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WORKERS' COMPENSATION BOARD

Province of British Columbia

- *Creation of workplaces that are safe and secure from injury and disease*
- *Successful rehabilitation and return to work of injured workers*
- *Fair compensation for workers suffering injury or illness on the job*
- *Sound financial management to ensure a viable WCB system*
- *Protection of the public interest*

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.

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

Date: May 15, 1996
Subject: Exemption of Personal Financial Holding Companies

WHEREAS:

The *Workers Compensation Act* provides in section 2(1) that Part 1 of the *Act* applies to "all employers, as employers, and all workers in British Columbia, except employers of workers exempted by order of the board",

and

The Governors determined in their February 7, 1994 resolution how the exemption authority of the Workers' Compensation Board is to be exercised under section 2(1) of the *Act*:

BE IT RESOLVED THAT:

the proposal to exempt personal financial holding companies identified by the following number in the meeting binder for the May 15, 1996 meeting of the Panel of Administrators of the Workers' Compensation Board of British Columbia, and considered at the Panel of Administrators' May 15, 1996 meeting, is approved:

96-008 Exemption Order for Personal Financial Holding Companies

Decision of the Appeal Division

Number: **97-0366**
Date: **March 14, 1997**
Panel: **Lorna A. Pawluk, Sarwan Boal, Derrick Spooner**
Subject: **Occupational Disease — Schedule B — Varicose Veins**

The employer, appeals findings dated May 30, 1996 of the Workers' Compensation Review Board (Review Board). There are two issues:

1. whether a claim filed on April 25, 1995 by the worker is barred under Section 55 of the *Act*; and

2. whether the claim is to be adjudicated under Section 5 or Section 6 of the *Act*.

On April 25, 1995, the worker, a camp cook and first aid attendant, applied for compensation for varicose veins in both legs; an allergy; and shoulder and back problems. Only the varicose veins are dealt with here.

She said that she first noticed slight varicose veins in her legs during a 1977 pregnancy but that the condition subsided until 1985 when she began working as a camp cook. She was not disabled at that point and wore support hose and took other preventative measures. She said she left a job in 1989 primarily because of her allergies, although she had also been bothered by her varicose veins. She said that the latter condition did not disable her until the spring of 1995 and at that time, she consulted a naturopath.

A physician's first report dated July 25, 1995 filed by Dr. S, a family physician, described the worker's 10-year history of leg problems and diagnosed "gross varicose veins bilaterally — long & short symptoms." He certified the worker as totally disabled.

By a letter dated July 19, 1995, the worker was advised by the Board that her claim for varicose veins would not be considered under Section 6 of the *Act*. By another letter dated May 5, 1995, the worker was advised that her claim was barred by Section 55 and that special circumstances did not preclude her application within the one-year time limit. Thus, her claim could not be considered on the merits.

The worker successfully appealed to the Review Board which, in the finding under appeal here, concluded that the worker's claim should be adjudicated under Section 6 as an industrial disease and that Section 55 did not limit her application. The claim was ordered to be returned to the Board for adjudication.

The employer appeals on the grounds that there is insufficient medical evidence to establish that the worker's condition was caused by her work with that company. They also argue that the worker did not advise them of her medical condition and that under Section 26.01 of the *Manual*, "vascular disturbances of the extremities" are recognized as an occupational disease, but they are presumed to be employment-related when "there is prolonged exposure to excessive vibrations and low temperatures." These working conditions did not exist in the workplace said to give rise to the varicose veins.

Analysis and Reasons

Under Section 55 of the *Act*, a claim for compensation must be made "within one year after the date of injury, death or disablement from occupational disease" unless "special circumstances . . . precluded the filing within one year." According to Section No. 93.21 of the *Manual*, in the case of an injury, the one year commences at the date of injury or death, and not the date of subsequent disablement. Section No. 32.50 fixes the operative date for the application of Section 55 to occupational disease claims as "the date the worker first became disabled by such disease." The one-year time limit starts when the worker first becomes disabled by the disease. Workers are considered to be disabled when "they are no longer able to perform their regular employment duties and as such would in the ordinary course sustain a loss of earnings." The date of disablement "may or may not correspond with the date the worker was first diagnosed with the occupational disease."

Should a claim for varicose veins be made under Section 5 of the *Act* as an injury or under Section 6 as an occupational disease? We find no evidence or allegation that the varicose vein condition arose from an injury under Section 5. Instead we find that it should be adjudicated as an occupational disease, more specifically as a vascular disturbance of the extremity, as listed at item 16 in Schedule B. Occupational disease is defined under Section 1 of the *Act* as follows:

> "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 industrial disease, and "disease" includes disablement resulting from exposure to contamination;

Schedule B is established under Section 6(4) of the *Act*. That provision entitles the Board to "add to or delete" from the Schedule any disease which it "deems to be an occupational disease."

Item 16 of Schedule B lists "vascular disturbances of the extremities" as an occupational disease. Section No. 27.13 of the *Manual* says that this item "covers the condition commonly known as vibration induced Raynaud's phenomenon, earlier described as Vibration-induced White Finger (VWF) and since 1986 widely referred to as Hand-Arm Vibration Syndrome (HAVS)." Section No. 27.13 is written in inclusive rather than exclusive language so that it includes Raynaud's in Schedule B, item 16, but does not limit that provision to Raynaud's only. Thus other diseases, if they fit the description "vascular disturbances of the extremities" will be designated as occupational diseases under the Schedule.

"Vascular" is defined by Dorland's Pocket Medical Dictionary as "pertaining to blood vessels or indicative of a copious blood supply." A vessel is "any channel for carrying a fluid, such as blood or lymph." Clearly, "vascular" is intended to refer to veins. A "disturbance," as defined in Dorland's, is "a departure or divergence from that which is considered normal." As "[e]longated, dilated torturous superficial veins (usually in the legs) whose valves have become incompetent, permitting reversed flow in the dependent position," varicose veins may be classified as a disturbance. (See *Merck Manual*, sixteenth edition) "Extremity" is defined in Dorland's as "the arm or leg." All of the elements in item 16 are present in the abnormal venous condition known as varicose veins. They are a vascular disturbance and they affect an extremity. Thus they are an occupational disease under the *Act* and should be adjudicated under Section 6. We are not concerned here whether the worker is entitled to the benefit of the presumption in Schedule B which deems a work relationship where the "Description of Process or Injury" in the second column is found. Rather, we are concerned only with the "Description of Disease" and occupational disease designation which results from the application of column 1 of the Schedule.

As noted above, the operative date for occupational diseases and Section 55 is the date of disablement: a claim for an occupational disease can be made within a year of disablement. In this case, the worker claims she first became disabled by her varicose veins in the spring of 1995. As the application for benefits is dated April 25, 1995, less than a year after the date of disability, Section 55 does not bar her claim.

All of the arguments outlined by the employer in support of their appeal deals with the merits of the worker's claim. We reiterate that we are not here concerned with whether the worker has a work-related condition which entitles her to compensation. Rather we are simply concerned about whether the Board may consider this claim on the merits, and we find that they should. Accordingly, the claim file should now return to the

Claims Division to determine whether the varicose veins are compensable under Section 6 of the *Act*.

For these reasons, the employer's appeal is denied, as stated above.

Editor's Note: This decision has been edited for publication and for the purposes of complying with the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165.

Decision of the Appeal Division

Number: 97-0501
Date: April 17, 1997
Panel: David Van Blarcom, Patrick L. Byrne, Herb Morton
Subject: Medical Review Panel Application — A Medical Decision

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The worker appeals Review Board findings dated July 16, 1996. The issue is whether the employer may appeal from Decision No. 93-0162 of the Appeal Division, dated January 29, 1993, to a Medical Review Panel.

Background

A central issue in this appeal is whether the previous decision of the Appeal Division decided a medical issue or a legal issue. As the decision was complex, it will be reviewed in some detail in this decision.

On page one of Decision No. 93-0162, the Appeal Division set out the background facts as follows:

> [The worker] has been employed as a firefighter with the [the employer] from 1964. At the time of the Review Board hearing, [the worker] was a fire captain, but had always been involved with front line fire suppression responsibilities.
>
> On October 8, 1986, [the worker], who was then 46 years old, made application for compensation for multiple myeloma, later indicated to be more specifically a metastatic diseased spine with spinal cord compression. [The worker] submitted his condition was a result of cumulative exposure to numerous carcinogens in his 22 years as a firefighter for the [the employer]. . . .

The Panel then identified the various expert reports which were tendered by the parties, and on page two identified the following issues:

> . . . As well, these experts gave evidence and opinions relating to the specific issue on this appeal — whether, on a general basis, multiple myeloma has a higher incidence among firefighters than would be

> expected in the general population, and whether [the worker] multiple myeloma was caused by, significantly contributed to, or aggravated by his occupation as a firefighter. . . .

In considering the Review Board finding of November 28, 1990, which was under appeal, the Panel said the Review Board denied [the worker's] appeal on the basis that there was insufficient evidence to relate his exposure to benzene to his multiple myeloma.

The Panel then summarized the evidence relevant to the appeal. Under the heading "Biological Plausibility," the Panel noted the evidence of Dr. A, a medical doctor and toxicologist who identified benzene as the most likely chemical exposure with respect to the worker's multiple myeloma. Dr. A noted evidence that benzene exposure could cause myelogenous leukemia, and said that the leukemia and myeloma were grossly related, leaving the inference that benzene exposure could also cause the myeloma.

Dr. B, director of the epidemiology unit disagreed with that inference and said:

> . . . Now, the argument, if I understand it correctly, was that benzene increases the risk of leukemia and therefore since multiple myeloma is in the same broad family of cancers maybe it could increase risk of myeloma. I guess my concern arises because in fact I think these cancers in this group do in fact often have different etiologies.

The Panel also heard from Dr. C, a toxicologist who said the best known cause for multiple myeloma in humans was exposure to ionizing radiation or radioactive materials, although there were case reports of the disease being associated with exposure to benzene.

The Panel also summarized evidence under the heading "Epidemiological Evidence." They referred again to the evidence of Dr. B and Dr. A. They also referred to the evidence of Dr. D, professor of epidemiology and Dr. E, professor of occupational medicine.

After reviewing the submissions of the lawyers for the worker and his employer, the Panel said: "The key issue on this appeal is the standard of proof to be applied." The Panel summarized the employer's submission that there was no evidence the worker had sufficient exposure to any particular carcinogen at a significant concentration while attending fires.

The Panel then went on to discuss the relative strengths and weaknesses of biological plausibility and epidemiology. At page 25 they cited Professor T. Ison from an article entitled *Compensation for Industrial Disease Under the Workers Compensation Act of Ontario*:

> Often there is uncertainty about the nature and degree of the worker's exposure and often there are no available data about the significance of particular exposures to whatever disease the worker may be found to have. These gaps in knowledge may preclude the reaching of any conclusion in a scientific way . . . the legal system does not require that all evidence should be direct, nor does it require that matters of causation must be determined in a scientific way. Circumstantial evidence can be considered and inferences can be drawn from the evidence.

