
Whether a worker was a “lent employee” (96-0486) .....	39
Section 73 – Whether subcontractor can be held responsible for violations of another subcontractor (96-0662) .....	47
Whether injury arose out of and in the course of employment where worker used method of transportation by employer (96-0805) .....	53
Spinal degeneration – Medical Review Panel Appeal (96-0963) .....	61
Whether “outworkers” are “workers” within the scope of Part 1 of the <i>Act</i> (96-1247) .....	71
Section 11 – Whether the Workers’ Compensation Board has authority to make a Section 11 determination relating to a proceeding before the Labour Relations Board (96-1315) .....	83
Appeals Practice and Procedure for Historic 39(1)(e) Project (No. 19).....	91
Practice Directive – Applications for Leave under the <i>Criminal Injury Compensation Act</i> (No. 21).....	93
Practice and Procedure concerning Appeals From Historical 39(1)(e) Project Review Clerk Decisions (No. 22).....	95
WCB Panel of Administrators Manual .....	97
Medical Review Panel – Annual Report.....	237
1996 Annual Report of the Appeal Division .....	251



# Decision of the Appeal Division

**Number:** 95-1514  
**Date:** December 13, 1995  
**Panel:** Thomas Kemsley, Derrick Spooner, Walter N. Peain  
**Subject:** Section 23(3) – Whether a Section 23(3) Pension can be cancelled when worker incarcerated.

---

This is an appeal by [the worker] from the findings of the Workers' Compensation Review Board dated May 18, 1995. It concerns his entitlement to a disability award while incarcerated.

## Background

The worker appealed to the Review Board after the Board retroactively cancelled his disability award [pension] as of the date he was incarcerated on criminal charges. The worker suffered a compensable back injury in 1986, and in 1992 the Board granted him a disability award effective as of January 1, 1990. The Board assessed his permanent disability on a loss of function as 5% of total, but determined he was entitled to a larger award on a projected loss-of-earnings assessment. Thus, the Board granted the disability award under section 23(3) of the *Workers Compensation Act*.

On June 4, 1993, the manager in Vocational Rehabilitation Services noted in memo #108 that the worker had been charged with first degree murder. She noted his rehabilitation benefits had been suspended earlier.

The next memo on file is dated May 4, 1994 and notes the worker had been incarcerated since May 31, 1993 awaiting trial. In a letter dated May 6, 1994, the Disability Awards Department informed the worker that it "cancelled" his pension as of May 31, 1993 and would determine if there were dependants to whom payments should be re-directed. If there were no such dependents, the amount paid to the worker between May 31, 1993 and May 6, 1994 would be an overpayment and deducted from any future benefits entitlement. The worker appealed that decision letter to the Review Board.

## **Review Board**

The Review Board considered several issues. First, it determined the Board had the statutory authority in section 98(3) of the *Act* to cancel the worker's loss-of-earnings pension if he was confined to jail or prison. They said the Board could cancel pensions awarded under both sections 23(3) and 23(1).

Second, the Review Board found the Board could not cancel the worker's pension retroactively to the date of incarceration, although it could issue a decision cancelling his entitlement as of the date of the decision. Therefore, the Review Board said the May 6, 1994 letter of the Board could cancel the pension as of that date, but not retroactive to May 31, 1993. The Review Board further said no overpayment could arise with respect to the pension money paid between those two dates.

Third, the Review Board determined the worker was not involved in any fraud or misrepresentation by failing to inform the Board that he had been incarcerated. Therefore, the Board could not declare an overpayment on the basis of fraud or misrepresentation.

Thus, the Review Board allowed the worker's appeal in part, by finding the Board could not cancel his pension retroactively, but denied his appeal against the cancellation of all his pension entitlement as of May 6, 1994.

## **Appeal**

The worker's representative appealed to the Appeal Division and argued, primarily, that, in accordance with previous Appeal Division decisions, the Board could not cancel the worker's pension entitlement under section 23(1) while he was incarcerated. The representative made no specific arguments about his section 23(3) pension, although he requested that the appeal be allowed, and "his estate be entitled to repayment of all amounts of the cancelled pension, with interest."

## **Reasons and Findings**

### **Board's Authority to Cancel Pensions**

We find the Board is entitled to cancel a loss-of-earnings pension awarded under section 23(3) when a worker is confined to jail but not a pension awarded under section 23(1). Pensions awarded under section 23(1) are based on an estimate of the average loss of earning capacity of all workers who suffer the same permanent impairment, regardless of other factors. In contrast, pensions under section 23(3) are based on an

assessment of the individual worker's permanent loss of earnings, which takes into account relevant individual factors.

Decisions 93-1059 and 93-1060 of the Appeal Division (published in Volume 10 of the *Workers' Compensation Reporter* (1994) at page 7) determined the Board could not cancel a pension awarded under section 23(1) by using section 98(3) of the *Act*. Section 23(1) says a pension payable under that section "shall be payable during the lifetime of the worker or in another manner the board determines." We find the reference to "another manner" does not concern entitlement but the way in which the pension is paid. Thus, the Board can commute a lifetime section 23(1) pension into a lump sum, but it cannot effectively cancel entitlement to that pension for a period of time by cancelling the payments while the worker is incarcerated.

Section 98(3) of the *Act* gives the Board the discretion to "cancel, withhold or suspend the payment of compensation" where a worker is confined to jail or prison, but we find the discretion contained in that section cannot override the non-discretionary entitlement provided in section 23(1). The Board can withhold section 23(1) pension payments while the worker is in jail, but those monies cannot be permanently lost to the worker or his dependents. If the Board does not pay those monies to the worker or his dependants, it is in breach of the section 23(1) requirement that the pension is payable during the lifetime of the worker. Incarceration is just one of many possible factors which is not relevant to a section 23(1) pension.

However, we find pensions under section 23(3) are different. Decisions 93-1059 and 93-1060 determined the Board could cancel some types of compensation payments where the worker's "confinement to jail or prison prevents re-employment and is an economic factor that may be relevant when determining entitlement." Entitlement under section 23(3) involves an assessment of the re-employability of the particular worker, and we find incarceration can be a relevant economic factor in that assessment. The language of section 23(3) is discretionary and says these pensions are payable "where the board considers it more equitable" and makes no reference to the duration of payment. Policy #40.20 in the *Rehabilitation Services and Claims Manual (Claims Manual)* notes the Board has a discretion regarding the duration of projected loss-of-earnings pensions and does not accept that these pensions are payable for life in every case. The policy states:

... it is reasonable for the Board to have authority to terminate benefits payable under the section at a time when, even if not disabled because of the compensable injury, the worker would not have been working.

Policy #49.20 provides in part:

In practice, the Board  *Cancels*  the compensation of an imprisoned worker suffering from a temporary disability and a permanent disability. Cancelled temporary or permanent disability payments are permanently lost to the worker.

In this case, when the Board informed the worker he had been granted a pension, the letter said:

Monthly disability awards are payable to the worker only — so long as the disability exists — and cease upon the worker’s death.

There was no reference in that letter to cancelling those benefits if the worker was incarcerated. However, it probably would be offensive to most workers if the Board’s pension letters routinely referred to the consequences of future incarceration. We find the Board’s policy is clear and the pension letter did not override or change the policy in the  *Claims Manual* .

Therefore, we find section 23(3) does not require the Board to pay a pension under that section for the lifetime of the worker. The Board is entitled to cancel those pensions under the discretionary provisions in section 98(3) of the  *Act* . Therefore, while we find the Board cannot use policy #49.20 to cancel pensions under section 23(1), we find it can cancel a pension under section 23(3) when a worker is confined to jail or prison. In this case, the worker was confined to jail and the Board could cancel his section 23(3) pension, but could not cancel his entitlement under section 23(1).

### **Retroactivity**

We agree with the Review Board that the Board did not have the authority to cancel the section 23(3) pension retroactively and create an overpayment. The worker was receiving this pension under a valid decision of the Board. Within a few days of his incarceration in May 1993, the Board was aware that he had been charged with first degree murder. This charge would involve immediate incarceration. The Board took no steps to cancel his pension for almost a year, and then it cancelled the pension retroactive to May 31, 1993.

In early June 1993, the Board had the relevant information and failed to make a decision then to cancel his pension. It is not clear why no action was taken on this file for 11 months, but the Board’s failure to make a decision when it had the relevant facts was a “Decisional Error.” Policy #48.41 in the  *Claims Manual*  notes that decisional

errors can include “situations where information was available but overlooked . . .”  
The policy says decisional errors do not result in an overpayment.

That policy also notes that decisional errors “due to fraud or misrepresentation are corrected retroactively to the date of the original decision, and result in an overpayment.”

We agree with the Review Board that there was no fraud or misrepresentation by the worker in failing to inform the Board of his incarceration. Fraud or misrepresentation usually requires an untrue statement, although it can involve silence where there is a duty to disclose information. In this case, the worker would not have known that his incarceration could affect his pension, as that information was not contained in the pension decision letter from the Board. The Review Board noted that, in 1990, the worker had been informed that incarceration would affect his temporary wage-loss and rehabilitation benefits. However, those benefits are different in kind from a permanent disability award and we are unable to find that the 1990 letter was sufficient to create a duty on the worker to disclose to the Board any further periods of incarceration for purposes of his pension.

In addition, even if there was misrepresentation on the part of the worker in failing to inform the Board of his incarceration, the Board knew in June 1993 the worker was charged with murder and knew, or should have known, he was incarcerated. Therefore, the Board had the relevant information in June 1993 and it is difficult to see how its failure to make a decision then was “due to” any misrepresentation by the worker.

## **Conclusion**

First, regarding the pension under section 23(3), we deny the worker’s appeal and find the Board decision to cancel his pension under section 23(3) was effective as of May 6, 1994.

Second, regarding the worker’s pension entitlement under section 23(1), we allow the worker’s appeal and find the Board could not cancel his entitlement to a section 23(1) pension based on his incarceration, and that pension is payable as of the day his pension under section 23(3) was cancelled.

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



## Decision of the Appeal Division

**Number:** 96-0019  
**Date:** January 9, 1996  
**Panel:** Patrick L. Byrne  
**Subject:** Section 6 – Whether disability resulting from adverse reaction to treatment is compensable

---

The worker, appeals the July 11, 1995 findings of the Workers' Compensation Review Board. The Review Board upheld a February 9, 1995 decision of a claims adjudicator denying the worker's claim for an adverse reaction to isonicotinic acid hydrazide (Isoniazid [INH]) treatment. The issue in this case is whether the disability resulting from the adverse reaction is compensable.

The worker has been a nurse with the employer in this case since August 18, 1980. On July 28, 1993 the worker was screened for tuberculosis as a condition of her employment. The results of the screening was a positive reaction. The worker was advised to seek medical attention and was seen by a doctor from the Ministry of Health, B.C. Centre for Disease Control, Tuberculosis Control. Given the degree of reaction it was felt the worker had a recent exposure to tuberculosis and the patient agreed to take INH. INH apparently is reasonably successful in preventing the onset of active tuberculosis. One of the potential side effects of taking INH is hepatitis. In this case the worker did develop hepatitis and was bed ridden for several weeks. The worker had a smaller positive reaction to a TB test in 1977 but that was thought to be related to an earlier vaccination for TB. The worker said that vaccination would only last a few years. The claims adjudicator relied on item #19.41 (Adverse Reactions to Inoculations or Injections) in the *Rehabilitation Services and Claims Manual (Claims Manual)* and denied the claim on the basis that the worker was not "compelled" by her employer to have the INH treatment.

However, the Review Board said the worker did not have an industrial disease under Schedule B of the *Act* and there was "no record of a patient diagnosed with

tuberculosis as a patient in their hospital.” The Review Board distinguished between exposure to the tuberculosis causing bacillus and “overt disease.” They said the INH was “for the purpose of preventing the onset of a disease which the Board does not accept responsibility for.” Further, the treatment was voluntary and not required by the employer. The Review Board denied the claim.

Submissions were received from both the employer and the worker in this case. The *Workers Compensation 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. Medical aid may be paid although the worker is not disabled from earning full wages at the work at which he was employed.
- (2) The date of disablement shall be treated as the occurrence of the injury.
- (3) If the worker at or immediately before the date of the disablement was employed in a process or industry mentioned in the second column of Schedule B, and the disease contracted is the disease in the first column of the schedule set opposite to the description of the process, the disease shall be deemed to have been due to the nature of that employment unless the contrary is proved.

#### SCHEDULE B

2. Infection caused by: . . .
  - (d) Tubercle bacillus      Employment where close and frequent contact with a source or sources of tuberculous infection has been established and the employment necessitates
    - 1) the treatment, nursing or examination of patients or ill persons; or

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

The first question is whether the worker suffers from an occupational disease. Infection by tubercle bacillus is an occupational disease by virtue of being mentioned in Schedule B. The Review Board was of the view that infection for the purposes of Schedule B must amount to "overt disease" in order to meet the requirements of Schedule B. That is, the infection must have progressed to the point of the worker having active tuberculosis before the worker would be "infected" for the purposes of Schedule B.

In May, 1990 the U.S. Department of Health and Human Services, Public Health Service, Centre for Disease Control, published a document entitled "*Screening for Tuberculosis and Tuberculous Infection in High Risk Populations and The Use of Preventative*

*Therapy for Tuberculous Infection in the United States,*” M.M.W.R. Vol. 39 / No. RR-8. That document provides, at page 1:

Tuberculosis is caused by bacteria (*Mycobacterium tuberculosis* complex, which includes *M. tuberculosis*, *M. bovis*, and *M. africanum*) that are transmitted from an infectious source to susceptible persons primarily through the air (e.g., through coughing). Most individuals who become *infected* do not experience clinical illness; *infected individuals* are usually asymptomatic and noninfectious. The only evidence of *infection* may be a reaction to a tuberculin skin test. Infection can persist for years, however, and *infected persons* remain at risk of contracting clinically apparent disease, especially if the immune system becomes impaired.

*(italics added)*

Section 6 of the *Act* recognizes that workers might have an occupational disease that does not disable them from earning full wages. In those cases workers are entitled to health care benefits. Schedule B does not refer to “clinically apparent disease” or “overt disease” but rather to “infection.” Had Schedule B referred to the clinically apparent disease, active tuberculosis, I might agree with the Review Board. However, the TB test shows more than the worker had an *exposure* to active tuberculosis, it shows that the worker is likely *infected* with the bacillus. I agree that mere exposure to active tuberculosis is insufficient to meet the definition of an occupational disease. However, a positive TB test is strong evidence of an *infection*, not merely evidence of exposure. I find that the worker suffers from the occupational disease “infection caused by tubercle bacillus.”

The second question is whether the disease was due to the nature of the worker’s employment. As a first step I must consider section 6(3). The second column of Schedule B next to the occupational disease “infection caused by tubercle bacillus” sets out a number of requirements including “Employment where close and frequent contact with a source or source of tuberculous infection has been established.” In this case there is insufficient evidence the worker has such close and *frequent* contact. Thus, there is no presumption of causation in this case. This case must be adjudicated under section 6(1) of the *Act*. Item #28.00 (Contagious Diseases) in the *Claims Manual* provides:

There are a number of contagious diseases recognized by the Board as occupational diseases either in Schedule B or by regulation.  
See #26.03.

A worker is not entitled to compensation simply because he or she contracted the disease while at work. For the disability to be

compensable, there must be something in the nature of the employment which had causative significance. Thus, in these cases of contracting a contagious disease at work, it is a requirement for compensation that either:

1. The nature of the employment created for the worker a risk of contracting a kind of disease to which the public at large is not normally exposed; or
2. The nature of the employment created for the worker a risk of contracting the disease significantly greater than the ordinary exposure risk of the public at large. In this category, it would not be sufficient to show only that the worker meets more people than workers in other occupations, but it would be significant to show that in the particular employment the worker meets a much larger proportion of people with the particular disease than is found in the population at large. It may help to illustrate these principles: . . .

There is no requirement that a worker with a contagious disease should name a contact, but there should be some evidence of a contact. For example, if the worker was employed in a hospital, and there were three patients known to be in his or her working area of the hospital suffering from the disease, an inference may be drawn from the circumstantial evidence that the worker contacted the disease there, even though they may not remember the names of the patients, or may not remember whether they actually had contact with them. The strength of this circumstantial evidence would obviously depend partly on the strength of evidence relating to alternative possibilities, such as whether the disease is extremely rare or one that is common in the community elsewhere. In other words, where there is no solid evidence of actual contact, the Adjudicator must still weigh the possibilities on the circumstantial evidence of possible contact and not simply reject the claim without weighing the possibilities.

The employer said they had no record of a patient diagnosed with tuberculosis in their hospital. At the Review Board the worker said she suspected that she was exposed to TB from a patient coughing on her. There are letters on file from three co-workers in the cardiovascular unit, where the worker worked, who stated they had all tested positive for TB in the summer of 1993 and these represented recent conversions. There are two additional letters from co-workers who said they tested positive in the summer of 1992 and that these were also recent conversions. The employer points out:

... It is impossible to state, for any one of us, that we are not exposed at various times, when riding in public transport, when at a sports event, in church, or while shopping in a mall, that there has been no exposure to a communicable disease. The question remains whether or not working in a hospital, in this case, exposed this worker to a heightened risk of infection ...

There is no “solid evidence” of actual contact at work or away from work. The strong positive tuberculosis test is evidence of a recent exposure to an active tuberculosis case and infection. The question is where was the contact made? I must “weigh the possibilities on the circumstantial evidence of possible contact.” In this case the worker as a health care worker had close contact with patients. The U.S. Centre for Disease Control in the previous referenced article said:

The risk to hospital workers, other institutional health-care workers, and home health-care workers is lower today than in the prechemotherapy era. The principal contributors to reducing infectiousness are a lower incidence of tuberculosis in the population and the potency of modern chemotherapy regimens. *However, the risk to health-care workers may still be substantial. The main risk is exposure to patients with unsuspected tuberculosis.* This poses a particular problem when the clinical presentation is atypical, as is often the case when elderly patients or patients with HIV infection are involved. Procedures that induce coughing, such as sputum induction and aerosolized pentamidine treatments, may present a particular hazard to health-care workers.

