WORKERS' COMPENSATION
REPORTER

WORKERS' COMPENSATION REPORTER

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WORKERS' COMPENSATION BOARD

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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 1996, Chapter 492 are provided for convenience and are to be used for informational purposes only.

For more information about the *Workers' Compensation Reporter*, please call Sheryl Wynne at 604 279-7594. The *Workers' Compensation Reporter* is colour-coded in the following way:

- Blue — Decisions of the Panel of Administrators
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WORKERS' COMPENSATION
REPORTER

Resolution of the Panel of Administrators

Number: 2002/07/16-03
Date: August 27, 2002
Subject: Policy Issues Arising From the Online Payments and Reporting Project

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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:

On July 16, 2002, the Panel of Administrators approved funding for the development of an online system for reporting payroll and paying assessments;

AND WHEREAS:

To implement the proposed online system and obtain the greatest benefit from it, it is desirable to amend certain policies in the *Assessment Policy Manual* relating to reporting payroll, paying assessments, and penalties for defaults;

AND WHEREAS:

Because the *Assessment Policy Manual* is currently being completely updated and rewritten, it is not practical to make specific amendments to the relevant pages of that manual;

THE PANEL OF ADMINISTRATORS RESOLVES THAT:

1. With regard to Policies No. 40:30:10 to 40:30:30 of the *Assessment Policy Manual*,

   (a) the threshold of $500 of annual assessment that determines whether an employer reports payroll and pays assessment annually or quarterly is raised to $1,500, and

(b) the Board is not required to send a paper form at any time for the employer to complete and return with the payment to the Board, but may use any means of written communication to advise an employer of the requirements for reporting and payment and accept payment and reports through any recognised payment medium.

2. With regard to Policies No. 40.50.05 and 40:50:30 of the *Assessment Policy Manual*, the penalty of 1% per month, as adjusted in accordance with the policy, may be imposed where an account has been overdue for less than 28 days if no initial penalty has been charged for the default under Policy No. 40:50:10 or 40:50:20.

3. With regard to Policies No. 40:50:10 and 40:50:20, the Board may apply a penalty or interest charge of 8% or less of the amount due or unpaid or estimated to be due or unpaid.

4. A review of the feasibility of a monthly payment option is to be conducted and the results of this review are to be reported to the Panel by June 2003 along with a progress report on the implementation of the online payment system.

5. The policy changes made by this resolution will be incorporated into the new manual that will replace the *Assessment Policy Manual* as a result of the updating and rewriting process, before the new manual is submitted to the Panel of Administrators for final approval.

6. To the extent the policies in the *Assessment Policy Manual* are inconsistent with this resolution, this resolution will prevail.

7. This is a policy decision of the Panel of Administrators and is effective January 1, 2003.

DATED at Richmond, British Columbia, August 27, 2002.

WORKERS' COMPENSATION
REPORTER

Resolution of the Panel of Administrators

Number: 2002/07/16-05
Date: July 16, 2002
Subject: Amendments to Part 33 of the *Occupational Health & Safety Regulation* (BC Regulation 296/97 as amended)

WHEREAS:

Pursuant to section 225(1) of the *Workers Compensation Act*, R.S.B.C. 1996, c. 492 and amendments thereto ("Act"), the Workers' Compensation Board (the "Board") may make regulations the Board considers necessary or advisable in relation to occupational health and safety and occupational environment;

AND WHEREAS:

The Occupational Health and Safety Regulation (O.H.S.R.) pertains to occupational health and safety and occupational environment;

AND WHEREAS:

The Board, pursuant to its mandate under the Act, has proposed amendments to Part 33 (Occupational First Aid) of the O.H.S.R. and has given notice of the proposed amendments and held a public hearing on the proposed amendments to Part 33 (Occupational First Aid) of the O.H.S.R. in accordance with section 226(1) of the Act;

AND WHEREAS:

The Panel of Administrators (the "Panel"), after due consideration of all the presentations to the Board, considers it necessary and advisable in accordance with the Board's mandate under the Act in relation to occupational health and safety and occupational environment to amend Part 33 (Occupational First Aid) of the O.H.S.R.;

AND WHEREAS:

Pursuant to the Provincial Government's Regulatory Reform Policy ("Policy"), the Panel has evaluated the proposed amendments according to the regulatory criteria set out in the Policy;

AND WHEREAS:

The Panel will make public the Regulatory Criteria Checklist;

THE PANEL OF ADMINISTRATORS RESOLVES THAT:

1. The amendments to Part 33 (Occupational First Aid) of the O.H.S.R. set out in Appendix A and B are approved.

2. The Regulatory Criteria Checklist in Appendix C is approved.

3. The above amendments to Part 33 (Occupational First Aid) of the O.H.S.R. will be deposited with the registrar of regulations in such form as may be required by the registrar.

4. The above amendments to Part 33 (Occupational First Aid) of the O.H.S.R. come into force 90 days after their deposit under the *Regulations Act.*

DATED at Richmond, British Columbia, July 16, 2002.

APPENDIX A

Definitions

33.1	In this Part
"attendant"	means a first aid attendant who is designated by an employer to provide first aid to workers at a workplace, and who holds a first aid certificate valid for that workplace;
"central first aid"	means the location where first aid equipment and supplies for a workplace are kept;
"certificate"	means, as described in Schedule 6, a Level 1, 2 or 3 first aid certificate ~~issued~~ **recognized** by the board;
"certificate endorsement"	means an endorsement, ~~issued~~ **recognized** by the board, to the holder of a first aid certificate;
"ETV"	means an emergency transportation vehicle meeting the requirements of sections 33.30 and 33.31;
"first aid"	means the provision and use of the equipment, supplies, facilities and the services of an attendant as required by this Part;
"first aid facility"	means a first aid room or dressing station;
"first aid kit"	means the first aid equipment and supplies specified in Schedule 2;
"hazard classification"	means the rating assigned to an industry specified in Schedule 7;
"health care facility"	means a hospital or other place where acute, intermediate or extended health care services are provided;
"hospital"	means a hospital or diagnostic and treatment centre that has an emergency department or resuscitation area and a physician on duty, or immediately available on call, 24 hours a day;
"industrial ambulance"	means a vehicle meeting the requirements of sections 33.30 and 33.32;
"injured worker"	means a worker who reports with an injury or illness during work;
"MTC"	means a mobile treatment centre meeting the requirements of section 33.33;

"number of workers per shift"	means the calculated value, used in Tables 1 to 6 of Schedule 1, to determine first aid requirements;
"physician"	means a person registered under the *Medical Practitioners Act*;
"potential for delay"	means a likelihood that the transport of an injured worker to medical treatment may be delayed 15 minutes or more after the time the injured worker is ready to be transported;
"qualified practitioner"	means a person registered under the *Chiropractors Act*, the *Dentists Act*, the *Naturopaths Act* or the *Podiatrists Act* ;
"remote workplace"	means a workplace which is located 2 hours or more surface travel time away from a hospital;
"surface travel time"	means the normal time to safely transport an injured worker on a stretcher by land or water, having consideration for the weather, road conditions, traffic patterns and other factors which may affect travel and are likely to prevail during working hours;
"training agency"	means a person or organization recognized by the board to provide first aid instruction.

Explanatory Note

Definitions of "certificate" and "certificate endorsement" amended to permit the board to recognize documents issued by agencies other than board.

APPENDIX A (continued)

REQUIREMENTS FOR SPECIFIC WORKPLACES

Health Care Facilities
Section 33.15

Health care facilities **33.15** (1) A health care facility with an emergency resuscitation area may designate that area as the workplace first aid facility, provided that

(a) immediate access is available to workers during working hours,

(b) written procedures are developed for moving a worker requiring stretcher transport to the designated treatment area,

(c) the transport equipment required by the procedures is provided, and

(d) a first aid kit, appropriate for the level of attendant required, is available to be taken to the scene of an injury.

(2) On written request, ~~the board will issue~~ a Level 2 certificate ***will be issued*** to a physician or registered nurse who has

(a) at least 6 months experience in an emergency department, or

(b) successfully completed a recognized course of training in emergency procedures.

(3) The experience or training required in subsection (2) must have been completed not more than 24 months before the request for certification.

(4) Certification granted under subsection (2) is restricted for use in health care facilities and is not transferable to other industries.

Explanatory Note

Section amended to recognize that board may not itself necessarily issue the required certificates.

APPENDIX A (continued)

Municipal fire departments
Section 33.16

Municipal fire departments **33.16** (1) If there are 5 or more firefighters at a workplace, at least one must hold a Level 1 certificate.

(2) If there are 20 or more firefighters at a workplace, at least one must hold a Level 3 certificate.

(3) If 25% or more of the firefighters at a workplace have a valid Emergency Medical Assistant First Responder (EMA FR) Level III licence issued under the *Health Emergency Act*, the requirements of subsections (1) and (2) do not apply.

(4) On written request, ~~the board will issue~~ a Level 1 or 2 certificate ***will be issued*** to a firefighter who holds an EMA FR Licence as follows:

(a) EMA FR Level II Licence = board Level 1 Certificate;

(b) EMA FR Level III Licence = board Level 2 Certificate.

(5) Certification issued under subsection (4) is restricted to the fire service industry and is not transferable to other industries.

(6) A firefighting crew dispatched on an emergency call must have

(a) a Level 1 kit specified in Schedule 2,

(b) portable oxygen therapy equipment,

(c) a bag-valve mask and airway kit, and

(d) two sterile burn sheets in sealed plastic containers.

Explanatory Note

Section amended to recognize that board may not itself necessarily issue the required certificates.

APPENDIX A (continued)

CERTIFICATION OF FIRST AID ATTENDANTS

Levels of certification
Section 33.38

Levels of certification **33.38** Levels of certification and certificate endorsements for an attendant ~~are issued by the board and~~ are specified in Schedule 6.

Explanatory Note

Section amended to permit the board to recognize documents issued by agencies other than board.

APPENDIX A (continued)

Certification process
Section 33.39

Certification process **33.39** (1) To qualify for a Level 1 certificate a candidate must successfully complete a Level 1 training course or its equivalent as taught and evaluated by a person authorized by the board.

(2) To qualify for an initial Level 2 or 3 certificate, a candidate must successfully complete a Level 2 or 3 training course or its equivalent, and achieve a grade of at least 70% on each of the written, oral and practical portions of ~~the~~ ***an*** examination **conducted by a person authorized by the board**.

~~(3) The Level 2 and 3 written examinations must be conducted by a person authorized by the board or by an officer.~~

~~(4) The Level 2 and 3 oral and practical examinations will be conducted by an officer at times and places determined by the board.~~

~~(5) The medical certificate of fitness, required by section 33.41(c), must be received and approved by the board before a Level 2 or 3 certificate is issued.~~

(~~6~~3) To qualify for a certificate endorsement the candidate must hold a valid Level 1 or 2 certificate and must successfully complete a board-developed training course or its equivalent.

Explanatory Note

Sections 33.39(2) to (4) are merged. Separate provisions are only required where there are different requirements for the written and the oral/practical examinations. Under the proposed amendments, all examinations can be conducted by a person authorized by the board.

Section 33.39(5) is deleted as it assumes that the board will always administer the process for receiving applications to take the examination and is in any event covered by section 33.41(c). The explicit statement that the certificate be received before certification occurs is moved to section 33.41

APPENDIX A (continued)

~~Eligibility for examination~~Medical Certificates
Section 33.41

~~Eligibility for examination~~ Medical Certificates

33.41 A candidate for examination leading to certification at Level 2 or 3 must **before a certificate is issued**

~~(a) apply for examination and provide the information requested on a form acceptable to provided by the board,~~

~~(b) ensure that the examination fee has been paid, and~~

~~(c)~~ provide a medical certificate of the candidate's fitness from a physician on a form **acceptable to** ~~provided by~~ the board and every two years thereafter on renewal of the Level 2 or 3 certificate.

Explanatory Note

Sections 33.41(a) and (b) are deleted as they assume the board will be conducting the examinations. Under the proposed amendments, all examinations can be conducted by other authorized persons. See comments on section 33.39(5) above.

APPENDIX A (continued)

Extensions to certificates
Section 33.43

~~**Extensions to certificates**~~ ~~**33.43**~~ ~~(1) Extensions to certificates are granted only if~~

~~(a) a course has not been available during the 3 months before the expiry of the certificate, or~~

~~(b) the attendant has been medically determined to be temporarily disabled and unable to take the renewal course or examination.~~

~~(2) A request for an extension must be made before the expiry date of the certificate held, and the request must be made by the attendant, the employer, or an immediate prospective employer.~~

~~(3) Except as noted in subsection (4), the maximum extension allowed is 3 months beyond the expiry date of the certificate held.~~

~~(4) A person who is certified by the board as a first aid instructor for Level 2 or 3 courses and is in good standing will be granted a 12 month extension to his or her current Level 3 certificate on written request to the board.~~

Explanatory Note

This section has been deleted since, if certificates are issued by agencies, it will not be practical for the board to grant extensions.

APPENDIX A (continued)

Program equivalency
Section 33.47

Program equivalency **33.47** (1) First aid programs offered by training agencies and approved by the board may be granted equivalency for Level 1**, 2 or 3** certification, **or** ~~qualification for~~ certificate endorsement, ~~or a Level 2 or 3 examination~~ provided the requirements of this Part are otherwise met.

(2) A person successfully completing an equivalent program will, upon application, be eligible for certification, ***or*** certificate endorsement~~, or examination leading to certification~~ provided the requirements of this Part are otherwise met.

(3) Only ~~board-issued~~ certificates and certificate endorsements **recognized by the board** will be accepted as proof of certification or qualification at a workplace subject to the requirements of this Part.

Explanatory Note

Section amended to permit the board to recognize documents issued by agencies other than the board. The current section allows equivalency for the purpose of obtaining certification in the case of level 1, but in the case of level 2 and 3, only for the purpose of doing the examination. This distinction is no longer necessary in light of the proposed changes to section 33.39.

APPENDIX A (continued)

INSTRUCTORS AND TRAINING AGENCIES

Instructor certification
Section 33.48

Instructor certification **33.48** (1) Instructors of Level 1**, 2 and 3 and transportation endorsement** courses must **have qualifications recognized** ~~be certified~~ by the board.

~~(2) Instructors of Level 2 and 3 courses must be trained and certified by the board.~~

(~~3~~**2**) Instructors of certificate endorsement training courses must be Level 2 or 3 instructors.

Explanatory Note

Section amended to permit the board to recognize instructors having qualifications issued by agencies other than the board.

APPENDIX A (continued)

Courses and examinations
Section 33.52

Courses and examinations

33.52 (1) A training agency must ensure that first aid equipment and supplies required by the board are clean and ready for use in each class.

(2) A training agency must ensure that board-developed or equivalent first aid courses are taught in accordance with training materials developed or approved by the board.

~~(3) Before conducting any approved first aid course leading to Level 1 certification, certificate endorsement or Level 2 or 3 examination by the board, a training agency must notify the board of its intention to conduct the course.~~

~~(4) Immediately following completion of a Level 1 certificate training course or certificate endorsement course the training agency must forward to the board, on behalf of each student registered in the course,~~

~~(a) a completed Course Registration Form,~~

~~(b) full payment of appropriate certificate fees, and~~

~~(c) a completed Certificate Record Booklet.~~

~~(5) In order for an examination to be scheduled for a Level 2 or 3 certificate training course, a training agency must forward to the board, on behalf of each student registered in the course,~~

~~(a) a completed Course Registration Form, and~~

~~(b) a completed Application for Examination Form.~~

~~(6) Before the examination, the training agency must remit to the board full payment of examination fees on behalf of each student registered in the course.~~

~~(7) A training agency has the right to cancel a student's examination for default of tuition or examination payment and must provide the board with 2 working days notice of any such cancellation, and any examination appointment vacancy created by a cancellation will be filled by the board and not the agency.~~

(~~8~~**3**) A training agency must maintain an accurate record of the attendance and classroom achievement of registered candidates.

~~(9) For Level 2 or 3 courses, a training agency must provide, on or before the examination date, a copy of the record required by subsection (8) to the examining board officer.~~

(~~10~~**4**) A training agency representative must be present at course updates as requested by the board.

Explanatory Note

Several subsections have been deleted as they assume that the board will always be conducting the examination process, issuing certificates and keeping individual records of every candidate.

APPENDIX A (continued)

SCHEDULE 6: EXPLANATION OF CERTIFICATION LEVELS AND TRAINING PROGRAMS

Occupational First Aid Level 1, Level 2, Level 3 and Certificate Endorsement training courses mean those first aid training courses that are developed ~~and distributed~~ by the board.

Level 1 First Aid Certificate

Level 1 certification requires successful completion of an Occupational First Aid Level 1 training course. Renewal of Level 1 certification requires successful completion of the full course. Restricted Level 1 certificates are permitted in some circumstances for municipal fire departments. (See section 33.16).

Level 2 First Aid Certificate

Level 2 certification requires completion of the examination process specified in this Part, unless the person qualifies for a restricted Level 2 certification based on training and/or experience as provided in this Part. Restricted Level 2 certificates are permitted in some circumstances for health care facilities and municipal fire departments. (See sections 33.15 and 33.16). Normally a candidate for Level 2 certification will complete a 36 hour Occupational First Aid Level 2 training course before taking the examination. For recertification, a 24 hour renewal course is available to prepare a candidate for a renewal examination.

Level 3 First Aid Certificate

Level 3 certification requires completion of the examination process specified by this Part. Normally the candidate for Level 3 certification will complete a 70 hour Occupational First Aid Level 3 training course before taking the examination. For recertification, a 40 hour renewal course is available, which includes the renewal examination.

Transportation Endorsement

A transportation endorsement for a first aid certificate requires the certificate holder to successfully complete an 8 hour Occupational First Aid Certificate Endorsement training course. Such a program gives Level 1 first aid certificate holders training to put an injured worker on a spine board and in a basket stretcher to allow the injured worker to be moved. The transportation endorsement expires with the Level 1 first aid certificate.

To obtain a transportation endorsement on the renewal of a Level 1 certificate, the certificate holder must successfully complete the full 8 hour Occupational First Aid Certificate Endorsement training course.

Other training courses, providing they meet specific standards set by the board and are approved by the board, may qualify candidates for a Level 1**, 2 or 3** certificate, ***or*** a certificate endorsement~~ or eligibility to participate in a Level 2 or 3 examination~~. Qualifications and certification of the instructor are the same as described in section 33.48. These other courses, however, cannot be titled Occupational First Aid Level 1, Occupational First Aid Level 2, Occupational First Aid Level 3 or Occupational First Aid Endorsement.

Explanatory Note

Section amended to recognize that the board may not "distribute" the programs it develops. See comments under section 33.47 with regard to the proposed changes to the last paragraph.

APPENDIX B

THE PANEL OF ADMINISTRATORS RESOLVES THAT:

1 *The Occupational Health and Safety Regulation, B.C. Reg. 296/97, is amended in section 33.1 in the definitions of* "**certificate**" *and* "**certificate endorsement**" *by striking out* "issued" *and substituting* "recognized".

2 *Section 33.15(2) is amended by striking out* "the board will issue" *and by adding* "will be issued" *after* "certificate".

3 *Section 33.16(4) is amended by striking out* "the board will issue" *and by adding* "will be issued" *after* "certificate".

4 *Section 33.38 is amended by striking out* "are issued by the board and".

5 *Section 33.39 is repealed and the following substituted:*

Certification Process

Certification process

33.39 (1) To qualify for a Level 1 certificate a candidate must successfully complete a Level 1 training course or its equivalent as taught and evaluated by a person authorized by the board.

(2) To qualify for an initial Level 2 or 3 certificate, a candidate must successfully complete a Level 2 or 3 training course or its equivalent, and achieve a grade of at least 70% on each of the written, oral and practical portions of an examination conducted by a person authorized by the board.

(3) To qualify for a certificate endorsement the candidate must hold a valid Level 1 or 2 certificate and must successfully complete a board-developed training course or its equivalent.

6 *Section 33.41 is repealed and the following substituted:*

Medical Certificates

33.41 A candidate for examination leading to certification at Level 2 or 3 must, before a certificate is issued, provide a medical certificate of the candidate's fitness from a physician on a form acceptable to the board and every two years thereafter on renewal of the Level 2 or 3 certificate.

7 Section 33.43 is repealed.

8 Section 33.47 is repealed and the following substituted:

Program Equivalency

33.47 (1) First aid programs offered by training agencies and approved by the board may be granted equivalency for Level 1, 2 or 3 certification or certificate endorsement provided the requirements of this Part are otherwise met.

(2) A person successfully completing an equivalent program will, upon application, be eligible for certification, or certificate endorsement, provided the requirements of this Part are otherwise met.

(3) Only certificates and certificate endorsements recognized by the board will be accepted as proof of certification or qualification at a workplace that is subject to the requirements of this Part.

9 Section 33.48 is repealed and the following substituted:

Instructor Certification

33.48 (1) Instructors of Level 1, 2 and 3 and transportation endorsement courses must have qualifications recognized by the board.

(2) Instructors of certificate endorsement training courses must be Level 2 or 3 instructors.