After an extensive discussion, the Panel said:

> . . . The panel finds that it is not possible or reasonable to insist that the precise exposure(s) to a specific chemical is required to be demonstrated in order to show causation in an individual firefighter. . . . Given the lack of knowledge in the given time periods as to the carcinogicity of substances firefighters were exposed to, such lack of precise information is not surprising. It is not reasonable to rely on this lack of specific evidence as the basis for deciding this appeal. Reasonable probability can be established without such detail. . . .
>
> . . . the question is whether the possibility of industrial causation is reasonably probable, even though the exact causal mechanism is unclear or even unknown. In determining this question, consideration will be given to whether there is evidence from which to reasonably infer that there was likely sufficient exposure to a carcinogen(s) which would likely significantly contribute to the development of the specific cancer in this case. As well, toxicological and epidemiological evidence regarding the likelihood of a relationship between the employment and the disease will be extremely important. However, the weight to be placed in each case on such evidence will depend, in part, on the basis of the experts' opinions and on the consistency of findings in the two fields. Even if this evidence is less than compelling scientifically, the secondary question is how this less than perfect evidence compares with the alternative hypotheses. . . .
>
> *[reproduced as written]*

At the outset of "Reasons and Findings," the Panel refined the issue under appeal:

> The panel, in applying the standard of proof delineated above, has carefully considered all expert opinions, testimony, research, and submissions. We have concluded that the legal question for

> compensation purposes differs from the question posed by Dr. B — how any risk from firefighting interacts with risk from other factors to produce the overall risk. The legal question to be decided is whether [the worker's] employment more likely contributed to his multiple myeloma, or whether it was more likely to have resulted from other causes.

The Panel then considered the expert evidence in the context of the standard of proof it had set out. The Panel concluded:

> . . . The only cogent hypothesis put forward as to causation has been [the worker's] exposure to carcinogens, specifically benzene, as a firefighter. The only alternate hypothesis put forward was that of genetic pre-disposition (Dr. A).
>
> The panel, as stated earlier, recognizes that there is no precise evidence with respect to the number of times and extent of [the worker] exposure to benzene. However, there is generalized evidence, as noted in this decision, of the prevalence and concentrations of benzene at fire sites. In the absence of specific evidence to the contrary, the panel has considered this general evidence in coming to its conclusion. It is not determinative of [the worker's] specific exposures, but is helpful in considering the opinions based on biological plausibility.
>
> It would be desirable to have more definitive evidence and opinion from all experts. However, we recognize that this uncertainty must be accepted as the current state of scientific knowledge. To decide this issue, then, requires that the possibilities referred to in Section 99 of the *Act* are those possibilities based on current, albeit incomplete, medical knowledge and opinion. The panel finds, therefore, that there is evidential support for the possibility that [the worker's] multiple myeloma was contributed to by his exposure to benzene. There is no evidence supporting an alternate hypothesis — only radiation and genetics have been put forward as possible "causes." No one has argued that radiation was a causative factor in [the worker's] case and genetics, even if valid, is not a "cause" which would affect the worker's entitlement. Therefore, the panel finds there is not a more likely alternative hypothesis to explain the development of multiple myeloma in [the worker]. We find that there is sufficient evidence to relate his exposure to benzene as a firefighter to his multiple myeloma. . . .

By letter dated April 2, 1993, the lawyer representing the employer wrote to the Medical Review Panel department of the Board advising that the employer disagreed with the January 29, 1993 medical decision of the Appeal Division. He enclosed a certificate for Appeal to a Medical Review Panel completed on behalf of the employer on March 16, 1993 by Dr. F of the department of Health Care and Epidemiology. Dr. A was one of the employer's witnesses at the Appeal Division. Dr. A identified the medical decision which he disputed as:

> [The worker's] multiple Myeloma was causally related to his exposure to benzene as a firefighter.

He said the reasons why he believed a medical dispute exists are:

(a) Exposure to benzene is not medically known to be causally related to multiple myeloma in humans.

(b) Prolonged exposure to benzene is known to be causally related to one form of leukemia (acute myelogenous leukemia) in humans. However, it is a medically unacceptable and speculative extrapolation to relate exposure to benzene to the development of multiple myeloma on the basis that such exposure is known to be causally related to acute myelogenous leukemia.

(c) If benzene exposure could be causally related to multiple myeloma in firefighters, it would reasonably be expected to see a higher incidence of acute myelogenous leukemia in firefighters as the "marker" disease arising from benzene exposure. However, the epidemiological studies do not demonstrate a higher incidence of acute myelogenous leukemia in firefighters. It is a medically unacceptable hypothesis to postulate that something (i.e., multiple myeloma due to benzene exposure), which if it occurs at all would be rare, is happening more often than a common occurrence (i.e., acute myelogenous leukemia due to benzene exposure). It is implausible that one would see a conjectural outcome (i.e., benzene exposure is causally related to multiple myeloma in firefighters) when one does not see what is known to be a more common occurrence (i.e., benzene exposure is known to be causally related to acute myelogenous leukemia).

Both the employer's request for a Medical Review Panel examination of the worker, and the medical certificate from Dr. A, were received by the Board on April 6, 1993 within 90 days of the January 29, 1993 Appeal Division decision.

Counsel for the employer and the worker made submissions to the Medical Review Panel department of the WCB. The medical review officer considered those submissions in her letter of January 26, 1994. In that letter, she concluded that the cause of the multiple myeloma was a medical question and that it was not open to her to

deny the employer's rights under the *Act* to appeal to a Medical Review Panel. The worker's appeal from that decision was denied by the Review Board on July 16, 1996.

Law and Policy

The *Workers Compensation Act* provides in Section 58(4):

> An employer or former employer of a worker is entitled to have the worker examined by a Medical Review Panel if, not later than 90 clear days after the making of a medical finding by the Review Board or a medical decision by the Board, the employer or former employer
>
> (a) writes to the Board expressing that the employer or former employer is aggrieved by the medical finding or decision, and
>
> (b) sends with the writing a certificate from a physician certifying that, in the physician's opinion, there is or may be a bona fide medical dispute to be resolved, and stating sufficient particulars to define the question in issue.

Section 61 of the *Workers Compensation Act* provides:

> (1) The decision of a majority of the panel is the decision of the panel, and within a reasonable time after the examination of the worker the chairman shall certify to the Board as to
>
> (a) the condition of the worker;
>
> (b) the existence or non-existence of a disability;
>
> (c) if there is a disability, its nature and extent, but not stated in terms of percentage of disability of the whole body
>
> (d) if there is a disability, its cause and, if there is more than one cause, how much of the disability is related to one cause and how much to another; . . . .

Section 64 of the *Workers Compensation Act* states:

> 64. Where the Board or the panel considers that a statement of foundational non-medical facts is necessary to determine the medical dispute, the Board shall prepare and deliver the statement to the chairman of the panel for the use of the panel.

The current *Rehabilitation Services and Claims Manual* discusses cause of disability in the context of Medical Review Panels at No. 103.84:

> . . . Cause is a word much like disability in that it has different meanings, depending on the context in which it is used. Sometimes it can refer to matters of natural science, sometimes to moral value judgements, and sometimes to questions of law. The purpose of the Medical Review Panel is to provide an appeal from "a medical decision of the Board" and it is in that context that the word "cause" must be interpreted. The Board interprets the word cause in Section 61(1) of the *Act* to refer to the etiology of a physical or psychological disability. It means cause insofar as it is a matter of medical science, but not cause insofar as it is a matter of moral value judgements, or law, or non-medical fact.
>
> Analysis of the issues that can arise in the adjudication of whether a work caused disease is compensable illustrate 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. . . .
>
> 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. . . .
>
> 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.

Governors' policy in Decision No. 17 (*Workers' Compensation Reporter*, Vol. 1: p. 78 [1973]) says, at page 79:

> The real problem in this case centres on the use of the word "cause" . . . a Medical Review Panel is required to certify as to " . . . cause of the disability." But "cause" is an ambiguous word, referring sometimes to matters of natural science, sometimes to moral judgments, and sometimes to questions of law. The purpose of a Medical Review Panel, as explained in Section 55, [similar language is now found in Section 58] is to provide an appeal from ." . . a medical decision of the Board," and that function is paramount in the interpretation of other language in the Section. It is in this context that the word "cause" must be interpreted. In Section 55(9), [the provision is now found in Section 61(1)(d)] therefore, "cause" refers to the etiology of the condition. It means cause insofar

> as it is a matter of medical science; but not cause insofar as it is a matter of moral value judgments, of law, or of non-medical fact. . . .
>
> Under Section 79(1), [now Section 96(1)] the Board has exclusive jurisdiction to determine all matters of fact and law arising under Part 1 of the *Act*. The authority conferred upon the Medical Review Panels to review the medical decisions of the Board is an exception carved out of that general jurisdiction. But it is an exception limited to the terms of Section 55. Thus the Board is left with an overall residual jurisdiction which includes authority to determine the jurisdiction of other tribunals established under Part 1.

At the time of the decision of the medical appeals officer now under appeal, the relevant policy was included in Sections #103.00 to #103.70 of the *Rehabilitation Services and Claims Manual*. The lawyer for the employer referred to #103.11, paragraph B.(2), which was in force at the time of the decision of the medical review officer presently under appeal, but which has since been repealed. We do not consider the changes to the policy since that time affect the particular issues in this case.

Submissions

In his submission dated October 11, 1996, the worker's lawyer states the issue before us is whether Decision No. 93-0162 is a medical decision or a legal decision.

He notes the previous Panel's statement that "The key issue on this appeal is the standard of proof to be applied" and submits that issue was a legal issue, not a medical issue. The worker's lawyer submits the issue raised in the medical certificate by Dr. A is not a medical issue but a legal issue, in that it addresses how the evidence was weighed.

The worker's lawyer also submits that diagnosis is not in issue, and that cause can be an issue of fact, law and policy, medicine and science, or both. In particular, he notes the Appeal Division accepted that it was not possible or reasonable to insist that the precise exposures to a specific chemical be proved to show causation in an individual firefighter.

He submits the Appeal Division essentially made a finding of fact, and cited two decisions of the Supreme Court of Canada, with which Professor Ison's observation quoted above is consistent:

In *Snell* v *Farrell*, [1990] SCR 311 at 328, the Court said:

> Causation need not be determined by scientific precision. It is . . . 'essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory."
>
> *[reproduced as written]*

In *Laferriere* v *Lawson*, [1991] SCR 541 at 606, the Court said:

> a judge will be influenced by expert scientific opinions which are expressed in terms of statistical probabilities or test samplings, but he or she is not bound by such evidence. *Scientific findings are not identical to legal findings.* (emphasis added). . . . proof as to the causal link must be established taking into account *all* of the evidence which is before (the court), factual, statistical and that which the judge is entitled to presume.
>
> *[reproduced as written by counsel]*

The worker's lawyer summarized his position as follows:

> What the Appeal Division did in [the worker's] case was apply a question of fact and reach an answer about whether his cancer was work related based on common sense after considering all the evidence. As a matter of law, it is not open to a Medical Review Panel to go through this exercise and a medical practitioner is not qualified or experienced to assess causation in this way. Medical findings are, of course, valuable but there are limits to their applicability. They are relevant and appropriate when the issue is a medical one and the inquiry is about causation as a pure medical issue. However, when the inquiry is a broader one requiring the assessment of *all* evidence a medical approach is not appropriate.
>
> *[emphasis in original]*

The submission of the employer's lawyer to the Review Board, dated October 4, 1995, included the following:

> . . . Every claim at every level of adjudication/appeal within the workers' compensation system involves the assessment and weighing of evidence — both medical and non-medical evidence. Although legal and/or policy standards are relevant with respect to the weighing of all of the evidence, the conclusion reached after the medical evidence has been weighed is a medical decision, not a legal one. . . .

> If, after determining what weight should be applied to the conflicting medical opinions and after considering the potential application of Section 99 of the *Act*, the conclusion reached by the Board is a medical decision, then the worker and/or the employer has the legal entitlement to bring the matter before the MRP pursuant to Section 58(3) or (4). . . .
>
> It is not the issue of what weight should be given to any particular piece of evidence which the [the employer] had appealed to the MRP. Rather, it is the conclusion reached by the Appeal Division Panel, after it weighed all the evidence, that the City disputed — that [the worker's] multiple myeloma was causally related to his exposure to benzene as a firefighter.

