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- *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 W.C.B. system*
- *Protection of the public interest*

Sections and excerpts from the *Workers Compensation Act*, Revised Statutes of British Columbia, Chapter 492 are provided for convenience and are to be used for informational purposes only.

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



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Resolution of the Panel of Administrators

Number: 2001/10/15-03

Date: October 15, 2001

Subject: Calculation of Interest

WHEREAS:

Pursuant to section 82 of the *Workers Compensation Act*, R.S.B.C. 1996, Chapter 492 and amendments thereto ("Act"), the Panel of Administrators ("Panel") must approve and superintend the policies and direction of the Workers' Compensation Board ("Board"), including policies respecting compensation, assessment, rehabilitation and occupational safety and health, and must review and approve the operating policies of the Board;

AND WHEREAS:

The Board's policy regarding interest on retroactive payments of compensation is provided in policy item #50.00 of the *Rehabilitation Services and Claims Manual*;

AND WHEREAS:

Interest is provided on retroactive wage-loss and pension lump-sum payments where the benefit is for a condition which was previously overlooked or for which the Board previously decided that no payment was due;

AND WHEREAS:

Board policy provides a monthly compound rate of interest that is equal to the average rate of return on the Board's total investment portfolio;

AND WHEREAS:

The same interest rate is also used with respect to assessment and prevention matters;

AND WHEREAS:

The Policy and Regulation Development Bureau has conducted extensive consultation with stakeholders regarding the appropriate criteria for entitlement to interest and the method of payment calculation;

THE PANEL OF ADMINISTRATORS RESOLVES THAT:

1. Policy item #50.00 of the *Rehabilitation Services and Claims Manual* is amended to provide simple interest at a rate equal to the prime lending rate of the banker to the government (i.e., the C.I.B.C.). Policy item #50.00 is also amended to restrict the period of time interest may accrue to a maximum period of twenty years.
2. Policy item #50.00 is also amended to provide new criteria for determining when it is appropriate for the Board to pay interest in situations other than those expressly provided for in the Act. The amended policy will provide for interest on retroactive wage-loss and pension lump-sum payments where it is determined that a blatant Board error necessitated the payment. For an error to be “blatant” it must be an obvious and overriding error.
3. Policy items #48.42 and #105.30 of the *Rehabilitation Services and Claims Manual* are amended to provide consistency with the amendments to policy item #50.00.
4. Policy No. 40:70:40 of the *Assessment Policy Manual* is amended in order to provide consistency with the amendments to policy item #50.00 of the *Rehabilitation Services and Claims Manual*.
5. The amendments to policy items #50.00, #48.42 and #105.30 of the *Rehabilitation Services and Claims Manual* and policy no. 40:70:40 of the *Assessment Policy Manual*, as attached, are approved. If there is any inconsistency between the wording in the general wording of items 1-4 inclusive of this Resolution and the specific wording in the attachments hereto, the wording in the attachments shall prevail.
6. The amended policies are effective November 1, 2001, and will apply to all decisions to award or charge interest on or after that date. When calculating the amount of interest payable, the new method for determining the applicable rate of interest will apply retrospectively and will be used for the entire entitlement period and will not be limited to entitlement for time periods after November 1, 2001.

DATED at Richmond, British Columbia, October 15, 2001.

Appendix 1

REHABILITATION SERVICES AND CLAIMS MANUAL **PROPOSED AMENDMENTS** *[Deletions Struck Through, Additions in Bold]*

#50.00 Interest

Effective May 7, 1984, interest is paid to workers or employers on retroactive wage-loss and pension lump sum payments subject to the following conditions:

1. ~~The decision to award interest is made by the Claims Adjudicator, Disability Awards Officer or Adjudicator in Disability Awards, as the case may be.~~
2. ~~Interest is paid when the wage loss or pension is for a condition which was previously overlooked or for which the Board previously decided that no payment was due.~~
3. ~~No interest is paid unless the commencement date of the retroactive benefits is more than one year prior to the date the retroactive payment is being processed. Interest is calculated from the first day of the month following the commencement date of the retroactive benefits.~~
4. ~~For each year in respect of which compensation is retroactively paid the rate of interest will equal the average return on the Board's total investment portfolio for the preceding year.~~

The annual effective compound rate of interest used with respect to retroactive wage loss and pension/cash award payments will be:

1998	11.40% (for calculations made after March 31, 1998)
1999	11.30% (for calculations made after March 31, 1999)
2000	12.6% (for calculations made after March 31, 2000)
2001	10.6% (for calculations made after March 31, 2001)

If required, earlier figures may be obtained by contacting the Board.

The interest rate applicable to the preceding year will be used for any period in the current year where the new rate has not yet been established.

Interest will be calculated up to the end of the month preceding the decision date.

For practical reasons, certain mathematical approximations will be used in the calculations.

The above principles are applied to all cases where full processing has not been completed by May 7, 1984.

These rates of interest are also used in the calculation of overpayments as outlined in #48.42.

With respect to compensation matters, the Act provides express entitlement to interest only in the situations covered by sections 19(2)(c) and 92(3). In these situations, the Board will pay interest as provided for in the Act (see policy items #55.62 and #105.30).

The Board has discretion to pay interest in situations other than those expressly provided for in the Act. In these situations, interest may be paid subject to the following conditions:

- The retroactive payment is to a worker or employer in respect of a wage-loss payment (provided under sections 29 and 30 of the Act) or a pension lump-sum payment (provided under sections 22 and 23 of the Act).
- It has been determined that there was a blatant Board error that necessitated the retroactive payment. For an error to be “blatant” it must be an obvious and overriding error. For example, the error must be one that had the Board officer known that he or she was making the error at the time, it would have caused the officer to change the course of reasoning and the outcome. A “blatant” error cannot be characterized as an understandable error based on misjudgment. Rather, it describes a glaring error that no reasonable person should make.
- Interest will be calculated from the first day of the month following the commencement date of the retroactive benefit and up to the end of the month preceding the decision date. Notwithstanding, in no case will interest accrue for a period greater than twenty years.

In all cases where a decision to award interest is made, the Board will pay simple interest at a rate equal to the prime lending rate of the banker to the government (i.e., the CIBC). During the first 6 months of a year interest must be calculated at the interest rate as at January 1. During the last 6 months of a year interest must be calculated at the interest rate as at July 1.

For practical reasons, certain mathematical approximations may be used in the calculations.

The rate of interest provided in this policy will also be used in the calculation of overpayments as outlined in #48.42.

Appendix 2

REHABILITATION SERVICES AND CLAIMS MANUAL **PROPOSED AMENDMENTS** *[Deletions Struck Through, Additions in Bold]*

#48.42 Recovery Procedures for Overpayments

If, at the time of the discovery of the overpayment, payments are still being made on the claim, the amount of any overpayment will be recovered from those payments. The Board officer will as far as possible do this in a manner which causes the least hardship to the worker. Normally, the Board officer will recover the amount owing by instalments. If payments of the claim are terminated by the time the overpayment is discovered or before full recovery can be obtained, the procedures outlined below are followed. If an appeal against the overpayment is lodged however, re-collection procedures are as outlined in #48.46.

1. The Vocational Rehabilitation Services and Claims Departments will conduct the initial collection procedure which will include the Board officer making personal contact with the claimant in addition to sending two letters, one immediately and one 30 days later. For overpayments in excess of \$500, the second letter advises that unpaid accounts will be turned over to the Board's Collections Section.
2. When the overpayment is 70 days overdue it will be sent to the Board's Collections Section. Unless there is evidence of fraud or misrepresentation, claims for overpayments under \$500 are not sent to Collections.
3. A letter will be sent to the claimant by a Collections Officer at the 70-day overdue date indicating that the overpayment has been transferred to the Board's Collections Section and suggesting that payment be made within a month in order to avoid possible legal action. This letter will make it clear that the Board is serious about collecting the overpayment.
4. If payment is not received within 30 days, or a reasonable payment plan arranged, the Collections Officer will attempt to make telephone contact with the claimant or pay a personal visit.
5. If this does not result in positive arrangements for payment, a final, more strongly worded letter will be sent. An asset search will be conducted and if there is a reasonable expectation that money is collectible, the account will be turned over to the Board's Legal Services Division for attention and action. The result of this action could be the seizing of assets or garnisheeing wages.

Item #50.00 sets out the procedures regarding the crediting of interest to retroactive wage-loss and pension payments. ~~There is no time limit on the awarding of compound interest. To be equitable, the same principle is applied to the charging of interest on monies owed to the Board.~~ In the case of claims overpayments, interest charges only apply to amounts due where

the overpayment is the result of fraud, misrepresentation or the withholding of information by the worker. Interest is not charged on overpayments that result from the correction of an error. The charging of interest on an overpayment must be approved by a Manager or a Director.

In the case of doctors and other health care benefit payees, overpayments are handled by the Board by making a deletion from future payments. There is no attempt by the Board to obtain the recovery of such an overpayment from a worker who received the health care benefits unless the costs of the health care benefits were paid directly to the worker.

Appendix 3

REHABILITATION SERVICES AND CLAIMS MANUAL **PROPOSED AMENDMENTS** *[Deletions Struck Through, Additions in Bold]*

#105.30 Implementation of Review Board Findings

Section 92 provides as follows:

1. “Where a claim is allowed by the review board, periodic payments must commence, and a lump sum under section 17(13) must be paid; and an amount so paid is not, in the absence of fraud or misrepresentation, recoverable from the worker or dependants.
2. Notwithstanding subsection (1), where a finding of the review board is appealed under section 91 or reopened or reheard under section 96, payment of any compensation that has not yet been paid with respect to the period prior to the finding of the review board must be deferred until the date on which the Appeal Division makes its decision or redetermination under section 91 or 96, as the case may be.
3. If the Appeal Division decision is in favour of the worker or his dependants, interest
 - a. calculated in accordance with the policies of the governors, and
 - b. beginning 31 days after the date on which the review board made its finding or beginning on an earlier day determined in accordance with the policies of the governors must be paid on compensation that has been deferred under subsection (2).”

The procedures for implementing all review board findings are as follows:

1. Any benefits payable from the date of the review board finding forward will be paid without delay.
2. Any benefits payable for the period of time prior to the date of the review board finding (retroactive benefits) will be paid after 30 days have elapsed following the date of the review board finding unless:
 - a. the president has referred the review board finding to the Appeal Division under Section 96(4); or
 - b. an appeal has commenced from the finding under Section 91.
3. If there is a referral to the Appeal Division by the president under Section 96(4) or an appeal of the finding under Section 91 retroactive benefits will not be paid until the Appeal Division has completed its consideration of the matter.

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4. The decision of the Appeal Division will be implemented upon its receipt by the Board officer. The worker's entitlement to retroactive benefits which were deferred according to #3 above will then be determined in accordance with the decision of the Appeal Division.
 5. Where retroactive benefits are payable, after the decision of the Appeal Division, interest is to be paid in accordance with the Board's general policy on the payment of interest on retroactive benefits as set out in #50.00. However, where no interest is payable under #50.00 because ~~the commencement date of the retroactive benefits is less than one year prior to the date the retroactive benefits are being processed,~~ **interest will be paid it is determined that the retroactive benefit was not necessitated by a blatant Board error, interest will be paid** beginning 31 days after the date on which the review board made its finding. The amount of interest to be paid is to be calculated in accordance with the interest rates set out in #50.00.

The implementation of review board findings which result in a lump-sum payment or commutation is discussed at #45.61.

Appendix 4

ASSESSMENT POLICY MANUAL PROPOSED AMENDMENTS *[Deletions Struck Through, Additions in Bold]*

ASSESSMENT OPERATING POLICY	POLICY NO. 40:70:40
	PAGE 1 OF 1
SUBJECT: INTEREST REBATES AND INTEREST ON APPEALS	DATE: OCT/98 NOV/01
	REPLACES ISSUE DATED: JUN/93 OCT/98

Where an overpayment of assessment has resulted from a blatant Board error, the firm may be entitled to accrued interest on the amount overpaid. This adjustment would also apply to penalty assessments and accrued interest on outstanding assessments that were paid during the period in question.

For an error to be “blatant” it must be an obvious and overriding error. For example, the error must be one that had the Board officer known that he or she was making the error at the time, it would have caused the officer to change the course of reasoning and the outcome. A “blatant” error cannot be characterized as an understandable error based on misjudgment. Rather, it describes a glaring error that no reasonable person should make.

An example of a blatant Board error that would entitle an employer to an interest rebate is where the employer is registered in an obviously incorrect classification; for example, a retail operation registered in the logging classification of industry when the employer correctly identified the industry at the outset. ~~When an error of this nature is discovered, the individual should make a written recommendation to the Section Manager who, if in agreement, will forward it to the Director. The originating Section Manager will return this cheque to the employer with a registered letter explaining the refund.~~

Interest is also payable in cases where an employer prepays a penalty assessment (including an experience rating DEMERIT) pending an appeal to the Appeal Division and is then successful in the appeal.

If the recommendation to pay interest is approved, the employer will receive an interest rebate calculated on the adjusted assessment. The rate of interest will be the same as that used for claims overpayments or retroactive payments.

The interest applicable will be calculated by the Actuarial and Research Department. A memo will be sent to the Actuarial and Research Department setting out the amount of overpayment on each payment date. Actuarial will provide the total interest amount applicable from the various payment dates to the current month.

Where an employer is granted relief under Section 39(1)(e) with respect to a claim where wage loss payments concluded, or a pension was awarded, after March 15, 1978 and on or before December 31, 1993 and on which the employer made a request in writing for the Board to consider the application of Section 39(1)(e), interest is payable on any refund from the date of the employer's request for relief.

Subject to the above provisions, where an amount is returned to an employer as a result of a successful appeal to the Appeal Division under Section 96(6) or (6.1) of the Act, interest is payable from the date the employer files the notice of appeal with the Appeal Division.

Notes:

In all cases where a decision to award interest is made, the Board will pay simple interest at a rate equal to the prime lending rate of the banker to the government (i.e., the CIBC). During the first 6 months of a year interest must be calculated at the interest rate as at January 1. During the last 6 months of a year interest must be calculated at the interest rate as at July 1.

Where an overpayment of assessment has resulted from a blatant Board error, interest will not accrue for a period greater than twenty years.

For practical reasons, certain mathematical approximations may be used in the calculations.

~~The interest reflects the average interest yield on investments of the WCB for each year, which is the same rate that is paid on compensation matters.~~

Decision of the Appeal Division**Number: 2000-0684****Date: May 11, 2000****Panel: Jill M. Callan, Cassandra Kobayashi, Randy Lane****Subject: Status of Principals of Unregistered Companies (No. 1)**

WORKERS UNDER THE ACT (PRINCIPAL OF UNREGISTERED FIRM) (CORPORATE VEIL) – Plaintiff, principal of an unregistered company, was in a motor vehicle accident – Defendants pled s. 10 of the Act and took position that plaintiff was a worker in the course of employment – Majority interpreted Decision No. 335 as affecting status of a principal of an unregistered company under sections 10 and 11 of the Act – Piercing of the corporate veil is triggered when the principal is injured, not when claim is made – Held that the plaintiff was not a worker – Dissent interpreted Decision No. 335 as providing guidelines for piercing the corporate veil – Allowing plaintiff to sue because of failure to meet obligations under the Act is contrary to justice and merits – Practical effect of majority reasons is to allow principals to opt out of the Act – Dissent would refer matter to Panel of Administrators for policy clarification – In absence of referral, dissent would find plaintiff was a worker.

Law: WCA (1996): s. 1, s. 2(2), s. 5(1), s. 10(1), s. 11, s. 47(2), s. 52(2), s. 99**Policy:** [Cited by **MAJORITY**] APM: #20:30:30; Decisions: No. 106, 2 *Workers' Compensation Reporter* 41, No. 141, 2 *Workers' Compensation Reporter* 156, No. 264, 3 *Workers' Compensation Reporter* 182, No. 335, 5 *Workers' Compensation Reporter* 101; [Cited by **DISSENT**] APM: #20:10:20; #20:10:30; #20:30:30; RSCM: #5.00, #48.48, #96.10, #111.30; Decisions: No. 169, 2 *Workers' Compensation Reporter* 262, No. 330, 5 *Workers' Compensation Reporter* 88, No. 335, 5 *Workers' Compensation Reporter* 101**Decisions:** [Cited by **MAJORITY**] Appeal Division Decision No. 92-1606, 9 *Workers' Compensation Reporter* 621, Appeal Division Decision No. 94-0872, 10 *Workers' Compensation Reporter* 801; [Cited by **DISSENT**] Appeal Division Decision No. 95-0320, 11 *Workers' Compensation Reporter* 327, Appeal Division Decision No. 94-0872

Status of Principal of Unregistered Company (No. 1) [s. 11 determination]
Appeal Division Decision No. 2000-0684

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- (1) The defendants have requested a determination under section 11 of the *Workers Compensation Act* (the Act) in respect of this legal action. The statement of claim filed by the plaintiff, Orest Alex Zaleschuk alleges that, on or about December 19, 1995, a vehicle operated by the defendant, Peter Musch (Musch) collided with a vehicle operated by the plaintiff. The accident is alleged to have taken place on 176th Street at or near 48th Avenue in Surrey, B.C. The statement of claim alleges that AT&T Capital Canada Inc. (AT&T) was the owner of the vehicle operated by Musch and Protrux Systems Inc. (Protrux) was the lessee of the vehicle. The defendants have pled the provisions of section 10 of the Act in paragraph 9 of their amended statement of defence filed on June 11, 1997.

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- (2) The Appeal Division was created on June 3, 1991 by the *Workers Compensation Amendment Act, 1989*. Board of Governors' Decision No. 4 dated April 9, 1991 assigned to the chief appeal commissioner and the Appeal Division the obligation of the Workers' Compensation Board (the Board) to issue certificates under section 11. The role of the Appeal Division in this matter is to determine the status of the parties pursuant to its authority under the Act. It is, however, for the courts to determine the effect of the section 11 certificate on the legal action.
 - (3) In this determination, submissions have been provided on behalf of all of the parties. The plaintiff's employer was provided with an opportunity to make submissions but none was received.

I. Status of the Plaintiff

- (4) The contentious issue in this application concerns the status of the plaintiff. Plaintiff's counsel takes the position that he was not a worker under the Act at the time of the accident. Defendants' counsel takes the position that the plaintiff was a worker and was in the course of his employment when the accident took place.

Background

- (5) On April 30, 1997, counsel for the defendants examined the plaintiff for discovery. He testified that in 1995 he leased a hotel called the Tudor Inn. He incorporated a company called 502467 B.C. Ltd. for the purposes of running the business (a company search obtained by the Appeal Division confirms that 502467 B.C. Ltd. was incorporated on August 15, 1995). The plaintiff held 55 of the issued shares in the company. His business partner held 35 shares and his daughter held 10 shares. The plaintiff and his business partner began operating the hotel around December 1, 1995 (Q 138). The plaintiff was managing the hotel and pub and his partner was managing the cabaret. The plaintiff typically worked from 6 a.m. to 3 or 4 p.m. (Q's 164 to 166). His duties included preparing the floats, doing the hotel accounting, preparing the bar, making staff schedules, and arranging the payroll (Q 167).
- (6) 502467 B.C. Ltd. was not registered with the Board at the time of the December 19, 1995 accident. 502467 B.C. Ltd. doing business as the Tudor Inn was registered with the Board on January 17, 1996 under registration no. 558156.
- (7) On the day of the accident (December 19, 1995), the plaintiff had started work at 6 a.m. and performed his usual routine which included picking up the floats, opening the restaurant, and making out the bank deposits (Q 187). At the time of the accident, the plaintiff was traveling from the hotel to Cloverdale in order to go to the liquor store to order liquor for the hotel and to the bank to do its banking. (Q's 204 to 207). The plaintiff did not apply for workers' compensation benefits for the injuries he sustained as a result of the accident.

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- (8) On July 16, 1998, the plaintiff swore an affidavit in which he stated that 502467 B.C. Ltd. was incorporated in approximately November 1995 for the sole purpose of operating the Tudor Inn. He swore that he had no earnings from 502467 B.C. Ltd. in 1995 and filed an income tax return in that regard. His affidavit also states:

I was a true entrepreneur in the establishment of this business and not an employee in any ordinary usage of that term.

Analysis of the Majority Concerning the Status of the Plaintiff

- (9) The terms “employer” and “worker” are defined in section 1 of the Act which states, in part:

“**employer**” includes every person having in their service under a contract of hiring or apprenticeship, written or oral, express or implied, a person engaged in work in or about an industry;

“**worker**” includes

- (a) a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise;
- (f) an independent operator admitted by the board under section 2(2);

[emphasis in original]

- (10) Subsection 2(2) of the Act states:

The board may direct that this Part applies on the terms specified in the board’s direction

- (a) to an independent operator who is neither an employer nor a worker as though the independent operator was a worker, or
- (b) to an employer as though the employer was a worker.

- (11) Subsection 5(1) provides:

Where, in an industry within the scope of this Part personal injury or death arising out of and in the course of the employment is caused to a worker, compensation as provided by this Part must be paid by the board out of the accident fund.

[emphasis added]

(12) Subsection 10(1) of the Act states:

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

[emphasis added]

(13) Pursuant to section 82 of the Act, "[t]he governors must approve and superintend the policies and direction of the board." Pursuant to section 83.1 of the Act, the powers, duties, and functions of the governors are currently performed by a panel of public administrators. Decision of the governors Number 86, which is dated November 16, 1994 and entitled "Bylaw No. 4 – Published Policy of the Governors" (*Workers' Compensation Reporter* Vol. 10, p. 781, states, in part:

1.1 As of June 3, 1991, the published policies of the governors consist of the following:

- (a) the *Assessment Policy Manual*,
- (b) the *Occupational Safety and Health Division Policy and Procedure Manual*,
- (c) the *Rehabilitation Services and Claims Manual*, and
- (d) *Workers' Compensation Reporter* Decisions No. 1-423

1.2 After June 3, 1991, the published policies of the governors consist of the documents listed in paragraph 1.1, amendments to the three policy manuals, any new or replacement manuals issued by the governors, any documents published by the Workers' Compensation Board that are adopted by the governors as published policy of the governors, and all decisions of the governors declared to be policy decisions.

...

2.2 In the event of a conflict between published policy in a Manual identified in Section 1.1(a), (b), or (c) of this Bylaw, and published policy in *Workers' Compensation Reporter* Decisions No. 1-423 identified in Section 1.1(d), published policy in the *Manual* is paramount.

- (14) If 502467 B.C. Ltd. had been registered with the Board at the time of the December 19, 1995 accident, it is clear that the plaintiff would have been a worker under the Act at that time (see policy no. 20:30:30 which is reproduced below). The question that arises is whether the result is different because 502467 B.C. Ltd. was not registered with the Board on December 19, 1995. It is a well-established principle of corporate law that a company is a legal entity that is separate and distinct from its principals. It is also established that, in some rather limited circumstances, the “corporate veil” will be “pierced” or ignored. Policy no. 20:30:30 of the *Assessment Policy Manual* states:

As mentioned in the previous section, an incorporated company is usually considered an independent firm by the Board, and therefore registration with the Board is mandatory. *As the incorporated entity is considered the employer, a director, shareholders [sic] or other principal of the company who is active in the operation of the company is considered to be a worker under the Act.* The earnings of these active principals are also fully assessable, as will be discussed in Section 40:10:30.

However, *in the event of an injury to an active principal of a private company that is not registered with the Board, that active principal is not entitled to compensation benefits.* This is based on two principles established in WCB Reporter Decision No. 335:

1. All active principals of a company should be aware of the obligations of the company and should bear the responsibility for registration as an employer under the Act.
2. Except under unusual circumstances, a person who in essence is both a “worker” and an “employer” cannot be given the benefits due to a “worker” unless that person’s obligations have been met under the Act as an “employer”.

Should an injured principal of a company be denied compensation benefits because of the company’s failure to register with the Board, that principal’s earnings prior to the date of injury are not assessed.

[emphasis added]

- (15) As indicated in its text, this policy is based on Decision No. 335 (dated April 27, 1981) of the former commissioners (Re Principals of Limited Companies – *Workers’ Compensation Reporter*, Vol. 5, p. 101) which also constitutes published policy on this issue. In Decision No. 335, the former commissioners considered the policies regarding small owner-operated limited companies set out in Decision Nos. 106, 141, and 264.
- (16) In Decision No. 106 dated April 4, 1975 (Re A One-Man Company – *Workers’ Compensation Reporter*, Vol. 2, p. 41) the former commissioners considered the claim of the widow of the principal of a one-person limited company. The company had not been registered as an employer with the Board. In addition, the deceased had not purchased personal optional

protection coverage, which was available to sole proprietors. The former commissioners referred to the principle that a company is a legal entity distinct from its principal shareholders. They concluded:

The essence of the matter is that the deceased, an independent businessman, failed to purchase the insurance protection that the Act provides, and we see no merit in the suggestion that this insurance protection should now be provided for him at the expense of other businessmen who have paid their assessments. The same man cannot avoid the coverage of the Act when it involves a cost and then claim to be covered when it involves a benefit. . . .

The doctrine that a company and its principal shareholder are separate legal persons is not one that should be applied to perpetrate an injustice of that kind.

- (17) Decision No. 141 dated September 24, 1975 (Re A One-Man Company – *Workers' Compensation Reporter*, Vol. 2, p. 156) involved a claim from the principal shareholder of an unregistered company. The former commissioners again concluded that the claimant could not claim the benefits of the Act because he had not caused the company's obligations under the Act to be met. They did not find merit in the argument that "if he is to be treated as a 'worker' for the purposes of establishing the assessment obligations of the company, then, to be consistent, he should also be treated as a 'worker' for the purposes of entitlement to benefits."
- (18) Decision No. 264 dated November 15, 1977 (Re Compensation Payable When Company Unregistered – *Workers' Compensation Reporter*, Vol. 3, p. 182) involved a claim from one of three shareholders of a small family-owned and operated company. The former commissioners extended the principle that arises out of the earlier decisions to all active principals of an unregistered company.
- (19) In Decision No. 335, the former commissioners conducted a more comprehensive review of the issues involving principals of unregistered companies. The review was initiated as a result of a request of the ombudsman "to review the Board's policy regarding small owner-operated limited companies." The ombudsman had raised three objections to the policy. The former commissioners stated (at p. 101):

This policy is concerned with the question which the Board must determine under the *Workers Compensation Act* as to who is a "worker", who is an "employer", and who is simply an "independent operator". *The rights and liabilities which accrue under the Act differ in accordance with into which of these categories a person falls. For instance, a person has no automatic right to receive compensation for work-related injuries unless he is a "worker" and no right to immunity from legal action in respect of such injuries unless he is an "employer" or a "worker". An "independent operator" does not have the rights of "workers". An "independent operator" does not have the rights of "workers" under the Act unless he has purchased from the Board optional personal protection. Nor does he have the rights or liabilities of "employers" unless he also happens to have employees.*

[emphasis added]

- (20) The former commissioners then considered Decision Numbers 106, 141, and 264 and stated (at pp. 103 and 104):

The problem with which these three decisions deal occurs when the principal of a small company submits a claim for compensation for a work injury suffered by him at a time when his company was not registered as an “employer” with the Board. The general rule followed by the Board is that a worker’s claim is not prejudiced by the fact that his employer has not complied with his obligation to register. However, since a company can only act through its principal, it was felt that the claimant in the situation in question, unlike most claimants, had to accept some personal responsibility for the failure to register. *If the corporate form of the business were ignored, the claimant was really an independent operator who had failed to obtain coverage for himself. It would be unfair to allow him to receive the benefits of the Act without meeting his obligations.* The Board, therefore, concluded that, except in unusual circumstances, claims from principals of small unregistered companies or their dependants should be denied. . . .

. . . The result is that, when the Board applies the policy contained in *Decisions 106, 141 and 264*, it concludes that the principal is not a “worker” under the Act for the purpose of his claim. . . .

. . . *The Act does not envisage persons who are essentially independent operators obtaining the benefits of the Act without fulfilling the corresponding obligations.*

[emphasis added]

- (21) At page 104, the former commissioners stated:

In regard to the third objection [raised by the ombudsman], we are unable to agree that the Board’s policy is discriminatory. *Since the policy results in the principal of the unlimited [sic] company not being a “worker” under the Act, it cannot be maintained that he is being discriminated against in comparison with other workers.* He is, in fact, being treated exactly the same as any other independent operator who has failed to purchase coverage for himself. Nor is he being discriminated against in relation to principals of limited companies who are registered with the Board prior to a claim being made. Discrimination only exists when persons in identical situations are treated differently for no valid reason. The situations of the principal of an unregistered and a registered company are not identical.

Whether they are registered or not is a distinguishing factor which properly allows the Board to treat them differently.

[emphasis added]

(22) They concluded the decision by stating:

In the result, the policy of the Board will be as follows:

1. A claim from the sole principal of a company which was unregistered at the time of the injury or his dependants will be denied.
2. A claim from one of several principals of a company which was unregistered at the time of the injury, or his dependants, will be denied unless the evidence indicates that the principal was not personally responsible for the failure to register.
3. Companies registered following a claim by a principal which is denied will not be required to pay assessments retroactively in respect of the principal's earnings.
4. Claims from a responsible principal of a company which has registered but which has defaulted in the payment of its assessments, or his dependants, will be honoured but a deduction from the resulting benefits will be made to offset the outstanding debt.

This decision supersedes *Decisions No. 106, 141 and 264*.

(23) Decision #94-0872 (*Workers' Compensation Reporter*, Vol. 10, p. 801) involved a claim from a principal of a company that was registered with the Board but had not paid all of its assessments. Pursuant to item #48.40 of the *Rehabilitation Services and Claims Manual* (the Claims Manual) the Board had deducted the overdue assessments from the compensation payable to the principal. The panel discussed the concept of piercing the corporate veil and considered Decision No. 335. The panel made the following observations (at page 813):

The policies at issue affect compensation, assessments, and prevention matters, and possibly Section 11 determinations. . . .

Further, the reasoning in Decision No. 335 must be approached with caution where prevention (occupational health and safety) matters are concerned. Decision No. 335 draws a parallel between principals of unregistered companies and independent operators. The Act does not authorize the Board to inspect the business of independent operators who have not opted for personal coverage. It is doubtful that Decision No. 335 intended to question the Board's authority to inspect the premises of unregistered incorporated companies. Thus, while the analogy between the principals of unregistered companies and independent operators has some appeal, it also has its limitations.


Finally, Section 10(1) of the *Act* bars the legal actions of workers against other workers and employers. If an independent operator or employer takes out personal coverage under Section 3(3) of the *Act*, they become "workers" for the

purposes of Section 10(1). However, when the corporate entity is ignored, this may leave some uncertainty about a person's status under the *Act*, depending on what approach is used. If the corporate entity is ignored for all purposes, then a responsible principal may not be a "worker" for the purposes of Section 10(1). However, as in this case, if benefits are initially paid to the responsible principal as a "worker" but then overdue assessments are deducted from his benefits, the question arises as to whether the person is a "worker" for the purposes of Section 10(1).

- (24) In Appeal Division Decision #92-1606 (Principal of Unregistered Firm – *Workers' Compensation Reporter*, Vol. 9, p. 621), which was also a section 11 determination, the plaintiff and her husband were principals of an unregistered company. The panel relied upon Decision No. 335 and item #7.52 of the Claims Manual (which no longer existed at the time of the December 19, 1995 accident). Item #7.52 provided, "[a] claim from one of several principals of a company which was unregistered at the time of the injury . . . will be denied unless the evidence indicates that that principal was not personally responsible for the failure to register." The panel concluded that the plaintiff was not a worker within the meaning of Part 1 of the Act because she was jointly responsible for the failure of the company to register with the Board.
- (25) The panel's conclusion in Decision #92-1606 appears to have resulted from the panel's application of the relevant policies. However, we find that the manner in which the policies are to be applied is not entirely clear. The questions that arise are:
1. Do the policies indicate that the principal of an unregistered company is a worker under the Act who is denied compensation benefits because the company is not registered or do the policies indicate that such a principal is not entitled to benefits because he or she is not a worker?
 2. If the policies indicate that the principal of an unregistered company is not a worker under the Act, does their application extend to the determination of the principal's status for the purposes of sections 10 and 11 of the Act?
- (26) In considering the first question, we have concluded that the passages we have quoted from Decision No. 335 indicate that the former commissioners were dealing with the status of a principal of an unregistered company under the Act and not merely his or her entitlement to benefits. The introductory words at page 101 indicate that the policies on principals of unregistered companies concerned the question of an individual's status as a "worker," "employer," or "independent operator" under the Act. In addition, Decision No. 335 likens the principal of an unregistered company to an independent operator without personal optional protection. In other words, it seems to say that once the corporate veil is pierced and the existence of the company is disregarded, such a principal becomes analogous to a sole proprietor (if it is a one-person company) or a partner in a partnership (if there is more than one principal). Pursuant to subsection 2(2), an independent operator with personal optional protection may become a worker under the Act. It follows that an independent operator without personal optional protection is not a worker under the Act and is not entitled to benefits. In light of the

statement in Decision No. 335 concerning status under the Act and the analogy of the independent operator considered by the former commissioners, we conclude Decision No. 335 provides that the piercing of the corporate veil affects the principal's status as a worker under the Act.

- (27) The second question involves consideration of whether the principal of an unregistered company is denied the status of a worker only in respect of his or her claim for compensation or is also not a worker under sections 10 and 11 of the Act. In this regard, we note that the law usually recognizes that a company is a distinct legal entity that is separate from its principals and the piercing of the corporate veil is an extraordinary measure. It is possible that a policy could dictate that the principal of an unregistered company is not a worker for the purpose of obtaining compensation without affecting the principal's status under sections 10 and 11.
- (28) Policy no. 20:30:30 may be interpreted to mean that an active principal of an unregistered company who applies for compensation is not entitled to benefits because the application for compensation has triggered the piercing of the corporate veil. The policy sets out, as its rationale, the two points which it indicates are derived from Decision No. 335. Firstly, active principals are responsible for the registration of the company under the Act. Secondly, when an active principal has not met his or her obligations as the operating mind of the employer, he or she cannot be granted the benefits to which workers are entitled under the Act. If the piercing of the corporate veil is triggered by the application for compensation, it would not necessarily follow that the corporate veil is pierced when the status of such a principal is determined for the purposes of sections 10 and 11.
- (29) There is nothing in policy no. 20:30:30 to indicate that the status of the principal under sections 10 and 11 has been considered or dealt with under the policy. Perhaps this is not surprising since that policy appears in the *Assessment Policy Manual*, which is generally concerned with the funding of the workers' compensation system. Since policy no. 20:30:30 is silent of the question of status under sections 10 and 11, further analysis of Decision No. 335 is required.
- (30) Decision No. 335 appears to be focused on claims matters. The three objections raised by the ombudsman (which are listed at page 103) related to compensation claims by principals of unregistered companies. We have quoted the statement from page 104 that the principal of an unregistered company "is not a 'worker' under the Act for the purpose of his claim." This statement and other similar statements in the decision could be read as providing that the corporate veil will only be pierced in respect of the claim. However, the words we have underlined from the quote at page 101 of Decision No. 335, which include the statement "a person has . . . no right to immunity from legal action in respect of such injuries unless he is an 'employer' or 'worker'," suggest that the former commissioners were contemplating the status of the principal under subsection 10(1) as well as the status for claims matters. The statements of the former commissioners at page 101 and elsewhere (such as in the passage we have quoted from page 104) indicate that the policy applies to the status of the principal under the Act. These statements coupled with the statement concerning "immunity from legal action" suggest that the policy is intended to extend to the status of the principal under subsection 10(1).

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- (31) The difficulty in interpreting Decision No. 335 raises the general question of how the policies in the decisions of the former commissioners are to be interpreted. One possibility is to interpret the policies narrowly and, therefore, view them as restricted to the issues that were before the commissioners for resolution. If that approach were taken, Decision No. 335 would be interpreted as only applicable to situations in which a principal is claiming compensation. However, in our view, the decisions of the former commissioners provide policy guidance in a general sense. Although the issue before the former commissioners was related to claims from principals of unregistered companies, we are satisfied that Decision No. 335 also provides guidance in relation to the status of such principals under subsection 10(1). We interpret Decision No. 335 as meaning that the principal of an unregistered company (who is responsible for the failure to register) is not a worker for the purposes of sections 10 and 11.
- (32) Our analysis of Decision No. 335 is supported when subsection 5(1) of the Act is considered. Subsection 5(1) provides that, when a worker sustains an injury arising out of and in the course of employment, “compensation as provided by this Part must be paid by the board out of the accident fund.” Accordingly, it is mandatory that the Board pay compensation benefits to a worker who sustains an injury if the other requirements of subsection 5(1) are met. If the piercing of the corporate veil is triggered by the principal making an application for compensation, it appears the principal would be entitled to compensation because the principal would be a worker who has sustained an injury arising out of and in the course of employment. Therefore, it seems the mandatory provision of the Act (that is, section 5(1)) would apply. Another possibility is that the piercing of the corporate veil is triggered by the principal sustaining an injury that arises out of and in the course of employment. We consider piercing of the corporate veil is triggered when the principal is injured rather than when a claim is made. The piercing occurs before an application is made.
- (33) The issue of when piercing occurs raises the question of the principal’s status prior to the piercing. For the purposes of this determination we do not need to decide the principal’s status between the date the company began employing him and the date of the injury. We only need to determine his status as of the injury date. However, in regard to the status between the date of employment and date of injury, we consider that up to the moment of injury the status of the principal may be regarded as being in a state of flux. If, prior to the injury, he contacted the Board or the Board contacted him and registration of the company resulted, he would be a worker. However, in the absence of such registration or contact, when an injury occurs the principal is not a worker.
- (34) Consideration of subsection 10(1) of the Act also weighs in favour of the interpretation that failure to register also affects the principal’s status under sections 10 and 11. If the policies merely dealt with the status of a principal who was applying for compensation, a principal in the plaintiff’s situation would not be a worker for the purposes of applying for benefits but would be a worker for the purposes of section 10 (and, accordingly, would not be able to pursue his legal action). However, this result appears to be inconsistent with subsection 10(1), which indicates the provisions of Part 1 “are in lieu of any right and rights of action, statutory or otherwise, founded on a breach of duty of care or any other cause of action.” In other words, the benefits provided under the Act are provided in lieu of a bundle of other rights, including the right to pursue an action for negligence against another worker or employer. The Act was

originally founded on what is often referred to as the “historic compromise,” which involved workers receiving benefits under the Act in lieu of their right to sue their employers. In 1974, the Act was amended so that workers were also prevented from suing other workers (provided that both parties were in the course of their employment at the relevant time). If the principal is not a worker for the purposes of applying for benefits but is a worker for the purposes of section 10, instead of being entitled to pursue a legal action in lieu of receiving compensation benefits, the principal would be left without the ability to pursue the legal action and be denied benefits under the Act. If such a severe result had been intended, we would have expected it to have been specifically outlined in the policies.

- (35) We have considered the application of our interpretation of Decision No. 335 to a scenario involving the principal of an unregistered company who, following a motor vehicle accident, is claiming benefits under section 5 and is also the defendant in a law suit. If the corporate veil was pierced and he was denied the status of a worker, he would not be able to claim benefits and he would not have the status of a worker for the purposes of the defence under section 10. This result is not inconsistent with subsection 10(1) since the principal would not be claiming benefits in lieu of pursuing a legal action because he or she would have no right of action.
- (36) We have also considered the fact that, in a case such as the situation before us, the piercing of the corporate veil will result in a benefit being conferred upon the plaintiff because his failure to register the company with the Board will enable him to pursue his law suit. We recognize that this appears to be somewhat anomalous because generally the corporate veil is pierced so that an individual, who has not met his or her obligations, will not receive a benefit. However, the policies also appear to operate to prevent the plaintiff from claiming workers’ compensation benefits. Therefore, they do, in fact, operate to prevent such an individual from obtaining the benefits that are provided under the scheme of the Act.
- (37) In addition, we have considered the argument advanced by counsel for the defendants that if an individual, such as the plaintiff, is not a worker he or she may pursue a law suit against a worker or employer who would otherwise enjoy the benefit of the section 10 defence. While we acknowledge that this argument raises a legitimate concern, it does not alter our conclusion. Our determination that the principal of an unregistered company is not a worker for the purposes of section 10, is grounded in our interpretation of the relevant provisions of the Act, including the trade-off involving compensation in lieu of a right of action set out in section 10.
- (38) In this determination, it is not necessary for us to consider whether the corporate veil should be pierced when the principal of an unregistered corporate employer is seeking employer status because the issue before us concerns the principal’s status as a worker. We note, however, that whether it is registered or not, the company would be an employer and there appears to be no basis on which to pierce the corporate veil to confer employer status on the principal. We acknowledge that the second principle set out in policy no. 20:30:30 is:

Except under unusual circumstances, a person who in essence is both a “worker” and an “employer” cannot be given the benefits due to a “worker” unless that person’s obligations have been met under the Act as an “employer”.