10 Section 33.52 is repealed and the following substituted:

Courses and Examinations

33.52 (1) A training agency must ensure that first aid equipment and supplies required by the board are clean and ready for use in each class.

(2) A training agency must ensure that board-developed or equivalent first aid courses are taught in accordance with training materials developed or approved by the board.

(3) A training agency must maintain an accurate record of the attendance and classroom achievement of registered candidates.

(4) A training agency representative must be present at course updates as requested by the board.

11 Schedule 6 is amended

(a) in the paragraph after the Schedule heading, by striking out "and distributed"***, and***
(b) in the last paragraph of the Schedule, by striking out "may qualify candidates for a Level 1 certificate, a certificate endorsement or eligibility to participate in a Level 2 or 3 examination" ***and substituting*** "may qualify candidates for a Level 1,2 or 3 certificate or a certificate endorsement"**.**

12 The above amendments to Part 33 (Occupational First Aid) of the *OHSR* come into force 90 days after their deposit under the *Regulations Act.*

DATED at Richmond, British Columbia, July 25, 2002.

APPENDIX C

Regulatory Criteria Checklist

Title of Legislation/Regulation — Amendments to the Occupational First Aid Requirements of Part 33 of the Occupational Health and Safety Regulation.

If the answer is "No" for any of the criteria, please attach explanation.

REGULATORY CRITERIA	CRITERIA MET
1. Reverse Onus: Need for Regulation is Justified	**Yes**
2. Regulatory Design is Results-Based	**Yes**
3. Transparent Development of Regulatory Requirements	**Yes**
4. Cost-Benefit Analysis Completed	**Yes**
5. Competitive Analysis Completed	**Yes**
6. Regulatory Requirements Avoid or Eliminate Duplication with Other Jurisdictions	**Yes**
7. Timeliness	**Yes**
8. Plain Language	**Yes**
9. Sunset Review and Expiry Provisions	Sunset Review provision: **No** — Part 33 is scheduled for further review in 2002. Sunset Expiry provision: **No** — The Board does not anticipate reversion to a role as sole provider of selected first aid examination and certification services.
10. Replacement Principle Applied	**Yes**

Number of Regulatory Requirements being introduced: **0 (zero)**

Responsible Minister or Head of Regulatory Authority **Date**

WORKERS' COMPENSATION

REPORTER

Decision of the Appeal Division

Number: 2002-0773
Date: March 27, 2002
Panel: Herb Morton
Subject: Subsequent Injury Following Verbal Abuse — In the Course of Employment

PERSONAL INJURY (ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT) — The worker appealed a decision by the Review Board that the worker's injury did not arise out of and in the course of his employment — The worker punched a wall during an emotional outburst while meeting with his supervisor — The worker's behaviour resulted from his subjection to a customer's abusive and racist comments — The Appeal Division panel evaluated the relative significance of the unauthorized conduct and found that it did not substantially deviate from the course of his employment, after considering the degree, duration and seriousness of the conduct — The panel applied section 5(3) of the *Workers Compensation Act* and found that the injury was not attributable *solely* to the conduct of the employee because the conduct was held to be part of a chain of events — Appeal accepted, the worker's injury arose out of and in the course of his employment.

Law: *WCA*: s. 5(1), s. 5(3), s. 5(4), s. 91(1), s. 96(3),

Policy: Appeal Division Decision No. 75, 10 *Workers' Compensation Reporter* 753; *RSCM*: #16.00–#16.60

Decisions: Appeal Division Decision No. 194, 2 *Workers' Compensation Reporter* 309; *Bridge* v. *Workers Compensation Board* (1985) 14 Admin L.R. 312; Appeal Division Decision No. 94-0563, 10 *Workers' Compensation Reporter* 645; Appeal Division Decision No. 2001-2270; Appeal Division Decision No. 98-0673, 15 *Workers' Compensation Reporter* 335; Appeal Division Decision No. 2001-0626 (published on Board website); Appeal Division Decision No. 2001-0254 (published on Board website); Appeal Division Decision No. 2001-2310 (published on Board website)

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(1) The worker appeals the October 26, 2001 Review Board finding.

(2) While working as a customer service representative, the worker was subjected to abusive and racist comments from an irate customer. Some time later the worker received a telephone call from the customer, who reiterated his abusive and racist statements. Upon reviewing this matter with an assistant manager in a back room, the worker punched a wall in a moment of emotion and suffered a right fifth metacarpal fracture. The claims adjudicator denied the worker's claim for compensation, and that denial was upheld by the Review Board. The Review Board concluded the worker's unauthorized activity was sufficient to take him out of the course of his employment.

Issue(s)

(3) Did the worker's action of punching a wall, in an emotional response following abusive and racist comments from a customer, involve a departure from the course of his employment? Did the worker's injury arise out of and in the course of his employment? If so, should compensation be denied under section 5(3) of the *Workers Compensation Act* (the Act) on the basis of misconduct by the worker?

Jurisdiction

(4) The worker's appeal is brought under section 91 of the Act. Section 96(3) 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) A detailed statement was taken from the worker by his union representative on February 7, 2001. This was nearly one year after the March 17, 2000 incident. While prepared by the representative, it is signed by the worker and dated on February 28, 2001, as being an accurate account. This statement is consistent with the other information on file, but provides a more detailed description of the events.

(6) The worker was a student and part-time clerk cashier in a supermarket, working approximately 20 hours per week. He commenced work with his employer in 1990. On March 17, 2000 (St. Patrick's Day), he was working a 3:45 to 12:15 p.m. shift at the customer service desk. At approximately 9:00 p.m., a customer requested a brand of cigarettes and the worker erred and selected a related brand. The customer corrected the worker and he picked out the correct brand. The worker apologized, stating he was really not up on his cigarette knowledge. The customer stated, "Well you should get acquainted boy!" The worker replied, "Boy, you're pretty cantankerous." The customer initially responded by stating he had never encountered such arrogance before. He left, and returned a few minutes later to belittle the worker with abusive and racist comments while the worker was serving another customer.

(7) Approximately a half hour later, the worker met with the assistant manager who had received a phone call from the customer. While they were meeting, the phone rang and it was the customer again, and the worker passed the call to the assistant manager. The customer apologized for being rude to the assistant manager in his previous phone call, but stated the worker was a "dumb punk." The worker returned to work at the customer service counter, and about 10–15 minutes later the customer phoned for him by name. The call was put through to the worker, and the customer repeated his abusive and racist comments. The worker stated, "Listen, sir, what does race have to do with any of this?", and the customer swore at him and hung up. The worker returned to the assistant manager's office. The worker's statement indicates:

> I went to the back office and [the assistant manager] came into the back office with [the worker's co-worker] shortly thereafter. I told him what just happened, my heart is pounding and I am quite upset. Mainly because it's an emotionally trait, remarks on racism get to me. If you complain about my service, okay. This touched a nerve. As I'm telling them this I faced the wall and punched the wall. My hand hit the stud. . . .
>
> [reproduced as written]

(8) The worker reports that subsequent to this incident, the first assistant manager told the customer he did not tolerate racial remarks against employees and told him not to shop in the store. Ultimately, the store manager told the customer not to shop at the store any more. The worker reports that he wound up losing a month due to his injury, but he had previously booked 2–3 weeks off for school purposes and is seeking one week's wage loss.

(9) By decision dated May 24, 2000, the case manager denied the worker's claim, stating:

> I regret that you were subjected to abusive and racist comments, however, I cannot conclude that the action of punching the wall would be considered an authorized activity and as such, it is my decision to disallow your claim for compensation benefits.

(10) The worker appealed to the Review Board. Several statements were provided by the worker's co-workers, attesting to the worker's personable and courteous nature, and the challenging nature of the work at the customer service desk.

(11) By finding dated October 26, 2001, the Review Board reasoned:

> The panel has no doubt that [the worker] is a polite and courteous individual as described by his references. We also accept that working in a customer services department can lead to arguments with customers that result in heated discussions. We also note the striking of the wall took place not while in the presence of the customer, but shortly thereafter in the back office with the assistant manager. The panel acknowledges that there are any number of examples where, in a fit of rage, any number of violent acts can be commited while releasing the anger, stress and frustration of the moment. This however, does not make the resulting injuries of these actions, compensable.
>
> The fact remains, [the worker] wilfully punched an immovable object and suffered an injury. This plainly is not a required part of his job, and the panel finds this is one of those situations contemplated by Policy #16.00 where the unauthorized nature of the activity is sufficient to take [the worker] out of the course of his employment.

(12) The worker's union representative has provided written submissions. No submission has been provided by the employer.

Findings and Reasons

(13) The case manager and the Review Board found the worker's injury did not arise out of and in the course of his employment, as his action of punching a wall was an unauthorized activity. The Review Board relied on the policy at #16.00 of the *Rehabilitation Services and Claims Manual* concerning *Unauthorized Activities*. That is a general subject heading, followed by policies on several related particular topics. These include policies on *Intoxication or Other Substance Impairment* (#16.10), *Horseplay* (#16.20), *Assaults* (#16.30), *Injury While Doing Another Person's Job* (#16.40*), Emergency Actions* (#16.50), and *Serious and Wilful Misconduct* (#16.60). It is useful to consider all of these related policies together, in considering the effect of the general policy at #16.00.

(14) The policy at #16.00 concerning *Unauthorized Activities* provides:

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

(15) The general policy at #16.00, and the specific policies which follow, make it clear that there is no absolute bar to compensation in respect of unauthorized activities. Rather, there must be an evaluation and assessment of the relative significance of the unauthorized conduct in connection with the employment circumstances, in order to determine whether the worker had in fact abandoned his or her employment (even if only temporarily).

(16) An example of a case in which a worker was found to have abandoned his employment due to horseplay is contained in policy in Decision No. 194 (*Re Horseplay*, 2 *Workers' Compensation Reporter* 309). The worker in that case was employed as a concrete mixer-truck driver. Decision No. 194 states:

> On the day of the injury there were frequent interruptions in the flow of concrete. This was due either to deficiencies in the pump-truck or to delays caused by the carpenters working on the site. During these interruptions the claimant engaged in conversation with the pump-truck driver and "horsed around" with him. On one such occasion the claimant attempted to grab some food from the pump-truck driver's lunch box, but moved into the roadway when the pump-truck driver appeared to be reaching for the water hose on the claimant's truck. The claimant apparently feared that the pump-truck operator was going to spray him in retaliation, but this did not occur. The claimant was struck by a car travelling west, his view of which was blocked by another mixer-truck of his employer parked behind the pump-truck. . . .

> Although the time period involved was quite small, it is felt that the conduct of the claimant which resulted in his injury was sufficient to constitute an abandonment of his employment. . . . . In no way could "horsing" around with the pump-truck operator be considered part of his employment.

(17) If the worker is found to have abandoned his or her employment, no compensation is payable no matter how serious the consequences of the injury. As stated in policy at #16.60:

> Before Section 5(3) can be considered, it must have been determined under Section 5(1) that the injury arose out of and in the course of the employment. The actions or conduct of the worker may induce the Board to conclude that the injury does not meet that requirement. If such a conclusion is reached, the claim will be denied even though the worker has suffered death or serious or permanent disablement.

(18) In another case, compensation was denied where a worker hid another worker's lunch bucket and was then killed when he was run over by a forklift while chasing the other worker and attempting to climb onto the moving forklift. A petition for judicial review was dismissed by the British Columbia Supreme Court (*Bridge* v. *Workers Compensation Board* (1985) 14 Admin. L.R. 321). Similarly, compensation was found not to be payable in the case of a security guard who plunged head first into a shallow pool and suffered a neck injury resulting in quadriplegia (Appeal Division Decision #94-0563, *The Course of Employment*, 10 *Workers' Compensation Reporter* 645; application for reconsideration denied — Appeal Division Decision #2001-2270).

(19) Policy at #16.20 concerning *Horseplay* explains:

> A worker who is injured through participation in horseplay is not for that reason alone denied compensation. The conduct of the claimant which caused the injury must be examined to determine whether it constituted a substantial deviation from the course of the employment. An insubstantial deviation does not prevent an injury from being held to have arisen in the course of employment.
>
> No definite rules can be laid down as to what constitutes a substantial deviation. One factor to be considered is the degree of participation of the claimant. For instance, a claimant who instigates or provokes horseplay, or who has been involved in previous episodes of horseplay, will more likely be considered to have made a substantial deviation than one who simply reacts to actions commenced or provoked by someone else.
>
> *The duration and seriousness of a claimant's horseplay is also of relevance in considering whether there has been a substantial deviation from the course of employment. For example, if a worker walks over to a co-employee to engage in a friendly word, and accompanies this with a playful jab in the ribs, this is a trivial incident which would probably be considered an insubstantial deviation.* As Larson notes,

> "At the other extreme, there are cases in which the prankster undertakes a practical joke which necessitate the complete abandonment of the employment and the concentration of all his energies for a substantial part of his working time on the horse-play enterprise." [**Notes:** Law of Workmen's Compensation, A. Larson, 1972, Vol. I, para. 23.61]

When this abandonment is sufficiently complete and extensive, it must be considered a substantial deviation from the course of employment.

It is also relevant to consider whether the "horseplay" involved the dropping of active duties calling for the claimant's attention as distinguished from the mere killing of time while the claimant had nothing to do. *The duration and seriousness of a deviation from the course of employment which will be called substantial will be somewhat smaller when the deviation necessitates the dropping of active duties than when it does not.*

[emphasis added]

(20) Similarly, the policy at 16.30 concerning *Assaults* explains:

> In considering cases of assault, the first question is whether the claimant was the aggressor and therefore the agent which caused the injuries. The answer to this question is not always clear cut *and may involve an evaluation of the degree to which a claimant is an aggressor in a given situation*. However, the fact that a claimant is less than friendly with another employee and is at least equally responsible for ill feeling that may prevail between them is not, by itself, grounds for disallowing a claim for injury arising out of an assault by that other employee.
>
> [emphasis added]

(21) Appeal Division decisions in which acts of aggression by a worker were found to represent a departure from (abandonment of) the worker's employment include #98-0673 (*Section 11 determination—whether altercation between employees arose in course of employment*, 15 *Workers' Compensation Reporter* 335), and #2001-0626, March 30, 2001. The action of an aggressor may be found to be outside his or her employment, even though the incident involved a spontaneous reaction to a workplace dispute. In Decision #98-0673, the action of a worker in grabbing and pushing a co-worker was found to be so out of proportion to the nature of the work dispute, that the assailant had removed himself from the course of his employment.

(22) The decisions of the case manager and Review Board in this case appear viable, in connection with the broad analytical framework applied in these other decisions which deal with unauthorized conduct involving horseplay or assaults. It must be considered, however, whether the decisions of the case manager and Review Board were correct based on all the evidence in this case.

(23) Section 1 of the Act defines "accident" as including "a wilful and intentional act, not being the act of the worker. . ." This case involves the act of the worker, and therefore falls outside the meaning of the term "accident" even though the consequences of the worker's act (involving his injury) were not intended by him. Accordingly, the worker's appeal is not assisted by the section 5(4) accident presumption. It is necessary to consider the dual requirements of section 5(1) of the Act, as to whether the worker's injury arose out of and in the course of his employment.

(24) At the time of the worker's injury, he was at work on the employer's premises, meeting with a supervisor during paid time. The encounter with the customer was part of the worker's employment. The central issue in this appeal is whether the worker's separate and independent action of punching a wall was such as to involve an abandonment of his employment.

(25) In the events which occurred on March 17, 2000, the worker had no acquaintance with the customer. His encounter with that customer occurred as part of his work. The fact that the customer chose to personalize the dispute by focussing on a personal characteristic of the worker (race), did not make this a personal dispute.

(26) The worker's representative submits:

> Had [the worker] not been at work he would have had any number of options open to him. He could have walked away. He would not have been required to remain polite and peaceful in the presence of the employer's store customers. He could have dealt with the situation. The work situation, however, prevent any of these *"normal"* reactions.
>
> Any normal person could be expected to "*lose it*" given the same circumstances. What this individual's reactions were at the point of peaked frustration may differ from other workers but it still remains that it was the employment situation that was responsible for his injury.

(27) I agree with the prior decisions on file, that the worker's action of punching a wall was unauthorized and inappropriate. However, as stated at #16.00, the mere fact that a worker's action which leads to an injury was unauthorized does not mean that the injury did not arise out of and in the course of the employment. In this case, the worker's response to the customer's initial ill-mannered comment, by asking why he was so cantankerous (i.e. bad-tempered or quarrelsome), appears to have been a poor choice of words, albeit possibly intended as light-hearted banter or jest. It is apparent it was received by the customer as an insult, and the customer escalated the situation into a personal attack on the worker. The use of racial epithets was obviously intended to demean or be hurtful to the worker.

(28) As part of his employment, the worker was subjected to racist epithets which would reasonably be expected to trigger an emotional response (whether or not this was revealed or expressed). Due to his duties as an customer service representative, it was important for the worker to maintain an appearance of calm and civility, notwithstanding any emotional reaction he might have been experiencing. It was only when he was in the back room, meeting with a supervisor

away from the eyes of the employer's other customers, and immediately following a further telephone call from the customer with additional abuse directed to the worker, that the worker released his frustration by punching a wall. This was a momentary impulsive gesture, in the heat of a moment of emotion, which was directed to an inanimate object with the only risk of injury being to the worker himself.

(29) In sum, the worker did not instigate or provoke the confrontation. He protected his employer's interests by not reacting visibly to the abuse to which he was subjected, while visible to other customers. He acted responsibly in going to a back room to meet with a supervisor, given his state of emotional upset. He then gave vent to his emotions in the momentary impulsive act of hitting the wall, in the heat of an emotional response to a work incident. There was no threat or risk to any co-worker or customer.

(30) While the evidence may be viewed as being in a gray area, on balance I am not persuaded that the worker's unauthorized act was of such a nature as to remove him from his employment. In the circumstances of this case, I find the worker's action of hitting a wall did not involve a substantial deviation from the employment. I find that the weight of the evidence supports the conclusion the worker's injury arose out of and in the course of his employment.

(31) The worker's representative argued in part that if the worker had struck the customer instead of the wall, application of the policy concerning assaults would mean that any injury suffered by the worker in striking the customer would be compensable. I need not determine that question for the purpose of this decision. I would note, however, that I would be inclined to view such a hypothetical incident as involving a much more serious and substantial deviation from the employment.

(32) I find that the worker's injury on March 17, 2000 arose out of and in the course of his employment. However, it remains necessary to consider the application of section 5(3) of the Act. Section 5(3) provides:

> Where the injury is attributable solely to the serious and wilful misconduct of the worker, compensation is not payable unless the injury results in death or serious or permanent disablement.

(33) The broad issue raised by the May 24, 2000 decision by the case manager, and the October 26, 2001 Review Board finding, is whether the worker's claim for compensation should be accepted. Neither decision addressed section 5(3) of the Act, as this was unnecessary in view of the findings that the worker's injury did not arise out of and in the course of his employment. The worker's representative does not comment on this issue. The employer completed a notice of participation in this appeal but did not make any submissions.

(34) The Appeal Division has a discretion to initiate and conduct a full inquiry into all of the issues arising out of an appeal once the matter is before it. I consider that the applicability of section 5(3) of the Act is a matter incidental to the worker's appeal on the broad issue as to whether his claim for compensation should be accepted. I consider it appropriate to proceed to address this issue in my decision.

(35) I find that the worker's action of hitting the wall constituted misconduct. A question arises concerning the meaning of the term "solely" in section 5(3) of the Act. Policy at #16.60 states:

> By the terms of Section 5(3), the injury must be attributable "solely" to the worker's misconduct. Thus, for example, where the worker was impaired by reason of alcohol or other substances, investigation will have to be carried out to evaluate the extent of the impairment and its degree of responsibility in producing the injury in order to establish whether this requirement is met. See #16.10 for further details.

(36) I note the reasoning expressed in recent Appeal Division decisions on this point, such as #2001-0254 and #2001-2310.

(37) It may be argued that the worker's injury was solely due to his misconduct, as the final act resulting in his injury involved his own voluntary action. However, I consider that the worker's final act of hitting a wall is more properly viewed as part of a chain of events which contributed to the worker's injury. Indeed, without the emotional stresses experienced by the worker, involving the abusive and racist comments from the customer, he would surely not have struck the wall. In viewing the worker's act in this larger context, I find that that the worker's injury was not attributable solely to the misconduct of the worker. I note, in this regard, that section 5(3) uses the word "solely" rather than other terms such as primarily or partly.

(38) In view of my conclusion on this issue, I need not proceed to consider whether the worker's misconduct was "serious and wilful," or whether the injury resulted in serious or permanent disablement.

Conclusion

(39) The worker's appeal is allowed. The worker's injury on March 17, 2000 arose out of and in the course of his employment. The worker's claim for compensation is not barred under section 5(3) of the Act, as the worker's injury was not attributable solely to the misconduct of the worker. The worker's file is referred to the Compensation Services Division to determine the benefits payable to the worker.