In his submission to the Appeal Division dated November 29, 1996, the employer's lawyer said:

> . . . the [employer] is not appealing the issue of [the worker's] exposure history to benzene to the MRP. Rather, the [the employer] is disputing the medical conclusion reached by the Appeal Division that exposure to benzene (regardless of the sufficiency) can lead to the development of multiple myeloma. . . .

Reasons and Decision

The issue of standard of proof was a "key" issue for the previous Panel in that they had to determine how to weigh the evidence, to "unlock the gate" so to speak, so they could proceed to the fundamental issue in the case. The fundamental issue was identified at the outset of the decision, and again at the beginning of the "Reasons and Decision"; namely, whether the worker's employment more likely contributed to his multiple myeloma, or whether it more likely resulted from other causes.

To assist themselves in answering that issue, the Panel determined, as a matter of law, what standard of proof they were required to use. That standard of proof then assisted them in determining the factual issue, that the worker had been exposed to benzene as a firefighter, the medical issue, that benzene was a cause of his multiple myeloma, and the fundamental question of fact and medicine, that the worker's multiple myeloma was caused by the exposure to benzene which occurred in the course of his employment.

In coming to their conclusion, the Panel, as a lay tribunal like a court, appropriately weighed the expert evidence in the manner appropriate for lay tribunals, as suggested by the Supreme Court of Canada in *Snell v. Farrell* and *Laferriere v. Lawson*. However, we do not see that, having used such means to weigh the evidence and arrive at a judgment on the issue, the issue is thereby characterized as non-medical and barred from proceeding to a Medical Review Panel if the statutory bases for such an appeal are made out.

Once having decided the worker was exposed to benzene in his work, virtually all the evidence the Panel considered in concluding the benzene caused the multiple myeloma was medical evidence. We find it difficult to escape the conclusion that an issue which is essentially determined by medical evidence is likely a medical issue. In this case, the issue raised by Dr. F arises from the disputed medical opinions of Dr. A and Dr. B, among others, which were central to the Panel's conclusion that exposure to benzene contributed to multiple myeloma.

We conclude the Appeal Division decision was, ultimately, a decision with respect to the cause of the worker's disease and the decision was a medical one. It is, therefore, one which is appealable to a Medical Review Panel.

Section 61(1)(d) clearly places the issue of cause of a disability within the jurisdiction of the Medical Review Panel, and it is now well established that such cause is limited to the medical cause of etiology of the condition (e.g. Decision No. 17, the previous policy #103.11, and the current policy #103.84).

The *Workers Compensation Act* anticipates that medical issues cannot be decided by the Medical Review Panel in a factual vacuum. The *Workers Compensation Act* therefore provides in Section 64 for the preparation of a statement of non-medical facts.

Appeal Division Decision No. 94-1296, which is reported in the *Workers' Compensation Reporter*, Vol. 11: p. 75 (1994), noted that a question of causation may include several questions, some medical and some non-medical, and the responsibility of the Medical Review Panel is to consider whether the Board has arrived at correct conclusions on the medical aspects of the matter. However, an appeal was not prevented from going to a Medical Review Panel on the basis that the decision consisted of non-medical as well as medical findings.

Similarly, in the case of *Oliver Hirschkorn* v. *W.C.B. et al.*, [unreported, No. A901196, Vancouver Registry, October 31, 1990], Mr. Justice Shaw of the British Columbia Supreme Court concluded that a worker disputing a decision of the Board concerning the cause of his disease should make use of the remedy of the review process before the Medical Review Panel before seeking redress from the court.

The Appeal Division made a finding of fact, which was that the worker was exposed to benzene in his employment as a firefighter, in a quantity which they accepted was sufficient to cause multiple myeloma if, indeed, exposure to benzene could cause multiple myeloma. The employer has not disputed the fact or the sufficiency of the worker's exposure to benzene as a medical issue on this appeal. We note Dr. A's certificate does not dispute that the worker was exposed to benzene in his employment.

However, Dr. A does identify a bona fide medical dispute to be resolved arising out of the Appeal Division's Decision No. 93-0162; namely, whether exposure to benzene contributed to the worker's multiple myeloma. He has filed a valid certificate for Appeal to a Medical Review Panel pursuant to Section 58(4) of the *Workers Compensation Act* and a proper request has been made by the employer for the establishment of a Medical Review Panel.

We find the employer's application satisfies the requirements of Section 58(4) of the *Act*. The worker's claim file is referred to the Medical Review Panel department to proceed with arrangements for the Medical Review Panel examination of the worker.

THE WORKER'S APPEAL IS DENIED.

Editor's Note: This decision has been edited for publication and for the purposes of complying with the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165.

Decision of the Appeal Division

Number: **97-0503**
Date: **April 17, 1997**
Panel: **Herb Morton, Patrick L. Byrne, David Van Blarcom**
Subject: **Medical Review Panel — Fatal Claim**

The employer of the deceased worker appeals the August 21, 1996 Review Board finding.

At issue is whether the widow of the deceased worker is entitled to obtain a Medical Review Panel inquiry into the cause of death of her late husband, pursuant to Section 63 of the *Workers Compensation Act*.

Background

In 1986, the worker claimed compensation for sigmoid colon cancer, on the basis that his work exposure to carcinogens during his 35 years of employment as a firefighter, had caused this disease. The worker died in 1987, at the age of 59. His widow applied for dependent's benefits under Section 17 of the *Act*. Both the worker's claim for compensation, and his widow's application for dependent's benefits were denied. These denials were appealed to the Review Board, and then to the Appeal Division. By decision dated January 29, 1993 (No. 93-0161), the Appeal Division Panel found that the deceased worker's employment as a firefighter did not contribute to his colon cancer.

On April 28, 1993, a lawyer representing the widow of the deceased worker wrote to the Board to state that she was aggrieved by the January 29, 1993 Appeal Division Decision (No. 93-0161) on this claim. The widow requested a Medical Review Panel be appointed to inquire into and ascertain the cause of her husband's death, pursuant to Section 63.

By decision dated January 26, 1994, a medical appeals officer accepted the widow's request for a Medical Review Panel inquiry into the cause of death of the worker. She stated that a Statement of Foundational Non-Medical Facts and Issues would be

prepared. In respect of objections presented on behalf of the employer, she reasoned:

> I do not accept that the meaning of the word 'cause' in Section 63 is meant to be interpreted differently than in Sections 58 through 61 of the *Act*, which govern the examination of a worker in a non-fatal case.
>
> In other words, in establishing the diagnosis of [the worker's] condition to be colon cancer, I would accept that a Medical Review Panel's scope under Section 63 of the *Act* includes a determination as to the cause of that condition. . . .
>
> . . . a determination regarding the *amount of exposure* is a determination of non-medical fact. The Appeal Division accepted that [the worker] had exposure to toxic substances and carcinogens, including asbestos. The Medical Review Panel will determine if the exposure had any causative significance in the development of the colon cancer and the worker's subsequent death.
>
> [emphasis in original]

The officer further noted that there was no prerequisite in Section 63, as is contained in Section 58, that there have been a medical decision by the Board or by the Review Board, for a Medical Review Panel inquiry into the cause of death of a worker.

The employer appealed this decision to the Review Board. By finding dated August 21, 1996, the Review Board denied the employer's appeal on the basis that a Medical Review Panel inquiry under Section 63 can determine whether the medical evidence supports a conclusion that, first, the worker died as the result of an occupational disease, and second, this disease was due to the worker's employment. The Review Board further found:

> . . . the Appeal Division expressed their judgment that the exposure was insufficient and we find that the inter-relationship between the degree of exposure and the development of cancer is a medical issue . . . .

The Review Board concluded, therefore, that the employer's argument that only a medical decision can proceed to a Medical Review Panel under Section 63 becomes moot.

The employer appeals the Review Board finding to the Appeal Division.

Submissions

Counsel for the employer argues that the January 29, 1993 Appeal Division Decision (No. 93-0161) did not involve a medical decision. He submits that a medical decision by the Board concerning the cause of death of the worker is a prerequisite to obtaining a Medical Review Panel inquiry under Section 63. He further argues that while a Medical Review Panel could determine the diagnosis of the medical condition which caused the worker's death, the Medical Review Panel has no jurisdiction to address the underlying cause of that condition. He submits, in other words, that the Medical Review Panel has no jurisdiction to determine "the cause of the cause" of the worker's death. Counsel for the employer acknowledges that this interpretation of Section 63(1) would result in a more restrictive use being made of the Medical Review Panel in the case of a death of a worker. He submits, however, that it is this narrower interpretation that was envisioned by Mr. Justice Tysoe on pages 376 and 377 of his 1966 Report.

Counsel for the widow submits that there is no requirement in Section 63 that the decision being appealed be a medical one. He acknowledges, however, that the amount of the worker's "exposure" is a non-medical fact. He expresses agreement with the employer that this is not a medical issue. He comments:

> . . . the employer is concerned about a Section 63 panel making findings contrary to the original Appeal Division decision on matters such as how many times [the worker] had been exposed to asbestos. We agree that a Section 63 panel would not be able to make findings on these issues contrary to those of the Appeal Division. However, . . . they can review the same factual evidence that was before the original panel and make their own findings of the significance of that evidence. This is simply a matter of inquiring into and determining the cause of death.

The widow's representative submits that a simple reading of Section 63 permits a broad inquiry into the cause of death of the worker.

Workers Compensation Act

Section 63 provides:

> (1) A dependent of a deceased worker is entitled to have a Medical Review Panel inquire into and determine the cause of death of the worker if the dependant writes to the Board expressing that the dependant is aggrieved by a finding of the Review Board or a decision of the Board concerning the cause of death.

(2) On receipt of the expression in writing, the Board shall, within a reasonable period of time, by notice by registered mail, require the dependant and the last employer of the worker each to nominate, from the list mentioned in Section 58 (2), within 8 days after receipt of the notice, one specialist in the particular class of injury or ailment alleged by the dependant to have caused the death of the worker, but no specialist who has treated the worker or who has been consultant in respect of the worker for the worker's physician may be nominated or accept nomination.

(3) Where this Section is invoked, Sections 59 (3), (4) and (5), 60, 61 (4), (5), (6) and (7), 62 and 64 apply with the necessary changes and so far as applicable.

(4) The decision of a majority of the panel is the decision of the panel, and within a reasonable time after the inquiry the chairman shall send a certificate to the Board setting forth the cause of death ascertained by the panel.

Section 63(3) incorporates several related provisions concerning Medical Review Panel appeals, in relation to an inquiry into the cause of death of a worker. These include Sections 61(4) and 64. Section 61(4) provides:

> The panel may receive and accept the evidence that in its discretion it may think fit and proper and essential *to the medical problem to be decided*. [emphasis added]

Section 64 provides:

> Where the Board or the panel considers that a statement of foundational non-medical facts is necessary *to determine the medical dispute*, the Board shall prepare and deliver the statement to the chairman of the panel for the use of the panel.
>
> [emphasis added]

Findings and Reasons

In a 1952 *Commission of Inquiry into the Workers' Compensation Board*, Mr. Justice Gordon McG. Sloan recommended the creation of a Medical Appeal Board. He commented, at page 145:

> There are classes of cases in which the medical determination of a disputed question would be based in part on non-medical facts. These preliminary questions of fact must, in my opinion, be decided by the Board. To illustrate: A man's claim for industrial or occupational deafness is rejected by the Board. His length of exposure to noise and the intensity of it are preliminary questions of fact. The Medical Appeal Board would then, on those facts as found,

determine as a medical question whether the condition of the man's hearing-loss was due to that exposure to excessive noise.