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- (39) This language could be interpreted to mean that, when the corporate veil is pierced, the principal becomes an employer who has failed to meet his or her obligations under the Act. However, it seems that the better interpretation is that the principal is “in essence” an employer because the principal is the operating mind of the employer. Accordingly, we interpret the statement to mean that the corporate veil should be pierced because the principal who (as the operating mind of the employer) has not caused the employer to be registered, should not be able to claim benefits under the Act.
- (40) In applying the relevant policies in this case, we have noted that Decision No. 335 referred to the policy concerning “small owner-operated limited companies.” A potential question that arises is whether 502467 B.C. Ltd. meets that definition. It could be argued that it is not such a company because it operates a hotel and presumably has a significant number of employees. However, since policy no. 20:30:30 (which deals with piercing the corporate veil generally) specifically states that it applies to principals of private companies (as opposed to being limited to small owner-operated companies) we find the policies are applicable to the plaintiff in this case.
- (41) Finally, we would like to note some other concerns that we have in respect of the question of whether principals of unregistered corporate employers are workers. On October 1, 1999, the *Workers Compensation (Occupational Health and Safety) Amendment Act, 1998* (Bill 14) came into force as Part 3 of the Act. Part 3 contains a number of provisions that place obligations on workers. For instance, section 116 outlines the general duties of workers. The question of whether principals of unregistered corporate employers are workers for the purposes of Part 3 is not before us in this determination. However, in light of the enactment of Part 3 and the lack of clarity of the policies concerning principals of unregistered corporate employers, the Panel of Administrators may wish to review the policies.
- (42) In Decision #94-0872, the panel stated the following (at pages 816 and 817):
- Finally, as set out above, there are some unresolved matters which the governors may wish to address, regarding the status of principals of unregistered and registered firms. While these unresolved matters did not prevent us from making a decision in this case, there is a degree of uncertainty, and perhaps inconsistency, in this area. The *Act* and the governors’ policy are not clear on who will be considered a principal or active principal of a corporation. Active principals appear to form a hybrid category — they can be workers or employers, or perhaps both, while also described as akin to independent operators. This has implications for the determination and collection of overdue assessments and entitlement to compensation, as well as possible consequences for prevention and Section 10(1) matters. It is a complex area and some of the uncertainties have been pointed out above.
- (43) Accordingly, they also recognized the need for a review of the policies in this area.

(44) Our dissenting colleague has suggested that this is an appropriate case to seek policy guidance from the Panel of Administrators in accordance with Governors' Decision No. 75 (*Workers' Compensation Reporter* Vol. 10, p 753). It states (at page 756):

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

(45) We acknowledge that the difference between our conclusion and that of our colleague largely stems from the difficulty of interpreting Decision No. 335. While we recognize that clarification would be of assistance, we have concluded that we should render a decision because the concerns about the policy identified in Decision #94-0872 (which was issued in 1994) have not been addressed by the Panel of Administrators and we do not wish to delay this matter further.

(46) We do not consider the 1994 amendments cited by our colleague resolved the issues raised by Decision #94-0872. The amendments to the Claims Manual were issued in December 1994 and the changes to the *Assessment Policy Manual* were issued in April 1995. The amendments consolidated the definitions of worker and employer in the *Assessment Policy Manual* but did not resolve the matter. We note that item #5.00 of the Claims Manual refers to Decision No. 335 and to policy no. 20:30:30 of the *Assessment Policy Manual* which also cites Decision No. 335. We do not consider that the amendments expressly limit the impact of Decision No. 335 to claims matters with the result that it has no relevance to section 10 matters. We also do not consider that the amendments have the effect of ensuring that an active principal of a limited company has worker status regardless of the circumstances.

(47) In summary:

- Decision No. 335 constitutes published policy of the governors.
- We interpret the policy in Decision No. 335 as denying compensation to the principal of an unregistered company because such a principal does not have the status of a worker under the Act for the purposes of establishing a claim.
- We interpret the policy as also affecting the status of such a principal under sections 10 and 11 of the Act because, in the decision, the former commissioners referred to the status of such an individual under the Act and specifically stated that status under the Act is relevant to immunity from suit.
- Our analysis is further supported when Decision No. 335 is considered in the context of sections 5 and 10 of the Act.

Conclusion of Majority Concerning the Status of the Plaintiff

- (48) We find, at the time of the December 19, 1995 accident, the plaintiff was not a worker within the meaning of Part 1 of the Act. Accordingly, the injuries suffered by the plaintiff did not arise out of and in the course of employment within the meaning of Part 1 of the Act.

DISSENT

- (49) I agree with the majority on the status of the defendants, but come to a different conclusion with respect to the status of the plaintiff. The published policies on determining status for the purposes of section 10 and 11 incorporate the general policies on the status of principals of limited companies. Furthermore, there are specific policies on when the Board will pierce the corporate veil to affect status. I would not expand the practice of piercing to this plaintiff's situation.

Status of Active Principals of Limited Companies

- (50) The Act defines "worker" inclusively, and includes a person who has entered into or works under a contract of service, express or implied.
- (51) At one time, the *Rehabilitation Services and Claims Manual (R.S.C.M.)* defined worker and employer, but in 1994, these definitions were consolidated in the *Assessment Policy Manual*. At the time of the accident on December 19, 1995, Chapter 2 of the *R.S.C.M.*, "Workers and Employers Covered by the Act," referred the reader to Policy No. 20:10:30 of the *Assessment Policy Manual* for those definitions:

#6.00 Definitions of "Worker" and "Employer"

. . . Detailed discussions concerning the definitions of worker and employer may be found at 20:10:30 of the *Assessment Policy Manual*.

- (52) The policy in *A.P.M.* Policy No. 20:10:30 discusses the statutory definitions, and others including volunteers, proprietors, cooperatives, inmates, elected officials, trade unions, federal workers and lent employees. Included in that policy is the following on incorporated companies:

Incorporated Companies

In a situation where the employer is a limited company, a director, shareholder or other principal of the company who is active in the operation of the company is considered a worker. Frequently, these active principals do not draw salaries due to income tax considerations, the lack of profitability of the company in formative years or other reasons, and this apparent lack of earnings does not affect their status as workers. If the active principal has drawn a nominal salary, or no salary at all,

the assessment base is adjusted to reflect the relative worth of the person's services to the company for the year in question. This is covered in greater detail in Section 40:10:30 of this manual.

[emphasis added]

- (53) These definitions are used by both the Compensation Services Division for adjudicating claims, and by the Assessment Department for determining payroll. They are also the definitions for the purposes of section 10 and 11, according to the policy in #111.30 of the R.S.C.M. on third party claims:

#111.30 Meaning of "Worker" and "Employer" under Section 10

In the provisions discussed in #111.10–#111.24, "worker" and "employer" have the meaning given to them in Chapter 2.

For the purpose of Section 10, "worker" includes an employer entitled to personal optional protection. (10) However, this does not affect status as an employer under this section in regard to other workers.

The meanings of "employer", "worker", and "employment" for the purpose of Section 10 in claims concerning commercial fishers are discussed in Fishing Industry Regulation 14 (found in Workers' Compensation Reporter Decision 223).

Note: (10) S. 10(9); S. 3(3)

[emphasis added]

- (54) Thus, the published policy has been designed so that for the purposes of claims, sections 10 and 11, and assessments, the definitions of who is a "worker" and who is an "employer" are consistently applied. In practice, this means that assessments will generally be paid on "workers" who will have coverage for work injuries and occupational diseases. It also means that a "worker" for section 10 and 11 purposes, will also be a "worker" for claims and assessment purposes.

Exceptions to the General Rules on Status

- (55) If a person is a "worker" under the Act, section 5(1) provides compensation must be paid for a personal injury arising out of and in the course of employment. Thus, as a worker, an active principal of a limited company is generally entitled to workers' compensation benefits if injured at work. The policy in #5.00 of the *Rehabilitation Services and Claims Manual* provides that registration of the employer with the Board generally does not affect coverage, subject to the exceptions identified in the policy:

A worker's claim is not prejudiced by the fact that the employer has not complied with the obligation to register with the Board. This is subject to the

principles set out in Workers' Compensation Reporter Decision 335 and 20:30:30 of the Assessment Policy Manual.

- (56) Policy No. 20:30:30 of the *A.P.M.* provides that a claim for compensation from a principal of a corporation that was not registered with the Board at the time of the injury will be rejected:

As mentioned in the previous section, an incorporated company is usually considered an independent firm by the Board, and therefore registration with the Board is mandatory. As the incorporated entity is considered the employer, a director, shareholders (*sic*) or other *principal of the company who is active in the operation of the company is considered to be a worker* under the Act. The earnings of these active principals are also fully assessable, as will be discussed in Section 40:10:30.

However, *in the event of an injury to an active principal of a private company that is not registered with the Board, that active principal is not entitled to compensation benefits.* This is based on two principles established in Workers Compensation Reporter Decision No. 335:

1. All active principals of a company should be aware of the obligations of the company and should bear the responsibility for registration as an employer under the Act.
2. Except under unusual circumstances, a person who in essence is both a "worker" and "employer" cannot be given the benefits due to a "worker" unless that person's obligations have been met under the Act as an "employer".

Should an injured principal of a company be denied compensation benefits because of the company's failure to register with the Board, that principal's earnings prior to the date of injury are not assessable. . . .

[emphasis added]

- (57) Another exception occurs when a claim is made by a principal for an injury at the time the corporation is registered but is in arrears in paying assessments, Item #48.48 of the *R.S.C.M.* provides the guidelines for collecting the unpaid assessments from benefits owing to the injured principal:

#48.48 Unpaid Assessments

Unpaid and overdue assessments are treated in the same manner as overpayments if a claim is later received from an employer or principal of the limited company responsible for the debt or an independent operator who has purchased but not fully paid for personal optional protection coverage. If, at the time of the claim, the claimant is a worker for another company or organization, the decision whether or not to recover the overdue assessment from benefit

entitlements can only be made by the Manager, Collections, or a Claims Director or a delegate. Recoveries will not be made from widows, widowers or dependants where the claim is the result of a fatality and the worker was employed with an employer other than the employer owing the assessments.

- (58) In that situation, the principal's claim is accepted, but the Board pierces the corporate veil when the assessments owed by the limited company to the accident fund are set-off against compensation payable to the principal from the accident fund.

Analysis of the Policy on Piercing the Corporate Veil

- (59) Both of the above exceptions are discussed in Decision 335. While the operational Manuals quoted above outline the mechanics for decision-making, the underlying legal analysis is contained in Decision 335 and the decisions it replaced, 106, 141, and 264. In Decision 335, the commissioners affirmed the Board's long-standing policy of respecting the normal separation between a limited company, and its principals. In compensation terms, this means the Board treats active principals of limited companies as "workers" of the corporation:

. . . Surely all principals who are actively engaged in management of their companies are in basically the same position and should be treated the same under the Act. The Board long ago laid down a general principle that all such principals should be treated as "workers" under the Act and we can see no grounds for changing this position now. . . .

. . . The Board is also in agreement with the basic principle of accepting at face value the form in which people carry on their businesses, while at the same time reserving a power to look into the real nature of the arrangements. The Board shares the reluctance of the courts to "pierce the corporate veil" and this is another reason why the Board prefers to treat principals of limited companies as "workers". To do otherwise would leave them in the anomalous position of being neither "workers", "employers", nor "independent operators" under the Act. Alternatively, the Board would have to ignore the corporate form of a business in all cases where there were active principals and consider them as independent operators and, where appropriate, the employers. We feel that the latter course of action would be too large an interference with the well-established practice of carrying on business through a limited liability company which would not be justified by the end sought to be achieved.

- (60) The commissioners then noted the Board's reasons for lifting or piercing the corporate veil will differ from those of the courts. They noted the courts had not laid down particular principles for piercing. Decision 335 rejected a case-by-case approach for the purposes of an administrative tribunal:

While we recognize the merits of this approach, as an administrative tribunal it is often necessary for the Board to lay down general guidelines for its staff. It is

the guidelines for piercing the corporate veil set out in Decisions 106, 141, and 264 which are the subject of this review.

The problem with which these three decisions deal occurs when the principal of a small company *submits a claim for compensation* for a work injury suffered by him at a time when his company was not registered as an “employer” with the Board.

[emphasis added]

- (61) Thus, the subject matter of Decision 335 is providing guidelines for Board staff when adjudicating a claim for compensation. The conclusion of Decision 335 reinforces this interpretation, as all four points address “a claim” from a principal:

In the result, the policy of the Board will be as follows:

1. *A claim* from the sole principal of a company which was unregistered at the time of the injury or his dependants will be denied.
2. *A claim* from one of several principals of a company which was unregistered at the time of the injury, or his dependents, will be denied unless the evidence indicates that the principal was not personally responsible for the failure to register.
3. Companies registered *following a claim* by a principal which is denied will not be required to pay assessments retroactively in respect of the principal’s earnings.
4. *Claims* from a responsible principal of a company which has registered but which has defaulted in the payment of its assessments, or his dependants, will be honoured but a deduction from the resulting benefits will be made to offset the outstanding debt.

This decision supercedes *Decisions No. 106, 141 and 264*.

[emphasis added]

- (62) The majority has quoted some passages from Decision 335 as supporting their conclusion that “the former commissioners were dealing with the status of a principal of an unregistered company under the Act and not merely his or her entitlement to compensation.” I agree that the commissioners referred to status, but interpret the quoted passages as simply describing how status changes upon piercing the corporate veil when adjudicating a claim for compensation. The commissioners point out at page 101 that rights and liabilities differ according to status. That passage provides by way of background that piercing will affect whether the Board determines a person is a “worker,” which will in turn, determine their rights and obligations.

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- (63) At page 103, the commissioners state that, “If the corporate form of the business were ignored” the active principal making a claim is really an independent operator who failed to obtain coverage. In other words, once the Board pierces the corporate veil, the person making the claim for compensation is an independent operator who failed to obtain coverage. The subjunctive verb tense – “were” – indicates the statement on status is conditional on ignoring the corporate form.
- (64) At page 104, Decision 335 states that “*the policy results in the principal of the unlimited (sic) company not being a ‘worker’ . . .*” under the Act. The commissioners were not stating that the principal was not a worker, but that when the policy on piercing the corporate veil is applied, the result is that the principal loses the status of worker.
- (65) In sum, Decision 335 first affirms that the Board will pierce the corporate veil only as an exception. It then specifies the two exceptions which are summarized in the enumerated conclusions. The references to status in the body of the decision need not be read more broadly than set out above to make sense of the decision. Given the stated purpose of the decision was to provide guidelines to staff for piercing the corporate veil, as a rejection of the case-by-case approach of the courts, I would hesitate to pierce the corporate veil without sound reasons as an exception to this policy. That said, policy must not be applied in a rigid, mechanical manner; therefore, I have considered whether the facts before us support piercing.

Section 99: the Merits and Justice of the Case

- (66) Section 99 of the Act requires the Board to give its decision according to the merits and justice of the case. The notion that policies are not to be applied inflexibly is also reflected in the provisions of #96.10 of the *R.S.C.M.* The published policies are described as general indications of how the Board will act when certain circumstances arise. Regard must be had to whether an existing policy should be applied, or whether there are grounds in a particular case for a change in or departure from policy.
- (67) In a section 11 determination, the merits and justice of the case include not only the plaintiff’s situation, but that of the other parties to the action. Do the justice and merits of the case lead to a conclusion that the extraordinary remedy of piercing should be invoked to allow the non-compliant principal to bring a suit against those who may well have met their statutory obligations?
- (68) Because the situation before us is not explicitly discussed in the policy, I have reviewed other policy decisions for guidance on how the justice and merits of the case should be determined in a section 11 matter. Decision 169 (1975), *Workers’ Compensation Reporter*, Vol. 2, p. 262, involved a defendant who wished to be afforded the protection of the bar as an employer. He was a partner with his wife in a hotel operation. The defendant had obtained personal optional protection, but declared he had no employees for the year in question. When he was later sued for his part in a motor vehicle accident, he said he had in fact hired occasional casual help. At that time, the Act did not bar suits between workers, so the defendant sought to be characterized as an “employer.” The commissioners refused to let the defendant submit a revised

payroll declaration and pay assessments. They said he “might . . . have been in the position of an employer” or not, but he cannot claim to be an independent operator when the obligations of an employer are being considered, and then seek to be an employer when there is some advantage in that position. The commissioners said the hotel operator might have believed the casual help he hired “was too slight and too trivial to require him to register and pay assessments as an employer.” These comments suggest that it would have been open to the hotel owner to declare as workers, the casual workers he hired for one or two hours, twice a month. The commissioners said, at page 264:

This employment appears to have been of a very casual kind, not continuous, at a low frequency, and for very temporary periods. Even so, it might well be enough to qualify the Defendant as an employer under the Act if it were not that the Board had earlier decided, for assessment purposes, and on the evidence of the Defendant, that he was not an employer.

- (69) The prior payroll report was seen as the hotel operator’s declaration, upon which the Board considered the defendant was not an employer and the consequences for the section 11 determination now flowed from that declaration.
- (70) It appears that the decision was based on whether the person would gain some advantage for which they had not met the corresponding obligations. The commissioners summarized that underlying principle at page 265:

It would not result in a consistent application of the Act if the same person were to be treated as an employer for the purpose of obtaining a benefit when he has not been so treated, and has not treated himself as being in that position for the purpose of meeting the obligations of an employer.

- (71) That language is very similar to the rationale for piercing in Decision 335 – “It would be unfair to allow him to receive the benefits of the Act without meeting his obligations” (at p. 103). It is arguable that the right to sustain a civil action is not necessarily a “benefit of the Act” equivalent to compensation benefits or immunity from suit. That said, the rationale expressed in Decisions 335 and 169 supports an exercise of discretion based on preventing a person from benefiting from failure to meet their statutory obligations.
- (72) In Decision 330, *Workers’ Compensation Reporter*, Vol. 5, p. 88, the commissioners considered an argument that the plaintiffs’ claims should be denied on the basis of section 99, because the plaintiffs would prefer to pursue a legal action. The commissioners rejected that approach as contrary to the mandate given the Board under the Act to determine the rights and status of those affected.
- (73) Finally, piercing to allow the plaintiff to sue is not consistent with the tradition of using this extraordinary remedy to prevent an injustice. The majority is uncomfortable with the possibility that an active principal who failed to register his limited company with the Board may be denied compensation benefits, when he has been found to be a “worker” for the purposes of a section 11 determination. First, it is not a certainty he will be denied compensation. Second,

for those who have failed to meet their obligations under the Act, there may indeed be hardship if they are injured on the job. That is true whether they are in a position to sue another person or not. I do not consider that the extraordinary remedy of piercing should be used to provide a principal who has not met his obligations with the opportunity to revert to his common-law rights.

- (74) Thus, even if Decision 335 stands for the proposition that generally the corporate veil will be pierced when determining status under section 11 of a non-compliant principal, the thrust of the policies leads me to conclude a person who did not meet their obligations should not stand to benefit over those who did. On the justice and merits of the case as a whole, allowing the plaintiff to sue because he did not meet his obligation as principal of a limited company to register and pay assessments is contrary to the scheme of the Act.

Alternate Policy Solutions

- (75) Underlying the majority reasoning seems to be a belief that a person who is a “worker” prior to claiming compensation, would be entitled to benefits because he would be a worker under section 5(1). Section 96(1) gives the Board exclusive jurisdiction to determine matters of status, and its decision is protected by a privative clause. As stated in Decision 335, there is nothing in the *Workers Compensation Act* that defines active principals of a corporation as “workers.”
- (76) There are other situations where the Board determines status as a “worker” based on registration. Section 2(2) of the Act allows the Board to extend coverage to independent operators on the terms specified by the Board. An independent operator who obtains personal optional protection, is considered a “worker.” The Board also allows “labour contractors” as defined in the *A.P.M.* to register. If they do, they will be considered the “employer” of those they hire, but they will not retain the status of a worker unless they also obtain personal optional protection.
- (77) That said, there is a possibility that the policy is unlawful in denying compensation to an active principal who has not registered the limited company, but otherwise has a valid claim. In an apparent attempt to uphold the lawfulness of the policy denying benefits, the majority would move the moment of piercing back in time to the occurrence of injury.
- (78) Because the lawfulness of the policy denying compensation is not before us, I have not made any determination on that point. However, in the absence of any finding that the policy is unlawful, I question on what basis the Appeal Division should depart from the published policy as to when the Board will consider piercing the corporate veil.
- (79) As an aside, there is another way to uphold the statutory entitlement of workers to compensation, while ensuring a principal not be allowed to benefit from his own failure to register the corporation. The provisions of section 47(2) allow the Board to collect the cost of any claim for an injury that occurs when an employer is in default with respect to its obligations at the time of the accident:

(2) An employer who refuses or neglects to make or transmit a payroll return or other statement required to be furnished by the employer under section 38(1), or who refuses or neglects to pay an assessment, or the provisional amount of an assessment, or an instalment or part of it, must, in addition to any penalty or other liability to which the employer may be subject, pay the board the full amount or capitalized value, as determined by the board, of the compensation payable in respect of any injury or occupational disease to a worker in the employer's employ which happens during the period of that default, and the payment of the amount may be enforced in the same manner as the payment of an assessment may be enforced.

- (80) If the claim for compensation of an active principal were accepted, then the mechanism available under section 47(2) would help ensure that other contributors to the accident fund do not pay the cost of a claim of a principal who failed to meet his obligations *qua* employer. If the assets of the corporation do not cover the cost of the claim, section 52(2) allows the Board to recover from property owned by a principal of the corporation where the property was used in connection with the industry. It is arguable that because the Act includes provisions to be followed if an employer fails to provide a statement required under the Act, the legislature's intent was that the statutory mechanism for recovery is the one that should be used by the Board. Perhaps the policy to pierce at the moment of an application for compensation is an attempt to shortcut that procedure to achieve the same result in at least some cases, with less administrative expense.
- (81) That said, the legality of the policy denying compensation to a principal who failed to register the corporation is not before us.

The Historical Compromise

- (82) The majority reasons that by giving normal effect to incorporation of the plaintiff's business, the plaintiff would lose the ability to sue, and under the policies, likely be denied compensation. They say he would not have the benefit of the historic compromise that gave workers the right to no-fault compensation benefits, in lieu of the right to sue employers. This, they suggest, is such a severe result, that they would expect it would have been specifically outlined in the policies.
- (83) Section 10(1) begins, "The provisions of this Part are in lieu of any right and rights of action, statutory or otherwise. . . ." Section 10(1) does not state that compensation benefits will be paid in lieu of the individual's lost rights of action. What is given in lieu are the "provisions of this Part," which means the whole bundle of rights and corresponding duties. Failure to meet the statutory and lawful policy requirements does not allow a person to revert to their common-law rights. For example, failure to submit an application on time can result in being denied compensation of any sort, without recourse to a civil suit. This could be seen as unfair in that the one-year period to file a claim is shorter than the limitation period for many types of legal action. As well, the Act imposes a ceiling on the earnings which a worker may recover, a

limitation that did not exist at common law. Such differences are the result of the Legislature altering common law rights. The loss of common law rights in some situations is not sufficient reason, in my view, to justify piercing the corporate veil as a new exception to ensure a non-compliant principal has some redress.

- (84) I agree that great personal hardship can result from a situation where a person doing business through a limited company fails to meet their obligations to register the company, and is subsequently denied compensation for an injury at work. Decision 106, *Workers' Compensation Reporter*, Vol. 2, p. 41, presented very compelling facts: a widow sought compensation for the death of her husband, who ran a "one-man company." If he had registered and paid assessments, compensation would have been payable, but even in that situation, benefits were denied to the surviving dependant. That decision was reviewed and its effect upheld in Decision 335.
- (85) There is nothing in the law or policies that suggests the principals of a corporation may opt out of the historic compromise, or the provisions of the Act. To the contrary, the expansion of the Act in 1994 to all workers and employers in the province has broadened the expectation that almost all workers and employers will be operating on the same footing. Various exemptions have been identified by the Panel of Administrators and are published in the *Assessment Policy Manual (A.P.M.)*, Policy No. 20:10:20. No general exemption has been made for the active principals of an incorporated business not registered with the Board.
- (86) Exemptions from the mandatory registration requirements have also been rejected in individual cases. In a test case brought by a lawyer who carried on business through a law corporation, the Board rejected her request to be treated as if she were an independent operator. Appeal Division Decision #95-0320, "Law Corporations As Employers," (1995) *Workers' Compensation Reporter*, Vol. 11, p. 327, upheld the director's decision that personal law corporations are employers, and the active principals are its "workers."
- (87) In sum, the remedy of an active principal of a limited company injured in the course of employment is to seek benefits from the workers' compensation system, as will be determined by the Board if he applies. Having failed to register the corporation in a timely manner, he cannot revert to his common law rights. The fact that he has the opportunity to pursue a third party action is also not sufficient to make an exception to the policies on piercing.

Seeking Policy Clarification

- (88) The decision whether the corporate veil should be pierced is a complex matter, potentially affecting other aspects of the Board's business such as assessments and prevention, as well as the viability of the legal action. Such matters are better addressed by the policy-makers of the Board, rather than on an adjudicative level with only one aspect of the issue before us.
- (89) The majority believes that piercing the corporate veil is triggered "when the principal is injured." For the purposes of a section 11 determination, that appears to mean when an active principal of an unregistered limited company commences an action to recover damages for injury, he will not be considered a "worker" for the purposes of that injury. Under this approach, the

person's status will be resolved when a determination is made as to the existence of an injury. In a section 11 matter, the Board usually leaves that issue for the courts to determine. A complication arises in that defendants often plead that the plaintiff was not injured, or that any injuries pre-existed the accident in question. Under the majority's approach, if the court determines the plaintiff's injuries were pre-existing or non-existent, it would appear the plaintiff would then revert to possibly having the status of a worker.

- (90) If I am correct in interpreting the policy as intending a determination of a person's status to apply for the purposes of claims, assessments, and sections 10 and 11, it would appear that an active principal of a corporation could defer investigation and determination by the Board of their status by claiming injury and commencing an action. Until the existence of an "injury" were determined, the person's status would be in limbo. That in turn could affect the collection of assessments on that person's earnings.
- (91) Before taking the extraordinary step of piercing the corporate veil at the time of the alleged injury for the purposes of a section 11 determination, I would refer this matter to the Panel of Administrators for clarification of the policy. Governors' Decision 75, *Workers' Compensation Reporter*, Vol. 10, p. 753, allows the chief appeal commissioner to ask the Panel of Administrators to address a policy issue and postpone a decision in an appeal. Although this is not an "appeal," in a matter of such importance to the parties, clarification is desirable in any event.
- (92) The majority notes that policy clarification was suggested in a 1994 Appeal Division decision, and has not yet been provided. Although we do not know the reasons for failure to respond to that request for clarification, one possibility is that the policy is considered to be clear. Appeal Division Decision #94-0872 was issued in July 1994. In late 1994, the Board's policy-makers revised the policy in the *Rehabilitation Services and Claims Manual* containing definitions of "worker" and "employer." The definitions have now been centralized in the *Assessment Policy Manual* for the purposes of sections 10 and 11, claims, and assessment matters, which suggests that the definitions are intended to be applied consistently in these areas, subject to the narrow exclusions set out in the policy.

Summary of Minority Reasons

- (93) Applying published policy helps ensure predictability and fairness between like cases. The general policies concerning status for the purposes of section 10 and 11 provide that active principals of limited companies are "workers" under the Act. The policy to pierce in specified situations could be seen as part of the Board's authority to define who is a "worker" and who is not. The situations where an exception is made to the general policy are clearly defined, and do not include determinations under section 11.
- (94) The subject of Decision 335 is the guidelines for piercing the corporate veil. The guidelines define two situations for piercing: in a claim for compensation by a principal whose limited company was not registered at the time of the injury, or was registered but in default. Upon piercing, the principal loses the status of a "worker" under the Act. A person who is not a "worker" is not entitled to compensation under the Act. Thus, a change in status follows

piercing. Any concerns about the lawfulness or appropriateness of the policy on piercing should be addressed by those responsible for setting policy, or in adjudication of that issue in a claim, not by creating new guidelines for piercing for section 11 purposes.

- (95) The practical effect of the majority's reasons is that principals of corporations will be treated as if the Act does not require their participation. If they do not register, and sustain an injury while working, they will be allowed to revert to their common law rights. This result is untenable, in my view, in light of the provisions of the statute as a whole, including the historical compromise, and the expansion of the Act to cover virtually all workers and employers in the province.
- (96) This is not a case where piercing will prevent an injustice. The Board should not pierce the corporate veil to enable a person who failed to meet his obligations to override the benefit of the statutory bar enjoyed by workers and employers who have accepted their obligations and rights under the historical compromise.
- (97) The majority's interpretation of the policies warrants referring this matter to the chief appeal commissioner to consider requesting clarification by the Panel of Administrators before we issue our decision. In the absence of such a referral for policy clarification, I would find the plaintiff was a worker, and would proceed to determine if his injuries arose out of and in the course of employment.

I agree with the majority regarding status of the defendants.

Cassandra Kobayashi
Appeal Commissioner

II. Status of the Defendant, Protrux

- (98) At the time of the accident, Protrux was registered with the Board under registration no. 438592. We find, at the time of the December 19, 1995 accident, the defendant, Protrux Systems Inc., was an employer engaged in an industry within the meaning of Part 1 of the Act.

III. Status of the Defendant, Musch

- (99) Musch provided evidence in an affidavit sworn on March 27, 1998. At the time of the accident, he was employed by Protrux as a truck driver. In his affidavit, he indicates that he was in the course of his employment. We find at the time of the December 19, 1995 accident the defendant, Peter Musch, was a worker within the meaning of Part 1 of the Act.
- (100) Since we have little evidence in respect of his activities at the time of the accident, we decline to make a finding in respect of whether any action or conduct of Musch which allegedly caused the breach of duty of care on December 19, 1995 arose out of and in the course of

employment within the scope of Part 1 of the Act. In light of the determination of the status of the plaintiff by the panel majority, we have not invited further submissions on this question. If the parties consider that a further determination is necessary, they may request a supplemental certificate.

IV. Status of the Defendant, AT&T

(101) Neither counsel has requested a determination of the status of the defendant, AT&T Capital Canada Inc.

V. Summary

(102) The majority finds at the time of the December 19, 1995 accident:

1. The plaintiff, Orest Alex Zaleschuk, was not a worker within the meaning of Part 1 of the Act.
2. The injuries suffered by the plaintiff, Orest Alex Zaleschuk, did not arise out of and in the course of employment within the scope of Part 1 of the Act.

(103) The panel unanimously finds at the time of the December 19, 1995 accident:

3. The defendant, Protrux Systems Inc., was an employer engaged in an industry within the meaning of Part 1 of the Act.
4. The defendant, Peter Musch, was a worker within the meaning of Part 1 of the Act.

Jill M. Callan, Chair
Appeal Commissioner

Randy Lane
Appeal Commissioner

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



Supplement to Decision of the Appeal Division

Number: 2000-0848A

Date: February 19, 2001

Panel: David Van Blarcom

Subject: Whether Appeal Division Should Reimburse Worker for Expenses for Attending a Review Board Hearing

REIMBURSEMENT OF EXPENSES (REVIEW BOARD) (APPEAL DIVISION, JURISDICTION) – Whether the Appeal Division may provide reimbursement for the expense of attending a Review Board hearing – Section 7 of the Review Board regulation does not preclude the Appeal Division from reimbursing expenses incurred in Review Board appeal – Underlying purpose of Review Board practice is to favour reimbursement of appellants with meritorious appeals – Broad mandate to rehear under sections 91 and 96(3) of the Act gives Appeal Division authority to deal with ancillary issues arising from the merits of appeals.

Law: WCA (1996): s. 89(5), s. 89(6); *Workers' Compensation Act (Review Board) Regulation*, B.C. Reg. 22/86, s. 7(1)(2)

Policy: RSCM: #100.00, #100.12, #100.14, #100.50, #100.60, #102.46

Reimbursement of Expenses for Attending Review Board Hearing [worker appeal (rev. brd.)]
Appeal Division Decision No. 2000-0848A


17 *Workers' Compensation Reporter* [503]

Issue(s)

- (1) Should the Appeal Division reimburse the worker her expenses for attending the Review Board hearing? The worker's appeal was denied by the Review Board, but allowed by the Appeal Division. The worker also seeks reimbursement of the expense of letters her chiropractor prepared.

Background

- (2) By Decision #00-0848, dated June 7, 2000, I allowed the worker's appeal against Review Board findings dated June 3, 1999. At issue were whether the worker should have health care benefits to pay for chiropractic treatments she received for her epicondylitis and whether she should have wage loss benefits for a period between ceasing and resuming a graduated return to work program.

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- (3) The worker's representative had submitted a letter from the worker's chiropractor dated March 25, 1998 to the claims adjudicator in support of an application for reconsideration. She did not include an account for that letter or request payment for it at that time. It is not clear that the chiropractor charged for it. The application for reconsideration was unsuccessful, and the worker appealed to the Review Board.
- (4) In her written submission to the Review Board, the worker's representative did not request reimbursement of the March 25, 1998 letter or the costs of attending the Review Board hearing. No account for the March 25, 1998 letter was submitted to the Review Board. The Review Board did not mention costs or expenses in its findings.
- (5) In her submission to the Appeal Division, the worker's representative included in her summary of remedies sought:
- . . . reimbursement of costs for appropriate Section 7 benefits with respect to costs incurred to obtain [the chiropractor's] report and wage loss (if any) to attend the Review Board hearing.
- (6) In considering the appeal, I requested an opinion from the Board's chiropractic adviser and a Board medical adviser. The letter of March 25, 1998 was attached to the request. The opinion of the Board medical adviser did not support the worker, but the opinion of the Board chiropractic adviser did. The opinions received were disclosed to the worker's representative and the employer's representative.
- (7) The worker's chiropractor provided a letter dated April 13, 2000, in which he wished to substantiate his diagnosis in response to the opinion of the Board medical adviser. He said he understood the Board medical adviser had disagreed with it, but it is not clear he actually saw the opinion from the Board medical adviser, as his opinion does not cogently respond to it. He does not appear to have seen the report from the Board's chiropractic adviser, as he does not mention it in his letter. There is no account submitted with the April 13, 2000 letter. In Appeal Division Decision #00-0848, I acknowledge the letter of April 13, 2000, but it did not contribute to the result in the decision.
- (8) Unfortunately, in the Appeal Division decision of June 7, 2000, I did not discuss the worker's request for reimbursement of appeal expenses. On June 14, 2000, the worker's representative wrote the Appeal Division: ". . . to request consideration of her request for reimbursement of costs for the medical opinion in support of her appeal and any costs (if applicable) for wage loss to attend the Review Board hearing." She did not provide evidence of the cost of "the medical opinion" (by which I take she meant one or both of the chiropractor's letters). She also did not provide evidence that the worker had missed work to attend the Review Board hearing.
- (9) The worker's representative's request was disclosed to the employer's representative. The employer had not made submissions on the costs issue in the original Appeal Division appeal but, in a letter dated July 20, 2000, the employer's representative strenuously objected to reimbursing costs incurred for the Review Board hearing, as it would amount to asking for a decision on Review Board procedure. He said:

... [the worker] was not successful in her appeal before the Review Board and, in accordance with their procedure, the appellant's costs were not paid. We do not consider that such a matter can be dealt with by the Appeal Division.

- (10) In her reply dated August 14, 2000, the worker's representative said it was reasonable to request a medical opinion from the chiropractor and she thought it was highly unlikely that the appeal would have been successful without it. She submitted that, as the information was helpful, reimbursing the cost would be consistent with Review Board policy.
- (11) The apparently simple issue of reimbursing expenses therefore took on larger significance for practice and procedure beyond this case; namely, does the Appeal Division have jurisdiction to reimburse expenses incurred at an unsuccessful Review Board hearing?
- (12) Because of this larger issue careful consideration has been required, which has unfortunately delayed this decision.

Law and Policy

- (13) Section 89(5) of the *Workers Compensation Act* gives Cabinet (the lieutenant governor in council) the authority to make such regulations as are considered necessary or advisable respecting "any matter or thing for the administration and efficient operation of the review board." Section 89(6) says that, subject to the regulations, the Review Board may conduct an appeal in the manner it considers necessary.
- (14) Pursuant to that power, the lieutenant governor in council has provided the *Workers' Compensation Act (Review Board) Regulation*, which says, in s. 7:
 - 7(1) The review board may order the board to reimburse a person for the cost incurred in
 - (a) attending an oral hearing,
 - (b) obtaining a medical report submitted to the review board, or
 - (c) attending an examination required under section 6(4).
 - (2) The amount of costs authorized under subsection (1) shall not exceed the rates paid by the board for similar services.
- (15) The Review Board has published the *Workers' Compensation Review Board Policies and Procedure Manual*. That procedure manual does not claim to derive from any statutory authority, but it usefully sets out procedures that will provide consistency in the management of Review Board appeals. The Review Board has set out the following in its procedure manual:

Criteria for Awarding Costs

Section 7(1) of the Regulation allows the Review Board to authorize payment of specific types of costs. Each panel decides which costs, if any, should be awarded based on the circumstances of the appeal. The Review Board does not

authorize payment of costs incurred by a party's representative in attending a hearing. The following criteria should be considered by a panel in considering cost awards for persons attending an oral hearing:

1. Whether costs were incurred by or on behalf of a successful appellant. There may however, be circumstances in which a respondent or an unsuccessful appellant will be reimbursed.
2. Whether attendance of non-party witnesses assisted the panel in deciding the appeal.
3. Whether attendance of non-party witnesses was reasonable, based on the issues under appeal and evidence already on the worker's claim file.
4. Whether the witness attended the hearing at the request of the panel.
5. Whether the costs were incurred by a party or witness attending an oral hearing which did not proceed due to a Review Board error. For example, where a party has not been informed of a postponement, and incurs travel expenses in attending the hearing, the panel will generally award costs regardless of the outcome of the appeal.

The criteria to be considered in awarding costs for medical reports are as follows:

1. Whether the report is submitted on behalf of a successful appellant.
2. Whether the report assisted the panel in deciding the appeal.
3. Whether it was reasonable for the party to obtain the report, based on the issues under appeal and evidence already on the worker's claim file.

Workers attending examinations required by the Review Board under section 6(4) of the Regulation will be reimbursed for their costs under section 7(1)(c).

Recommendation for Payment of Costs

Panels may conclude that the Board should consider payment of costs not listed in section 7 of the Regulation, and may refer the matter back to the Board with that recommendation.

- (16) The governors of the Board are given the authority under s. 82 of the *Workers Compensation Act* to approve the policies and direction of the Board (the powers, duties, and functions of the governors are currently discharged by a Panel of Administrators). The *Rehabilitation Services and Claims Manual* is Board policy, and provides the following:

#100.00 REIMBURSEMENT OF EXPENSES

Set out below are the rules relating to the reimbursement of expenses for people attending at the Board or elsewhere in connection with claims inquiries or appeal hearings. The principles relating to expenses incurred in connection with medical examinations and treatment and vocational rehabilitation programs are dealt with in #82.00 and #83.00.