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

WORKERS' COMPENSATION
REPORTER

Decision of the Appeal Division

Number: **2002-0994/0995**
Date: **March 19, 2002**
Panel: **Heather McDonald, Randy Lane, James Sheppard**
Subject: **Justification of Charging Average Cost to Employers in Fatality Claims**

EXPERIENCE RATING (TRANSFER POLICY) (EMPLOYER — PAYMENTS) — The employer appealed a Board decision to charge the average cost of a fatal claim ($109,700.00) to the employer's experience rating under section 42 — The employer also appealed a Board decision to deny a cost transfer under subsection 10(8) on the basis that actual amount of compensation paid on the claim was less than the "substantial" figure of $34,150.90 — The Appeal Division panel held that section 10(8) was separate and distinct from section 42, and therefore the Board did not err in using of different cost values — The average cost of fatal claims was found to be an appropriate quantification of "hazard" given section 42, which entitles the Board to have regard to "hazard" of industry or plant — Associating each fatal claim with the average cost of fatal claims was found to provide a degree of fairness in an experience rating plan — The panel did not accept the employer's argument that the Board did not engage in an adequate investigation and pursue remedy from other parties — The panel found that the decision not to pursue a legal recourse was not relevant, and that no published policy provided relief on this basis — Further, the panel found that section 10(8) did not apply as it expressly made reference to "substantial" amount of compensation and the cost in this instance did not exceed the threshold required — There was a specific statutory intent regarding the need for a significant amount of compensation before the Board transfers costs to another employer — The panel concluded that the Board did not fetter its discretion or otherwise err in its interpretation of section 42 in charging the average costs of a fatal claim to the employer's experience rating.

Law: *WCA* (1996): s. 10(8), s. 38, s. 42, s. 96(6), s. 96(6.1)
Policy: *APM*: #30:50:41; #30:50:52; *RSCM*: #111.25, #115.30, #115.32
Decisions: Decision 49, 1 *Workers' Compensation Reporter* 210; Appeal Division Decision No. 93-1765 (unpublished, December 17, 1993); Appeal Division Decision No. 96-0955 (unpublished, June 15, 1996); Appeal Division Decision No. 2000-0036 (published on Board website, January 12, 2000); Appeal Division Decision No. 2001-0619 (published on Board website, March 30, 2001); Decision No. 65, 1 *Workers' Compensation Reporter* 270

18 *Workers' Compensation Reporter* p. 823

Introduction

(1) In December of 1998, a worker (W), a resident of British Columbia and an employee of the employer, was killed during the course of his employment. W's car was struck on the highway by a semi-trailer unit driven by "X," an Alberta resident employed by an Alberta trucking company (the Trucking Company). The accident occurred in British Columbia. The employer's position is that 100% responsibility for the cause of the accident is attributable to X and/or the Trucking Company.

(2) The Workers' Compensation Board (the Board) accepted a claim for compensation filed on behalf of W's estate. As W had no known dependants at the time of his death, the Board paid compensation on the claim of $3,010.33 for funeral and incidental expenses.

(3) The Board's Legal Services Division considered pursuing legal action against X and the Trucking Company but decided not to do so. In a memorandum dated November 16, 2000, endorsed by the vice-president, Legal Services Division, Board legal counsel gave his opinion that any legal action would be barred by section 10(1) of the *Workers Compensation Act* (the Act) and that the "limited chances of success do not justify further action."

(4) The employer is appealing two Board decisions resulting from this fatal claim for compensation. The first decision is dated March 16, 2001 and is a decision of the director of the Board's Assessment Department. In that decision, the director confirmed the Board's decision to charge the average cost of a fatal claim to the employer's experience rating. The employer notes that the actual costs of W's claim were small and submits that 100% of the accident is attributable to X and/or the Trucking Company. Therefore the employer challenges the Board's decision to charge it with the average cost of a fatal claim ($109,700.00) as in its view, the resulting experience rating impact is unfair in this case. The employer submits that the Board's decision is contrary to section 42 of the Act. The employer further submits that the Board did not adequately investigate the issues involved in deciding whether or not to take legal action against X and/or the Trucking Company. The employer submits that the assumptions made by the Board regarding the status of X and the Trucking Company do not support the Board charging the average costs of a fatal claim against the employer's experience rating.

(5) The second decision is dated August 1, 2001 and is a decision of the director, Central Services, Compensation Services Division. In that decision the director denied the employer's request to transfer, under section 10(8) of the Act, the costs of W's claim to the industry subclass of the Trucking Company. The director determined that only the amount of compensation *paid* on a claim, not the average cost of a fatal claim, could be charged to a different subclass. Section 10(8) requires, among other things, that the Board has awarded a "substantial" amount of compensation on a claim, before the costs can be charged to another subclass. As the costs paid by the Board on W's claim were far less than the threshold for a "substantial amount" of compensation ($34,150.90), one of the requirements in section 10(8) was not met in this case.

Issue(s)

(6) Are the issues of whether the Board properly investigated the status of X and the Trucking Company or whether the Board ought to have pursued legal action against X and/or the Trucking Company relevant in this appeal? Is the employer's lack of culpability relevant to the charging of claim costs for the purpose of experience rating? In charging the costs of W's claim to the employer's experience rating, did the Board fetter its discretion by charging the average cost of a fatal claim? Did the Board err in its application of section 42 of the Act? Did the Board err in using two different cost values for the same claim [that is, the actual cost of the fatal claim for the purposes of section 10(8) of the Act and the average fatal claim cost for the purpose of charging the employer's experience rating]? Did the director of the Assessment

Department err in fact or law, or contravene published policy, in his March 16, 2001 decision? Did the director of Central Services, Compensation Services Division, err in fact or law, or contravene published policy in his August 1, 2001 decision?

Procedural Matters

(7) A management consultant represented the employer in these appeal proceedings. The employer requested an oral hearing, but we decided that the extensive written submissions from the consultant, as well as the other documents on file, were sufficient to enable us to decide the issues in this case. We refer to several unpublished Appeal Division decisions in our reasons. We disclosed copies of those decisions, severed for privacy reasons, to the management consultant and gave him an opportunity to make a written submission about them.

(8) Under section 96(6) and 96(6.1) of the Act, an employer may appeal a decision relating to a shifting of costs between classes, and an experience rating decision, on the grounds of error of law or fact or contravention of a published policy of the governors. In this case, the employer is alleging errors of law, in that the Board failed to properly apply sections 10(8) and 42 of the Act. The employer also says that the Board erred in law in fettering its discretion in including W's claim in its experience rating calculation. It alleges that the Board erred in fact in finding X to be a worker under the Act (but treating him as an independent operator under section 38 of the Act) and in considering the Trucking Company to be an employer under the Act.

Relevant Statutory and Policy Provisions

(9) Section 42 of the Act deals with classification of rates. It states as follows:

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

(10) Section 10(8) of the Act provides that where the Board considers that (a) a substantial amount of compensation has been awarded as a result of the injury or death of a worker, and (b) the injury or death was caused or substantially contributed to by a serious breach of duty of care of an employer or an independent operator under the Act, the Board may order that the compensation be charged, in whole or in part, to the other class or subclass.

(11) Section 30:50:41 of the *Assessment Policy Manual* (the Assessment Manual) states that the concept behind the Board's experience rating plan is to promote positive safety attitudes and provide a "degree of equity" down to the firm level. The policy states that a main feature of the experience rating ("E.R.") plan is that:

> Er adjustments are based solely on claims costs. Costs used for the purpose of experience rating are costs directly associated with compensation claims, including the capitalized value of pensions awarded. *The cost used for fatal claims will be the five-year moving Board-wide average cost of fatal claims rather than the actual cost of each claim*.
>
> [italic emphasis added]

(12) Section 30:50:52 of the Assessment Manual identifies several types of claims costs that are excluded from E.R. consideration. These include "costs recovered by way of a third party action" and "costs transferred to the class of another employer or independent operator" under section 10(8) of the Act. Otherwise, section 30:50:52 is clear that the Board will not consider an argument as to employer culpability in determining the inclusions/exclusions of claims and their costs for experience rating purposes. The policy notes that one of the most common requests from an employer under experience rating is to exclude claims costs on the basis that the claim was not that particular employer's fault. The policy refers to Decision No. 49 (1 *Workers' Compensation Reporter* 210, July 22, 1974) as explaining the basic philosophy behind the Board's general policy not to consider employer culpability in determining claim cost inclusion/exclusion for E.R. purposes.

(13) Decision No. 49 stated in part that:

> The system of experience rating is based to some extent on notions of fault. It reflects the view that some accidents are preventable, and that employers in whose operations injuries are more frequent or substantial should pay higher assessments than those in whose operations injuries are less frequent or less substantial. *But to the extent that the system concerns itself with fault, it does so by reference to aggregated data, not by moral judgments on individual claims.* To take out of this accounting a particular incident because it was adjudged not to be the fault of the particular employer would, therefore, introduce a distortion rather than an improvement in accuracy.
>
> There may be scope for argument about what is a fair and proper formula to apply in the administration of an experience rating system. But once a formula has been adopted, fairness among employers in the class then requires the formula must be strictly followed. To take out a particular claim on the application of the particular employer would be unfair to other employers whose experience includes similar claims, but who have not initiated similar applications.
>
> [italic emphasis added]

(14) Section 115.30 of the *Rehabilitation Services and Claims Manual* (the Claims Manual) repeats the Board's policy that as a general rule, all acceptable claims coded to a particular employer are counted for experience rating purposes. It makes no difference whether the injury was or was not the employer's fault. Board policy does specify exceptions to this general rule, including costs recovered by way of a third party action, and costs transferred to the class of another employer under section 10(8) of the Act.

(15) Section 115.32 of the Claims Manual repeats the policy that experience rating does not include the actual cost of the fatal claims experienced by an employer. Rather, it includes for each claim the average cost for all fatal claims in the year.

(16) With respect to the exception for costs recovered by way of a third party action, section 10(6) of the Act provides:

> If the worker or dependant applies to the Board claiming compensation under this Part, neither the making of the application or nor the payment of compensation under it restricts or impairs any right of action against the party liable, but as to every such claim the board is subrogated to the rights of the worker or dependant and may maintain an action in the name of the worker or dependant or in the name of the board; and if more is recovered and collected than the amount of the compensation to which the worker or dependant would be entitled under this Part, the amount of the excess, less costs and administration charges, must be paid to the worker or dependant. The board has *exclusive jurisdiction to determine whether to maintain an action or compromise the right of action, and its decision is final and conclusive*.
>
> [italic emphasis added]

(17) 111.25 of the Claims Manual is a relevant policy provision, reflecting the wording of section 10(6) of the Act. It states in part that:

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

History of the Board's Experience Rating Policy

(18) It is useful at this point to provide a brief history of the Board's policy on experience rating. The first E.R. plan, developed and put into practice at the request of employers, was adopted by the Board in 1932. It applied to all qualifying employers [employers with an assessable payroll of greater than $20,000] in the forest industry, other than logging. In 1941, it was extended to qualifying employers in the metal-mining industry. In 1957, a second plan was implemented for the logging industry. A third plan was put into effect in 1960 for the construction industry.

(19) In 1966, the *Tysoe* report discussed experience rating. The sample plan at page 102 of the *Tysoe* report sets out the experience rating system for the forest products industries for 1963. Item 6 states that: "The calculated cost of each fatal accident shall be the average cost of all fatal accidents under the Act for each of the years 1959, 1960 and 1961."

(20) The ability of the experience rating system to motivate safe work practices has been the subject of debate and criticism, dating from the *Sloan* report in 1952. The *Tysoe* report notes that experience rating plans were introduced "to offer an incentive to industry to adopt and maintain safe work practices so as to obtain a reduction in assessments or at worst to avoid a penalty." However, the *Tysoe* report refers to two main disadvantages: (1) the deviation from the principle of collective responsibility underlying the insurance scheme on which workers' compensation is based and (2) the unfairness flowing from the fact that an employer may be penalized for something he cannot control. Notwithstanding those criticisms, experience rating plans have remained in effect.

(21) In charging a claim to an employer's experience rating, the Board has consistently used an average fatal cost rather than the actual cost of the individual fatal claim. This principle was continued when the Board redesigned its 1986 plan. From 1986 to 1995, the average fatal cost for each year was used for the experience rating. In the autumn of 1995, the Panel of Administrators, in an effort to avoid year to year fluctuations, amended the experience rating policy (effective November 1, 1995) to use a five year moving average rather than a one-year average.

Relevant Case Law

(22) We have earlier referred to Decision No. 49, in which the former commissioners of the Board ruled that the employer's lack of culpability in the worker's death was not a consideration in charging the claim to the employer's experience rating.

(23) In Appeal Division Decision No. 93-1765 (unpublished, December 17, 1993), the employer argued that the actual cost of the fatal claim, rather than the Board-wide average cost, ought to have been used for the purposes of calculating the employer's experience rated assessment. The employer observed that section 42 of the Act did not use the phrase "average cost of compensation," but rather the wording "cost of compensation."

(24) The panel in that case adopted the rationale of the then director of the Assessment Department to explain why the actual cost of a fatal claim is not an appropriate basis to reflect the "hazard" of an industry or plant:

> We use an average cost for fatal claims for experience rating purposes so as to treat the significance of the fatality identically from employer to employer. As illustrated by your example, the cost of a fatal claim can range from being very minimal to very significant. To a large extent the cost is contingent upon dependents and other factors unrelated to the severity of the injury. With other types of claims the cost is largely influenced by the severity of the injury but that is not always the case with fatal claims as can be seen in your example.

> As a result, it has long been our policy to ensure fatalities are accorded universal recognition and significance rather than the significance being minimized by costs which are unrelated to severity.

(25) The panel stated that the Board, in a practical sense, gave the "hazard" associated with a fatal claim a dollar figure (the average cost of a fatal claim) for inclusion in the experience rating system. The panel noted that section 42 permits comparison between industries or plants based on "hazard" as well as the "cost of compensation." The panel also noted that the effect of including the Board-wide average cost of a fatal claim was to alter the employer's merit/demerit rating, not to assess the employer to pay the average cost of a fatal claim. The panel found no reasons to vary from published Board policy and grant the employer's request to exclude the average cost of a fatal claim from the employer's experience rating.

(26) In Appeal Division Decision No. 96-0955, (unpublished, June 14, 1996), an employer appealed a decision of an assessment manager charging $194,900.00 (the average cost of a fatal claim) against the employer's experience rating, when the actual cost paid by the Board on the claim was $4,644.51. The panel quoted from the justification provided by the then director of the Assessment Department:

> . . . depending on the marital status of the deceased and other factors, the cost of an individual fatal claim can range from a few thousand dollars to several hundred thousand dollars. In view of this the Board has always used the average cost of all fatal claims in any accident year regardless of industry.
>
> The impact of a fatality is so severe that all fatalities are treated as equally significant for experience rating purposes.
>
> The average fatal cost is used only for experience rating purposes and is not reflected on the Claims Cost Statement as it refers only to the actual amount paid on any particular claim.

(27) The employer argued that Board policy in section 30:50:41 of the Assessment Manual, using for experience rating purposes the average cost of fatal claims rather than the actual cost, was "illogical, unwarranted and unfair." The employer submitted that this introduction of "an artificial component into the formula" skewed the experience rating system for "no apparent reason."

(28) The panel dismissed the employer's appeal. It found that section 42 of the Act permitted the Board to devise an experience rating system which the Board had established in its policy. The panel found no error of fact or law or contravention of policy in the decision under appeal. The panel stated that the employer's submissions essentially raised policy issues, not within the ambit of appeal under section 96 of the Act.

(29) In Appeal Division Decision No. 2000-0036 (published on Board website; January 12, 2000), the employer appealed a case manager's decision denying it cost relief under section 42 of the Act. The panel referred to section 115.30 of the Claims Manual's policy that generally all acceptable claims coded to a particular employer are counted for experience rating purposes. With respect to the exception for "costs recovered by way of a third party action," the panel stated:

> I consider that exclusion #1 is triggered when the Board actually recovers monies. Where there is recovery by the Board it seems reasonable that the Board relieves an employer of costs. With recovery the Board has not in the end incurred costs so why should the employer be charged? However where there is no recovery by the Board there is no basis to relieve the employer of costs. The general guideline in item #115.30 would be applicable. Thus on the plain wording of the policy no exclusion of costs is possible in this case.
>
> [underline emphasis in original]

(30) In that case, the employer argued that the Board should have pursued third party action. The panel responded in part as follows:

> I appreciate that Mr. H considers that Board policy was not followed and the Board should have pursued a legal action on behalf of the worker against Dr. P and asserted a claim to the monies recovered. I stress that the decision of the Board not to pursue the action is not before me as the appeal is from the decision of the case manager. I strongly question whether a decision to pursue a legal action would be within the Appeal Division's jurisdiction . . .
>
> I do not consider costs can be removed from an employer's claims cost statement simply on the basis of an argument that had the Board recovered monies by way of a third party action then the Board could have relieved costs. *There is no provision in published policy of the Governors to provide some sort of equitable relief on the basis that had something been done, monies would have been recovered, and monies could have been credited to a claims cost statement* . . .
>
> [italic emphasis added]

(31) The panel in that case commented that the Board's policy rules regarding the charging of costs were constructed with a particular purpose in mind, and are interlinked with each other. The panel said that to grant exclusion of costs in cases other than those covered by the policies would amount to "tinkering" with the cost charging system. It considered that to do so would be appropriate only in very compelling circumstances, which did not exist in that case. The panel did not elaborate on what type of circumstances might be considered sufficiently compelling to tinker with the cost charging system.

(32) Reasons similar to those expressed in Decision No. 2000-0036 were given in Appeal Division Decision No. 2001-0619 (March 30, 2001, published on the Board website).

The Section 42 (Experience Rating) Issue

(33) The employer provided an extensive submission in support of its position that the Board's Legal Services Division was wrong in not pursuing legal action against the Trucking Company and/or X to recover costs of the worker's claim. The employer has argued that the Board did not conduct a timely investigation to determine the status of X and the Trucking Company under the Act to protect the employer's interests, and this lack of adequate investigation amounts to an error of law. The employer submits that the Board erred in its application of section 42, as the fatal injury to the worker was "clearly the fault of a third party" according to the employer. The employer submits that because it was not responsible for the worker's death, there is no support for the Board's decision to charge the average cost of a fatality to the employer's experience rating. The employer says that under section 42 of the Act, it was not "so circumstanced or conducted that the hazard or cost of compensation differs from the average of the class or subclass" to which the employer is assigned.

(34) We have given serious consideration to the employer's arguments on these matters. We have decided, however, that the issue of whether the Board "properly" investigated the legal status under the Act of X and the Trucking Company, and the issue of whether the Board ought to have pursued legal action against them, are not relevant in these proceedings.

(35) Board policies to which we have earlier referred are clear that employer culpability with respect to a particular claim injury or fatality is not a relevant concern in the experience rating system. All claims accepted by the Board are coded to the accident employer and counted for experience rating purposes, whether or not they were the employer's fault. There are only specified exceptions to this rule, one of which is the exception for costs "recovered" by way of third party action. We agree with Decision No. 2000-0036 that that exception only comes into play when monies are actually recovered through third party action. This policy exception does not create a type of equitable relief for an employer on the ground that there was the potential for a successful legal action and possible cost recovery in the future.

(36) The Board's decisions regarding how much time to spend in investigating the legal status of X and the Trucking Company, and the ultimate decision not to pursue third party action, have an important administrative component beyond law and policy. For example, decisions regarding the cost of pursuit must be made, whatever the legal status under the Act of the potential third parties. In any event, the Legal Services Division's decision is not one of the appealable decisions in these proceedings. Section 10(6) of the Act and section 111.25 of the Claims Manual emphasize that the Board has exclusive jurisdiction to determine whether to maintain an action or compromise the right of action, and its decision in that regard is final and conclusive. Such a decision is not within the types of appealable decisions specified in section 96(6) or 96(6.1) of the Act. Our view is that we do not have jurisdiction to review and intervene in the Board's decision not to pursue third party action in this case based on its investigations and conclusion regarding the section 10(1) bar and the "limited chances of success" of such legal action.

(37) We disagree with the employer's submissions that the Board erred in its interpretation and application of section 42 of the Act, fettering its discretion by including the average cost of a fatal claim without consideration to relevant matters. Section 42 does not require that in the

case of each claim to which experience rating applies, the Board must inquire regarding the culpability of the employer. Neither does it require the Board to examine other facts specific to the claim injury and accident, before the average costs of a fatal claim can be charged to the employer's experience rating. Section 42 entitles the Board to have regard to the "hazard" of a particular industry or plant. We find that an appropriate quantification of "hazard" with respect to fatal claims is to associate each claim with the average cost of fatal claims. This provides a degree of fairness in an experience rating plan. This is because it recognizes, on a systemic basis, that the cost of a fatal claim in a particular case is largely a matter of chance that has nothing to do with the severity of the worker's injury.

(38) In a fatal claim, the injuries are equally severe — they are all fatal — yet the costs on each claim will differ widely depending on, for example, whether or not the worker had dependants and/or whether the death occurred immediately or sometime after the claim accident. We do not agree that by applying an experience rating plan which takes into account the equal severity of fatal claims and treats all such "hazards" as having an equal compensation cost to be charged against employers, that the Board has fettered its discretion in this case by abandoning that important element of the plan and considering the culpability of the employer for the worker's accident.