Fatal or non-fatal heart cases, in which dispute arises, would necessitate a finding of fact by the Board as to the amount of strain to which the man was subjected in his occupation prior to his seizure. On these facts the Medical Appeal Board would decide whether or not the heart-failure was the result of this strain.

Aggravation of carcinoma would also fall into this category. . . .

The factual questions arising here are, firstly, did the accident occur as alleged and, secondly, where was the bruise on the man's body?

Assuming it was decided by the Board that the accident was caused as alleged and there was evidence of "deep trauma to the right lower lumbar region," *the medical question for determination by the Medical Appeal Board would be "could such an injury aggravate a carcinoma of the pancreas and accelerate the man's death"?*

[emphasis added]

It is instructive to note that Mr. Justice Sloan provided two examples of situations in which inquiries into the cause of death of a worker could be undertaken by the proposed Medical Appeal Board. One involved the death of a worker due to heart failure, and the other involved the death of a worker due to cancer. In both situations, Mr. Justice Sloan expressly indicated that the task for the Medical Review Board would be, respectively, to determine (in the first case) whether or not the worker's heart-failure was the result of a strain at work, and (in the second case), whether a traumatic injury aggravated a carcinoma of the pancreas and accelerated the worker's death. In other words, Mr. Justice Sloan clearly contemplated that the Medical Appeal Board would address causation in the broader or more general sense of determining whether the worker's death was causally related to his or her employment, rather than being restricted to determining the diagnosis of the medical condition leading to the worker's death. Mr. Justice Sloan clearly did not contemplate establishing Medical Appeal Board's for the narrow purpose of determining that, in these situations, the worker died from heart failure or a carcinoma.

Mr. Justice Sloan's report lead to the creation of provisions granting a right to request examination of a worker by a Medical Review Panel. These provisions were first enacted in 1954, under Section 54A, and were subsequently amended in 1955, 1959 and 1960 (under Section 55). No provision was made in the *Act* at that time for a Medical Review Panel inquiry into the cause of death of a worker.

A subsequent *Royal Commission of Inquiry Report* was provided by Mr. Justice Tysoe in 1966. Mr. Justice Tysoe noted, at pages 374–375:

> Labour groups have submitted that dependent widows and invalid widowers and other dependents of deceased workmen who, if the workman's death resulted from an injury or disease arising out of and in the course of his employment, would be entitled to payments under Section 18 of the Act should have the same right of review by a Medical Review Panel as a workman has.
>
> [emphasis added]

Mr. Justice Tysoe concluded, at pages 376–377:

> In my opinion, dependents of a deceased workman who would be entitled to payments under Section 18 of the *Act* if the death resulted from an injury or disease arising out of and in the course of employment should be given a right to go to the Medical Review Panel *on the medical question of the cause of death*. *I recommend* that they be given that right. This will involve amendments to Section 55....
>
> I am not unmindful of the fact that there will be cases, particularly where no autopsy has been held, that will create difficulties for the Panel in arriving at its decision. In some instances it may find itself in the position where it can do no more than say that the evidence does not satisfy it that the decision of the Board that death did not result from a compensable injury or disease is wrong. Indeed, in my opinion it should not be required to certify to anything more than that unless it is satisfied that the Board erred, in which case it should, of course, certify that a specified injury or disease was the cause of death.
>
> I confess that I have felt impelled to make this recommendation largely because *it does not seem to me to be fair that dependents of deceased workmen should be in a less favourable position, so far as having a right of review by the Panel is concerned, than are the workmen themselves. . . .*
>
> My thought is that, in justice to dependents, we should give this matter a try. . . .
>
> [emphasis added]

Under the *Workmen's Compensation Act* of 1968, Section 55 was amended to include, as Section 55(15):

> (a) Where the dependent of a deceased workman expresses himself in writing to the Board as being aggrieved by the decision of the Board concerning the cause of death of the workman, the cause of death of the workman shall be inquired into and ascertained by a Medical Review Panel.
>
> (c) Where this subsection is invoked, subsections (5), (6), (7), (8), (10), (11), (12), (13), (14), and (16) of this Section apply mutatis mutandis. [quoted in part]

Section 55(10) at that time provided (similar to the current Section 61(4) of the *Act*):

> The Panel may receive and accept such evidence as in its discretion it may deem fit and proper and essential to *the medical problem to be decided*. [emphasis added]

Section 55(16) at that time provided (similar to the current Section 64):

> Where the Board or the Panel is of the opinion that a statement of foundational non-medical facts is necessary for the determination of *the medical dispute*, the Board shall prepare and deliver such a statement to the Chairman of the Panel for the use of the Panel.
>
> [emphasis added]

As indicated under Section 55(15)(c), these provisions, which referred to "the medical problem to be decided" and to "the medical dispute," and which authorized the preparation by the Board of a statement of foundational non-medical facts, were specifically incorporated in connection with Medical Review Panel inquiries into the cause of death of a worker. It is evident, therefore, that this was envisioned from the outset as a medical inquiry, based upon facts determined by the Board.

The provisions in the *Act* relating to Medical Review Panels were renumbered in 1979, as Sections 58 through 65.

We note, at this juncture, that a Medical Review Panel inquiry into the cause of a living worker's back problems under Section 58 is not limited to determining, for example, that the worker's pain is due to a disc herniation. The role of the Medical Review Panel established at the request of a worker or employer under Section 58 is to determine whether the worker has or had a disability, and, if so, whether this is causally related to the worker's employment. The purpose of a Medical Review Panel inquiry is to resolve key medical issues which are central to determining entitlement under the *Act*. Mr. Justice Tysoe's recommendation that dependents of deceased

workmen have access to a Medical Review Panel inquiry was intended to remedy a perceived unfairness in dependents being in a less favourable position than workers, so far as having a right of review by a Medical Review Panel is concerned. We consider, in this regard, that the same scope of medical inquiry was intended to apply in both situations, in determining the cause of a worker's disability (in respect of a living worker), or death (in respect of a deceased worker). In other words, this medical inquiry was intended to rule upon whether or not such disability or death was causally related to the worker's employment, which is central to determining entitlement under the *Act*.

We do not consider that the narrow interpretation of Section 63 advanced by counsel for the employer would be consistent with the intent of this provision. The application of such a restrictive interpretation would, in our view, frustrate the legislative objective. We are satisfied that Section 63 was intended to allow dependants of a deceased worker the option of requesting an inquiry into the cause of death of a worker, which would resolve any medical issues relevant to determining the dependants' entitlement to benefits under the *Act*. Thus, in determining the "cause" of the worker's death, the Medical Review Panel is not restricted to determining the diagnosis of the immediate cause of the worker's death. The larger purpose of the Medical Review Panel inquiry is to determine, inasmuch as this involves medical issues, whether the worker's death was causally related to the worker's employment. This interpretation of the *Act* is consistent with policy #103.84 in the *Rehabilitation Services and Claims Manual* which provides:

> 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. . . .
>
> 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.

One of the arguments presented on behalf of the employer is that the Appeal Division finding, that the worker had "insufficient" occupational exposure for a cancer to have developed, is a non-medical finding of fact. We consider, however, that this represented a finding of fact as to the extent of the worker's employment exposure, and a medical decision as to the significance of this exposure. This latter aspect of the decision-making by the Appeal Division Panel is one which is open to review by a Medical Review Panel. We agree with the Review Board in concluding that the Appeal Division Panel made a factual finding that the worker had certain exposures in his employment, and that the Appeal Division Panel made a medical decision that those work exposures were not of causative significance to his cancer (and hence, that his death was not causally related to his employment).

In considering the submissions presented by the employer, we infer that underlying their objections may be an apprehension that the Medical Review Panel will embark on a new inquiry and base its medical decision on a different set of facts than found by the Board. Such apprehension may relate to the difficulties inherent to determining the "foundational non-medical facts" in a case such as this, where the worker's exposures cannot be precisely quantified.

Appeal Division Decision No. 93-0161 concerned an appeal by the widow of the deceased worker, from a Review Board finding of November 28, 1990. In its decision dated January 29, 1993, the Appeal Division Panel found that the deceased worker's employment as a firefighter did not contribute to his colon cancer. In the course of providing its reasons and findings, the Panel commented, in part:

> The panel accepts that [the worker] was likely exposed to asbestos and other carcinogens in his working life as a firefighter. It is not known how many times, or to what extent he was exposed to asbestos, or to any other toxic substance or carcinogen. However, Dr. [M.] has identified asbestos as an occupational carcinogen that could cause excesses of colon cancers in firefighters. She has explained a biological plausible route of how asbestos fibres get into the gastrointestinal tract. The panel accepts Dr. [M's] evidence that it is biologically plausible that asbestos can cause colon cancer. . . .
>
> However, the key issue in [the worker's] case is whether he had *sufficient* exposure to asbestos or any other substance in his thirty-five years as a firefighter which more likely than not contributed to the development of his colon cancer. As stated above, we do not know the exact amounts and concentrations of exposure to asbestos or any other substance [the worker] had. . . .
>
> The panel recognizes that it is not possible or reasonable to insist that [the worker] or his representative identify the precise exposure to a specific chemical in order to show causation. . . .
>
> As stated, we have no information before us that would distinguish [the worker's] asbestos exposure history from that of the firefighters who were the subject of the epidemiological research. Nor do we have any information that [the worker's] diet was different from that of the general population or firefighters in general. . . .
>
> . . . we find that [the worker's] employment as a firefighter did not contribute to his colon cancer.

We have not quoted the reasoning of the Panel in respect of its weighing of the medical evidence. Rather, these brief excerpts have been selected as representing the

consideration provided to the factual evidence underlying the medical issues on this claim. One of the difficulties in a case such as this is, as stated by the Panel, attempting to elucidate the extent of the worker's exposures to certain risk factors in his employment. In an ideal world, one would be able to arrive at precise factual findings concerning the extent of these exposures. In the real world, however, it may well be impossible to arrive at such findings with any degree of certainty or precision.

We do not consider, however, that an apprehension that the Medical Review Panel might base its medical decision on a different set of facts than found by the Board can provide a basis for denying access to such a review. The *Act* provides its own mechanism for ensuring that the medical inquiry by a Medical Review Panel is based upon the facts as determined by the Board. This mechanism is contained in Section 64, which provides for the preparation of a statement of foundational non-medical facts by the Board, where the Board or the Panel considers that such a statement is necessary to determine the medical dispute. Section 64 is specifically incorporated as part of the package of provisions applying to Medical Review Panel inquiries into the cause of death of a worker, under Section 63(3). To the extent the Board makes findings of fact concerning the worker's claim, the legislature has provided a mechanism for the Board to place those before the Medical Review Panel in the form of the statement of foundational non-medical facts.

In enacting Section 63, the legislature imposed no onerous requirements which would stand in the way of a dependant of a deceased worker seeking an inquiry into the cause of death of the worker. No time limit was placed upon the right to request such a remedy. No medical certificate was required, to certify as to the existence of a bona fide medical dispute, as is necessary under Section 58 in a Medical Review Panel application involving a living worker. The simple requirements of Section 63 are that the application be made by a dependant of a deceased worker, and that the dependant write to the Board expressing that the dependant is aggrieved by a finding of the Review Board or a decision of the Board concerning the cause of death. In this case, the last decision on the cause of death was issued by the Appeal Division. Section 85.2(6) of the *Act* provides that a decision of the Appeal Division or of a Panel shall be deemed to be a decision of the Board.