*(italics added)*

Given the number of co-workers who tested positive for tuberculous infection, as recent converters, at approximately the same time as the worker and given the potential risk of exposure to unsuspected tuberculosis case, it is my view, that it is more likely than not that the worker’s exposure occurred at work. There is no evidence, circumstantial or otherwise that the worker had exposure outside of work, although that is a possibility. Thus, I find that the worker’s occupational disease was due to the nature of her employment.

Although the worker was not disabled from earning full wages as a result of the infection alone, she was disabled from earning full wages as a result of the medical treatment for the occupational disease. That is sufficient, in my view, to meet the intent of the phrase “thereby disabled from earning full wages” as set out in Section 6(1)(a). Item #22.10 in the *Claims Manual* says that where further injury arises as a direct consequence of treatment for a compensable injury, the further injury is also

compensable. The policy does not specifically refer to the direct consequences of treatment for compensable diseases and does not specifically exclude such coverage. It seems to me there is little reason to distinguish between the direct consequences of treatment for compensable injuries and the direct consequences of treatment for compensable occupational diseases. Certainly where the requirements of Section 6(1) have been met, as in this case, compensation is payable "as if the disease were a personal injury." I find that the worker's adverse reaction to the INH treatment for her occupational disease is compensable.

THE WORKER'S APPEAL IS ALLOWED.

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



## Decision of the Appeal Division

**Number:** 96-0144  
**Date:** January 31, 1996  
**Panel:** Herb Morton  
**Subject:** Section 35 (1) – Reimbursement to worker

---

The worker appeals the July 31, 1995 Review Board finding.

The general issue is whether the worker is entitled to reimbursement of fees paid to the public trustee, which were deducted from his pension entitlement under this claim. This involves two sub-issues with respect to:

- The July 31, 1995 Review Board finding on the worker's appeal, which concluded that the board erred in commencing payment of the public trustee fees effective July 1, 1994, and,
- The June 21, 1994 decision by the director to reimburse these fees but not retroactively for the period December, 1992 to June, 1994.

The worker was injured on June 2, 1987, when he drove his motorcycle into the back of another vehicle. By decision dated March 20, 1992, the disability awards claims adjudicator advised the worker concerning the assessment of his residual impairment under this claim. The worker's injuries included a closed head injury, fractures of the right tibia and fibula, a right brachial plexus injury, partial amputation of the right arm below the shoulder, lung contusion and various other soft tissue injuries. The decision stated:

You also have major concerns with respect to the after effects of your head injury. These include communication skills, memory difficulties and emotional mood swings. . . . In terms of the psychological functioning, assessment confirms residual impairment in memory, judgement, problem solving, insight, social skills and self-control.

Based on these findings and all other information on file, it is considered that your disability in relation to your physical symptoms is equal to 62% of a totally disabled person. Your disability with respect to complex integrated cerebral function and emotional disturbance is considered equal to 20% of a totally disabled person.

The worker's disability was assessed on a functional impairment basis at 82% of total disability. His pension was paid on a total loss of earnings basis, as it was concluded that the worker was unemployable.

By letter of November 26, 1992, the disability awards claims adjudicator advised the worker that beginning with his December 1992 cheque, his future pension cheques would be sent to the public trustee. By letter of January 8, 1993, [a consultant neurosurgeon] advised the public trustee:

His main problems with regard to the central nervous system was severe cognitive defects in his memory, concentration, attention and other higher integrated cerebral functions.

Further CT scans of the brain revealed considerable brain tissue loss of a generalized nature. I would like to advise the Public Trustee that under Section 35(1) of the *W.C.B. Act* we would consider the worker incapable of managing his own financial affairs and that the Public Trustee would be best qualified to administrate payments. This statement is based on the medical evidence of brain damage.

In a memo dated May 10, 1993 addressed to the director of rehabilitation services at the board, the vocational rehabilitation consultant inquired:

The fee by the Public Trustee for administering the worker's finances is 5% of the funds administered, approximately \$150.00 per month. The worker is concerned that the fee has been coming out of his funds and is requesting reimbursement for this.

... As per the worker's request, is it possible to reimburse [the worker] for the cost of the Public Trustee?

By letter of November 30, 1993, the Board's psychology department wrote to the director, [of a company providing treatment], requesting that treatment be provided for:

[The worker's] suicidal thoughts and frustrations along with anger control. These factors appear to be linked to [the worker's] desire to gain control of his financial affairs and it may be important to deal with the issue of why a public trustee was appointed and how it would be possible for [the worker] to slowly regain financial responsibility at this time. . . .

By letter of March 2, 1994, the disability awards claims adjudicator advised the worker:

... I am not satisfied that you have reached a point where you are again financially capable of managing your own financial affairs. . . .

Your circumstances require that you have continuous rehabilitation services and the Workers' Compensation Board will indeed continue to make these available. You are continuing to be at risk for antisocial behaviour due to anger management problems which are and have been accepted as a result of the work injury suffered under this claim.

In a memo dated May 24, 1994 (#215), the vocational rehabilitation consultant noted:

... [the] Director Service Effectiveness, has been working with division management to have the WCB become responsible for the fee for all WCB pension (sic) administered by the Public Trustee. She has advised [the worker] and myself that this is close to fruition but will not be retroactive. This has upset [the worker].

By decision of June 21, 1994, the director, vocational rehabilitation and service effectiveness, advised the worker:

This letter will serve to confirm our previous discussion regarding the payment of public trustee fees on your claim.

Effective July 1, 1994, we have instructed the Public Trustee to invoice the Workers' Compensation Board directly. Payment of the fees will be made by the Workers' Compensation Board in your particular case. As explained, these fees will not be reimbursed to you retroactively.

Thank you for your patience while we reviewed your particular case and considered your request for payment of these fees.

Commencing July, 1994, the public trustee submitted a claim to the board for reimbursement of the fees charged to the worker for administration of his pension cheques. To illustrate, the charges for the first three months were:

	Commission	GST		
July 1994	\$164.16	\$11.49		
August 1994	153.06	10.71		
September 1994	<u>153.06</u>	<u>10.71</u>		
TOTAL	\$470.28	\$32.91	=	\$503.19

This account was processed by the health care benefits section of the board, under the automated wage loss payments system, as a "Code D/Personal care" item.

In March, 1995, the worker's father assumed responsibility from the public trustee for administering the worker's pension funds.

The worker appealed to the Review Board concerning the decision not to reimburse the fees of the public trustee to him retroactively. In its finding of July 31, 1995, the Review Board concluded:

The panel finds that there is no provision in the *Workers Compensation Act* or in published Board policy to pay administrative fees of third parties where a worker is found financially incompetent. The panel finds that the Board Officer erred in commencing payment of the Public Trustee fees under this claim effective July 1, 1994.

With respect to the matter of third party administrative fees, where it is found that such fees arise as a consequence of the injury or industrial disease sustained under the claim, the panel refers the issue to the Governors of the Board for their determination whether such fees should be Board responsibility.

The appeal is denied.

There is no indication on the claim file that the referral by the Review Board of this policy issue to the governors was brought to the attention of the governors or administrators. The worker has appealed the Review Board finding to the appeal division. Section 91(3)(c) of the *Act* requires that the appeal division make its decision "as soon as practicable and in any case within 90 days of the date on which the appeal

is commenced,” subject to certain limited exceptions. The workers' advisor notes the Review Board's reference of this policy issue to the governors, but submits:

... there is enough direction in the *Act* and the [*Rehabilitation Services and Claims Manual*] to make a decision about these fees... .

I consider it appropriate to proceed to consider the worker's appeal on the basis of current governors' policy and the *Act*.

## **Findings and reasons**

The involvement of the public trustee under section 35(1) of the *Workers Compensation Act* was required in this case as a consequence of the worker's compensable injury. This is not a case where the worker became incapable of managing his own affairs due to reasons unrelated to the work injury.

The materials on the claim file provide no explanation or stated rationale for the June 21, 1994 decision by the director to authorize the payment of the public trustee's fees effective July 1, 1994. I infer, from the effective date and the wording of the letter to the worker, that the decision was undertaken as an exercise of discretion in the individual case.

I have considered the worker's appeal from two perspectives: firstly, as to whether the decision to pay such expenses from July 1, 1994 was justifiable under the *Act*; and, secondly, whether such expenses should be reimbursed retroactively for the period December, 1992 to June, 1994.

The public trustee's account was paid by the health care benefits department of the board as a “personal care” item. I do not consider, however, that the form of the payment, or the manner in which the account was processed, is necessarily determinative of the character of the decision which authorized the payment.

Section 35(1) of the *Act* provides:

Payments of compensation shall be made periodically at the times and in the manner and form the board considers advisable and, in the case of minors or persons of unsound mind who the board considers are incapable of managing their own affairs, may be made to the persons that the board thinks are best qualified in all the circumstances to administer the payments, whether or not the person

to whom the payment is made is the legal guardian in respect of whom the payment is being made.

This provision of the *Act*, under which the worker's pension was paid to the public trustee, is silent on the issue of payment of fees for administering the worker's funds.

Section 21, which deals with the provision of health care, provides that:

. . . the board may furnish or provide for the injured worker any medical. . . or other care or treatment . . . that it may consider reasonably necessary at the time of the injury, and thereafter during the disability to cure and relieve from the effects of the injury or alleviate those effects . . . .

Consideration could be given as to whether the fees of the public trustee might be authorized under this provision, or whether such fees fall outside the scope of the term "health care."

Section 15 of the *Act* provides:

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

Section 14(1) of the *Public Trustee Act* provides:

The Lieutenant Governor in Council may make regulations prescribing fees or a scale of fees payable to the Public Trustee for the performance of a duty or for services rendered by or on behalf of the Public Trustee under this *Act* or any other enactment.

In view of the combined effect of sections 15 (which contemplates the payment of compensation to a personal representative) and 35(1), as well as the provisions of the *Public Trustee Act* which authorize the charging of fees for their services, I find no contravention of the legal protections provided by section 15 in the deduction by the public trustee from the worker's pension of the fees for administering the worker's pension funds.

The submissions of the workers' advisor rely on section 16 of the *Act*, which concerns the provision of rehabilitation services. This 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. . . . (*emphasis added*)

On consideration of the foregoing, I agree with the Review Board in concluding that there is no provision in the *Workers Compensation Act* which explicitly authorizes the payment by the board of the public trustee's fees for administering the compensation benefits due to a worker who is found to be incapable of managing their own affairs as a result of the work injury. This is not to say, however, that such payments could not be authorized under the *Act*. As stated by the B.C. Supreme Court in *Re Estate of Artibano Milito*, Vancouver Registry No. A840860, June 7, 1984, in another context (at page 9):

I have no doubt that the legal fees of any particular claimant could be paid if those charged with the responsibility of administering the *Act* deemed it appropriate — but that is a far different matter from a duty imposed by statute to exercise a discretion as to payment of legal fees with respect to each and every claimant.

In the absence of clear statutory direction on this point, it is necessary to consider whether guidance is provided by governors' policy.

The workers' advisor submits that the June 21, 1994 decision by the director, vocational rehabilitation and service effectiveness, to authorize payment of the public trustee's fees in this case, is supportable as a rehabilitation measure. She points out that #88.70 of the *Rehabilitation Services and Claims Manual* concerns the provision of legal services by the board as a rehabilitation measure. The policy states:

While legal assistance is not normally required as a rehabilitation measure, the provision of legal assistance might be considered, where appropriate, as part of the worker's rehabilitation offered under Section 16 of the *Act*, either at the request of the worker or at the initiative of an officer of the Board.

The policy provides several examples to illustrate some of the circumstances in which legal assistance by the board may be considered. One of the examples is:

#### 4. Workers' Estates

Where workers suffer serious injuries that render them unable to administer their own affairs, their family may need legal advice and assistance to make alternative arrangements.

The policy specifies that the examples set out in this item are mentioned only by way of illustration, and are not an exhaustive list of circumstances in which legal assistance might be provided.

The policy in the *Manual* derives from Decision No. 203 in the *Workers' Compensation Reporter (Re Legal Services for Rehabilitation Purposes, Workers' Compensation Reporter, Vol. 3: p.12]*. That decision provides, at pages 12–13, that legal services may be authorized to deal with issues of indebtedness or insolvency, for the following reasons:

The value of the compensation system, as well as rehabilitation services, can obviously be undermined if the financial affairs of a worker are in such a state that he is unable to make effective use either of the compensation benefits he is receiving or of future earnings in the event of a return to work. If the combined effect of the work injury together with the pressures of creditors have created a psychological strain, the prospect of garnishment following a return to work can be not only a disincentive to re-employment, but also can create anxieties which may themselves be an impediment to recovery.

Decision No. 203 further notes that legal assistance may be considered in cases in which the threat of wage garnishment for the enforcement of a maintenance order is a cause of anxiety, or in other respects an impediment to a return to work.

It is apparent 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 guiding principles of vocational rehabilitation are stated at #85.30 of the *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)*

Governors' policy clearly 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.

It appears that the issues surrounding the appointment of the trustee, as well as the worker's frustration in not having control of his finances and in receiving a smaller pension award because of the deduction of the trustee's fees, were adversely affecting the worker's functioning. These concerns might have detracted from the therapeutic efforts being undertaken to assist the worker with anger management problems which were accepted as being a result of the work injury. Having regard to the guidelines provided by governors' policy as outlined above, I find no error in the decision by the director of rehabilitation services to authorize the payment of the fees of the public trustee in the particular circumstances of this case. The reasons for the payment of the public trustee's fees in this case may be seen as analogous to those which supported the payment of legal fees as a rehabilitation measure in the examples provided in governors' policy. I find that the decision to authorize this expenditure was clearly supportable as an exercise of discretion by the director, vocational rehabilitation and service effectiveness, under section 16 of the *Act*. I allow the worker's appeal from the Review Board finding on this basis.

In view of my conclusion on this issue, it is not necessary to consider whether the payment of the public trustee's fees may be supportable under governors' policy and the *Act* on another basis except insofar as this would support the worker's request for retroactive reimbursement of the public trustee's fees.

#80.00 of the *Manual* provides:

In cases of major injuries, such as spinal cord injuries, resulting in paraplegia or quadriplegia, severe head injuries, hemiplegia, aphasia, near or total blindness, multiple amputations, or severe disability as a result of occupational diseases, the Board may pay certain personal care expenses. These expenses are in addition to wage-loss or pension benefits.

Personal care expenses may be paid when a seriously disabled person, though not confined to an institution, has very limited mobility or requires assistance in toilet functions, bathing, eating, *or has other problems in caring for himself or herself, or needs assistance to a lesser or greater degree in daily living.* Personal care expenses are payable at the discretion of the Board. An investigation is made of the circumstances of each case. (*emphasis added*)

It is arguable that the payment of the public trustee's fees might also be supported on this basis. In the absence of clear language at #80.00 to support the payment of a public trustee's fees, however, I do not consider that this policy provides sufficient basis to support the conclusion that the worker has a retroactive entitlement to reimbursement of these fees on this basis.

Similarly, I do not consider that the wording of sections 16, 21, or 35(1) provide any clear direction to support the worker's request for retroactive reimbursement of the public trustee's fees. In the absence of a statutory provision or policy which clearly addresses this issue, I agree with the Review Board in concluding that the issue with respect to the payment of the public trustee's fees would appropriately be addressed as a general policy issue under section 82 of the *Act*. As it is not apparent whether the July 31, 1995 Review Board finding to refer this issue to the governors was brought to their attention, a copy of this decision together with a copy of the Review Board finding will be forwarded to the office of the administrators. 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).

While I do not find that the worker has entitlement to full retroactive reimbursement of the public trustee's fees, I have considered whether there was any error in the decision to pay these fees only from July 1, 1994.

I am troubled by the extent of the delay which occurred between the May 10, 1993 request by the rehabilitation consultant to the director as to whether these costs could be reimbursed, and the June 21, 1994 decision by the director to reimburse these fees. Having regard to the severity of the worker's disability and the injury-related problems with which the worker was attempting to come to terms, the delay in making a decision on this issue was unfortunate. The materials on file do not reveal the reasons for the extensive delay in making the decision on this claim. The information in memo #215 dated May 24, 1994 gives rise to an inference that this delay may have been due to efforts being undertaken to obtain a review of the board's general practice in this area. Inasmuch as a decision was ultimately made as an exercise of discretion in this individual case, it is apparent that the decision on this claim need not have awaited the outcome of this review. Without implying criticism of the board officers involved in the decision-making, I find that the delay of more than one year in the making of a decision with respect to the May 10, 1993 request by the vocational rehabilitation consultant constituted an unreasonable delay in the particular circumstances of this individual case. The fact that this time period has passed does not, in my view, have the effect that no remedy can now be provided. I find that the worker should not be required to bear the costs associated with this delay, and that he should be provided with reimbursement of the fees of the public trustee effective from June, 1993 (i.e. the month following the request by the vocational rehabilitation consultant). I find that the awarding of such reimbursement on this limited retroactive basis is, in the circumstances of this case, in keeping with the purpose and intent of the June 21, 1994 decision.

In conclusion, the worker's appeal is allowed in part. The decision to authorize the reimbursement of the public trustee's fees in this case is upheld as a rehabilitation measure under section 16 of the *Act*. However, the worker should be reimbursed such fees retroactively to June, 1993, rather than being effective July 1, 1994. The worker's request for reimbursement retroactive to December, 1992, is denied, based upon consideration of current governors' policy and the *Act*.

A copy of this decision, together with the July 31, 1995 Review Board finding, will be forwarded to the office of the administrators. I agree with the Review Board in concluding that the issue as to whether fees payable to the public trustee should generally be accepted as a board responsibility, when compensation is diverted under section 35(1), would be appropriately addressed as a general policy issue.

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



## Decision of the Appeal Division

**Number:** 96-0225  
**Date:** February 15, 1996  
**Panel:** Herb Morton  
**Subject:** Rehabilitation training-on-the-job allowance

---

The worker appeals the October 10, 1995 Review Board finding.