(39) What the employer proposes we do in this case is what many employers would request: that the Board make exceptions, contrary to published policy and the basic structure of the experience rating plan, on an individual basis with reference to the "fault" of various parties to a fatal claim accident. We agree with the panel in Decision No. 2000-0036 that only in the most compelling of circumstances, none of which exist in this case, should such distortion at the individual claim level be undertaken by the Board. Like the panel in Decision No. 2000-0036, we do not find it necessary to describe the type of circumstances that might qualify as sufficiently compelling to justify making such an exception to general policy and the basic rules on experience rating.

(40) The employer has argued that the Board is not entitled to use the average cost of a fatal claim for section 42 experience rating purposes, and use a different cost value for the same claim for purposes of section 10(8) transfer of costs to a different subclass. We disagree with the employer's position. Section 10(8) expressly refers to the requirement of a "substantial amount of compensation" having "been awarded." Thus there is a specific statutory intent regarding the need for a significant amount of compensation to be awarded before the Board may charge costs to another employer. In Decision No. 65 (1 *Workers' Compensation Reporter* 270, November 12, 1974), the former commissioners discussed the significance of the word "substantial" in section 10(8):

> A primary goal in our system of workers' compensation is to provide for automatic compensation in cases of industrial injury or death without enquiry into fault, either on the part of a worker or an employer. The adoption of this system not only reflected a moral judgment that compensation should be paid regardless of fault, but also a desire to avoid the enormous administrative expense that would be incurred by enquiring into fault as a normal routine. Thus it is only in exceptional circumstances that the Act makes reference to fault, and it is

> only in very exceptional circumstances that an enquiry into fault should be undertaken. *The word "substantial" should, therefore, be construed as indicating a level of compensation payments sufficiently high that an enquiry into fault is worthwhile*. In a case of this kind, making dependable judgments on fault could involve an administrative cost easily in excess of $1,000.00. It would seem out of proportion that expenditures of this order should be incurred to determine whether costs as low as this case should be borne by one class or another.
>
> [italic emphasis added]

(41) We agree with the interpretation of the director of Central Services, Compensation Services Division, that the phrase "substantial amount of compensation" in section 10(8) refers to the actual cost of compensation paid on the claim. Section 10(8) pre-dates the experience rating system and the statutory provision is separate and distinct from the purposes and objects of section 42. Although it is true that claims involving significant compensation awards fulfill a section 10(8) requirement whereas claims involving less significant awards do not, nevertheless section 10(8) treats employers in like situations the same way. We find no error in the Board's use of two different cost values for the same claim, with respect to the two different statutory provisions in sections 10(8) and 42.

(42) For the foregoing reasons, we have found no error in fact or law, or contravention of published policy, in the March 16, 2001 decision of the director, Assessment Department.

The Section 10(8) (Transfer of Costs) Issue

(43) In his August 1, 2001 decision, the director, Central Services, Compensation Services Division, noted that two criteria must be met in section 10(8) before the Board will transfer costs to another class or subclass. The first is that the Board must have awarded a "substantial" amount of compensation on the claim. He noted that the Board has interpreted "substantial" as claims costs in excess of a certain monetary amount as adjusted in accordance with the Consumer Price Index Adjustment Formula. The claims cost threshold for 1998 was $34,150.90. Given that the Board had paid only a little over $3,000.00 on the worker's claim in this case, the director found that the first criteria was not met for the Board to charge the claim costs to the Trucking Company in the different industry subclass.

(44) For the same reasons we have provided earlier in this decision with respect to the section 42 issue, we agree with the director's interpretation of section 10(8) as not referring to the average cost of fatal claims, but rather the amount of compensation actually paid by the Board on a claim. We agree with his decision that the claims cost threshold of "substantial" was not met in this case, and that section 10(8) does not apply.

(45) We have found no error of fact or law, or contravention of published policy in the director's August 1, 2001 decision denying the employer's request to apply section 10(8) to charge the compensation awarded on the worker's claim to the Trucking Company's industry subclass.

Conclusion

(46) We deny the employer's appeal of the March 16, 2001 decision of the director, Assessment Department to charge the worker's claim to the employer's experience rating. We deny the employer's appeal of the August 1, 2001 decision of the director, Central Services, Compensation Services Division, not to apply section 10(8) in this case.

(47) We have found:

- The issues of the adequacy of the Board's investigation into the viability of third party action, and its decision not to take third party action, are not relevant in these appeal proceedings;
- The employer's lack of culpability is not relevant in this case to the charging of claims costs for the purpose of experience rating;
- The Board did not fetter its discretion or otherwise err in its interpretation and application of section 42 of the Act in charging the average costs of a fatal claim to the employer's experience rating;
- The Board did not err in using two different compensation cost values in interpreting sections 10(8) and 42 of the Act;
- We find no errors in fact or law, or contraventions of published policy in either of the Board's March 16, 2001 or August 1, 2001 decisions.

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

WORKERS' COMPENSATION

REPORTER

Decision of the Appeal Division

Number: 2002-1445
Date: November 9, 2001
Panel: Cassandra Kobayashi
Subject: Section 11 Determination (Timothy Edward Connell v. Medox Health Services Inc. and Stonehill Investment Ltd.)

APPEAL DIVISION (CERTIFICATION TO COURT) (ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT) — Plaintiff fractured his forearm while working as a painter and drywaller — While attending a Work Conditioning Program for the arm injury, the plaintiff allegedly fell from a piece of equipment at the defendant's property and injured his back — At issue was the status of the plaintiff and whether his injuries arose out of and in the course of employment — Both defendants were incorporated and registered with WCB as employers in good standing — Defendants sought declaration that a worker's injuries arose out of and in the course of employment by relying on Appeal Division decisions concerning injuries during surgery — Plaintiff was a worker for the original injury and he retains that status through the recovery period — The panel accepted that subsequent injuries are compensable if they are in direct consequence of treatment — The Appeal Division panel interpreted policy item #74.11 and Decision No. 152 and concluded: "The treatment injury results from the original workplace injury; therefore, the Board must pay compensation. However, the treatment injury does not arise in the coarse of employment. Therefore, the worker may elect to claim compensation, or bring an action" — The panel found that the presumption in subsection 5(4) of the *Workers Compensation Act* that an accident occurred in the course of employment can be rebutted if the treatment injuries are unrelated to the original injury.

Law:	*WCA* (1996): s. 5(4), s. 10(1), s. 10(8), s. 11, s. 82
Policy:	*RSCM*: #14.10, #14.20, #17.11, #22.10, #22.11, #74.11, #84.54, #111.10; #115.30, Decision No. 152, 2 *Workers' Compensation Reporter 186*; Appeal Division Decision No. 00-0668, 16 *Workers' Compensation Reporter* 287;
Decisions:	*Kovach* v. *Royal Inland Hospital, et al.*, 10 *Workers' Compensation Reporter* 603; *Kovach* v. *Workers' Compensation Board, et al.*, (2000) 184 D.L.R. (4th) 415, [2000] 1 S.C.R. 55; *Smith* v. *Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (C.A.); *Frandle* v. *Mackenzie* (1988), 47 C.C.L.T. 30 (B.C.S.C.); *Pasiechnyk* v. *Saskatchewan (Workers' Compensation Board)*, [1997] S.C.J. No. 75

18 *Workers' Compensation Reporter* p. 835

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(1) In May 1997, the plaintiff fell off a ladder while working as a painter and drywaller. His claim for a right forearm fracture was accepted by the Workers' Compensation Board (WCB or Board). In August 1997, he attended a Work Conditioning Program, which is often part of the rehabilitation process. The Program was run by the defendant, Medox Health Services Inc., in a fitness centre operated by the other defendant, Stonehill Investments Ltd.

(2) While at the Work Conditioning Program, the plaintiff claims he fell from some equipment at the defendants' premises on August 28, 1997, resulting in a disc protrusion ("the accident"). The WCB gave permission for him to commence the civil action, noted above. He alleges the defendants were negligent, or are liable for their breach of duty under the *Occupiers Liability Act*.

(3) The defendant, Stonehill Investments Ltd., has requested a determination under section 11 of the *Workers Compensation Act* (the Act) regarding the status of the parties.

Issue(s)

(4) At the time of the alleged injury at the defendants' premises, was the plaintiff a worker whose injuries arose out of and in the course of employment? What was the status of the defendants, and did their action or conduct, which caused the alleged breach of duty arise out of and in the course of employment?

Section 11 Law and Policy

(5) Section 11 of the Act requires the Board to make determinations and provide a certificate to the court regarding certain matters relevant to the legal action, and within its competence under the Act. Governors' Decision 4, April 8, 1991, *Workers' Compensation Reporter* (W.C.R.) Vol. 7, p. 19, assigned to the chief appeal commissioner and Appeal Division, the Board's obligation for issuing section 11 certificates. That Decision also said the chief appeal commissioner may determine the practice and procedure for the conduct and disposition of these matters. In Decision 33, which sets the current practice and procedure, the chief appeal commissioner has said, "The Appeal Division will, in considering a section 11 application, consider all of the evidence and argument anew irrespective of a prior decision by a Board officer."

(6) The Appeal Division determines the status of the parties under the Act; the court determines the effect of the certificate on the legal action.

(7) Whether the plaintiff suffered a disabling injury at the defendants' premises, and the defendants' liability are issues in the legal action. For the purposes of this determination, I will assume that an injury did occur as alleged.

Submissions

(8) The defendants seek a finding that the plaintiff's claimed injuries arose out of and in the course of his employment. The defendants seek support in the prior Appeal Division decisions that found that workers undergoing treatment were in the course of their employment, while undergoing surgery (section 11 determination, *Kovach* v. *Royal Inland Hospital, et al.*, 10 *Workers' Compensation Reporter* 603 http://www.worksafebc.com/Publications/appeals/wc_reporter/assets/pdf/93_1399.pdf), using a staple gun at the WCB rehabilitation clinic (*Majer* v. *Karabilgin*, [1995] B.C.J. No. 20), driving their vehicle in the WCB parking lot after physiotherapy treatment (Appeal Division Decision 92-1899, 9 *Workers' Compensation Reporter* 653, http://www.worksafebc.com/Publications/appeals/wc_reporter/assets /pdf/92_1899.pdf), and being examined by a WCB physician (Appeal Division Decision 93-1185, 9 *Workers' Compensation Reporter* 745, http://www.worksafebc.com/Publications/appeals/ wc_reporter/assets/pdf/93_1185.pdf).

(9) The plaintiff advances that the reasoning in *Kovach* is of limited assistance because the Supreme Court of Canada only found the Appeal Division decision was not patently unreasonable: *Kovach* v. *Workers' Compensation Board, et al.,* (2000) 184 D.L.R. (4th) 415, [2000] 1 S.C.R. 55. Furthermore, the Appeal Division is not bound by prior decisions.

(10) The painting firm which employed the plaintiff when he fell and broke his arm was concerned that the disc protrusion allegedly sustained during treatment would adversely affect its experience rating for assessment purposes. It was participating in this section 11 matter until it was informed that the costs associated with the disc protrusion had in fact been removed from its claims costs pursuant to #115.31, *Rehabilitation Services and Claims Manual*.

Status of the Defendants

(11) It is convenient to address the defendants' status first. Both are incorporated. On the day of the alleged accident, both were registered with the WCB Assessment Department as employers, and were in good standing. I find they were both employers under Part 1 of the Act.

Action or Conduct of Defendants

(12) The last sentence in section 10(1) of the Act provides:

> 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.

(13) Although the plaintiff has suggested in his submissions that the problem with the equipment may have been caused by a patron in the fitness facility, the question before me is whether any breach of duty by the defendants arose out of and in the course of employment. It is not necessary for me to consider whether another person caused the accident.

(14) Corporations can act only through their agents, servants and workers. I find that any action and conduct of the defendants, which caused the alleged breach of duty arose out of and in the course of employment.

Was the Plaintiff a Worker?

(15) At the time of his original workplace injury, the plaintiff was a worker, employed by a painting firm that was registered with the WCB, according to the Board's Assessment Department.

(16) "Worker" is defined in section 1 of the Act as including:

> (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.

(17) On the day of the workplace injury, the plaintiff was working under a contract of service, and was a "worker" within the meaning of Part 1 of the Act.

(18) On August 28, 1997, when the worker allegedly injured himself at the Work Conditioning Program, was he still a "worker" within the meaning of Part 1 of the Act? It has been said that for the purposes of the Act, a person need only be a "worker" at the time of the original injury. For example, the Act provides rights of appeal to workers under sections 90 and 91, and these rights are considered to apply to the person who was a worker, or claimed to be a worker at the time of the injury. It is not necessary that the person be a worker at the time of the appeal. Similarly, once compensation begins, if the worker becomes unemployed during the course of recovery, benefits continue. I accept that for the purposes of the Act, a person need be a worker only when initially entering the gateway provisions of section 5(1). Once through that gateway, the person retains their status as a "worker" under the Act.

(19) For the purposes of Part 1 of the *Workers Compensation Act*, I find the plaintiff was a "worker" on August 28, 1997, at the time of the alleged accident at the defendants' premises.

Plaintiff's Injuries

(20) The statutory bar in section 10(1) applies to personal injury arising out of and in the course of employment. The original workplace injury occurred during work hours, at the place where the plaintiff was employed to work, and while doing an activity in furtherance of the job for which he was hired. It was accepted as compensable, and I find it arose out of and in the course of employment.

(21) However, the injury during rehabilitation ("the treatment injury") did not occur during hours of employment. The plaintiff was not receiving any "earnings," was not on the job site of his employer, and was not using equipment supplied by the employer. Can it be said that the treatment injury arose out of and in the course of employment?

Prior Appeal Division Decision: *Kovach*

(22) These questions have been previously considered by the Appeal Division in *Kovach*. The worker commenced an action against Dr. Singh for alleged injury caused by surgery and treatment of her compensable back injury. The Appeal Division determined that the plaintiff's injuries during surgery to treat a compensable injury arose out of and in the course of employment. Underlining in this quote and others in this decision is my own. The surgery was not treated as a *novus actus interveniens*, but as a "direct consequence" of the workplace injury (at p. 608):

> The Board has decided, properly in our view, that these subsequent injuries are compensable if they are a direct consequence of treatment for a compensable injury. An original injury which arose out of and in the course of employment is both compensable under Section 5(1) and gives rise to a certificate under Section 11 which can result in a legal action being barred. *It follows* that the same must be said for the direct consequences of that injury which gave rise to

> further entitlement to compensation. The worker is undergoing treatment because of a work injury. Exposure to the risk of further injury during that treatment is due to having suffered the work injury. Otherwise, the worker would not be undergoing the medical treatment. There is a direct causal link between the two injuries. The risk in treatment is part of the original compensable injury for the purposes of compensation under Section 5(1) of the *Act*. We find that *it is also part of the compensable injury for the purposes of Section 11*. That is, *the direct consequences of a compensable injury also arise out of and in the course of employment*. The broad definition given to that phrase for the purposes of Section 5(1) must carry through into Section 11. There is no reason to assume that the legislature intended them to be interpreted differently.
>
> However, under both Sections 5(1) and 11, this is limited to situations where there is a sufficient causal link between the original injury and any subsequent injury. An injured worker could be further injured by an unrelated cause or by a cause that is only remotely connected to her work injury or subsequent treatment. In such a case, the subsequent injury would not be a compensable consequence of the original injury. It would not arise out of and in the course of employment, either for Section 5(1) or Section 11 of the *Act*.

(23) The Court of Appeal majority criticized the logic of the sentence beginning, "It follows . . . ." The court suggested that whether the injury during treatment arises out of and in the course of employment need not follow the determination regarding the original workplace injury.

(24) The Appeal Division did not say that *all* injuries during treatment will be considered a direct consequence of the workplace injury. The Decision suggested some treatment injuries will be outside the scope of the Act, due to being "separate and distinct," or causally remote (at page 609):

> In this case, the plaintiff's complaint is that her injured back was made worse by the defendant's surgery and treatment. Some subsequent injuries could be "new" injuries, in the sense that they are separate and distinct from the original injury and / or there is an insufficient causal link between the original and subsequent injuries. However, based on the evidence submitted, we find any subsequent injury to the plaintiff's back due to the defendant's surgery and related treatment was a direct consequence of her original injury and not a new or different injury.

(25) In *Kovach*, the surgery was on the same part of the worker's body as was injured in the original workplace injury, and the surgery was occasioned by the work injury. The reasons seem to leave open the possibility that with different facts, the injury during treatment would not be considered to have arisen out of and in the course of employment.

(26) That could be seen as a potential for departure from what was described as the Board's past practice, to certify that the worker's injuries during treatment arose out of and in the course of employment. Reference was made to *Smith* v. *Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (C.A.), and *Frandle* v. *Mackenzie* (1988), 47 C.C.L.T. 30 (B.C.S.C.). Prior to June 1991, the Board

did not issue reasons to accompany the section 11 certificates, so it is not clear on what basis the Board previously certified that injuries during treatment arose out of and in the course of employment.

(27) Having withstood judicial review to the Supreme Court of Canada, the Appeal Division reasons in *Kovach* are one viable interpretation of the Act. That analysis of "arising out of and in the course of employment" relies on the strength of the causative relationship between the original workplace injury and the treatment injury, with a very weak "in the course" element. In contrast, a literal approach would suggest this gateway test involves two separate requirements: first, the injury must "arise out of" employment; meaning causal connection with the employment; second, the injury must arise "in the course" of employment, meaning time and place.

(28) These terms are defined in #14.10, *R.S.C.M.*, in the context of the presumption in section 5(4) of the Act, which applies to injuries caused by accident:

> Generally speaking, "out of the employment" concerns the cause of injury and "in the course of the employment" its time and place.

(29) While the presumption requires the Board to consider separately "cause" and "course," section 5(1) and the policy in general does not favour the two-pronged test. The policy sometimes refers to both cause and course, as in #14.20, "Occurrence or Non-Occurrence of a Specific Incident," which states that where the presumption does not apply, "the evidence must support a conclusion that the injury arose out of the employment as well as a conclusion that it arose in the course of the employment." However, that policy does not proceed to explain how to determine if both cause and course have been satisfied. Instead, the policy tends to analyze various situations without precise reference to both cause and course.

(30) For example, #14.00 lists a number of factors to consider, some of which relate to the course of employment (e.g., on the employer's premises, being paid at the time of injury); and others, to the causal connection with the employment (e.g., acting in response to employer's instructions; using equipment or materials supplied by the employer; whether the risk was the same as in the course of production). There is no requirement that there be both "cause" and "course" factors for a claim to be accepted. Thus, a worker may be in the course of employment, on the journey to report to work after dispatch from a union hall (Decision 26, 2 *Workers' Compensation Reporter* 109), after the worker quit work and was awaiting a flight from the remote logging camp, was drunk, and in the company dump (Decision 49, 1 *Workers' Compensation Reporter* 210), or is at work, but engaging in horseplay (#16.20, *R.S.C.M.*).

(31) Such a unitary approach is favoured by *Larson's Worker's Compensation Law*, Lexis Publishing, New York, 2000. After reviewing the interpretation of this phrase in the early chapters, Chapter 29, Vol. 2, concludes that the tests are not and should not be applied entirely independently:

> In practice, the "course of employment" and "arising out of employment" tests are not, and should not be, applied entirely independently; they are both parts of a single test of work-connection, and therefore deficiencies in the strength of one factor are sometimes allowed to be made up by strength in the other.

(32) Larson gives examples of borderline cases that are weak in the "course" factor, but strong in the "arising" factor, such as injury to a travelling worker when the hotel burns down while he is sleeping in it. Although not engaged in any productive activity, the worker's employment put him in the position of risk. Taken as a whole, the connection between the accident and the employment is strong. The B.C. Board also accepts such injuries (see #18.41, *R.S.C.M.*).

(33) Conversely, when the "course" factor is strong, but the "arising" factor is weak, compensation is again paid. Examples in the *R.S.C.M.*, include the personal comfort cases, such as an injury caused by some aspect of the work environment during a meal break (see #21.10, *R.S.C.M.*). Overall, the published policy of the governors generally accepts a unitary test. However, where a policy addresses particular situations, I consider they take precedence over a general approach. In such cases, the policy-makers have given specific direction to decision-makers, which will generally be applied to such fact situations. Therefore, I have considered whether the relevant published policies provide specific guidance in this situation. Two such policies were not mentioned in the *Kovach* decision.

Published Policies

(34) Section 82 of the Act provides the governors of the Board must approve and superintend the policies and direction of the Board. The governors' duties are now performed by a Panel of Administrators. Governors' Decision 86, *Workers' Compensation Reporter*, Vol. 10, p. 781, and Panel of Administrators' Decision 1, *Workers' Compensation Reporter*, Vol. 11, p. 465, provide the published policies include the *Assessment Policy Manual* (*A.P.M.*), *Rehabilitation Services and Claims Manual* (*R.S.C.M.*), and *Workers' Compensation Reporter*, Decisions 1–423, with the exceptions of the Decisions which have been "retired" by resolution of the Panel of Administrators (see http://www.worksafebc.com/policy/panelpolicy/mtgs2000/000428b.asp, April 28, 2000 resolution of the Panel of Administrators).