The widow has exercised her statutory right, as a dependant of the deceased worker, to request an inquiry into the cause of death of the worker, under Section 63, being aggrieved by the decision of the Board concerning the cause of death. We find that the requirements of Section 63(1) have been met by the widow, and that she is, in the words of this provision, "entitled to have a Medical Review Panel inquire into and determine the cause of death of the worker."

While not necessary to our decision, we would express doubt as to the correctness of the statement by the medical appeal officer that there need not have been a medical

decision by the Board or by the Review Board, in order for there to be a Medical Review Panel inquiry into the cause of death of a worker. We recognize, in this regard, that Section 58(3) and (4) specifically refer to "the making of a medical finding by the Review Board or a medical decision by the Board," whereas Section 63 only refers to "a finding of the Review Board or a decision of the Board concerning the cause of death." We consider it implicit to the provisions relating to the establishment of a Medical Review Panel, however, that this is intended to address medical issues with respect to a medical decision concerning the cause of death of the worker. Although no medical dispute need be identified, we consider it reasonable to infer that the decision of the Board or the Review Board contemplated by Section 63 involves a medical decision. It may be that the wording of Section 63 assumes that a decision as to the cause of death of a worker is necessarily a medical decision.

The medical appeal officer's decision letter of January 26, 1994 sets out that the Medical Review Panel will be asked to certify the following issues:

1. What was the condition, disability or other body malfunction that was the cause of death?

2. What was the aetiology of that condition, disability or other body malfunction?

3. Did [the worker's] employment have any causative significance, directly or indirectly, in producing any condition, disability or other body malfunction that resulted in his death? If yes, please explain how and to what extent.

4. Was the condition, disability or other body malfunction that resulted in the death of [the worker], due to factors wholly independent of his employment?

5. If not already answered, would the Panel please state whether the worker's death was a result of his occupation as a firefighter?

The Board may submit questions relating to matters enumerated in Section 61(1) to a Medical Review Panel constituted under Section 58. Provisions of the *Act* applicable to a determination under Section 63(1) are set out in Section 63(3), which provides:

> Where this Section is invoked, Sections 59(3), (4) and (5), 60, 61(4), (5), (6) and (7), 62 and 64 apply with the necessary changes and so far as applicable.

Thus, Sections 61(1) and 61(3) are not applicable to determinations under Section 63(1). The responsibility of a Medical Review Panel under Section 63 is to "inquire into and determine the cause of death of the worker."

In conclusion, the employer's appeal is denied. The widow is entitled to a Medical Review Panel inquiry into the cause of death of the worker. The claim file is forwarded to the Medical Review Panel department to proceed with the arrangements for such an inquiry under Section 63.

Editor's Note: This decision has been edited for publication and for the purposes of complying with the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165.

Decision of the Appeal Division

Number: 97-0880
Date: June 27, 1997
Panel: Herb Morton, Anne-Marie Drosso, Judith Williamson
Subject: Criminal Injury — Sexual Abuse Prior to July 1, 1972

By decision dated November 25, 1996 (No. 96-1785), the victim was granted leave to obtain a review of the July 17, 1996 findings and report of the appeal committee. It was noted in Decision No. 96-1785:

> Inasmuch as this case would seem to have involved continuing sexual abuse extending beyond July 1, 1972, it raises the question of whether the abuse that occurred prior to July 1, 1972 and any resulting effects on the victim should be excluded from consideration in assessing her entitlement to compensation under the *Act*. This is a legal question of significance beyond the particular case which has not been addressed by the Appeal Division, in the context of criminal injury compensation.

During her childhood, the victim endured years of sexual abuse by her brother-in-law. The committee found that the abuse began when she was eight years old and continued until she was approximately 15 years old. The offender was charged and convicted of numerous incidents of sexual abuse against other family members.

In a series of decisions issued between June 1988 and July 1994, Board officers in the criminal injury section of the Workers' Compensation Board awarded the victim $9,500 for pain and suffering as well as various other benefits, including wage loss benefits.

By decision dated August 28, 1995, the Board officer noted the report of a psychologist which indicated that virtually all the abuse occurred prior to September of 1972. The Board officer found that the Board's responsibility in this case "is extremely limited and has come to an end." The Board officer found that "no compensation including counseling can be considered for any incidents occurring prior to that date." This was evidently based on the position that the victim could not be compensated for injuries related to the sexual abuse which occurred before July 1, 1972.

In their July 17, 1996 findings and report, the appeal committee denied payment of any further benefits to the victim. The committee concurred with the Board officer in that regard, while also expressing doubts about the extent of any sexual abuse that took place after July 1, 1972. The committee concluded:

> While this Committee concludes that [the victim's] memories of abuse are unreliable, we also have no doubt that she firmly believes them, and has become genuinely disabled by their development through the recall process that began with hypnosis in 1987 and expanded to include more intensive therapy by 1991. Genuine belief, however, does not necessarily mean that one is a victim of crime. [The victim] has already received $9,500.00 for pain and suffering, as well as thousands of dollars in disability benefits, but we have substantial doubts about the extent of sexual abuse that occurred after July 1, 1972. In particular, on a balance of probabilities, we are unable to conclude that those particularly horrific events that have been described to us as occurring after that date did indeed occur. As a result, we have to conclude that little or no injury occurred after the enactment of the legislation, and that the compensation she has received has been more than adequate.

In this decision, we will refer to the provisions of the *Criminal Injury Compensation Act* as it existed prior to the minor changes to wording and numbering made effective April 21, 1997 pursuant to the *Statute Revision Act*.

This case requires consideration as to the effect of Section 25, in relation to the history of continuing abuse over several years and continuing for at least a limited time after July 1, 1972. At issue is whether compensation is payable in relation to the assaults which occurred prior to July 1, 1972, or whether those events are properly excluded from consideration in assessing the victim's eligibility for compensation under the *Act*.

In the text *Criminal Injuries Compensation* (2nd edition, Butterworths), Professor Peter Burns states (at page 3) that in 1960, no criminal injury compensation scheme operated anywhere in the world. He indicates that the first such compensation scheme was brought into force in New Zealand in 1964, followed by other compensation schemes in the United Kingdom, Australia, and most jurisdictions in North America. Twelve provinces and territories in Canada enacted criminal injury compensation schemes between 1967 (in Saskatchewan) and 1988 (Prince Edward Island). Of these, eight Canadian jurisdictions introduced such legislation during the 1970's. The British Columbia *Criminal Injury Compensation Act* was enacted in 1972.

It is evident from this background that any entitlement to benefits under the *Act* must be based in the wording of the *Act*. At common law, victims of crime generally had no right to claim compensation from the state. A victim could sue the offender who had assaulted or otherwise harmed them while committing a negligent or criminal offence — that right continues to exist under Section 10(1) of the *Act*.

When the *Criminal Injury Compensation Act* was enacted in 1972, a victim had the right to bring a legal action against the offender for damages, or to claim compensation. An election was required. This provision was subsequently amended to allow the victim to sue and to claim compensation. Section 10(1) provided:

> Where the cause of the injury or death of the victim is such that an injury lies against some person, the victim or dependant may apply for and receive compensation, bring the action or do both.

Section 10(5) further provided:

> Neither the making of the application for nor the payment of compensation under this *Act* shall restrict or impair a right of action of the Board, victim or dependant against any person liable.

Under Section 10(6), the victim is entitled to receive the amount recovered in a legal action after the costs of the action and execution have been deducted, and the Board has been reimbursed for the compensation paid or payable to the victim.

Decision No. 2 of the Panel of administrators (*Statement of the Duties of the Voting Governors of the Workers' Compensation Board*, August 3, 1995, *Worker's Compensation Reporter,* Vol. 11(3): p. 467), provides that the duties of the administrators appointed under Section 83.1(1) in relation to policy-and regulation-making include (at page 480):

> **4. Criminal Injury Compensation**
> A. determine all policy concerning criminal injury compensation matters

There are no governors' policies concerning the interpretation or application of Section 25. None of the published policies of the governors concerning criminal injury compensation specifically concern victims of sexual abuse.

Section 25 of the *Act* stated:

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

Section 2(2) provided:

> For the purpose of this *Act*, a victim of crime is a person injured or killed in the Province by an act or omission of another resulting from
>
> (a) the commission of an offence within the description of a criminal offence mentioned in the Schedule, ...

Section 6 established a limitation period for claiming compensation. It provided:

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

As the victim's application for compensation was submitted to the Board in 1988, it may be inferred that an extension of time was granted under Section 6.

Section 2(2) provides coverage for an act or omission of another resulting from the commission of a scheduled criminal offence. In other words, the act or omission may be separate from or in addition to the commission of the criminal offence. Reading Sections 2(2) and 25 together, the *Act* provides coverage for injuries or death, resulting from an act or omission that occurs after July 1, 1972, resulting from the commission of a scheduled criminal offence. This wording suggests the possibility that a criminal offence could occur prior to July 1, 1972, resulting in some other act or omission subsequent to July 1, 1972, which could result in injury or death. There is room in the statute to extend coverage to the limits of this chain of events. Of course, the simplest situation is where the offence, act or omission, and injury or death, all occur after July 1, 1972.

The first question to be addressed in interpreting Section 25 is whether it refers:

- To an injury or death that occurs after July 1, 1972, resulting from a criminal act or omission?
- To an injury or death, which results from a criminal injury or act occurring after July 1, 1972?

In other words, is Section 25 concerned with whether the offence (or resulting act or omission) occurred after July 1, 1972, or whether the *injury* occurred after July 1, 1972? The distinction may be significant. For example, in a case involving sexual abuse of a child, the offences may all have occurred prior to 1972. On the other hand, the injury might first manifest itself as a psychological disability when the victim is an adult. It might be argued, on this basis, that the occurrence of the injury happened at the date of the first disablement (which may be several years after the assaults took place).

The time of the victim's disablement can only be relevant, however, if Section 25 takes into account the date of the victim's injury.

Interpreting Section 25 according to the plain meaning of its words and grammatical construction, we find no real ambiguity in the Section on this basis. The plain meaning of the Section is that it is the offence or resulting act or omission which must occur after July 1, 1972. To interpret Section 25 differently would at least require the addition of two commas, as follows:

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

It would require an unduly strained or ungrammatical construction of Section 25 to interpret it as extending coverage in relation to an offence or resulting act or omission that occurred prior to July 1, 1972, based upon the occurrence of a "delayed" injury or death after July 1, 1972.

Further questions raised by the circumstances of this claim are whether there is any basis to conclude that the assaults prior to July 1, 1972, resulted in an act or omission after July 1, 1972 which resulted in injury to the victim, and whether the offences prior to 1972 are compensable as part of a series of offences which continued past July 1, 1972.

A prior published Appeal Division decision (No. 94-1395, *Criminal Injury Compensation Act, Section 25*, November 25, 1994, *Workers' Compensation Reporter*, Vol. 11(2): p. 279) concerned one related issue. That case concerned sexual abuse of a child by her father over several years. The sexual abuse ended prior to 1972, but verbal and psychological abuse continued after 1972. The Panel noted that there is a significant difference between the application of a limitation period, and the application of new rights created by legislation. Thus, the Panel found that the trend in the jurisprudence towards obliterating limitation periods when it comes to cases of sexual abuse was of no relevance to the issue of whether the person comes within the terms of the *Act*. We agree with that reasoning.