#100.12 *Claims Inquiries, Appeals to the Workers Compensation Review Board or the Appeal Division*

Where a claimant is attending on a claims inquiry, or on an appeal to the review board or to the Appeal Division, or for a decision review with a Manager, the payment of expenses is discretionary. There will be no undertaking to pay expenses and no advance.

1. Where the claims inquiry, review or appeal results in a decision for the claimant, the discretion will normally be exercised in favour of payment. But payment should be refused if it is concluded that the inquiry or appeal was brought about unnecessarily by the claimant.

For example, payment might be refused on an appeal where it is concluded that the denial of the claim in the first instance resulted from misleading information supplied by the claimant.

2. Where the claims inquiry, review or appeal results in a decision against the claimant, payment of expenses will normally be refused.

But payment may be allowed if there is special reason. An example might be, where, although the claim was unfounded, the bringing of the appeal resulted from misleading reasons for the decision being given in the first instance.

These provisions apply only where people are notified to come for a formal claims inquiry, an appeal or for a decision review with a Manager. Expenses are not reimbursed for people coming to the Board to make enquiries, or for ordinary discussions.

There is one exception to the foregoing. In the case of appeals to the Appeal Division, if an oral hearing is to be held outside the area in which a party resides, the Appeal Division may on request make provision for travel costs in advance of the oral hearing. This would include transportation and accommodation in the Board's Richmond Residence for the appellant and respondent, and would be provided without regard to the outcome of the appeal. Other costs in connection with attending the hearing will be determined in the normal fashion at the discretion of the panel.

#100.14 *Amount of Expenses*

The amount of expenses paid is calculated in accordance with the rules set out in #82.20 (transportation), #83.20 (meals and accommodation) and #83.13 (lost time from work where the worker is not already in receipt of temporary disability or vocational rehabilitation benefits from the Board).

#100.50 **Expenses Incurred in Producing Evidence**

Where a claimant incurs expense in producing evidence of a kind which the Adjudicator would have sought had it not been produced by the claimant, these expenses will be reimbursed by the Board as an item of administrative cost. In this connection, it makes no difference whether the expense was incurred directly or through a lawyer or other representative. However, confusion should not be made between the expenses incurred by the lawyer or other representative on behalf of the claimant and the fees of the lawyer or representative for work done. Only the former are reimbursable.

The cost of medical reports obtained by a claimant or employer will also be paid by the Board where, following the inquiry or appeal, it appears reasonable for them or their representative to have assumed, prior to the inquiry or appeal, that the provision of the report was necessary. These costs may be paid even if, after the matter is concluded, it is determined that they had not specifically served to assist in the enquiry.

The Board, in a decision on a claim, refused to pay for medical reports obtained by a claimant's lawyer. Although it was a normal and prudent action on the part of a responsible lawyer to seek information in order to acquaint himself properly with his client's problem before pursuing it before the Board, the information contained in the reports could have been obtained from the claimant's attending physician at no cost. A simple request to the attending physician, together with a release from the claimant, would have been sufficient.

It is not the Board's intention that claimants or employers should incur costs in obtaining evidence, for example, accountants' fees for producing earnings information. Rather, the general approach is that the claimant or employer should advise the Board of possible sources of information and the Board should carry out the necessary inquiries.

#100.60 **Decision on Expenses**

With regard to claims inquiries, any necessary decisions relating to expenses would be made by the Adjudicator.

With regard to appeals, the review board or the Appeal Division, as the case may be, will decide on the eligibility for expenses, and where expenses are payable, may either:

1. determine the amount payable, or
 2. refer the file back for the amount payable to be determined by the Adjudicator, or
 3. determine the amount on some items and refer the file back to the Adjudicator for determination of the amount on other items.
- (17) The *Rehabilitation Services and Claims Manual* contains a number of items with that refer to procedure at the Review Board. For example, policy item #102.46 recites s. 7 from the regulation, and references the Board's policy in #100.00.
- (18) S. 85.1 of the *Workers Compensation Act* authorizes the chief appeal commissioner to determine practice and procedure for the conduct of appeals by the Appeal Division, subject to Board policy. The practice and procedures of the Appeal Division do not refer to the reimbursement of expenses, but they are under review.

Analysis

- (19) The discussion of costs in the *Rehabilitation Services and Claims Manual* draws a distinction between expenses incurred in producing evidence (#100.50) and the payment of costs of attending the hearing (travel, meals and accommodation, lost wages) (#100.12 and #100.14).

Expense of Producing Evidence

- (20) I do not see any conflict with Review Board procedures when the Appeal Division provides reimbursement for medical reports (or other such reports, including chiropractic) if the Appeal Division finds the reimbursement justified by #100.50. Such reimbursement relates solely to the Appeal Division's use of the evidence and does not necessarily relate to the use of the reports at other levels of adjudication, including the Review Board.

Expense of Attending a Hearing

- (21) There is obviously no issue with respect to the Appeal Division providing reimbursement to a worker for the expense of attending a hearing at the Appeal Division. The issue is whether the Appeal Division may provide reimbursement for the expense of attending a hearing at the Review Board and, if so, whether it should, as a matter of practice or in a particular case.

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- (22) Section 7 of the Review Board regulation provides the necessary power to the Review Board to award expenses, but I do not find granting such a power to the Review Board necessarily precludes the Appeal Division from exercising a jurisdiction to pay expenses incurred in the Review Board appeal.
- (23) The Review Board practice manual stresses that the success of the appellant is an important consideration in reimbursing expenses, although it does provide that an unsuccessful applicant may be reimbursed in certain circumstances.
- (24) Policy item #100.12 also indicates that success is a factor. With respect to appeals to the Appeal Division, the policy says expenses will normally be paid if the appellant is successful, and denied if unsuccessful. Exceptions against payment are suggested when the worker provided misleading information, and in favour of payment when bringing the appeal resulted from misleading information from the Board.
- (25) The significance of success indicates an underlying purpose to support meritorious appeals and not to support appeals that are not meritorious. In pursuance of that purpose, the Review Board practice would deny expenses where an unsuccessful appeal would be viewed as not having merit in that context. However, if that appeal is subsequently allowed at the Appeal Division and it is found to have been meritorious after all, why should the worker not be reimbursed for costs at the Review Board as well? Such reimbursement would not be contrary to the underlying purpose of the Review Board practice, which favours reimbursement of appellants with meritorious appeals. I therefore do not see that such reimbursement would be an interference in Review Board practice.
- (26) Moreover, the jurisdiction of the Appeal Division in an appeal from the Review Board is pursuant to sections 91 and 96(3) of the *Workers Compensation Act*. It is a rehearing by the Appeal Division and the Division has the discretion “to initiate and to conduct a full inquiry into all of the issues arising out of an appeal once the matter is before it” (Governors’ Decision No. 75, 10 *Workers’ Compensation Reporter* 753). That broad mandate empowers the Appeal Division to deal with the merits of appeals before it, and is capable of extending to ancillary issues arising from those merits, such as costs.
- (27) There might be cases in which the Review Board has expressly refused expenses because the appellant misled the Review Board or abused its process or for some other such reason, and the Appeal Division would then have to decide on the facts of the particular case whether it was appropriate to reimburse expenses contrary to the express finding of the Review Board. However, that is a different situation from declining to reimburse because of lack of merit.
- (28) Although the statutory basis is different, I do note that it is not uncommon for the B.C. Court of Appeal to award costs to a successful appellant “both here and in the court below.” The notion of an appeal tribunal reimbursing costs incurred in the first instance is therefore a familiar one.

This Circumstances of the Case

- (29) The worker has not yet provided the invoices for the chiropractor's letters. In general it is preferable for a number of reasons to provide invoices for an opinion letter at the time the opinion letter is provided that indicate whether the invoice has been paid and by whom. The Appeal Division panel does not want ancillary issues such as costs to require time that can better be spent determining the merits of appeals.
- (30) Firstly, without the invoice there is no evidence the expert has billed for the letter. There are a few experts who will provide such letters at no cost, and in such cases there would be nothing to reimburse. Secondly, providing the invoice with the letter gives the panel the option of determining whether there should be an exception to limiting payment of the opinion letter to the Board's tariff. Thirdly, without the invoice, we do not know whom we should order to be reimbursed, the worker or the representative.
- (31) Fourthly, caution may be indicated in reimbursing invoices that were only billed after the appeal was successful. While such billings may be made in good faith to assist a financially disadvantaged party, there may be cases in which such a billing procedure gives the expert a financial interest in the success of the appeal: as the expert would only expect payment if the opinion were supportive, this could undermine the objectivity that is expected of an expert opinion.
- (32) In the present case, I find the letter of March 25, 1998 and (to a lesser extent) the letter of April 13, 2000 meet the guidelines of policy #100.50. The worker or her representative will be reimbursed the cost of the chiropractor's letters of March 25, 1998 and April 13, 2000, according to the Board's tariff for medical legal letters, upon the worker's representative producing invoices that were made out before the date of the Appeal Division decision. The letter of April 13, 2000 was not very useful because it was not very responsive to the opinions at hand; at the same time, it was reasonable to seek an opinion in response to the potentially damaging opinion from the Board medical adviser.
- (33) As the worker's appeal has ultimately been found to have merit, the worker will be paid her expenses for attending the Review Board hearing, in accordance with policy item #100.14. The file is returned to the claims adjudicator pursuant to policy item #100.60 to determine and pay the amounts payable.

Editors' Note: The names of the parties have been removed for privacy considerations. The text of the decision is otherwise unchanged.



Decision of the Appeal Division

Number: 2000-1857

Date: November 22, 2000

Panel: Laura Bradbury

Subject: Criminal Injury Compensation Act – Use of Polygraph Evidence

CRIMINAL INJURIES (VICTIM OF CRIME) (EVIDENCE) – Applicant seeking compensation for sexual abuse – Board found insufficient evidence that a criminal act had occurred on basis that alleged offender had passed a polygraph test – Polygraph results no longer in police records – Appeal committee found applicant credible but relied on polygraph evidence – Whether the evidence supports a finding that the applicant was a victim of crime – Polygraph test results inadmissible in civil and criminal courts – Applicant's direct evidence carries more weight than suspect's claim that he passed the polygraph test – Applicant was a victim of crime and entitled to compensation.

Decisions: R. v. Oickle, [2000] 2 S.C.R. 3

Criminal Injury Compensation Act – Use of Polygraph Evidence [C.I.C.A. review (app. comt.)]
Appeal Division Decision No. 2000-1857

17 *Workers' Compensation Reporter* [513]

Introduction

- (1) The applicant applied for compensation on October 22, 1993 as a victim of crime under the *Criminal Injury Compensation Act* (the Act). The applicant requested compensation for two incidents of sexual abuse which she said had been carried out by her friend's father in 1973 or 1974 when the applicant was eight or nine years old.
- (2) In decisions dated March 21, 1994 and September 7, 1994 the Criminal Injury Section of the Workers' Compensation Board (the Board) concluded there was insufficient evidence to find that the applicant was a victim of crime within the meaning of the Act. The Board noted that the applicant's abuse allegation was investigated by the police in 1974 and 1975 and the alleged offender had passed a polygraph examination (lie detector test). The Board stated that since no criminal charges were laid in 1975, it was reasonable to assume there was insufficient evidence that a criminal act had occurred. The Board also pointed out there was no independent corroborating evidence in support of the applicant's allegations.
- (3) The applicant applied to the appeal committee. In its decision dated May 22, 1996 the appeal committee made the following findings:
 - a. The applicant "was entirely credible and consistent in her recollection of what occurred to her as a child".

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- b. The appeal committee accepted that the polygraph testing undertaken on the suspect in 1974 or 1975 was “sufficiently sophisticated that on the balance of probabilities, it is unlikely that a person who was lying would be able to skew the results. To say that does not mean that it could not happen, rather it simply means that on a balance of probabilities, the chances are most unlikely that a false negative would occur in these circumstances”.
- (4) The evidence about the reliability of polygraph testing in 1974 or 1975 was obtained after the hearing from the R.C.M.P. but was not provided to the applicant or her representative. The appeal committee concluded that since the polygraph testing indicated the suspect did not commit an offense, there was insufficient evidence to find the applicant was a victim or crime under the Act.
- (5) In my decision dated January 20, 1999, I granted the applicant leave to further review the findings of the appeal committee. Leave was granted on the basis that the appeal committee’s failure to disclose the information from the R.C.M.P. to the applicant was a breach of the rules of natural justice.
- (6) The applicant was given an opportunity to provide further submissions on the merits of the review. In her letter dated February 11, 1999, the applicant’s representative advised that no further submissions would be provided but the representative asked the Appeal Division to consider carefully the submissions to the appeal committee dated March 20, 1998.
- (7) The Ministry of Attorney General’s Victim Services Branch was given an opportunity to make submissions on the further review but they chose not to participate.

Issue(s)

- (8) Was the applicant a victim of crime in 1973 or 1974 as defined by the *Criminal Injury Compensation Act*? The Act defines a victim of crime as a person injured in the province of B.C. by an act or omission of another resulting from the commission of a scheduled criminal offense. In 1973 and 1974 the offense of sexual assault on a female under the age of 14 was a scheduled criminal offense. The question I must decide is whether the evidence supports a finding, on a balance of probabilities, that the applicant was a victim of that crime.

Facts and Evidence

- (9) The applicant’s evidence, as reported in her 1993 statement to the police and at the appeal committee hearing, is that when she was eight or nine years old she went to three sleepovers at her friend’s house in the same townhouse complex. On the first occasion, the friend’s father came into the room where the girls were sleeping, went to the applicant’s bed, lifted her nightgown, fondled her and put his fingers into her vagina. The applicant pretended to be asleep until pain caused her to cry. The father left the room at that point.

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- (10) A few weeks later, the applicant was invited for a second sleepover. During the night, the friend's father picked up the applicant and took her to his bedroom, laid the applicant on his bed and closed the door. Again, he lifted her nightgown, fondled her and put his fingers into her vagina. He then took her hand and made her stroke his penis. The applicant began to cry then and the man's older daughter came into the room. She asked "What's the matter with [the applicant]" and the man replied: "She wasn't feeling well but she's alright now."
 - (11) On both occasions, the applicant smelled liquor on the man's breath. And, on both occasions, the man prepared breakfast for the girls the next morning but said nothing about the incidents during the night.
 - (12) The applicant was invited for a third sleepover several weeks later. She went, but panicked when she got there. She said she wasn't feeling well and went home.
 - (13) The applicant's mother noticed around this time that something was wrong with her daughter. She told police in December 1993 that she asked her daughter what was wrong and the applicant "fell apart and started to cry." She told her mother some details of what had happened. The applicant's mother took her to their family doctor, Dr. B. Dr. B. spoke with the applicant and she was able to explain to him what happened.
 - (14) The Board contacted Dr. B. in 1994 for information about the visit. Dr. B. advised that he had no record of seeing the applicant twenty years earlier but advised the Board that his records could have been forwarded to the applicant's next doctor.
 - (15) The applicant's father contacted the police department in 1974 about the allegations. According to the applicant's mother, the suspect was interviewed by police and he took a polygraph test. The applicant's father was deceased when the applicant applied to the Board in 1993 so there is only her mother's recollection about the events in 1974.
 - (16) The police investigated again in 1993 when the applicant reported the incident to them as an adult. The applicant went to the police on October 16, 1993 about one week before she applied for criminal injury compensation.
 - (17) The police found that the record of the 1974/75 investigation no longer existed. The only information available was that Constable M. had conducted a polygraph examination of the suspect some time in the first four months of 1975. The results of the polygraph test were not available.
 - (18) In December 1993 the police contacted the suspect and interviewed him. The suspect stated that he insisted on the polygraph test in 1975 and that he had passed "with flying colours." He said the police officer apologized to him at the time "for putting me through all this nonsense." He stated that the events described by the applicant could not possibly have happened.
 - (19) The 1993 investigating officer contacted a friend of the applicant's. The friend agreed to send a letter outlining her recollection of information given to her by the applicant about the 1974 events. Once the police discontinued the investigation, after learning the suspect had passed a polygraph test, the police told the friend that her letter was not required. No other investigation was undertaken.

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- (20) The police file indicates that the 1993 investigation was concluded on the basis that the earlier investigation was “handled thoroughly at the time” and there was no additional information about the alleged incident.
- (21) The Board contacted the applicant’s counsellor as part of its investigation with respect to the criminal injuries matter. In a letter dated March 15, 1994 the counsellor wrote: “It is my impression that sexual abuse had occurred based on a number of indicators.” The counsellor reviewed the indicators which included the applicant’s history of drug and alcohol abuse; her inability to access her feelings; her defenses of denial and minimization; her need to control people and situations; and, the applicant’s genuineness and credibility about the incidents of the sexual abuse.

The Applicant’s Submissions

- (22) The applicant’s representative has provided detailed submissions which take issue with the appeal committee findings about the reliability of polygraph evidence. The representative referred to a decision of the Ontario District Court (*R. v. Doe* (1986), 31 C.C.C. (3d) 353) which reviewed expert evidence regarding the polygraph. The court concluded that the test was not infallible and that the test has a percentage of both false positive and false negative results. The representative also noted that current scoring methods (as reported by the R.C.M.P. to the appeal committee) may have resulted in the suspect’s results being found “inconclusive” by today’s standards. This point is relevant when considering the effect of the suspect’s polygraph result on the police decision not to proceed further with the investigation.

- (23) On the issue of the use of polygraph evidence in sexual abuse cases, the representative wrote:

Because the statements of the child and the accused are often the only evidence available to authorities to determine whether any abuse has occurred the use of a polygraph to determine such a matter is quite compelling. However, a recent article indicates that the use of the polygraph in alleged sexual abuse cases is still quite controversial. The author states that opponents of the polygraph question the overall reliability of the test and state that, at best, the polygraph will detect deception at rates better than chance. However, the test still produces high rates of false positives and false negatives.

In addition, the author noted that because sex offenders often have personality disorders (they do not experience anxiety when they lie), engage in cognitive distortions (rationalization of their activities), may be desensitized to anxiety as a response to lying (due to patterns of lying over many years to cover their abusive acts), and believe their lies and distortions are the truth, there are reservations that the polygraph would not be able to detect any deception of the test subject.

Most importantly, this study confirmed that the results of polygraphs administered by police agencies were highly indicative of whether there would be a criminal prosecution. Specifically, if the accused passed the polygraph there was no prosecution. If the accused failed the polygraph, there was a greater likelihood that there would be a criminal prosecution, although charges were not always pursued.

- (24) The representative argued that the appeal committee erred by giving more weight to the result of the polygraph test than to any other evidence, including the applicant's credibility and her counsellor's letter.

Analysis and Reasons

- (25) The appeal committee acknowledged that the applicant was credible but accepted the polygraph result as evidence that there was insufficient proof of a crime. The appeal committee concluded that, as a result, the applicant was not entitled to compensation under the Act as a victim of a crime.
- (26) My concerns with the appeal committee's finding are twofold. First, polygraph test results are inadmissible as evidence, both in criminal trials and in civil court proceedings. In the recent Supreme Court of Canada decision of *R. v. Oickle* (2000 S.C.C. 38. File no. 26535), Mr. Justice Iacobucci writing for the majority reviewed the law on polygraph evidence and commented that: "As many sources have demonstrated, polygraphs are far from infallible . . . Similarly, this court recognized in *Béland* that the results of polygraph exams are sufficiently unreliable that they cannot be admitted in court."
- (27) The appeal committee, as an administrative tribunal, is not governed by the strict rules of evidence with respect to the admissibility of evidence as the courts are. However, an administrative tribunal must ensure that it does not rely on information that is inaccurate, unreliable or unfair. Tribunals must ask if the evidence before them is relevant to the issue and if it is reliable. Information may be relevant but not reliable because it is unlikely to be true. Based on the comments of the Supreme Court of Canada in the *Oickle* decision, I believe that the polygraph information in this case falls into the category of information that is unreliable evidence about whether or not a crime occurred.
- (28) There is the added concern in this case that we have only the suspect's statement that he, in fact, "passed" the polygraph test. The police file is missing and the only evidence the police had was that a polygraph test was administered in 1975. The results of the polygraph test are not in the police records. As well, the police did not do a complete investigation in 1993 – they discontinued the investigation after learning that a polygraph test had been administered in 1975. It is important to appreciate, as well, that the police assessed the polygraph information in light of the need to prove a crime occurred "beyond a reasonable doubt." The standard of proof in a criminal injuries matter is proof "on a balance of probabilities."

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- (29) My second concern about the appeal committee's decision relates to the weighing of evidence before it. The appeal committee accepted the polygraph information, which would be inadmissible in any court, and then used it as the definitive piece of evidence in deciding the applicant's appeal. The appeal committee relied on the polygraph information in the face of direct evidence from the applicant which the appeal committee found credible and which contradicts the polygraph information. In my judgment it was unreasonable to give greater weight to the suspect's information and to the R.C.M.P. information about the polygraph against the applicant's direct evidence of events and the other evidence available.
- (30) This is not a case where the applicant recalled memories of the abuse years after it occurred. She told her mother and her doctor at the time she alleged the events happened and there was a police investigation at the time. The applicant's mother recalls her daughter's information about the abuse and she recalls taking her daughter to the doctor's. The applicant's mother also reported to the police in 1993 that her daughter received psychological counselling for quite a long time after the alleged events. In addition, the applicant's counsellor stated in 1994 that she believed the applicant was a victim of abuse.
- (31) I consider that the applicant's evidence, her mother's information, and the counsellor's opinion carry more weight and is more relevant than the information from the suspect that he passed the polygraph test in 1975. As I stated earlier, polygraph tests are considered to be unreliable evidence about whether or not a criminal act occurred.
- (32) I am satisfied on the basis of the evidence before me that it is more likely than not the applicant was a victim of the crime of sexual assault on a female under the age of 14. She is therefore entitled to compensation under the Act.

Conclusion

- (33) In summary, I find that the applicant is a victim of crime in accordance with the Act. I refer the claim to the Criminal Injury Section to determine the amount of compensation the applicant is entitled to.

Editors' Note: The names of the parties have been removed for privacy considerations. The text of the decision is otherwise unchanged.

Decision of the Appeal Division**Number: 2001-0897****Date: May 8, 2001****Panel: John Steeves, Paul Petrie, Jill M. Callan****Subject: Section 34 – Payment of Wage Loss Benefits
for a Statutory Holiday**

REFERRALS OF REVIEW BOARD FINDINGS (WAGE LOSS BENEFITS) (PAYMENT FOR STATUTORY HOLIDAY) – Review Board held that worker not entitled to wage loss benefits for statutory holiday during a temporary disability – Referred to the Appeal Division for redetermination – Section 96(4) grounds established on basis that Review Board findings contravened policy – Purpose of s. 34 is to prevent double liability and double compensation – No mandatory requirement that statutory holiday pay be deducted – Policies #34.40 and #34.41 lawful under the Act – Worker entitled to wage loss benefits for statutory holiday and employer not eligible for reimbursement.

Law: WCA (1996): s. 34, s. 96(4)**Policy:** RSCM: #34.40, #34.41; Decision No. 107, 2 *Workers' Compensation Reporter* 42**Decisions:** Appeal Division Decision No. 95-0165, 11 *Workers' Compensation Reporter* 13, Appeal Division Decision No. 2000-0668, 16 *Workers' Compensation Reporter* 287, Appeal Division Decision No. 2000-0730

Section 96(4) – Referral [s. 96(4) referral]
Appeal Division Decision No. 2001-0897

17 *Workers' Compensation Reporter* [519]

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- (1) In accordance with section 96(4) of the *Workers Compensation Act* (the Act), by memo dated May 17, 2000, the then acting president of the Workers' Compensation Board (the Board) has referred the April 18, 2000 finding of the Workers' Compensation Review Board (the Review Board) to the Appeal Division for redetermination on the grounds of error of law and contravention of a published policy of the governors. The reasons for the referral are set out in the memorandum of a case manager dated May 17, 2000.
 - (2) The Review Board panel had identified three issues. The issue that has resulted in this referral is "whether the Board correctly paid wage loss compensation benefits to the worker for a statutory holiday falling on November 11, 1998." Based on section 34 of the Act, the Review Board panel concluded that the worker was not entitled to wage loss benefits for that day because the employer had paid the worker for the statutory holiday.
 - (3) Although invited to do so, the worker is not participating in this matter. The employer is participating and is represented by a consultant.

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- (4) An oral hearing was held in Richmond on October 5, 2000. The hearing was adjourned in order to enable the panel to obtain various documents from the Board's Policy Bureau, which had been requested by the employer's representative. By letter dated October 30, 2000, the employer requested that the Appeal Division schedule a continuation of the oral hearing. However, given that the merits of this matter involve a question of statutory interpretation, we determined that it was appropriate to complete the hearing by receiving written submissions from the employer's representative. By letter dated November 7, 2000 addressed to the Board's Policy Bureau, the chief appeal commissioner requested copies of documents related to items #34.40 and #34.41 of the *Rehabilitation Services and Claims Manual* (the Manual) as well as a September 18, 1997 legal opinion from Mr. W, which had been requested by the employer. By letter dated December 22, 2000 (received by the Appeal Division on January 29, 2001), the Board's general counsel responded to the request and provided various documents, including Mr. W's opinion. The appeal officer disclosed those documents to the employer's representative, who commented on them in his March 15, 2001 submission.

Issue(s)

- (5) The issues are: (1) whether the April 18, 2000 Review Board finding that the worker was not entitled to wage loss benefits for the statutory holiday involved an error of law or contravention of policy; and (2) if so, how should the Review Board finding be redetermined.

Law and Policy

- (6) Subsection 96(4) of the Act states:

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

- (7) Section 34 of the Act provides:

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

- (8) Pursuant to section 82 of the Act, the governors "approve and superintend the policies and direction of the board." Pursuant to section 83.1, the powers, duties and functions of the governors are currently performed by a Panel of Administrators. The policies of the governors include the policies in the Manual and Decisions Nos. 1 to 423 of the *Workers' Compensation Reporter* (with the exception of those decisions that have been "retired" effective May 1, 2000 pursuant to a resolution of the Panel of Administrators).

- (9) The former commissioners considered section 32 (which under the current Act is section 34) in Decision No. 107 (April 9, 1975 *Workers' Compensation Reporter* Vol. 2, p. 42), which involved termination pay. While there have been some amendments to the section since that time, the amendments do not appear to be relevant to this matter. The most notable amendment is that in 1975, the section stated "consideration *shall* be had to any payment, allowance, or benefit" while the current version states "consideration *must* be had to payments, allowances or benefits." However, we consider both "shall" and "must" to be imperative verbs. In Decision No. 107, the former commissioners stated, in part:

The language of the Section is broad enough to cover termination pay. On the other hand, the Section does not provide that any payment made by the employer *shall* be deducted from compensation, or that any compensation deducted *shall* be paid to the employer. It requires that the Board must consider the matter, and that any compensation deducted under this Section may be paid to the employer. The Section is permissive, not mandatory, and the question is, therefore, in what circumstances a deduction should be made.

The normal situation in which the Section is applied is where an employer maintains the wages or salary of a worker who is disabled by a compensable injury. In that situation, it would seem fair that a worker should not be paid twice in respect of the same period, and that an employer, having paid his assessments to the Accident Fund, should then receive a benefit if he maintains the wages or salary of an injured worker. *Indeed, a manifest purpose of the Section is to facilitate the operation of various plans under which the full wages or salary of a worker are maintained during a period of compensable disability.*

[emphasis added]

- (10) Item #34.40 of the Manual (Pay Employer Claims) provides, in part:

[Section 34] does not provide that any payment made by the employer shall be deducted from the compensation, or that any compensation deducted shall be paid to the employer. It requires that the Board must consider the matter, and that any compensation deducted under this section may be paid to the employer. The section is permissive, not mandatory, and the question is, therefore, in what circumstances a deduction should be made.

In practice, employers who continue paying full wages to disabled workers are reimbursed in amounts equal to the compensation that would normally be paid to their employees. No refund is made for the difference between the amount of compensation and the worker's regular salary. *If an employer continues to pay 25% of a worker's salary or less, full wage-loss payments are made to the worker and no refund made to the employer.*

[emphasis added]

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- (11) Item #34.41 (Vacation Pay) provides:

If a vacation period or statutory holiday occurs while a worker is receiving wage-loss benefits, the Board continues to pay those benefits or, in the case of a pay employer claim, to the employer.

Background

- (12) On October 15, 1998, the worker sustained a compensable back injury. On the employer's report of injury, an officer of the employer indicated that the employer would be paying the worker for statutory holidays during the period of disability (see question 24).
- (13) The Board paid the worker wage loss benefits under the claim from October 16 to November 1, 1998 and from November 4 to 22, 1998.
- (14) By a decision dated December 30, 1998, which was addressed to the employer's representative, a claims officer II stated the Board had paid the worker wage loss benefits for the November 11, 1998 statutory holiday pursuant to item #34.41 of the Manual. The employer's appeal of the December 30, 1998 decision was the subject of the April 18, 2000 Review Board findings.
- (15) The employer's representative provided a submission to the Review Board dated July 8, 1999. He argued that section 34 required the Board to deduct from the worker's benefits the amount the employer had paid to the worker for the statutory holiday.

The April 18, 2000 Review Board Finding

- (16) In their April 18, 2000 finding, the Review Board panel referred to section 34 of the Act and item #34.41 of the Manual. The panel concluded:

. . . We find that Section 34 of the Act requires the Board to take into consideration "payments, allowances or benefits" paid by the employer and to deduct that from compensation payable to the worker.

In this case, the worker did not lose any statutory benefit as a result of his work injury, as the employer paid the worker for November 11, 1998 and had indicated in their report to the Board that statutory holidays would be paid by their firm for the period of [the worker's] disability. As the worker did not experience a loss of earnings for November 11, 1998 he was not therefore entitled to compensation from the Board for that day.

The Case Manager's May 17, 2000 Referral Memorandum

- (17) As stated earlier, the reasons for the president's referral are set out in a case manager's May 17, 2000 memorandum, which states, in part:

. . . I consider that the Review Board finding in this case is contrary to law and policy. It is submitted that the Review Board erred by:

- determining the worker's loss of earnings and benefit entitlement based on Section 34 of the *Act*.
- determining that this was a pay employer claim and then incorrectly applying Policy item #34.41 of the R.S.C.M.
- determining that the worker was not entitled to both statutory holiday benefits under Policy item #34.41 and the statutory holiday pay established under a collective agreement and by using Section 34 of the *Act* to address the employer's concerns that the worker was compensated twice. As noted by the Appeal Division panel [in decision #92-1717 (*Workers' Compensation Reporter* Vol. 8, p. 715)] employer concerns that result from provisions of the collective agreement are more properly considered through the collective bargaining process.

Grounds under Section 96(4)

- (18) As stated earlier, the grounds for reconsideration under section 96(4) are error of law or contravention of a published policy of the governors. We find that, in concluding that the worker was not entitled to wage loss benefits for November 11, 1998, the Review Board findings involved contraventions of items #34.40 and #34.41 of the Manual. Item #34.40 provides that full wage loss payments are paid to a worker unless the employer continues to pay more than 25% of the worker's salary. In addition, item #34.41 provides that the Board continues to pay wage loss benefits to a worker when a statutory holiday occurs while the worker is receiving wage loss benefits.
- (19) Although not expressly stated in the Review Board findings, it appears the panel concluded that the policies conflict with section 34 of the Act and, accordingly, the Act prevails. In the course of our redetermination of this matter, we will consider whether the policies contravene section 34 of the Act.
- (20) As we have determined that grounds for the referral have been established on the basis of the contraventions of the two policies, we do not find it necessary to determine whether the Review Board findings involved an error of law.

Redetermination

- (21) The employer's representative provided verbal submissions at the oral hearing and has provided a submission dated March 15, 2001. He has also referred us to his July 8, 1999 submission to the Review Board.
- (22) The principal argument advanced by the employer's representative is that items #34.40 and 34.41 "are in conflict with the intent of Section 34." He refers to the report of the Meredith Royal Commission and submits, ". . . it appears one purpose of the original enactment of Section 34, then, would be to prevent double liability for the employer and to avoid double compensation to the worker *for the same injury*" [emphasis in original].
- (23) The purpose of section 34 was considered in Decision #95-0165 (*Workers' Compensation Reporter* Vol. 11, p. 13). In that decision, the panel defined the issue before it as "whether the amount of the worker's retirement pension should be deducted from his W.C.B. disability award and if so whether it should be paid to the employer under Section 34." In considering the purpose of section 34, the panel stated (at pages 19 and 20):

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

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

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

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

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

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

This intent to protect the employer from double liability and to prevent double compensation for the worker resulting from one injury is consistent with governors' policy in item #34.40 which reimburses the employer under Section 34 when the employer continues paying the worker's wages *during the period of his disability*. It is also consistent with the exception in governors' policy #34.42 which exempts termination pay required by law from deductions under Section 34. Such termination pay is for *a different purpose* than the disability payment for the compensable injury. As pointed out in reporter decision #107 ((1975), 2 W.C.R. 42) a worker who has received termination payment equivalent to wages for one month is free to take another job during that month to supplement the termination pay. But if he is disabled during that period he is not in a position to take another job. Wage loss payments may be paid to the worker to compensate for his inability to secure another job *during the period of disability*.

[emphasis in original]

- (24) We adopt the panel's analysis and agree with the general submission of the employer's representative that the purpose of section 34 is to prevent the employer from sustaining a double liability and to prevent the worker from receiving double compensation for the injury. The questions that arise in this case are, however, more specific. They are whether the application of section 34 requires the Board to deduct one day of wage loss benefits for the November 11 statutory holiday and, if so, whether the Board should pay the employer the amount deducted. While section 34 has been addressed in four Appeal Division decisions published in the *Workers' Compensation Reporter* (in addition to Decision #95-0165, see Decision #92-0922 at Vol. 9., p. 39, #92-1717 at Vol. 8, p. 715, and #98-0496 at Vol. 15, p. 67), the question of the application of section 34 when the employer has paid statutory holiday pay to a worker during a period of temporary disability has not been considered in a previous published decision.

- (25) The employer's representative contends that, given the purpose of section 34 and its wording, in a situation in which an employer pays statutory holiday pay to a worker who is on wage loss benefits, the Board is required to deduct the amount paid by the employer from the worker's wage loss benefits. In his March 15, 2001 submission, he states, in part:

. . . the intent of Section 34 is clearly to protect the employer from double liability and to prevent double compensation for the worker resulting from one injury. Indeed, when one looks at Section 34, it clearly records, "*In fixing the amount of a periodic payment . . . consideration must be had to payments, allowances or benefits which the worker may receive from the worker's employer during the period of disability . . . and a sum deducted . . . may be paid to the employer*".

According to any dictionary at the employer's disposal, the word "consideration" means regard or account: something taken, or to be taken into account" and thus the Board is required to take into account such payments and deduct them from it's [sic] payments to the worker. The Board then, after the deduction, has the option of paying the amount deducted to the employer.

Despite their obligation to consider each case on its own merits and to deduct benefits paid by the employer, the Claims Department and the Panel of Administrators have attempted to ignore the Act by encouraging claims personnel to simply pay wage loss benefits for all Statutory Holidays regardless of the individual circumstances and the advance notice of payment provided by the employer.

In support of this failure to consider the employer's payments and Section 34 of the Act, Board staff frequently make reference to item 34.40 and 34.41 of the R.S.&C.M. but both these policies are in conflict with the words and intent of Section 34.

- (26) In support of his position, the employer's representative relies on a September 18, 1996 memo of the Board's general counsel, in which he expressed the opinion that "the existing practice of continuing to pay workers for statutory holidays when they are at the same time being paid for those holidays by the employer albeit for the statutory holiday only offends Section 34 of the Act". His opinion was based on the following analysis:

. . . Section 34 clearly allows discretion in regard to whether a deducted amount is paid to the employer but is mandatory in regard to the deduction of payments, allowances or benefits paid by the employer. In other words, the words "consideration shall be had" require the Board to make the deduction to prevent double payment to the worker.

- (27) In his September 18, 1997 legal opinion, which was addressed to the Board's Legal Department, Mr. W noted that two issues were under consideration. The first is the issue that is before this panel. Mr. W stated "[t]he second issue pertains to the deductibility of payments made under

employer pension plans from permanent disability awards.” In considering section 34, Mr. W concluded, in part:

The use of the imperative “must” in section 34 requires that in *all* cases the Board will have to take into account payments, allowances or benefits flowing to the worker from his employer during the currency of his disability in fixing the level of compensation paid by the Board. There is no *obligation* to in fact deduct such sums or, if deducted, pay them to employers. Rather, the Board has a discretion whether to deduct the payment in order to lower the compensation otherwise payable.

...

The permissive term “may” contained at the end of section 34 grants a discretion to the Board in determining whether or not a deducted sum ought to be repaid to an employer. Nevertheless, owing to the purpose of the provision, it is difficult to envision a situation where the Board would find it appropriate to deduct a sum from a worker’s compensation without any intention of repaying its to the employer.

In summary, in our opinion, the Board’s only *obligation* to workers and employers under section 34 is to *bona fide* consider whether payments received by the worker from his employer as a result of his disability ought to be deducted from the compensation otherwise payable and, if so, paid to the employer. The Board’s consideration involves the exercise of a broad discretion based on factors the Board deems relevant based on its statutory mandate. These factors would include the amount, frequency and duration of the payments, and whether they are made voluntarily or pursuant to collective agreements.

[reproduced as written]

- (28) As an administrative tribunal dealing with workers’ compensation issues, the Appeal Division frequently considers expert evidence, particularly expert medical evidence. When such evidence is relevant to a particular issue before a panel, the panel’s task is to analyze the evidence and assess the weight that ought to be granted to it. In this case, there are two competing legal opinions that relate to the issue before us. The application and interpretation of the Act is at the heart of the Appeal Division’s jurisdiction and purpose under the Act. While the legal opinions are of interest, our role is not to choose between the two competing opinions. Rather, our role is to interpret the Act and consider whether the policies in question are lawful.
- (29) There is no doubt that section 34 contains mandatory language to the extent that it states that “In fixing the amount of a periodic payment of compensation, *consideration must be had* to payments, allowances or benefits which the worker may receive from the worker’s employer during the period of disability.” However, there is no express mandatory language in section 34 that such payments, allowances or benefits be deducted from the compensation that is paid to workers under the Act. The definitions of “consideration” in *The Concise Oxford Dictionary*

(9th edition) include “the act of considering; careful thought.” The definitions of “consider” include, “**1 a** contemplate mentally, esp. in order to reach a conclusion; give attention to. **b** examine the merits of (a course of action, a candidate, claim etc.) **2** look attentively at **3** take into account; show regard for.” In our view, the requirement that a particular payment, allowance or benefit be considered falls short of constituting a requirement that it be deducted from the compensation that is paid to a worker. While we interpret section 34 as requiring those items to be considered, we find the determinations that flow from the consideration of those items has been left within the discretion of the policy makers.

- (30) Our interpretation is further supported when section 34 is considered within the context of the Act as a whole. In Decision #95-0165 (cited earlier), the panel noted (at page 20):

We have also considered the purpose of Section 34 within the context of the *Act* as a whole. The authority to deduct a sum from a worker’s compensation entitlement is an exceptional power in light of the foundational statutory requirement to pay compensation to the worker where the prerequisites for entitlement are met. Section 5(1) provides that where the worker’s injury arises out of and in the course of employment “. . . compensation as provided by this part *shall* be paid by the board . . .” Other entitlement sections of the *Act* such as Sections 22, 23, 29 and 30 all require the Board to pay compensation where the prerequisites for entitlement have been met. . . .

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

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

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

It is generally accepted that where a worker has entitlement to workers' compensation benefits the Board is in the position of first payer. Other organizations and agencies which provide disability payments *for the same disability* may adjust their benefits to take into consideration WCB entitlement or make arrangements through the worker for reimbursement of double payments. . . .