(35) Most of the published policies are primarily concerned with the payment of compensation benefits, which is the principal task of claims adjudication (see Preface to *R.S.C.M.*, for example). The policies clearly and consistently provide that compensation will be paid for injuries during treatment for a compensable injury. For example, item #22.10, *R.S.C.M.*, provides:

> **22.10 Further Injury or Increased Disablement Resulting From Treatment**
>
> Where a further injury arises as a direct consequence of treatment for a compensable injury, the further injury is also compensable.
>
> Where a worker is undergoing treatment for a compensable injury, the *place of treatment is analogous to a place of employment*, and *a further injury arising out of the place of treatment would also be compensable*. For example, if a worker is undergoing treatment at a hospital for a compensable injury and sustains a further injury by stumbling down the stairs in the hospital, that is also compensable.
>
> [emphasis added]

(36) The policy to pay compensation for injuries during treatment is repeated in Decision 17, 1 *Workers' Compensation Reporter* 78, and Item #22.11, *R.S.C.M.*, which is taken from Decision 17. Item #17.11 also provides, "If a worker acted reasonably in undergoing unauthorized treatment, compensation will be paid to him or her for the consequences of that treatment."

(37) While the *compensability* of injuries during treatment seems to be consistently articulated, the published policies are more ambiguous on questions of status for the purposes of sections 10 and 11. According to the policy in *Workers' Compensation Reporter* Decision 152, injuries during treatment are compensable, but they do not arise out of and in the course of employment: "Re: Injuries Arising Out of Treatment and Other Appointments," (1975) 2 *Workers' Compensation Reporter* 186. Most of Decision 152 is now found in the *R.S.C.M.*, but that decision concluded with a statement that is not found in the Manual:

> Where a subsequent injury within the scope of this directive is accepted as compensable, it is *not accepted on the ground that the injury is one arising out of and in the course of the employment*. It is accepted on the ground that the subsequent injury is a compensable consequence of the original injury. *Thus the provisions of Section 10 might not apply to any tort claim arising out of the subsequent injury.*
>
> [emphasis added]

(38) That policy clearly distinguishes between compensability of treatment injuries and the gateway criteria for compensation. It is the only policy where the "cause" and "course" concepts are defined in terms of both compensation entitlement, and status for section 11 purposes.

(39) A contrary view of that issue is provided in another policy item, #111.10, *R.S.C.M.*, in Chapter 16, on Third Party and Out-of-Province Claims. The policy quotes section 10(1), explains the application of the bar, and ends:

> Where an action is barred under Section 10(1) in respect of a work injury, the same applies to any subsequent injury occurring in the course of treatment or rehabilitation which is accepted as a compensable consequence of that injury.

(40) If the statutory bar for a compensable workplace injury automatically applies to a subsequent treatment injury, then:

a) the treatment injury must have arisen out of and in the course of employment, and

b) the potential defendant was a worker or employer, whose action or conduct, which caused the breach of duty arose out of and in the course of employment.

(41) That contradicts Decision 152, which states that the injury during treatment is accepted as compensable, but *not* on the grounds that it arose out of and in the course of employment.

(42) Further confusion is added by the policy in #74.11, in Chapter 10, "Medical Assistance," *R.S.C.M.* It sets out a procedure for the Board staff to consider initiating legal action for medical malpractice:

> **#74.11 Medical Negligence or Malpractice**
>
> During the progress of a claimant's file, information may come to the attention of Board employees that would lead them to conclude that there was prima facie evidence of medical malpractice or negligence. This may come from the perusal of a single file or the perusal of a series of files where claimants have been treated by the same physician. The following action should be taken in these cases:
>
> 1. Where this is brought to the attention of a Board employee or a Board physician, it shall be reported to the Vice-President, Medical Services Division.
>
> 2. The Vice-President, Medical Services Division will review the case, together with a committee composed of the following members:
>
>   (a) The Board's General Counsel, or nominee;
>
>   (b) The Director, Medical Services Department;
>
>   (c) The Director, Rehabilitation Centre.
>
> 3. The committee will forward to the President a recommendation for action in cases where it is felt that medical malpractice or negligence may have occurred. The President will determine whether to proceed with an action. The claimant will be advised of the President's decision with reasons.

(43) While this policy appears to be outdated (the position, vice-president, Medical Services Division, has not existed for many years), it appears to contemplate at least some situations where an injury in the course of treatment will be actionable. That would be inconsistent with the statement in #111.10, which states actions for treatment injuries are barred if the workplace injury was compensable.

(44) The policies in Decision 152, #111.10 and #74.11 all pre-dated the expansion of the Act in January 1994, which provided that all workers and employers in the province are covered by Part 1. Prior to the expansion, the status of the plaintiff was less of an issue because many physicians and treatment providers were not covered, so an action against them would not be barred. Therefore, actions for injuries during treatment were more likely to proceed.

Policy on Conflict Between Policies

(45) Can the policies in Decision 152, #111.10 and #74.11 be reconciled with each other and the Act? According to Governors' Bylaw 4, all are part of the published policy. That Bylaw provides a number of interpretive rules:

> 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. . . .
>
> **2.0 Section 2 — Application of Published Policy of the Governors**
>
> 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.
>
> 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.
>
> 2.3 In the event of any other conflict between published policies of the governors:
>
> (a) if the policies were approved by the governors on the same date, the policy most consistent with the Act or Regulations is paramount.
>
> (b) if the policies were approved by the governors on different dates, the most recently approved policy is paramount.

Is Policy #111.10 Viable Under the Act?

(46) The policy purports to say when an action is barred. To review, the policy states:

> Where an action is barred under Section 10(1) in respect of a work injury, the same applies to any subsequent injury occurring in the course of treatment or rehabilitation which is accepted as a compensable consequence of that injury.

(47) The Board has not had the authority to determine whether the action was barred since 1968. Rather, the Board makes determinations about the status of the parties, and the court decides how that affects the legal action: see *Smith* v. *Vancouver General Hospital*. On this basis, the policy in #111.10 oversteps the Board's authority.

(48) The history of the legislation indicates the legislature's intent that employers no longer have the benefit of the statutory bar simply because they are employers. Initially, the Act did not require that the employer's action or conduct arise out of and in the course of employment for the action to be barred. A worker whose injuries arose out of and in the course of employment could not maintain an action against his or her employer regardless of whether the employer's conduct was related to the employment. Section 11 of the *Workmen's Compensation Act*, S.B.C. 1916, c. 77, stated:

> 11 (1) The provisions of this Part shall be in lieu of all rights of action to which a workman or his dependents are entitled, either at common law, or by any Statute, against the employer of such workman for or by reason of any accident which happens to him arising out of and in the course of his employment, and no action against the employer shall lie in respect of such accident.

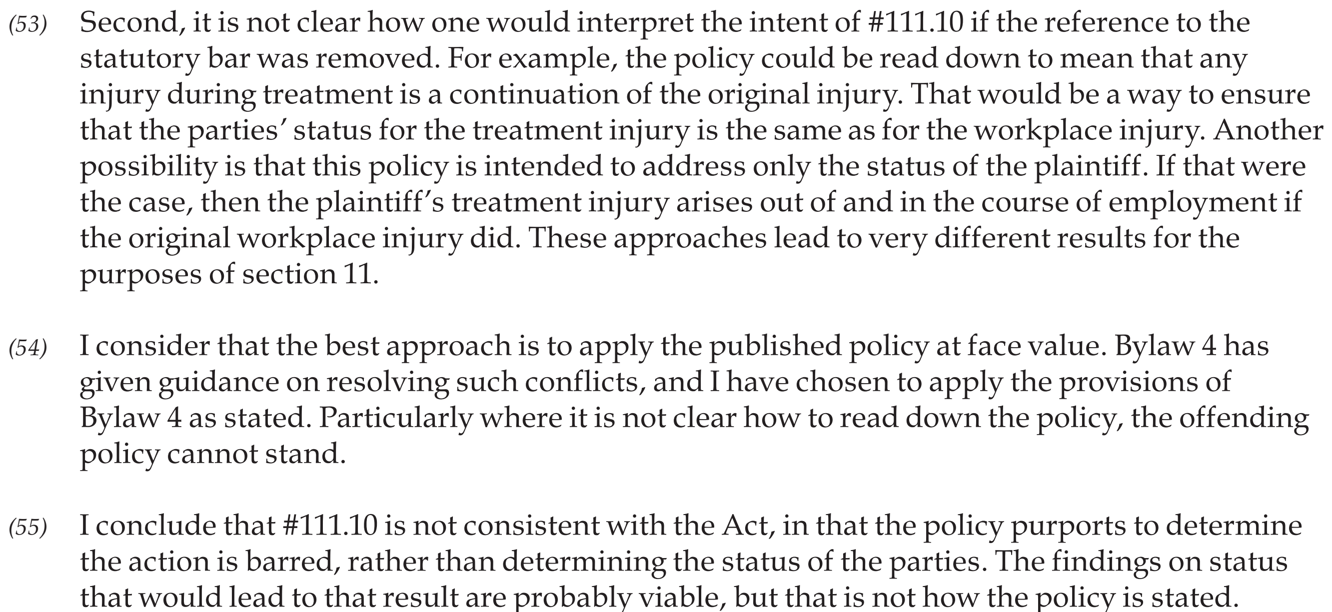
(49) Similarly, the injured worker was barred from suing another employer covered by Part 1 of the Act, again, without that employer's conduct having to relate to employment. Section 10(4) provided:

> 10 (4) In any case within the provisions of subsection (1), neither the workman nor his dependent nor the employer of the workman shall have any right of action in respect of the accident against an employer in any industry within the scope of this Part; . . .

(50) Section 10(1) now affords the defendant the protection of the statutory bar only if its action or conduct arose out of and in the course of employment. This indicates the legislature's intent to allow suits to proceed against employers or workers whose action or conduct was outside the scope of the Act.

(51) If the policy in #111.10 is not intended to set out the Board's jurisdiction to rule on whether the action is barred, but only refers to the result, it is probably viable. The outcome in the Appeal Division decision in *Kovach* was consistent with that result, although the reasoning allowed for more flexibility in deciding if the treatment injury was causally connected to the workplace injury. However, the Appeal Division analysis in *Kovach* did not apply the policy in #111.10, *R.S.C.M.* In fact, it did not mention that policy. I have considered whether this policy should be "read down" so that the offending elements regarding the effect on the action are eliminated, in an attempt to "save" the policy. If that were possible, this policy might be paramount over that in Decision 152. However, several reasons lead to me to conclude that is not the proper approach to resolving this conflict.

(52) First, Bylaw 4 does not list reading down as a method of resolving conflicts between the Act and Regulations, and the policy. It simply states that in such a conflict, the Act and Regulations are paramount.



(53) Second, it is not clear how one would interpret the intent of #111.10 if the reference to the statutory bar was removed. For example, the policy could be read down to mean that any injury during treatment is a continuation of the original injury. That would be a way to ensure that the parties' status for the treatment injury is the same as for the workplace injury. Another possibility is that this policy is intended to address only the status of the plaintiff. If that were the case, then the plaintiff's treatment injury arises out of and in the course of employment if the original workplace injury did. These approaches lead to very different results for the purposes of section 11.

(54) I consider that the best approach is to apply the published policy at face value. Bylaw 4 has given guidance on resolving such conflicts, and I have chosen to apply the provisions of Bylaw 4 as stated. Particularly where it is not clear how to read down the policy, the offending policy cannot stand.

(55) I conclude that #111.10 is not consistent with the Act, in that the policy purports to determine the action is barred, rather than determining the status of the parties. The findings on status that would lead to that result are probably viable, but that is not how the policy is stated.

Is Policy #74.11 Viable?

(56) This policy contemplates the Board taking legal action for medical malpractice, but does not set out the basis for that practice. The policy implies that if the Board had a subrogated interest then the plaintiff had a choice to sue or obtain compensation. That does not necessarily mean that the treatment injury is simply a continuation of the original workplace injury.

(57) Section 10(6) of the Act gives the Board a right to maintain an action on behalf of the worker for an injury for which compensation is paid:

> (6) If the worker or dependant *applies to the board claiming compensation* under this Part, neither the making of the application nor the payment of compensation under it restricts or impairs any right of action against the party liable, but *as to every such claim the board is subrogated to the rights of the worker* or dependant and may maintain an action in the name of the worker or dependant or in the name of the board; and if more is recovered and collected than the amount of the compensation to which the worker or dependant would be entitled under this Part, the amount of the excess, less costs and administration charges, must be paid to the worker or dependant. The board has exclusive jurisdiction to determine whether to maintain an action or compromise the right of action, and its decision is final and conclusive.

(58) One possibility that provides for the Board having a subrogated right of action, and for the worker to receive compensation for the injury during treatment is characterizing the treatment injury as a continuation of the compensable workplace injury, but the defendant is not covered by Part 1 of the Act, then an action is not barred.

(59) This approach resembles the Appeal Division's analysis in *Kovach* with respect to the plaintiff's injuries. Any injuries during treatment are considered to be causally related to the original compensable injury.

(60) Another possibility was discussed by the Court of Appeal majority in *Kovach*. It contemplated that paying compensation and allowing a suit to proceed need not be mutually exclusive. Madam Justice Newberry did not look favourably on the defendants' position in oral argument that once the worker's injury is properly compensable, the same injury cannot form the basis for a legal action (at paragraph 33):

> If counsel for Dr. Singh now wishes to modify his position to acknowledge that the "capacity in which a person is sued" may in some circumstances be regarded as "paramount" to his capacity as an "employer" or "worker" for purposes of the **Act**, then as is already apparent, I would agree with that concession. I would analyze it, however, in terms of jurisdiction rather than "paramountcy".

(61) While the Court of Appeal findings were overturned by the Supreme Court of Canada, that seems to have rested on the strength of the WCB's privative clause, rather than the correctness of the reasoning. In other words, the WCB's privative clause allows it to make decisions within its exclusive jurisdiction, which are not the best interpretation of the legislation, or even a correct interpretation. Even where the decision is wrong, the courts will not interfere with the Board's jurisdiction, unless the result is patently unreasonable.

(62) I recognize there is a tension between finding an injury does not arise in the course of employment, but is compensable, and that the Board has a subrogated interest. In the first approach above, the treatment injury arises out of and in the course of the plaintiff's employment, even though the plaintiff is not being paid a salary, is not at the employer's premises, and is not engaged in any of the normal activities associated with employment. Indeed, the panel in *Kovach* noted, "It may be difficult to say that an injured worker who is undergoing an operation miles from her place of employment is still in the course of her employment."

(63) The second approach also involves some tension, but of a different sort. The worker's treatment injury "results" from the original workplace injury, and is therefore compensable, but that same treatment injury has an identity separate from the original workplace injury capable of giving rise to a cause of action. This will be discussed in more detail.

(64) Neither of these interpretations is entirely satisfactory. Clearly, the policy intends that compensation be paid for certain consequences of a workplace injury, including injuries that occur while the worker is being treated. Such a determination would appear to fall squarely within the Board's authority in section 96(1) to determine whether an injury arises out of or in the course of employment, or the existence and degree of disability by reason of an injury. In the context of the conflicting policies, and the difficulties in reconciling the policies with the Act, I consider that the best route is to simply apply the policies as they are written, and leave it to those responsible for policy to provide direction or clarification if necessary.

(65) That said, I have considered that Item #74.11 has been part of the policies for many years prior to the expansion of the Act to cover all workers and employers in the province. Possibly it is no longer of wide application. It is, however, still viable and even with the expansion of the Act, there are very likely some potential defendants who are neither workers nor employers under Part 1.

(66) Because #74.11 does not explain on what basis the Board will consider proceeding with a legal action, it is not clear which of the two analyses, or possibly another, underlies the policy. I consider that this policy is viable under the Act.

Is Decision 152 Viable Under the Act?

(67) Decision 152 states:

> Where a subsequent injury within the scope of this directive is accepted as compensable, *it is not accepted on the ground that the injury is one arising out of and in the course of the employment*. It is accepted on the ground that the subsequent injury is a compensable consequence of the original injury. Thus the provisions of Section 10 might not apply to any tort claim arising out of the subsequent injury.

(68) The Appeal Division Decision in *Kovach* considered this policy raised a possible distinction between injuries that arise out of and in the course of employment and injuries that arise as a consequence of a compensable injury, but concluded there was no real distinction between them. The panel applied a broad interpretation of "arising out of and in the course of employment," that would include treatment injuries. Such an approach was consistent with interpretation of the other policies to pay compensation for injuries sustained during treatment of a compensable workplace injury. Their interpretation, they said, "appears to fit more closely the intent of the Act." In deciding not to apply the policy in Decision 152 to the facts before them, the panel appears to have used a "best fit" or "better fit" test. Little deference was given to the role of the governors in setting the policy in Decision 152.

(69) Since 1993, when *Kovach* was written, decisions of the Appeal Division have more clearly articulated the standard of review concerning published policy. Some Decisions have favoured a best fit approach (as in *Kovach)*, but the recent trend is to uphold and apply the policy if it is a viable interpretation of the Act (#00-0668, 16 *Workers' Compensation Reporter* 287). As stated in the Appeal Division Decision in *Kovach*, the treatment injury results from the original workplace injury; therefore, the Board must pay compensation. However, I consider that Decision 152 means the treatment injury does not arise in the course of employment. Therefore, the worker may elect to claim compensation, or bring an action. If the worker claims compensation, the Board has a subrogated right of action.

(70) Decision 152 is the clearest statement in the published policy on the status of the injured worker for the purposes of section 11 purposes. That unique place in policy is to be respected. It is not necessary for me to precisely define the standard of review which is applicable in this case, except to say that I would be prepared to give considerably more deference to the policy than did the panel in *Kovach*. Applying a more deferential standard of review to the published policy leads to a different conclusion with respect to Decision 152.

Compensation Issues

(71) Although it does not directly concern the disposition of the issue before me, any interpretation of the law and policy concerning treatment injuries may also affect compensation entitlement. The Supreme Court of Canada described the workers' compensation system as having three main aspects, compensation and rehabilitation of injured workers, the statutory bar, and the injury fund: per Sopinka, J., in *Pasiechnyk* v. *Saskatchewan (Workers' Compensation Board)*, [1997] S.C.J. No. 74.

(72) While I consider this is an aside to my reasoning above, some consideration will be given to the long-standing and numerous policies to compensate workers for injuries during treatment. Within the context of workers' compensation, such policies encourage workers to undergo appropriate treatment, knowing that an adverse outcome of surgery will not be at their own risk. Having a uniform policy also reduces costs and delay in adjudicating claims.

(73) Finding a legal underpinning for paying compensation for consequential injuries has involved some contortion. Larson acknowledges that consequential injuries do not strictly occur in the course of employment, but are related to the employment because they are necessary or reasonable activities that would not have been undertaken *but for* the compensable injury: §10.05. Larson calls this "quasi-course of employment."

(74) However, the published policy in British Columbia states that it is not sufficient that the consequential injury would not have occurred "but for" the workplace injury. Item #22.00 suggests the previous injury must be a "significant cause" of the later injury, but the test is not one of foreseeability.

(75) For example, after cutting his hand at work, it is foreseeable that a worker will need to see his doctor, and go to the drug store. However, compensation is not payable for injuries arising out of ordinary travel to see a doctor including a specialist, travel to a drug store, or doing maintenance exercises at home after the return to work (see #22.15, *R.S.C.M.*). On the other hand, injuries while travelling to an appointment at the WCB, Review Board, or Medical Review Panel are compensable: #22.21, *R.S.C.M.*

(76) On what basis can the Board pay compensation for certain consequences of the workplace injury? The Act describes only the original injury in terms of "arising out of and in the course of the employment." Section 5(1) provides:

> 5 (1) Where, in an industry within the scope of this Part, personal injury or death arising out of and in the course of the employment is caused to a worker, compensation as provided by this Part must be paid by the board out of the accident fund.

(77) This gateway triggers the payment of compensation as set out in Part 1. Section 5(1) does not specify that the Board may pay compensation only for injuries arising out of and in the course of employment. Compensation is not paid for that *injury per se*, but for certain compensable *consequences* that result from the injury. For example, section 22(1) provides for full benefits in the case of permanent total disability:

> 22 (1) Where *permanent total disability results from the injury*, the compensation must be a periodic payment to the injured worker equal in amount to 75% of the worker's average earnings, and must be payable during the lifetime of the worker.

(78) Whether disability *results* from an injury is for the WCB to decide.

(79) If the injury results in permanent *partial* disability, compensation is again paid for disability that "results from the injury":

> 23 (1) 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.

(80) Thus, the acceptance of a claim for personal injury under section 5(1) requires both the "causal" and "course" factors to be satisfied, but after that, the payment of benefits requires only a causal relationship with the original injury. The same is true for benefits paid under section 16(1):

> **Vocational rehabilitation**
>
> 16 (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.