The worker seeks reinstatement of his training-on-the-job program, as originally approved by the director of vocational rehabilitation services.

The worker was employed as a journeyman cladder. On January 31, 1992, he stepped backwards and fell about 10 feet through an opening, landing on a concrete floor. He suffered an acetabular fracture of the left pelvis, and a soft tissue injury of the left shoulder. By report dated February 12, 1992, an orthopaedic surgeon indicated that surgery would not benefit the worker to any great degree, but that he is at risk for development of post-traumatic osteoarthritis.

A vocational assessment was provided on September 28, 1992 by the manager, vocational rehabilitation services (memo #22). She noted that prior to the worker's injury, he was employed as a journeyman cladder primarily putting down decking for high-rise commercial buildings. He was required to walk on steel girders, climb on ladders, and lift, pull and twist metal sheets 30 feet long by 3 feet wide (generally with the assistance of another worker). The sheets weigh from 100 to 150 pounds. Information from the union local confirmed that work in cladding and decking requires the ability to climb and work at heights. It was recommended that the worker take training to become a journeyman sheet metal worker, which would allow him to stay in the trade but to work at ground level.

The wage rate set on this claim was \$920.55 per week, based upon the 1992 statutory maximum of \$48,000.00 per year. The worker's actual pre-injury earnings were in

excess of this figure. The \$920.55 weekly rate was subject to CPI adjustments as follows:

January 1992	\$920.55
January 1993	\$927.04
July 1993	\$937.14
January 1994	\$944.36
July 1994	\$939.31
January 1995	\$942.91
July 1995	\$962.39

By letter of February 16, 1993, the vocational rehabilitation consultant provided a "To whom it may concern" letter stating:

This letter will confirm that [the worker] is currently in receipt of Workers' Compensation Benefits at the rate of \$927.04 per week (gross). These payments will continue until [the worker] is once again employed. Should [the worker] be employed in a job which does not pay this amount he will be "topped up" until such times as his previous earning capacity is attained.

On June 24, 1993 (memo #42), the director, vocational rehabilitation services, approved a recommendation for expenditure in the amount of \$44,049.70. This included \$36,401.00 for a training-on-the-job program as a sheet metal worker at ground level. By letter of June 18, 1993, a "statement of understanding" was sent to the worker stating that the board had agreed to grant him a top-up allowance for the 4 years of his apprenticeship program. (It is unclear why this letter was dated earlier than the director's approval.) The letter was very specific in its terms, stating:

The first year top up will amount to \$393.00 gross per week (\$982.50 – \$589.50). This nets at \$294.75 per week.

In the second year of the apprenticeship the employer will pay you 70%, i.e. \$736.875 and the WCB top up will be \$245.625 gross, i.e. \$184.21 net.

In the third year the employer will pay 80%, i.e. \$786.00 and the WCB top up will be \$196.50 (\$982.50 – \$786.00) i.e. \$147.37 per week.

The fourth year of the apprenticeship the employer's contribution will be 90%, i.e. \$884.25 and the WCB top up \$98.25 per week (\$982.50 – \$84.25) which nets at \$73.68 per week.

*(italics added)*

The sum of the employer's contribution and the board's contribution was \$982.50 per week, for each of the four years of the program. The figure of \$982.50 per week was based upon the worker's pre-injury earnings which exceeded the \$48,000 statutory maximum. The net figure which then followed was based upon 75% of the "WCB top-up." The intent appears to have been to pay the worker 75% of the amount by which the employer's contribution was below the worker's pre-injury earnings, without regard to the statutory maximum wage rate. No reference was made to what the effect would be when the worker received his pension award. There was no explanation in the "statement of understanding" that the board might further review the matter and reconsider its position.

The rehabilitation plan set out above was presented to the worker as a "statement of understanding," which had been approved by the director of rehabilitation services. The worker subsequently received a series of decisions which changed its effect.

In September, 1993, the vocational rehabilitation consultant submitted a request to the director, rehabilitation services, for an amended budget. The basis for this request was to add 12%, in lieu of holiday pay, to the worker's earnings of \$946.88 per week. A new budget was approved by the acting director, using a new set of figures for each year based upon a weekly wage of \$1,060.50 (again in excess of the maximum wage rate). This first revisiting of the "statement of understanding" was in the worker's favour, and was submitted to the director, rehabilitation services, for authorization.

By decision of October 18, 1993, the worker was granted a functional impairment pension award of 7.5% of total for his left hip disability, calculated with reference to the statutory maximum in effect at the time of the worker's injury (\$48,000.00 per year in 1992).

By letter of November 24, 1994, the vocational rehabilitation consultant advised the worker that there had been an "administrative error" in the calculation of his training-on-the-job "top up" allowance. He stated that this should have been limited by the statutory maximum wage rate. He further advised that the worker's functional impairment pension award of \$225.00 must be deducted from his training-on-the-job

allowance. Based on these two decisions, the worker was advised that he had received an overpayment to date of \$9,668.21, and that all future payments would be decreased to take into account the statutory maximum wage rate and the amount he was receiving in his pension award.

By further letter of December 12, 1994, the vocational rehabilitation consultant advised:

I spoke with [the employer], on November 28, 1994 regarding your current rate of pay. [The employer] states that you are currently being paid \$26.53 per hour, which works out to \$994.87 gross per week. Your bi-weekly gross from [the employer] is now \$1,989.75, this amount is greater than the wage loss rate of \$1,878.62 gross bi-weekly from WCB. Therefore effective November 21, 1994 no further top up will be provided. I would like to congratulate you. . . on a return to a wage rate which surpasses your wage set on the wage loss system on WCB. I wish you all the success in completion of your apprenticeship program.

By manager review decision of February 24, 1995, the termination of the worker's top-up training-on-the-job allowance was confirmed.

In a summary dated March 9, 1995 addressed to the director, vocational rehabilitation services, the vocational rehabilitation consultant noted that "the Senior Policy Advisor states that Section 33(7) makes the original plan illegal," and that "no re-adjudication of the original plan ever seems to have been requested or granted."

In a submission dated November 3, 1995, the worker states his case as follows:

On January 31, 1992 I was injured in a fall which rendered me unable to continue working as a Cladder/Decker in the Sheet Metal Industry. A Cladder/Decker in the Sheet Metal Industry is limited to fabricating and installing metal sheeting which is placed on the outside of buildings, and the laying of metal decking for roofs. This is very physical, demanding work and requires that I work on swing staging, climb ladders, squat, lift heavy material and walk beams. I am no longer able to return to this type of work.

On June 18, 1995 I entered into an agreement with the Board through their Rehabilitation Department. The Rehabilitation Department and myself decided it would be best if I utilized my knowledge and skills

in the Sheet Metal Industry, and with some schooling and entering into an apprenticeship program within the industry, I would alleviate any long term loss.

A lot of confusion arose from the outset of this agreement. I was never told that my partial disability pension would be taken into account on their top-up of my wages. I now understand and know how the system works.

The problem arose when work in the Sheet Metal Industry slowed down, and no work was available for some time. Not wanting to be unemployed, and not being able to support my family, I managed to get a job with [an employer]. This company is in the cladding industry in which I am a journeyman. Knowing my abilities they hired me to work in their shop doing some fabricating of panels. There was no climbing, heavy lifting etc. It was mainly to utilize my knowledge as a Cladder. Also, this was only a short term job.

The rehabilitation consultant was informed on November 21, 1994 that I had taken this work and was being paid journeyman rate of pay, although I was an apprentice sheet metal worker.

What the rehabilitation consultant and the Board fail to understand is that the job with [that employer] was only temporary, not a full time position. When work is available in the Sheet Metal Industry I will be returning to work as an apprentice. I am in full agreement with the Board that the top-up payments while I was working [with that employer] should cease. I do not feel that the agreement with the Board should be terminated because I took the initiative to work during a slow down in the Sheet Metal Industry and I respectfully request that I be allowed to continue my apprenticeship under the terms and conditions that were mutually agreed to.

## **Findings and reasons**

In reviewing the history of this case, I find it unfortunate that the degree of expert assessment and investigation which went into the development of an appropriate rehabilitation program for the worker did not extend to the execution and, ultimately, the termination of the program.

It would appear, from the skimpy evidence on file surrounding the termination of the training-on-the-job allowance, that this decision was rendered solely on the basis of advice that the worker was, at a particular date, earning in excess of the statutory maximum wage rate. There appears to have been no attempt to investigate the circumstances surrounding this, nor did the worker's attempts to explain the situation receive adequate consideration. While there was certainly proper cause to suspend the worker's training-on-the-job allowance while he temporarily returned to a short-term position in his pre-injury occupation, this by no means provided adequate grounds to terminate the training-on-the-job allowance. To do so was to ignore the expert opinion of the board's rehabilitation consultant which went into the development of the rehabilitation program. The fact that this was done with no apparent further investigation or willingness to listen to the worker's explanations makes this course of events all the more unfortunate. There was no inquiry as to whether this short-term work in the worker's pre-injury occupation as a journeyman cladder, would be suitable and available to the worker over the long term.

I am persuaded, based on the information considered at the time the rehabilitation program was first developed and the additional evidence provided by the worker, that the training-on-the-job program is still necessary. A training-on-the-job allowance should be extended to the worker to assist him in pursuing his apprenticeship to become a journeyman sheet metal worker. Notwithstanding the fact that the worker was able to obtain short-term work in his pre-injury occupation, I find no basis for concluding that suitable employment would be available to the worker in this field over the long term. The rationale behind the original rehabilitation program is still valid. The worker's appeal is allowed on this issue.

With respect to the manner in which the training-on-the-job allowance was presented to the worker, it is evident that some lessons can be drawn from the problems which were encountered in this case. The program was presented to the worker as being similar to a contract, approved at the director's level, and drawn up for signature by the worker and the rehabilitation consultant. The purpose, evidently, was to ensure that the worker had a sense of commitment to the rehabilitation program. This was certainly appropriate and desirable. However, this process created certain legitimate expectations in the mind of the worker that the board would honour its side of the "understanding." When the vocational rehabilitation consultant subsequently altered the terms of the agreement in a significant way, the worker was upset. In his notice of appeal to the Review Board, he stated:

W.C.B. is not living up to its letter dated June 18, 1993. I was lied too, right from the start, about how this training worked.

It is evident that the changes in the board's position, which did not go through the same process of being submitted to the director for approval, were damaging of a productive rehabilitative working relationship. It is difficult to understand how issues such as the effect of a pension award (which was foreseeable from the outset on this claim), and the statutory maximum wage rate, would not be taken into account in a uniform way in drawing up such a detailed "statement of understanding."

This "statement of understanding" was not a contract, as such. The Board could not legally fetter its discretionary authority to reconsider the terms of the "understanding" under section 96(2), if new evidence came to light or an error was discovered in the original plan. The first illustration of this was in the worker's favour, when a revised budget was approved to increase the level of benefits payable to the worker based on the 12% vacation pay allowance which had initially not been taken into account. It might have been helpful to explain this to the worker at the outset.

The decision to approve a training-on-the-job allowance in excess of the Board's statutory maximum wage rate was approved, on two occasions, at the director level. However, the decisions to reduce the worker's allowance by application of the statutory maximum wage rate, and the deduction of the amount of the worker's pension award, were made by the vocational rehabilitation consultant apparently acting on his own initiative. There is no evidence of any request to the manager or director for permission to readjudicate the earlier decision. This procedure was in contravention of governors' policy at #108.30 of the *Rehabilitation Services and Claims Manual* (notwithstanding the fact it was subsequently upheld on a manager's review). It is understandable that the worker felt he was being treated in an unfair and capricious manner.

In the worker's March 10, 1995 Part 1 notice of appeal to the Review Board, he stated that he was appealing the December 12, 1994 decision. That letter concerned the termination of his training-on-the-job allowance. However, in his explanation as to why he thought the decision was wrong, the worker complained that the Board was not living up to its letter of June 18, 1993. In the worker's written submission to the Review Board of June 4, 1995, the worker similarly expressed his grievances concerning the adjustments to the amount of his training-on-the-job allowance. The Review Board found that the only issue before it involved the decision to terminate the allowance. Taking a broad remedial approach to jurisdiction, I consider that the worker's appeal involved both whether a training-on-the-job allowance was payable, and the level of the allowance, and that both issues should be addressed in this decision.

With respect to the application of the statutory maximum wage rate, I have considered, first of all, whether it is contrary to the *Workers Compensation Act* to award rehabilitation benefits to a worker in excess of this rate. Upon consideration of the

wording of subsections 33(7) and (8) of the *Act* in the context of section 33 as a whole, I find that the maximum wage rate governs the payment of *compensation* under Part 1 of the *Act*.

Section 82 of the *Act* establishes the authority of the governors to “approve and superintend the policies and direction of the board, including policies respecting *compensation*, assessment, *rehabilitation* and occupational safety and health.” Section 82 distinguishes between “compensation” and “rehabilitation.” For this and other reasons expressed in an earlier decision [#95-0668, *Rehabilitation Costs and ERA, Workers’ Compensation Reporter*, Vol. 12: p. 221], I consider the term “compensation” does not include rehabilitation expenditures under section 16. For this reason, I do not consider, as a matter of statutory interpretation, that the maximum wage rate governing the payment of compensation applies to rehabilitation payments to a worker under section 16.

As noted above, however, the governors have authority under section 82 of the *Act* to make policies concerning rehabilitation. They could exercise this authority to decide, as a matter of general policy, that periodic rehabilitation payments to a worker should generally not exceed the maximum wage rate for compensation purposes. They could further decide that the amount of such payments, when added to the remuneration provided by the worker’s employer, should not exceed the maximum wage rate. It is, therefore, necessary to consider governors’ policy concerning the payment of a training-on-the-job allowance to ascertain whether it has this effect.

I find no provision in Chapter 11 of the *Rehabilitation Services and Claims Manual* concerning vocational rehabilitation services which specifically states that the maximum wage rate for compensation purposes applies to the calculation of rehabilitation benefits payable to an injured worker. There are, however, several provisions which refer to payment of rehabilitation benefits at a “wage-loss equivalency” level, which would have the same effect. These include:

#88.00

*Wage-loss equivalency* benefits provided by Vocational Rehabilitation Services are payable only when wage-loss benefits have concluded and follow the same rules with regard to the deduction of pensions. (See #69.10 to #70.30). These benefits may apply while workers are either awaiting or undertaking specific vocational programs. (*emphasis added*)

#88.32

The Board may provide financial assistance in the form of a job search allowance. This is a discretionary benefit which applies if the worker is actively seeking or returning to appropriate employment, attending a designated job search program, or awaiting a confirmed job opportunity. The amount of the allowance will not exceed *wage-loss equivalency*. (*emphasis added*)

#88.53

When it is decided to support a formal training program related directly to the disability, the assistance provided under Section 16(1) of the *Act* will normally include:

1. Training allowance at *wage-loss equivalency* when enrolled in a full-time program. (*emphasis added*)

The specific policies governing the payment of a training-on-the-job allowance are set out at #88.40, 88.41, and 88.42 of the *Manual*. #88.42 states:

Financial assistance for a training-on-the-job program will normally be provided on a shared-cost basis with the training employer. The Board's contribution will usually decrease, on a sliding scale, as the program proceeds and the worker's productivity increases. *The portion of the worker's wages paid by the Board will normally not exceed the worker's wage-loss rate.* (*emphasis added*)

The policy at #88.42 does *not* state:

The *sum of the* portion of the worker's wages paid by the Board, *and the portion paid by the employer*, will normally not exceed the worker's wage-loss rate.

It is necessary to insert the phrases "sum of the" and "and the portion paid by the employer" in order to limit the total remuneration received by the worker under a training-on-the-job program to a wage-loss equivalency rate. Several of the governors' policies concerning payment of rehabilitation benefits restrict payments to workers to wage-loss equivalency rates. I cannot find, however, that the specific wording of #88.42 contains such a limitation. The plain effect of the wording of #88.42 is that only the portion of the training-on-the-job allowance actually paid by the board should (normally) be restricted by the worker's wage loss rate. In the absence of such a limitation in the *Act*, or in governors' policy, I consider that the worker should be

provided with a training-on-the-job allowance calculated with reference to his pre-injury earnings without reference to the statutory maximum, as approved on September 29, 1993.

The worker's apprenticeship program started in May, 1993, at which time the applicable statutory maximum wage rate was \$927.04. The highest level of rehabilitation benefits payable to the worker in the form of a training-on-the-job allowance, under the June 18, 1993 "statement of understanding" was \$393.00 per week gross, or \$294.75 net per week. The portion of the worker's wages paid by the board was, therefore, well below the worker's wage-loss rate (notwithstanding the increase which was approved on September 29, 1993). In view of this, consideration of the effect of the statutory maximum may be moot in any event.

If #88.42 is intended to have a meaning which is not reasonably apparent from its actual wording, the matter should be brought to the attention of the panel of public administrators for consideration as to whether an amendment in the wording of the policy is required. For the purpose of deciding this individual case, I consider it appropriate to proceed with a decision based upon the plain wording of the existing policy.

With respect to the deduction of the worker's disability pension from his training allowance, #88.42 further states:

Disability pensions are not deducted from training allowances for training-on-the-job programs *when paying the employer.* (*emphasis added*)

This statement is somewhat ambiguous in its effect. Its implication, however, would seem to be that disability pensions are deducted from training allowances for training-on-the-job programs *when paying the worker.* Otherwise, it would not have been necessary to include the phrase "when paying the employer." It appears that this issue was not considered at the time the "statement of understanding" was drawn up. The worker states that he now understands and knows how the system works in this regard. I find no error in the decision to make such a deduction, notwithstanding the concerns noted above with respect to the procedure which was followed.

In finding that the worker's training-on-the-job allowance should be reinstated, I would state for the sake of clarity that this does not limit the board's authority to reexamine the terms of the program and tailor it to the worker's current rehabilitation needs (provided the policy at #108.30 is respected). I note, for example, that the original program contemplated a four-year apprenticeship. It appears that the worker has received a one-year credit based upon his prior training. The vocational rehabilitation

consultant should investigate the worker's current circumstances in determining the terms on which the training-on-the-job allowance should be reinstated.