[emphasis in original]

- (31) In our view, if the legislature had intended to make it mandatory for the Board to deduct payments for statutory holiday pay from a worker's wage loss benefits, they would have used express language in section 34 that there will be a deduction from wage loss benefits when a worker is receiving "payments, allowances or benefits" from his or her employer "during the period of the disability." In the absence of such language, we do not interpret section 34 to mean that statutory holiday pay must be deducted. We acknowledge that the deduction of statutory holiday pay from a worker's wage loss benefits may be consistent with the analysis of section 34, which was articulated in Decision #95-0165. However, we also note that, had the worker not been injured, he could have received statutory holiday pay and done casual work for another employer on that day.
- (32) In the case before us, it is arguable that the worker received a windfall because he received wage loss benefits for November 11 and also received statutory holiday pay from the employer for that day. In addition, the employer bore the expense of paying the worker for the November 11 holiday and the wage loss benefits for November 11 were included in the employer's claims costs for experience rating purposes. However, section 34 grants the policy makers the discretion to determine the manner in which the purpose will be carried out. In determining the circumstances in which payments will be deducted or reimbursed to employers, the Panel of Administrators must consider and balance a variety of factors, including the extent of the administrative expenses and requirements that would be involved in deducting statutory holiday pay from wage loss benefits. It is apparent from the policy materials provided by the employer's representative and the Policy Bureau that the Policy Bureau has considered the option of enacting a policy that requires statutory holiday pay that an employer pays to a worker be deducted from the worker's wage loss benefits. Through its representative, the employer has expressed frustration regarding the lack of a policy amendment. It appears that such a policy amendment is within the options available under section 34. However, any policy change in this regard is within the mandate of the Panel of Administrators and not part of the jurisdiction of the Appeal Division.
- (33) In light of our interpretation of section 34, we find items #34.40 and #34.41 to have resulted from a lawful application of the discretion granted to the policy makers under section 34. In Appeal Division Decision #00-0668 [16 *Workers' Compensation Reporter* 287], the panel considered the standard of review that is to be applied in determining whether policies are lawful under the Act and summarized the approaches that had been taken in prior decisions. The panel concluded that a policy is lawful if it is viable under the Act. In this case, we find the policies in question are lawful under any of the standard of review options. Accordingly, we have found it unnecessary to invite submissions concerning the standard of review and to make a determination as to the appropriate standard.

- (34) In redetermining the Review Board findings, we find that, pursuant to items #34.40 and #34.41 of the Manual, the worker was entitled to receive wage loss benefits for the November 11, 1998 statutory holiday and the employer is not eligible for reimbursement in respect of the payment it made for that day. Item #34.41 provides that the Board continues to pay wage loss benefits for statutory holidays and item #34.40 provides, "If an employer continues to pay 25% of a worker's salary or less, full wage-loss payments are made to the worker and no refund made to the employer." In this case, it is apparent that the statutory holiday pay for November 11 amounted to less than 25% of the worker's salary. We find the circumstances in the situation before us do not warrant a departure from the policies.
- (35) The employer's representative contends the claim should be considered an "employer pay claim" for November 11, 1998 and, accordingly, pursuant to item #34.41, the Board should have paid the worker's wage loss benefits for that date to the employer. However, when item #34.40 is applied, it is apparent that the Board will not consider a claim to be an "employer pay claim" unless the employer continues to pay more than 25% of the worker's salary. While the employer was paying 100% of the worker's statutory holiday pay, we do not find that is sufficient to meet the 25% requirement in item #34.40. We interpret item #34.40 as requiring the employer to continue to pay 25% of the worker's salary during the overall period of disability.
- (36) We note that the statutory holiday pay issue was previously considered by an Appeal Division panel in Decision #00-0730 (available at www.worksafefbc.com). Since that decision involved a claim by another worker of the employer and since the employer was represented by the representative who is involved in the case before us, we have not disclosed a copy of the decision to the employer's representative. In that decision, the panel noted the following provision from the applicable collective agreement (at paragraph 7):

Article XII – Statutory Holidays and Floating Holiday

- (a) an employee, to qualify for statutory holiday pay, must comply with each one of the following three conditions:
- (i) Have been on the payroll thirty (30) calendar days immediately preceding the holiday.
 - (ii) Have worked his last scheduled work day before, and his first scheduled work day after the holiday, unless his absence is due to illness, compensable occupational injury, or is otherwise authorized by the employer.
 - (iii) Notwithstanding (ii) above, the employee must have worked one (1) day before and one (1) day after the holiday both of which must fall within a period of ninety (90) calendar days.

(37) The panel commented (at paragraph 23):

... according to the collective agreement, no payment is made until after the worker returns to work, as only then will it be known whether that is within the 90 day period since he last worked. If the worker must wait until he returns to work to be paid for a statutory holiday falling within the period of wage loss, he is without payment for that day from any source. That would appear to be contrary to #34.41, which provides that wage loss is paid for statutory holidays.

(38) In our view, it is questionable whether a payment for a statutory holiday that is not provided to the worker by the employer until after the worker returns to work constitutes a payment “which the worker may receive from the worker’s employer *during the period of the disability*” [emphasis added] within the meaning of section 34.

(39) In this case, we do not have the applicable provision from the collective agreement. In light of our analysis, we have found it unnecessary to obtain it. However, we note that, even if the policies are changed in the manner desired by the employer, it seems that an amended policy will only apply to payments, allowances, and benefits that are “made during the period of disability” as required by section 34. We also note, if the Board was required to review the applicable collective agreement in order to apply such amended policies, it appears the administrative burden might be significant.

Conclusion

(40) We find:

1. Grounds have been established under subsection 96(4) on the basis that the April 18, 2000 Review Board finding contravenes items #34.40 and #34.41 of the Manual.
2. In redetermining the Review Board finding, we find the Board’s decisions to pay the worker wage loss benefits for November 11, 1998 and not to reimburse the employer were in accordance with items #34.40 and #34.41 of the Manual.

Editors’ Note: The names of the parties have been removed for privacy considerations. The text of the decision is otherwise unchanged.



Decision of the Appeal Division**Number: 2001-0916****Date: May 9, 2001****Panel: Herb Morton****Subject: Whether Medical Review Panel Certificate was Properly Implemented**

WAGE LOSS BENEFITS (PROPORTIONATE ENTITLEMENT) (SUBJECTIVE COMPLAINTS) – Medical Review Panel certified that degenerative disc disease was major cause of worker's disability and that worker's lifting strains at work accounted for approximately one-third – Board apportioned worker's wage loss benefits – Review Board denied worker's appeal on apportionment of wage loss benefits and request for increase in pension award for subjective complaints – Worker appeal allowed on proportionate entitlement issue – Board not obliged to apply proportionate entitlement to wage loss benefits in implementation of the Medical Review Panel certificate – Merits and justice do not warrant a departure from general policy – Worker appeal denied on issue of pension increase – Panel notes four interpretations of policy #39.01 (subjective complaints) – Subjective complaints not of a nature and extent beyond what would normally be associated with assessed impairment.

Law: WCA (1996): s. 5(5), s. 65**Policy:** RSCM: #39.01, #44.10, #44.20; Governors' Decision No. 86, 10 *Workers' Compensation Reporter* 781; Decision No. 17, 1 *Workers' Compensation Reporter* 78; Decision No. 270, 2 *Workers' Compensation Reporter* 6; Decision No. 318, 5 *Workers' Compensation Reporter* 55; Decision No. 407, 6 *Workers' Compensation Reporter* 61**Decisions:** Appeal Division Decision No. 91-0388, 7 *Workers' Compensation Reporter* 119; Appeal Division Decision No. 93-0329, 9 *Workers' Compensation Reporter* 389; Appeal Division Decision No. 93-0277, 9 *Workers' Compensation Reporter* 259; Appeal Division Decision No. 93-0740, 10 *Workers' Compensation Reporter* 127; Appeal Division Decision No. 96-1721, 13 *Workers' Compensation Reporter* 353; *Sebastian v. Saskatchewan (Workers' Compensation Board)* (1994), 7 C.C.E.L. (2d) 270 (Sask.C.A.)*Appeal Division Decision No. 2001-0916**Implementation of Medical Review Panel Certificate [worker appeal (rev. brd.)]**17 Workers' Compensation Reporter* [533]

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- (1) The worker appeals the November 16, 2000 Workers' Compensation Review Board (Review Board) finding.

Issue(s)

- (2) At issue is whether the Medical Review Panel certificate has been correctly implemented. This concerns whether proportionate entitlement should be applied to the worker's wage loss benefits, and whether her pension award should be increased based on her subjective complaints.

Jurisdiction

- (3) The worker's appeal is brought under section 91 of the *Workers Compensation Act* (the Act). Section 96(3) of the Act provides that on an appeal under section 91(1), the Appeal Division may reopen, rehear and redetermine any matter that has been dealt with by the Review Board. Governors' policy in Decision No. 75 (Appeal Division Administration, Practice and Procedure, 10 *Workers' Compensation Reporter* 753) further provides that the Appeal Division has the discretion to initiate and conduct a full inquiry into all of the issues arising out of an appeal once the matter is before it.

Background

- (4) In a prior Appeal Division decision dated January 7, 1997 (#97-0024), the panel found the worker's back problems were not causally related to her work injury of April 24, 1994. The worker appealed to a Medical Review Panel. She was examined on September 29, 1998 by a Medical Review Panel with specialists in orthopaedic surgery.
- (5) In a certificate dated September 29, 1998, the Medical Review Panel found the worker had a disability with respect to her back. The Panel certified that degenerative disc disease was the major cause of the worker's disability, accounting for approximately two-thirds. The worker's lifting strains at work on various occasions were, taken together, the minor cause of her disability, accounting for approximately one-third. This was true both for her permanent disability, and for her temporary disability from mid-December 1994 to September 1997. The April 24, 1994 work injury was one of approximately four significant known back strains, which contributed to the worker's disability. The Medical Review Panel further certified that the worker did suffer from a pre-existing condition prior to April 24, 1994, and that the worker did suffer intermittently from pre-existing disability prior to April 24, 1994.
- (6) By decision dated November 20, 1998, the worker was advised that section 5(5) of the Act would be applied in calculating her entitlement to wage loss benefits. By decision of December 20, 1999, the worker was advised of her pension award. Her functional impairment with respect to her back was assessed at 4.2% of total disability. This was apportioned by one-third to 1.4%, plus age adaptability of 0.04%, for an award of 1.44% of total. Her pension award was made effective July 21, 1997, the day following the termination of wage loss benefits (notwithstanding the Medical Review Panel certification that the worker was temporarily disabled until September, 1997, and that her disability stabilized in September, 1997).
- (7) The apportionment of the worker's wage loss benefits was confirmed by the manager in a decision dated December 14, 1998. The manager advised:

Under Section 44.20 of the Claims Adjudication Manual, the Board [Workers' Compensation Board] does not normally apply Section 5(5) to wage loss, based on the premise that the claimant was fit to carry on regular duties prior to the injury and is at the time of receiving wage loss totally or partially unable to perform those duties.

This is not the situation here. This claimant was injured and off work for a period of time when wage loss was paid. She returned to work and subsequently laid off, for a combination of reasons, given in the Medical Review Panel Certificate. Only a portion of this disability was caused by the compensable injury.

We have perfect information in this instance and the Medical Review Panel certificate and their decision is clearly within the criteria of Section 5(5). It does not meet the criteria for exception under Section 44.20.

If we never apply Section 5(5) to wage loss under any circumstances we risk violating Section 5(5) of the Statute. It appears the Legislation should be applied and while the exception shown above is reasonable this does not mean the Legislation should be ignored in all cases.

As indicated in decision #1 of the Appeal Division entitled "Practice and Procedures" Section 3.8, "***In the event of a conflict between the Act or Regulations and the published policy of the Governor's, the Act and Regulations are paramount.***" [emphasis in original]

Based on the above it is my opinion that the Adjudicator rightly applied Section 5(5) to the benefits.

- (8) The worker previously received full wage loss benefits from April 27 until May 3, 1994. It appears that following the Medical Review Panel certificate she received wage loss benefits at a $\frac{1}{3}$ value from December 15, 1994 until July 20, 1997. These payments amounted to slightly more than \$20.00 per day. Although not addressed in the decision letters, it appears these benefits were paid up to July 20, 1997 rather than continuing to September 1997, on the basis the worker was working during this latter period (following a graduated return to work from July 14–20, 1997).
- (9) The worker appealed to the Review Board. By finding dated November 16, 2000, the Review Board denied the worker's appeal. With respect to the apportionment of wage loss benefits, the Review Board panel reasoned (at page 7):

... [The worker's] representative submitted that under Paragraph #44.20 of the *Manual* the Board does not apply Section 5(5) to wage loss. However, according to the Medical Review Panel Certificate, only $\frac{1}{3}$ of the temporary disability as [sic] caused by the compensable injury. The panel also notes that Section 5(5) of the *Act* states that where the personal injury or disease is superimposed on an already existing disability, compensation shall be allowed only for the proportion of the disability following the personal injury or disease that may reasonably be attributed to the personal injury or disease. The question of further periods of temporary disability and the causes of any such disability were squarely before the Medical Review Panel and they certified as to the portion of disability that was to be attributed to injury. The Board, and this panel are bound by that finding.

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- (10) With respect to the worker's request for an increase in her pension award for subjective complaints, the Review Board panel further reasoned at page 8:

While the worker's representative has submitted that a further award should be given for [the worker's] subjective complaints, we cannot agree. Lawful Board policy requires that for an award to be given for [the worker's] subjective complaints, there must be evidence that the complaints themselves are disabling in a manner which can affect [the worker's] earning capacity and the complaints are not reflected in the measurable functional impairment. Furthermore, Policy 39.01, "Subjective Complaints", is not applicable in this case. [The worker] has been able to return to full-time employment. There is no evidence that she is receiving any less earnings than she would have otherwise.

- (11) The worker has appealed the Review Board finding to the Appeal Division. The worker seeks payment of full wage loss benefits from December 1994 until September 1997. The worker's representative submits that the worker's disability plateaued in September 1997, not December 1994, and that there is no practice, policy or legal requirement in the Act to apply section 5(5) to a period of temporary disability. To this extent, the Medical Review Panel certificate does not bind the Board. The worker also seeks an increase in her pension award, for her subjective complaints of pain and restrictions resulting from pain. The employer's representative expresses support for the decisions by the Board officers and the Review Board.

Law and Policy

- (12) Section 65 of the Act provides:

A certificate of a panel under sections 58 to 64 is conclusive as to the matters certified and is binding on the board. The certificate is not open to question or review in any court, and proceedings by or before the panel must not be restrained by injunction, prohibition or other process or proceeding in any court or be removable by certiorari or otherwise in any court.

- (13) Section 5(5) of the Act provides:

Where the personal injury or disease is superimposed on an already existing disability, compensation must be allowed only for the proportion of the disability following the personal injury or disease that may reasonably be attributed to the personal injury or disease. The measure of the disability attributable to the personal injury or disease must, unless it is otherwise shown, be the amount of the difference between the worker's disability before and disability after the occurrence of the personal injury or disease.

- (14) Decision No. 86 of the governors (Bylaw No. 4 – Published Policy of the Governors, 10 *Workers' Compensation Reporter* 781, November 16, 1994) provides under item 2.1:

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

- (15) This wording is the same as that provided in Decision No. 3 of the governors (Published Policy of the Governors, 7 *Workers' Compensation Reporter* 17, April 8, 1991), except that Decision No. 3 used the singular in referring to “the published policy.” A similar passage in Appeal Division Decision No. 1 (Practice and Procedure, 7 *Workers' Compensation Reporter* 33, May 29, 1991, at item 3.8, page 45) was a reference to the policy provided earlier by the governors.
- (16) Policy at #44.20 of the *Rehabilitation Services and Claims Manual* (the Manual) states:

44.20 Temporary Disability and Health Care Benefits

It is not the policy of the Board to apply the provisions of Section 5(5) to health care benefits or temporary disability benefits. Ordinary wage loss will be paid on the simple presumption that the claimant was fit and able to carry on regular duties prior to the injury and is, at the time of receiving wage-loss benefits, totally or partially unable. The only conclusion to be derived from these facts is that the injury itself is the sole cause of that immediate total or partial disability. Proportionate Entitlement is thus a concept applicable only to permanent disability awards.

- (17) The current policy at #44.20 is a longstanding one. This policy was first expressed in Decision No. 270 (Re Subsection 6(5): Proportionate Entitlement, 2 *Workers' Compensation Reporter* 6, March 6, 1978), which similarly states at pages 8-9:

It must be pointed out that it has been and will continue to be the policy of the Board not to apply the provisions of subsection 6(5) – regardless of whether a “disability” is found to have pre-existed the injury – to medical aid or temporary disability benefits. Ordinary wage loss will be paid on the simple presumption that the claimant was fit and able to carry on regular duties prior to the injury and is, at the time he is receiving wage loss benefits, totally or partially unable. The only conclusion to be derived from these facts is that the injury itself is the sole cause of that immediate total or partial disability. Proportionate Entitlement is thus a concept applicable only to Permanent Disability Awards.

- (18) Policy at #44.10 concerns the meaning of the phrase “already existing disability,” for the purposes of section 5(5) of the Act. It concludes by noting that “These rules apply to all permanent partial disability awards assessed on or after March 15, 1978.”

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- (19) Policy in Decision No. 17, Re Disablement Following Unauthorized Surgery, 1 *Workers' Compensation Reporter* 78, November 3, 1973, provides (at page 79):

The real problem in this case centres on the use of the word "cause" in Section 55(9). Under Section 55(9)(a)(iv), a Medical Review Panel is required to certify as to ". . . the cause of the disability." But "cause" is an ambiguous word, referring sometimes to matters of natural science, sometimes to moral value judgments, and sometimes to questions of law. The purpose of a Medical Review Panel, as explained in Section 55, 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), 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.

- (20) A published Appeal Division decision concerning the topic of apportionment following a Medical Review Panel certificate is #96-1721 (Discretionary Policy Change and Apportionment, 13 *Workers' Compensation Reporter* 353).
- (21) With respect to the second issue raised in the worker's appeal, policy in the Manual provides:

39.01 Subjective Complaints

In making a determination under Section 23(1), the Disability Awards Officer or Adjudicator in Disability Awards will enquire carefully into all of the circumstances of a worker's condition resulting from a compensable injury. This means that both the objective physical findings noted by the doctors who examined the claimant and the subjective complaints of pain will be considered. The fact that the complaints are largely subjective does not automatically preclude a finding that a worker has a disability within the meaning of Section 23(1). Nor, on the other hand, does the fact that subjective complaints exist automatically warrant a finding of disability. In all cases, a decision must be made on the particular facts of the claim as to whether or not a disability exists.

With regard to the question as to what type of evidence will be sufficient to justify a conclusion that a permanent disability exists in these cases, it is not possible to lay down an exclusive list. However, some suggestions can be made. There will, in the first place, be the claimant's own evidence regarding the nature and extent of the complaints and whether that evidence is credible and consistent. Regard must also be had to the claimant's conduct and activities and whether they are consistent with the complaints. There will then be the evaluations of the claimant by the various professional personnel and Board's staff who have been involved in the case, for example, doctors, psychologists, rehabilitation consultants, and assessors in the Board's Industrial Department.

Consideration will have to be given to the objective observations of these persons as well as their subjective assessments. They may be able to comment on whether the claimant's complaints are of a type and extent that might reasonably result from the type of injury which was suffered.

When there is little clinical evidence of objective impairment, extreme caution must be exercised in concluding that there is a permanent disability resulting from that injury. The evidence that is relied upon to support the assessment of such an award must be fully documented. It must clearly demonstrate that there is a permanent disability for which the payment of a pension award may be supported.

Sometimes cases occur where, although the worker has subjective complaints of pain and discomfort, the actual impairment which can be objectively seen by the Disability Awards Medical Advisor is negligible or too minimal to justify an award of the lowest percentage of disability ordinarily recognized. Where there is appropriate medical rationale to support the subjective complaints, the Disability Awards Officer or Adjudicator still has some discretion to make an award, having regard to the worker's particular circumstances, and may do so where, for instance, the Disability Awards Medical Advisor is of the opinion that the stress of the claimant's occupation or other physical activity could result in an impairment. The Disability Awards Officer or Adjudicator will not grant an award if she or he considers that the impairment is unlikely to affect the claimant's earning capacity. There is, in that situation, felt to be no "impairment of earning capacity" within the meaning of Section 23(1).

In making this determination, the Disability Awards Officer or Adjudicator may, in some cases, have to ask the Rehabilitation Consultant to investigate the jobs which are, in the long term, available and which the claimant is able to do. This represents one exception to the general principle that, in assessing the degree of physical impairment, no regard is had to the actual loss of earnings suffered by the claimant because of permanent impairment. On the other hand, if in such a case it is ultimately determined that the impairment, though minimal, will affect earning capacity, the assessment of the pension on a physical impairment basis is still on a percentage basis. A separate assessment of the pension will be made under the projected loss of earnings method which will result in a pension based on the actual loss of earnings. The higher of the two pensions will, according to normal principles, be the one awarded.

Findings and Reasons

(a) Proportionate Entitlement

- (22) Pursuant to section 65 of the Act, a certificate of a Medical Review Panel on a medical issue is conclusive and binding. As set out in Decision No. 17, however, it is only binding insofar as it involves a medical determination. Consideration as to the effect of the Medical Review Panel certificate, in respect of a worker's entitlement to compensation, may also involve issues of law and policy. The Medical Review Panel does not adjudicate issues of compensation entitlement.
- (23) Given the binding effect of a Medical Review Panel certificate, the conclusions of the Medical Review Panel will commonly, but not always, be determinative of the adjudication to be made on the claim. The scope for consideration of issues of law and policy will often not be apparent. However, it must be kept in mind that the determination of a worker's entitlement to compensation is always a separate matter in the implementation of a Medical Review Panel certificate.
- (24) Pursuant to section 82 of the Act, the governors must approve and superintend the policies and direction of the Board, including policies respecting compensation. Under section 83.1, the powers of the governors are currently exercised by a Panel of Administrators. The published policies provide direction, in the strongest possible terms, that "Proportionate Entitlement is thus a concept applicable only to permanent disability awards." This sentence is contained in published policy at #44.20 of the Manual, and in Decision No. 270.
- (25) The policies do not address this as a matter on which clear or unequivocal medical evidence would be required. Rather, the policies exclude in the broadest terms, the consideration of proportionate entitlement under section 5(5) of the Act to wage loss and health care benefits, on the basis that this is a concept which is applicable only to permanent disability awards. This is not qualified by reference to situations involving Medical Review Panel certificates, or reopenings on claims following an initial period of wage loss benefits immediately following an injury.
- (26) It is true that the policy cannot be considered determinative of the outcome. In *Sebastian v. Saskatchewan (Workers' Compensation Board)*, (1994) 7 C.C.E.L. (2d) 270, the Saskatchewan Court of Appeal stated (at para. 57):

The role of policy in administrative decisions is generally recognized. A board or tribunal is entitled to develop guidelines for application of statutory provisions which facilitate consistency and enable those governed by the legislation to know what factors may affect a claim. A policy may not remove the decision from the Board; if it predetermines a matter without an opportunity to address the merits, the Board disables itself from exercising the power to decide entrusted to it by statute. . . .

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- (27) On the other hand, there is a clear potential for unfairness if one worker's entitlement is adjudicated on terms different from those expressed in the policy, in the absence of clear and compelling reasons to support a departure from the policy in the circumstances of the particular worker's case.
- (28) The worker's representative submits that it is consistent with policy and the Act for the M.R.P. certificate to be interpreted so as to apply the one-third/two-thirds apportionment to the pension award, but not to the worker's wage loss benefits.
- (29) I note, in this regard, that a determination of compensation entitlement does not require a finding that the worker's employment was the sole or major cause of his or her injury or disease. It suffices that the work injury or work process is a significant cause of the worker's disability due to injury or disease. To that extent, it will commonly be the case that there are multiple causes of a worker's temporary and permanent disability. However, clear direction is provided by policy that proportionate entitlement does not apply to wage loss benefits.
- (30) Upon careful consideration of this matter, I am not persuaded that the Board is obliged, as a matter of law, to apply proportionate entitlement to the determination of the worker's entitlement to wage loss benefits in implementation of the Medical Review Panel certificate. Section 99 directs that the Board's decision be given according to the merits and justice of the case. I do not consider that the merits and justice of the case support a departure from the general policy in the circumstances of this particular case. I consider it more equitable to adjudicate the worker's entitlement based on the terms of the general policy. I find that the policy at #44.20 provides useful policy guidance with respect to the meaning of the phrase ". . . the proportion of the disability following the personal injury or disease that may reasonably be attributed to the personal injury or disease."
- (31) I do not consider that the policy at #44.20 of the Manual is contrary to the Act. Nor do I consider that applying that policy in the circumstances of this claim, and the September 29, 1998 Medical Review Panel certificate, involves an unlawful fettering of discretion. Accordingly, I allow the worker's appeal on this issue. Proportionate entitlement should not be applied to the calculation of the worker's wage loss benefits in implementation of the Medical Review Panel certificate.
- (32) I will not address the duration of the worker's wage loss benefits in this decision. The Medical Review Panel has certified the worker was temporarily disabled until September, 1997. If, in fact, the worker did not return to full duties by July 20, 1997 (when wage loss benefits were terminated), that information should be brought to the attention of the claims adjudicator. The worker is entitled to wage loss benefits up to September, 1997 in respect of any time loss from work, based on the Medical Review Panel certificate.

(b) Pension Award – Subjective Complaints

- (33) The worker seeks an increase in her loss of function pension award, for her subjective complaints of pain and restrictions resulting from pain.

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- (34) In clause three of the Medical Review Panel certificate, the panel found that at the time of examination, the worker had a disability. The panel certified “The disability consists of back pain, mild in extent now but severe in the past, limiting bending, lifting, long standing, prolonged sitting, and any strenuous activity utilizing the trunk; mildly now, but substantially in the past.”
- (35) I note, in this regard, the Medical Review Panel’s use of the terms “mild in extent” and “mildly now” to qualify its references to both the worker’s back pain and her restrictions due to the back pain.
- (36) The “pension decision letter” dated December 20, 1999 was in the nature of a standardized form letter concerning the pension award on the worker’s claim. A copy of a memo dated December 10, 1999 was attached to provide the details of how the decision was reached. Neither the memo nor the decision letter reveals any mention of consideration being provided to the worker’s subjective complaints.
- (37) The December 2, 1999 permanent functional impairment evaluation report by the Disability Awards medical advisor included the following information:

Present Complaints (Aggravating Factors, Relieving Factors, Associated Features)

[The worker] has decreased some of her recreational activities and states that she does not like vacuuming at home anymore and also had to give up quite a bit of the garden. She looks after her husband at home who apparently has severe migraines and does not work. She does walk the dogs for 1 to 2 hours everyday as this is her main exercise.

Her job has changed from being in the chef’s position to being salad preparer. She does not do much of the cooking anymore as this involved heavier lifting. She stated that she uses an occasional Naprosyn or Naproxen. She occasionally gets intermittent pain to the hip but she has an aching in the back most of the time. After her third surgery, she returned to work 2½ years ago and has been able to stay at work with the occasional day of discomfort. She uses a chair to sit at work sometimes as the job is mostly standing and this causes an increasing ache in her back.

- (38) Section 23(1) of the Act provides:

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

(39) Policy concerning pension awards for subjective complaints is set out at #39.01 of the Manual, and in Decision No. 318 (Re Stress Testing, 5 *Workers' Compensation Reporter* 55) and Decision No. 407 (Re Assessment of Permanent Disabilities, 6 *Workers' Compensation Reporter* 61).

(40) Published Appeal Division decisions include:

- #91-0388, Permanent Disability Awards for Subjective Pain, 7 *Workers' Compensation Reporter* 119
- #93-0329, Subjective Complaints of Pain, 9 *Workers' Compensation Reporter* 389
- #93-0277, Chronic Pain Syndrome, 9 *Workers' Compensation Reporter* 259
- #93-0740, Right to Reconsider Appeal Division Decisions, 10 *Workers' Compensation Reporter* 127

(41) In Decision #91-0388, the panel reasoned:

Since the Disability Awards Medical Advisor here found the objective functional assessment to be 3% and the Medical Review Panel had already found the worker to have a disability involving pain, the total award for objective plus subjective factors had to be greater than 3%. Otherwise, the subjective factors would only be assessed at 0%, which would contradict the binding Certificate of the Medical Review Panel.

The functional assessment has to be increased due to the subjective factors. Complaints of pain will not always mean that subjective factors will increase the functional impairment assessment. It is the effect of pain and whether or not it is disabling that must be considered by the Disability Awards Officer. It is not easy to assess and measure the effects of pain, but it must be done as Section 23(1) of the Act directs the Board to consider disability and impairment. This cannot be limited to objective factors. In this case, the assessment of the subjective factors was made easier by the Certificate of the Medical Review Panel.

(42) In considering the worker's appeal, I note that the policy concerning subjective complaints is not entirely clear and appears capable of differing interpretations:

- I. A first interpretation is that loss of function pension awards under section 23(1) are generally made based on an assessment of a worker's objectively measured impairment of function. However, even where such an assessment would tend not to support the making of any pension award as little or no objectively verifiable or measurable impairment is present, there is discretion to consider making an award on the basis of the worker's subjective complaints. This is done where the evidence supports a conclusion that these complaints would cause an impairment which is likely to adversely affect the worker's earning capacity, even though not objectively measurable in an examination. The making of such an award based largely on subjective complaints has the associated benefit of

permitting entry to consideration of a loss of earnings pension award under section 23(3) of the Act. Under this first interpretation, consideration of a pension award for subjective complaints is only undertaken where the assessment of loss of function would not otherwise support the granting of a pension award. If a measurable impairment of function is present, the pension award will be assessed on that basis alone. The worker's subjective complaints need not be considered where a pension is being awarded based on a loss of function basis.

- II. A second interpretation of the policy concerning subjective complaints is that such complaints are always addressed as a separate component in determining the worker's pension award. To the extent the subjective complaints are considered to cause an impairment which is likely to adversely affect the worker's earning capacity, an additional award should always be made on this basis in addition to any award made for the measured loss of function. Appeal Division #91-0388 might be interpreted as supporting this interpretation, although that is not the only way to interpret that decision.
- III. A third interpretation of the policy concerning subjective complaints is that an injury and resulting measurable objective impairment of function is considered to normally involve subjective complaints of a certain nature and extent. Where these are within the range of what is normally to be expected with a particular type of injury and impairment, no additional award is made for the subjective complaints. These complaints are considered part of the disability for which the loss of function pension award is made, and are subsumed in that award. Where, however, the subjective complaints are found to be genuine and credible, but are disproportionate to what would normally be associated with the particular type of injury and impairment, consideration may be given to making an additional award based on these subjective complaints (i.e. where these are of a nature and degree such that they are considered to cause an impairment which is likely to adversely affect the worker's earning capacity, beyond the extent recognized by the objectively measurable impairment of function alone).
- IV. A fourth interpretation is that it is necessary to consider whether the worker is suffering from an actual loss of earnings as a result of the injury, as a prerequisite to making a pension award for subjective complaints. The Review Board panel in this case found the policy at #39.01 of the Manual inapplicable, on the basis that the worker has been able to return to full-time employment and that there is no evidence that she is receiving any less earnings than she would have otherwise. I note, in this regard, Appeal Division reconsideration Decision #93-0740. That related to an Appeal Division decision in which the panel noted, perhaps in a similar vein:

In [the worker's] case, the objective findings were measurable and a functional award of 7% was allocated. The Disability Awards adjudicator noted the subjective complaints; however, concluded there was no loss in earnings greater than reflected by the functional impairment. We find no error in the Disability Awards adjudicator's rationale and calculations.

In Decision #93-0740, it was noted that the prior Appeal Division panel's comment regarding loss of earnings appeared to be gratuitous and unrelated to the determination of the amount of the pension award. Accordingly, it was found there was no error of law going to jurisdiction.

- (43) The wording of the policy concerning subjective complaints is somewhat ambiguous. It is not obvious that one of the various approaches most clearly reflects the intent of the policy, although Decision #93-0740 appears to indicate that the fourth approach would involve an error of law going to jurisdiction if it formed the basis for the decision (i.e. if evidence of an actual loss of earnings was considered a prerequisite, rather than merely a relevant consideration).
- (44) The facts of the case addressed in Decision No. 318 would tend to support the first interpretation. However, if the reasoning and analysis is viewed as having broader application beyond the facts of that situation, that reasoning would tend to support the second or third interpretations. It may be that clarification of #39.01 would assist in promoting consistency in the manner in which it is to be applied.
- (45) For the purposes of considering the worker's appeal, I am inclined to interpret the policy in the fashion described as the "third interpretation" set out above. The first interpretation may, in fact, be viewed as one situation in which the analysis applies (with respect to the recognition that subjective complaints may constitute a disability, where no measurable impairment is present), but the analysis need not be restricted to that particular situation (it may also apply where measurable impairment is present). This provides for a measure of discretion in considering the circumstances of individual cases. Under section 23(1), the impairment of earning capacity must be estimated from the nature and degree of the injury. It is appropriate to take into account the worker's subjective complaints in undertaking this assessment.
- (46) Upon considering the evidence and argument in this case, I am not persuaded that any additional award is warranted for the worker's subjective complaints. It is unfortunate the memo and decision letter providing details of the worker's pension award did not explain the consideration given to the worker's subjective complaints. Upon consideration of these complaints, however, I am not persuaded that they are of a nature and extent beyond what would normally be associated with an impairment of 4.2% of total disability (i.e. her assessed impairment before proportionate entitlement was applied). I find insufficient basis to conclude that there was any error in estimating the worker's impairment of earning capacity from the nature and degree of her injury.
- (47) In reaching this decision, I have considered the analysis in Appeal Division Decision #91-0388. However, in the present appeal, the Medical Review Panel certified that the worker's "disability consists of back pain, mild in extent now but severe in the past, limiting bending, lifting, long standing, prolonged sitting, and any strenuous activity utilizing the trunk; mildly now. . . ." In other words, she has mild back pain producing mild restrictions. I do not read the Medical Review Panel's certificate in this case as requiring separate recognition for her subjective complaints and objective impairment in the determination of her pension award, as these are very much interlinked and are mild in nature. I am not persuaded that the worker's pain and subjective complaints are the source of any additional disability greater than is reflected by the pension award based on the worker's objective impairment of function.

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- (48) The worker's appeal is, therefore, denied on this issue. I find that no increase is warranted in the worker's pension award based on her subjective complaints.

Conclusion

- (49) The worker's appeal is allowed in part. On the first issue, her appeal is allowed. Proportionate entitlement should not be applied in calculating her wage loss benefits, in implementing the Medical Review Panel certificate. On the second issue, her appeal is denied. No increase is warranted in the worker's pension award based on her subjective complaints.

Editors' Note: The names of the parties have been removed for privacy considerations. The text of the decision is otherwise unchanged.

Decision of the Appeal Division**Number: 2001-0972****Date: May 16, 2001****Panel: Herb Morton, Glen Bell, Heather McDonald****Subject: Entitlement to Interest on Retroactive Rehabilitation Benefits**

VOCATIONAL REHABILITATION (RETROACTIVE BENEFITS) (INTEREST) – No statutory entitlement to interest on retroactive benefits except in limited situations expressly addressed in the Act – Interest payment policy (#50.00) covers wage loss and pension benefits, but excludes rehabilitation benefits – Any change in circumstances under which interest is payable requires statutory or policy change – Under applicable general policies, no interest payable to worker – Worker appeal denied.

Law: WCA (1996): s. 16, s. 82, s. 91(1)**Policy:** RSCM: #50.00, #50.10, #85.30, #102.26; Decision No. 384, 5 *Workers' Compensation Reporter* 206; Decision No. 369, 5 *Workers' Compensation Reporter* 169; Panel Resolutions: #98/04/23003, 14 *Workers' Compensation Reporter* 107, #98/09/11-01, 14 *Workers' Compensation Reporter* 431; APM: #40:70:40**Decisions:** Appeal Division Decision No. 95-0668, 12 *Workers' Compensation Reporter* 221; Appeal Division Decision No. 97-0857, 13 *Workers' Compensation Reporter* 443; Appeal Division Decision No. 98-1112, 15 *Workers' Compensation Reporter* 349; Appeal Division Decision No. 2000-0482; Appeal Division Decision No. 2000-1551

Interest on Retroactive Rehabilitation Benefits [worker appeal (rev. brd.)]
Appeal Division Decision No. 2001-0972

17 *Workers' Compensation Reporter* [547]

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- (1) The worker appeals the November 21, 2000 Workers' Compensation Review Board (the Review Board) finding.
 - (2) The worker requests an oral hearing, stating that the Review Board panel majority questioned his credibility. We find that the issue raised by the worker's appeal involves the interpretation of law and policy, and can be properly addressed on the basis of written submissions.

Issue(s)

- (3) Is the worker entitled to interest on the payment of retroactive rehabilitation benefits?

Jurisdiction

- (4) The worker's appeal is brought under section 91 of the *Workers Compensation Act* (the Act). Section 96(3) of the Act provides that on an appeal under section 91(1), the Appeal Division may reopen, rehear and redetermine any matter that has been dealt with by the Review Board.

Governors' policy in Decision No. 75 (Appeal Division Administration, Practice and Procedure, 10 *Workers' Compensation Reporter* 753) further provides that the Appeal Division has the discretion to initiate and conduct a full inquiry into all of the issues arising out of an appeal once the matter is before it.

Background

- (5) While employed as a carpenter, the worker suffered a right knee injury on February 1, 1995 at age 63. The worker underwent arthroscopic surgery for a right knee meniscal tear on April 6, 1995. He received wage loss benefits until January 14, 1996, and rehabilitation benefits to June 16, 1996.
- (6) A Review Board finding dated February 27, 1997 allowed the worker's appeal for further rehabilitation benefits beyond June 16, 1996. By letter of September 11, 1997, the vocational rehabilitation consultant advised the worker that a rehabilitation allowance would be paid commencing from the date of the February 27, 1997 Review Board finding. By decision dated February 6, 1998, the worker was advised that his rehabilitation benefits would cease as of February 22, 1998.
- (7) The worker appealed the September 11, 1997 and February 6, 1998 decisions of the vocational rehabilitation consultant. A second Review Board finding dated August 20, 1998 found at page 6:

The panel finds that the intention of the original Review Board panel was clear and that [the worker] must be provided with vocational rehabilitation allowances from June 16, 1996 to February 27, 1997 and this panel so directs.

- (8) The Review Board panel further found (at page 8):

The panel finds that [the worker] is entitled to a comprehensive employability assessment and that until such time as this is completed he is entitled to a continuation of vocational rehabilitation and benefits.

- (9) By decision dated January 6, 1999, the rehabilitation consultant advised the worker regarding the payment of retroactive rehabilitation allowances in implementation of the August 20, 1998 Review Board finding. This letter refers to payments as follows:

Number of days	Payment amount	Period covered
183	\$22,122.98	June 17, 1996 to February 26, 1997
190	\$26,545.21	February 23, 1998 to November 15, 1998
10	\$1,439.60	November 16, 1998 to November 29, 1998
20	\$2,879.20	November 30, 1998 to December 27, 1998

(10) The first payment amount was coded as regular rehabilitation assistance. The other three payment amounts were coded as “regular planning.”

(11) The January 6, 1999 decision by the rehabilitation consultant further advised the worker:

Your letter also requested payment of interest on the retroactive amount. Unfortunately the Board’s current policy allows for payment of interest only on retroactive wage loss or pension amounts as outlined in the attached excerpt from the Rehabilitation Services and Claims Manual.

(12) Rehabilitation payments continued after the January 6, 1999 letter on a “current” rather than retroactive basis. The issue with respect to possible eligibility for interest on retroactive rehabilitation assistance is solely in respect of the payments made under the January 6, 1999 decision.