(81) The title of section 16 suggests that the purpose of these expenditures is vocational, and subsection (2) and (3) concern training and placement services for dependants of a worker whose death is compensable. However, subsection (1) does not limit the Board to paying only for vocational assistance. Indeed, section 16 has been used to pay continuity of income benefits in some situations where a worker is no longer temporarily disabled (and therefore not eligible for temporary total disability benefits). Due to administrative delays, the worker's pension assessment cannot be started immediately after the temporary benefits end, so bridging payments are made (see #89.11, *R.S.C.M.*).

(82) Injuries during rehabilitation at a training school or work site are considered to be a continuation of the original injury: #88.54, *R.S.C.M.* In such cases, the costs of the second injury will normally be excluded from the original injury employer's experience rating (#115.30), but appears to be included in the original injury employer's sector or rate group. There is provision in section 10(8) of the Act to transfer costs for assessment purposes where "a serious breach of duty of care" has resulted in injury or death, and the payment of a substantial amount of compensation. Transfer of claims costs under section 10(8) might also have some application to injuries resulting from treatment. Instead of costs being carried by the employer at the time

of the workplace injury (or its sector), applying section 10(8) would result in costs being transferred to the treatment facility or health care provider, where there has been a serious breach of duty of care.

(83) The provision of health care is somewhat different, in that benefits can be paid "to cure and relieve from the *effects* of the injury or alleviate those effects," but again rests on there being a causal connection between the original injury and the resulting "effects":

> 21 (1) In addition to the other compensation provided by this Part, the board may furnish or provide for the injured worker any medical, surgical, hospital, nursing and other care or treatment, transportation, medicines, crutches and apparatus, including artificial members, that it may consider reasonably necessary at the time of the injury, and thereafter during the disability *to cure and relieve from the effects of the injury or alleviate those effects*, and the board may adopt rules and regulations with respect to furnishing health care to injured workers entitled to it and for the payment of it. . . .

(84) According to my interpretation of the law and policies, the original injury must arise out of and in the course of employment, but compensation will be paid for resulting disability, including disability caused by injury during treatment, where that treatment resulted from the original injury.

(85) It is sufficient that there is a causal connection between the original workplace injury and the injury during treatment, rather than having to re-enter through the section 5(1) gateway requirements regarding "course" and "cause" for compensation to be paid for treatment injuries.

Analysis of the Viable Policies

(86) Having determined that the policies in #74.11 and Decision 152 are viable, they can be interpreted together in a coherent manner, as follows. The treatment injury results from the original workplace injury; therefore, the Board must pay compensation. However, the treatment injury does not arise in the course of employment. Therefore, the worker may elect to claim compensation, or bring an action. If the worker claims compensation, the Board has a subrogated right of action.

(87) The reasoning of the majority in the Court of Appeal in *Kovach* suggests that such an approach is viable, even preferable.

Application to the Facts

(88) The plaintiff was a worker at the time of the workplace accident, and remained a worker at the time of the alleged accident on the defendants' premises. Having found that Decision 152 is a viable interpretation of the Act, the plaintiff's injuries during treatment did not arise out of and in the course of employment.

(89) A further factor in this case is that the alleged injury during treatment was to the worker's back, whereas the original workplace injury was to the right forearm. This is not a case of a further injury to the same part of the body, which distinguishes this case from *Kovach*.

(90) I have also considered the presumption in section 5(4) of the Act:

> (4) In cases where the injury is caused by accident, where the accident arose out of the employment, unless the contrary is shown, it must be presumed that it occurred in the course of the employment; and where the accident occurred in the course of the employment, unless the contrary is shown, it must be presumed that it arose out of the employment.

(91) If the plaintiff's treatment injury occurred as claimed, it was an "accident" as defined in section 1 of the Act:

> "accident" includes a wilful and intentional act, not being the act of the worker, and also includes a fortuitous event occasioned by a physical or natural cause.

(92) The treatment injury could be seen to have arisen out of the employment, in that had he not broken his arm at work, he would not have been using the allegedly faulty equipment at the defendants' premises. Thus, it is presumed that the injury also occurred in the course of employment, "unless the contrary is shown." On the basis of my findings above, the contrary is shown.

(93) The plaintiff's injuries on August 28, 1997 did not arise out of and in the course of employment.

Conclusion

(94) At the time of the alleged accident on August 28, 1997:

1. The defendants were employers under Part 1 of the Act.
2. Any action or conduct by the defendants, which caused the alleged breach of duty arose out of and in the course of employment.
3. The plaintiff was a worker under Part 1 of the Act.
4. The plaintiff's injuries did not arise out of and in the course of employment.

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

WORKERS' COMPENSATION

REPORTER

Decision of the Appeal Division

Number: **2002-1613**
Date: **June 28, 2002**
Panel: **Jane MacFadgen**
Subject: **Whether Worker's Injuries were Sustained Out of and in the Course of Employment — Firefighter as Samaritan and Interpretation of Policy in Item #14.00**

PERSONAL INJURY (ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT) (INTERPRETATION OF POLICY) — The worker firefighter was injured in the course of rendering emergency first aid to a critically injured person when he stopped at the scene of motor vehicle accident in the course of his commute to work — The Workers' Compensation Board denied the worker's claim for temporary disability caused by anti-retroviral treatment for potential H.I.V. exposure — At issue is whether the injury rose out of and in the course of employment — Worker does not dispute *Rehabilitation Services and Claims Manual* (*R.S.C.M.*) item #18.00, which denies compensation for injuries occurring during commute to work, but argued that rendering assistance at accident site took worker out of commute — *R.S.C.M.* item #14.00 was applied and multiple criteria were used to evaluate the status of the worker — Appeal Division panel found the worker's actions were not brought within the course of employment — Worker appeal denied.

Law: *WCA* (1996): s. 5(1)
Policy: *RSCM*: #14.00, #16.50, #18.00, #20.00
Decisions: *Betts* v. *New Brunswick (Workmen's Compensation Board)*, [1934] S.C.R. 107; Decision No. 747/91, [1992] O.W.C.A.T.D. No. 178

18 *Workers' Compensation Reporter* p. 853

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(1) The worker is employed as a firefighter. While driving to work, he arrived at the scene of a serious motor vehicle accident (M.V.A.). In the course of rendering emergency first aid to a critically injured person at the accident site, the worker cut his hand and was exposed to the victim's blood through this cut. He became very ill as a result of anti-retroviral treatment for potential H.I.V. exposure, and was disabled from work for a number of weeks.

(2) The Workers' Compensation Board (the Board) denied the worker's claim on the basis that his injury did not occur in the course of his employment. In findings dated November 14, 2001, the Workers' Compensation Review Board (the Review Board) upheld the Board's decision disallowing the claim. The worker now appeals to the Appeal Division.

(3) An oral hearing has not been requested. The employer is not participating in the appeal. The underlying facts in this appeal are not in dispute, and I am satisfied that the issue raised in this appeal may be properly considered upon the basis of the written evidence and submissions on file.

(4) My jurisdiction in this appeal is found in sections 91 and 96(3) of the *Workers Compensation Act* (the Act), which give the Appeal Division the authority to rehear and redetermine any matter that has been dealt with by the Review Board. The Appeal Division also has the discretion to conduct a full inquiry into all of the issues arising out of an appeal that is before it.

Issue(s)

(5) Whether the worker sustained an injury which arose out of and in the course of his employment, such that any adverse consequences arising from treatment for that injury would be compensable.

Background

(6) The worker is employed as a firefighter with the employer city (X). His advanced rescue training included training in emergency first responder skills. About 75% of his emergency work for the employer involved rendering rescue and medical assistance to members of the public, often in M.V.A. situations. He had on occasion been dispatched to the scene of M.V.A.'s in municipalities outside X's geographic boundaries.

(7) While driving to work on the morning of May 2, 1999, the worker was one of the first to arrive upon the scene of a serious M.V.A. He stopped and rendered paramedical assistance to the accident victims for about 15 minutes on his own, until fire department members from cities Y and Z arrived at the scene. The worker stayed at the scene in a supportive capacity for another 10 minutes, and then left after briefing the attending captain.

(8) In the course of administering emergency first aid, the worker lacerated his hand on broken glass and the broken skin was exposed to the blood of an accident victim. He subsequently received A.Z.T. treatment as H.I.V. prophylaxis. He became ill as a result of this treatment and was disabled from work for about a month and a half.

(9) In the June 1999 decision under appeal the Board denied the worker's claim because he was not in the course of his employment at the time of injury. The adjudicator relied on the Board's published policy that accidents occurring in the course of travel from a worker's home to his normal place of employment are not compensable.

(10) The worker unsuccessfully appealed this decision to the Review Board. The Review Board concluded that his actions on his way to work were those of a good Samaritan, and that he was not a worker in the course of his employment. The panel noted that the worker was not properly attired (as he would have been if on duty) to assist the victims of the M.V.A.

(11) The worker appeals the Review Board findings. His counsel has provided a detailed submission analyzing the facts in light of the relevant law and published policy. He does not dispute the general applicability of *Rehabilitation Services and Claims Manual* (the Manual) policy #18.00 that injuries occurring during the usual commute to and from the workplace are not compensable. Rather, he argues that the worker's action of rendering assistance at the accident took

him out of the usual morning commute to work, and placed him in the course of his employment within the scope of section 5(1) of the Act. This was so, even though the worker was not on paid time and would not otherwise have been on duty at that specific time and place.

(12) I have summarized below counsel's primary arguments in support of the proposition that the worker's injury and consequent disability arose out of and in the course of his employment as a firefighter.

- While the worker was not under a legal duty to provide emergency assistance, he felt obligated to stop and render emergency assistance because of his sense of public duty and extensive specialized training and experience, which were directly and inextricably related to his employment as a firefighter. As a result, his involvement at the accident clearly arose out of his employment.
- Unlike the ordinary public spirited good Samaritan, the worker was doing exactly what he was trained for and paid to do as a public servant, i.e. providing rescue and emergency paramedical assistance to members of the public, both within and occasionally outside the bounds of the employer city. He was thus in the course of his employment as an emergency first responder at the time he was injured.
- The worker was injured in the process of performing a public service in his role as a public servant, which was of benefit to the employer. His provision of emergency assistance to a member of the public was consistent with the public's expectations of a firefighter and the employer's mission statement and message to the public that its employees were "there to help, whatever the need." Although he was not specifically dispatched to this accident, the public would not expect a firefighter would need specific instruction to perform the emergency duties that are central to his job.
- The risk to which the worker was exposed in rendering emergency assistance at the scene of the accident was the same as the risk to which he was exposed during his usual employment. He injured his hand going through a broken window to assist the accident victim, and there was no evidence that any special clothing or equipment would normally have been used or would have prevented this injury.
- While the worker was not attired in emergency gear, he was dressed in employer issued T-shirt and shorts, which on occasion could be deemed the uniform of the day by the officer in charge of a shift.
- The type of emergency assistance which he provided in this case did not require any particular equipment/materials.

(13) The submission noted that the *Good Samaritan Act*[1], which removes liability for injury/death caused by a person who renders emergency medical services or assistance, exempts from its operation a person who is employed expressly for the purpose of rendering such medical services or aid.

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[1] R.S.B.C. 1996, c. 172

(14) The submission asserted that two of the criteria in Manual policy #14.00 strongly supported an employment connection in this case: the worker was doing something for the benefit of the employer, and thereby became exposed to the same risks to which he was exposed in the normal course of his employment. As well, the presumption in section 5(4) of the Act assisted the worker's position.

(15) The worker's counsel contended that the legislation should be given a liberal interpretation to support coverage of this claim. He referred to several cases which took an expansive approach to the scope of a worker's employment, particularly in the context of an emergency rescue situation, to include any injury which arose out of or in the course of anything the worker did which was reasonably incidental to his work (e.g. *Betts* v. *New Brunswick* (*Workmen's Compensation Board*), [1934] S.C.R. 107, and Decision No. 747/91, [1992] O.W.C.A.T.D. No. 178).

(16) The submission stated that the worker's situation was analogous to the off-duty Ontario firefighter's injury while assisting other firefighters to fight a fire in his neighbour's house, which was outside the municipality where he was employed. The Ontario tribunal in Decision No. 747/91 concluded that the activity of pulling the heavy fire hose was reasonably incidental to the worker's employment, and his injury was therefore compensable, because he was doing something which he had knowledge of specifically because of his employment, and because he was recognized as a fellow firefighter by the on-duty firefighters.

(17) The submission argued that the worker was acting in his capacity as an employee, doing something referable to his employment, rather than in his capacity as a citizen doing something independent of his employment. As a result, his injury arose out of and in the course of his employment, and his claim should be accepted.

Law and Policy

(18) Section 5(1) of the Act provides that compensation shall be paid where a worker sustains a personal injury arising out of and in the course of his employment.

(19) Manual policy item #14.00 states that no single criterion is conclusive in deciding whether an injury should be classified as one arising out of and in the course of employment. While control by an employer may be an indicator that a situation is covered under the Act, the absence of control by the employer does not preclude the acceptance of a claim where other factors demonstrate an employment connection. The policy lists a number of indicators which are commonly used for guidance:

a. whether the injury occurred on the premises of the employer;
b. whether it occurred in the process of doing something for the benefit of the employer;
c. whether it occurred in the course of action taken in response to instructions from the employer;
d. whether it occurred in the course of using equipment or materials supplied by the employer;

e. whether it occurred in the course of receiving payment or other consideration from the employer;
f. whether the risk to which the employee was exposed was the same as the risk to which the employee is exposed in the normal course of production;
g. whether the injury occurred during a time period for which the employee was being paid;
h. whether the injury was caused by some activity of the employer or of a fellow employee.

This list is by no means exhaustive. All of these factors can be considered in making a judgment, but no one of them can be used as an exclusive test.

(20) Manual policy item #16.50 addresses a worker's role in emergency actions. It states that where an emergency occurs while the worker is in the course of employment, the worker will be covered if he is injured while acting to protect a fellow worker or the employer's property. If, however, the worker's action is that of a public spirited citizen, and he is doing no more than anyone would do, whether or not working for an employer at that time, his action is not considered to be related to the employment.

(21) Manual policy item #18.00 sets out the Board's general position that accidents occurring in the course of commuting from the worker's home to his usual place of employment are not compensable.

(22) A number of other policies relate to a worker's participation in extra-employment activities. Manual policy item #20.00 states that, generally speaking, activities which workers undertake outside of their employment are for their own benefit, and injuries occurring in the course of them are not compensable. The policy recognizes, however, that there are some activities which, because of their relevance to the worker's employment, may be accepted as being part of that employment.

Reasons and Findings

(23) Did the worker's hand injury while rendering emergency first aid to an M.V.A. victim arise out of and in the course of his employment as a firefighter?

(24) The worker was commuting to work and was not on duty at the time he responded to the emergency and sustained his injury. The essence of the worker's argument is that he was brought into the course of his employment when he performed emergency rescue and first aid services at the accident scene because:

- his role as a public servant and his specialized training and experience as a firefighter with the employer impelled him to render emergency assistance to the accident victims;

- the emergency first response services which he provided were the same as his usual duties as a firefighter, and therefore exposed him to the same risks attendant on his normal work activity; and

- his timely and skilled emergency services, which likely saved the life of the accident victim, were of benefit to the employer.

(25) I am not persuaded by the worker's arguments that his voluntary actions, however critical and laudable, fell within the scope of his employment. The worker was off duty at the time he was injured. The accident occurred outside the employer's boundaries. It was not the worker's conditions of employment which brought him to the location where he encountered the rescue opportunity. He was not acting in response to direction from the employer, and he was not using equipment or materials supplied by the employer.

(26) I do not accept that the worker was in the process of doing something for the benefit of the employer as contemplated by Manual policy #14.00 item (b). He was not protecting the employer's property or a fellow employee, or responding to an emergency to which the employer was required to dispatch firefighters. The possible spin-off of some amorphous public goodwill toward the employer as a result of the worker's volunteer rescue efforts in another municipality is, in my view, too remote and intangible to be considered a material benefit to the employer.

(27) I am not persuaded by the decision of the Ontario appeal tribunal which found that the off-duty firefighter's actions were reasonably incidental to his employment. The fact that the worker's professional training and expertise as a firefighter uniquely equipped him to provide emergency first response assistance to the M.V.A. victim(s), and motivated him to do so out of a sense of public service, is not sufficient to bring him into the course of his employment on the evidence before me. A worker may use his professional qualifications and experience while acting in a personal capacity, and thereby be exposed to the same risks as in the performance of his regular duties; that factor alone does not necessarily bring his acts within the course of his employment for workers' compensation purposes.

(28) Considering the evidence as a whole, I find that the employment nexus in this case is insufficient to bring the worker's actions at the time of injury within the scope of his employment, as required by section 5(1) of the Act. Even if the section 5(4) accident presumption applied on the facts of this case, I consider that the presumption would be rebutted given the factors noted above which weigh strongly against an employment connection.

(29) In conclusion, I deny the worker's appeal.

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

WORKERS' COMPENSATION
REPORTER

Decision of the Appeal Division

Number: 2002-1769; 2002-1770
Date: July 11, 2002
Panel: John Steeves, Herb Morton, Heather McDonald
Subject: Whether it is Appropriate to Impose a Claims Cost Levy Under 73(1) in Addition to an Administrative Penalty Under Section 196

OCCUPATIONAL SAFETY AND HEALTH (SANCTIONS) (PROCEDURAL FAIRNESS) — A fatal injury at the employer's premises led to the imposition of both an administrative penalty under section 196 and a claims cost levy under section 73(1) of the *Workers Compensation Act* (the Act) — A review by the Review and Penalty Section rejected the employer's argument that imposing an administrative penalty and a claims cost levy was inappropriate and contrary to published Board policy — The employer submitted that since changes to the Act by *Bill 14* in 1998 were equivalent to the repeal and simultaneous re-enactment of essentially the same statute, there is a continuation of former policies — The employer argued that *Rehabilitation Services and Claims Manual* item #115.20, concerning alternate penalties, was still applicable — The Appeal Division panel carefully reviewed the application of item #115.20 and found it cannot be assumed to reflect the current intent of the Panel of Administrators' concerning the relationship between s. 73(1) and s. 196 of the Act — Employer's appeal denied.

Law: *WCA* (1996): s. 73(1), s. 196(1)
Policy: *RSCM*: #94.20; #115.20
Decisions: *Smith* v. *I.C.B.C.* (1981), 30 B.C.L.R. 31; Appeal Division Decision No. 98-1950, 15 *Workers' Compensation Reporter* 265

18 *Workers' Compensation Reporter* p. 859

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(1) This decision relates to two decisions of the Workers' Compensation Board (the Board) following a fatal injury at the employer's premises. Both were dated November 15, 2001 and both were made by the Review and Penalty Section, Prevention Division, of the Board.

(2) The first decision was to impose an administrative penalty in the amount of $10,000.00 against the employer, pursuant to section 196 of the *Workers Compensation Act* (the Act). The second decision was to impose a levy in the amount of $41,634.88 against the employer, pursuant to section 73(1) of the Act. The employer has appealed these decisions to the Appeal Division, arguing that it was inappropriate to impose an administrative penalty under section 196, and a claim costs levy under section 73(1), of the Act.

(3) After preliminary consideration, the Appeal Division panel scheduled an oral hearing for July 23, 2002, to further inquire into the background facts and evidence. Following a prehearing telephone conference on June 6, 2002, the employer's lawyer confirmed by letter of July 5, 2002 that the employer is content to have the outcome of this matter rest on the success or failure of its argument that it was inappropriate to levy an assessment under section 73(1) of the Act in view of the fact that an administrative penalty had already been established under

section 196 of the Act for the same infraction. The lawyer representing the employer has provided extensive legal argument dated February 19, 2002 and June 24, 2002 (together with a book of authorities).

Issue(s)

(4) Was there an error of law or policy in the decision to impose a claim costs levy under section 73(1), in addition to an administrative penalty under section 196 of the Act?

Background

(5) In view of the narrow basis on which the employer's appeal is being pursued, the factual background will not be set out in detail. Very briefly, the employer operated in the fibre optic cable business. On December 14, 1999, a worker of the employer was fatally injured. He was rewinding fibre optic cable onto a wooden reel when he was caught in the bight and carried around a number of revolutions resulting in serious injuries to his head and chest after hitting the concrete floor. An electric eye had been in place as a safeguard but this was apparently not adjusted to accommodate the various sizes of reels used in production.

Decisions of the Board

(6) On October 16, 2000 the Board's occupational safety officer (O.S.O.) reviewed the December 14, 1999 fatal injury as well as the history of similar violations. An administrative penalty pursuant to section 196 of the Act and a levy of claim costs pursuant to section 73 of the Act were recommended. By letters dated February 19, 2001 and June 12, 2001, the employer was advised that an administrative penalty in the amount of $10,000.00 would be considered and a levy for an additional sum of $40,000.00 (plus C.P.I. increases) would be considered.

(7) A review was conducted by the Board on the basis of written submissions provided by counsel for the employer dated August 7, 2001. The employer did not oppose a penalty pursuant to section 196 of the Act in the amount of $10,000.00. However, the employer objected to an administrative penalty pursuant to section 196 as well as a claim costs levy pursuant to section 73(1) of the Act. According to counsel, it was inappropriate and contrary to published Board policy to impose both the administrative penalty and claim costs levy.