No submissions have been received in this regard, and I make no finding on this point. This matter should, however, be further reviewed in reinstating the worker's training-on-the-job allowance.

In conclusion, the worker's appeal is allowed in part. A training-on-the-job program should be reinstated to assist the worker in pursuing his apprenticeship to become a journeyman sheet metal worker. The worker's training-on-the-job allowance will be calculated with reference to his pre-injury earnings without regard to the statutory maximum. The worker's disability pension will, however, be deducted from his training-on-the-job allowance.

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



## Decision of the Appeal Division

**Number:** 96-0486  
**Date:** March 12, 1996  
**Panel:** Herb Morton  
**Subject:** Whether a worker was a “lent employee”

---

“Employer A” appeals the July 21, 1995 decision by the manager, employer assessment, assessment department. The manager concluded that the worker was employed by Employer A for the purposes of [his 1993] claim.

### Background

On October 10, 1993, the worker submitted an application for compensation for left shoulder problems which he attributed to his work activities from June to August, 1993. On the back of his application for compensation, he explained:

I was required to install conduit on the concrete ceiling of the job site at ... . This process required to drill with a hammer drill approx. 3 – 4 lbs. an anchor hole, install an insert, then screw in a strap to secure conduit to ceiling. Most of the work was done at arms length and overhead. This work comprised 90% of the work that I did on this job site from June thru. Aug.

A form 7 *Employer's Report of Injury or Industrial Disease* on this claim was filed by “Employer B,” on October 4, 1993.

In an undated note submitted to the board in April or May, 1994, Employer B wrote to the claims adjudicator stating:

Have you had a chance to consider whether or not this claim is properly assigned to us?

By decision of June 8, 1994, the claims adjudicator replied, stating:

... you advised that, when [the worker] was injured, he was on loan to Employer A. You indicated that you had no contact with the worker for weeks at a time and that the worker reported to Employer A. However, Employer A would be billed by your company and you would then pay wages to [the worker]. You wanted clarification as to whether your company, Employer B, is the correct employer.

*This matter was referred to the Assessment Department, who has indicated that this worker was issued only 1 T-4 slip for 1993, through Employer B. The Assessment Department has indicated that your company is the employer of record at the date of injury. As a result, all costs of the claim are allocated to Employer B, (emphasis added)*

By further letter to the Review Board dated August 8, 1994, Employer B stated they wished to appeal the determination that they were the worker's employer for the purposes of this claim. By letter of reply dated August 24, 1994, the Deputy Registrar, Review Board, advised:

We also acknowledge receipt of your August 8, 1994 correspondence in which you are disputing whether or not you are the employer of record with respect to this appeal.

*Please be advised that the jurisdiction of the Review Board is limited, that is, we can only consider appeals from Officers of the Board which affect the worker. In this case, the determination of who the correct employer of record would be is an issue that cannot be dealt with by the Review Board. (emphasis added)*

By letter of September 6, 1994, Employer B wrote to request a manager's review of the decision that they were the worker's employer, stating:

W.C.B. Claims Policy Manual, Clause 7.60 LENT EMPLOYEES, would appear to lend weight to our contention that we were NOT [the worker's] employer for W.C.B. purposes, and the fact that we met four of the five specific tests to establish a "Lent Employee" status should firmly establish that position. The tests being:

- a/ Which employer owns the major equipment used by the worker?  
answer - Employer A
- b/ Which employer owns any regulatory licensing required for the worker to carry on the work?  
answer - Employer A

- c/ Which employer pays the worker?  
answer – Employer A thru Employer B
- d/ Which employer has the right to terminate the employment?  
answer - Employer A
- e/ Which employer has the right to control the details of the employee's work, as opposed to the end result of that work?  
answer - Employer A

By letter dated December 6, 1994, the president, Employer A., wrote to the Board concerning an experience rating letter Employer A had received on November 28, 1994, which included claim costs for this claim in the amount of \$13,922.00. He stated:

[The worker] was on loan to us from Employer B in Victoria. The other contractor paid his wages and benefits and submitted an invoice to us on a bi-weekly basis. He was *on loan to Employer A from June 2nd, 1993 to September 17th, 1993*, at which time he returned to work for Employer B... .

We feel this claim should not be added to our Experience Rating Letter as he was not on our payroll and we were never made aware of an injury while he was working with our firm. (*emphasis added*)

By letter dated March 21, 1995, the manager, employer assessment unit, confirmed that Employer A would be considered the worker's employer on this claim. She noted:

I have reviewed the details contained in the claim file and also Employer A's and Employer B employer firm files. We have information that:

- [The worker] was on loan to Employer A. Employer B also indicated that during the month (sic) July to September 1993 they did not have sufficient work for [the worker] and had made arrangements with Employer A to employ [the worker].
- [The worker] reported to Employer A and [was] under the direction/supervision of Employer A
- Employer A has control over the safety of the job site
- Employer B was not the sub-contractor of this job.
- This job was for the purpose of Employer's business.
- Employer B continued to issue a pay cheque to [the worker] and therefore also issued the T4. Employer B then invoiced

Employer A for [the worker's] wages. Employer B did not realize a profit from this arrangement.

- Employer A was in a position to terminate [the worker's] employment with them if the work was not satisfactory or the work was completed. Your letter indicates that Employer A did not have the authority to hire or fire this individual. I believe the hiring of the individual was done through an arrangement between the owners of Employer A and Employer B. If [the worker's] work did not meet the expectations of Employer A, would Employer A have discontinued the arrangement?
- Employer A had the right to control the details of [the worker's] work, as opposed to the approving or inspecting the end result of that work.

Employer A appealed the March 21, 1995 decision to the Review Board. By letter of October 31, 1995, the deputy registrar, Review Board, confirmed that this appeal has been suspended pending further action by Employer A within six months.

In response to objections by Employer A to the March 21, 1995 decision, by further decision of July 21, 1995, the manager, employer assessment, stated that it was the assessment department's responsibility to determine whether there is an employment relationship and who the employer is. She concluded that Employer A was the worker's employer for the purposes of this claim.

Employer A has appealed the July 21, 1995 decision to the appeal division, arguing that this decision "is clearly a claim issue," objecting to the decision-making by the assessment department, and submitting that Employer B is the worker's employer for the purposes of [this] claim.

The central issue in the appeal concerns the identity of the worker's employer for the purposes of this claim. Natural justice required, therefore, that Employer B have the opportunity to participate in the appeal. Notice of this appeal to the appeal division was provided to Employer B by letter of December 29, 1995. A reply dated January 30, 1996 was provided by Employer B, stating:

Our position was, and is, that [the worker] was a 'lent employee' as defined by the W.C.B. claims policy manual, clause 7.60.

## Findings and reasons

This appeal with respect to the identity of the worker's employer for the purposes of his claim does not bring into question his status as a worker. It does not bring into question the benefits payable to the worker under his claim for compensation. This appeal concerns the assessment of the costs of this claim to Employer A, and to the class of employers of which Employer A is a member, and is appropriately considered under section 96 of the *Act*. I find, upon consideration of the foregoing, that the appeal by Employer A is properly before the appeal division. I have, therefore, proceeded to consider Employer A's appeal on the merits.

Employer A's representative objects to the involvement by the Board's assessment department, following the initial decision by the claims adjudicator advising that Employer B would be considered the employer. I note, however, that the initial decision of June 8, 1994 by the claims adjudicator was stated to be based upon the input provided by the assessment department. I do not consider that the administrative separation of the Board, as between the compensation services division and the assessment department, has substantive significance to this appeal. Section 96(2) of the *Act* provides:

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

Both at the outset, and subsequently upon receipt of additional information, the claims adjudicator sought the input of the assessment department in determining which employer would be responsible for the costs of this claim. I am unable to find any basis for concluding that there was anything objectionable or improper in the assessment department's involvement in the consideration of this issue.

Reference is made in the submissions to the policy previously contained in item #7.60 of the *Rehabilitation Services and Claims Manual*, concerning "Lent Employees." I note that this policy no longer appears in the *Rehabilitation Services and Claims Manual*. The policy concerning "lent employees" is now located in the *Assessment Policy Manual*, which provides indirect confirmation of the appropriateness of these issues being addressed as "assessment" issues to the extent any significance is attached to these administrative divisions within the board.

Currently, governors' policy at 20:10:30 of the *Assessment Policy Manual* provides:

#### Seconded/Lent Employees

In determining whether an employee of one employer has become the seconded or lent employee of another employer, the question to be decided in each case is whether there is an employment relationship between the employee and the other employer for the purposes of the *Act*. The normal tests for determining whether an employment relationship exists are applied with the necessary modifications (*Workers' Compensation Reporter Decision No. 229*).

In Decision No. 229 of governors' policy [*Re Industries and Employment, Workers' Compensation Reporter, Vol. 3: p. 75*], it was noted as follows:

*Larson's Workmen's Compensation Law* states the following principle in regard to "lent employees."

When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if

- (a) the employee has made a contract of hire, express or implied, with the special employer;
- (b) the work being done is essentially that of the special employer; and
- (c) the special employer has the right to control the details of the work.

When all three of the above conditions are satisfied in relation to both employers, both employers are liable for workmen's compensation.

In Decision No. 229, it was concluded that these general principles should apply in British Columbia, except for (a). It was concluded that:

In determining whether an employee of one employer has become the "lent employee" of another employer, the question to be decided in each case is whether there is an employment relationship between the employee and the other employer for the purposes of the *Act*.

... When the question of “lent employees” is being considered this test must be reformulated to consider whether the employee has become part of the enterprise of the other employer, or whether he remains independent of it and part of the enterprise of his original employer. A company may contract as an entity to do some work for another company in which case it performs the work stipulated for through its own employees who remain part of its organization and subject to its control and direction. Or it may simply provide another company with employees of its own for the other company to perform certain tasks with. The employee becomes part of the organization of the other company and subject to its direction and control. Only in the latter case does the employee become a “lent employee” of the other company. This reflects item (b) of Larson's formulation set out above which considers whether the “work being done is essentially that of the special employer.”

In applying the above test, some of the more specific tests set out in Decisions 32 and 138 may be usefully adopted and used, for example, the following:

- (i) which employer owns the major equipment used by the employee?
- (ii) which employer owns any regulatory licensing required for the employee to carry on his work?
- (iii) which employer pays the employee?
- (iv) which employer has the right to terminate the employment?
- (v) which employer has the right to control the details of the employee's work, as opposed to the end result of that work?

These tests reflect item (c) of Larson's formulation which asks whether “the special employer has the right to control the details of the work.”

It was found in Decision No. 229:

Where a person works for one employer for most of the time, he will not be considered a “lent employee” of another company, when, as a result of some arrangement between his employer and the other company and under the direction of his employer, he does some work for the other company *for a short period, or recurring short periods.*  
(*emphasis added*)

In Decision No. 229, the board considered the case of a worker employed by [Company X] in Alberta, but who travelled to British Columbia for two days each month where he was paid by [Company Z] through reimbursement of [Company X]. It was found that the worker remained an employee of [Company X], even while working for [Company Z] for these recurring short periods.

The evidence in this case, however, is that the worker was working for Employer A during the period June 2, 1993 to September 17, 1993. The worker's claim was filed in respect of left shoulder problems which he attributed to his employment during the period when he was performing work exclusively for Employer A. Governors' policy in Decision No. 229 indicates that a worker will not be considered a "lent employee" where the worker does some work for the other company for a short period, or recurring short periods. I consider this time period, which exceeded three months' duration, goes beyond what was contemplated by the term "a short period."

Employer A's representative concedes that Employer A had the authority to terminate the worker's work assignment with them. He emphasizes, however, that Employer A did not have the authority to terminate the worker's employment in terms of the worker's primary employment relationship with Employer B. I do not find this inconsistent with a finding that the worker was a "lent employee" while working for Employer A. Such terms would seem to typify the "lent employee" situation.

Having regard to the various tests set out in governors' policy, I find that there was an employment relationship between the worker and Employer A, for the purposes of Part 1 of the *Workers Compensation Act*. I find that this was a case in which Employer B simply provided Employer A with the services of its employee ("the worker"), for Employer A to carry out its own business activities. The worker became part of Employer A's organization, and was subject to its direction and control, during the period in which Employer A's engaged the worker's services.

On the basis of governors' policy at 20:10:30 of the *Assessment Policy Manual* and Decision No. 229 of the *Workers' Compensation Reporter*, I find that the worker was a "lent employee" while working for Employer A from June 2, 1993 to September 17, 1993.

Employer A's appeal is, therefore, denied. The worker was appropriately found to be in Employer A's employment for the purposes of this claim.

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

## Decision of the Appeal Division

**Number:** 96-0662  
**Date:** April 22, 1996  
**Panel:** Patrick L. Byrne  
**Subject:** Section 73 – Whether subcontractor can be held responsible for violations of another subcontractor

---

“Company A” appeals the August 28, 1995 decision of a hearing officer in the Variance & Sanction Review Section of the Prevention Division to impose a penalty assessment of \$7,000. The hearing officer concluded that Company A was the employer responsible for the violations of regulations 8.20, 14.08(2), 14.21(1)(b), 34.02(5)(a), 34.04(1) and 34.08(4) and that a type IV penalty assessment was appropriate in the circumstances.

Company A appeals on the grounds of error of fact and error of law. The issue is whether Company A is the employer liable for the reported violations of the regulations.

On February 21, 1995 a board occupational hygiene officer (OHO) inspected a construction worksite in Vancouver. The OHO reported a number of violations of the regulations by Company A which he characterized as posing “a high risk of serious injury or death.” The OHO recommended a penalty assessment. By letter dated April 3, 1995 Company A was notified the board was considering a penalty assessment of \$7,000 for the reported violations of the above noted regulations. They were invited to either attend an oral hearing or to provide a written submission.

Company A provided a submission dated May 30, 1995. They said, in essence, that they were not the employer of the workers involved with the reported violations. Those workers were employed by a different employer, “Company B,” and that firm was registered with the board.

The OHO responded to the employer's submission. In a memo dated May 5, 1995 the OHO said “Company C” was the principal contractor and that the roofing contractor was Company A. Company A supplied the material for the project but contracted out

the labour to Company B . The employer provided a further submission dated April 23, 1995 but they did not make any new arguments.

By letter dated August 28, 1995 the hearing officer imposed a penalty assessment of \$7,000. The hearing officer concluded:

I find [Company A] violated *Industrial Health and Safety Regulations* 8.20, 14.08(2), 14.21(1)(b), 34.02(5)(a), 34.04(1) and 34.08(4) as stated in Inspection Report 9506. I find the Employer is accountable for the actions of their labour contractor's workers. I further find the Employer did not have any evidence of a safety program. Therefore, I will impose a Type IV, \$7,000 penalty.

The hearing officer reasoned that Company A could be held responsible for regulation violations committed by Company B's workers as Company A had "authority and control over the subcontracted firm and their workers."

Company A now appeals to the Appeal Division. They are represented by their counsel. Counsel submits that Company B was the employer of the workers involved with the reported violations of the regulations. Further, Company B had direct responsibility over the "proximate cause" of the violations and were thus the responsible employer. Counsel asserts that Company A had no responsibility for the violations here.

## **Reasons and Findings**

The *Workers Compensation Act* provides:

- 73.(1) Where the board considers that
- (a) sufficient precautions are not taken by an employer for the prevention of injuries and occupational disease;
  - (b) the place of employment or working conditions are unsafe; or
  - (c) the employer has not complied with regulations, orders or directions made under section 71,

The penalty assessment was imposed under section 73(1) of the *Act*. There is no question that Company A and Company B are both employers under the *Act* and both are registered with the board. Both are incorporated companies and both meet the definition of "employer" under the *Act*. The characterization of Company B as a labour contractor is irrelevant here. The board recognizes that in some circumstances incorporation is not determinative of a person's status under the *Act*. The Board could examine the actual relationships and determine the status of the parties under the *Act*, independent of any labels attached by them to their relationship. That is, if the Board

thought that incorporation was used to avoid the provisions of the *Act* the board could examine the circumstances and determine the actual relationship and the status of the parties under the *Act*. For example, if on the facts it could be shown that the workers of Company B were, in substance, workers of Company A then the board could make such a finding, regardless of any contractual relationship between Company B and Company A or whether each were registered with the board or incorporated. The hearing officer was concerned with the “authority and control” of Company A over Company B. The hearing officer said that Company A had a financial stake in ensuring that the roofing materials were not damaged. Further, if the principal contractor needed to enforce safety measures against Company B, they would turn to Company A for compliance.

There is no evidence on file to show that Company A had any authority or control over Company B's workers. The matter of whether Company A had a financial stake in ensuring that roofing materials were not damaged is irrelevant to the substance of the relationship here. There is nothing in this case that would lead me to believe that either Company A or Company B were involved in anything but a contractual relationship between two independent employers under the *Act*. There is no evidence that Company A had any control over the workers of Company B. It is not unusual in the construction industry for the labour portion of a contract to be subcontracted out. In this case we have a principal contractor who subcontracted the roofing to Company A who in turn further subcontracted the labour to Company B . In essence Company B became a sub-subcontractor.

The reported violations of the regulations were allegedly committed by workers of Company B . The basic question here is whether Company A has any responsibility under the *Act* for those violations.

The *Industrial Health & Safety Regulations* provide:

- 4.02. (4) When the work force at a place of employment includes workers of more than one employer, each employer shall be responsible for the accident prevention program for his workers. Where the work areas of two or more employers adjoin or overlap, the principal contractor, or if there is no principal contractor, the owner shall ensure the continuing coordination of the industrial health and safety activities of the several employers.
  
- 34.16. (2) When a construction project involves the services of one or more subcontractors or their workers, the principal contractor, or if there is no principal contractor, the owner, shall ensure that all industrial health and safety regulations are complied with in respect of the construction project, but nothing in this regulation

shall relieve any subcontractor or his workers from compliance with the industrial health and safety regulations.