The Panel also concluded that this did not involve an issue pertaining to the exercise of a statutory power of discretion. The issue was simply the proper interpretation of Section 25 which entails determining the circumstances to which the *Act* is intended to apply. The Board has no discretion in that regard — either the *Act* applies or it does not. The Panel further concluded (at pages 282–286):

> . . . Put succinctly, as I understand it, counsel's argument is that the wording of Section 25 is broad enough for the *Act* to cover: acts or

omissions that constitute an offence and occur after July 1, 1972; and acts or omissions that result from the commission of an offence but are not themselves an offence and that occur after July 1, 1972. Therefore, according to counsel, the behaviour of the applicant's father after 1972 (his refusal to acknowledge wrongdoing, his verbal abuse, etc.) amounts to an act or omission within the meaning of Section 25.

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

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

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

The father's behaviour, after July 1, 1972 cannot be said to have been the consequence of the offences he committed in the 1960's. The commission of these offences neither formed a necessary nor a sufficient condition for such acts and omissions. The verbal abuse could have occurred, even if no offences had been committed. Similarly, the failure to assist the applicant obtain therapy could have occurred, even if the sexual abuse had been perpetrated by someone else. Furthermore, as counsel herself points out, the father could have behaved very differently after committing the offences. For example, he could have acknowledged his crime and obtained psychological treatment for the applicant or gone with her for therapy. Therefore, as broadly as it may be interpreted, the phrase "resulting from" as it appears in Section 2(2), cannot be stretched to encompass acts and omissions such as the verbal abuse and failure to provide medical treatment. The father's behaviour after July 1, 1972

> was in principle independent from the crimes he committed in the 1960's. There is neither a necessary nor a sufficient connection between this behaviour and the earlier crimes committed.
>
> In light of the above, the father's behaviour after July 1, 1972 does not open the door to the applicant's claim. If they do not constitute the offence, the acts or omissions referred to in Section 25 must at least be causally related to the offence — that is, they must "result from" it. I cannot find that the father's post-July 1, 1972 behaviour "resulted from" the offences he committed in the 1960's.

The Panel found, therefore, that if the acts or omissions referred to in Section 25 do not constitute the offence, they must at least be causally related to the offence; that is, they must "result from" it, in order to establish eligibility for compensation under the *Act*.

Upon examining the evidence in the present case, we find no basis to conclude that the offences prior to July 1, 1972 resulted in acts or omissions after July 1, 1972 so as to support a finding of eligibility for compensation on that basis. Rather, this is a case in which there were independent offences both before and after July 1, 1972.

We have also considered whether the offences committed against the victim may be viewed globally. Where assaults have been made on the victim over several years, extending beyond July 1, 1972, can the events be viewed as a single offence which was not complete until the final assault was committed?

In Decisions No. 95-1476, 1477, 1478 and 1479 (*Criminal Injury Awards*, *Workers' Compensation Reporter*, Vol. 11(3): p. 575), the prior chief appeal commissioner found, at page 581:

> . . . a victim is not compensated for the act (or omission) resulting in an injury. The seriousness of the act (or omission) is not *per se* relevant to the question of compensation. The effect of the act (or omission) is what matters; a victim is compensated for the consequences of the injury arising from the act (or omission) — that is, for the damages, loss, expenses or harm resulting from the injury. An appreciation of the victim's loss is the key to determining the quantum of compensation. In the case of a victim of years of physical and sexual abuse, the victim's past, present and future losses are the combined result of years of abuse. It is reasonable, therefore, to view the victim's claim for compensation as a claim for the combined damages resulting from the years of abuse.

We consider, however, that the issue of determining eligibility for compensation, as opposed to assessing the amount of compensation, must be approached differently by virtue of Section 25 of the *Act*. For the purposes of Section 25, it is the date of the offence or resulting act or omission which is critical in determining eligibility for compensation. In general, once such eligibility is established, the date of the offence or resulting act or omission is no longer of central importance — the effects on the victim are what matter. Thus, fundamentally different considerations apply to the determination of eligibility as opposed to quantum. A difference in approach is required by these separate issues. The first issue is a jurisdictional one — the proper interpretation of Section 25 of the *Act* entails determining the circumstances to which the *Act* is intended to apply. The second issue, with respect to quantum, only arises in respect of injuries found to be within the scope of the *Act*.

While the injuries suffered by the victim may be considered globally, as being due to the cumulative effects of all the assaults suffered by her, this approach is not appropriate for the purpose of establishing eligibility for compensation under Section 25. Given the time span involved and the separate events involved in the abuse suffered by the victim, we do not consider that the assaults may be viewed as one continuous criminal transaction. Where there are offences occurring both before and after July 1, 1972, we consider that Section 25 creates a dividing line which generally excludes from coverage those offences occurring prior to July 1, 1972.

The July 1, 1972 date is, obviously, an artificial distinction as far as the victim is concerned. However, upon careful consideration of the wording of Section 25 and the legislative background, we find no basis upon which to conclude that the intent of the legislature was to provide compensation for offences occurring prior to July 1, 1972 (except in the limited situation where the offence may be said to have resulted in an act or omission after July 1, 1972 resulting in injury to the victim). We consider that the commission of a further offence after July 1, 1972 will generally not constitute an act or omission resulting from an offence prior to July 1, 1972. Rather, the further offence will generally be seen as independent from the prior offences. To conclude otherwise would, in our view, be contrary to the plain meaning of Section 25 of the *Act*. We find that the approach of viewing the assaults on the victim in a global fashion is not tenable in terms of establishing eligibility for coverage under Section 25 of the *Act*. Under Section 25, eligibility is determined with reference to the dates of the offences and/or the resulting acts or omissions of the offender. Eligibility is not determined with reference to the date of injury to the victim.

This is not an issue of curtailing rights. Rather, it involves the creation of limited rights, where none existed in the past. Eligibility for compensation under the *Act* can only be found within the terms of the statute.

We have also considered whether offences committed against a victim prior to July 1, 1972, which were outside the scope of the *Act*, may make a victim more vulnerable or susceptible to a more severe injury in terms of the consequences of any offence occurring after July 1, 1972. This is relevant to establishing the theoretical framework for considering a claim where the victim has suffered prior injuries outside the scope of the *Act*. Can events outside the scope of the *Act* affect the quantum of compensation which may be payable in relation to an offence within the scope of the *Act*?

The *Act* provides guidance on this issue under Section 12. Section 12 provided:

> (1) Where injury is superimposed on an already existing disability, compensation shall be allowed only for the proportion of disability that exists following the injury as may reasonably be attributed to the injury.
>
> (2) The measure of the disability attributable to injury shall be the amount of the difference between the victim's disability before and disability after the occurrence of the injury.

If at the time of a scheduled criminal offence subsequent to July 1, 1972, a victim suffered from an already existing disability, that pre-existing disability would not be compensable. However, the *Act* provides for full compensation in respect of the measure of the disability attributable to injury, which is defined as the amount of the difference between the victim's disability before and disability after the occurrence of the injury. There is, therefore, room for consideration of the evidence in the individual case to determine the relative significance of the events which occurred prior and subsequent to July 1, 1972 for the particular victim, having regard to the provisions of Section 12 of the *Act*.

We find no basis to conclude that the victim is entitled to compensation for assaults suffered by her prior to July 1, 1972. With respect to the victim's claim for compensation in respect of the assaults occurring after July 1, 1972, we agree with the reasoning and conclusion of the appeal committee. In particular, we accept the factual findings of the appeal committee regarding the alleged assaults subsequent to July 1, 1972. Having regard to the extent of compensation already awarded, and the limited evidence of assaults subsequent to July 1, 1972, we find no basis for awarding further compensation to the victim.

Conclusion

The abuse to which the victim was subjected during her childhood appears to have had devastating consequences for her. Under Section 25 of the *Act*, however, the victim is not entitled to compensation for assaults suffered by her prior to July 1, 1972.

We do not find the victim entitled to any additional compensation in respect of the limited events occurring after July 1, 1972. We agree with the reasoning and conclusion of the appeal committee.

Editor's Note: This decision has been edited for publication and for the purposes of complying with the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165.

Decision of the Appeal Division

Number: 96-1900
Date: December 11, 1996
Panel: David Van Blarcom, Patrick L. Byrne, Jill M. Callan
Subject: Determination of who is the employer and whether multiple classification assigned is appropriate

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The employer appeals a decision of the manager of assessments dated November 22, 1995. The issue is whether the manager erred in law or fact or contravened a published policy of the governors in adding the subclassification of bridge construction (072507) to the appellant's prior classification in the subclass of building construction (070600).

General Background

The appellant is a general contractor which has participated in a number of substantial building and industrial construction projects. The employer was assigned its present registration in the subclass of building construction (070600) as of April 8, 1991. It was the successor to firms which had been assigned to the additional subclass of the industry of "bridge construction administration," although there is no indication on the assessment file of prior payroll actually assessed in the bridge construction subclass. From time to time, additional subclasses have been assigned and deleted, as the appellant has been involved in projects involving generator installation and tunnel construction.

In 1995, the appellant successfully bid on a project to construct a bridge [which was part of a much larger highway project]. The bridge project had a contract value of [several million dollars]. The appellant bid on the bridge project on the basis of it being assessed at its building construction rate which in 1995 had a basic rate of $6.71 per $100 of payroll. The bridge construction continued for 14 months.

The highway construction is based on a somewhat complex system of contractual arrangements between the contractor, the unions and various government authorities. The arrangements will be explored in more detail below but, in brief, the construction workers on site are, for industrial relations purposes, employed by Company A, which is a wholly owned subsidiary of Company B. Company A provides the workers to the

contractor, and coordinates many dealings with the WCB, including remittances of assessments on behalf of the contractor for the work force provided. The contractor then directs and supervises the employees on the site.

On June 26, 1995 the accounts officer spoke to the appellant and recorded:

> I asked him for the Total Payroll for the project, he is going to have someone call me with the figure. I advised . . . that if the total payroll is $200,000.00 or over we would be adding the Bridge construction class to the Account
>
> [reproduced as written]

The employer appealed the decision of the accounts officer to a unit manager, who wrote the employer on July 17, 1995:

> Your company derives 98% of its revenue from building construction and 2% from bridge construction. The total payroll for the bridge construction could be approximately [several hundred of thousands of dollars] which includes payroll for [the employer's] staff and subcontractors. There are [a few] employees of [the employer] involved in the project and their estimated earnings will be approximately $200,000. . . .
>
> We also have to use our discretion and decide whether a particular operation of a firm is a significant factor in another specific industry. If this is the case, then to be equitable, the company should be assigned the same classification as its competitors.
>
> I understand that the bridge construction is being carried out for [Company B] who awarded the contract to your company. Therefore, in my view it is not part of any general building construction presently being undertaken by your company and must be deemed to be a separate project. In my view the payroll involved and the revenue expected is clearly one where an additional classification is justified.

The employer appealed that decision to the director of assessments and, in his written submission dated September 7, 1995, the appellant's lawyer systematically reviewed the criteria in Policy No. 30:20:20 in the *Assessment Policy Manual* and wrote:

> Finally, there is the $200,000 factor. There must be $200,000 in payroll for the individuals listed in the first of the criteria in order for this factor to weigh in favor of multiple classifications. These

> individuals must be *exclusively* assigned to the bridge project. There is no one who fits that requirement.
>
> Even if one were to look at the [few] personnel whose primary duties relate to the bridge, their payroll is less than $200,000. The factor requires that it exceed $200,000. The information provided earlier to the Board was that it was approximately [a few hundred of thousands of dollars]. Please advise on what basis the Board determined that it exceeded $200,000.

Thus, the appellant raised the issue that the work force provided by Company A was not its workers for workers' compensation purposes by arguing that only the supervisory personnel payroll should be considered for the purposes of the $200,000 payroll factor in the third condition.