(8) On November 15, 2001, the Review and Penalty Section issued a decision with regards to the review of the administrative penalty and levy. The reviewing officer concluded that an administrative penalty pursuant to section 196 of the Act in the amount of $10,000.00 was appropriate. Further, the reviewing officer also found it was appropriate to levy the maximum sum of $41,634.88 in respect of compensation paid for the fatal injury, pursuant to section 73(1) of the Act.

(9) The reasoning of the review officer can be summarized as follows:

(a) The employer's argument that there should not be both a levy and penalty assessment was reviewed. Decisions of the Appeal Division reaching apparently different results were also reviewed.

(b) Recent health and safety legislation effective October 1, 1999 was noted as well as recent policy pursuant to that legislation.

(c) The reviewing officer found there was nothing evident in the wording of the new policy which prevents the Board's concurrent use of sections 196 and 73(1) of the Act.

(d) The reviewing officer noted that the employer acknowledged the failure to ensure that the electric eye was properly positioned. He recognised that "such a failure defeated its very purpose to safeguard workers" but he found "such a neglect was not deliberate or willful, and did not constitute 'gross negligence'."

(e) The reviewing officer noted the conclusion of the accident investigation report that this accident could have been avoided if the employer had recognized their workers were not complying with the essential need of the electric eye being positioned to match the reel size in use. If the employer had provided proper supervision and training of the cable winding operation the accident could have been prevented.

(f) It was evident that the operation of the cable rewind machine was an activity that exposed the workers to a "high" risk of hazard. A prior accident with the same machine and the provision of the electric eye following that accident were noted. The O.S.O.'s investigation, including interviewing of workers, revealed that it was common for workers to work within the danger area without the electric eye having been properly adjusted.

(g) The circumstances demonstrated a breakdown in the employer's responsibilities to properly supervise their staff and ensure they were following the safe and required operating procedures. The employer also failed to be duly diligent and, "to adopt all reasonable means for the prevention of this most unfortunate accident." The reviewing officer found the death of the worker was substantially due to the employer's failure to adopt reasonable means for the prevention of injuries, death or occupational diseases.

(10) It was noted that the employer did not present any arguments concerning the quantum for a levy pursuant to section 73(1) of the Act. Considering the accident resulted in the death of the worker, the reviewing officer applied the maximum levy of $41,634.88. (The pension reserve on the claim for dependant's benefits exceeded $300,000.00.)

Law and Policy

(11) The following provisions of the Act are applicable to this decision.

(12) Section 73 of the Act provides:

73(1) If

(a) an injury, death or disablement from occupational disease in respect of which compensation is payable occurs to a worker, and

(b) the board considers that this was due substantially to

(i) the gross negligence of an employer,

(ii) the failure of an employer to adopt reasonable means for the prevention of injuries, deaths or occupational diseases, or

(iii) the failure of an employer to comply with the orders or directions of the board, or with the regulations made under Part 3 of this Act,

the board may levy and collect from that employer as a contribution to the accident fund all or part of the amount of the compensation payable in respect of the injury, death or occupational disease, to a maximum of $40,000.

(2) The payment of an amount levied under subsection (1) may be enforced in the same manner as the payment of an assessment may be enforced.
[B.C. REG 162-99, Oct 1 1999]

(13) Section 196 of the Act provides in part:

196(1) The board may impose an administrative penalty in accordance with this section if it considers that

(a) an employer has failed to take sufficient precautions for the prevention of work related injuries or illnesses,

(b) an employer has not complied with this Part, the regulations or an applicable order, or

(c) a workplace or working conditions are not safe.

. . .

(6) After considering any representations made by the employer under subsection (5) and any other information the board considers relevant, the board may, by order, impose an administrative penalty on the employer, subject to the limits that

(a) the employer is not liable to an administrative penalty if the employer proves that the employer exercised due diligence to prevent the failure,

non-compliance or conditions to which the penalty relates, and

(b) the board must not impose an administrative penalty greater than $500 000.

. . .

(9) If an administrative penalty is imposed on an employer, a prosecution under this Act for the same contravention may not be brought against the employer.

(14) The following are excerpts from policy of the Panel of Administrators that are applicable to this decision.

(15) Item D24-73-1 of the *Prevention Manual* provides in part:

RE: Imposition of Levies — Charging of Claim Costs

Section 73 authorizes the Board to charge claims costs to the employer in certain circumstances. The maximum of $40,000 is adjusted in accordance with the Consumer Price Index under section 25 of the Act.

. . .

This section may be applied if:

- the grounds for an administrative penalty under Item D12-196-1 are met; and
- a serious injury or disablement from occupational disease, or a death, results from a violation of the regulations.

A claim may be reopened at any time in the future and further costs may be incurred after the decision under section 73(1). The Board will charge the employer:

- the costs incurred up to the time of the decision; and
- any additional amounts that result from matters still under consideration by the Compensation Services Division or an appeal body under a current valid appeal.

Where appropriate, the Board will apply the policies and practices set out in the following Items to the charging of claim costs under section 73(1):

- D12-196-1, -2, -3, -4, -5;
- D12-196-8;
- D12-196-10, -11; and
- D16-223-1.

(16) Policy in the *Rehabilitation Services and Claims Manual* provides in part:

> **#115.20 Significance of Employer's Conduct in Producing Injury**
>
> *As an alternative* to the charge under section 73(2), penalty assessment may be levied under sections 70 and 73(1). These are general provisions allowing the Board to penalize employers for infractions of Occupational Safety and Health or First Aid Regulations or for other unsafe practices which apply whether or not an injury has occurred. Levies made under any of these sections are additional to the employer's ordinary liability to pay assessments and are credited to the Board's general funds rather than to the employer's class or subclass.
>
> [emphasis added]

Submissions

(17) The employer relies on the policy at #115.20 of the *Rehabilitation Services and Claims Manual*. The employer further relies on the reasoning of the majority in published Appeal Division Decision #98-1950, 15 *Workers' Compensation Reporter* 265. The employer objects to the reasoning expressed in subsequent unpublished Appeal Division Decisions #00-1160, 00-1434, and 2001-1547, which came to the opposite conclusion.

(18) The employer's lawyer notes that in 1998, the legislature passed *Bill 14* (which came into effect on October 1, 1999) The former s. 73(1) became s. 196, and the former s. 73(2) became s. 73(1). He submits that for the purposes of interpretation, the repeal and simultaneous re-enactment of substantially the same statutory provisions must be construed, not as an implied repeal of the original statute, but as an affirmation and continuance of the statute, and the rules which it expresses are deemed to remain in force without interruption [see *The Interpretation of Legislation in Canada*, Third Edition, Pierre-André Côté, p. 104, and *Smith* v. *ICBC*, (1981) 30 B.C.L.R. 31]. He submits that if an enactment is repealed and another enactment is substituted for it, the procedure established for the new enactment must be followed as far as it can be adapted in the recovery or enforcement of penalties and forfeitures incurred under the former enactment, in the enforcement of rights existing or accruing under the former enactment, and in a proceeding relating to matters that have happened before the repeal. This implies that regulations adopted under the authority of the earlier enactment giving effect to the previous statute apply in such a way as to permit operation of the new one.

(19) The employer's lawyer submits that policy #115.20 should be treated as equivalent to a regulation in respect of continuity upon the passing of replacement legislation. Accordingly,

policy #115.20 is still applicable to s. 73(1) and s. 196 of the current Act. He submits that while there are differences between s. 196 of the Act and s. 73(1) of the Act as it existed prior to October 1, 1999, these are not differences in substance (except that the current section gives the Board a discretion as to the amount of any claim costs levy under s. 73(1), whereas the former s. 73(2) required the Board to levy the entire amount of compensation that had been paid up to a specified cap).

(20) The employer's lawyer notes that the overall scheme of the Act is "no fault," and the old s. 73(2) and current s. 73(1) are exceptions to that general scheme. He submits that by policy, the Board has chosen to deal specifically with the interpretation of this section. Policy at #115.20 provides that: "As an alternative to the charge under section 73(2), penalty assessment may be levied under sections 70 and 73(1)." He argues that the Board as a matter of policy has clearly set out that levies under the old s. 73(1) and (2) are mutually exclusive. He notes that Decision #98-1950 invited clarification of the policy at #115.20 (at Volume 15, page 276), but none has been provided.

Findings and Reasons

(21) The initial Order in this case, and the June 12, 2001 notice letter to the employer, cited s. 115(2)(e) of the Act concerning the employer's obligation to provide instruction, training and supervision to workers. The November 15, 2001 decision referred only to s. 115(2)(f) of the Act, concerning an employer's obligation to make a copy of the Act and regulations available for review by the employer's workers. The references to s. 115(2)(f) were evidently intended to refer to s. 115(2)(e). While this error was unfortunate, we note that the employer does not appear to have been misled by the incorrect references in the decision. We infer that the employer was aware that those references in the decision were concerned with the employer's responsibilities under s. 115(2)(e), rather than (f).

(22) The employer has no objection to the $10,000 administrative penalty, except in relation to the claim costs levy (of $41,634.88) being applied together with the administrative penalty. The employer's appeal concerning the imposition of a claim costs levy under s. 73(1), is brought under section 96(6)(c) of the Act. This requires that grounds be established for the employer's appeal, of error of fact or law or contravention of published policy.

(23) The employer has elected to restrict its appeal to the issue of law and policy as to whether it is appropriate or legally permissible to apply a s. 73(1) claim costs levy and an administrative penalty together. In this appeal, the employer does not ask the Appeal Division to review the facts, to determine whether there was any error of fact in the decision to impose a claim costs levy under s. 73(1). The employer's lawyer specifically advised that "the circumstances respecting the operation of the electric eye and the training related to it . . . need not be explored."

(24) The panel has acceded to the employer's request to address its appeal on this limited basis. The panel has, therefore, refrained from engaging in a fuller enquiry. The panel has not inquired into the facts to determine, for example, whether the panel would find gross negligence on the part of the employer pursuant to s. 73(1)(b)(i) of the Act. In view of the limited nature of this review, the panel will not address the argument presented in the February 19, 2002 submission

concerning the standard by which failures under s. 73(1) are to be measured.

(25) The Appeal Division will not provide declaratory opinions, on issues which are not necessary to the determination of an appeal. We find that the issue of law and policy raised by the employer (as to whether a claim costs levy under section 73(1) and an administrative penalty under section 196 may both be imposed in relation to the same event), is one which was addressed in the November 15, 2001 decision, and is properly before us on the employer's appeal.

(26) The employer's lawyer relies on published Appeal Division Decision #98-1950. That decision was based on the express wording of the policy at #115.20 of the *Rehabilitation Services and Claims Manual*, which was in effect at the time of the events addressed in that decision. While #115.20 remains in that Manual, it is stated to concern the Board's authority to levy penalty assessments under sections 70 and 73(1) as an alternative to a claim costs levy under s. 73(2) of the Act. The authority to impose a claim costs levy is now contained in s. 73(1) of the Act. The Board's authority to impose an administrative penalty is now contained in s. 196 of the new Part 3 to the Act, pursuant to the *Bill 14* amendments effective October 1, 1999.

(27) On its face, therefore, #115.20 is concerned with the relationship between the former s. 73(1) and (2). It is evident that #115.20 has not been reviewed by the Panel of Administrators in the context of the *Bill 14* amendments.

(28) The employer's lawyer argues that the policy at #115.20 concerning the application of s. 73(2) of the Act continues to speak to the application of the similarly worded s. 73(1). We have considered, in this regard, whether the policy at #115.20 concerning the relationship between s. 73(1) and (2), continues to apply in respect of the relationship between the current s. 73(1) and section 196 of the Act.

(29) In considering this issue, we note that *Bill 14* resulted in very substantial revisions to the Act effective October 1, 1999. These statutory amendments were made effective prior to the accident on December 14, 1999 which gave rise to these appeals.

(30) Previously, section 73(1) and (2) were both contained in Part 1 of the Act. Appeals under section 73(1) and (2) were both under s. 96(6) of the Act. Currently, section 73(1) is in Part 1, and section 196 is in Part 3 of the Act. Different appeal processes apply to decisions under section 73(1), and section 196 of the Act. Some of the points on which these appeal mechanisms differ concern:

- whether there is authority to grant an extension of time to appeal;
- the applicability of the 90-day time frame for Appeal Division decision-making;
- requirement for appeal grounds of an error of fact or law or contravention of published policy;
- requirements for posting notices;

- standing of worker, union or other aggrieved person to appeal;
- requirement for service by registered mail or other means; and,
- power to issue a stay.

(31) On August 1, 1999, the Panel of Administrators approved a resolution entitled *Policies to Implement Bill 14 — Workers Compensation (Occupational Health and Safety) Amendment Act, 1998*.

(32) While not necessary to our decision, we note that another policy in the *Rehabilitation Services and Claims Manual* which was affected by *Bill 14* was previously set out at #94.20 of that Manual. An Appeal Division decision dated February 28, 2001 (#2001-0416) noted:

> In view of the repeal of section 13(2) of the *Act* effective October 1, 1999, I would flag the need for revision of the policy at #94.20. Given the extensive provisions contained in the new Part 3 of the *Act*, and the fact that those provisions are largely dealt with by the prevention division rather than the compensation services division, there would appear some risk of such situations not being appropriately addressed under the new sections of the *Act* unless guidance is provided by policy to board officers in the compensation services division. Coordination between the compensation services division and the prevention division will likely be required to ensure that such issues are addressed under the current provisions of the *Act*.

(33) By resolution dated July 17, 2001 (*Re: Claims Avoidance)*, the Panel of Administrators amended policy item #94.20 of the *Rehabilitation Services and Claims Manual*. That amendment was stated to recognize the repeal of s. 13(2), the enactment of section 177 of the Act regarding attempts to prevent reporting, and the Board's authority to levy an administrative penalty in respect of a violation of s. 177. These policy changes were made effective August 1, 2001. The new policy at #94.20 also states:

> As an alternative to imposing an administrative penalty, the Board may refer the case to Crown Counsel for consideration of prosecution.

(34) (This new policy uses the phrase "as an alternative," in connection with the statutory prohibition in s. 196(9) to bringing a prosecution where an administrative penalty has been imposed. This usage tends to confirm the interpretation of the phrase "as an alternative" in the policy at #115.20, which was applied in Decision #98-1950.)

(35) The Panel of Administrators has undertaken a process for consolidating the policies contained in the Prevention Division's *Policy and Procedure Manual* into the new *Prevention Manual*. The amendment of #94.20 on August 1, 2001, in light of the *Bill 14* amendments effective October 1, 1999, suggests that the policies in the *Rehabilitation Services and Claims Manual* had not previously been fully reviewed to ensure they remained valid in light of the *Bill 14* amendments.

(36) We appreciate that the wording of the current s. 73(1) is similar to the wording of the prior s. 73(2), and the wording of the current s. 196 is similar to the wording of the former s. 73(1).

However, we do not consider that this is a situation involving the repeal and simultaneous re-enactment of substantially the same statutory provisions. The new Part 3 of the Act contains very substantial changes to the Act, with many significant differences. We do not consider that this is a case where the prior policy can be assumed to speak to the new provisions in the Act. Accordingly, we do not find that this is a situation involving a simple affirmation and continuance of the statute, so that the policies may be viewed as remaining in force without interruption. The policy at #115.20, which concerned the relationship between the former s. 73(1) and (2) of the Act, cannot, in our view, reasonably be assumed to reflect the current intention of the Panel of Administrators in terms of providing policy guidance concerning the relationship between the current s. 73(1) and s. 196 of the Act.

(37) Accordingly, we conclude that one cannot assume that #115.20 applies to the new section 73(1). To the extent #115.20 provided guidance concerning the relationship between section 73(1) and (2), we do not consider that it can be safely inferred that this same guidance would apply concerning the relationship between section 73(1) and the new provisions for administrative penalties under Part 3, given the extent of the revisions to the Act set out in Part 3.

(38) Section 196(9) of the Act expressly prohibits the Board from bringing a prosecution against an employer, where an administrative penalty has been imposed on the employer. There is no provision in the Act to expressly prohibit the Board from imposing an administrative penalty under s. 196, and a claim costs levy under s. 73(1), in connection with the same event. We do not consider that the wording of the Act necessarily requires that s. 73(1) and s. 196 be mutually exclusive.

(39) The employer's payroll for 1999 was close to seven million dollars. Pursuant to the Panel of Administrators' resolution dated September 21, 1999, published at 15 *Workers' Compensation Reporter* 585, the *Recommended Schedule of Sanctions* in effect in December, 1999 provided for an administrative penalty of $10,000.00 (based on a Type III violation, and a payroll of $5.7 to 11.4 million). Under the current schedule approved under the *Bill 14* amendments, the "basic amount" of the administrative penalty would be $68,250 plus 0.125% of payroll over 5,000,000, or $75,000, whichever is less. Having regard to the substantially increased range of administrative penalties currently being imposed, it may be that the arguments against imposing both an administrative penalty and a claim costs levy are now even more compelling. However, that remains a policy issue, on which the Panel of Administrators may provide direction. Alternatively, it is an issue which could be expressly addressed in the Act, in similar fashion to s. 196(9).

(40) For the purposes of our decision, we need not contemplate what new policy might be developed concerning the relationship between s. 73(1) and s. 196. Conceivably, the Panel of Administrators might choose to adopt a policy requiring the Board to choose between imposing a claim costs levy under s. 73(1) or imposing an administrative penalty under s. 196. However, the issue before us in this appeal is whether the November 15, 2001 decision involved an error of law or policy, in imposing a claim costs levy under section 73(1), in addition to an administrative penalty under section 196 of the Act. As set out above, we consider that the policy at #115.20 is obsolete, in view of the October 1, 1999 changes to the Act. In the absence of any guidance from policy at #115.20, we are not persuaded that the board officer erred in law or policy by

imposing a claim costs levy under section 73(1), in addition to an administrative penalty under section 196 of the Act.

(41) Decision #98-1950 stated at page 276 of Volume 15 of the *Workers' Compensation Reporter*:

> Having regard to the concerns expressed in the dissent, we will ask the chief appeal commissioner to refer this decision to the attention of the panel of administrators. Consideration might be given to whether the policy currently contained at #115.20 of the *Rehabilitation Services and Claims Manual* would be better placed in the *Occupational Safety and Health Division Policy and Procedure Manual*, and whether any changes to the wording of the policies may be appropriate in respect of the apparent contradiction between them. While we consider that the policies are reasonably interpreted in a fashion which resolves this seeming contradiction, it would be desirable that the wording be clarified to remove any question as to their intended effect. Consideration might also be given to providing additional policy guidance as to the general circumstances in which consideration will be given to levying the costs of a claim against an employer under section 73(2) of the *Act*.

(42) In view of our conclusion that the policy at #115.20 is obsolete, based on its reference to the authority in s. 73(2) to impose a claim costs levy, a review of #115.20 is clearly required. The chief appeal commissioner will bring this concern to the attention of the Panel of Administrators. It may well be desirable, in any review of #115.20, to provide additional policy guidance as to the general circumstances in which consideration will be given to levying the costs of a claim against an employer under section 73(1) of the Act, and concerning the situations in which the maximum amount under s. 73(1) should be levied. This might include policy direction as to the meaning and application of the situations in section 73(1)(b) of the Act.

Conclusion

(43) The employer's appeal is denied. The November 15, 2001 decision did not err in law or policy in imposing a claim costs levy under section 73(1) in addition to an administrative penalty under section 196 of the Act.

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

WORKERS' COMPENSATION

REPORTER

Decision of the Appeal Division

Number: 2002-2402
Date: September 16, 2002
Panel: Paul Petrie
Subject: Whether a Panel Member's Prior Treatment of an Issue Constitutes a Reasonable Apprehension of Bias and Disqualifies Him From Participating on a Reconsideration Panel

APPEAL DIVISION (RECONSIDERATION) (PRACTICE AND PROCEDURE) (APPREHENSION OF BIAS) — Worker seeks reconsideration of Appeal Division Decision No. 2001-1600 where a three person non-representational panel considered an allegation of an apprehension of bias against one of its members — The panel adopted the position that appeal commissioners' prior treatment of an issue does not necessarily require disqualification unless they are unable to approach the determination of the matter with an open mind — Analysis using an "objective standard based on what an informed, reasonable person would conclude, viewing the matter realistically and practically, and having thought the matter through" was accepted as applicable — Further, the panel concluded that a commissioner's participation on a panel that addressed the apprehension of bias objection regarding him, did not offend natural justice — The policy requiring no special perspective for non-representational appeal commissioners background training and experience of the panel member was considered consistent with perscribed qualifications of appeal commissioners and The Appeal Division panel rejected institutional bias arguments and determined the Appeal Division structure had sufficient institutional independence — Application for reconsideration denied.