Further, regulation 2.16 deems a contravention of a regulation to be a contravention “by the employer.”

Governors' Policy 4.02 provides:

Regulation 4.02(4) requires coordination of health and safety at multiple-employer jobsites. Some industries have more specific regulations on coordination of health and safety at multiple-employer jobsites, for example, construction industry Regulation 34.16(2), petroleum industry Regulation 72.244A.

Where two or more employers operate at the same jobsite, each employer is responsible for the health and safety of its respective workers and compliance with the regulations for operations involving its workers.

The principal contractor, or the owner where there is no principal contractor, is responsible for coordination of the industrial health and safety activities of the multiple employers. Generally, the principal contractor or owner will not be held accountable for non-compliance by the other employers, except in instances where it can be shown the principal contractor or owner made no reasonable effort to ensure compliance.

The policies and regulations contemplate that generally each employer is only responsible for the health and safety for *their* workers but that in some circumstances an employer could be held responsible for the violations of another employer or their workers. In the construction industry a principal contractor or owner is responsible for ensuring compliance on their construction project. That includes compliance by all subcontractors and their workers. The definition of a subcontractor in regulation 34.16(1) includes a sub-subcontractor.

Thus, subcontractors (or sub-subcontractors) are responsible for the health and safety of *their* workers and a principal contractor or owner is responsible for their workers and all subcontractors and their workers on the construction project. The regulations do not contemplate that a subcontractor could be held responsible for the violations of another subcontractor. The hearing officer seemed to acknowledge that limitation in the regulations. However, the hearing officer applied an “authority and control” test and said that would make Company A responsible for the violations of their subcontractor Company B. I do not agree. The test of “authority and control” assists in

determining the contractual relationship between the parties and a determination of the true employer of the workers involved with the violations. It is not the test under the construction regulations for deciding whether a subcontractor is responsible for the violations of another subcontractor.

Case law leaves no doubt that the principles of statutory interpretation developed by the courts apply equally to regulations and to statutes. "Driedger on the Construction of Statutes" Third Edition by Ruth Sullivan, describes the principle of implied exclusion at page 168:

*Governing principle.* One of the so-called maxims of statutory interpretation is *expressio unius est exclusio alterius*: to express one thing is to exclude another. This maxim reflects a form of reasoning that is widespread and important in interpretation. Côté refers to it as *a contrario* argument. Dickerson refers to it as negative implication. The term 'implied exclusion' has been adopted here.

An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within the ambit of its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied. The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature.

An expectation of express reference can arise in a number of ways. Most often it is grounded in presumptions relating to the way legislation is drafted or to the policies it is likely to express. However, it can arise from any assumption or observation that the court feels entitled to make about legislation.

Some common forms of the implied exclusion argument are examined below under the headings (1) failure to mention comparable items and (2) failure to follow an established pattern.

*Failure to mention comparable items.* Where a provision specifically mentions one or more items but is silent with respect to other items that are comparable, it is presumed that the silence is deliberate and reflects an intention to exclude the items that are not mentioned. The reasoning goes as follows: if the legislature had intended to include all comparable items,

it would have mentioned them all or described them all using general terms; it would not have mentioned some while saying nothing of the others, for to proceed in this way would be irrational and contrary to standard drafting practice. One must presume that legislation has been competently drafted.

Thus, applying the interpretive principle of “implied exclusion” I would conclude that the construction regulations only permit principal contractors (or owners) and the employer of the workers involved with the violations to be held responsible for any violations. It cannot be inferred that one subcontractor can be held responsible for the violations of another subcontractor. Therefore, Company A has no responsibility for the violations of the regulations by Company B. There are valid reasons for holding one party responsible for co-ordinating health and safety on construction sites. It would be improper to imply that the regulations would permit subcontractors to be held responsible for the violations of other subcontractors in a *true contractual relationship between independent contractors*.

I appreciate that given the often complex contractual relationships on construction projects it may be difficult to determine, in substance, the true employer of workers involved with regulation violations. However, the board has published policies to assist in that determination and in any event can hold principal contractors (or owners) responsible for any violations on a construction project. It is the principal contractors (or owners) who have control over their construction project and who can ultimately determine the complexity of the contractual relationships on their work sites.

There was an error of law and a contravention of a published policy of the governors. Company A is not responsible for the reported violations of the regulations by Company B. Therefore, Company A’s appeal is allowed and the penalty assessment is removed.

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

## Decision of the Appeal Division

**Number:** 96-0805  
**Date:** May 17, 1996  
**Panel:** Cassandra Kobayashi, Walter N. Peain, Derrick Spooner  
**Subject:** Whether injury arose out of and in the course of employment where worker used method of transportation prohibited by employer

---

On September 17, 1994, the worker was involved in an accident while riding an all-terrain vehicle (ATV) during his shift as a locomotive moving unit helper at a railway yard. His claim was accepted as arising out of and in the course of employment by the claims adjudicator over the objections of the employer.

The employer's appeal was allowed by the majority of the Review Board panel in findings of October 30, 1995. The majority found that the worker was expressly prohibited from operating the ATV and by operating it, took himself out of the course of his employment. The worker now appeals to the Appeal Division.

The worker was on shift from 23:00 to 07:00. The worker had been employed with the railway for 10 years in this job. He had received training from the employer to operate the ATV, although the ATV was not supplied for the use of workers in his job category. Following the accident he was suspended from operating forklifts, trucks or ATVs for 5 years, and received 25 demerit points. He grieved, and the discipline penalty was reduced to a one-year suspension and 15 demerit points.

The employer's position is that the worker's use of the ATV took him outside the course of his employment because the worker's supervisor had previously prohibited the worker's use of that vehicle. The company provided a three-quarter ton van for the use of the locomotive moving unit. The ATV was provided for and used by the car shop workers. It would appear that there is some practice that the locomotive moving unit workers also use the ATV on occasion, both by the worker's admission of prior use, and the note from [a co-worker] dated November 8, 1994 which states [the co-worker] used the ATV when the van was in use by other employees.

The evidence regarding the number of occasions when the worker was told not to use the ATV is reported differently on various occasions. In the employer's first letter setting out their protest of the claim, dated October 12, 1994, they wrote:

[The worker's] supervisor has advised me that, *approximately a week before the accident*, told [the worker] that driving the ATV was not part of his duties, nor was it needed in order to perform his duties. The supervisor has also advised that [the worker] neither asked for, or received, permission to operate the ATV on the date of accident.

*(emphasis added)*

The employer's next letter dated October 26, 1994 indicated the worker "had been told *on several previous occasions* that he had no need to use the ATV, and was not to use it again," *(emphasis added)*. It was alleged that the worker was not using the ATV to benefit the employer, but to "joy-ride." Enclosed was a copy of a memo from [the worker's employer] dated September 21, 1994 concerning the accident. He noted that on September 8, 1994, he told the worker "that he had no use for it and he was told to put it away and not use it again." On September 15, 1994, the supervisor received a complaint about the worker riding the ATV at high speeds around the dispatch tracks, and the supervisor "again told [the worker] to leave the machine alone." On the date of the accident, September 17, 1994, the supervisor confronted the worker and asked if he was riding the ATV again, which the worker denied.

The supervisor's evidence at the Review Board oral hearing on September 19, 1995, contradicted this written report to some extent. The supervisor thought he had told the worker not to use the ATV on September 7, 1994 as well as on September 8 and 15, 1994. His handwritten notes from a coil-bound notebook were entered as exhibit #1, and confirm the warnings on September 8 and 15, 1994. There was no entry for September 7, 1994. On the date of the accident, the supervisor is reported to have told the worker at about 00:15 hr that he had "better not be using the ATV" and told the worker to tell a mechanic to put it away.

Regarding the company policy on infractions, the Review Board reported the supervisor said that three warnings are given before the matter is reported to a committee. The supervisor thought he had given four warnings, but did not report it to the committee because he believed the worker should be given a chance to correct his actions on his own. The Review Board findings state that the supervisor "could have had the worker's qualification card for operation of an ATV rescinded." It is not clear whether this would occur on the supervisor's own authority, or after the committee's involvement.

The worker told the Review Board that he did not recall receiving any verbal warnings against using the ATV. The Review Board majority found that the supervisor's testimony was more credible, and that he had warned the worker not to use the ATV. The dissenting Review Board member also agrees that the worker had been warned not to use the ATV, but considered that prohibition did not take the worker outside the course of his employment because of several mitigating factors: there was no recorded previous discipline concerning use of the ATV; the worker had received instruction in operating the ATV; there is no evidence he was riding the ATV purely for personal pleasure; he was using the ATV to facilitate his normal duties of aligning the switches. The submission on behalf of the worker is that even if such warnings were given, they "could well have been interpreted as specific to the occasions in question, and not a blanket ban on the use of the ATV for ever!"

### **Analysis and Reasons**

In the absence of any new evidence, we accept the conclusions of the Review Board that the supervisor had previously warned the worker that he was not to operate the ATV. The worker's statement as reported by the field officer in memo #3 is that "on the date of the accident" he could not recall having been instructed not to use the particular ATV. The worker's qualified answer — limited to the date of the accident — does not deny that previous warnings were given.

That said, it is understandable that the worker has difficulty recalling the events of the shift in question, given the worker sustained a head injury with resulting loss of memory regarding the events around the accident. The co-worker who took the worker to the hospital emergency described the worker becoming sleepy and unable to walk by the time they reached the hospital. The hospital discharge summary reported that on admission, "he appeared confused and had no recall of the accident."

The Review Board majority did not make any finding about joy-riding although they said at page 9 that "the worker was not using the ATV for the benefit of the employer." This statement seems to be based on their finding that there was a van for the worker's use. With respect, we consider that "the benefit of the employer" test refers to the ultimate end of the worker's activities, and whether they were in furtherance of the employer's business. Although the employer alleges the worker was "joy-riding," they do not dispute that he used the ATV to travel to those places where he carried out his normal job duties.

The dissenting Review Board member explicitly said there was no evidence of joy-riding. We agree that the evidence does not establish that the worker's use of the ATV was for personal pleasure unrelated to the job duties. It appears that he used it to more easily accomplish the duties for which he was hired. He could have and was expected to use the van, but used the ATV instead.

In order to be compensable, a personal injury must arise out of and in the course of employment to meet the requirements of section 5(1) of the *Workers Compensation Act*. The "course of employment" requirement generally refers to time and place, and the "out of employment" requirement generally refers to causation of the personal injury: #14.10 of the *Rehabilitation Services & Claims Manual*.

The accident occurred during the shift and on the employer's premises. This normally would suggest the accident occurred in the course of employment. The employer's submission is that the worker took himself out of the course of employment by contravening an explicit prohibition that he not use the ATV because of his reckless operation of it, even though other workers were allowed to use it. Our analysis of this position begins with the governors' published policy as stated in #16.00, "Unauthorized Activities":

The mere fact that a worker's action which leads to an injury was in breach of a regulation or order of the employer or for some other reason unauthorized by the employer does not mean that the injury did not arise out of and in the course of the employment. On the other hand, there will be situations where the unauthorized nature of the worker's conduct is sufficient to take the worker out of the course of employment or to prevent an injury from arising out of the employment.

The policy proceeds to discuss various situations where workers are aware of prohibited activity such as working while intoxicated, and engaging in horseplay or assaults. The fault of a worker is not generally a bar to accepting a claim, even where the worker clearly disobeys the employer's rules or the law. For example, an intoxicated truck driver who was killed when he drove into a bridge column was not considered to be outside of his employment simply because of inebriation (Decision No. 48, *Workers' Compensation Reporter*, Vol. 1: p. 209). The commissioners pointed out that fatigue or other personal characteristics of the worker may play a causal role in an accident, but that does not make the claim unacceptable.

Item #16.40, "Injury While Doing Another Person's Job," seems to support the employer's argument. The policy acknowledges that it is impossible to lay down rules covering every aspect of a worker's employment. Workers are expected to exercise discretion, and if they use poor judgment, a claim will not be denied because they acted to protect their employer's property, or rescue a fellow worker, or help a coworker. That said, the policy continues:

On the other hand, there is a clear need to place some limit on the activities which form part of a worker's employment. Thus, for example, if an act is specifically prohibited by an employer or is known, or should reasonably have been known, to the worker to be unauthorized, or, if the worker has been previously warned against doing other persons' jobs, the worker would not usually be covered merely because of a bona fide action for the benefit of the employer. On the other hand, it might be different if, for example, the employer had previously condoned a prohibited practice carried out by employees or some emergency forced a worker to act.

If a worker performs some work activity without the employer's instructions, this is an indicator that any resulting injury did not arise out of and in the course of the employment. On the other hand, this factor does not exclusively determine the compensability of the injury. It must be weighed along with the other factors set out in #14.00 and any other relevant factors.

This policy had its origins in Decision No. 230, *Workers' Compensation Reporter*, Vol. 3: p. 82. In that case, the commissioners accepted a claim from a worker who was injured while using a loader in a sawmill. He was not trained in its operation, and it was not part of his usual job duties as clean-up man. The commissioners found the worker had not been expressly prohibited from using the loader in this manner, and in fact had been asked to do this work on odd occasions during his three-years of employment. They noted that at the time of the accident, there was no supervisor on shift to decide whether he should use the loader. Decision No. 230 concerns doing a job for which the worker was not hired. That is a matter going to the heart of the "employment" relationship.

If read literally, the policy in #16.40 could be interpreted as to "method" as well as ultimate productive activity, in particular the references to "act," or "practice." In the context of the policy title, and its origin in Decision No. 230, we consider that the policy refers to the substantive job being outside the worker's assigned duties rather than method. In this case, it is not established by the evidence that the productive aspect of the worker's activities were outside his job description; rather, it is argued that the

method he chose was prohibited. As described before, where a worker does his usual job while intoxicated, or otherwise inattentive due to nausea, depression, or lack of sleep, the policy in #16.10 is that it is still compensable because the worker's contravention relates to method rather than the substance of the work.

The relationship between prohibited acts and the course of employment is summarized by Arthur Larson in *The Law of Workmen's Compensation*, Volume 1A, (1995), Matthew Bender, at para. 31, "Misconduct Apart from Statutory Defenses," p. 6-10:

When misconduct involves a prohibited overstepping of the boundaries defining the *ultimate work* to be done by the claimant, the prohibited *Act* is outside the course of employment. But when misconduct involves a violation of regulations or prohibitions relating to *method* of accomplishing that ultimate work, the act remains within the course of employment. Violations of express prohibitions relating to incidental activities, such as seeking personal comfort, as distinguished from activities contributing directly to the accomplishment of the main job, are an interruption of the course of employment.

According to Larson, where the worker is carrying out their job using prohibited methods, tools, or materials, compensation is generally paid. This is consistent with the drunken trucker case in Decision No. 48, and many other claims where the injured worker failed to lock out equipment, neglected to wear safety equipment, or otherwise contravened the Board's or employer's health and safety rules and regulations. Compensation is paid where the worker was doing the job for which he was hired, but did not do it in the prescribed manner.

In para. 31.25, p. 6–36, Larson discusses use of a prohibited conveyance:

The choice of a conveyance is a choice of method of accomplishing a result, and not a variation in the ultimate content of claimant's task. If claimant's job is to remove stones, but he is forbidden to use a tractor, removing stones with a tractor is still removing stones and an injury from the tipping of the tractor is compensable.

This approach is consistent with Decision No. 108, *Workers' Compensation Reporter*, Vol. 2: p. 44, in which a young coal mine worker rode a loaded mine car in contravention of the Coal Mines Regulations. He was late in going to the surface because he had been helping with a derailment, and said he rode the car to the surface to take his oil can to be refilled for the next shift. The commissioners reconsidered a prior commissioners' decision which had denied the claim on the basis that the worker

was engaged in an activity that was not in the performance of a required duty. In the reconsideration, the commissioners said that this “ostensible test” did not further the analysis: to say the worker was not hired to ride in mine cars provided no criterion for decision. Equally, it could be said that the worker had to go to the surface at the end of the shift as part of his employment and therefore “riding the mine car in violation of a rule was simply an improper method of carrying out a function within the scope of his employment.”

Like the coal miner, the worker rode equipment that was not part of his normal job duties, even though it was within the job duties of other workers at the jobsite. The commissioners wrote on page 53 of Decision No. 108:

Many cases of this kind involve situations in which the employment includes an allurements that constantly tempts workers into a hazardous position. To deny compensation when a worker succumbs to the temptation comes dangerously close to saying that a worker will be compensated if he is injured while working safely, but not if he gets himself into a position of hazard.

Although Larson's *Treatise* is not policy, the analysis is consistent with the policy as set out in the *Rehabilitation Services & Claims Manual* and those decisions published in the *Workers' Compensation Reporter* that are part of the governors' published policy. Because the worker's ultimate activities for which he used the ATV on the journey in question were those duties for which he was hired, his injuries are compensable even though his chosen method was prohibited.

We have considered the reasoning of the Review Board majority regarding the supervisor's previous warnings. The Review Board majority said that by the time he received the second warning, “he should have fully understood the consequences of his actions.” The “consequences” were the disciplinary actions that followed the ATV accident — suspension from driving various types of equipment including ATVs, and demerit points. The Review Board did not distinguish between prohibited method and prohibited doing of an unrelated job. In our view, Decision No. 230 does not support the proposition that an injury arising from a prohibited means of accomplishing one's assigned job duties does not arise out of the employment.

## Summary

The worker's job duties involved travel to various points in the rail yard, and the employer provided a van to assist the workers in this job category to more efficiently accomplish their duties. The worker took the ATV instead of the van, contrary to the supervisor's explicit prohibition. His journey at the time of the accident was for the purpose of more quickly accomplishing the duties for which he was hired. The use of the ATV instead of the van is a distinction related to "method" of doing his job, not his doing another worker's job.

WE ALLOW THE WORKER'S APPEAL.

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

## Decision of the Appeal Division

**Number:** 96-0963  
**Date:** June 18, 1996  
**Panel:** Herb Morton  
**Subject:** Spinal degeneration – Medical Review Panel Appeal

---

The worker appeals the December 28, 1995 Review Board finding.