(13) The worker appealed the January 6, 1999 decision to deny payment of interest to the Review Board. By finding dated November 21, 2000, the Review Board majority denied the worker’s appeal. The majority reasoned:

... item #50.00 of the *Manual* is lawfully approved policy of the Board and should be followed by this panel unless there are unusual and extraordinary circumstances which preclude adherence to the policy.

The panel majority feels the Board has had ample time to consider the make-up of policy #50.00, including the interpretation suggested by Decision #00-0482, and are clear that retroactive interest applies only to wage loss and pension payments. The Board is very aware of the on-going debate on this issue, and in fact have been asked by the Appeal Division to clarify their position. By their silence, the Board has confirmed that the policy is not to be applied to retroactive interest on rehabilitation benefits.

As this policy is not a patently unreasonable interpretation of the Act, we see no unusual or extraordinary circumstances in this case to deviate from the lawful policy of the Board as stated in item #50.00. The panel majority therefore denies [the worker’s] appeal.

(14) A dissenting member of the Review Board panel found that interest should be paid to the worker. She reasoned, in part:

I have been spared the effort of weighing and analyzing all of the underlying policy and prior Appeal Division findings by allowing myself to be guided by the analysis set out by the Appeal Division in #00-0482. I have included much of the analysis in the body of this finding because it clarifies the reasoning of the Appeal Division whose reasoning I adopt and support. The decision sets out the conditions which would have to be met should there be a basis for paying interest on retroactive rehabilitation wage loss equivalency benefits. [The worker] meets all the tests set out in the Appeal Division finding.

I find that the worker's unique and unusual situation leads me to conclude that interest is appropriate in this circumstance. . .

- (15) The worker has received rehabilitation benefits or allowances for a total of 1,015 days (for the four years from January 15, 1996 until December 5, 1999). In memo #52, the vocational rehabilitation consultant noted "this budget brings total rehabilitation expenditures on this case to \$137,619.25." Rehabilitation benefits provided to the worker during 1996, 1997, and 1998 were provided in the categories of rehabilitation assistance, planning, work assessment, and rehabilitation miscellaneous. For the period August 23, 1999 until December 5, 1999, the worker was paid continuity of income (Code R) benefits on a current basis. None of the retroactive rehabilitation payments for which interest is sought in this appeal were paid as continuity of income (Code R) benefits under the policy at #89.11 of the *Rehabilitation Services and Claims Manual* (the Manual).
- (16) We have included in our review the evidence concerning the worker's particular circumstances, although we do not consider it necessary to set out that evidence in this decision.

Law and Policy

- (17) There are several provisions in the *Workers Compensation Act* concerning payment of interest. These include sections 19(1) and 19(2)(c), 48(2), 49(1), 92(3), 96(7), and 196(8). None of those provisions are directly relevant in this case.
- (18) Section 82 of the Act provides:
- The governors must approve and superintend the policies and direction of the board, including policies respecting compensation, assessment, rehabilitation and occupational safety and health. . . .
- (19) Under section 83.1, the powers of the governors are currently exercised by a Panel of Administrators.
- (20) Section 16 of the Act concerns vocational rehabilitation. It provides:
- (1) To aid in getting injured workers back to work or to assist in lessening or removing a resulting handicap, the board may take the measures and make the expenditures from the accident fund that it considers necessary or expedient, regardless of the date on which the worker first became entitled to compensation.
- (2) Where compensation is payable under this Part as the result of the death of a worker, the board may make provisions and expenditures for the training or retraining of a surviving dependent spouse, regardless of the date of death.
- (3) The board may, where it considers it advisable, provide counselling and placement services to dependants.

- (21) The central policy in the *Rehabilitation Services and Claims Manual* concerning interest is set out at item #50.00 (quoted in part):

50.00 Interest

Effective May 7, 1984, interest is paid to workers or employers on retroactive wage-loss and pension lump sum payments subject to the following conditions.

1. The decision to award interest is made by the Claims Adjudicator, Disability Awards Officer or Adjudicator in Disability Awards, as the case may be.
 2. Interest is paid when the wage loss or pension is for a condition which was previously overlooked or for which the Board previously decided that no payment was due.
 3. No interest is paid unless the commencement date of the retroactive benefits is more than one year prior to the date the retroactive payment is being processed. Interest is calculated from the first day of the month following the commencement date of the retroactive benefits.
 4. For each year in respect of which compensation is retroactively paid the rate of interest will equal the average return on the Board's total investment portfolio for the preceding year.
- (22) The historical practice of the Workers' Compensation Board (the Board) is described at #50.10 of the Manual. Decision No. 346 (Re Payment of Interest, 5 *Workers' Compensation Reporter* 125, December 16, 1981) provided for the payment of interest on retroactive wage loss and pension lump sum payments effective November 26, 1981. Decision No. 384 (Re Interest Payments on Retroactive Pensions, 5 *Workers' Compensation Reporter* 206, May 1, 1984) replaced Decision No. 346 effective May 7, 1984.
- (23) The subject of interest was addressed in a resolution by the Panel of Administrators dated April 23, 1998 (Number 98/04/23003, section 39(1)(e), published at 14 *Workers' Compensation Reporter* 107). In a resolution dated September 11, 1998 (Number 98/09/11-01, Interest on Assessment and Prevention Appeals, 14 *Workers' Compensation Reporter* 431), the Panel of Administrators provided further policy concerning payment of interest following employer appeals to the Appeal Division under section 96(6) or (6.1) of the Act. The effect of paragraph 4 of the April 23, 1998 policy resolution, concerning relief of claim costs applications under section 39(1)(e) of the Act, is to award interest on only a short-term basis, and not retroactive to the date of the events in question. This is consistent with the terms of the later policy dated September 11, 1998, which provides that the effective date of interest following successful appeals to the Appeal Division under section 96(6) or (6.1) will be the date the employer filed the notice of appeal with the Appeal Division (i.e. rather than from the date of the events in question). In both cases, the payment of interest is on a limited basis.

- (24) Additional policy concerning payment of interest by the Board is set out at No. 40:70:40 of the *Assessment Policy Manual*.

Prior Appeal Division Decisions

- (25) The question of the Board's authority to pay interest, apart from those situations expressly provided for in the Act, was addressed in a prior Appeal Division decision (#97-0857, *Authority to Award Interest*, 13 *Workers' Compensation Reporter* 443). The Appeal Division panel found that there is no entitlement to interest under the Act except as expressly provided in the various sections of the Act dealing with interest. The Appeal Division panel reasoned, at page 459:

We interpret ss. 92(3) as recognizing the board's authority to award interest in a number of situations on a discretionary basis (if the governors' policies so provide), while creating a statutory obligation to pay interest in one specific situation.

- (26) The dissenting member of the Review Board panel, which issued the November 21, 2000 finding which is the subject of this appeal, relied upon the reasoning expressed in Appeal Division Decision #00-0482. That decision concerned continuity of income (Code R) benefits paid to the worker under the policy at #89.11 of the Manual. Part of the panel's reasoning in that case related to the fact that such benefits had historically been paid by the Board as a type of wage loss benefit for temporary partial disability, rather than as rehabilitation benefits. In its April 10, 2000 decision (#00-0482), the Appeal Division majority concluded by noting:

We note that the Panel of Administrators has yet to consider the 1994 submission of the workers' advisor that requested direction and clarification on this issue. We urge the Panel of Administrators to review Item #50.00 of the *Manual* with a view to clarifying its intent, so that there will be clear direction as to the Board's policy in making interest payments and the reasons which justify the Board's policy. Only with clear direction from the Panel of Administrators will the current vague and unsatisfactory situation surrounding Item #50.00 come to an end.

- (27) The employer's advisor cites Appeal Division Decision #00-1551 dated October 3, 2000. In that case, the Appeal Division panel found that policy at #50.00 only provides for interest on true wage loss benefits, and not on "wage loss equivalency rehabilitation benefits." The panel noted that "it would have been a simple matter for the Panel of Administrators to have amended policy item #50.00 to refer to rehabilitation benefits. It has not done so. The worker is not entitled to interest under item #50.00."

Royal Commission Report

- (28) While not directly relevant, we note with interest that the subject of payment of interest by the Board was a matter addressed in the January 20, 1999 *Final Report of the Royal Commission on Workers' Compensation of British Columbia, For the Common Good*, at volume 1, chapter 8,

page 31–32. The Royal Commission noted the policy at #50.00 limiting interest to wage loss or pension benefits for a condition which was previously overlooked or for which the Board had previously decided that no payment was due. The Royal Commission recommended the following statutory amendment:

48. the *Workers Compensation Act* be amended:

- a) to require the board to pay interest on compensation payable for wage loss benefits to a worker, or benefits payable to the worker's dependants, where the initial adjudication of that compensation is delayed more than 60 days after the board was in receipt of sufficient notice to consider the claim to have been commenced, if the circumstances that resulted in the delay were or ought to have been in the control of the board; and
- b) the rate of interest be calculated in accordance with Section 7 of the *Court Order Interest Act*, rather than on the basis of the rate of return of the board's investment portfolio.

- (29) The Royal Commission restricted its recommendation for statutory amendment to require payment of interest to compensation payable for wage loss benefits to a worker, or benefits payable to the worker's dependants.

Submissions

- (30) The worker submits:

Reading [the Review Board finding] I get the feeling That the commissioners drafting item #50 were feeble in the mind? not being able to foresee the consequences of their vaguely worded item #50??. On the contrary, aided by the best legal minds and strategist and influenced by industrial lobbying, it was crafted with Machiavellian precision first to deflect criticism from labour unions where the changes proposed to W.C.B. were discussed in detail, but more important to them, for discretionary powers and inherent monetary gain. Of course the board keeps Quiet about possibilities of item #50, carefully crafted as a twosided sword to enable the board to withhold payments from anyone as long as possible collect interest and effectively punish the workers by not paying interest and forcing to lose premium interest payable on credit cards, 17% + in my case, adding insult to injury. The interest payed on this money should be the same as payed by people on overdrawn accounts 2% per months. . . . *This and an on purpose ambiguous worded item # 50 entitles Me to full reimbursement of lost income caused by being put in the position to have to pay interest on badly needed loss of ready cash.*

[reproduced as written, emphasis in original]

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- (31) The employer is no longer registered with the Board and the B. C. Construction Association is not participating although invited to do so. A submission has been provided by the employers' advisor dated March 23, 2001, and a reply was provided by the worker on April 4, 2001 (forwarded by the workers' adviser on April 5, 2001).

Findings and Reasons

- (32) Upon consideration of the arguments provided in this case, and the analyses provided in prior decisions, we find it clear that there is no right to interest on retroactive benefits payable under the Act except in those limited situations expressly addressed in the Act. We agree, in this regard, with the reasoning expressed in published Appeal Division Decision #97-0857.
- (33) As there is a statutory entitlement to interest only in the situations expressly covered by sections 19(2)(c), 92(3), 96(7) and 196(8), it is necessary to look to the policies of the governors (now Panel of Administrators) in order to determine whether interest is payable to the worker on his retroactive rehabilitation benefits.
- (34) We accept that the policy-makers have authority under the Act to establish policy concerning the payment of interest in respect of those benefits and situations not expressly addressed by the Act. The Board of Governors / Panel of Administrators have, in exercising their authority for providing policy direction under section 82 of the Act, established an interest payment policy which covers only wage loss and pension benefits and excludes rehabilitation benefits.
- (35) We further note that the policy-makers have been asked to clarify the policy at #50.00, both by the workers' advisors office in 1994 and the Appeal Division panel in Decision #00-0482. To date, they have declined to do so.
- (36) In considering this matter, we have looked for a rationale for the policy of not awarding interest on rehabilitation benefits. The policy does not provide reasons, so this requires some conjecture on our part. One rationale might relate to the difference in character between compensation in the form of wage loss and pension benefits, and rehabilitation assistance under section 16. The sections in the Act concerning wage loss and pension benefits (including sections 22, 23, 29, and 30), are viewed as "entitlement" provisions, whereas rehabilitation benefits are seen as intrinsically "discretionary" in nature.
- (37) Decision No. 60 (Re Appeals to Board of Review, 1 *Workers' Compensation Reporter* 247, October 1, 1974) stated at page 257:

Assistance under section 16 should not be grudgingly dispensed as if it were a charity. But neither should it be firmly established as if it were a right. A right is something to which a person is entitled regardless of any effort on his part. But successful rehabilitation requires stimulating and motivating the injury victim to take an initiative himself, and then assisting him in fulfilling that initiative. A re-training allowance should, therefore, be seen as a form of support offered in response to the determination of the worker to re-establish himself. Any recognition of a "right" to rehabilitation services would be counter-productive.

(38) That reasoning was offered in support of a conclusion that the prior boards of review did not have jurisdiction in rehabilitation matters. While appeal rights are currently recognized in relation to rehabilitation decisions, the analysis is revealing in its description of the different character and purposes of compensation and rehabilitation benefits under the Act. The payment of interest on retroactive rehabilitation assistance would, by that analysis, likely have been considered counterproductive as amounting to recognition of a right to rehabilitation services.

(39) The reasoning in Decision No. 60 with respect to appeal rights on rehabilitation matters was replaced in 1983 by Decision No. 369 (*Re Appeals to the Boards of Review*, 5 *Workers' Compensation Reporter* 169, April 8, 1983). Decision No. 369 provides, at page 170:

Rehabilitation is a discretionary matter for the Board. There is no legal right to rehabilitation. However, appeals are permitted on other discretionary matters. The Commissioners consider that the reasons for not previously permitting appeals to the boards of review on rehabilitation matters are legitimate concerns, but are not sufficient to justify a different rule from that followed in connection with other discretionary matters. . . .

(40) Current policy at 102.26 of the Manual similarly states:

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

(41) The statement that “there is no legal right to rehabilitation” reinforces the concept of rehabilitation services being provided on a discretionary basis rather than as a matter of right.

(42) We note the historical overview provided in Appeal Division Decision #95-0668 (*Rehabilitation Costs and E.R.A.*, 12 *Workers' Compensation Reporter* 221) at pages 225 to 227, in connection with the provision of rehabilitation assistance under the Act. There was no provision for payment of rehabilitation in the original workers' compensation legislation of 1916. Provision was not made in the Act for such assistance until the 1943 amendments, and was originally based upon a fixed amount being allocated by the Board for this purpose each year. In his Royal Commission report of 1952, Mr. Justice Sloan recommended the \$75,000 ceiling (for all rehabilitation expenses paid by the Board during the year) be removed, and that such expenditures be left to the discretion of the Board. It is evident from this history that rehabilitation assistance was, from the outset, treated as different in character from compensation. The conclusion reached in Appeal Division Decision #96-0244 (*Rehabilitation Costs and Experience Rated Assessments*, 12 *Workers' Compensation Reporter* 265) concerning the inclusion of rehabilitation costs in calculating an employer's experience rating, does not affect the summary provided in Decision #95-0668 of the history concerning the provision of rehabilitation assistance under the Act.

- (43) Governors' policy at #85.30 sets out the guiding principles of quality vocational rehabilitation. The second principle states:

Successful vocational rehabilitation requires that workers be motivated to take an active interest and initiative in their own rehabilitation. Vocational programs and services should, therefore, be offered and sustained in direct response to the commitment and determination of workers to re-establish themselves.

- (44) Unlike wage loss or pension benefits, the extent of rehabilitation assistance to be provided to a worker is not determined by the Act and policy alone. It is also contingent on the worker's own desire to pursue a rehabilitation program. This illustrates one of the differences between wage loss and pension benefits, and rehabilitation assistance under section 16 of the Act.
- (45) The distinction between compensation and rehabilitation benefits is also supported by the wording of section 82 of the Act which refers to compensation and rehabilitation benefits separately.
- (46) We note that it is sometimes suggested that rehabilitation assistance cannot be provided on a retroactive basis in any event. This reasoning relates to the provision of active rehabilitation such as retraining. Where no rehabilitation program was being undertaken in the past, history cannot be rewritten as a result of an appeal or reconsideration. New or additional active rehabilitation measures can normally only be offered prospectively. We recognize, however, that there are situations where the worker has undertaken an educational, training or job search program on his or her own initiative and it will subsequently be determined that this should have been accepted as a Board responsibility, resulting in a retroactive rehabilitation payment. We note, in this regard, the reasoning expressed in Appeal Division Decision #98-1112 (*Retroactive rehabilitation benefits – Reconsideration of an Appeal Division Decision*, 15 *Workers' Compensation Reporter* 349). That decision found, at page 357, that there is range of viable interpretations as to the Board's authority to make retroactive payments to meet its obligation to provide vocational rehabilitation benefits – all of which may to a greater or lesser extent be reconciled with s. 16 of the Act. Thus, there is no strong reason for considering that such payments cannot be made on a retroactive basis.
- (47) We further note that the provisions in the Act which set out an express entitlement to interest deal with particular defined and limited circumstances. It may be considered that the policies limiting payment of interest to other defined and limited situations are consistent with a general legislative intent to limit payment of interest. In this light, the drawing of a distinction between compensation benefits which are payable as an entitlement, and rehabilitation benefits which are discretionary, has some rational basis under the Act.
- (48) The Board has responsibility under section 39 of the Act for creating and maintaining an adequate accident fund. We accept that the magnitude of costs associated with various policy proposals may be a proper consideration for the policy-makers in connection with their responsibility for maintaining an adequate accident fund, so long as this does not impinge improperly on entitlement created by the Act. We have already found above that there is no

statutory entitlement to interest except in a few situations expressly covered by the Act. Thus, there is scope for the policy-makers to exercise discretion in determining whether interest costs on retroactive rehabilitation expenditures are appropriately borne by the accident fund.

- (49) Our consideration in respect of the intent of the policy at #50.00 is not necessary to our decision. Our reasoning is not intended to limit any review of the policy which might be undertaken in the future. We note, in this regard, the analysis in Decision #98-1112, at page 357:

While the wording of s. 16 may suggest that it only contemplates the actual delivery by the board of vocational rehabilitation services which would seemingly preclude any retroactive payments, the discretionary provisions it contains arguably allow the board to make such payments. It could be reasoned that, although there is no entitlement under the Act to vocational rehabilitation benefits in the sense that there is an entitlement to compensation, the fact that the board is bound by the Act to try to rehabilitate injured workers almost creates an entitlement to these benefits with the board retaining a discretion as to the type and amount of benefits it ultimately provides.

- (50) The Panel of Administrators has provided additional policy direction relating to payment of interest, as set out in the published resolutions dated April 23, 1998 and September 11, 1998. It is evident from this that the policy-makers have addressed issues relating to interest, and provided new policy on this subject in recent years. The absence of policy amendment or clarification pertaining to item #50.00 does not necessarily mean that it will not be further addressed in the future. However, no amendment of item #50.00 has been undertaken by the policy-makers to date. Accordingly, the worker's appeal must be considered on the basis of the guidance provided by the general policy at #50.00. Under the terms of that policy, the worker is not eligible for interest on his retroactive rehabilitation payments as interest is only payable under #50.00 for retroactive wage loss and pension benefits.
- (51) We have also considered the circumstances of the worker's particular case. We find, however, that the circumstances of the worker's case do not warrant a departure from the policy at #50.00. Accordingly, the worker's appeal must be decided in accordance with that policy.
- (52) In summary, there are several provisions in the Act requiring payment of interest. These involve limited situations, and are generally for limited periods of time. There is no general statutory entitlement to interest. Any change in the circumstances under which interest is payable would require statutory or policy change. To the extent the policy-makers have declined to exercise their discretion to expand the situations in which interest is payable, this is within the range of reasonable choices allowed and the Appeal Division cannot interfere. We find that under the applicable general policies, no interest is payable to the worker. We further find no basis for departing from the published general policies in the circumstances of the worker's case. We are in agreement, therefore, with the conclusion of the Review Board majority in their November 21, 2000 finding.

Conclusion

- (53) We deny the worker's appeal. The worker is not entitled to interest on the payment of retroactive rehabilitation benefits.

Editors' Note: The names of the parties have been removed for privacy considerations. The text of the decision is otherwise unchanged.

Decision of the Appeal Division**Number: 2001-1217****Date: June 19, 2001****Panel: Herb Morton, Heather McDonald, Marguerite Mousseau****Subject: Status of Principals of Unregistered Companies (No. 2)**

WORKERS UNDER THE ACT (PRINCIPAL OF UNREGISTERED FIRM) (LAWFULNESS OF POLICY) – Plaintiff, principal of company not registered with the Board at the time of the accident – Panel adopts approach of majority in Appeal Division Decision No. 2000-0684 – Decision No. 335 concerns the status of persons under Part 1 of the Act and is not limited to eligibility for compensation – Lawfulness of policy stated in Decision No. 335 – Whether policy offends general legal principles against piercing the corporate veil or offends provisions of the Act concerning compulsory provision of compensation coverage for workers – Policy is viable under the Act – No exceptional circumstances warranting a departure from policy – While policy not so strained to be unlawful, panel notes inherent difficulties and recommends that the Panel of Administrators review the policy – Plaintiff was not a worker.

Law: WCA (1996): s. 11, s. 47(2), s. 47(3),**Policy:** APM: #20:30:30, #40:10:30; RSCM: #48.40; Decision No. 335, 5 *Workers' Compensation Reporter* 101**Decisions:** Appeal Division Decision No. 93-0336, 9 *Workers' Compensation Reporter* 705; Appeal Division Decision No. 94-0872, 10 *Workers' Compensation Reporter* 810; Appeal Division Decision No. 95-0320, 11 *Workers' Compensation Reporter* 327; Appeal Division Decision No. 2000-0684, 17 *Workers' Compensation Reporter* 475; *Isaac v. W.C.B.*, [1994] 9 W.W.R. 245 (B.C.C.A.); *B.G. Preeco I (Pacific Coast) v. Bon Street Holdings Ltd.* (1989), 37 B.C.L.R. (2d) 258 (C.A.); *Villetard's Eggs Ltd. v. Canada (Egg Marketing Agency)*, [1995] F.C.J. No. 598 (QL) (F.C.A.); *Mantei v. Morris*, [1997] 9 W.W.R. 203 (Sask.Q.B.), *aff'd*, [1998] 10 W.W.R. 741 (Sask.C.A.)

Status of Principal of Unregistered Company (No. 2) [section 11 determination]
Appeal Division Decision No. 2001-1217

17 *Workers' Compensation Reporter* [559]

- (1) The defendants request a determination under section 11 of the *Workers Compensation Act* (the Act) in this legal action.
- (2) Section 11 of the Act obliges the Board to make determinations and provide a certificate to the court in certain matters which are relevant to the legal action. The governors of the Board assigned this function to the chief appeal commissioner and the Appeal Division. The role of the Appeal Division is to determine the status of the parties under the Act. It is for the court to determine the effect of the certificate on the legal action. Section 85.2(6) of the Act provides that a decision of the Appeal Division is deemed to be a decision of the Board.

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- (3) Appeal Division decisions since January 1, 2000 are publicly accessible on the internet. For this reason, Appeal Division decisions are generally written without identifiers to protect confidentiality. A section 11 determination for a court action in British Columbia is filed in the court registry by the Appeal Division, and is thus publicly accessible. Section 11 determinations are therefore generally written with identifiers, and are posted to the internet with identifying information included. However, in this case the legal action is brought outside the province of British Columbia and responsibility for filing the certificate in the action rests with the parties. Where, as here, the Appeal Division does not handle the filing of the certificate in the legal action, the copy of the Appeal Division decision posted to the internet will not include identifying information. To facilitate this process, the body of this decision will be written without naming the parties. The plaintiff is referred to as the plaintiff, the personal defendant as D, and the corporate defendant as C.
- (4) All references in this decision to “the Act” mean the British Columbia *Workers Compensation Act*, unless otherwise specified. All references in this decision to “the Board” mean the British Columbia Workers’ Compensation Board, unless otherwise specified.

Issue(s)

- (5) Determinations are requested as to the status of the parties to the action, at the time of the February 18, 1994 motor vehicle accident. This raises the following questions:
- Was the plaintiff a worker within the meaning of Part 1 of the Act?
 - Did the injuries suffered by the plaintiff arise out of and in the course of employment within the scope of Part 1 of the Act?
 - Was the personal defendant (D) a worker within the meaning of Part 1 of the Act?
 - Did any action or conduct of the personal defendant, D, which caused the alleged breach of duty of care, arise out of and in the course of employment within the scope of Part 1 of the Act?
 - Was the corporate defendant, C, an employer engaged in an industry within the meaning of Part 1 of the Act?
 - Did any action or conduct of the corporate defendant, C, or its servant or agent, which caused the alleged breach of duty of care, arise out of and in the course of employment within the scope of Part 1 of the Act?

Background

- (6) This action relates to a motor vehicle accident which occurred on February 18, 1994, at approximately 2:00 p.m., involving a collision between two vehicles at an intersection. The accident occurred approximately three miles west of Edson, Alberta. The plaintiff was driving

a rental vehicle. The other vehicle was being driven by the personal defendant (D), whose vehicle was owned by his employer, the corporate defendant (C).

Status of the Plaintiff

- (7) The central issues in this case are whether, at the time of the accident, the plaintiff was a worker within the meaning of Part 1 of the Act and, if so, whether his injuries arose out of and in the course of his employment. The plaintiff is the principal of a limited company (X Ltd.). X Ltd. was not registered with the Board at the time of the accident. More than two years later, X Ltd. registered with the Board (on April 9, 1996).
- (8) Plaintiff's counsel submits that the plaintiff was the president and controlling mind of X Ltd. She submits that the plaintiff was solely responsible for the failure by X Ltd. to register with the Board.
- (9) Following the February 18, 1994 accident, the plaintiff's lawyer wrote to the Board on March 25, 1996 requesting a certificate or letter concerning the plaintiff's status. The plaintiff's lawyer advised that the plaintiff was a businessman/office worker and was not covered by the Board. The enclosed authorization for release of information, signed March 2, 1996, showed the plaintiff's personal residence was in the lower mainland of British Columbia.
- (10) By letter dated April 19, 1996, the claims adjudicator advised the plaintiff that as he was a principal of X Ltd., and as X Ltd. was not registered with the Board at the time of the February 18, 1994 accident, his claim would not be accepted by the Board. The claims adjudicator enclosed a copy of *Workers' Compensation Reporter* Decision No. 335 (Re Principals of Limited Companies, 5 *Workers' Compensation Reporter* 101, April 27, 1981).
- (11) In considering this application for a section 11 determination, the Appeal Division is not bound by the prior decision of a Board officer. We will consider the evidence and argument anew, in making our determination.
- (12) By letter dated April 17, 1997, a representative for the corporate defendant C noted:

In this accident, [the plaintiff] was involved in a motor vehicle accident while on business in Alberta, on 18 February 1994. Although a principal in the company, [the plaintiff] was acting in capacity as a buyer for the firm. It is our understanding that he was purchasing lumber from [an Alberta company]. . . . As such, we were under the impression that this firm would require mandatory registration by the WCB, and not voluntary registration.
- (13) At the time of the accident, the plaintiff was on Highway #47, preparing to turn off to the premises of an Alberta lumber company.
- (14) As noted above, the determination of the plaintiff's status involves two issues. Firstly, was he a worker within the meaning of Part 1 of the Act, and secondly, did his injuries arise out of and in the course of his employment? If the first issue is answered in the affirmative, we find that it

would then be clear that the plaintiff's injuries arose out of and in the course of his employment. Governors' policy at #18.40 of the *Rehabilitation Services and Claims Manual* (the Manual) concerns travelling employees. The policy states:

Employees whose job involves travelling on a particular occasion or generally are covered while travelling. Where they do not travel to their employer's premises before beginning the travelling required by their work, they are covered from the moment they leave their residence. However, they will not be covered if they first travel to their employer's premises even though their vehicle has been provided by their employer and/or they need that vehicle to do the travelling required by their work.

(15) #18.41 of the Manual further provides (in part):

The basic principle followed by the Board is set out in Larson's *Workmen's Compensation Law* as follows:

"Employees whose work entails travel away from the employer's premises are held . . . to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown." [Larson, para. 25.00]

This principle covers the activities of travelling, eating in restaurants, and staying in hotels overnight where these are required by a person's employment.

(16) Policy at #18.42 of the Manual concerns *Trips Having Business and Non-Business Purpose*:

Whatever other requirements there may be for accepting a claim for an injury occurring on a trip made for business and non-business purposes, one essential is that the injury occur at a time when the claimant is or is substantially on the route which leads to the place where the business purpose is to be carried out. No compensation is payable where the injury occurs while the claimant is making a significant deviation from that route for non-business purposes.

(17) Given the evidence that the plaintiff was engaged in a business trip out of the province, and was close to the premises of a company which he intended to visit for a work purpose at the time of the accident, we consider that the plaintiff's activities at the time of the accident were for a "work" purpose. There is no evidence of a deviation by the plaintiff from his route for a non-business purpose preceding the accident. If he were a worker within the meaning of Part 1 of the Act, the policies would support a conclusion that the accident arose out of and in the course of his employment. It is, therefore, the first issue which is central to this determination.

(18) A similar issue was addressed in Appeal Division Decision #00-0684 dated May 11, 2000. This concerns the interpretation of the policy in Decision No. 335. We disclosed Decision #00-0684 to counsel, and the parties have provided us with submissions concerning the reasoning in that decision.


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- (19) We would note, at this juncture, that although Decision No. 335 was a decision of the former commissioners in 1981, its current significance lies in its adoption by the Board of Governors in 1991 as part of their published policies, and then by the Panel of Administrators in 1995.
- (20) Prior to 1991, key decisions of the Board were published in the *Workers' Compensation Reporter* under the authority of the commissioners of the Board. Decision No. 1 of the *Reporter* explained, on page 1, that "the views of the Commissioners on matters of policy and principle should be made clearly known to the staff." The word "policy" did not appear in the Act at that time. Since June 3, 1991, pursuant to the changes contained in Bill 27, the *Workers Compensation Amendment Act, 1989*, under section 82 the governors have authority to "approve and superintend the policies and direction of the Board, including policies respecting compensation, assessment, rehabilitation and occupational safety and health. . ." Decision No. 3 of the governors, effective June 3, 1991 [Published Policy of the Governors, 7 *Workers' Compensation Reporter* 17], stated that the published policies of the governors consisted of the Board's policy manuals and the *Workers' Compensation Reporter* Decision Nos. 1-423, and all decisions of the governors declared to be policy decisions. The powers, duties and functions of the governors are currently discharged by a Panel of Administrators under section 83.1 of the Act. In Decision No. 1 of the Panel of Administrators dated July 17, 1995 [Discharge of Governor Policy-making Function, 11 *Workers' Compensation Reporter* 465], the administrators confirmed that "all policies of the governors immediately prior to the appointment of the panel will continue to apply."
- (21) Current policy in the *Assessment Policy Manual* provides, at No. 20:30:30:

However, in the event of an injury to an active principal of a private company that is not registered with the Board, that active principal is not entitled to compensation benefits. This is based on two principles established in WCB Reporter Decision No. 335:

1. All active principals of a company should be aware of the obligations of the company and should bear the responsibility for registration as an employer under the Act.
2. Except under unusual circumstances, a person who in essence is both a "worker" and an "employer" cannot be given the benefits due to a "worker" unless that person's obligations have been met under the Act as an "employer".

Should an injured principal of a company be denied compensation benefits because of the company's failure to register with the Board, that principal's earnings prior to the date of injury are not assessed.

- (22) Consequently, Decision No. 335 provided policy guidance for the Board when it was first issued in 1981. It remains policy as adopted by the Board of Governors in 1991 and re-adopted by the Panel of Administrators in 1995, and as cited in the current policy set out at No. 20:30:30 of the *Assessment Policy Manual*.

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- (23) In Decision #00-0684, the majority found the principal of the company, who had responsibility for the failure of the company to register with the Board, was not a worker within the meaning of Part 1 of the Act at the time of a motor vehicle accident. The dissenting member of the Appeal Division panel found that the responsible principal was a worker.
- (24) The defendants in this case rely on the dissenting opinion in Decision #00-0684. The defendants argue that Decision No. 335 is limited in its application to the issue of the plaintiff's eligibility for workers' compensation benefits, as the responsible principal of an unregistered company, rather than being determinative of whether or not he is a worker. The defendants further argue that if the majority has interpreted the policy correctly, in finding that the policy was intended to govern the status of the plaintiff and to hold that a responsible principal is not a worker, then the policy itself is unlawful under the Act.
- (25) Decision No. 335 involved a review and reconsideration of the Board's policy previously set out in Decision Nos. 106, 141 and 264 regarding small owner-operated limited companies. It is helpful to examine the opening passages in Decision No. 335, which defined the scope of the issues encompassed in this review (at page 101):

This policy is concerned with the question which the Board must determine under the *Workers Compensation Act* as to who is a "worker", who is an "employer", and who is simply an "independent operator". The rights and liabilities which accrue under the Act differ in accordance with into which of these categories a person falls. For instance, a person has no automatic right to receive compensation for work-related injuries unless he is a "worker" and no right to immunity from legal action in respect of such injuries unless he is an "employer" or a "worker". An "independent operator" does not have the rights of "workers". An "independent operator" does not have the rights of "workers" under the Act unless he has purchased from the Board optional personal protection. Nor does he have the rights or liabilities of "employers" unless he also happens to have employees.

If a person establishes his own business, then he is, under general law, considered to be an independent operator. If he obtains the assistance of other persons in the operation of this business, then those other persons will either be his partners or his employees. Various factors can be considered to determine which of these categories applies, but the major one is whether the other persons will share in the assets and the profits or losses of the business or will simply be paid a wage or salary. If these other persons are considered to be employees, then the person who established the business will be their employer.

This position usually changes if the business which has been established operates through the means of a limited company. The company is then considered the owner and operator of the business and the persons who in the previous paragraph were said to be employees of the independent operator become employees of the company which as a separate legal entity is now considered

their employer. However, the status of the persons who would in an unincorporated business be the individual proprietor or the partners is at common law less clear. On the one hand, they are no longer the owners of the business or the employers of the employees. On the other hand, it seems that they themselves do not necessarily become employees of the corporation. . . .

- (26) Decision No. 335 was concerned with those principals of an unregistered limited company who had responsibility for the management of the company, and who, if the business were unincorporated, would be its proprietors or partners. Under Decision No. 335, both ownership and responsibility appear to be relevant factors in determining whether an active principal is, or is not, a worker under the Act.
- (27) In Decision No. 335, the Board considered objections to the guidelines established by certain earlier decisions for piercing the corporate veil. The Board considered and rejected several objections which had been raised concerning those guidelines. Decision No. 335 stated, at pages 102–104:

. . . Of particular significance for the purpose of this decision is the position in relation to a limited company of those persons who would, if the business were unincorporated, be its proprietor or partners. . . .

. . . although the Board does generally treat principals as workers of the company, this is subject to its right to pierce the corporate veil in appropriate cases. The circumstances dealt with in Decisions 106, 141 and 264 are felt to be appropriate for doing this since otherwise a person would be able to gain the benefits under the Act without meeting the corresponding obligations which the Act lays down. While technically the obligations may be on the company rather than the principal, the principal's control of the company means that, in reality, he is the one responsible. The result is that, when the Board applies the policy contained in Decisions 106, 141 and 264, it concludes that the principal is not a "worker" under the Act for the purpose of his claim.

[emphasis added]

- (28) We consider as significant the passage in Decision No. 335 which provides (at page 104):

In regard to the third objection [raised by the ombudsman], we are unable to agree that the Board's policy is discriminatory. Since the policy results in the principal of the unlimited [sic] company not being a "worker" under the Act, it cannot be maintained that he is being discriminated against in comparison with other workers. He is, in fact, being treated exactly the same as any other independent operator who has failed to purchase coverage for himself. Nor is he being discriminated against in relation to principals of limited companies who are registered with the Board prior to a claim being made. Discrimination only exists when persons in identical situations are treated differently for no valid reason. The situations of

the principal of an unregistered and a registered company are not identical. Whether they are registered or not is a distinguishing factor which properly allows the Board to treat them differently.

[emphasis added]

- (29) We read Decision No. 335 as being concerned with the status of persons under Part 1 of the Act. It is concerned with who is a worker, an employer or an independent operator, and with the differing rights and liabilities which accrue to such status. The intended general scope of the policy review conducted in Decision No. 335 is clearly flagged by the opening passages of the decision. It is specifically noted on page 101 that a person has no right to receive compensation for work-related injuries unless he is a “worker” and no right to immunity from legal action in respect of such injuries unless he is an “employer” or a “worker.” It is evident that Decision No. 335 was concerned with the bundle of rights and obligations attendant upon the determination of a person’s status as a worker, or employer or independent operator. A determination of a principal’s status under this policy would apply both to a claim for workers’ compensation benefits, as well as to a determination of the principal’s status for the purposes of sections 10 and 11 of the Act. We consider that the later passages in the decision, which refer to the denial of a claim for compensation by a responsible principal of an unregistered company, must be read in light of the context established by the introduction. Such denial of a claim for compensation was based on a determination that the responsible principal was really an independent operator without workers’ compensation coverage, rather than a worker. Much of the analysis in Decision No. 335, which outlines that at common law an active principal is not necessarily an employee of the company, is directed at establishing the foundation for this determination of the principal’s status. We are satisfied that Decision No. 335 was concerned with the larger issues of status, rather than being limited to addressing eligibility for compensation.
- (30) The theoretical basis stated for the denial of workers’ compensation benefits for the principal of the unregistered firm is that the principal is most like an independent operator who elects not to purchase WCB coverage. Such a person is outside the scope of Part 1 of the Act. As stated above, we agree that the reference in Decision No. 335 to the principal “not being a ‘worker’ under the Act” was in reference to the bundle of rights and obligations associated with that status, rather than being concerned only with the principal’s eligibility for workers’ compensation benefits under his claim.
- (31) In Decision #00-0684, detailed reasons were provided by both the majority for their decision, and by the dissenting member. We do not consider it necessary to restate all of the points addressed in those reasons. We are in agreement with the majority in #00-0684, in reference to the interpretation and effect of Decision No. 335. The underlying rationale for the denial of compensation to the responsible principal of an unregistered company is that the principal is not a worker under Part 1 of the Act. We agree that the effect of the policy is to determine the principal’s status, rather than being restricted to barring payment of compensation notwithstanding the principal’s status as a worker.

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- (32) Defence counsel argues, in the alternative, that the policy set out in Decision No. 335 is unlawful. It is necessary to consider, in this regard, whether the policy offends general legal principles against lifting or piercing the corporate veil, or offends the provisions of the Act concerning the provision of compensation coverage for workers on a compulsory basis.
- (33) Chapter 8 of Gower's *Principles of Modern Company Law*, Sixth Edition, 1997, concerns "Lifting the Veil," at pages 148–177. It is noted at page 148:

... it has always been recognised that "the legislature can forge a sledgehammer capable of cracking open the corporate shell" and even without the aid of a legislative sledgehammer the courts have sometimes been prepared to have a crack. To various illustrations we now turn. In the cases where the veil is lifted, the law either goes behind the corporate personality to the individual members or directors, or ignores the separate personality of each company in favour of the economic entity constituted by a group of associated companies.

- (34) Chapter 8 concludes by describing "the end result" (at page 173):

Where then does this leave "lifting of the veil"? Well, considerably more attenuated than some of us would wish. There seem to be three circumstances only in which the courts can do so. These are:

- (1) when the court is construing a statute, contract or other document;
- (2) when the court is satisfied that a company is a "mere façade" concealing the true facts;
- (3) when it can be established that the company is an authorised agent of its controllers or its members, corporate or human.

And (2) only is a true example of lifting the veil; in (1) and (3) the separate personality of the company is not denied but the practical effect on the parties' rights and liabilities is the same as if it had been. . . .

- (35) It is further noted at page 175 of *Gower's*:

Hence while statutory inroads into the corporate entity principle continue to increase those by the judiciary have contracted.