A manager replied to the appellant's request for a review on behalf of the director. In her letter dated November 22, 1995, which is the decision appealed from, the manager said:

> . . . With respect to the third criteria, I agree that the bridge construction does not generate at least 25% of your client's revenue. I do not agree, however, that the job could not stand alone as an independent business. Bridge construction is recognized as a separate business and the work is not being done to support other projects or contracts your client has.
>
> You have stated that the payroll for the project management personnel whose primary duties relate to the bridge construction would not exceed $200,000. I would point out that based on the contractual agreement your client has with [Company A], all labour costs are charged back to your client.
>
> The term "*generally*" used in the third criteria deliberately affords flexibility with respect to this point. The last sentence under this point reads "*discretion will be exercised to recognize that an operation of a firm which has a significant presence in a specific industry should be classified the same as it's competitors.*" It is my view that a [several million dollar] contract is significant.
>
> It is my view that the criteria of Policy No. 30:20:20 has been met. I would confirm Classification 0725 for this project is correct.
>
> [reproduced as written]

Employer for Workers' Compensation Purposes

The issue of the proper employer of the labour for workers' compensation purposes was raised by the appellant and its lawyer, and was considered by the director and manager in coming to the decision appealed from. The panel therefore felt it must consider that issue in this appeal and invited Company A to participate. The panel obtained a copy of a [British Columbia] Labour Relations Board (LRB) decision referred to by the director of assessments.

At the Appeal Division hearing, Company A called its general manager as a witness to explain the contractual arrangements between the various parties to construct projects on the highway project. He was also its principal witness in the LRB case.

Company A and Company B have entered a labour force agreement which provides that Company A will provide the labour force for the construction. Clause 5.1 of that agreement says:

> It is recognized and agreed that [Company A] as employer of the labour force shall have full and complete authority in the conduct of all aspects of labour relations for the development including, without limitation: . . .
>
> accommodation, transportation, recreation, Workers' Compensation and unemployment insurance. . . .

By paragraph 6 of that agreement, Company A covenants with Company B to promote and maintain harmonious labour relations for the project. The tender documents provided to the appellant by Company B provided that bidders must meet the safety qualification of having complied with the pre-qualification procedures for bridge construction and painting developed by the province. Company B also provided a schedule which was an information document for bidders explaining the working relationship between the contractor and Company A. Paragraph 3 of the schedule set out the purpose of Company A as follows:

> [Company B] desires to ensure that the Work is carried out with maximum labour stability and to avoid, as far as possible, any dislocation of the economy of British Columbia by reason of labour problems and costs associated with the Work. Further, [Company B] desires to ensure economic and social development through the provision of employment to qualified local residents, B.C. residents and First Nations people in British Columbia, to ensure economic benefit to contractors and local companies, to ensure the efficiency of

> the work, and to maximize cost-saving measures, to encourage affirmative-action programs and employment for First Nations people, women in non-traditional job classifications, visible minorities, disabled or other identified target groups, to improve training and apprenticeship programs for local residents and First Nations people, and to promote good stewardship of the natural environment through expanded management's right to make and enforce rules for environmental concerns. To achieve these objectives, [Company A] was formed to employ the Labour Force for the Work and to manage labour relations matters for the Labour Force.

Paragraph seven of the schedule said:

> Sole responsibility for the management, operation, direction, supervision and performance of the Work by the Labour Force will be delegated to the Contractor but [Company A] will be the employer of the Labour Force.

The witness for Company A said paragraphs three and seven were correct summaries of the purpose of Company A and its working relationship with the contractors.

The appellant, as a successful bidder, entered a contract with Company B. One of the terms of that agreement is in a schedule which says:

> The contractor will be required to enter into an agreement with [Company A] for the supply of labour to perform the Work under this agreement, as detailed in the contract documents. . . .
>
> **The Workers' Compensation Board of B.C. assessment rate for this contract will be established by using the Contractor's own assessment rate for the type of work involved.**
>
> [reproduced as written]

Section 1.07 of that schedule says that the contractor will be the "principal contractor" under the terms of the *W.C.B. Industrial Health & Safety Regulation* 34.16. Section 1.08 states that the work will be undertaken in accordance with the provisions of a formal occupational safety & health program, which the contractor must provide for approval by Company A.

Labour relations on the project is governed by a collective agreement between Company A and a council of trade unions. Article 16.100 says workers will:

> . . . while in the employ of the Employer, be bound by the safety rules and regulations as established by the Contractor, Employer and Owner. Upon commencing employment the Contractor and the Employer shall fully acquaint employees with these rules and regulations. . . .

Article 20.200 states that protective clothing and safety equipment as required by the Industrial Health & Safety Regulations of the *Workers Compensation Act* will be provided by the contractor and article 20.300 says Company B will ensure that the contractor is responsible for providing sanitary facilities and keeping all areas free of hazards and debris.

The agreement between Company A and the appellant provides that the contractor will obtain from Company A assignment of all the labour force required by the contractor to perform the work. The contract also says the contractor will be solely responsible for the day-to-day management operation, direction, supervision and performance of the work by the labour force while Section 6.2 of the agreement says the contractor will not in any way obstruct or interfere with Company A's ability to comply with the collective agreement. By Section 19.1, Company A delegates to the contractor its rights to manage, operate, direct and supervise the labour force on a day-to-day basis.

The parties submitted that much of the control in the choice of the work force came, not from either the appellant or Company A, but from the trade union council. The appellant was entitled to appoint its own site supervisor and was able to name request its crew leader. It was also entitled to name request 5 out of the next 10 employees.

The appellant said it had a work force of roughly 20 people on the project, although that force could have peaked at 35. Of those, 10 or 11 would have been former employees, including the [few] supervisors. The [few] supervisors remained on the employer's direct payroll rather than on the Company A payroll. In addition, there was considerable support for the project by the appellant's head office staff. That staff performed extensive project engineering as well as estimating and purchasing of materials such as form work and scaffolding. Those head office staff were the same staff as were used on all the appellant's building projects.

Company A and the appellant do not accept the director's characterization of Company A as the general contractor and the appellant as the subcontractor, as set out in his memo of November 20, 1995. The parties to this appeal take the position that Company

B is the owner in that, through the government, it owns the property and issues the tenders. The Company B project team is the project manager for the tenders. The parties' position is that the appellant has contracted with the owner and therefore is a primary contractor. Company A resists being characterized as either a contractor or a subcontractor and says that its "business" is not building highways, but simply providing a labour force.

The workers receive a paycheque drawn on the account of Company A, although the cheque is annotated that it is payment for work on the appellant's project and the paycheque is handed to the worker by the appellant's staff. The funds for the payroll are in fact provided by the appellant, who pays them to Company A.

The WCB has taken the position that, while Company A is the employer of record, the particular contractor is the employer for workers' compensation purposes. In practice, it is Company A which turns in the "form 7" employer's report of accident; through an arrangement with the WCB, the form is coded so that the cost of a claim flows through to the contractor for experience rating purposes. Also, Company A remits payroll assessments to the Board on behalf of the contractor and for that reason requests the experience rating from the Board before the first payroll.

Company A employs two safety officers who move from site to site on the highway project. Company A sees the role of its safety officers as providing a resource to contractors, without usurping the basic responsibility of the contractors for on site safety. Company A says it has no direct power to intervene or to enforce safety on the sites. If it finds an unsafe situation, it draws it to the attention of the contractor's representative who is then expected to take the necessary remedial action. Company A is more likely to become involved if the safety issue becomes a labour relations issue; while the contractor has the authority to require a worker to leave the site, only Company A has the power to terminate the worker. Likewise, Company A might become involved if a worker refused to work because he or she felt the work was unsafe. Correspondence on the Company A prevention file showed an example of a contractor objecting to Company A interfering on a safety issue.

Reasons and Decision as to Employer of the Workforce

The purposes of the *Workers Compensation Act* are best attained by making the appellant the employer for workers' compensation purposes.

The contractor has supervisors on the worksite who can supervise and correct unsafe situations, while Company A has no power to correct an unsafe work situation on the site. If Company A were the employer for compensation purposes, there would be fewer incentives for the contractors to focus on safety.

The contractors would have a reduced financial incentive to make safety a priority if they did not bear the consequences of claim costs in their experience rating. Moreover, contractors with a high demerit experience rating would experience a windfall if their contracts on the highway project were not subject to assessment at their experience rated rates.

Thus, there are several ways in which the purposes of the *Workers Compensation Act* in promoting safety could be attained by recognizing the appellant as the employer for worker's compensation purposes. Nevertheless, the panel was concerned as to whether the fact that Company A was the legal entity employing the workers for labour relations purposes precluded the recognition of the contractor as the employer for workers' compensation purposes.

Section 1 of the *Workers Compensation Act* says:

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

Counsel for Company A noted that the definition uses the word "includes," and therefore is not an exclusive definition. He cited the Board policy with respect to lent or seconded employees, as set out in Policy No. 20:10:30 of the *Assessment Policy Manual*. That policy says:

> 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 of determining whether an employment relationship exists are applied with the necessary modifications *(Workers' Compensation Reporter* Decision # 229).

Decision No. 229 is reported at *Workers' Compensation Reporter*, 1977, Vol. 3: p. 75. In that decision, the former commissioners reviewed the discussion of lent employees in *Larson's Workmen's Compensation Law* (1973 edition, paragraph 48.00). The former commissioners cited the importance of the word "includes" as to whether a worker had to in fact be under a contract of service and found that the definition of employer did not require a contract of service. The former commissioners said at page 79:

> 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 then 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) in 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."

Counsel for Company A submitted that, while the Company A employees might not be "lent" employees per se, the policy of "lent" employees illustrates that employees can be workers "in substance" for a firm for workers' compensation purposes, even though there is not a contractual relationship between that firm and the workers.

We find the employees provided by Company A to the contractor are "lent" employees within the meaning of the policy. Usually, in a lent worker situation, the company loaning the employee will have some ongoing business of its own, which is promoted

by loaning the employee. That is not the case here, in that Company A only exists to provide workers to contractors on the highway project. Nevertheless, the essential requirements of Policy No. 20:10:30 are present.

While the workers are employed by Company A for labour relations purposes, the work being done is essentially that of the contractor and the contractor has the right to control the details of the work, especially those with respect to health and safety. As in Decision No. 229, we find this analysis does not require a piercing of the corporate veil.

We find the appellant is the employer for the purposes of the *Workers Compensation Act*.

Reasons and Decisions as to Multiple Classification

Policy No. 30:20:20 permits a firm to be assigned two or more classifications when it is engaged in two or more industrial activities. The policy permits separate classifications only on the basis of industrial undertaking, not on the basis of the occupation of the workers. The policy says:

> For an operation to be considered a separate industry and classified separately, it must be separate and distinct. To meet this criteria [sic], the following conditions must be satisfied: . . .

There is no question in this appeal that bridge construction (subclass 072507) is a separate industry from building construction (070600). However, to be classified separately, it must be an operation which is separate and distinct from the firm's primary industry. In other words, is this firm's bridge building operation a separate and distinct operation from its building construction operation?

The policy sets out three conditions (which are sometimes referred to as "criteria") for determining whether the general criterion of "separate and distinct" has been met. Some of the conditions themselves contain a number of other factors. In the use of the words "and," "must," and "conditions," the policy is clear that all three conditions must be met for multiple classification.

The first condition is:

> 1. The operation must be one which is performed by specific personnel as their sole function.

The workforce provided by Company A are specific personnel performing the work of the appellant employer as their sole function. That is also true of the three supervisory personnel.

The appellant submits the "head office" personnel contributed work to the project as a part of their general duties. That included project engineering and design, as well as estimating and purchasing materials such as form work and scaffolding. The district health and safety supervisor was responsible for the bridge project as well as for the firm's other construction projects. The head office staff were engaged in the bridge construction project on an ongoing basis, but not solely.