At issue is whether the December 19, 1994 Appeal Division Decision (#94-1508) on his claim is appealable to a medical review panel under section 58 of the *Workers Compensation Act*.

The claims adjudicator concluded that the worker's degenerative disc disease was not causally related to his employment. The worker appealed to the Review Board. By finding dated March 25, 1994, the Review Board concluded that the worker's degenerative disc disease was not a consequence of his life of manual labour.

By decision dated December 19, 1994 (#94-1508), the Appeal Division Panel found as follows:

The panel has carefully considered both the worker's physicians submissions as well as the medical evidence put forward by the Board's Medical Advisor. The evidence in this case clearly indicates that this claimant suffers from osteoarthritic degeneration of the spine. The Board has not designated that as an industrial disease and it is therefore not compensable.

*The panel finds no evidence that would allow for a departure from the governors' policy which states that heavy labour does not cause an increase in degenerative disc disease.* The panel notes that the worker's degenerative disc disease was acknowledged by the Board as a pre-existing condition and not a pre-existing disability. As a result no proportionate entitlement has been applied to his PPD and all of his disability, at this time, is related to the compensable permanent aggravation of his pre-existing condition.

The workers appeal is therefore denied. (*emphasis added*)

The worker completed a *Request for Examination by a Medical Review Panel* and this was received by the Board on January 26, 1995. By letter of acknowledgment dated February 22, 1995, the medical intake clerk advised the worker of the requirement that he provide a physician's certificate stating that, in his or her opinion, there is a bona fide medical dispute to be resolved, and stating sufficient particulars to define the question in issue. However, by letter dated April 4, 1995, the medical appeals officer wrote to the worker stating:

In their decision the Appeal Division denied your appeal as you suffer from osteoarthritic degeneration of the spine and the Board has not designated that as an industrial disease and it is therefore not compensable. In a decision dated July 7, 1994 [concerning the worker's earlier attempt to appeal the March 25, 1994 Review Board finding to a medical review panel], . . . [the medical appeals officer] provided you with a copy of decision #99 and #263 of the *Workers' Compensation Reporter Series* and advised you that a decision which concludes that a worker's spinal degeneration is not related to his work activities, is not a medical decision that can be placed before a Medical Review Panel.

I must therefore reject your request for an examination by a Medical Review Panel under Section 58(3) of the *Workers Compensation Act*.

My decision that this matter is not a medical issue that can be placed before a Medical Review Panel is appealable to the Workers' Compensation Review Board within 90 days of the date of this decision.

On May 24, 1995, the medical review panel section received a medical certificate from [a doctor] dated May 11, 1995. In that certificate, [the doctor] stated disagreement with the July 7, 1994 decision by the medical appeals officer, but did not refer to the Appeal Division decision. In a further decision dated May 30, 1995, the medical appeals officer denied the worker's application and reiterated:

The Appeal Division Panel found that you suffer from osteoarthritic degeneration of the spine and that the Board has not designated that as an industrial disease and it is therefore not compensable. This is not a medical issue that can be placed before a Medical Review Panel.

The worker appealed the April 4, 1995 and May 30, 1995 decisions by the medical appeals officers to the Review Board. By finding of December 28, 1995, the Review Board panel stated that it agreed with the medical appeals officer's decisions "that no medical issue exists which may be placed before a Medical Review Panel." The worker appeals this finding.

*Workers Compensation Act*

Section 1:

"occupational disease" means any disease mentioned in Schedule B, and any other disease which the board, by regulation of general application or by order dealing with a specific case, may designate or recognize as an occupational disease, and "disease" includes disablement resulting from exposure to contamination;

Section 6(4)(b):

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

Section 58(3):

A worker is entitled to be examined by a medical review panel if, not later than 90 clear days after the making of a medical finding by the Review Board or a medical decision by the board, the worker

- (a) writes to the board expressing that the worker is aggrieved by the medical finding or decision, and
- (b) sends with the writing a certificate from a physician certifying that, in the physician's opinion, there is a bona fide medical dispute to be resolved, and stating sufficient particulars to define the question in issue.

Section 85.2(6):

A decision of the appeal division or of a panel shall be deemed to be a decision of the board.

## **Findings and Reasons**

The worker's appeal concerns the issue as to whether the December 19, 1994 Appeal Division Decision (#94-1508) constituted "a medical decision by the board" which is appealable to a medical review panel. This involves the general question as to whether an appeal to a medical review panel can be made concerning the medical cause of the worker's disease, where the Board has not designated that disease as an industrial/occupational disease under the *Workers Compensation Act*.

Governors' policy in Decision No. 99 (*Re Degeneration of the Spine, Workers' Compensation Reporter*, Vol. 2: p.15, March 7, 1975) concerned an argument that osteoarthritis or a similar degeneration of the spine, if due to industrial activity over a period of years, should be recognized by the board as an industrial disease. The decision states at page 17:

... not every disablement from disease is compensable. That result depends on the disease being listed in Schedule B of the *Act*, or otherwise being recognized or designated by the Board as an "industrial disease." Where a disease is of a kind that affects the population at large, it will not be designated by the Board as an industrial disease unless employment causation can be established, and osteoarthritis in the spine has not been so designated.

In Decision No. 263 (*Re Appeals to Medical Review Panels*, 3 W.C.R. 176, November 14, 1977), the commissioners considered a Review Board finding which recommended that a worker be examined by a medical review panel to determine if his left shoulder problems were causally related to his employment as a baker. While the physician's certificate was ambiguous, they commented that they were prepared to interpret it as meaning that the worker's employment may have been partly causative of his condition. They found (at page 179):

Have reviewed the evidence, we would not be prepared to disagree with this aspect of the physician's Certificate. Therefore, there is no medical dispute which needs resolution by a Medical Review Panel.

The decision reiterated the reasoning from Decision No. 99, and concluded:

This was the substance of the adjudicator's decision: not that contribution to the claimant's condition by his work was denied, but that the condition, for the reasons expressed in Decision No. 99, could not be recognized as an industrial disease and was therefore not compensable. There is no evidence that the occupation of baker is more conducive to rotator cuff degeneration than any other occupations, nor is it shown that the claimant's work over the years involved some unusual activity which could be said to have produced the degeneration or significantly advanced the development of the disability.

It is therefore the Board's decision that the recommendation of the board of review that a Medical Review Panel should consider the claimant's appeal will not be implemented.

As illustrated by the decisions of the medical appeals officers and the Review Board on this claim, Decision No. 263 has sometimes been interpreted as precluding medical review panel appeals concerning the medical cause of a worker's disease where that disease has not been designated as an industrial/occupational disease. It is necessary to consider, first of all, whether this interpretation of Decision No. 263 is consistent with governors' policy as a whole. If so, it is then necessary to consider whether this interpretation of Decision No. 263 is lawful under the *Workers Compensation Act*.

Governors' policy in Decision No. 219 (*Re Medical Review Panels, Workers' Compensation Reporter*, Vol. 3: p. 45, December 16, 1976) provided an analysis as to what constitutes a medical decision which is appealable to a medical review panel. The Board found (at pages 46-47):

Determining the cause of a condition involves three separate issues.

(1) The first issue concerns what is usually termed the "non-medical facts." The non-medical facts are all the events and circumstances which surround and lead up to the worker's claim. ... Determinations of the non-medical facts are not medical decisions. ...

(2) Once the non-medical facts have been determined, a decision may be made as to the medical cause of the worker's condition. ... This is a medical decision.

(3) Having determined the non-medical facts and made a medical decision as to the cause of the claimant's condition, it remains to consider whether those decisions bring the condition within the terms of the *Act*. For example, it must be considered whether the injury arose out of and in the course of the employment under Section 6(1), or the industrial disease was due to the nature of the employment under section 7(1). This determination is a non-medical decision which is not appealable to a Medical Review Panel.

The sequential three-step decision-making process described in Decision No. 219 identified consideration of the medical cause of a worker's disease (step #2) as a medical decision, and situated this consideration prior in time to the consideration as to whether that disease would be recognized as an industrial disease (step #3). However, Decision No. 263 appeared to reverse this order, and to place step #3 before step #2.

However, more recent policy provided by the governors has placed step #2 before step #3, so that the medical cause of a disease must be determined before consideration is given to whether the disease will be recognized as an industrial disease. By resolution of May 1, 1995, the governors approved a new section #103.00 of the *Rehabilitation Services and Claims Manual* concerning medical review panel appeals. #103.84 of this new policy provides:

Analysis of the issues that can arise in the adjudication of whether a work caused disease is compensable illustrate (sic) *the distinction between a medical cause and a legal cause.*

*Whether a disease is an occupational disease as contemplated by the Act is a question of law.* An occupational disease is either a disease listed in Schedule B of the *Act*, or such other disease that the Board, by regulation of general application, or by order dealing with a specific case, may recognize as being an occupational disease.

*The diagnosis of a disease and the conclusion that the disease was due to the nature of any employment in which the worker was employed is a medical question.*

Compensation is payable, pursuant to section 6(1) of the *Act*, only for occupational disease. Therefore a Medical Review Panel finding that a disease was due to the nature of the worker's employment would not create entitlement or benefits unless the disease was already one

mentioned in Schedule B or had been recognized by regulation or order as an occupational disease.

*It would be proper for the Medical Review Panel to certify that as a question of medical science, a disease was caused by the worker's employment. However, such a finding would say nothing about entitlement to benefits and the Panel would be going beyond its jurisdiction if it certified that such a disability was an "occupational disease" because that would be a conclusion of law.*

*However the policy of the Board is that where a Medical Review Panel certifies that a disease is due to the nature of the worker's employment, and that disease has not previously been designated as an occupational disease, the Board will designate, for the purpose of that worker's claim, that that disease is an occupational disease and compensation benefits will then be paid as warranted. (emphasis added)*

Governors' policy at #103.84 clearly provides that in the adjudication of occupational disease claims, the issue as to whether the worker's disease is caused by employment is a medical issue. The policy obviously contemplates that such causation issues are properly to be considered by medical review panels. The policy further contemplates that consideration as to whether a disease should be recognized as an occupational disease in the particular case will be addressed by the Board following receipt of a medical review panel certificate.

Decision No. 263 appeared to place consideration of the "legal cause" of a disease before consideration of its "medical cause." #103.84 reverses this, placing consideration of the "medical cause" before consideration of the "legal cause."

The May 1, 1995 change in governors' policy was subsequent to the Appeal Division Decision (#94-1508) which the worker wishes to appeal to a medical review panel. It was also subsequent to the April 4, 1995 decision by the medical appeals officer to reject the worker's request for examination by a medical review panel. The policy change was, however, made prior to the May 30, 1995 decision by the medical appeals officer, as well as the December 28, 1995 Review Board finding on the worker's appeal.

Inasmuch as the May 1, 1995 policy change of the governors is "beneficial" to the consideration of the worker's appeal, and as the worker is still "in the system," I consider it appropriate to apply the current policy of the governors in considering whether the worker is entitled to be examined by a medical review panel. I rely, in this regard, upon the reasoning expressed in appeal division Decision No. 96-0242, *Workers' Compensation Reporter*, Vol. 12: p. 255.

The current policy at #103.84 may be interpreted as being in conflict with, or reversing, the policy expressed in Decision No. 263 of the *Reporter*. Governors' policy in Decision No. 86 (*Bylaw No. 4 — Published Policy of the Governors, Workers' Compensation Reporter*, Vol. 10: p. 781, November 16, 1994) provides direction as to how such a conflict is to be resolved. This states that in the event of a conflict between the *Act* or Regulations and the published policies of the governors, the *Act* and Regulations are paramount. In the event of a conflict between a policy in one of the three *Manuals* (*Assessment Policy Manual, Occupational Safety and Health Division Policy and Procedure Manual, or the Rehabilitation Services and Claims Manual*), and policy contained in decisions number 1–423 of the *Reporter*, the policy in the *Manual* is paramount. In the event of any other conflict, the most recent policy is paramount. If the conflicting policies were approved on the same date, the policy most consistent with the *Act* and Regulations is paramount.

I find, therefore, that to the extent the policy at #103.84 conflicts with the policy in Decision No. 263 of the *Reporter*, the policy at #103.84 is paramount. This conclusion is based upon governors' policy establishing the *Manual* as paramount over the old *Reporter* decisions. I consider the policy at #103.84 to be consistent with the *Act* in providing a mechanism for giving consideration to the merits and justice of an individual case (as mandated by section 99). Further, #103.84 accords with the requirements of natural justice which prohibit the fettering of discretion. This approach is also in keeping with governors' policy at #26.04 which states:

The lack of prior designation or recognition by the Board of a disease as an occupational disease by any of the means specified in #26.01, #26.02, or #26.03, does not mean a claim for such disease will not be considered on its merits. Such disease may not have been previously designated or recognized due to weak or a complete absence of medical and scientific information which causally associates such disease with employment. If the merits and justice of an individual claim for such a disease warrant its recognition as an occupational disease, the Board may do so "by order dealing with a specific case" (Section 1).

The effect of such an order is to accept the claim for compensation purposes without establishing an institutional memory for decision-makers or an expectation for others who may suffer from that disease that the disease may be due to the nature of some employment. In

other words, the disease will be recognized as an occupational disease limited to the specific facts of that individual claim.

This allows an avenue of recognition for unique, meritorious individual disease claims.

I do not read governors' policy concerning the procedures for considering recognition of an occupational disease in an individual case as applying to most but not all occupational diseases. I interpret the policies noted above as providing general guidance to the consideration of *all* occupational disease claims. I find these policies provide sufficient guidance to resolve this appeal. It is not necessary to my decision that I determine whether Decision No. 263 (as interpreted in the manner described above), is contrary to the *Act*. Nor do I find it necessary to consider whether other interpretations of Decision No. 263 are possible.

In their December 19, 1994 (#94-1508) decision, the Appeal Division Panel stated that they found "*no evidence* that would allow for a departure from the governors' policy which states that heavy labour does not cause an increase in degenerative disc disease (*emphasis added*)." I interpret this finding concerning the evidence as having necessarily involved consideration of the merits of this individual worker's claim. As such, it constituted a decision that the worker's degenerative disc disease was not causally related to his employment. That is a medical decision. A decision by the appeal division is deemed to be a decision of the Board pursuant to section 85.2(6) of the *Act*. I find, therefore, that appeal division Decision No. 94-1508 was "a medical decision by the board" within the meaning of section 58(3) of the *Act*. As such, it is appealable to a medical review panel.

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



## Decision of the Appeal Division

**Number:** 96-1247  
**Date:** August 9, 1996  
**Panel:** Herb Morton  
**Subject:** Whether “outworkers” are “workers”  
within the scope of Part 1 of the *Act*

---

The employer appeals the February 16, 1996 decision by the assessments director, on the ground of error of fact. The director found that in-home garment knitters, who purchase their wool from Company X and sell their completed sweaters to Company X, are Company X's workers.

Company X's records referred to these knitters as subcontractors, and document payments to knitters totalling in excess of \$500,000.00 during 1994. Following an assessment audit of Company X's 1994 records, by letter of October 17, 1995 the assessment officer advised:

As a result of this examination, your 1994 assessment has been increased by \$2,663.65 which will be reflected on your next Statement of Account. This adjustment results from the inclusion of previously unreported contract labour in the amount of \$501,375.00.

... Under the amendments to the *Workers Compensation Act* Bill 63, effective January 1, 1994, all out workers are considered workers and therefore payments to them are assessable.

Following objections from Company X, by decision dated December 20, 1995, the audit manager stated:

The *Workers Compensation Amendment Act*, 1993 amended the *Workers Compensation Act* effective January 1, 1994 so that, under Section 2(1) of the *Act*, Part 1 applies to “all employers, as employers, and all workers in British Columbia except employers or workers exempted by order of the board” as covered under Assessment Operating Policy 20:10:20 ... .

Prior to the amendment to the legislation effective January 1, 1994, outworkers were not covered by the *Act*. With this change in legislation, all workers, including outworkers, are now covered by the *Act* and any payments to them become assessable to the Board effective January 1, 1994 ... .

Company X appealed this decision to the director of assessments. By decision dated February 16, 1996, the director found that in-home garment knitters, who purchase their wool from Company X and sell their completed sweaters to Company, are Company X's workers and are not independent operators. He reasoned:

It is your position that the garment knitters should be considered independent operators and not workers of Company X., since the knitters work in their own home, purchase wool from Company X, and sell the finished product to Company X when it is completed.

It is our understanding that the knitters receive the wool from Company X, complete the sweater, and are paid by cheque for their labour in knitting the garment. The amount paid to the knitter is based on each completed item. Company X will then sew their label into the sweater before it is wholesaled to retailers.

It is also our understanding that no invoices for the sale of wool to the knitters are created, no vouchers or invoices are produced to cover the "purchase" of the sweaters from the knitters, there is no contract between Company X and the knitters, and the Synoptic Journal shows payments to the knitters as payments to "subtrades" under Code 503.  
...

The fact that Company X allows the knitters to work at their own pace in their own home does not change the employment relationship. In my view, the knitters are workers and covered under Company X's registration.

By submission dated May 10, 1996, the employer's representative argues:

With regard to our appeal against the assessment for 1994 the grounds for said appeal are as follows:

1. The knitters are not sub-contractors within the normal definition of the term since they sell the finished products to Company X. No contract exists between the company and the knitters who can cease

providing products to Company X at any time. They purchase the wool they use from Company X as Company X buys specific types of wool in bulk from overseas, something that would be impractical for knitters to do as they use small quantities.

2. The cost of purchasing completed sweaters is classified in the financial statements as sub-contract to differentiate this cost from that of purchasing raw wool.

It is our contention that the knitters working in their own homes and at their own pace, are neither employed by Company X nor are sub-contractors to Company X and therefore do not fall within the WCB provisions.