- (36) Decision No. 335 stated as follows, in connection with the common law rule against lifting the corporate veil (at page 102):

While the Courts do generally accept at face value the forms under which persons operate their business, this is not universally the case. They will, on occasion, examine the substance beneath the form to determine the real nature of the arrangements. They will readily do this when, in the case of an

unincorporated business, the question arises whether the person carrying it on is really the independent operator he declares himself to be or is, in fact, an employee of some other person, or whether the person who declares himself to be an employee is really an independent operator. They are less willing to do this when the business is incorporated and they are asked to “pierce the corporate veil” and equate the company with its principals. However, they have clearly done this in certain cases.

In determining who is a “worker”, “employer” or “independent operator” under the *Workers Compensation Act*, the Board is, by virtue of Section 99 of the Act, not bound to follow legal precedent. Therefore, it does not have to rigidly follow all the particular rules laid down by the Courts when they have had to decide similar questions. On the other hand, the Board does not regard Section 99 as giving it a licence to completely ignore the common law rules. Rather, its approach is that those rules should in general be adopted but with modification to suit the particular nature of the statute with which they have to deal. The result is that the principles set out above in the preceding paragraphs are in general applicable to workers’ compensation matters.

However, some modifications of the common law principles have been found necessary. Of particular significance for the purpose of this decision is the position in relation to a limited company of those persons who would, if the business were unincorporated, be its proprietor or partner. . . .

- (37) Decision No. 335 further explained the rationale for the Board’s lifting or piercing of the corporate veil as follows (at page 103):

The situations when the Board will examine the substance as opposed to the form of the arrangements will obviously differ from the situations when a court will do the same thing. This will arise in the first place because of the different types of questions the Board has to decide within the particular context of the *Workers Compensation Act*. Furthermore, it does not appear that the Courts have, in any event, laid down particular principles when they will or will not do this. It seems rather to have been done on a case-by-case basis. While we recognize the merits of this approach, as an administrative tribunal it is often necessary for the Board to lay down general guidelines for staff. It is the guidelines for piercing the corporate veil set out in *Decisions 106, 141, and 264* which are the subject of this review.

- (38) Given the apparent acknowledgment in Decision No. 335 that the Board’s policy concerning piercing the corporate veil “will obviously differ from the situations when a court will do the same thing,” we do not consider the lawfulness of the policy can be assessed simply by reviewing court decisions for the purpose of determining whether the policy strictly accords with current court decisions, or whether the courts would likely have reached the same conclusion. Rather, some scope must be left for an administrative tribunal to reach its own interpretations for policy reasons. Obviously, while the Board is not bound by legal precedent, there are limits

to the extent to which the Board can depart from common law authorities. The Board's determination cannot be patently unreasonable in relation to the common law authorities. As well, the Board's decisions or interpretations must be correct on jurisdictional issues.

- (39) The question as to the authority of the Board to establish policy involving a lifting of the corporate veil was addressed in published Appeal Division Decision #94-0872 (Section 96(4) – Deduction of Assessments from Benefits, 10 *Workers' Compensation Reporter* 801). That decision concerned the lawfulness of the policy at #48.40 of the Manual, which provides for the deduction of overdue assessments from the compensation payments due to an injured principal of the business. #48.40 states:

Assessments owing by a limited company may be deducted from compensation payments made to the sole principal of that company or, where there is more than one principal, from payments made to a principal who is personally responsible for the non-payment of assessments. [See 70:20:80 *Assessment Policy Manual*] This also applies to situations involving personal optional protection premiums owing.

- (40) This policy also stems from Decision No. 335, which stated at page 106:

... while we do not feel that the principal's claim should be refused in the above situation [when a company has registered, but fails to pay its assessments], we do consider that the Board has the right to deduct overdue assessments from the compensation payments made to a principal responsible for non-payment.

- (41) Decision #94-0872 reasoned, in this regard (at page 815–816):

This leaves the issue of whether the Board can pierce the corporate veil in this case. There are many common law cases on piercing the corporate veil. However, we find they have little relevance to the Governors' policies here, other than to establish the general principle that the separate legal status of corporations is not interfered with lightly. The policy of the Governors recognizes this when it states that "the Board hesitates to adopt a policy of piercing the corporate veil unless sound reasons for this can be demonstrated". The policies then set out circumstances in which the corporate veil can be pierced for certain purposes. The policy relates these exceptions to significant policy concerns about employers avoiding their obligations under the *Act*. Policy #7.51 refers to the serious abuse which would result if an employer could evade its obligations as an "employer" by persuading its employees to incorporate. Policy #48.40 developed from decisions which expressed concern that an employer should not be able to gain the benefits of the *Act* without meeting the corresponding obligations. The policy allows the Board to pierce the corporate veil to avoid such abuse.

The Governors are empowered to adopt policy consistent with the *Act*. There is nothing in the *Act* which prevents them from allowing the Board to pierce the corporate veil when there are sound policy reasons. It is not contrary to law.

Further, the reasons for policy #48.40 appear sound and consistent with the *Act*. If a person runs a business and makes the business decisions, then it is a valid concern that he not be able to gain benefits under the *Act* as part of that business while not meeting the obligations of the business under the *Act*. If the device of incorporation is the only thing that allows a person to do that, then it is consistent with the *Act* for the Governors' policy to allow the Board to look at the substance, and not merely the form, of the matter.

- (42) In considering the lawfulness of the policy at #48.40, the Appeal Division panel had to deal with section 14 of the Act which makes it unlawful for an employer to require or to permit a worker to contribute in any manner toward indemnifying the employer against a liability which the employer has incurred under Part 1 of the Act. The panel reasoned, on this point (at page 815):

As set out above, generally, corporations are viewed as legally distinct from their shareholders, and their shareholders are not responsible for the debts of the corporation. However, that is not an absolute rule. In certain circumstances, courts have pierced the corporate veil and made shareholders liable for the obligations of the corporation. Thus, it is not contrary to law to pierce the corporate veil for specific purposes. Once that is done, the legal distinction between the shareholder and the corporation disappears for the particular purpose at hand.

Thus, if the Board pierces the corporate veil in the circumstances of this case, there no longer is a legal distinction between the claimant personally and the business. He is a worker and, at the same time, he is the employer. If he is the only worker of the business, then it may be more accurate under the *Act* to describe him as an independent operator rather than an employer. However, regardless of whether he is the sole worker of the business, once the corporate veil is pierced for the purposes of workers' compensation, the business and the worker become one and the same person. If the business as an employer owes money to the Board, the claimant then personally owes that money to the Board. If the Board pays him compensation, they can deduct this debt which he owes personally to the accident fund.

We find this is not contrary to section 14 of the *Act*, which prohibits a worker from contributing to or indemnifying his employer for any liability the employer has incurred under the *Act*. It is reasonable to interpret that section as applying only when the employer and the worker are separate people. It does not make sense to say that a person can contribute to or indemnify himself. One can only contribute to or indemnify others.

- (43) Defence counsel cites the British Columbia Court of Appeal decision in *Isaac v. WCB* (1994), 10 *Workers' Compensation Reporter* 715, also at [1994] 9 W.W.R. 245, as showing that the Board does not have the discretion to deny compensation to a worker under the Act on the basis that the worker's employer is not registered under the Act. That case involved a member of an

Indian band, employed by the band in its logging operation on reserve lands. The Board's policy had been that no coverage was provided in respect of band members engaged in band activities on a reserve unless the band had requested such coverage and paid assessments. At the time of Mr. Isaac's death, the band had not requested WCB coverage in respect of its logging operation. There was no evidence Mr. Isaac was in any way involved in the decision of the band to request or decline to request coverage. When Mr. Isaac was killed in a logging accident, the Board denied compensation to his widow on the basis that compulsory coverage did not apply to operations on reserve lands. The Court of Appeal noted, at page 724:

The Board says in effect the *Act* should be construed as if there was a provision stipulating the Board has a discretionary power to deny compensation if the employer has not paid its assessments or if the Board considers such assessments cannot be collected.

As a matter of statutory construction it is, in my view, impossible to imply such a provision. To achieve this result requires the assistance of the legislature, not the courts.

- (44) The Court of Appeal cited the August 5, 1919 judgment of the Judicial Committee of the Privy Council concerning the *S.S. Princess Sophia* case: *Canadian Pacific Railway Company v. Workmen's Compensation Board*, [1919] 3 W.W.R. 178. That judgment affirmed the views of the dissenting judge at the British Columbia Court of Appeal [1919] 3 W.W.R. 167, who reasoned at page 175 (quoted at page 728):

I cannot see upon what principle that it can be said to be *ultra-vires* legislation. It amounts to statutory insurance or pension and is payable to workmen or their dependents by Statute quite independent, *so far as they are concerned, of whether the employers pay the assessments into the accident fund or not*; and the employers who are called upon to pay assessments are employers generally not alone those who are concerned with the accident that gives rise to the compensation payable and the assessments made as against the employers are not referable to any particular accident.

[emphasis in original]

- (45) In the *Isaac* case, the Court of Appeal concluded (at page 729) that the notion of an inextricable link between compensation to a worker and the payment of assessments by his employer was rejected by the Act.
- (46) We note, however, that the application of this analysis requires a determination that an individual is a worker under Part 1 of the Act. That is precisely the issue with which Decision No. 335 is concerned. To the extent the reasoning in Decision No. 335 concerning responsible principals of unregistered firms not being viewed as workers is valid, the decision in the *Isaac* case is distinguishable.

- (47) Defence counsel also cites Appeal Division Decision #93-0336 (Out-of-province Employer: Compulsory Industry, 9 *Workers' Compensation Reporter* 705). That decision held that an out-of-province company which was operating in British Columbia was entitled to the protection of section 10 under Part 1 of the Act despite a lack of registration with the Board. The decision reasoned:

I appreciate the apparent unfairness of that conclusion – that Bow Ridge could fail to remain registered as an employer in B.C. and pay no assessments in B.C., and yet be entitled to the protections found in Section 10 of the Act. However, the Act and the policy of the Board are clear. An employer in a compulsory industry in B.C. is an employer under the Act whether or not it is registered – otherwise the protection of its workers under the Act would be uncertain. An employer who fails to register is subject to certain penalties, but no exception is made in the Act or Board policy regarding the Section 10 protections. That is, there is nothing that allows an employer who fails to register to be found to be an employer for the purposes of assessments and penalties but not for the purposes of Section 10. An employer under Part 1 of the Act is an employer for all of Part 1.

- (48) Defence counsel further points to Appeal Division Decision #95-0320 (Law Corporations as Employers, 11 *Workers' Compensation Reporter* 327), concerning the status of lawyers practicing law through a corporation. The Appeal Division panel reasoned in that case (at pages 330–331):

We find the policy does provide a tenable result. Lawyers choose to incorporate and carry on the practice of law through a law corporation. Undoubtedly, they do this for certain advantages, perhaps relating to succession or tax planning. They do not gain all the advantages of other incorporated businesses, but there must still be some advantages or there would be no reason to incorporate. This is no different than other business people who incorporate. They do it for certain advantages. However, incorporation also gives rise to certain obligations. In workers' compensation, one of the obligations is that the corporation must pay assessments on the wages or remuneration of its active principals. *Thus, the principals lose the ability to opt out of personal coverage under the Act, but they receive entitlement to no-fault compensation coverage and the protection of the bar against legal action in section 10(1) of the Act in appropriate circumstances.*

[emphasis added]

- (49) Defence counsel astutely points out the contradiction between finding that principals lose the ability to opt out of personal coverage under the Act, while at the same time allowing responsible principals of unregistered companies to do precisely that on a *de facto* basis. Defence counsel argues:

The result of the majority's determination in *Decision No. 00-0684* is that a principal of a company, while not entitled to receive compensation benefits for work-related injuries he/she may have suffered, will be entitled to rely upon

any common law rights he/she may have against other persons involved in the accident. Not only does this non-conformity with the mandatory registration requirements under the *Act* appear to benefit the principal (by allowing the principal the opportunity to commence a legal action which he/she may otherwise have been barred from bringing if the company had been registered as required under the *Act*), but it could also impose an injustice on other parties who had complied with the requirements of the *Act*. . . .

[emphasis in original]

- (50) Defence counsel similarly endorses the point made by the minority in Decision #00-0684 that other workers who fail to meet their obligations under the Act (involving timely reporting to the employer under section 53, and to the Board under section 55) face the potential hardship of being denied compensation while remaining subject to the section 10 bar to legal action. He questions the basis for the seemingly differential treatment of non-conforming principals as compared to other workers. We consider that these arguments have considerable force. However, they bring one back to the central point in Decision No. 335, which is that such principals are not clearly workers and may be regarded as independent operators.
- (51) It is apparent that there are some strains or anomalies between the various policies. Decision #93-0336 is distinguishable as dealing with the status of the company, as the employer of workers with compensation coverage despite the lack of registration. There would be no rational basis for finding that the company was not an employer. In general terms, lack of registration does not affect compensation coverage. It is only in the specific situation of a claim by an injured responsible principal of an unregistered company that the lack of registration is taken into account in determining status. There is an underlying consistency between the statement that “an employer under Part 1 of the Act is an employer for all of Part 1,” and the interpretation of Decision No. 335 as concerning the general status of an unregistered principal rather than simply the principal’s eligibility for compensation.
- (52) From a strictly analytical perspective, it would be simpler and more straightforward were the separation between the limited company and its principal to be respected in a uniform fashion. This would lead to the payment of compensation to injured principals (and their dependents in fatal cases), whether or not the company was registered with the Board. Section 47(2) of the Act would then require the Board to charge the company with the full costs of the claim as an additional assessment, subject to the Board finding that the default (failure to register) was excusable so as to warrant exercising the Board’s discretion under section 47(3) to relieve the employer from liability.
- (53) It might be suggested that the full amount of the costs of the claim could be charged to the employer, and then recovered from the compensation payable to the principal under the policy at #48.40. Any legal action by the principal (against a worker or employer under Part 1) might be barred, but the compensation payable to the principal could be attached at source with the net effect that at the end of the day, the principal might end up with nothing although the Board’s records would show it had paid full benefits on the claim. However, if the policy set out in Decision No. 335 fails as contravening the rule against lifting the corporate veil, it may be considered that the policy at #48.40 should similarly fail. This would oblige the Board

to pay compensation, but then undergo the expense and attendant difficulties of seeking to recover these costs from the employer (which might have no assets or have gone out of business). Injured principals of unregistered companies would be at risk of losing the assets of their business under section 47(2). However, that is the same risk to which the firm is already exposed in respect of claims by any other injured workers of the company where it fails to register.

- (54) In practical terms, where the company has few assets or goes out of business, the costs of the claim would be met by the contributions of other employers to the accident fund. This might seem unfair. In one respect, however, it is no more unfair than the situation addressed by the Court of Appeal in the *Isaac* decision, in which compensation coverage was found to apply whether or not registration was made or premiums paid. One distinction, however, is that the *Isaac* decision did not concern the situation of a principal with responsibility for the failure to register.
- (55) To reiterate, it is not the simple failure to register which is significant. Rather, Decision No. 335 was primarily concerned with the issue as to whether the responsible principal is truly a worker or is more akin to an independent operator.
- (56) It is evident that the strong tendency in court decisions is to respect the corporate veil. In the case of *B.G. Preeco I (Pacific Coast) Ltd. v. Bon Street Holdings Ltd.* (1989), 37 B.C.L.R. (2d) 258, the British Columbia Court of Appeal stated:

I do not subscribe to the “Deep Rock doctrine” that permits the corporate veil to be lifted whenever to do otherwise is not fair (see: *Pepper v. Litton*, 308 U.S. 295). That doctrine and the doctrine laid down in *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.), cannot co-exist. If it were possible to ignore the principles of corporate entity when a judge thought it unfair not to do so, *Salomon’s* case would have afforded a good example for the application of that approach.

- (57) However, the common law does admit of exceptions, as summarized in *Gower’s Principles of Modern Company Law* (1997). The governors (now Panel of Administrators) have authority under section 82 to provide policy direction to the Board. The policy provides for a lifting of the corporate veil in the circumstances set out in Decision No. 335. We are bound to apply that policy, unless we find the policy unlawful or unless we find there are unique circumstances in this case warranting a departure from the policy.
- (58) In considering whether the policy direction provided by Decision No. 335 is outside the realm of what is legally permissible under the Act, we note two court decisions involving administrative tribunals. The first is a decision by the Federal Court of Appeal in *Villetard’s Eggs Ltd. v. Canada (Egg Marketing Agency)*, [1995] F.C.J. No. 598. *Villetard’s Eggs* was a family partnership in Alberta which carried on business as a producer, grading station and wholesale dealer in eggs. Its licence was revoked in 1992 by the Canadian Egg Marketing Agency for having violated certain conditions of its licence. In 1993, the Agency received new licence applications from a corporation called *Villetard’s Eggs Ltd.*, involving the same address and telephone number. The application was signed by a partner from the partnership as manager of the corporation.

The Agency denied the licence applications on the basis that they were “colourable” (i.e. presenting an appearance which did not correspond to the reality, or which was intended to deceive). An application for judicial review was allowed, on the basis that the Agency was not empowered to lift the corporate veil unless it found actual *mala fides* or some kind of fraud. However, this decision was reversed by the Federal Court of Appeal, which reasoned:

I simply cannot imagine a licensing authority invested with such a duty, not being capable of denying a licence where it has good grounds to believe that the issuance of the licence would be detrimental to the interests of the public.

In making this proposition I am only responding to the invitation made by the Supreme Court of Canada in *Maple Lodge Farms Ltd. v. Government of Canada* [[1982] 2 S.C.R. 2] to interpret statutes – and, I would add, regulations—such as the ones at issue here in such a realistic way as to allow administrative agencies to function effectively [at page 7]:

In construing statutes such as those under consideration in this appeal [the Export and Import Permits Act], which provide for far-reaching and frequently complicated administrative schemes, the judicial approach should be to endeavour within the scope of the legislation to give effect to its provisions so that the administrative agencies created may function effectively, as the legislation intended. In my view, in dealing with legislation of this nature, the courts should wherever possible, avoid a narrow, technical construction, and endeavour to make effective the legislative intent as applied to the administrative scheme involved.

(59) The Federal Court of Appeal concluded, at paragraphs 25–28:

For these reasons I have taken the view that the interrelationship between the respondent and the partnership was a proper and, in the circumstances, essential consideration for the Agency to take into account in deciding whether or not to grant the licences applied for. Indeed, had the Agency failed to take that interrelationship into account, that failure might well have constituted a reversible error.

Attempts to import into modern administrative law the theory of the corporate veil developed a century ago by the House of Lords [See: *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.)] in the area of corporate law have been facing increasing opposition.

That opposition has come either through findings that what was done by a licensing authority was not piercing the corporate veil or through findings that the corporate veil may be lifted where the corporation is under the control of another person or entity to such an extent that they constitute a common unit, or where one company is in fact the agent or puppet of the other or is being used as a cloak for the actions of the other or, more generally, where fraud or improper conduct is alleged.

Whether we characterize it as a case of non-application of, or exception to, the doctrine of corporate veil, what the Agency did in the instant case, i.e. enquire into the relationship of an applicant with a third party for the purpose of determining whether the application in the circumstances constituted an attempt to circumvent the regulations, was permissible.

- (60) Another court decision is that in *Mantei v. Morris*, [1997] 9 W.W.R. 203 (Sask. Q.B.), affirmed [1998] 10 W.W.R. 741 (Sask. C.A.), which concerned a decision by the Saskatchewan Workers' Compensation Board. Morris and Walker were the principals and sole shareholders of two companies which were employers under the Saskatchewan *Workers Compensation Act*. Morris and Walker had not opted for personal workers' compensation coverage, nor were they on the payroll of their respective companies. Mantei was a worker who was killed in a motor vehicle accident. At the time of the accident, Morris was driving a vehicle, pulling an industrial trailer owned by Walker. He was taking the trailer to an oil well to conduct repair work. The issue before the Saskatchewan Board was whether Morris and Walker were, personally, employers under the legislation and thereby protected by the statutory bar. The Saskatchewan Workers' Compensation Board found that while the companies existed as entities independent from Morris and Walker, they could not be distinguished from the companies for the purposes of the policy underlying the Saskatchewan *Workers Compensation Act*. The Saskatchewan Workers' Compensation Board reasoned:

The Board recognizes that at law a corporation is treated as a separate entity from its shareholders. However, in the case of a one person company, it is difficult to make any practical distinction. The interests of the individual shareholder and the company are indistinguishable and thus, the policy considerations reflected in sections 44 [concerning the statutory bar to legal action against a worker or employer] and 168 [concerning the jurisdiction of the Saskatchewan Board to determine whether a legal action is barred] apply equally to both. The sole shareholder, in effect, bears the financial burden of the payment of workers' compensation assessments and of the payment of wages and typically makes all management decisions. Importantly, any significant verdict against the sole shareholder is very likely to have the adverse financial impact on the "employer" corporation that the statutory bar was intended to prevent. It is reasonable to expect that any sole shareholder of a corporation facing a substantial verdict would have to fund the liability by taking money out of the corporation. The sole shareholder of a corporation which is an employer is, in reality, in very much the same position as a sole proprietor who employs employees. In the Board's view, it would be an artificial result for the former to be subjected to the legal action and the latter not, simply because of the choice of the corporate structure for the carrying on of the business.

The Board has long been of the view that proprietors of one person companies are entitled to the protection of the statutory bar. . . . In effect, the Board is prepared to pierce the corporate veil in cases such as this. The Board is aware that the courts will pierce the corporate veil on limited grounds. However, under section 25 of the Act, the mandate of the Board is to decide each case

before it in accordance with the real merits and justice of the case, and the Board is not bound by precedent. Considering the policy reflected in sections 44 and 168, the Board is of the view that individuals such as Mr. Morris and Mr. Walker fall within the scope of the Act as employers.

The Board therefore finds that the action is barred as against both Mr. Morris and Mr. Walker.

- (61) In an application for judicial review, it was argued that Morris and Walker were not employers, as a corporation is in and of itself a legal entity, distinct from its executive officers and employees. The application to quash the Board's decision was, however, dismissed on the basis that the Board's decision was not patently unreasonable. The Court of Queen's Bench decision to dismiss the application was affirmed by the Saskatchewan Court of Appeal in 1998.
- (62) We are asked, in this case, to find the policy set out in Decision No. 335 unlawful. In the two court decisions cited above, decisions by administrative tribunals to pierce or lift or disregard the corporate veil for policy reasons were found to be permissible under the relevant statutes. These court decisions dealing with the corporate veil in the administrative law context, as opposed to the corporate law context, lend support to the view that the analysis set out in Decision No. 335 is permissible under the Act.
- (63) We accept that the reasons for the policy stated in Decision No. 335 are ones which relate to the purposes of the Act. We note in particular, the passage at page 103 which explains:
- The general rule followed by the Board is that a worker's claim is not prejudiced by the fact that his employer has not complied with his obligation to register. However, since a company can only act through its principal, it was felt that the claimant in the situation in question, unlike most claimants, had to accept some personal responsibility for the failure to register. If the corporate form of the business were ignored, the claimant was really an independent operator who had failed to obtain coverage for himself. It would be unfair for him to receive the benefits of the Act without meeting his obligations.
- (64) While no doubt there are other policy approaches which would also be valid, we find that the policy set out in Decision No. 335 is viable under the Act. We further find that the policy is applicable in the circumstances of this case. We do not consider that the policy is unlawful, or that there are exceptional circumstances warranting a departure from the policy in this case.
- (65) We have noted that the plaintiff in this case does not wish to be brought within the umbrella of Part 1 of the Act. Defence counsel argues that the plaintiff is being permitted to benefit from his failure to register, and that in effect, the Board is permitting the plaintiff to opt out of workers' compensation coverage contrary to the intent of the Act. This argument has some force. We do not consider, however, that the determination as to an individual's status can vary from case to case depending on whether the outcome is perceived to be to their advantage or disadvantage. We consider it appropriate that the Board establish general policies which may be applied in a consistent fashion, to avoid an untenable degree of inconsistency.

- (66) We appreciate the difficulties with this approach, which are outlined in the dissent to #00-0684. We note in particular the apparent contradiction between Decision No. 335 and the policy at Nos. 20:30:30 and 40:10:30 of the *Assessment Policy Manual*. These latter policies require an assessment of a principal's earnings when backdating the registration of a company, so long as a claim by an injured principal has not been denied. As set out in paragraphs 32–33 of the reasons of the majority in Decision #00-0684, this raises thorny issues with respect to the principal's status being indeterminate, requiring crystallization upon the occurrence of an event such as the injury to the principal or an application for compensation. The majority found that piercing of the corporate veil is triggered when the principal is injured, rather than when a claim for compensation is made. The majority found the principal's status between the date of "employment" and date of injury may be regarded as being in a state of flux. If, prior to the injury, steps were taken involving registration with the Board, he would be a worker. However, in the absence of such registration or contact with the Board, when an injury occurs the principal is not a worker. The fact that the policy set out in Decision No. 335 requires such strained analysis to support it points to certain inherent difficulties with the policy.
- (67) As indicated above, different approaches would likely be viable. However, we consider that the question as to whether any change is warranted in the Board's general approach to such situations is better addressed as an issue of general policy under section 82 of the Act. Decision No. 36 (*Retroactivity of Policy Changes*, 9 *Workers' Compensation Reporter* 147) notes that a policy change may occur as a result of a reconsideration and rethinking of existing lawful policy, or as a result of a finding of the Appeal Division that a policy is unlawful. We are not persuaded that the policy is so strained as to be unlawful. However, given the concerns flagged above, and in #00-0684, and the "legal gymnastics" required to account for the seeming state of flux in the status of a responsible principal of an unregistered company, we recommend that the Panel of Administrators review the policy to determine whether it remains satisfactory in fulfilling the purposes of the Act. We agree with the majority in Decision #00-0684, who commented in paragraph 41 that in light of the enactment of Part 3 of the Act, and the lack of clarity of the policies concerning principals of unregistered corporate employers, the Panel of Administrators may wish to review the policies. We note, as well, that cogent reasons were provided in the dissenting opinion in Decision #00-0684, in support of seeking clarification of the policy.
- (68) Notwithstanding these concerns, we find that the policy set out in Decision No. 335 is viable under the Act. We do not consider that there are unusual circumstances in the present case requiring a departure from the general policy. We will, therefore, follow the approach set out in Appeal Division Decision #92-1606, *Principal of Unregistered Firm*, 9 *Workers' Compensation Reporter* 621, and of the majority in Appeal Division Decision #00-0684.
- (69) Accordingly, we find that at the time of the February 18, 1994 motor vehicle accident, the plaintiff was not a worker within the meaning of Part 1 of the Act. The injuries suffered by the plaintiff, at the time the cause of action arose, February 18, 1994, did not arise out of and in the course of employment within the scope of Part 1 of the Act.

Status of the Personal Defendant

- (70) Only limited information has been provided concerning the status of the personal defendant, D. D was employed by the corporate defendant, C. C is a federally regulated company which operates throughout Canada. Defence counsel advises that C is registered as an employer with the appropriate workers' compensation tribunals in most Canadian jurisdictions. In particular, C is registered as an employer for workers' compensation purposes in both Alberta and British Columbia.
- (71) An issue for determination is whether D was, at the time of the February 18, 1994 accident in Alberta, a worker within the meaning of Part 1 of the Act. If so, the further question to be addressed is whether any action or conduct of D, at the time the cause of action arose, February 18, 1994, which caused the alleged breach of duty of care, arose out of and in the course of employment within the scope of Part 1 of the Act.
- (72) Defence counsel states that due to the nature of C's operations, C's employees regularly perform work responsibilities in more than one Canadian jurisdiction. No information has been provided specifically concerning D, to show that D regularly performs work responsibilities in British Columbia. No specific evidence or argument has been presented to show that the action or conduct of D at the time of the accident in Alberta, arose out of and in the course of employment within the scope of Part 1 of the Act.
- (73) Defence counsel notes, in this regard:

Since the Federal Government has not implemented a workers' compensation system that is applicable to federally regulated employers (other than employers who are covered by the federal *Government [Employees] Compensation Act*), such federally regulated employers must register with the WCB in each jurisdiction within which it operates. Nevertheless, [C] is a single operating legal entity across Canada, notwithstanding this artificial separation for workers' compensation purposes.

In [C's] view, it is inherently unfair that [C] should be required to pay workers' compensation assessments for all of its employees across Canada, yet at the same time be subject to a legal action in one Provincial jurisdiction simply due to the fact that the Plaintiff is covered by the workers' compensation scheme in another Provincial jurisdiction. Such a legal action is, in our submission, inconsistent with one of the primary foundations of the historic compromise (which led to the present day workers' compensation regimes in Canada) – the protection of the employer from legal action arising from work-related injuries to the employer's workers or to workers of other employers.

There can be no dispute that [C] was an employer registered with the B.C. WCB at the time of the accident on 18 February 1994. Based on the nature of [C's] operations across Canada (and, in particular, in B.C. and Alberta), and on the fact that employees of [C] regularly perform work in more than one jurisdiction

(once again, with particular emphasis on B.C. and Alberta), it is submitted the Appeal Division should find that both [C] (as an employer) and [D] (as a worker) were covered by the B.C. legislation at the time of the accident.

- (74) While not necessary to our decision, we note with interest a decision of the Alberta Court of Appeal in *Glavin et al. v. Dicken Bus Lines Ltd. et al.*, (1988) 51 D.L.R. (4th) 389. The Court of Appeal found, at page 393, that “one province cannot enact legislation affecting the rights of a resident of another province arising out of a cause of action in such other province.” We refer to this decision simply for the purpose of noting that in making our decision under Part 1 of the Act, we must be cognizant of the limits to our jurisdiction.
- (75) Very limited information has been provided concerning D. D was born in 1946, and has never had a claim for workers’ compensation benefits in British Columbia. D was, at the time of the accident, operating a motor vehicle near the town of Edson in Alberta. The vehicle was owned by C, his employer. The defendants admit that D was driving the motor vehicle owned by C with the consent, express or implied, of C, at the time of the accident.
- (76) No specific evidence or argument has been presented to show a link between D, and Part 1 of the Act. It appears, from the limited information available, that D resides in Alberta. He was working in Alberta at the time of the accident. No foundation has been established to support a conclusion that D was, at the time of the accident, a worker within the meaning of Part 1 of the Act. We draw an adverse inference from the lack of any positive evidence to establish a connection between D and his activities, and the scope of the British Columbia workers’ compensation legislation.
- (77) It may be that D’s duties on other dates would bring him to British Columbia, and that he would, in other circumstances, be a worker within the meaning of Part 1 of the Act. However, our determination must focus on D’s status at or around the time of the motor vehicle accident. Our determination is solely in relation to Part 1 of the Act. As stated at the outset of this decision, this means Part 1 of the British Columbia *Workers Compensation Act*. We have no jurisdiction or authority to address the status of the parties under the Alberta workers’ compensation legislation.
- (78) On the evidence before us, we find that at the time of the February 18, 1994 accident, the defendant D was not a worker within the meaning of Part 1 of the Act. Any action or conduct of the defendant D, at the time the cause of action arose, February 18, 1994, which caused the alleged breach of duty of care, did not arise out of and in the course of employment within the scope of Part 1 of the Act.

Status of the Corporate Defendant (C)

- (79) By memo of June 6, 2000, the Assessment Department policy manager confirmed that C was registered as an employer at the time of the accident on February 18, 1994.
- (80) It is not disputed that C was, on February 18, 1994, an employer engaged in an industry within the meaning of Part 1 of the Act. We so find.

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- (81) Defence counsel points out that C was also registered as an employer with the Alberta Workers' Compensation Board.
- (82) It must be noted that under the British Columbia workers' compensation legislation, unlike in some other provinces, the Board has no jurisdiction to certify as to whether the cause of action is barred. The Board only certifies as to the status of the parties, and it is for the courts to determine the effect of the certificate in relation to the legal action.
- (83) In relation to the specific activities of C which relate to the February 18, 1994 motor vehicle accident, we find that no connection with Part 1 of the Act has been established. We find, therefore, that any action or conduct of the defendant C, or its servant or agent, which caused the alleged breach of duty, did not arise out of and in the course of employment within the scope of Part 1 of the Act.

Conclusion

- (84) We find that at the time of the February 18, 1994 motor vehicle accident:
- the plaintiff was not a worker within the meaning of Part 1 of the *Workers Compensation Act*;
 - the injuries suffered by the plaintiff did not arise out of and in the course of employment within the scope of Part 1 of the Act;
 - the personal defendant, D, was not a worker within the meaning of Part 1 of the Act;
 - any action or conduct of the personal defendant, D, which caused the alleged breach of duty of care, did not arise out of and in the course of employment within the scope of Part 1 of the Act;
 - the corporate defendant, C, was an employer engaged in an industry within the meaning of Part 1 of the Act; and,
 - any action or conduct of the corporate defendant, C, or its servant or agent, which caused the alleged breach of duty of care, did not arise out of and in the course of employment within the scope of Part 1 of the Act.

Editors' Note: The names of the parties have been removed for privacy considerations. The text of the decision is otherwise unchanged.

Decision of the Appeal Division

Number: 2001-1285/2001-1286
Date: June 28, 2001
Panel: John Steeves
Subject: Effective Date of Pension

APPLICATION FOR COMPENSATION (OCCUPATIONAL DISEASE, SILICOSIS) (REFERRALS OF REVIEW BOARD FINDINGS) – In 1997, worker applied for compensation for silicosis – Pension granted, effective the date of application – Worker appealed – Appeal allowed in part – Review Board relied on medical evidence that the worker was symptomatic in 1994 and adjusted the effective pension date – Worker appealed amount of functional pension – Matter referred by the president to the Appeal Division under s. 96(4) – Claim not filed within three years of medical disablement – When an application for compensation is not filed in time there can be a difference between the date of medical disablement and the date when compensation is effective – Review Board erred in law by not applying s. 55 of the Act and contravened policy by applying policy #29.42 for a purpose it was not intended.

Law: WCA (1996): s. 6(8), s. 23(1), s. 55(3.1), s. 91(1), s. 96(4)
Policy: RSCM: #29.42

*Section 96(4) – Referral [s. 96(4) referral]
Permanent Disability Award – Impairment Percentage [worker appeal (rev. brd.)]
Appeal Division Decision No. 2001-1285/2001-1286*

17 *Workers' Compensation Reporter* [583]

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- (1) This is a decision with regards to two matters before the Appeal Division. The first is a referral to the Appeal Division by the president of the Board, pursuant to section 96(4) of the *Workers Compensation Act* (the "Act"), of a Review Board finding dated November 29, 2000. The second matter is an appeal by the worker pursuant to section 91 of the Act of the same Review Board finding of November 29, 2000.

Issue(s)

- (2) With regards to the president's referral pursuant to section 96(4) of the Act the issue before me is whether the Review Board finding of November 29, 2000 contains an error of law or contravention of policy. With regards to the worker's appeal pursuant to section 91 of the Act he has raised the issue of the effective date of his pension.

- (3) I set out sections of the Act that are relevant to this decision as follows,

Section 6 – Occupational disease

6(8) A worker in the metalliferous mining industry or coal mining industry who becomes disabled from uncomplicated silicosis or from silicosis complicated with tuberculosis is entitled to compensation for total or partial disability as provided by this Part, and where death results from the disability, the dependants of the worker are entitled to compensation as provided by this Part; but neither a worker nor a dependant is entitled to compensation for the disability or death unless the worker

- (a) has been a resident of the Province for a period of at least 3 years last preceding the disablement, or unless at least $\frac{2}{3}$ of the worker's exposure to dust containing silica was in the Province;
- (b) was free from silicosis and tuberculosis before being first exposed to dust containing silica in the metalliferous mining or coal mining industry in this Province; and
- (c) has been a worker exposed to dust containing silica in the metalliferous mining or coal mining industry in the Province for a period or periods aggregating 3 years preceding his or her disablement, or for a lesser period if the worker was not exposed to dust containing silica anywhere except in this Province.

Section 55 – Application for compensation

(1) An application for compensation must be made on the form prescribed by the board or the regulations and must be signed by the worker or dependant; but, where the board is satisfied that compensation is payable, it may be paid without an application.

(2) Unless an application is filed, or an adjudication made, within one year after the date of injury, death or disablement from occupational disease, no compensation is payable, except as provided in subsections (3), (3.1), (3.2) and (3.3).

(3) If the board is satisfied that there existed special circumstances which precluded the filing of an application within one year after the date referred to in subsection (2), the board may pay the compensation provided by this Part if the application is filed within 3 years after that date.

(3.1) The board may pay the compensation provided by this Part for the period commencing on the date the board received the application for compensation if

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- (a) the board is satisfied that special circumstances existed which precluded the filing of an application within one year after the date referred to in subsection (2), and
 - (b) the application is filed more than 3 years after the date referred to in subsection (2).

Section 91 – Appeal to appeal division

(1) Where the review board makes a finding under section 90, the worker, the worker's dependants, the worker's employer or the representative of any of them may, not more than 30 days after the finding is sent out, or within a longer period the chief appeal commissioner may allow, appeal the finding to the appeal division.

(2) Where an appeal is commenced under subsection (1), the appeal division may direct the review board to reconsider the matter either generally or on a particular issue, and the appeal division may withhold its decision pending the finding of the review board.

(3) A decision on an appeal commenced under subsection (1) must be made as soon as practicable and in any case within

- (a) 90 days of the date on which the appeal is commenced,
- (b) 90 days of a reconsideration by the review board under subsection (2), or
- (c) a longer period the chief appeal commissioner may designate where the appellant requests a delay in the proceedings or where the chief appeal commissioner considers the longer period necessary because of an act or omission of the appellant or because of the complexity of the matter under appeal.

Section 96 –Jurisdiction of board

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

- (4) The jurisdiction of the Appeal Division in an appeal pursuant to section 91 of the Act is described in section 96(3) as the authority to, "re-open, re-hear and redetermine any matter that has been dealt with by the Review Board." Decision 75 of the governors (10 *Workers' Compensation Reporter* 753) provides more detail about my jurisdiction on the worker's appeal in this case by stating that the Appeal Division can, "initiate" and "conduct a full inquiry into all of the issues arising out of an appeal once the matter is before it."

Background

- (5) The worker was employed in the mining industry for a number of years and he stopped work in 1981.
- (6) On August 20, 1997 the worker made an application for compensation for silicosis and he listed his first exposure in British Columbia as occurring in 1962. After reviewing a C.T. scan dated January 11, 1994 Dr. M, an expert in radiology, provided a report dated July 7, 1998 in which he identified bilateral calcified plaques. There were also bilateral upper lobe nodules in a pattern and distribution most suggestive of silicosis. In memo #8 Dr. F, a Board internal medicine consultant, accepted that there was a pulmonary impairment and his opinion was that the worker fulfilled the requirements for Class 2 of the American Medical Association classes of respiratory impairment. The range in this class is 10% to 25% and Dr. F thought that the worker had a maximum of 15% overall respiratory impairment.
- (7) In a decision dated November 18, 1998 the Board advised the worker that his diagnosed silicosis had been accepted by the Board and his impairment had been judged to be 15% of total. He was granted a pension of \$352.35 per month effective August 20, 1997. This date was chosen as the date of the worker's application for benefits because there was no clear indication that the worker had a medical disability prior to that time (memo #9). There was no consideration of a loss of earnings' pension because it was believed that the worker had been retired for approximately 15 years. Memo 10 indicates that the earnings used for calculating the worker's pension were those from his last year worked in 1981.

Review Board Finding of November 29, 2000

- (8) The worker appealed the decision of November 18, 1998 to the Review Board.
- (9) In a finding dated November 29, 2000 the majority of a Review Board panel allowed the worker's appeal in part. The majority's decision can be summarized as follows:
 - (a) The panel found that the Board correctly assessed the worker's impairment at 15% of total.
 - (b) The majority found that the worker's average earnings for the purpose of computing his wage rate should be calculated with reference to his 1981 and 1982 earnings up to the date of his retirement. It was an error for the Board to use the worker's earnings in 1981, the last full year in which he was employed, according to the majority.
 - (c) The majority found that the Board erred in determining the effective date of the worker's pension at August 20, 1997. The majority accepted that the date of application for benefits was one option allowed by policy. However, they preferred the medical opinion of Dr. M who had found in July 1998 that the worker had findings consistent with silicosis based on a 1994 C.T. scan. On this basis the majority found that the effective date for the worker's pension should be January 12, 1994.