Any time there is a single firm involved in separate industries, there may be head office resources which are not exclusively devoted to either industry. The overriding criterion in the policy is that for an "operation" to be classified as a separate industry, it must be "separate and distinct." To be a "separate and distinct industry" does not necessarily require it to be able to stand alone as an independent business, as that requirement is listed as only one of the factors considered in the third condition, which is discussed below.

The examples given in the policy do not suggest an intention to necessarily include head office staff in the staff performing the operation. The policy gives the example of dual classification being given to a major canning company which had both farming operations and a processing operation. Individuals worked on the farm for a continuous period of time, and then transferred to the processing plant. We presume that, in the example, there were head office staff whose activities supported the activities of the workers both while on the farm and while in the plant. That approach is consistent with Policy No. 30:20:21, which provides for pro-rating the payroll of administrative staff for firms with multiple classifications.

In this case, there was a clearly identified work force separately accounted for performing the bridge construction. We do not find the manager erred in finding the first condition was met.

The second condition is:

> The product or service must be offered to the public at large with the intent of producing revenue from sales to non-affiliated companies. The operation must not be an incidental, supportive, inescapable or ancillary part of the firm's main industry.

The second condition is divided into two parts. The first part is whether the product or services are offered to the public at large with the intent of producing revenues from sales to non-affiliated companies. There is no issue taken with the assessment manager's position that the bridge construction was done with the intent of producing revenue from a non-affiliated firm.

The first paragraph of Policy No. 30:20:20 provides some definitions and illustrations of the terms in the second condition:

> . . . a machine shop will be classified as such if that is the industry in which the employer is doing business, but a machine shop or group of machinists which operates within a boat yard will be considered incidental and supportive to the boat yard operations. Incidental is where an operation, regardless of whether separated by location or payroll, exists to service the prime industry of the firm. Additionally, separate classifications are not allowed if the operation or activity is a supportive, inescapable or an ancillary part of the firm's main industry. For example, a manufacturing firm which maintains a sales division or sales outlet to sell its own products is not accorded a separate sales category but, rather, the sales are considered an inescapable part of the firm's manufacturing industry.

The appellant argues that bridge construction is incidental to its "general construction" business, in that it uses the same head office resources as other construction projects. However, the appellant's main industry for workers' compensation purposes is not "general construction"; there is no such industry recognized by the Board for classification purposes. The issue is whether the appellant should be classified in the industry of bridge construction in addition to its classification in the industry of building construction. While the appellant may be involved in the construction of other works, we agree with the assessment manager that construction of this bridge was not incidental, supportive, inescapable or an ancillary part of its main industry of constructing buildings. We therefore find that this condition for multiple classification has also been met.

Most of the evidence and argument in this appeal was addressed to the third condition, which is:

> 3. Generally, the operation must generate at least 25% of the firm's revenue. (The flexibility afforded by the term "generally" exists to allow discretion in this area. In addition to revenue, consideration will also be given to the operation's ability to stand alone as an independent business and/or physical separation of the operation

and/or assessable annual payroll for the specific personnel mentioned in criteria [sic] 1 in excess of $200,000. Discretion will be exercised to recognize that an operation of a firm which is a significant presence in a specific industry should be classified the same as it competitors.)

The assessment manager noted that the revenue from the bridge project did not generate at least 25% of the firm's revenue. Indeed, the evidence is the bridge project only generated [a small percentage] of the appellant's revenue over the 14 months of the construction. The evidence is also that this was the appellant's first bridge project in several years, and there were no other bridge projects underway or foreseen.

The manager then went on to justify her discretion in departing from the general requirement of 25% by considering the factors in parentheses. We agree that the discretion to depart from the 25% standard should be exercised by reference to the four factors. The policy begins by stating three conditions must be met, and then enumerates three conditions. Following the numeral "3," is a statement that "Generally, the operation must generate at least 25% of the firm's revenue." We take that to be the third condition. In parentheses after that condition is a statement that there is discretion "in this area," which we take to be the "area" of the 25% revenue requirement. The portion in parentheses then goes on to list four matters which will be considered "in addition to revenue." We find that those matters are considered "in addition to revenue" in order to exercise the discretion to be flexible as the amount of revenue. If that were not the case, then the factors that follow would simply be additional conditions, and would expand the number of conditions from three to seven. The factors are clearly not mandatory conditions in the sense of the three enumerated conditions, as three of them are separated by the conjunction "and/or."

We can appreciate the need to provide some flexibility in determining what an appropriate level of revenue is. A fixed figure can be arbitrary and unfair, depending on other circumstances of the firm and its operations, including its size and the nature of its business and industry. Twenty-five percent is a substantial portion of a firm's business, and the factors which follow in parentheses provide other indications of the significance of an operation, both in the context of the firm and of the marketplace. For clarity, the four factors may be summarized as:

1. Is the operation able to stand alone as an independent business?
2. Is the operation physically separated from the main operation?

3. Does the payroll of the specific personnel mentioned in the first condition exceed $200,000.00?

4. Is the operation a significant presence in the industry, such that it should be classified the same as its competitors?

In considering the first factor, the assessment manager found the operation could stand alone, on the basis that "bridge construction is recognized as a separate business." The manager appears to be saying that, because bridge construction is recognized as a separate industry for classification purposes, that recognition is evidence that a bridge construction project can stand alone as an independent business. The purpose of the multiple classification policy is to determine whether an operation which is capable of being classed in a recognized industry ought to be assessed in that industry. To restate that the industry in question is a recognized industry simply begs the question.

On the other hand, we interpret "stand alone as an independent business" as meaning "able to sustain itself as an enterprise." In those terms, the factor provides useful evidence as to whether the operation is a significant one within the context of the third condition.

In this case, we find the bridge project could not stand alone as an independent business. It was essentially a one-time operation, and did not have the means to sustain itself once this bridge was finished. While the firm could take on new bridge projects from time to time, the evidence is it did not. This was its only bridge project in several years, and was not the first in a new enterprise of bridge building (insofar as can be determined from the evidence at this point. It is a weakness of the policy that a firm may not be extensively involved in an industry at the time a particular project is adjudicated for multiple classification, when in fact that project could prove to be the first of a series).

The second factor, that of physical separation, was not discussed by the assessment manager. The bridge project was not any more separated from the main firm than any construction project is, of necessity, physically separated.

With respect to the third factor, the payroll clearly exceeded $200,000, once the payroll for the workers provided by Company A is included. At the Appeal Division hearing, the employer said the [several hundred of thousands of dollars] figure indicated in the earlier correspondence was not correct, but estimated the payroll on the bridge project was about [several] per cent of its total payroll for the period. Thus, the payroll figure does not contradict the revenue figure, and both figures are consistent in indicating the project did not represent a significant portion of the appellant's business. As we have found the payroll size to be only one factor to be used in considering whether to

deviate from the 25% norm, we do not find that, in itself, it serves as a condition or criterion in place of the 25% condition.

The fourth factor considers whether the operation has a significant presence in the marketplace, and grants a discretion to recognize such a presence. However, the manager does not offer any basis for finding that a [several million dollar] contract is significant, except that it is her view. [The sum in this case] is a large amount of money in many contexts, but the evidence in this case is that a contract of that size is not a significant presence in the bridge construction industry. The employer called as a witness a senior government manager who gave evidence that this contract represented [a few per cent] of the $163 million in bridge construction contracts issued in 1995. The proportion would be smaller if contracts let by municipalities and railroads were considered.

If the operation is a significant presence in the industry, then the factor permits a discretion to classify the operation the same as its competitors. We note that a project which is a small part of a general contractor's business might be a significant part of a specialist contractor's business. The specialist contractor might be placed in an unfair competitive position if it was required to the pay the bridge construction rate, and the larger general contractor only had to pay the building construction rate. Policy No. 30:20:10 discusses in general the method of assigning classifications and says:

> Classifications are assigned to accounts on the basis of the industry in which the employer is operating. In assigning the classification, some of the factors considered are the type of product or service that is being provided and the type of industry with which the employer is in competition. It is desirable that the assessment classification system not be an economic factor in the way business is conducted in the province.

The appellant's evidence was that the information as to who submits a tender is confidential, but the information as to who picks up tender documents is not. The employer said all the firms who picked up tender documents for this project were large general contractors.

While the fourth factor gives a discretion, it also sets out the relevant considerations for exercising that discretion; namely, the significance of the operation's presence in the industry and the classification of its competitors. In this case, there is no indication the manager based her discretion on any consideration but her own view. We find that, upon obtaining the necessary evidence, the operation of this single project was not a significant presence in the bridge building industry and that the bridge construction classification was not necessary to "even the playing field" for competitors.

Therefore, in considering the third condition, we note that the operation generated only [a few per cent] of revenue, rather than the 25% which is generally required to support multiple classification. Using the revenue test alone, the operation was not a substantial part of the firm's business.

The four factors provided in parentheses do not indicate the operation was a substantial one, either in the context of the firm's own business, or in the context of the industry of bridge construction, and do not support essentially ignoring the 25% norm.

Policy No. 30:20:20 is set out on pages which are numbered "page 1 of 4" through "page 4 of 4." On an unnumbered, untitled page on the back of "page 4 of 4" is a flow chart, which appears to describe the decision making process for multiple classification. The chart was not referred to by the parties in their submissions, and it is not clear what its policy status is, or that it is entirely consistent with the written policy in the four pages which precede it. We do not find we have to embark on a close analysis of that chart for the purposes of this decision. However, we do note that one box says: "Does the operation account for 25% or more of the firm's total revenue?" If the answer is "no," the chart suggests asking "Should a waiver of this requirement be considered?" If the answer is again no, the chart suggests the operation should be regarded as "unassigned." If a waiver should be considered, then it asks: "*Classification Committee* waive requirement?" (emphasis in original) If the classification committee does waive the requirement, the chart suggests assigning the appropriate classification.

While the status of this chart as policy is open to question, it at least supports the employer's contention that in practice the 25% standard is routinely required in practice. Indeed, it suggests that a waiver of that requirement is not given by an assessment officer or even by a manager, but by the classification committee.

For all the reasons set out above, we do not find the third condition (criterion) of Policy No. 30:20:20 for multiple classification has been met in this case and, as a result, the subclassification of bridge construction must be removed for the project in question, and the payroll for that bridge project assessed at the firm's primary rate of building construction.

In bringing this appeal, the appellant initially relied heavily on an unpublished decision of the Appeal Division which also dealt with bridge construction on the highway project, No. 95-1085. We did not find that decision applicable to the facts of this case, but we do reiterate the final sentence of that decision:

> As the employer observes, there may well be valid policy objectives for assessing employers separately for exceptional projects; however, the present Policy No. 30:20:20 is not well suited to that task.

In this case, the Board has sought to use the policy in an expansive way to impose a multiple classification. The employer has submitted that the policy is more commonly used by the Board in a restrictive way to deny applications by firms for multiple classifications. He submits that in those cases, the Board is quite strict in, for example, requiring that the 25% threshold be met.

We do not find it necessary to make findings on that submission; however, we do note that, in this case, the ambiguity in the drafting of the policy has created a difficulty for the firm in properly bidding on this project and thus planning its affairs, and has created a difficulty for the Board in determining the proper assessment on the project. We therefore recommend that the Panel of Administrators thoroughly review the principles of multiple classification and how they might be clearly embodied in policy.

Having found a contravention of the published policy of the governors, the employer's appeal is allowed as provided above.

Editor's Note: This decision has been edited for publication and for the purposes of complying with the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165.