*(reproduced as written)*

## **Law and Policy**

Prior to January 1, 1994, section 2(2) of the *Workers Compensation Act* contained a set of exclusions from Part 1 of the *Act*. Section 2(2) excluded several categories of persons from compulsory coverage under Part 1 of the *Act*, stating:

Subject to section 3, this Part does not apply to

- (a) persons whose employment is of a casual nature and who are employed otherwise than for the purposes of the employer's trade or business;
- (b) players, performers and similar artists;
- (c) *outworkers*;
- (d) members under 19 years of age of the employer's family, or his spouse; and
- (e) employers with no place of business in the Province who temporarily carry on business in the Province but do not employ a worker resident in the Province. *(emphasis added)*

Section 1 of the *Act* stated:

“outworker” means a person to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, repaired or adapted for sale in his own home or on other premises not under the control or management of the person who gave out the articles or materials.

This definition is essentially unchanged from that originally contained in the *Workmen's Compensation Act* of 1916. Outworkers were excluded from coverage under Part 1 of the *Act* since the introduction of workers' compensation legislation in British Columbia.

Governors' policy at #9.00 of the *Rehabilitation Services and Claims Manual*, as it existed prior to January 1, 1994, noted that section 2(2) of the *Act* excluded certain persons from being workers or employers. #9.30 referred to the definition of "outworker" in section 1 of the *Act*, and stated:

This provision excludes from the *Act* persons working in their own home on materials supplied by an outside employer.

Bill 63, the *Workers Compensation Amendment Act, 1993*, effective January 1, 1994, removed the list of exclusions previously contained in section 2(2) of the *Act*. However, the definition of "outworker" was maintained without change in section 1 of the *Act*. The term "outworker" does not appear in the *Act* outside of section 1. It is not mentioned in current governors' policy as contained in the *Rehabilitation Services and Claims Manual* (apart from the index which indicates this term is found in section 1 of the *Act*), nor is it mentioned in the *Assessment Policy Manual*. The definition of "outworker" in section 1 is provided in a paragraph separate from the paragraph containing a definition of the word "worker."

Effective January 1, 1994, section 2 of the *Act* provides:

- (1) This Part applies to all employers, as employers, and all workers in British Columbia except employers or workers exempted by order of the board.
- (2) The board may direct that this Part applies on the terms specified in the board's direction
  - (a) to an independent operator who is neither an employer nor a worker as though the independent operator was a worker, or
  - (b) to an employer as though the employer was a worker.
- (3) The application of this Part under subsection (2) to an employer does not exempt the employer, as an employer, from the application of this Part.

## Findings and Reasons

The retention of the definition of “outworker” in section 1 of the *Act*, contained in a paragraph separate from the definition of “worker,” is puzzling. Why is outworker defined in section 1 of the *Act*, when this term is not mentioned elsewhere in the *Act*? Is this definition a remnant of the past legislation, which no longer has any meaning? Or, does the term “outworker” have a meaning which warrants its definition separate from the definition of worker? If “outworker” is merely an additional category of workers, why is the term “outworker” not contained in the list of categories contained under the definition of “worker”?

Reading the current *Act* in a literal way, without reference to its background or the intent of the changes contained in Bill 63, one might assume that the retention of the term “outworker,” separate and apart from the definition of “worker,” must have some particular significance. It might be concluded, from these separate definitions in section 1, that “outworker” is not included within the definition of “worker.”

In Decision No. 60 (*Exemption from Coverage Under Part One of the Workers Compensation Act*, *Workers’ Compensation Reporter*, Vol. 10: p.167), the governors set out a number of principles as to how they would exercise their exemption authority under section 2(1) of the *Act*. They stated, for example:

- (c) Although the following principles underlie the purpose and intent of the *Act*, an industry or occupation will not be automatically exempted because one or more the principles do not necessarily apply:
  - (i) prevention of injuries and occupational diseases, ...
  - (iii) coverage is limited to employment relationships and activities, ... .

Decision No. 60 does not mention outworkers. This could be interpreted in two ways: either that the governors considered outworkers to be workers, and did not consider it appropriate to exclude them from Part 1 of the *Act*, or that the governors considered outworkers were not workers and that it was therefore unnecessary to address their status in this decision. The policies shed no light on this issue.

The “universal coverage” provided by section 2(1) of the *Act* is stated to be in respect of all workers and employers. By logical necessity, however, a person must be found to be a worker in an employment relationship before this universal coverage applies. The definition of “outworker” in section 1 as separate from the definition of the term

“worker” might suggest that such persons fall outside the term “worker,” in which case the coverage provided by section 2(1) would not apply.

At the time Bill 63 was introduced in the Legislature, the Hon. M. Sihota commented concerning the purposes of the Bill as follows [*Debates of the Legislative Assembly (Hansard)*, Volume 11, at page 7883]:

The legislation I am introducing to the House today is a bill that will extend workers' compensation coverage to virtually every worker in the province, and will eliminate discrimination in the payment of survivor benefits. There are also some housekeeping amendments.

At the moment, approximately 85 percent of the province's workforce is covered by WCB legislation. Those who are not covered include workers in the financial sector such as banks, insurance companies, medical-dental offices and law offices, where the workforce is largely female. *The universal coverage in this bill* means that these workers will no longer have to use their savings to cover work-related injuries.

... With its *expansion to universal coverage* and elimination of discrimination, this bill marks the most significant step in the government's commitment to WCB reform. (*emphasis added*)

On July 6, 1993, when the House was in committee on Bill 63, an inquiry was made to the Minister as to where the initiative had come from for the broad expansion of workers' compensation coverage. His reply was as follows [*Hansard*, Volume 11, at page 8271]:

First of all, the request did come from the board of governors, which unanimously requested that the coverage be extended. As part of their ongoing work, they felt it was an appropriate time for them to cover this gap in coverage.

Secondly, there were lobbies from different elements in society. I know that performers were active in their lobbying of the Minister of Tourism. Domestic workers certainly have been very vigorous in their lobbying. ... We received lobbying from the medical side, and to a lesser degree from the legal side — both from unorganized and organized workers.

Quite frankly, when I took a look at the issue, *I had to ask whether one should simply extend coverage, let's say, to a subset of those that weren't covered,*

*or whether one should just move full measure with the policy. Obviously, with the motion from the board and the philosophical question of whether there is a reason for people not to be covered, the board felt it was a right move for the public interest to proceed with the full extent of coverage. ... (emphasis added)*

Yes, there was some lobbying. Yes, there were some decisions at the administrative end — certainly at the board level. And yes, to some extent it was a decision on policy made by government. So it was a combination of variables that arrived at the formation of this amendment.

The Minister further commented (at page 8, 273):

*I make no apologies for holding the view that all workers in British Columbia ought to be covered by workers' compensation, regardless of whether they are a low risk or high risk. We on this side of the House take some pride in introducing legislation that expands the scope of coverage to every worker in British Columbia. ... (emphasis added)*

The Minister clearly expressed an intent to move to universal coverage, subject to the board exercising its exemption authority under section 2(1) of the *Act*. The Minister indicated, in particular, that there was a policy decision to move to full coverage, rather than to simply extend coverage to a subset of those who previously were not covered. These statements must be read in the context of the complete deletion of the list of exclusions from coverage previously contained in section 2 of the *Act*. By obvious implication, all those categories which were previously excluded were intended to be brought within the scope of Part 1 of the *Act*. The elimination of this list of exclusions, the granting of exemption authority to the board, and the pronouncements by the Minister responsible concerning the expansion to universal coverage and the decision to “move full measure with the policy,” all support the conclusion that the intent was to bring all workers, including outworkers, within the scope of Part 1 of the *Act*. These statements as to the intent of the statutory amendments support a purposive, rather than a literal, interpretation of sections 1 and 2. To read section 1 so as to exclude outworkers from the definition of “workers,” and compulsory coverage under Part 1 of the *Act*, would be to defeat the expressed legislative intent.

The definition of workers in section 1 is inclusive, rather than exclusive. It is defined as including several categories, but the definition is not exhaustive. It does not offend the definition provided for the term workers, to read it as including outworkers.

Having regard to the legislative background, to the deletion of the provisions which previously excluded outworkers from compulsory coverage under Part 1 of the *Act*,

and to the stated legislative intention of providing “universal coverage,” I find that the effect of the amendments to section 2 of the *Act* is to include outworkers as workers within the scope of Part 1 of the *Act*. This interpretation most plainly accords with the apparent intent involved in the deletion of the previous exclusion of outworkers from compulsory coverage under Part 1.

Admittedly, this requires a somewhat strained interpretation of section 1. The legislation would be clearer if the term outworker was deleted from section 1 of the *Act*, or if outworkers were specifically listed within the definition of the word “worker” in section 1 rather than being the subject of a separate paragraph in section 1. If there was some other intent for the term “outworker,” a provision in the *Act* dealing with outworkers would appear necessary to give meaning to this term. As it stands, the separate definition of outworkers in section 1 of the *Act* appears to serve no purpose, and to exist merely as a remnant of the past legislation.

While acknowledging the ambiguity created by the definitions of outworker and worker in section 1, I find that the effect of the deletion of the exclusion under the former section 2(2)(c) concerning outworkers was to bring them within the definition of workers. But for the exclusion clauses previously contained in section 2(2)(a) to (e), it would appear that those categories would have fallen within the definition of the term “worker.” The deletion of these exclusions would, therefore, suggest that these categories were intended to come within the definition of “worker.” It would seem to lead to an unintended result, if the deletion of the exclusion clause concerning outworkers had the effect of leaving outworkers outside the scope of Part 1 of the *Act*. Looking to the purposes sought to be achieved by the statutory amendment, as reflected by the legislative debates, and having regard to the remedial nature of workers' compensation legislation, I am persuaded that a purposive rather than a literal interpretation of sections 1 and 2 should prevail.

In view of the foregoing, I find that persons performing work at home may in some circumstances be workers of a particular employer. Of course, not all persons performing work at home will be workers. For example, a person knitting sweaters at home on their own initiative, and offering them for sale to the public at large, would not be engaged in an employment relationship. Independent operators have the option of purchasing personal optional protection, but are not covered on a compulsory basis.

In this case, the knitters use wool which is purchased in bulk by Company X. The knitters obtain their wool from Company X, paying a deposit for this wool. They knit the sweaters to Company X's specifications. They sell their finished sweaters to Company X, which then sews its label into the sweaters and sells them at a wholesale price to retailers. The work performed by these knitters on a “cottage industry” basis in their own homes is integral to the employer's business. This is not a situation in

which the company is simply buying products produced by various individuals working out of their homes which are available for purchase by the public at large.

These circumstances are not greatly different than those that would exist if the employer had a workroom for employees to perform knitting. By using outworkers, the employer is saved the expense of providing workstations, and the knitters have the flexibility of working at their own pace at home. Company X is in a position of financial control, in that they receive deposits for the wool from the knitters at the outset, and then pay the knitters for the finished sweaters. Company X maintains detailed records listing all the knitters and the payments made to each knitter. As such, Company X is in a position to pay assessments on the earnings of the knitters derived from their work.

The representative for Company X argues that the records maintained by Company X refer to the payments to knitters as payments to “subtrades” simply to “differentiate this cost from that of purchasing raw wool.” I attach no significance, however, to the terminology utilized in Company X’s records. Company X could utilize the label “independent contractors” in its records of the payments to the knitters. The *label* utilized by the parties for their relationship is irrelevant — the facts of the situation must be examined to determine whether a worker-employer relationship exists. As stated in Decision No. 32 (*Re the Employment Relationship, Workers’ Compensation Reporter*, Vol. 1: p.127), at page 128:

For full effect to be given to the principle of compulsory coverage contained in the *Act*, and reflected in that section [now section 14], the prohibition of contractual avoidance must be applicable whether such a contract provides in express terms that no benefits under the *Act* are payable to the worker of the employer, or whether it seeks to achieve the same objective by more subtle means, such as by describing the parties as independent contractors in circumstances in which the relationship is, in substance, one of employment.

In Decision No. 32, the Board noted:

In distinguishing between an employment relationship and one of independent contractors there is no single test that can consistently be applied. A test that was once traditional, but now rather discredited, is whether the employer has control, or the right to control, the manner in which the worker carries out the work.

Tests that may be more valid, and which certainly seem more significant in the present situation, are:

1. Whether the worker is engaged continuously and indefinitely for the same employer, or whether he acts intermittently and for different employers.
2. Who owns the major equipment used in the relationship.
3. If the business enterprise is one that is subject to some kind of regulatory licencing, who is the licensee.

Company X's representative argues that the knitters are totally independent of Company X and that Company X has no way of imposing safety standards on them. Decision No. 60 of the governors indicates, however, that while the prevention of injuries and occupational diseases is one of the principles which underlie the purpose and intent of the *Act*, an industry or occupation will not be automatically exempted because one or more of these principles do not necessarily apply. Decision No. 32 in the *Reporter* points out that control, or the right to control, the manner in which the worker carries out the work has been discredited as a central test for establishing an employment relationship.

I do not, in any event, accept that Company X would necessarily have no control over the knitters. If an employment relationship is found to exist, both the workers and the employer would be subject to the requirements of the *Industrial Health and Safety Regulations* (although that is not the subject of this decision). A question arises, therefore, as to the meaning of the phrase in the definition of outworker which states "in his own home or on other premises not under the control or management of the person who gave out the articles or materials." I am inclined to interpret this phrase as referring to the employer's lack of direct control or management over the premises, rather than to a complete absence of control or management of such premises.

For the reasons expressed in the first part of this decision, I have a concern with respect to this expansion of coverage under Part 1 to include outworkers on the basis of amendments to the *Act* which contain an ambiguity. It would obviously be preferable that such a significant expansion of coverage (with the concomitant expansion of the board's jurisdiction with respect to prevention), be based upon clear and unambiguous statutory language. As stated above, however, I find that the effect of the amendments is that outworkers are included in the definition of worker.

Company X argues that the risk of injury or disease to these persons is non-existent. If Company X maintained a "factory" or workroom to which the knitters came to perform their work, however, there would be no question as to the fact that they were workers to whom the *Act* provided coverage. The risk of injury or disease may be low -- objective data will be obtained in due course on the actual costs of injuries and disease to such workers. If such costs are low, presumably this would be reflected in

the assessment rate charged to the employer. It is not, however, a reason for not providing such coverage under the *Act*.

Difficulties may arise in adjudicating applications for compensation for injury or disease alleged to arise out of and in the course of employment where this is performed without supervision at home. Those difficulties are not insurmountable, however. Nor are they unique to outworkers. There are many workers whose duties must be performed away from the premises of the employer.

Upon consideration of all the evidence and submissions, I find no error of law or fact, or contravention of a published policy of the governors, in the February 16, 1996 decision by the assessments director, in which it was found that the garment knitters working out of their own homes were workers of Company X. As their employer, Company X is responsible for the payment of assessments on the earnings of these workers.

THE EMPLOYER'S APPEAL IS, THEREFORE, DENIED.

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



## Decision of the Appeal Division

**Number:** 96-1315  
**Date:** August 23, 1996  
**Panel:** Herb Morton, Thomas Kemsley, Sarah Davis  
**Subject:** Section 11 – Whether the Workers’ Compensation Board has authority to make a Section 11 determination relating to a proceeding before the Labour Relations Board

---

This is a preliminary application under section 11 of the *Workers Compensation Act* (the “*Act*”) which arises in a proceeding before the Labour Relations Board. It is unusual, as section 11 applications usually arise in civil actions for personal damages. The parties request a preliminary determination as to whether the Workers’ Compensation Board (the “Board”) has the authority to make a section 11 determination in this type of proceeding. If we find we have the jurisdiction to provide a section 11 certificate in this situation, the parties will make further submissions on the substance of the certificate.

Section 11 applications concern the bar against legal action contained in section 10(1) of the *Act*. Pursuant to section 11 of the *Act*, on request by the court or by any party to an action, the Board will make a determination and issue a certificate on matters which are relevant to section 10(1) and within the competence of the Board. The Board of Governors assigned this function to the chief appeal commissioner and the Appeal Division.

### Background

This application concerns the death of a worker at work on April 28, 1995. The worker was a fourth year apprentice carpenter with the Employer. [A union] was the sole bargaining agent of the employees of the employer.

After the worker’s death, the proposed administrator of his estate sought certain life insurance and accidental death benefits under the union’s Health and Welfare Plan (the “plan”). The union determined those benefits were not payable in this case as the employer had not enrolled the worker in the union’s plan nor paid premiums on his

behalf, as required by the Collective Agreement. The administrator was unable to obtain payment of these benefits from the union or the employer, and brought an application against the union to the Labour Relations Board pursuant to the Labour Relations Code. The administrator alleges the union violated section 12 of the Labour Relations Code.

The administrator's primary complaint against the union is that it failed to bring a grievance against the employer for what the administrator says was a serious breach of the Collective Agreement by the employer in failing to enroll the worker in the union's plan prior to his death. In particular, the administrator alleges, "the Union has failed to properly investigate and thoughtfully consider the case for the worker as against the Employer," or, in the alternative, that the union failed to communicate its investigations to the administrator. The administrator seeks a determination that the union has breached section 12 of the Labour Relations Code and an order that the union pay the appropriate life insurance and accident death benefits to the estate of the worker.

### **This Application**

In a letter dated January 26, 1996 addressed to the Board's Legal Department, the employer's representative stated:

... the employer request certification by the WCB, that [the worker] was a "worker" at the time of his death. . . *and* that the provisions of section 10 of the *Act* apply to any further actions by the workers estate against "any worker or employer" for additional benefits arising out of [the worker] death.

The representative explained:

The workers estate initiated an action through the L.R.B. seeking to compel the union to pursue additional benefits by way of life insurance & death benefits (or an equivalent payment of \$80,000), interest, costs, and other relief, arising out of the workers death on the job.

*(Reproduced as written.)*

The letter addressed to the Legal Department was forwarded to the Appeal Division. Following an exchange of correspondence with the Appeal Division, the employer clarified in a letter dated February 23, 1996 that the request conveyed by the January 26, 1996 letter was for a section 11 Certificate.

The Appeal Division received submissions from the employer and the worker's estate regarding the interpretation of section 11. The union is not participating in these proceedings.