(d) The majority accepted that the worker was not entitled to a loss of earnings pension because he had retired.

- (10) The dissenting vice-chair would have denied the worker's appeal for two reasons. First, the worker had not been disabled from earning wages as a result of his compensable disease. This is because he retired in 1981 and the disease was not diagnosed until 1994. Also, the dissenting vice-chair applied section 55 and 6(2) of the Act and found that 1994 would be the date of injury after applying section 6(2) of the Act. When an application is received more than three years after the date of injury this provision of the Act permits payment of benefits but only from the date of the application.

President's Referral

- (11) In memo #11, December 6, 2000, a claims adjudicator in the Board's Occupational Disease Unit submitted to his manager that the Review Board finding of November 29, 2000 contained an error of law;

If this worker was in fact disabled as of January, 1994 he has failed to file an Application for Compensation within one year of the date of disablement from his disease. Implicit in the Review Board findings is that special circumstances existed which precluded the filing of an application in a timely fashion. However, Section 55(3.1) provides that where such special circumstances existed and where the application is filed more than three years after the date of disablement by the occupational disease, benefits under the *Act* can only be paid "for the period commencing on the date the Board received the Application for Compensation" (sic). Clearly the timeframe from January 12, 1994 to August 20, 1997 exceeds three years. This is why the pension was made effective from the time of his application, namely August 20, 1997. To initiate a disability award with an effective date of January 12, 1994 would be in breach of Section 55(3.1) of the *Act*.

- (12) In a memorandum dated December 11, 2000 the president referred the Review Board finding to the Appeal Division pursuant to section 96(4) of the Act.

Worker's Appeal

- (13) The worker has also appealed the Review Board finding of November 29, 2000. In a submission dated December 28, 2000 the worker stated the following:

(1) If the Board considers the findings of [Dr. M] that the conditions described as parenchymal disease (silicosis & bilateral calcified plural plaques relating to exposure from 1/12/94 I don't see why my pension can't be considered from that date.

(2) Why I did not apply for compensation till 1997.

I was hoping my breathing of the lungs would improve like the health of rest of me did after the lung surgery and no need to apply for compensation (this did not happen).

Was at a loss how to apply for compensation (never heard of workers advisers) contacted a labour lawyer in [city] he asked for \$500 before he would look at my case. After lung surgery had two cancer cases and a heart problem, so was not thinking of W.C.B.

(3) Do think that [Dr. F's] impairment of 15% is on the low side, my pension of 367.05 per month does not amount to much as Revenue Canada took away pension supplement when it was payed.

(4) Throuout the correspondence there is a referance to my employer [name] retiring me, this is not the case, was on a salary and they dismissed me without any notice, or monatary allowance, other than severance pay. Was told I could now get old age security, which I did 3 years later as I was only 62 years of age at that time.

[reproduced as written]

Submission From Employers' Advisers

- (14) In a submission dated March 20, 2000 the Employers' Adviser advised that they would not be responding specifically to the worker's appeal. They did however provide a detailed submission with regards to the president's referral.
- (15) The Employers' Adviser supports the president's referral. It is submitted that the Review Board majority erred in determining the effective date of the pension to be January 12, 1994. Pursuant to section 55 of the Act the worker must first satisfy the Board that there were special circumstances which precluded his filing the application if he was in fact disabled in January 1994. If the worker meets this requirement then the Board may exercise its discretion to pay the pension award, but only from the date of application. The Employers' Adviser submits that the Appeal Division must first consider and determine the date of disablement and this decision will then direct the course of action to be followed under the Act and policy.

Decision and Reasons

- (16) On March 27, 2001 I held a hearing into the matters before me. At that hearing the worker attended on his own. Initially the Workers' Adviser and Employers' Adviser indicated that they were going to attend the hearing but they subsequently advised that they would not attend.

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- (17) During the hearing before me the worker referred to surgery he had in 1991 or 1994. He was not sure of the date but he recalled it was surgery on his lungs, he recalled the name of the surgeon and the hospital. On the basis of this evidence the Appeal Division obtained further medical records which describe a carcinoma in the right lung plus diffuse pleural plaques and non specific fibrosis. This information was disclosed to the worker and he was given an opportunity to provide a submission on this information but no submission was received. A lobectomy was done on January 19, 1994. Much of this is summarized in a report from Dr. K, the surgeon, dated March 1, 1994, which was on file prior to the hearing.
- (18) At the hearing before me the worker also made submissions on two issues which were of concern to him. The first was that he believes that his disability was more than 15% of total and this is the focus of his appeal. On the second issue he submits, as a party to the president's referral, that the majority of the Review Board was correct because he believes that the effective date of his pension should be 1994.
- (19) The worker objects to the Board describing his leaving work in 1981 as retirement. In his evidence before me he says that he was "dismissed" from the employer at the time. He was a supervisor of maintenance with the employer in an excluded position and he was having difficulties with management of the mine over issues such as safety. I accept that description of the worker's history with his last employer but the worker also explained that there was "lots of other work" and he did not take advantage of that other work. He described the situation as his age being in the early 60s and he "had had enough." In these circumstances I find that it can be fairly stated that the worker retired in 1981.
- (20) With regards to whether the worker has an impairment of 15% of total the worker states that, "I can't do 15% of the work I used to do." While he can walk up stairs he cannot perform that activity in a hurry. He can go for extended walks but he has to rest during those walks. As well, he does not have the breath to mow his lawn except when he uses a self-propelled mower.
- (21) I have reviewed the issue of the percentage of disability awarded to the worker in the context of his appeal. While I appreciate the worker's comments about his reduced activity the determination of impairment in these matters is determined by classifying the worker within the guidelines of the American Medical Association. They are a reflection of medical tests rather than a person's perceptions of his disability. In this case memo #8 sets out a medical opinion that the worker fulfills the requirements for Class 2 of the guidelines with a range of 10% to 25% of the whole person and his individual situation is that he has a 15% overall respiratory impairment. The medical tests used to determine the opinion have not been challenged and, in the absence of a contrary medical opinion, I cannot make a different finding than the one in memo #8.
- (22) For these reasons I deny the worker's appeal on the issue of the amount of his functional pension pursuant to section 23(1) of the Act. On the basis of the evidence available to me his permanent impairment was correctly assessed at 15% of total. I also find that the Board correctly determined the average earnings of the worker and it was correct to conclude that he was not entitled to a loss of earnings' pension.

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- (23) Given the two matters before me – the president’s referral and the worker’s appeal – it is sensible to consider the issue of the effective date in the context of both matters. Again the president submits that the effective date should be August 20, 1997, the date of the worker’s application for compensation, and the worker submits the Review Board majority was correct when they concluded it should be 1994.
- (24) The worker gave evidence to me that he does not recall lung symptoms until the surgery he had in 1994. He describes the surgery as taking two-weeks hospital time and then some recovery time afterwards. In fact, the worker describes himself as “still recovering” because he attributes the beginning of his symptoms to the surgery. That is, he describes no symptoms prior to the surgery and the surgery was done as a result of the finding of a spot on his lung through a routine x-ray.
- (25) It seems to me a fair reading of the evidence that the worker was symptomatic as of the date of surgery in 1994 and, furthermore, it seems clear that he was disabled in 1994 as a result of being hospitalized and the subsequent recovery. Put another way, if the worker had been employed at the time he would have missed work as a result of his surgery.
- (26) With regards to the Review Board finding of November 29, 2000 I note the majority’s conclusion that the evidence of Dr. M supported a conclusion that the worker had symptoms in 1994 and this was used as the basis for concluding that the date of disablement of the worker should be in 1994. To the extent that this is a medical finding I agree with this conclusion. But it is only part of the inquiry of what is the effective date of the worker’s compensation in the form of a pension.
- (27) The Review Board majority used 1994 as the effective date of the worker’s pension. They accepted that using the date on which the worker applied for benefits was “certainly one option allowed by policy” but they identified another option in governors’ policy at #29.42 of the *Rehabilitation Services and Claims Manual* (the “Manual”). I have set out that policy in its entirety and emphasized the portions highlighted by the majority of the Review Board panel;

#29.42 Meaning of Disabled from Silicosis

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

It is a requirement in a claim for silicosis that the worker be “disabled” from the silicosis, or from silicosis complicated with tuberculosis. There is no definition of “disability” in the Act, and the Board has not attempted any comprehensive definition. If a worker has a condition of an internal organ which is so slight as to be unnoticeable to that person, and which causes no significant discomfort or other ill effects, that is not a “disability”.

It can be difficult to fix the date for commencing the pension when there is no change of jobs or reduction in earnings to mark the inception of the disability. **No general rules can be laid down for this purpose.** The Adjudicator must decide the question according to the available evidence. However, **if the evidence does not clearly establish when the disability commenced, and there is no evidence of the existence of a disability prior to the receipt of a particular medical report, the Adjudicator may properly decide that, according to the available evidence, the disability commenced on the date of the medical examination which was the subject of that report.**

There may also be a difficulty in fixing the worker's average earnings when such worker is not employed at the time when the disability commenced. The Adjudicator should generally refer back to the employment or employments in which the worker was most recently engaged and base any pension on the previous earnings thus discovered.

- (28) The majority disagreed with the Board's conclusion in memo #9 that there was no clear indication of a medical disability related to the worker's condition prior to his application in August 1997. They considered that Dr. M's opinion of July 7, 1998 was evidence of a silicosis in 1994 and, applying Policy in #29.42, they concluded that January 12, 1994 should be the effective date of the pension.
- (29) In contrast the president submits that the Review Board majority decision contains an error of law. This is because, when an application is received more than three years after the date of disablement, section 55 of the Act states that compensation can only be paid for the period commencing on the date the application was received and not for any time before the date of the application. The date of the worker's application for compensation in the case before me was August 20, 1997 and his date of disablement was January 1994 and, according to the president, the Act only permits compensation to be paid after August 20, 1997.
- (30) What appears to be at issue as between the president and the Review Board majority is whether section 55 of the Act or #29.42 of policy decides the facts of this case.
- (31) I note that the Board's decision of November 18, 1998, which was the subject of the Review Board finding before me, decided two issues (among others). The first was to accept the worker's application for compensation and the other was to grant the worker a pension. I think separating these two issues is important for this case.
- (32) Whether a worker's application for compensation will be accepted is governed, in part, by section 55 of the Act because that section creates time limits for an application. This section is set out above. In summary, an application is normally expected to be made within one year of the date of injury, applications made after one year require special circumstances explaining the delay in order to be accepted and applications made after three years also require special circumstances but compensation can only be paid after the date of application. In cases of occupational diseases, such as this case, section 6(2) of the Act states that, "the date of disablement must be treated as the occurrence of the injury." Again, in this case the date of medical

disability was January 1994 and the statutory time limits began then. More than three years passed before the worker's application for compensation was made in August 1997 and, therefore, if special circumstances exist, compensation can only be paid from the date of application. I take it from the acceptance of the worker's claim in November 1998 that the Board has accepted there are special circumstances in this case.

- (33) On the other hand a pension decision is based on section 23 of the Act and related policy of the governors. Policy for a pension in the case of silicosis is contained in #29.42 of the Manual, as identified by the Review Board majority. The policy discusses situations where "the evidence does not clearly establish when the disability commenced and there is no evidence of the existence of a disability prior to the receipt of a particular medical report." The Review Board majority relied on this language for their finding that the worker's pension should be effective on the date of his medical disablement in 1994.
- (34) What is contemplated in #29.42 is a situation where there [is] a lack of medical evidence to reach a conclusion on the *medical* date of disablement and the policy provides guidance about how to adjudicate a claim in those circumstances. However, the issue before the Review Board related to *medical* disability only for the purposes of determining the start of the time for filing an application for compensation. The Review Board majority did this. The second step was to determine the date of *legal* disablement or effective date of the pension in the context of the legislation. When an application for compensation is not filed within the time limits established by the legislation there can be a difference between the date of medical disablement and the date when compensation is effective. The Review Board majority did not complete this second step.
- (35) Section 55 of the Act is specific about how these situations are to be adjudicated. It is not that there is a conflict between section 55 and #29.42 or that one is a provision of the Act and another is policy. And this is not a situation where it is a choice between "one option" over another as described by the majority. As a result of the worker not filing his application for compensation within the time limits set out in the Act the effective date of his pension occurs after the date of his medical disablement.
- (36) In my view the majority of the Review Board panel committed an error of law by not applying section 55 of the Act to the facts before them. In this case section 55 of the Act specifically applies and #29.42 cannot be used to replace that provision or otherwise serve a purpose for which it was not intended. Policy in #29.42 is limited to determining the date of medical disability and it is an error to apply it as if there are no time limits in the Act for making an application for compensation. I note that the majority of the Review Board did not mention or analyze section 55 and, therefore, we do not have the benefit of their analysis of why they did not apply that provision of the Act.
- (37) As a final matter I wish to address the decision and reasons of the dissenting vice-chair of the Review Board. In her view sections 6(2) and 55 of the Act apply in essentially the same way as I have discussed above.
- (38) The dissenting vice-chair also concluded that the worker had not been disabled from earning wages as a result of his compensable disease and the worker's "earning capacity at the date of

disablement was nil.” This is because he retired in 1981 and the disease was not diagnosed until 1994. This is a tracking of the language in section 6(1) of the Act which creates a technical and perhaps arbitrary obstacle to entitlement to compensation when a worker becomes disabled from an occupational disease after he has left his employment because, for example, he retired. Because of the wording of section 6(1) a worker in these circumstances would be entitled to medical aid only and would not receive compensation even though it is undisputed that his disability is related to his work.

- (39) However, it is important to recognize that the language which creates this problem is part of section 6(1) and the adjudication of this claim is properly under section 6(8) of the Act. As Policy #29.42 states,

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

- (40) Accordingly, the dissenting vice-chair’s concern about whether the worker was disabled from earning full wages is not a concern which is raised by section 6(8).

Summary

- (41) In summary my decision is as follows;

- (a) I deny the worker’s appeal on the issue of whether he is entitled to a functional pension greater than 15% of total.
- (b) I find that the Board and the Review Board correctly determined the issue of the average earnings used to calculate the worker’s pension as well as the issue of whether the worker is entitled to a loss of earnings’ pension.
- (c) I find that the majority Review Board finding dated November 29, 2000 contains an error of law by not applying section 55 of the Act and it also contains a contravention of policy by interpreting and applying #29.42 of governors’ policy for a purpose it was not intended.
- (d) I have redetermined the majority Review Board finding and concluded that section 55 of the Act applies to the circumstances of the worker in this case and policy in #29.42 has no application to the issue of the effective date of compensation in this case.
- (e) The worker’s date of medical disablement was in 1994. Section 55 of the Act requires that the effective date of the worker’s compensation is August 20, 1997. Since the primary compensation issue is permanent disability this is also the effective date of his pension.

Editors’ Note: The names of the parties have been removed for privacy considerations. This decision has been edited for publication.



Decision of the Appeal Division**Number: 2001-1902****Date: September 27, 2001****Panel: Laura Bradbury, Teresa White, Herb Morton****Subject: Payment of Legal Fees**

REIMBURSEMENT OF EXPENSES (FEES AND EXPENSES, LAWYERS) (RECONSIDERATION, APPEAL DIVISION) – Reconsideration of Appeal Division decision denying worker request for payment of legal fees – New evidence – Test of “flagrant abuse” not definitive – “Unique considerations” in a “truly deserving case” may constitute an exception to Board’s general policy of not paying legal costs – Totality of the circumstances warrants departure from policy – Decision to pay legal fees limited to circumstances which existed up to the time of the 1994 decision being reconsidered – Costs of the judicial review application not payable – Partial reimbursement of \$25,000 without interest.

Law: WCA (1996): s. 94, s. 96.1, s. 100**Policy:** RSCM: #96.10, #100.12, #100.40; Decisions: No. 54, 1 *Workers’ Compensation Reporter* 229; No. 69, 1 *Workers’ Compensation Reporter* 285; No. 154, 2 *Workers’ Compensation Reporter* 192; No. 208, 3 *Workers’ Compensation Reporter* 24; No. 252, 3 *Workers’ Compensation Reporter* 147**Decisions:** Canada (Attorney General) v. Albrecht, [1985] 1 F.C. 710 (F.C.A.); Suranyi v. W.C.B., [1999] B.C.J. No. 1225 (QL) (S.C.), 15 *Workers’ Compensation Reporter* 491; Van Unen v. W.C.B. (2001), 87 B.C.L.R. (3d) 277 (C.A.), 15 *Workers’ Compensation Reporter* 513; Appeal Division Decision No. 92-0144/92-0145, 8 *Workers’ Compensation Reporter* 85; Appeal Division Decision No. 93-1687, 10 *Workers’ Compensation Reporter* 211; Appeal Division Decision No. 2000-1596, 16 *Workers’ Compensation Reporter* 349; Appeal Division Decision No. 2001-1183

Payment of Legal Fees [reconsideration s. 96.1 (app. div.)]
Appeal Division Decision No. 2001-1902

17 *Workers’ Compensation Reporter* [595]

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- (1) This decision involves reconsideration of a 1994 Appeal Division decision (#94-0791) to deny the worker’s request for payment of legal fees.

Issue(s)

- (2) The issue is whether any change should be made in the 1994 decision to deny payment of legal fees incurred by the worker in pursuing his claim for workers’ compensation following his 1986 head injury.

Background

- (3) By decision dated May 31, 2000 (#00-0809), a panel of the Appeal Division found that the requirements of section 96.1 of the *Workers Compensation Act* (“the Act”) were met for obtaining

reconsideration of Appeal Division Decision #94-0791. That decision, dated June 24, 1994, denied the worker's request for payment of legal fees. In Decision #94-0791, the panel reasoned:

The Legal Cost Issue

[The worker's] file is voluminous. The correspondence section of the file contains significantly more documents than does the medical section. A large number of those documents represent correspondence between [the worker] and/or his legal counsel and the board. The main issues dealt with in that correspondence include: the compensability of [the worker's] injuries, the average earnings upon which [the worker's] compensation should be based, the degree of disability suffered by [the worker] as a result of his compensable injuries, the nature and degree of rehabilitation assistance required by [the worker] and, lastly, the method of calculation of lump sum amounts owing to [the worker], including interest payments and legal fees.

[The worker's] counsel, [Mr. T], submitted his arguments to the Appeal Division in a letter of May 16, 1994. He argued that the board is permitted to pay legal fees in an appropriate case. He submitted that in [the worker's] case, he would have been unable to pursue his claim with the board without legal advice and representation. Mr. [T] submits that failure to pay legal fees "means that [the] claimant is not receiving the full compensation to which he is entitled."

An analysis of the question of legal fees was published in Appeal Division Decision #93-1687. The panel in that decision included the chief appeal commissioner, the undersigned and a third non-representational appeal commissioner. We found that there indeed was authority for the board to pay legal fees but that lawful board policy closely circumscribed the conditions under which legal fees would be paid. In essence, we found that there would have to be an example of "flagrant abuse" of his authority by an officer of the board before legal fees will even be considered. Only where such flagrant abuse is present will "consideration of other relevant factors" take place.

In [the worker's] case, I find no evidence of "flagrant abuse" by an officer of the board. There certainly is considerable controversy reflected in the file, but that does not lead to a finding of flagrant abuse.

In [the worker's] case, even if there was flagrant abuse, the circumstances of his claim are not such that legal fees would normally be considered. Although [the worker] had brain damage as a result of his compensable injury, his reasoning power does not seem to be particularly impaired. The psychological reports on file do not suggest an impairment of reasoning power and indeed [the worker's] own correspondence both with board officials and politicians attest to his reasoning power and power of analysis.

The issues dealt with on [the worker's] claim file are largely issues of entitlement and quantum. These are not unusual matters to be dealt with by claims adjudicators and rehabilitation consultants. I find nothing in them that suggest a requirement for legal expertise.

Lastly, there are other resources available within the compensation system that [the worker] could have accessed but chose not to. That is, the Workers' Advisers office frequently represents workers with problems similar to [the worker's] at no charge. From the contents of the claim file, it would appear that, in some measure at least, [the worker] chose to obtain legal counsel on the strength of his personal acquaintance with the legal system through his wife's employment in a law firm.

In summary, I find nothing in [the worker's] file that would lead to a conclusion that his legal fees ought to be borne by the board.

- (4) In Decision #00-0809, an appeal commissioner (exercising delegated authority of the chief appeal commissioner) found that the requirements of section 96.1(3)(a) and (b) were met. The panel found that there was new evidence which was substantial and material to the 1994 decision, which "did not exist at the time of the hearing or did exist at that time but was not discovered and could not through the exercise of due diligence have been discovered." The panel noted, in this regard, a detailed report dated June 13, 1994 by a specialist in neurology and psychiatry. The panel found that although that report was provided to the 1994 Appeal Division panel, the impact of that report on the worker's entitlement to compensation was not known and could not have been known at the time of the 1994 decision. While the worker had previously been granted a 100% loss of earnings award under section 23(3) of the Act on the basis that he was unemployable, it was only later that the worker's permanent functional impairment was assessed at 100% under section 23(1) of the Act. The panel reasoned:

That report was provided to the 1994 panel on June 21, 1994, just three days before the panel issued its June 24, 1994 decision. The impact of the June 13, 1994 opinion from the neuropsychiatrist on the worker's entitlement was not known and could not have been known at the time of the 1994 Appeal Division decision. On October 16, 1996, on the basis of the medical evidence from Dr. H. and a further review by the Board's Psychology Department, the worker's permanent disability award for psychological impairment under section 23(1) of the Act was increased from 40% to 100%. In a further report of December 2, 1996, Dr. H. indicated that the October 1996 decision resolved one of the key contentious issues relating to recognition of the full extent of psychological impairment. In the 1996 report, Dr. H. noted the worker's disinhibited frontal lobe syndrome had continued to be present to varying degrees. He said:

His irritability has fluctuated in severity with angry outbursts usually linked to psychosocial stressors. His frontal lobe syndrome continues to limit his capacity to cope with even mild to moderate levels of demands.

Dr. H. also commented on the worker's outstanding debt related to losses associated with his failed vocational rehabilitation program and legal expenses. Dr. H. stated:

I strongly recommend that a fair and equitable solution be found to this outstanding issue. I have discussed various options with him. [The worker] is not capable of representing himself and I have advised him against this. One possibility is the appointment of a worker's advisor as [the worker] himself can no longer afford an independent lawyer. Unfortunately [the worker] does not trust anyone with even the remotest connection to WCB. I have therefore come to favour an independent lawyer who could represent [the worker's] interests so that the outstanding matters can be drawn to a close in a reasonable and fair manner. It would allay [the worker's] concerns significantly if he plays a role in the choice of legal counsel.

I find that the Board's October 1996 recognition of the worker's increased psychological impairment to 100% and Dr. H.'s subsequent medical opinion of December 1996 contain substantial and material new evidence not available at the time of the 1994 Appeal Division decision. I find that the requirements of section 96.1(3)(a) and (b) have been met.

- (5) This panel has now been assigned to reconsider, on the merits, the 1994 denial of the worker's request for reimbursement of his legal costs. Subsequent to the 1994 decision, the worker obtained new legal counsel as his previous lawyer moved to another province. Submissions requesting reconsideration of the denial of legal fees were provided by the worker's former lawyer following the 1994 decision, and by his current lawyer.
- (6) The original employer is no longer in business; therefore, the Appeal Division invited the Employers' Advisers office and the relevant industry association to participate. The Employers' Advisers office provided a submission. The submission was forwarded to counsel for the worker for reply submissions.
- (7) Comments were also invited on the recent British Columbia Court of Appeal decision in *Van Unen v. WCB* (2001), 87 B.C.L.R. (3d) 277, which concerned the issue of awarding legal costs in the workers' compensation system. The Court of Appeal upheld a decision of the British Columbia Supreme Court, which denied the worker's petition for judicial review of the denial of his request for legal fees. The British Columbia Supreme Court decision is published in the *Workers' Compensation Reporter* at Volume 15, page 513. That decision followed the reasoning expressed in a 1999 British Columbia Supreme Court decision which similarly denied a petition for judicial review of a decision to deny payment of legal fees (*Suranyi v. WCB*, published at 15 *Workers' Compensation Reporter* 491).

The Legal Framework

(8) This application for reconsideration is based on new evidence. As Appeal Division Decision #00-0809 has determined that the requirements of section 96.1 of the Act are met for obtaining reconsideration, the merits of the worker's request for payment of legal fees are now before us. Prior to addressing the evidence on the worker's claim, we consider it appropriate to establish the legal framework for this task, with the benefit of the further court decisions which have been issued since 1994. While these decisions did not provide the basis for the reconsideration application, it is appropriate to include them in our reconsideration on the merits of the decision on the worker's claim. Once it has been determined that the preliminary requirements of section 96.1 of the Act for obtaining reconsideration are met, we consider it appropriate to reexamine the matter in light of all the evidence, argument and other materials currently available (i.e. including, but not limited to, the specific evidence which gave rise to this reconsideration).

(9) Section 100 of the Act provides that the Board may award certain expenses in a contested claim:

The board may award a sum it considers reasonable to the successful party to a contested claim for compensation or to any other contested matter to meet the expenses the party has been put to by reason of or incidental to the contest, and an order of the board for the payment by an employer or by a worker of a sum so awarded, when filed in the manner provided for the filing of certificates by section 45 (2), becomes a judgment of the court in which it is filed and may be enforced accordingly.

(10) The policy of the governors of the Board (now the Panel of Administrators) is set out at #100.40 of the *Rehabilitation Services and Claims Manual* (the "Manual"). The policy prohibits payment of legal fees and expenses:

100.40 Fees and Expenses of Lawyers and Other Advocates

No expenses are payable to or for any advocate. Nor does the Board pay fees for legal advice or advocacy in connection with a claim for compensation [Note: see #48.10]. The Board will not pay the legal costs of a claimant or employer in connection with court proceedings to challenge a Board decision beyond what it may become subject to pay following the court's decision under the general law of costs.

(11) The policy at #100.40 of the Manual follows that contained in Decision No. 69, Re Legal Fees, 1 *Workers' Compensation Reporter* 285. Additional policy guidance concerning section 100 of the Act is provided at #100.72 of the Manual:

100.72 What Costs May Be Awarded?

It would not be reasonable to make an order for costs against a worker or employer in respect of an expense which the Board would not allow under the rules set out in #100.00, #100.10, #100.12, #100.13, #100.14, #100.15, #100.20,

#100.30, #100.40 #100.50. Therefore, an award of costs will not include the fees of lawyers and other persons paid to them for advice or advocacy in connection with a claim for compensation.

- (12) Decision No. 54, Re the Reimbursement of Expenses, 1 *Workers' Compensation Reporter* 229, provides for the reimbursement of a range of expenses out of the accident fund in connection with claims decisions. The policy similarly states, at page 231:

ADVOCATES

10. No expenses are payable to or for any advocate.

THE AWARDING OF COSTS

11. The above provisions relate to the payment of expenses by the Board out of the Accident Fund. An order for the payment of costs by one party to another under Section 83 is a separate matter, and is an alternative that may be considered in an appropriate case.

- (13) The policy at #100.12 concerning *Claims Inquiries, Appeals to the Workers Compensation Review Board or the Appeal Division* further provides, in part:

Where a claimant is attending on a claims inquiry, or on an appeal to the review board or to the Appeal Division, or for a decision review with a Manager, the payment of expenses is discretionary. There will be no undertaking to pay expenses and no advance.

1. Where the claims inquiry, review or appeal results in a decision for the claimant, the discretion will normally be exercised in favour of payment. But payment should be refused if it is concluded that the inquiry or appeal was brought about unnecessarily by the claimant.

Other costs in connection with attending the hearing will be determined in the normal fashion at the discretion of the panel.

- (14) The policy concludes by noting an exception to the general rules:

In the case of appeals to the Appeal Division, if an oral hearing is to be held outside the area in which a party resides, the Appeal Division may on request make provision for travel costs in advance of the oral hearing. This would include transportation and accommodation in the Board's Richmond Residence for the appellant and respondent, and would be provided without regard to the outcome of the appeal. Other costs in connection with attending the hearing will be determined in the normal fashion at the discretion of the panel.

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- (15) The policy refers to the discretion of the panel to award payment of costs out of the accident fund.
- (16) On its face, section 100 is somewhat ambiguous. The language of section 100 does not clearly convey a discretion on the Board to award costs out of the accident fund, nor does it clearly prohibit the Board from awarding legal fees out of the accident fund. One reading of section 100 is that it only contemplates the Board making an award of costs against one party to the appeal for the benefit of the other party to the appeal. This would typically involve an award to a worker or employer, to be paid by the opposing worker or employer. Policy in Decision No. 208, *Re The Awarding of Costs*, 3 *Workers' Compensation Reporter* 24, supports this interpretation. On its face, it is not evident that section 100 provides the Board with a broad discretion to award reimbursement of costs out of the accident fund in the same way, for example, section 33 does in respect of the calculation of a worker's average earnings. It is arguable whether the legal prohibition against the fettering of discretion applies, in the absence of a clear discretion contained in the statute. While the courts have upheld the Board's position that it reserves the right to award legal fees in exceptional circumstances, this might have involved the application of some degree of deference to the Board's interpretation of the *Workers Compensation Act*.
- (17) A published Appeal Division Decision (#93-1687, *Legal Fees*, November 26, 1993, 10 *Workers' Compensation Reporter* 211) considered the issue of legal fees in light of the Act and policy. In that decision, the Appeal Division panel quoted (at pages 213–214) from an unpublished decision of the former commissioners dated May 22, 1980 which set out the Board's position that the policy must be read as a general guideline which can be departed from in a particular case:

The Commissioners do not regard the policy decisions which the Board makes as being absolute, unchanging rules to be applied regardless of the circumstances of a particular case. They recognize that a policy enacted to meet a particular type of situation may require modifications or exceptions as particular situations develop. A policy applied for particular reasons may not be relevant in situations in which those reasons do not operate or there are additional distinguishing factors.

On the other hand, this does not mean that the policy will be ignored when it becomes necessary to make a judgment over a concrete situation. Regard must be had not only to the individual circumstances of the particular situation, but the possibly overriding general considerations which produced any relevant policies. A policy laid down by the Board is an indication to its staff and the outside world as to how it will treat certain situations. This means that when those situations do arise, the Board will normally act in accordance with its policy. Otherwise, there would be no point in having the policy in the first place. *However, the application of the policy in each case will be subject to arguments raised at the time and the particular circumstances of the case.* A statement to similar effect is contained in Decision No. 252 at pages 148 and 149.

The particular policy with which your letter is dealing is laid down in Decisions No. 54 and 69. These decisions state that the Board will not pay fees for legal advice or advocacy, and sets out the reasons for that policy. The Commissioners recognize that in the last paragraph of Decision No. 69, the statement is made that "For the reasons explained, this must be maintained without exception and without attempting any judgment on the legal services in the particular case". This may appear to contradict the approach outlined above. However, that is a matter of interpretation into which the Commissioners do not propose to enter. Whatever may have been intended by the Commissioners at the time Decision No. 69 was written, the approach of the Commissioners is now, and has been for some time, as stated in the previous two paragraphs.

[emphasis added]

- (18) It is evident, therefore, that at least by 1980 the position of the Board was that the seemingly mandatory language of #100.40 did not exclude the possibility of an award of legal fees in an appropriate case. Decision No. 252 (Re Scope of Employment, 3 *Workers' Compensation Reporter* 147) similarly reasoned (at page 148):

Based on their analysis of many factors, including how other jurisdictions view various aspects of compensation law and any special circumstances prevailing in this jurisdiction, the Commissioners may well establish what is generally known to be policy and, in order to depart from that policy, an adjudicator must show good reason for doing so. Nevertheless, by statute [previously s. 82, now s. 99] each claim is decided according to its own merits. . . .

- (19) That reasoning was expressed at a time when the direction provided by the former commissioners of the Workers' Compensation Board was understood as policy, although the term "policy" was not contained in the Act. However, subsequent to the 1991 changes to the Act which formally conferred policy-making authority on the governors under section 82 of the Act, and currently the Panel of Administrators under section 83.1 of the Act, the Appeal Division has applied similar reasoning in interpreting those policies.
- (20) We note that this approach to interpreting and applying policy is supported by the policy at #96.10 of the Manual entitled *Precedent and Policy*. This states in part:

The Board is not bound to follow legal precedent; its decision shall be given according to the merits and justice of the case. [Note: section 99]

In the adjudication of individual claims, the Board is not "bound" by either internal policy directives or by external authorities in the field of compensation, at least not in the sense of the word "bound" as understood at common law. However, in issuing internal directives, the Board gives general indications of how it will act when certain circumstances come before it. When these circumstances arise, the applicable directive will normally be followed. It is recognized that there is an infinite variety of circumstances that can arise and that it is not possible to lay down in advance policies to finally determine every conceivable

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

- (21) In Appeal Division Decision #93-1687, the panel found that reimbursement of legal fees might be considered on the basis of unusual or extraordinary circumstances involving flagrant abuse of a worker's rights. However, even where the test of flagrant abuse is met, the panel found that consideration would then have to be given to other relevant factors, such as the availability of free legal advice from other sources. The panel emphasized that entitlement to payment of legal fees would arise only in very unusual circumstances. The panel in Decision #93-1687 explained that the test for "flagrant abuse" is not intended to encompass cases in which Board officers merely erred or failed to exercise good judgement. It would not arise from a mere failure to investigate a matter fully. Nor would it arise from a mere error in interpreting and applying governors' policies or the Act.
- (22) In respect of the source of the Board's authority to pay legal fees in circumstances involving flagrant abuse, Decision #93-1687 discussed the difficult interpretive issues presented by this question at pages 217 to 219. Decision #93-1687 concluded, at page 219:

We find that s. 100 of the *Act* is broad enough to authorize the Board to award expenses to a successful party in an appeal or non-appeal context (for example, in the context of first instance adjudication or a referral), and it is broad enough to authorize the Board to award legal costs out of the Accident Fund or order them paid by one of the parties.

- (23) The mandatory language of the policy at #100.40 was noted by the British Columbia Supreme Court decision in the *Van Unen* case. The court commented (at paragraphs 70-71):

On their face, these policies are couched in mandatory language:

If the Appeal Division blindly applied these policies, I have no doubt that that would represent an improper fettering of the discretion to award costs found in s. 100 of the *Act*.

- (24) The court indicated that it would constitute an unlawful fettering of discretion to treat the apparently mandatory language of #100.40 as being absolutely binding regardless of the circumstances of the particular case. The court dismissed the petition for judicial review in that case, however, as the Appeal Division had not treated the policy as mandatory.

- (25) In the April 6, 2001 Court of Appeal decision in the *Van Unen* case, the Court of Appeal examined two Appeal Division decisions which denied payment of legal fees. The court's examination of these decisions was in the context of a judicial review application, and was subject to the applicable standard of review. The Court of Appeal commented (at paragraphs 28–30):

Those two sets of reasons reflect an application of the reasoning set out in the “generic” Decision No. 93-1687. In my opinion, applying the standard of correctness, coupled with appropriate deference to the Appeal Division’s expertise in relation to the objects and practical application of the legislation, *the interpretation of s. 100 which allows it to apply to claims for legal expenses, but does not require that they be paid in any case or class of cases, (with the possible exception of unusual cases where the claiming party was subjected to abuse of process or otherwise became subject to unique considerations), is an interpretation that meets the standard which I have described. It is an interpretation which rises above the **Rehabilitation Services and Claims Manual** by allowing for exceptions not indicated in the Manual.*

The interpretation I have described was actually applied in the passages from the two relevant decisions which I have quoted. In my opinion, *it leaves an ample discretion for truly deserving cases without violating the harmony of a system that the Board has decided should be conducted without any customary liability of the Board to pay legal fees from the accident fund to every successful claimant who retains a lawyer.*

In my opinion the Appeal Division did not improperly fetter its discretion in the two relevant decisions refusing the payment of legal expenses, did not act in a way that was patently unreasonable, and did not violate the principles of natural justice. I would not accede to the first ground of appeal.

[emphasis added]

- (26) A recent Appeal Division decision (#2001-1183) reviewed the law on paying legal fees, including the *Van Unen* Court of Appeal decision. The panel stated in paragraph 29:

... the “flagrant abuse” test should not be considered exhaustive. As noted by the Court of Appeal in the *Van Unen* case, consideration of reimbursement of legal fees may arise in “unusual cases where the claiming party was subjected to abuse of process or otherwise became subject to unique considerations”.

- (27) The panel concluded, after reviewing the circumstances in that case, that it was not persuaded that there were unique considerations in the worker’s case warranting reimbursement of legal fees.
- (28) On the basis of the foregoing (and noting in particular the Court of Appeal decision in *Van Unen*), we accept we have the jurisdiction to consider making an award of legal fees, as an exception to the general policy, if there are unique considerations in the worker’s case warranting reimbursement of legal fees. It is necessary, therefore, to review the evidence concerning the worker’s case, with particular regard to the new evidence cited in Appeal Division Decision #00-0809 which provided the basis for this reconsideration.

The Evidence

- (29) The worker's claim file is contained in two boxes, and we will not outline it in detail. Rather, we will provide an overview of the worker's case, focusing on points which are relevant to the issue of legal costs.
- The worker was a truck driver. On February 4, 1986 he suffered a severe closed head injury in an accident while driving the truck. The hospital report stated that the worker experienced a grand-mal seizure in the emergency room. The worker suffered multiple facial and scalp lacerations as well as amnesia. Cranial C.T. scanning subsequently demonstrated a right frontal contusion. After the accident, the worker experienced poor concentration and memory, depression, change in personality resulting in irritability and anger, headaches, numbness, tingling and reduced dexterity in his hands, dizziness, misperception of his arms, bilateral tinnitus, and stuttering.
 - The WCB initially accepted the worker's claim for compensation. The worker's employer was in receivership and the Board decided initially that the receiver/manager was the employer.
 - On July 23, 1986 the Board reversed its decision and denied the worker compensation coverage. The Board considered that the worker was an independent contractor and not an employee based on a written contract he had with the company before it went into receivership. Coverage was denied even though the receiver/manager acknowledged being the worker's employer and confirmed payment of assessments to the Board on his earnings.
 - The Board had paid the worker wage loss benefits of \$2,028.79 up to July 23, 1986. The Board wrote to the worker and requested that that amount be refunded by the worker since it was an "overpayment." The Board asked that payment be received within 30 days or interest of .85% per month would be added to the outstanding balance.
 - On September 4, 1986 the worker filed an appeal of the July 1986 decision; however, the Board pursued the outstanding overpayment. The Board wrote to the worker on September 8, 1986 and said it would send the amount to the Board's Collections Department after November 6, 1986 and that "all costs of any legal action may also be your responsibility."
 - The worker hired a lawyer to help him with his appeal. According to counsel's September 15, 2000 submission to the Appeal Division, the worker obtained the lawyer's name through a union staff representative whom the worker knew from another workplace. The staff representative recommended a lawyer who was familiar with workers' compensation matters. The lawyer was formerly a union representative himself who became a lawyer later in life. (Decision #94-0791 stated it appeared from the claim file that the worker chose to obtain legal counsel on the strength of his personal acquaintance with the legal system through his wife's employment in a law firm.)