## **Analysis**

### **Legislation**

Section 11 of the *Act* is best read in conjunction with section 10(1) of the *Act*. Section 10(1) states:

10. (1) The provisions of this Part are in lieu of any right and rights of action, statutory or otherwise, founded on a breach of duty of care or any other cause of action, whether that duty or cause of action is imposed by or arises by reason of law or contract, express or implied, to which a worker, dependant or member of the family of the worker is or may be entitled against the employer of the worker, or against any employer within the scope of this Part, or against any worker, in respect of any personal injury, disablement or death arising out of and in the course of employment and no action in respect of it lies. This provision applies only when the action or conduct of the employer, his servant or agent, or the worker, which caused the breach of duty arose out of and in the course of employment within the scope of this Part.

Section 10(1) encapsulates the historical compromise on which the legislation rests, namely, by acquiring rights and remedies under the *Act* workers gave up certain other rights and remedies.

Section 11 states:

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

- (a) a person was, at the time the cause of action arose, a worker within the meaning of this Part;
- (b) injury, disability or death of a worker arose out of, and in the course of, his employment;

- (c) an employer or his servant or agent was, at the time the cause of action arose, employed by another employer; and
- (d) an employer was, at the time the cause of action arose, engaged in an industry within the meaning of this Part, and shall certify its determination to the court.

Until 1968, the *Act* conferred authority on the Board to determine whether section 10(1) barred workers from pursuing other remedies. However, the 1968 changes to the *Act* removed that authority from the Board and left it with the courts. Hence, the authority assigned by the Governors to the chief appeal commissioner and the Appeal Division under section 11 of the *Act* is strictly the authority to certify findings which are material to the question before the courts under section 10(1), namely, whether the remedies sought before the courts are barred by the *Act*. Neither the Board nor the Appeal Division has the authority to determine the effect of the findings in the section 11 certificate on the legal action.

### **Section 11 — pre-conditions**

Section 11 of the *Act* contains a pre-condition: the request for the determination must arise in “an action based on a disability caused by occupational disease, personal injury or death. . .” Therefore, the preliminary question which the panel must address is twofold: do the proceedings before the Labour Relations Board constitute an “action” within the meaning of section 11 of the *Act*, and, if they do, are they “based on” a death?

#### **An “action”**

The *Oxford Companion to Law* (1980) defines “action” as:

A legal proceeding which one person seeks, in a civil court of justice by civil procedure, to enforce a right against, restrain the commission of a wrong by, or obtain a legal remedy from, another party.

*Black’s Law Dictionary* (Fifth Edition) defines “action” as meaning:

... a suit brought in a court; a formal complaint within the jurisdiction of a court of law.

It is arguable that the proceeding before the Labour Relations Board is not an “action” on the basis that the Labour Relations Board is not a civil court of justice or a court of law. American case law has found that administrative boards differ from “courts” in

that boards frequently represent public interests entrusted to them, whereas courts are concerned with litigating rights of parties with adverse interests (*Rommell v. Walsh*, 127 Conn. 16, 15 A. 2d 6, 9).

In Decision No. 53/87 (1987), 5 W.C.A.T.R. 97, the Ontario Workers' Compensation Appeal Tribunal specifically ruled on whether an arbitration proceeding is an "action" within the meaning of the Ontario *Workers' Compensation Act*. In light of the Ontario *Interpretation Act* and *Courts of Justice Act 1984*, the panel in Decision No. 53/87 reached the conclusion that the word "action" in the Ontario *Workers' Compensation Act* does not include a grievance arbitration. While this ruling has no direct bearing on the question before us because the Ontario legislation is different from the British Columbia legislation, we have considered whether the approach used by the Ontario panel is helpful in the context of our legislation. According to the Ontario *Interpretation Act*, the definition of "action" in the *Courts of Justice Act, 1984* would apply to the Ontario *Workers' Compensation Act*, unless it were inconsistent with its intent, object or context. The *Courts of Justice Act, 1984* defines "action" as follows:

- (a) 'action' means a civil proceeding that is not an application and includes a proceeding commenced in the Supreme Court or the District Court by:
  - (i) statement of claim,
  - (ii) notice of action.
  - (iii) counterclaim,
  - (iv) crossclaim,
  - (v) third or subsequent party claim, or
  - (vi) divorce petition or counterpetition,

and a proceeding commenced in the Provincial Court (Civil Division) by claim;

The panel determined a grievance arbitration did not come within that definition. Furthermore, in that panel's opinion, a definition of "action" that excludes a grievance arbitration is consistent with the overall worker's compensation scheme. The panel explained:

Collective agreements are voluntary agreements which do not affect workers' rights under the *Workers' Compensation Act*. Any such provisions in collective agreements would be enforced by the grievance procedure. Such provisions are not, in our view, what was contemplated by the historical "trade-off" which is embodied in ss. 8, 14 and 15 of the *Workers' Compensation Act*. These were not the types

of “actions” or “rights of action” which workers gave up in return for a statutory no-fault accident compensation system. Thus, in our view, the reference to “action” or “rights of action” in ss. 8, 14 and 15 of the *Act* was not intended to prevent the union and the employer from using the grievance procedure to enforce rights under the collective agreement.

In this context, then, the type of “action” contemplated by the *Courts of Justice Act* appears to us to be consistent with the meaning of the word “action” in ss. 8, 14 and 15 of the *Workers’ Compensation Act*. The panel concludes, therefore, that the term “action” in s. 15 of the *Act* does not include a grievance arbitration.

According to section 40 of the British Columbia *Interpretation Act*, “The interpretation section of the *Supreme Court Act*, so far as the terms defined can be applied, extends to all enactments relating to legal proceedings.” The interpretation section of the *Supreme Court Act* (section 1) states: “In this *Act*... ‘proceeding’ includes an action, suit, cause, matter, appeal or originating application.” The section does not define, however, “action.” But since it defines “proceedings” as including “action,” it could be inferred that “action” has a narrower meaning and, therefore, excludes in the context of the *Act* proceedings in front of the other administrative tribunals. While this line of reasoning has some plausibility, we do not find it conclusive.

A related point is the final requirement of section 11, that the board certify its determination “to the court.” There are fundamental differences between the functioning of courts and administrative tribunals. Courts generally function on an adversarial basis. Administrative tribunals commonly have investigatory powers and operate on an inquiry basis and develop or apply policy within the tribunal's area of expertise, although these distinctions may appear blurred in practice. For example, an administrative tribunal may choose to conduct hearings on an adversarial basis. Both the Labour Relations Board and the Workers’ Compensation Board are administrative tribunals created by statute, with privative clauses (sections 137, 138, and 139 of the Labour Relations Code and section 96(1) of the *Workers Compensation Act*) which grant to the boards exclusive jurisdiction over certain specified matters, and shield the boards' decisions from “question or review in any court.” We are inclined to the view that neither the Labour Relations Board nor the Appeal Division is a court (as that term has traditionally been understood) for the purposes of section 11 of the *Workers Compensation Act*.

Therefore, it does not seem possible to resolve the interpretation of “action” in section 11 of the *Act* merely by considering the available definitions. We are unaware of any court decisions on point. Thus, to determine the meaning of “action” the panel would

need to consider the purpose of section 10(1) of the *Act*. However, first, we will consider the other pre-condition in section 11.

### **“Based on a . . . death”**

Assuming for the moment that the proceedings before the Labour Relations Board constitute an “action” and that Board is a “court” for the purposes of section 11, it is necessary to determine whether these proceedings are “based on a . . . death.”

The obligation on the Board under section 11 to determine any matter that is relevant to the action would arise if the action can be characterized as “based on” a death. We have examined the application by the worker’s estate currently before the Labour Relations Board. The allegation put forth in that application is that the union has breached its duty of fair representation as set out in section 12 of the Labour Relations Code. To that extent, we find the proceedings, even if they constitute an action, cannot be characterized as “based on a death.” It is the union’s conduct that furnished the legal grounds for the proceedings before the Labour Relations Board — not the worker’s death. The worker’s death did not give rise to the relations of rights and duties at issue before the Labour Relations Board. Put slightly differently, the estate’s position as advanced in the application is not that the union is required by law to pay death benefits to the estate; it merely seeks payment of those benefits as a remedy for the union’s alleged misconduct. Thus, the panel concludes the proceedings cannot be characterized as “based on” a death.

We also note the comments of Mr. Justice Tysoe in his 1966 report *Report on the Workmen’s Compensation Act*. Mr. Justice Tysoe commented on two types of situations: (a) where there is an action on a policy of accident insurance; and (b) where an employer in an industry coming under the *Act* contracts with each of his employees that, if any of them is injured in the course of the employment, he will pay the injured workman a specific amount for the period of his disability over and above the compensation receivable under the *Act*. According to Mr. Justice Tysoe the statutory bar should not exist in these two cases. One could conclude on that basis that there are even stronger reasons for the statutory bar not to apply to these proceedings before the Labour Relations Board. Of course, the views and recommendations of Mr. Justice Tysoe are not determinative of how the *Act* should be interpreted.

## **Conclusion**

The panel finds a pre-condition for a section 11 determination has not been met in this case. While we have made no decision on whether the proceeding before the Labour Relations Board is an “action” within sections 10(1) and 11 of the *Act*, and whether the Labour Relations Board is a “court” within the meaning of section 11 of the *Act*, we find the proceeding before the Labour Relations Board is not “based on a . . . death” as required in section 11. Therefore, the panel finds it has no jurisdiction to proceed with a determination under section 11 of the *Act*.

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

## Decision of the Appeal Division

**Number:** Decision No. 19  
**Date:** October 31, 1996  
**Panel:** Maureen S. Nicholls, Chief Appeal Commissioner  
**Subject:** Appeals Practice and Procedure for Historic 39(1)(e) Project

---

To ensure the personal privacy of workers is protected, the Information and Privacy Commissioner recommended that employers not be given access to worker's files unless there is a valid appeal. In a resolution dated June 11, 1996, the Panel of Administrators determined that effective July 1, 1996, employers cannot review the file before initiating an appeal.

Pursuant to Section 85.1 of the *Workers Compensation Act*, the chief appeal commissioner may determine the practice and procedure of the Appeal Division, subject to any policies of the governors and bylaws.

This decision is concerned with the practice and procedure to be followed by the Appeal Division respecting appeals related to the Historic Section 39(1)(e) Project. The Historic 39(1)(e) Project involves reviewing files for relief of cost considerations where wage loss exceeded 13 weeks, and ended between March 15, 1978 and December 31, 1993.

1. Section 96(6) of the *Workers Compensation Act* provides an employer may appeal to the Appeal Division within 30 days from a decision on relief of costs. This right of appeal will include decisions from the Historic 39(1)(e) Project.
2. The governors' published policy in Decision 75 requires written reasons for appeal. Consistent with procedures for other appeals, if written reasons have not already been provided, the appeal officer will write to the representative, requesting them. The letter will indicate that failure to respond within 21 days will result in the appeal being considered abandoned, and any further consideration will require an extension of time to appeal (see Appeal Division Decision #4, *Workers' Compensation Reporter*, Vol. 7: p.79, at p. 80).

3. Consistent with procedures for other appeals, the representative must request disclosure in writing if disclosure has not already been provided (such as on a prior appeal), but updated disclosure will be provided automatically. The appeal must remain active while disclosure is provided. The worker will be advised when the employer is granted disclosure of the file.
4. Prior to the Panel of Administrators' resolution, some employer representatives obtained disclosure by viewing the actual claim file. For those representatives, and any others who request it, the Appeal Division will advise the representative when the file is sent to the viewing area, and that they have 30 days to make a written submission. Further time to make a submission will be considered as for other cases (see Appeal Division Decision 1, *Workers' Compensation Reporter*, Vol. 7: p. 33).
6. After reviewing the file, it is open to the employer to withdraw the appeal, and seek reconsideration by submission to an Employer Cost Relief Officer (ECRO).
7. While awaiting reconsideration by the ECRO, the employer must withdraw the appeal before the Appeal Division, or the appeal will proceed to an appeal panel for a decision within 90 days. There is no provision for "suspending" an appeal before the Appeal Division. As in other cases where an appeal is withdrawn pending a request for reconsideration, the appellant can re-establish that appeal within 30 days of any reconsideration. A delay beyond 30 days of the reconsideration decision will require an application for an extension of time.
8. The initial appeal should be re-established within 30 days of the ECRO's reconsideration decision. If the reconsideration addresses the merits, an appeal of that reconsideration would also allow the Appeal Division to address the merits.

## Decision of the Appeal Division

**Number:** Decision No. 21  
**Date:** April 23, 1997  
**Panel:** Maureen S. Nicholls, Chief Appeal Commissioner  
**Subject:** Practice Directive – Applications for Leave under the *Criminal Injury Compensation Act*

---

The chief appeal commissioner and the appeal division have authority under the *Criminal Injury Compensation Act* to review the decision of an officer of the Workers' Compensation Board, or the findings and report of an appeal committee. Section 22(3) of the *Act* states, in part:

22(3) By leave of . . . the chief appeal commissioner of the board, the appeal division may further review the decision, or the findings and report.

The *Criminal Injury Compensation Act* does not state the grounds upon which the chief appeal commissioner will exercise her discretion to grant leave for further review. So as to assist parties in making submissions to the chief appeal commissioner, this practice directive indicates in general terms the grounds for leave examined in past Appeal Division decisions. Reference to these grounds in applications for leave will assist in the timely consideration of applications. The grounds mentioned in this directive are not exhaustive and are not intended to limit applicants in presenting information they consider relevant to the application for leave.

The necessity to secure leave to obtain a further review of an appeal committee's findings and report suggests a legislative intent to provide a more narrow basis for further review than would be the case if a simple statutory appeal was provided. The Legislature's use of the word "review," rather than "appeal," supports this interpretation. Against this background, past Appeal Division decisions have indicated that leave may be granted if any of a number of factors appear to exist. These factors have been articulated as follows, with minor revisions for greater clarity:

1. substantial and material new evidence;
2. strong reasons to doubt the correctness of the findings, such as the presence of the following in the findings:
  - (a) an error of law on the face of the record;
  - (b) an error with respect to an important fact, which error is clear from the record;
  - (c) the absence of any evidence to support the findings; or
  - (d) an obvious oversight of some material evidence (as opposed to considering and rejecting such evidence - it is not intended that leave be granted simply for the purpose of reweighing the evidence considered by the appeal committee);
3. a breach of the rules of natural justice;
4. an issue concerning the interpretation of the *Act* or policy of significance beyond the particular case.

This list, although not exhaustive, describes situations in which there has been a serious flaw in the decision-making process, or a significant issue of statutory or policy interpretation has been raised, and where further review is warranted.

Pursuant to section 85(8) of the *Workers Compensation Act*, the chief appeal commissioner may delegate in writing any of her powers and duties to an appeal commissioner. By written delegation dated November 29, 1996 (Delegation by the chief appeal commissioner, Appeal Division Decision No. 20, *Workers' Compensation Reporter*, Vol. 12: p. 361), I delegated 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 to obtain a further review of the decision of an officer of the board, or the findings and report of an appeal committee. If leave is granted, section 22(3) of the *Criminal Injury Compensation Act* contemplates that the further review of the decision, or findings and report, will be conducted by a panel of the appeal division.

All applications for leave, which must be in writing, should be addressed to the chief appeal commissioner.

## Decision of the Appeal Division

**Number:** Decision No. 22  
**Date:** May 7, 1997  
**Panel:** Maureen S. Nicholls, Chief Appeal Commissioner  
**Subject:** Practice and Procedure concerning Appeals From Historical 39(1)(e) Project Review Clerk Decisions

---

Appeal Division Decision 19, October 31, 1996, established a practice for appeals concerning decisions made by the Historical 39(1)(e) Project. That decision provided that appeals could be initiated from a relief of costs decision of the Historical Project. After file disclosure, it was open to the employer to withdraw the appeal and seek reconsideration by submission to an Employer Cost Relief Officer. No reference was made in Decision 19 to appeals from the initial decision by a Review Clerk.

On April 24, 1997, a three-person panel of the Appeal Division considered an appeal from a Review Clerk's decision. Their decision, #97-0525, observed that the decision letter contained no reasons for denying relief of costs. Section 96(6) and (6.1) allow an employer to appeal "on the grounds of error of law or fact or contravention of a published policy of the governors." An appeal can only be allowed on the merits in relation to one of these grounds. Without reasons in the decision letter, the panel concluded, it was difficult for them to discharge their obligation under the *Act* to ensure full and proper consideration be given to whether these grounds had been met. Furthermore, the absence of reasons may impair the employer's opportunity to exercise the right of appeal in a meaningful fashion. The panel noted that it was not addressing the adequacy of the reasons provided, but the absence of reasons.

The panel allowed the appeal on a preliminary basis. They declined to hear the appeal on the merits, set aside the Review Clerk's decision, and remitted the matter to the Compensation Services Division to provide a decision with reasons.

Procedures relating to the Historical 39(1)(e) Project have evolved over time. Before July 1996, employers reviewed the file and on selected files, asked for reconsideration of the initial decision. Consistent with recommendations made by the Information and Privacy Commissioner, the Panel of Administrators passed a resolution effective July 1996, which provided that employers could no longer review the file before initiating an appeal. Employers began appealing decisions of the Review Clerk to the Appeal Division after July 1, 1996. It is my understanding that when the Historical 39(1)(e) Project began, neither the employers nor the Board expected that decisions of the Review Clerk would be appealed to the Appeal Division.

In light of this history, the following practice and procedure will take effect immediately.

1. Appeals from decisions of a Review Clerk, Historical 39(1)(e) Project, will be reviewed by the Appeal Division on a preliminary basis. If reasons have not been provided, the appeal will not proceed.
2. The matter will be returned to the Compensation Services Division to render a decision with reasons.
3. The employer has a right of appeal to the Appeal Division from the further decision of the Compensation Services Division within 30 days.
4. This practice and procedure applies to all Historical 39(1)(e) Project appeals currently before the Appeal Division and any that may come before the Appeal Division that are made by a Review Clerk and do not contain reasons.