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- The notice of appeal filed by the worker did not contain information about the Workers' Advisers office or the Employers' Advisers office. The Board initially sent the worker only the appeal forms but not the appeal pamphlet which contained information about the Workers' Advisers office. The pamphlet was not sent to the worker until after his counsel was involved in complex legal submissions to the Board about "who is the employer" in a receivership situation and the difference between employees and independent contractors. Legal submissions were also provided by counsel for the receiver and by the Employers' Advisers office.
 - The Review Board issued its decision on December 15, 1988. The Review Board found the worker's unregistered limited company was his employer and therefore he was not an employee for purposes of workers' compensation and was not entitled to compensation. The worker's lawyer applied to the B.C. Supreme Court to quash the decision under the *Judicial Review Proceedings Act*.
 - In January 1989, the Board's collections office began sending letters to the worker about the overpayment.
 - On January 25, 1989, the worker's lawyer appealed the Review Board finding to the former commissioners and informed them of the court action.
 - In June 1989, the court stated that the worker's application was premature. The worker's lawyer agreed to adjourn the court proceedings until the former commissioners of the Board heard the appeal. The Board agreed to expedite the appeal process.
 - On July 25, 1989, the former commissioners found the worker was an employee and therefore entitled to coverage. They also found that monies paid by the employer to the worker's company and to the worker directly should be considered in total as his employment earnings.
 - Between July 1989 and December 1990, there were disputes about the implementation by the Board of the former commissioners' decision. The disputes involved a period for which the worker was not paid, the Board's failure to pay interest on the monies, and the Board's interpretation of the worker's wage rate.
 - The worker's file was transferred to a different officer. On September 24, 1990, in memo #65, the new claims adjudicator wrote:

On reviewing file in some detail, I do note this worker does have some valid reasons for being upset with the way this claim has been handled. . .

- The claims adjudicator noted the claim was not accepted until July 25, 1989 and that outstanding issues remained to be determined. In memo #68, the claims adjudicator said:

On reviewing claimant's file I also note that at no point in time has anybody sat down with the claimant and his representative and gone over the normal

progression of a claims file so this worker would have some understanding of the various stages a claim must go through.

- [The worker] was assessed by a Board psychologist, Dr. B, in October 1990. In his October 16, 1990 report, Dr. B refers to “the drawn-out claims process” having a negative impact on the worker’s emotional functioning, “more so because of vulnerability to stress as a result of his head injury.”
- The October 25, 1990 report of Dr. B said that as a result of his injury, the worker could not deal with stress. The worker had irritability and loss of temper resulting in inefficiency and loss of clear thinking. Overall, the psychologist noted a decrease in the level of the worker’s adaptive functioning as a result of his brain injury. Dr. B commented that the worker’s functional level was now only “fair.”
- On October 30, 1990, Dr. B sent a memo to the claims adjudicator about the worker’s gunsmithing business as a rehabilitation measure. Dr. B wrote in paragraph 1:

... the protracted claims process has clearly contributed to his level of emotional distress, all the more so because of disinhibitory effects arising out of his brain injury.

- In paragraph 3, Dr. B wrote:

... [the worker], whether rightly or wrongly, has viewed the Board as unfair and unsympathetic to his case. Abandonment of support for his gunsmithing venture will only be perceived by him as further validation for his belief. This could very well lead to a significant increase in his emotional volatility. . . I believe it is important to note that [the worker’s] emotionally charged relationship with the Board flows out of the claims process, and were it not for these conflicts, [the worker] would likely function quite well emotionally as long as the stresses in his life are kept at a reasonable level. . . . It seems incumbent on us not to penalize [the worker] for emotional difficulties which are largely a product of the claims process itself.

- The worker’s lawyer began requesting legal fees and making submissions on this issue on March 28, 1991 and again on April 17, 1991. The lawyer commented that the worker had no alternative but to retain legal counsel to assist him since the issues to be resolved were primarily legal issues. He noted as well that the worker’s lawyer had become part of the worker’s support system. He also made the point that the money the worker spent on counsel was coming from the worker’s compensation benefits.
- The worker was assessed with a 5% permanent functional psychological impairment (P.F.I.) in 1991, effective September 1, 1989. The worker wrote to the Board objecting to the 5% rating and stated that he had never been properly assessed by a head injury team prior to the pension rate being set.

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- Following the involvement in 1993 of Dr. S, director of the Board's Psychology Department, the Board approved the referral to a neuropsychiatrist, Dr. H., on October 1, 1993.
 - Prior to the referral, Dr. S summarized the reports of the worker's treating psychologist and the rationale for increasing the worker's P.F.I. from 5% to 40%. In a memo dated June 9, 1993, Dr. S wrote:

[The worker] presents with marked emotional disturbances secondary to his frontal lobe injury; those include impulsivity, emotional lability, irritability, anger, poor frustration and stress tolerance, reduced adaptability, anxiety, suspiciousness, depressive tendencies with suicidal and aggressive ideations, and morbidity. Due to these problems, he requires ongoing assistance and monitoring from his wife on business and family matters, and from his psychologist and family physician on overall adjustment and coping matters. Without these support systems in place, [the worker] would likely have to be provided with residential treatment or even institutionalized. [The worker's] intellectual functioning in neuropsychological testing is likely to be close to the premorbid level but he is markedly emotionally compromised in his daily living, social, work and recreational activities.

Due to the combination of frontal lobe related factors with preexisting personality characteristics and ongoing stress of unresolved and contentious claim, [the worker's] emotional state is highly volatile, potentially explosive, violent and self-violent. Therefore, a prompt resolution of any outstanding claims issues, though difficult due to history of suspiciousness, distrust and confrontation, is essential from the rehabilitation perspective.

- Dr. S recognized that one of the puzzling difficulties in the worker's case was the intactness of his intellectual functioning, as measured by neuropsychiatric tests prior to 1993, vis-à-vis what appeared to be a significant behavioural dysfunction (see letter to worker, July 26, 1993).
- Dr. H saw the worker and his wife on several occasions in 1994 and he reviewed all the reports on the worker's condition. Dr. H diagnosed:
 1. Disinhibited frontal lobe syndrome with explosive outbursts. (Post-traumatic personality syndrome-explosive type)
 2. Organic mood syndrome – depressed type.
 3. Post-traumatic amnesic syndrome and impaired attention.
 4. Traumatic cervical myelopathy.
 5. Post-traumatic headaches.
 6. Paranoid state and conflict with the board.

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- Dr. H concluded that the worker was totally disabled “for any and all occupations” and said that “his combination of deficits preclude him from competitive gainful employment.” Among other recommendations, Dr. H. recommended that the worker’s WCB claim be settled expeditiously.
 - Dr. H’s December 2, 1996 report to Dr. S summarizes the worker’s condition based on Dr. H’s treatment of the worker on a regular basis (every one to three months) in 1995 and 1996. Dr. H reported that the worker had “disinhibited frontal lobe syndrome” which limited his capacity to cope with even mild to moderate levels of demands. The syndrome meant that the worker could not control his emotions and that stressors lead to angry outbursts.
 - Dr. H recommended a fair resolution to the worker’s outstanding issues with the Board. We repeat the comments here for ease of reference:

I have discussed various options with [the worker]. [The worker] is not capable of representing himself and I have advised him against this. One possibility is the appointment of a workers’ adviser as [the worker] himself can no longer afford an independent lawyer. Unfortunately [the worker] does not trust anyone with even the remotest connection to WCB. I have therefore come to favour an independent lawyer who could represent [the worker’s] interests so that the outstanding matters can be drawn to a close in a reasonable and fair manner. It would allay [the worker’s] concerns significantly if he plays a role in the choice of legal counsel.

- Dr. H’s June 13, 1994 and December 2, 1996 evaluations of the worker were the basis for the Board’s 1996 finding that the worker was entitled to a 100% permanent functional impairment award for his psychological impairment.
- The history of the Board’s ratings of the worker’s permanent functional impairment under section 23(1) of the Act is as follows:
 - 5% in 1991, effective 1989
 - 40% in June 1993
 - 55% in September 1994
 - 100% in October 1996
- The worker’s position throughout has been consistent that given the severity of his frontal lobe injury on his emotional behaviour, it was essential for him to have legal representation. The worker agrees that he can think and reason, as the decision under reconsideration stated, but he feels that not enough significance has been given to the fact that he cannot control his emotions. On this point, we note that there are numerous letters from the worker to various people at the Board which begin reasonably, but end as angry diatribes.
- The worker has initiated appeals of various negative Board decisions on issues of entitlement, wage rate, rehabilitation, and interest on payments and has been successful in his appeals.

In Appeal Division supplemental Decision #97-0728A dated April 9, 1999, the panel made a recommendation about the Board's handling of the worker's file, at page 13:

Given the circumstances of this claim, I recommend that one individual from the Board who is fully familiar with the details of the case be assigned to co-ordinate the management of any further issues under the claim. This should be done in consultation with [the worker and his wife] and their representative to ensure a co-operative relationship and to avoid any unnecessary appeals. This management should, where possible, be carried out in consultation with a senior Board psychologist to ensure that there is appropriate communication with the worker's health care providers when required to minimize any possible adverse consequences. A copy of this decision will be provided to the director of the Clinical Services Department to facilitate consideration of this recommendation.

- Decision #97-0728A also stated:

The severity of the head injury and its sequelae were not fully recognized until a comprehensive assessment was completed by Dr. H. in 1994. This late recognition of the nature and severity of the injury and its consequences has further complicated the adjudication of this very complex claim.

- In a follow-up letter to the worker's lawyer, dated March 27, 1998, Dr. H wrote that the worker:

... is capable of advising counsel about his views and feelings. However his mental inflexibility as a result of his brain injury will prevent him from handling his disputes with the Board without legal representation. I have advised [the worker] that he should not represent himself as his interests would not be served.

Positions of the Parties

(30) The worker's lawyer provided a submission dated September 14, 2000 in support of the worker's request for legal costs. Counsel's arguments are summarized as follows:

- There was flagrant abuse by the Board when one considers the history of rejection of the various claims made by the worker and the failure to give the worker information on entitlement. Counsel noted that it is important to view the Board's actions in the overall context of the worker's injury.
- Counsel noted that none of the recommendations made by the Appeal Division in its 1997 decision or by Dr. H. to ensure cooperation between the Board and the worker have been followed up.
- The late recognition of the sequelae of the worker's brain injury and its severity has further complicated the worker's claim.

- Dr. H recommended an independent lawyer for the worker to reduce the worker's stress level.

(31) The Employers' Advisers' submissions were provided on October 13, 2000. In summary, they state:

- There was no flagrant abuse in this case when one compares the circumstances of the worker's with the circumstances in Decision #93-1687 and the two decisions cited therein.
- The Workers' Advisers office was available to the worker and the worker was informed of their availability.
- The employer never opposed the worker's claims and never appealed any of the Board's decisions.
- No consideration should be given to costs which the worker incurred in bringing a judicial review application of the Review Board findings of December 15, 1998 since the Review Board is not a "Board decision" as contemplated by policy #100.40

Analysis and Reasons

A. Payment of Legal Fees – General

- (32) In our review of the worker's reconsideration application, our primary source of guidance is the policy at #100.40 of the Manual and Decision No. 69 of the *Workers' Compensation Reporter*. The policy generally prohibits payment of legal fees. In interpreting and applying that policy, however, we are further guided by the policy at #96.10 of the Manual, together with the reasoning in Appeal Division Decision #93-1687 and the court decisions in the *Van Unen* and *Suranyi* cases. In particular, we find useful the phrasing utilized by the British Columbia Court of Appeal in the *Van Unen* case, in its summation of the Board's position, as allowing for the possibility of the payment of legal fees based on "the possible exception of unusual cases where the claiming party was subjected to abuse of process or otherwise became subject to unique considerations."
- (33) The 1994 decision under reconsideration found there would have to be flagrant abuse by a board officer of the officer's authority, before payment of legal fees could be considered. We consider, however, that to the extent the discretion to pay legal fees is exercised as a departure from the general policy due to unique considerations, the circumstances under which this might be considered cannot be defined or limited by a particular test. The flagrant abuse test is useful in identifying one situation which might qualify for such a departure, but is not definitive.

- (34) As discussed above, the source of the Board's authority under the Act to pay costs to appellants is not obvious. Decision #93-1687 found section 100 is broad enough to authorize the Board to award expenses to a successful party in an appeal or non-appeal context. Similarly, the former commissioners of the Workers' Compensation Board exercised their discretion to pay legal fees in rare cases, although it is unclear whether this was under section 100, or on the basis of some implied authority. The Board has, in the *Suranyi* and *Van Unen* cases, successfully defended the refusals to pay legal fees on the basis that these decisions were made in recognition of a discretion to pay legal fees should rare circumstances in a particular case warrant a departure from the general policy. While recognizing that the source of the authority to pay legal fees under the Act is somewhat obscure, we consider it appropriate to proceed on the basis that we have the authority, whether under section 100, or on the basis of some implied authority, to award legal fees as an exercise of discretion should there be unique circumstances warranting such a decision.
- (35) We note, as well, an additional possible footing for considering an award of legal fees in the circumstances of this case. Decision No. 154, Re Legal Services for Rehabilitation Purposes, 2 *Workers' Compensation Reporter* 192, stated that the provision of legal services might be considered in an appropriate case as part of the rehabilitation assistance offered to a worker under section 16 of the Act. We appreciate that point 7 in that decision stated:
- Legal advice is not provided in respect of any matter that the Board is or may be adjudicating. If the worker indicates he would like legal advice in respect of his claim to compensation, he may be referred to the Compensation Consultant.
- (36) Nevertheless, we note the evidence on this file suggesting that the assistance of a legal representative provided support to the worker while he was struggling with the effects of a brain injury, the effects of which were not fully recognized initially. We further note the evidence concerning the effects of the worker's brain injury involving depression, irritability, anger, paranoia, tendency to fixate on a topic, and suicidal ideation, as well as his lack of emotional control and related incidents. Thus, the provision of legal assistance in this case may be viewed as having served some rehabilitative purpose, beyond the legal service rendered.
- (37) We consider, in this regard, that the test of "flagrant abuse" enunciated in Decision #93-1687, should not be considered definitive of the circumstances under which legal fees might be payable. Rather, we read that decision as attempting to envisage the type of situation in which it might be truly said that there were unique circumstances justifying a departure from the policy at #100.40. We interpret that decision as involving an attempt to apply the policy in a meaningful way, so as meet the legal requirement of not fettering discretion. It would be ironic, however, if this terminology or test were itself to then be applied in a rigid fashion. The test of "flagrant abuse" is not contained in policy. We consider that the better approach is to rely on the general policy at #100.40, but to keep in mind that, as stated at #96.10, "regard must always be had to the particular circumstances of each claim to determine whether an existing policy should be applied or whether there are grounds for a change in or departure from a policy. There will also be situations arising from time to time which are not covered by existing policy."

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- (38) The flagrant abuse test, as described in Decision #93-1687, may be viewed as simply one means by which such circumstances might be identified. However, we are not restricted by that test. Rather, we must approach the worker's case with an open mind as to whether it involves some unique considerations which warrant a different result than the literal application of the policy at #100.40 would dictate. We consider, in this regard, that it is important to read the policy at #96.10 as tempering or mitigating the mandatory language of the policy at #100.40.
- (39) We accept the policy at #100.40 as providing very strong direction that legal costs will not be paid. Requests for reimbursement of legal fees will normally be denied based on the clear direction provided by the policy at #100.40. We further consider, however, that there is a very narrow window for considering a departure from this general policy in "a truly deserving case" where there are "unique considerations" warranting reimbursement of legal costs. There is no *entitlement* to reimbursement of legal fees, but *consideration* may be given to providing reimbursement of legal fees in very rare circumstances. The "flagrant abuse" test may assist in identifying such circumstances, but should be considered as an example of, rather than a complete definition of, the kinds of circumstances which might warrant departure from the general policy.
- (40) We note, in this regard, that Decision #2001-1183 considered first whether the circumstances substantiated the worker's claim of "flagrant abuse." The panel considered next whether the worker's specific circumstances (including a brain injury) supported a finding of "unique considerations." The panel wrote: "without attempting to define what such unique considerations might be, I consider they would have to be of similar ilk to those encompassed by the 'flagrant abuse' test, in terms of being so truly exceptional as to warrant a conclusion that they involve a situation to which the general policy could not be intended to apply."

B. Other Appeal Division Decisions

- (41) We have also looked to other Appeal Division decisions for guidance in how to apply the general test. Since Decision #93-1687 was issued, the Appeal Division has not granted any request for reimbursement of legal expenses. We agree with the Employers' Advisers' submission that a review of relevant appeal decisions may provide some guidance about what does *not* constitute grounds for granting legal costs. From there, we may be able to discern whether the circumstances of this case fall within the policy or whether this case should be treated as an exception to the general policy. The employer's adviser submitted that the facts of this case are similar to the facts before the panel in published Decision #93-1687 where legal costs were denied. The adviser asks that we apply the reasoning in that decision to deny the worker's application here.
- (42) In considering the prior Appeal Division decision(s), we note that the Hallmarks of Quality Appeal Division Decisions (currently contained at page 26 of Decision No. 33, Appeal Division Practice and Procedure, published in Volume 17 of the *Workers' Compensation Reporter*), provide as follows:

A good decision is consistent with previous published Appeal Division decisions unless the conflict is identified and the reasons for the departure are articulated in a coherent manner.

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- (43) We also note the reasoning in Appeal Division Decision #00-1596 dated October 11, 2000 (Reconsideration of an Appeal Division Decision – Consistency and “Hallmarks of Quality Decisions,” 16 *Workers’ Compensation Reporter* 349). That decision found, at page 360:

... consistency in decision-making is an important and necessary part of administrative tribunal decision-making. However, this is not always possible, and, indeed, there are important reasons for not binding quasi-judicial decision makers in these matters. At the end of the day appeal commissioners have a legal duty to make decisions on the basis of the facts and issues before them and that may require a reasoned decision that is different and inconsistent with one made previously.

- (44) We also remain mindful of the policy at #96.10 which states:

While decisions of the Courts and the Appeal Division and findings of the review board may be published in the *Workers’ Compensation Reporter Series*, their publication does not turn them into published policy of the Governors.

- (45) Thus, while we agree that it is appropriate to review the prior Appeal Division decisions, the guidance to be taken from them may be subject to certain limitations. For the reasons set out above, we consider it appropriate to consider the worker’s request for payment of legal fees on a somewhat broader basis than was expressed in Decision #93-1687. While we are guided by that decision, we do not find that our consideration is restricted to the flagrant abuse test articulated in that decision.
- (46) In Decision #93-1687 the worker died in a work accident in 1982. His widow and children received dependants’ benefits under the Act. There was considerable dispute over the years about the proper amount of that pension, focused mainly on the calculation of the worker’s average earnings at the time of his death. The worker’s widow retained counsel to assist her in appealing to the Review Board and to the former commissioners; her pension was increased on appeal. The widow requested reimbursement of legal costs she incurred in bringing the appeals due to the complexity of the case, the errors made by the Board, a lack of thorough investigation by the Board, the need for legal analysis, and the lack of available alternatives.
- (47) The panel in #93-1687 found that the adjudicator made errors of judgement in denying coverage initially, then in delaying a response on the wage rate issue but found that “poor judgement alone does not constitute evidence of flagrant abuse of the claimant’s rights.” A third error by the Board adjudicator involved a failure to implement exactly a Review Board finding. The Appeal Division panel found the adjudicator “did a thorough analysis of the facts and produced what he thought was a proper decision” in light of the Board’s assessment policies. Again, the panel found this error did not constitute flagrant abuse. The panel found the circumstances of the case did not warrant an exception to the governors’ policy that denies payment of legal fees.
- (48) In the *Van Unen* case, referred to above, the worker suffered a compensable left knee injury in 1962. The Appeal Division granted the worker’s request to reopen the 1962 claim and allowed his later knee surgery. The Appeal Division also decided the appropriate wage rate on the

reopening. The panel found the worker's situation was not "unusual" nor were the Board's errors a "flagrant abuse" of the worker's rights and therefore denied the worker's request for reimbursement of legal costs. The petition for judicial review was dismissed in the British Columbia Supreme Court, and an appeal of that decision was dismissed by the British Columbia Court of Appeal.

(49) In Decision #2001-1183, the worker had suffered a closed head injury in 1994 resulting in a post traumatic head injury syndrome. The worker did not dispute that her functional psychological impairment was 50%, as rated by the Board's psychological disability award committee in 1999. Her dispute related to the Board's calculation of her long-term wage rate by considering her earnings in the one year prior to her injury. Some of the elements in that case are similar to the circumstances of the case before us. For example, the worker's lawyer in Decision #2001-1183 referred to the late recognition of the effects of the worker's brain injury and the worker's "profound lack of trust in the Board and its decision making" as reasons for paying her legal costs. Counsel also referred to the worker's significant functional impairments as relevant to the issue of costs.

(50) The Appeal Division panel in #2001-1183 considered counsel's arguments with respect to the issue of the worker's long-term wage rate as it related to the question of legal costs. The panel wrote:

Upon careful consideration of the evidence in this case, I find that it is precisely the type of case which the panel in Decision #93-1687 described as not meeting the test of "flagrant abuse". Having regard to the successful outcome of the worker's appeal concerning her average earnings, it may fairly be asserted that the Board officer erred or failed to exercise good judgment, or failed to investigate a matter fully, or erred in interpreting and applying Governors' policies of the Act. However, those are all grounds which were identified in Decision #93-1687 as not giving rise to a finding of flagrant abuse.

(51) The panel went on to consider whether there were "unique considerations" given the worker's brain injury. The panel found the circumstances were not "so truly exceptional as to warrant a conclusion that they involve a situation to which the general policy could not be intended to apply." The panel noted that the worker had at one point pursued an appeal to the Review Board on her own and provided articulate and well-reasoned submissions. She had also, at one point, utilized the services of the Workers' Advisers office in a successful appeal to the Appeal Division on a different issue. The panel stated that "notwithstanding the medical evidence concerning the effects of the worker's head injuries, I am not persuaded that there are unique considerations in the worker's case warranting reimbursement of legal fees."

C. Factors to Consider in Applying the Test

(52) As stated earlier, "unique considerations" in a "truly deserving case" may constitute an exception to the Board's general policy of not paying legal costs.

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- (53) The determination of whether abuse of process or flagrant abuse or other unique considerations exist must be done on a case-by-case basis. Mere errors of judgement are not enough to ground such a finding. Medical complexity, factual complexity, or legal complexity in a particular case will not be sufficient to conclude that a worker requires representation by counsel. There must be other unique or exceptional considerations.
- (54) To the extent Decision #93-1687 set out a new test of “flagrant abuse,” we read this as merely representing an example, rather than constituting a comprehensive definition, as to how the policy at #96.10 tempers the application of the seemingly mandatory wording of the policy at #100.40. We prefer, in this regard, the language utilized by the Court of Appeal in the *Van Unen* case, in summarizing the Board’s position in respect of the policy at #100.40 as permitting of an “exception of unusual cases where the claiming party was subjected to abuse of process or otherwise became subject to unique considerations.”
- (55) In considering whether there are “unique considerations” it is necessary to consider all relevant factors including the availability of free advice from the Workers’ Advisers. Even if, for example, the test of flagrant abuse is met, this is not determinative. We agree with the employers’ adviser that a worker’s mistrust of the Board and Board personnel, on its own, is not sufficient to consider reimbursement of legal expenses. We agree with counsel for the worker that it is also important to consider the history and overall context of a particular case in making the determination about legal expenses.

D. Circumstances of This Case

- (56) We come then to the particular circumstances of this worker’s case.

(i) Is there evidence of “flagrant abuse”?

- (57) The panel in Decision #94-0791 found that there was considerable controversy reflected in the worker’s file but that did not constitute flagrant abuse.
- (58) The worker’s lawyer stated that flagrant abuse exists by virtue of the fact that the Board denied each of the worker’s requests in the first instance (for entitlement, for a particular wage rate, for interest on retroactive payments, for rehabilitation, etc.) but in each case the worker was successful on appeal.
- (59) We agree that the worker had to appeal most decisions made in his case and that he was generally successful on appeal. However, we are not inclined to see wrong adjudication, even where prolonged, as amounting to flagrant abuse unless there are some additional circumstances to warrant such a conclusion.

(ii) Did the issues suggest a requirement for legal expertise?

- (60) Decision #94-0791 found the issues were largely issues of entitlement and quantum which are usual issues for the Board and concluded that nothing in those issues “suggest a requirement for legal expertise.”

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- (61) Our review of the file, particularly for the period between 1986 and 1989 when the worker was appealing the denial of compensation, suggests that, in fact, the issues were legally very complicated. The determination of the worker's status required a knowledge of legal principles which went beyond the bounds of workers' compensation entitlement issues, including bankruptcy law and labour relations law. Counsel for the worker had to review case law in those areas in order to make appropriate submissions to the Board on the worker's appeal concerning his status as a worker under Part 1 of the Act.
- (62) In our view, the worker's appeal was assisted by having a lawyer argue his position at all levels of the appeal process. His entitlement appeal succeeded eventually on the basis of the lawyer's legal arguments. Nevertheless, there is nothing unique about these circumstances. It is not uncommon for legally complex issues to arise for consideration, whether in appeals of Review Board findings or in section 11 determinations for court actions. The Board functions on an inquiry basis. It is not possible to anticipate whether the former commissioners would have reached the same conclusion concerning the worker's status, for example, even if the worker had not been legally represented. At most, this can be considered as one relevant consideration.

(iii) Could the worker have accessed other resources in the compensation system?

- (63) As the employer's adviser points out and as the panel in Decision #94-0791 stated, the Workers' Advisers office is available for unrepresented workers specifically so that workers can have access to free assistance in workers' compensation matters including appeals. Generally, workers are advised of the availability of the Workers' Advisers by way of the appeal pamphlet or by discussions with Board personnel.
- (64) This worker's case is unusual, however, for a number of reasons. First, the correspondence between the worker and the Board indicates that the worker was sent only the appeal form and not the appeal pamphlet when he decided to appeal the July 1986 cancellation of benefits. The appeal form in 1986, which we reviewed, did not contain information about the Workers' Advisers or Employers' Advisers offices so the worker did not have notice of the availability of the Workers' Advisers when he initiated his appeal.
- (65) By the time the appeal pamphlet (with information about the Workers' Advisers office) was sent to the worker he had retained counsel and counsel was involved in the complex legal issues we commented on earlier. The worker's lawyer felt that the issues were too complex for a workers' adviser, some of whom are legally trained and some of whom are not. In addition, counsel felt that the Workers' Advisers office could not take on a case like the worker's which required so much time and individual attention. While we cannot comment on the truth of this statement about the Workers' Advisers, it is clear to us that the worker's case was unusual and complex and required a great deal of his representative's time.
- (66) As the claim's adjudicator wrote in 1989 in memo #68, no one at the Board sat down with the worker to explain the process a claim goes through and we assume this includes a discussion about the availability of the Workers' Advisers.

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- (67) The Workers' Advisory Services are created by section 94 of the Act. It may be suggested that the failure to access the services of the Workers' Advisers involved ignorance of the law, which is generally not considered a valid excuse. We note, however, the reasons given in the case of *Canada (Attorney General) v. Albrecht*, [1985] 1 F.C. 710. These reasons were quoted in Appeal Division Decision #92-0144/92-0145, published at 8 *Workers' Compensation Reporter* 85, in relation to delay with respect to the filing of an application for compensation. The Federal Court of Appeal considered what constitutes "good cause" in a delay in making an application for unemployment insurance benefits:

To say, as the Applicant does in effect, that ignorance of the law excludes good cause seems to me to defeat the whole purpose of the legislation since, apart from instances of physical incapacity and leaving aside possible cases of indifference or lack of concern, ignorance of the law is necessarily involved in the failure of a claimant to exercise his rights in due time. . . Of course, I have no doubt that it would be illusory for a claimant to cite "good cause" if his conduct could be attributed only to indifference or lack of concern. I readily agree, too, that it is not enough for him simply to rely on his good faith and his total unfamiliarity with the law. But an obligation, with its concomitant duty of care, can be demanding only to a point at which the requirements for its fulfillment become unreasonable. In my view, when a claimant has failed to file his claim in a timely way and his ignorance of the law is ultimately the reason for his failure, he ought to be able to satisfy the requirement of having "good cause" when he is able to show that he did what a reasonable person in his situation would have done to satisfy himself as to his rights and obligations under the Act. *This means that each case must be judged on its own facts and to this extent no clear and easily applicable principle exists; a partially subjective appreciation of the circumstances is involved which excludes the possibility of any exclusively objective test. I think, however, that this is what Parliament had in mind and in my opinion this is what justice requires.*

[emphasis added]

- (68) We must also consider the impact of the worker's brain injury and its effect on his need for a lawyer. Dr. H. said the worker was incapable of representing himself. In 1996 Dr. H. recommended an independent lawyer, rather than a workers' adviser, since by then the worker did not trust anyone "with even the remotest connection to the WCB." As we commented earlier, mistrust of the WCB would not usually be a determinative factor, but in this worker's case it takes on more significance given his psychological condition which we discuss in more detail below.

(iv) Declaration of an Overpayment

- (69) The worker's initial appeal must also be seen in the context of the Board's declaration of an "overpayment" which resulted when the Board found, in July 1986, that the worker had no entitlement to compensation. While the Board's practice in 1986 was to collect payments made in error, policy in the Manual provided that the Board generally did not pursue collection when an appeal was instituted. The worker was told, however, that the Board would add


interest to the unpaid balance and that the Board might add its legal costs of collection to the unpaid balance. This was the case even after the worker wrote the Board on October 30, 1986 stating he had not paid since the claims adjudicator told him he did not have to pay if the matter was under appeal. We recognize, in this regard, that policy at #48.41 in the *Rehabilitation Services and Claims Manual*, as it existed at that time, generally required that an overpayment be declared and recovered when it was found that money had been paid to which someone was not entitled by law or policy. #48.42 set out specific steps for pursuing such recovery. However, #48.46 of the Manual further stated:

Our policy requires that if an overpayment is being appealed, procedures to recover the overpayment from the worker will be suspended pending the decision on the appeal.

- (70) It may be that the collection letters sent to the worker requesting reimbursement of the overpayment, and advising of interest charges, were merely form letters to provide him with full notice of the legal effect of the decisions which had been rendered. They were likely intended to better inform him of the legal effect of the decisions to deny his claim and to allow him the opportunity to challenge these decisions on appeal. The fact that the worker was verbally advised by telephone that he did not have to pay if the matter was under appeal suggests that the procedures established in the Manual were being followed. To the extent these may be viewed as "routine" procedures, they cannot be described as flagrant abuse. We note this evidence as simply constituting a relevant consideration, in contemplating how this situation would have been experienced by the worker (who was suffering from a brain injury the effects of which had not been recognized).
- (71) We note that the worker, who was suffering from a severe brain injury, was in the situation of not only being denied any future compensation, but was being asked to repay the compensation previously awarded. The reversal of the Board's decision to pay compensation related to the legally complex issue as to whether he was a worker within the meaning of Part 1 of the Act. Given the complex legal nature of the issue in dispute, we can understand that the worker would be unwilling and unable to argue the case on his own. We are also mindful of the significance of the issues which were at stake for the worker, and the emotional response which the reversal of the decision to accept his claim would have produced (bearing in mind the significance of the worker's brain injury, as it was ultimately diagnosed, to the worker's emotional functioning).

(v) Did the worker have sufficient reasoning power to deal with the various issues in his case?

- (72) The panel in Decision #94-0791 felt the worker's reasoning power was not impaired by his compensable injury; therefore, he could deal with the various issues in his case, without counsel. The comment is somewhat similar to the comment in Decision #2001-1183 where the panel noted that the head-injured worker was articulate and had in fact represented herself well before the Review Board. We consider, however, that the circumstances of this case are distinguishable from the circumstances of the worker in Decision #2001-1183. Among other things, the worker in this case is 100% permanently functionally psychologically impaired whereas the worker in Decision #2001-1183 was 50% psychologically impaired.

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- (73) The worker in this case suffers from frontal lobe syndrome which both Dr. H. and the Board psychologist agree allows him to function at an average intellectual level but severely impairs his emotional behaviour. As a result of the injury, this worker becomes angry and hostile in reaction to stress and his workers' compensation case is a major stressor. We were struck by Dr. S's statement that the worker would likely have required residential treatment or even have been institutionalized were it not for the support of his wife, his psychologist, and his family doctor. This factor, in combination with the worker's other circumstances, suggest to us that the worker's case involves "unique considerations." We consider, in this regard, that no one factor is determinative, and that our decision must be based on a weighing of all the circumstances of the case in combination.
- (74) It is clear from the worker's file that until 1993 when Dr. S, the Board's director of psychology, became involved in the worker's case, the prevailing view at the Board was that the worker's condition was primarily an exacerbation of his pre-existing personality. The worker had been assessed as having only a 5% permanent psychological impairment at that point. Based on the expert advice provided by Dr. S and Dr. H, the worker was eventually granted a 100% permanent psychological functional impairment award in 1996. But, at least until 1993 or 1994, there was no clear understanding on the part of Board personnel that the worker's angry and hostile behaviour was as a result of his injury. It is fair to say that the medical and psychological professions have come a long way in their understanding and treatment of closed head injury cases in the last ten years. This worker's case, at least until 1993 or 1994, reflects some of the prior misunderstandings of the effects of closed head injuries that occurred in the past. While the worker's permanent functional impairment pension award was not increased to 100% until October, 1996, we consider it significant that this increase was based on the medical evidence originally provided in June, 1994.

(vi) Is there evidence of abuse of process?

- (75) We are not persuaded that the circumstances of this case involved flagrant abuse of the worker or other abuse of process. We note, however, the presence on file of various suggestions and recommendations aimed at reducing the stress of the claims process on this worker, which were not acted upon. We also take note of the difficulties which would have been experienced by the worker in dealing with the stresses associated with appealing decisions on his claim, while he was suffering from his particular brain injury. We further take note of the additional stresses which would have been experienced by the worker due to the long delay before the full extent of his brain injury was diagnosed and accepted. The delay in fully recognizing the nature and extent of the worker's injury would likely have caused a corresponding lack of appropriate support to the worker, with enhanced stress on his functioning.
- (76) In 1990, Board psychologist, Dr. B, wrote that were it not for conflicts with the Board, the worker could function emotionally quite well. Dr. B, Dr. S, and Dr. H, all recommended a speedy, fair resolution of the worker's claims to reduce the negative effects on the worker's functioning as a result of his brain injury. The worker's claim took many years to resolve and there is ample evidence that the process exacerbated his inability to cope. While we are not persuaded this amounted to "flagrant abuse," we consider that the negative effects of such delay, particularly in the context of the worker's particular brain injury, must be seen as a

relevant consideration. The combination of delayed medical recognition of the worker's brain injury, and the delays in finally adjudicating both the acceptability of the worker's claim and his compensation entitlement, must be viewed as significant. We are cognizant that delay in the decision-making process has been identified as a system failure in other contexts. Unfortunately, such delay is not unique, and does not by itself warrant payment of legal fees. Again, however, it is a relevant consideration in this worker's case.

(77) In summary, the combination of factors in this worker's case includes:

- the lack of information provided to the worker initially about the availability of the Workers' Advisers office;
- a severe brain injury, which was ultimately recognized as producing a 100% permanent psychological functional impairment;
- the initial acceptance of the worker's claim, followed by a reversal of the decision, with a demand for repayment of the compensation paid to him;
- the legal complexity of the entitlement issue, with respect to whether he was a worker within the meaning of Part 1 of the Act;
- the significance of the claim to the worker, involving both a denial of any entitlement and a claim for recovery of the compensation already paid to him;
- the delays in recognizing the nature and extent of the worker's brain injury, combined with the prolonged delays in achieving resolution of important issues on the adjudication of the acceptability of his claim and the assessment of his permanent disability;
- the lack of support provided to the worker, in respect of the delayed recognition of the full nature and extent of his particular brain injury; and,
- the effects of the worker's brain injury on his ability to represent himself and on his inability to cope with the claims process.

(78) In consideration of the totality of circumstances of the worker's claim, we find there were unique considerations warranting reimbursement of legal fees. While no one factor is determinative, we find that the combined effect of all the factors listed above leads us to this conclusion. We find, therefore, that a departure from the general policy at #100.40 is warranted, as contemplated by the policy at #96.10 of the Manual and the reasoning expressed by the British Columbia Court of Appeal in the *Van Unen* case. In other words, this is a "truly deserving" case where an exception should be made to the Board's general policy against reimbursement for legal expenses.

E. Extent of Reimbursement

- (79) Once the decision to pay legal fees has been made, the question arises as to the basis for calculating such an award. As the policy prohibits payment of legal fees, it does not offer guidance as to how such an award should be calculated in the rare circumstance that an award is found to be warranted.
- (80) Section 100 provides the “board may award a sum it considers reasonable. . . .” Awards of legal costs in court actions are commonly made pursuant to certain scales (such as party and party, special costs (formerly solicitor and own client), and increased costs).
- (81) To begin, we find that our decision to pay legal fees must be subject to certain limits. First, our decision involves reconsideration of a 1994 decision to deny payment of legal fees. The circumstances which existed prior to the 1994 decision, are different than the circumstances which followed the 1994 decision. At least by the time of the 1994 decision, the worker clearly had specific notice of the availability of the Workers’ Advisers office. The legally complex issue of his status as a worker under the Act had been previously resolved. In addition, the lawyer who was initially assisting the worker, left British Columbia to practice in another province. As a result, the worker had to obtain a new representative, so there was no question of interrupting an established and supportive solicitor-client relationship. The combination of circumstances which lead us to conclude there were unique circumstances in this case no longer existed after the 1994 decision. The remaining issues on the claim concerned the amount of compensation payable to the worker; his eligibility for compensation was no longer in issue; and it was necessary for the worker to obtain new representation in any event. We specify, therefore, that our decision to pay legal fees is limited to the circumstances which existed up to the time of the 1994 decision which we are reconsidering.
- (82) Second, we also deny payment of any legal fees associated with the judicial review application. That application was brought after the Review Board issued its December 15, 1988 finding. At that point, the worker had a further avenue of appeal open to him to the former commissioners. In that context, we consider that the judicial review application was brought prematurely as the worker had not availed himself of the remedies available to him under the Act. No legal fees are payable which relate to any part of the judicial review application.
- (83) Finally, we must consider whether the worker should be granted full or partial reimbursement of the legal fees. What degree of detail should be provided by the worker, to justify the expenditures made by the worker for legal fees? What evidence is available concerning the reasonableness of these fees? Even if reasonable, should the full cost of those fees be paid or should reimbursement be made on the basis of some tariff?
- (84) We could provide a general direction that the worker be granted reimbursement for the fees that a reasonable client would have paid to a reasonably qualified solicitor to perform the legal services reasonably necessary in the context of the claim. Alternatively, we could award costs on a particular scale, and leave the amount to be determined. We could remit the matter to a board officer for implementation pursuant to such a general direction.

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- (85) We consider it preferable, however, to provide a final decision on the worker's request, notwithstanding the difficulties in determining the appropriate amount. Inasmuch as the decision to pay legal fees is discretionary, we find it appropriate in exercising this discretion to also address the amount of the payment.
- (86) By letter of October 15, 1993, the worker's lawyer advised the worker's legal expenses exceeded \$35,000.00 at that point. A submission on August 17, 1994 advised that the worker's legal fees exceeded \$40,000.00. The worker's lawyer advised:
- . . . the amount of legal fees involved exceeds \$40,000.00. The fees are not excessive. The claimant's wife is an Office Manager in a law firm and she is capable of recognizing an unreasonable account when she sees one. She and the claimant are both aware of the procedures open to them to tax a lawyer's bill when it should be taxed. . . . So the \$40,000.00 bill is a cost the claimant has had to bear spread over the 8 years of his claim.
- (87) The worker's lawyer explained that the worker's legal bills had been paid by the worker out of his compensation benefits and represented a reduction from his compensation.
- (88) Upon consideration of this matter, and in light of our finding that the costs of the judicial review application should not be reimbursed, we have decided to grant partial reimbursement in the amount of \$25,000.00, as a discretionary payment based on the worker's unique circumstances. We do not award interest on this discretionary payment.

Conclusion

- (89) Upon reconsideration of Appeal Division Decision #94-0791, the worker's request for reimbursement of legal fees is granted to the extent outlined above. The sum of \$25,000.00 is awarded to the worker. In implementing this decision, it is open to the Board to consider the application of section 35 of the Act concerning the manner of payment of compensation.

Editors' Note: The names of the parties have been removed for privacy considerations. The text of the decision is otherwise unchanged.