Law: *WCA* (1996): s. 85(1), s. 96.1(1)

Policy: Appeal Division Decision No. 93-0740, 10 *Workers' Compensation Reporter* 127; Appeal Division Decision No. 33, 17 *Workers' Compensation Reporter* Appendix "O"; *Appeal Division Code of Conduct*, 17 *Workers' Compensation Reporter* Appendix "L"; *Decision No. 2 of the Governors*, 7 *Workers' Compensation Reporter* 13

Decisions: Appeal Division Decision No. 93-1687, 10 *Workers' Compensation Reporter* 211; *Committee for Justice and Liberty* v. *National Energy Board* (1976), 68 D.L.R. (3d) 716 per Laskin C.J.C.; [1978] 1 S.C.R. 369 per de Grandpré (S.C.C.); *Nfld. Telephone Co.* v. *Nfld. (Board of Commissioners of Public Utilities)* (1992), 89 D.L.R. (4th) 289 (S.C.C); Appeal Division Decision No. 92-0818, 8 *Workers' Compensation Reporter* 211; *Van Unen* v. *B.C. (Workers' Compensation Board)* 17 *Workers' Compensation Reporter* 305, 87 B.C.L.R. (3d) 277 (B.C.C.A.); Appeal Division Decision No. 98-2016 (unreported decision); Appeal Division Decision No. 99-1074 (unreported decision); *Arsenault-Cameron* v. *Prince Edward Island*, [1999] 35 S.C.R. 851; *Canadian Union of Public Employees, Local 963* v. *New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Suranyi* v. *W.C.B.*, 15 *Workers' Compensation Reporter* 491 (B.C.S.C.); *Regina* v. *Valente*, [1985] 2 S.C.R. 673; *Canadian Pacific Ltd.* v. *Matsqui Indian Band*, [1995] 1 S.C.R. 3; *2747-3174 Quebec Inc.* v. *Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919; Appeal Division Decision No. 96-0272, 12 *Workers' Compensation Reporter* 291; Appeal Division Decision No. 2001-0934-0935, 17 *Workers' Compensation Reporter* 383; *Baker* v. *Minister of Citizenship and Immigration*, [1999] 2 S.C.R. 817

18 *Workers' Compensation Reporter* p. 871

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(1) The worker seeks reconsideration of the August 14, 2001 Appeal Division Decision #2001-1600. In that decision a three-person panel of non-representational appeal commissioners considered an allegation of an apprehension of bias against one of the panel members advanced by the

worker's counsel. Counsel for the worker alleged that the panel member, Mr. O'Brien, could not be expected to fairly and independently adjudicate the legal costs issue raised in the appeal. Counsel for the worker based the allegation on the contention that the panel member was "well known for . . . always deciding against awarding legal costs to disabled workers" (counsel's emphasis). In support of the allegation counsel submits that the panel member was on the panel that issued Appeal Division Decision #93-1687 (10 *Workers' Compensation Reporter* 211) which denied a worker's legal costs.

(2) In Decision #2001-1600 the panel concluded that the fact that an appeal commissioner has addressed a similar issue in the past does not necessarily disqualify him or her from addressing the issue again. The panel noted that Decision #93-1687 does not state that legal costs will never be awarded. The panel also concluded that the panel member's presence on the panel did not contravene the rules of natural justice or procedural fairness.

(3) On August 31, 2001 counsel wrote to the chief appeal commissioner seeking reconsideration of Decision #2001-1600 on grounds that the panel member should not have participated in the decision on the issue of allegation of bias. He advised that a further detailed submission would be provided. He sought extensions of time to provide a submission in support of the reconsideration application on October 30, 2001, January 17, 2002 and April 2, 2002.

(4) In the submission of April 19, 2002 counsel for the worker again advances the worker's position that Mr. O'Brien's participation in the appeal raises a reasonable apprehension of bias because of his participation in Decision #93-1687. This 1993 decision, counsel submits, adopted the restrictive test for considering legal costs. Counsel also submits that Mr. O'Brien should be removed from the panel because he has never granted legal costs in a previous decision. Counsel also argues that the panel member's lack of legal training and his prior involvement in management on behalf of employers raises a reasonable apprehension of bias. Counsel asserts that the panel in Decision #2001-1600 applied the wrong legal test. Counsel also raised the issue of "institutional bias" as a basis to find that:

> . . . the structure of the Appeal Division and/or the WCB itself justifies a reasonable apprehension of bias.

Jurisdiction

(5) Section 96.1(1) of the *Workers Compensation Act* (the Act) provides that a decision of the Appeal Division is final and conclusive. Section 96.1(3) provides the chief appeal commissioner with jurisdiction to reconsider an Appeal Division decision where there is substantial and material new evidence provided that was not available at the time of the decision. In addition, Appeal Division Decision #93-0740 "Reconsideration of Appeal Division Decisions" (10 *Workers' Compensation Reporter* 127) provides that the chief appeal commissioner has the common law authority to reconsider Appeal Division decisions on the basis of clerical mistakes or omissions, fraud, or an error of law going to jurisdiction, including a breach of the rules of natural justice. In Appeal Division Decision #33 (17 *Workers' Compensation Reporter* Appendix "O") the chief appeal commissioner delegated to all non-representational appeal commissioners the

authority to reconsider a matter pursuant to section 96.1(3) of the Act or the common law grounds for reconsideration in Decision #93-0740. The Code of Conduct for Appeal Commissioners (Decision #33, Appendix "L") provides that the panel assigned to consider the appeal will decide an allegation of a conflict of interest in the first instance. Any application for reconsideration of the panel's decision on the allegation of bias is referred to the deputy chief appeal commissioner for a final determination.

(6) Because the application alleges a breach of natural justice in Decision #2001-1600 the standard of review is one of correctness. If I find a breach of natural justice on this reconsideration, the original panel's decision can be set aside.

Issue(s)

(7) The issue is whether the assignment of the worker's appeal to a panel which includes Mr. O'Brien gives rise to a reasonable apprehension of bias.

(8) Counsel requested an oral hearing or a conference call. After considering the narrow issue raised in this application I find an oral hearing is not required to fully and fairly decide this reconsideration application.

Analysis and Reasons

(9) I have considered all of the issues, allegations and observations advanced by counsel on behalf of the worker. My analysis of the main issues is as follows:

1. The Proper Legal Test for Determining a Reasonable Apprehension of Bias

(10) Counsel submits that the August 14, 2001 decision failed to articulate and apply the proper test:

> The test is not whether the Appeal Commissioners subjectively consider there to be a reasonable apprehension of bias or a breach of the rules of natural justice.

(11) The panel in Decision #2001-1600 addressed the question of the legal test to be applied to the allegation of an apprehension of bias in this case in paragraphs 8 through 12 of that decision. The panel noted that the question of a reasonable apprehension of bias was raised by counsel in another decision of the Appeal Division involving the same worker (Appeal Division Decision #98-2016). The panel quoted from that decision with respect to the test commonly applied by the courts for determining whether a reasonable apprehension of bias exists and cited two key cases from the Supreme Court of Canada detailing the appropriate tests: *Committee for Justice and Liberty* v. *Canada (National Energy Board)* (1976), 68 D.L.R. (3d) 716 at 722, 723, per Laskin C.J.C. (S.C.C.); and *Nfld. Telephone Co.* v. *Nfld. (Board of Commissioners of Public Utilities)* (1992), 89 D.L.R. (4th) 289 (S.C.C.). It is well established in *Nfld. Telephone Co.* at 297:

> The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.

(12) In the words of Mr. Justice de Grandpré in *Committee for Justice and Liberty* v. *National Energy Board*, [1978] 1 S.C.R. 369:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude . . ."

(13) This is the standard (or test) that has been incorporated in the Appeal Division's Code of Conduct developed for the guidance of appeal commissioners (17 *Workers' Compensation Reporter* Appendix "L"):

> . . . an "apparent conflict of interest" exists when a reasonable, well-informed person could have a reasonable perception that the existence of a personal attitude, interest (either pecuniary or non-pecuniary), relationship or association (past or present) could impair the appeal commissioner's ability to discharge her/his duties fairly and impartially . . .

(14) After reviewing the panel's analysis and reasons in Decision #2001-1600 I am satisfied they applied the appropriate legal test as detailed in the court decisions which they cited and in accordance with the test in the Code of Conduct.

(15) Counsel provided an affidavit in which the worker objected to the August 14, 2001 decision being reached without the benefit of an oral hearing. I consider that the issue raised in the allegation of an apprehension of bias before the panel in Decision #2001-1600 could be fully and fairly considered by way of written submissions.

(16) The worker alleged that:

> [The] WCB Appeal Division members are concerned to cover for each other and keep their jobs and to avoid the appearance of any conflict amongst themselves.

(17) No evidence was provided to support this allegation.

(18) As noted by a former chief appeal commissioner in Appeal Division Decision #92-0818 (8 *Workers' Compensation Reporter* 211):

> While appearances are an essential part of the test of reasonable apprehension of bias, mere suspicion of bias does not suffice. The apprehension of bias must be a reasonable one, held by a reasonable person.

(19) The worker's unsupported suspicions are not sufficient to establish a reasonable apprehension of bias.

2. The Panel Member's Participation in Decision #93-1687

(20) Counsel for the worker submits it was "an error in principle" for the panel to treat Decision #93-1687 as if it were just another decision. Counsel says:

> This was a special panel adopting a broad policy rule which effectively denied all legal costs (for 8 years, as it turns out) by adopting a radically restrictive test (undefined and unillustrated) of "flagrant abuse of process".
>
> (reproduced as written)

(21) Counsel submits that the court's decision in *Van Unen* v. *B.C. (Workers' Compensation Board)* 17 *Workers' Compensation Reporter* 305, also 87 B.C.L.R. (3rd) 277, (British Columbia Court of Appeal)

> . . . reviewed and effectively amended Appeal Division decision #93-1687 (in which Commissioner O'Brien participated) and set new tests for when legal fees should be paid by the WCB.

(22) In the B.C. Court of Appeal decision in *Van Unen* Mr. Justice Lambert had this to say about the application of Decision #93-1867 to the two Appeal Division decisions that denied legal costs in that case:

> 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.

(23) As noted by the panel in Decision #2001-1600, and acknowledged by the Court of Appeal in *Van Unen*, Decision #93-1687 does not state that legal costs will never be awarded.

(24) The panel in Decision #2001-1600 provided detailed references on this point from decisions #98-2016 and #99-1074 to support their conclusion that the fact that an appeal commissioner has addressed a similar issue in the past does not necessarily disqualify him or her from addressing the issue again.

(25) In Decision #98-2016 the panel cited the following excerpt from the text *Administrative Law* (David J. Mullan, 1996) at page 300:

> > The continuing nature of their responsibilities means that many statutory decision-makers deal with the same persons on more than one occasion and also the same or related issues. This is not of itself a basis for alleging a reasonable apprehension of bias.
>
> We note a decision by the Canadian labour relations board, *VGH and BCNU [1982]* 3 Can L R B R 349, which referred to Mullan and stated at p.354 that "a reasoned decision setting out a particular principle in one case does not attach to that panel, or a member of it, a reasonable apprehension of bias when a similar issue arises later". The decision also stated that "[t]he Legislature and labour relations community anticipate that panel members will be involved in many cases with similar facts and that their expertise is desirable because of their familiarity and experience with labour relations issues".
>
> We have found no authority that contradicts Mullan. That is, we have found no authority that would support counsel's position that a decision-maker ought not to hear a case if he (or she) has decided a similar issue in the past.

(26) The worker through his counsel sought a reconsideration of Decision #98-2016 which was considered by a former chief appeal commissioner in Decision #99-1074. In that decision the chief appeal commissioner addressed counsel's reiteration of the same allegation as follows:

> . . . However, counsel has only sought to answer in passing the original panel's conclusion that it found no authority that would support counsel's position that a decision-maker ought not to hear a case if he or she has decided a similar issue in the past. I do not find counsel's comments in this regard persuasive. I agree with the statement from Mullan and the British Columbia Labour Relations Board decision cited by the original panel. I also agree with the original panel when they state:
>
> > While appeal commissioners will remove themselves from a panel if they consider that their participation would involve a reasonable apprehension of bias, having regard to the authorities cited above it is not generally contemplated that appeal commissioners will disqualify themselves simply because he or she has addressed a similar issue in the past. Given the number of related issues which come before the Appeal Division on a frequent basis, such an approach would quickly curtail the

> Appeal Division's capabilities for hearing appeals. Appeal commissioners have, therefore, a responsibility to proceed with the hearing of a matter, unless they consider that they are unable to approach the determination of the matter with an open mind.

(27) Counsel has provided no further argument or authority that would undermine the analysis in decisions #98-2016 and #99-1074. I find that the above analysis in those decisions continues to apply in this application. I agree with the panel's conclusion in Decision #2001-1600 that Mr. O'Brien's participation in Decision #93-1687 does not create a reasonable apprehension of bias with respect to his participation in the worker's appeal from the Review Board finding of October 6, 2000.

(28) I have also considered counsel's argument that Mr. O'Brien should not have participated in the August 14, 2001 decision which initially considered the worker's allegation of an apprehension of bias. His participation in that decision is consistent with the practice established in the Appeal Commissioners Code of Conduct (Appendix "L" item 2.7). Where the initial panel dismisses the allegation, parties have the opportunity to have the allegation considered afresh by the deputy chief appeal commissioner. Mr. O'Brien's participation in the initial consideration does not, in my view, offend natural justice. I note this practice of decision-makers first considering bias allegations against them has been used by the Supreme Court of Canada: *Arsenault-Cameron* v. *Prince Edward Island, [1999]* 35 S.C.R. 851. As noted by Mr. Justice Bastarache in that decision:

> The test for apprehension of bias takes into account the presumption of impartiality. A real likelihood or probability of bias must be demonstrated.

3. The Panel Member's Training and Experience

(29) Counsel's submission with respect to Mr. O'Brien's training and work history implies that his employment as an appeal commissioner raises a reasonable apprehension of bias. Mr. O'Brien was first appointed as a non-representational appeal commissioner in June 1991 at the inception of the Appeal Division. As noted in the June 1992 Appeal Division annual report Mr. O'Brien had previously served as a member of the Boards of Review starting in December 1985, and became a vice chair of the Review Board in February 1988. Prior to joining the Boards of Review he had extensive experience in labour relations and hospital administration. He has also served as the administrative chair of the Review Board.

(30) Section 85(1)(b) of the Act provides for the appointment of appeal commissioners by the chief appeal commissioner. Decision #2 of the governors (7 *Workers' Compensation Reporter* 13) establishes the policy for selection of appeal commissioners. That policy provides that non-representational appeal commissioners will have no special perspective although they may have had either an employer or worker perspective in their background. That policy also outlines a list of 13 qualifications that an appeal commissioner might possess.

(31) Mr. O'Brien's background, training and experience are consistent with the prescribed qualifications of appeal commissioners. His continuing contribution to the workers' compensation appeal system over the last 17 years is well established and exemplifies the level of expertise relied on by the courts in exercising deference to decisions of administrative tribunals (see, for example, *Canadian Union of Public Employees, Local 963* v. *New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227).

(32) Counsel's submission on this point has little substance or merit and in my view requires no further analysis or comment.

4. The Panel Member's Adjudicative History

(33) Counsel seeks to establish that that Mr. O'Brien has never granted legal costs, which in his submission raises a reasonable apprehension of bias. A review of Appeal Division decisions publicly available on the internet since January 2000 (at http:\\www.worksafebc.com.) shows that Mr. O'Brien has considered seven cases involving "legal costs" and has not found sufficient exceptional circumstances to warrant granting legal costs in these cases. This fact, by itself, does not in my view establish a reasonable apprehension of bias. As noted below, the courts have recognized that legal fees are seldom granted under the *Workers Compensation Act* and policy unless there are exceptional circumstances that warrant granting such costs.

(34) Counsel's argument if embraced would indicate that only appeal commissioners who had previously granted legal costs or who had never before considered the issue of legal costs would be untainted and thus immune from a bias allegation.

(35) In an application by counsel for the worker under the *Judicial Review Procedure Act* the worker sought to have the court make an order for the Board to pay his legal fees in his claim. That application was considered by the British Columbia Supreme Court in the case of *Suranyi* v. *WCB* (B.C.S.C., published at 15 *Workers' Compensation Reporter* 491). In that May, 1999 judgement Mr. Justice Edwards concluded that the application for an order for reimbursement of legal fees and costs "must be dismissed." Mr. Justice Edwards stated:

> It should not come as a surprise to Mr. Suranyi and his advisors that the Board does not generally pay legal fees. It is apparently well known in the legal community, members of which deal with the WCB, that that policy has been in effect for some period of time and is seldom breached.

(36) The British Columbia Court of Appeal in *Van Unen* approved the interpretation of s. 100 which allows for acceptance of legal costs in exceptional circumstances. The fact that the panel member has not yet granted legal costs in a particular case does not by itself raise a reasonable apprehension of bias. The panel's adjudicative history may simply be a reflection of the fact that in the small number of cases where this issue has been considered by the panel member, the requisite exceptional circumstances have not existed.

(37) The panel member's adjudicative history on this issue is consistent with the court's approval of limiting acceptance of legal costs to exceptional circumstances and does not provide support for the allegation of an apprehension of bias.

5. Institutional Bias

(38) Counsel notes that the worker had not previously argued "institutional bias." However, counsel submits that there are a number of factors that would support an argument of institutional bias including:

- The contract terms of the commissioners being very limited;
- The fact that the commissioners are WCB employees with WCB benefits, including pensions, paid by the WCB;
- The Appeal Division is physically located inside the WCB's main office and the appeal commissioners and their support staff interact with the rest of the WCB in meetings, conferences, the lunch room, and seminars.

(39) Counsel submits that the structure of the Appeal Division and the Workers' Compensation Board (the Board) justifies a reasonable apprehension of bias. Counsel has raised similar allegations in this case in 1999 when he sought reconsideration of Decision #98-2016 which denied this worker's previous application that a member of that panel remove himself on the basis of a reasonable apprehension of bias. In the 1999 application for reconsideration, counsel for the worker also belatedly raised the issue of institutional bias. In that prior application (Decision #99-1074) the chief appeal commissioner dismissed the allegation with detailed reasons. In that decision, the chief appeal commissioner addressed counsel's arguments regarding institutional independence and the allegation of institutional bias with reference to Supreme Court of Canada decisions on institutional independence (*Regina* v. *Valente*, [1985] 2 S.C.R. 673, *Canadian Pacific Ltd.* v. *Matsqui Indian Band*, [1995] 1 S.C.R. 3, and 2747-3174 *Québec Inc.* v. *Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919).

(40) The chief appeal commissioner provided detailed reasons to support her conclusion that counsel's assertions did not provide a sufficient basis to establish a reasonable apprehension of bias with respect to institutional independence. I agree with her analysis and conclusions.

(41) Counsel also raised similar arguments regarding the issue of independence of the Appeal Division in a separate matter (see Decision #96-0727 published in the *Workers' Compensation Reporter* Vol. 12, p. 291). The panel in Decision #96-0727 dismissed counsel's application with reasons. That panel's analysis and conclusions are publicly available and I do not propose to repeat them here.

(42) Counsel for the worker seeks support for his application in Appeal Division Decision #2001-0934/0935 (17 *Workers' Compensation Reporter* 383). Counsel notes that that decision dealt with WCB occupational safety officers, not with Appeal Division commissioners. That decision analyzed a complex set of disputed facts arising in the context of an oral hearing. That

decision analyzed in detail the issue of procedural fairness and relied on the Supreme Court of Canada's decision in *Baker* v. *Minister of Citizenship and Immigration*, [1999] 2 S.C.R. 817. The panel reviewed the conduct of Board officers in arriving at decisions affecting the employer. The panel found a lack of procedural fairness in the Board's failure to give notice to the employer about new information provided to the initial decision maker and the resulting failure to provide the employer with an opportunity to respond to that new information. The panel concluded that the lack of procedural fairness in the context of evidence suggesting a lack of impartiality on the Board's part raised a reasonable apprehension of bias. I consider the facts and circumstances of Decision #2001-0934/0935 can be distinguished from the reconsideration application before me. Counsel has not established any basis to find a failure of procedural fairness in the panel's decision that is the subject of this reconsideration application.

(43) I have considered whether there is any other basis to find institutional bias in this matter, aside from the issues addressed in the decisions cited above. The Appeal Division is a separate division of the Workers' Compensation Board, accountable to the Board's governing body (the Panel of Administrators) with respect to administrative issues. The Appeal Division is structured in accordance with the provisions of the Act and operates independently with respect to its quasi-judicial functions in deciding appeals under the Act. A number of specific provisions of the Act underscore the independent decision making role of the Appeal Division.

(44) Section 85 is among those provisions and provides that the governing body of the Board appoints the chief appeal commissioner, and the chief appeal commissioner selects appeal commissioners in accordance with policies established by the Board's governing body. The governing body may not remove the chief appeal commissioner or any appeal commissioner because they have made a decision on an appeal with which the governors do not agree. Section 96.1(1) provides that a decision of the Appeal Division is final and conclusive.

(45) After considering the arguments raised by counsel and the provisions of the Act I find there is sufficient institutional independence in the structure of the Appeal Division to allow the panel to fully and fairly consider the issues raised in the worker's appeal.

Conclusion

(46) After considering the submissions raised by counsel on behalf of the worker, I deny the application for reconsideration of Decision #2001-1600. The test is an objective standard based on what an informed, reasonable person would conclude, viewing the matter realistically and practically, and having thought the matter through. I find that counsel has failed to meet this test in the circumstances of this case.

(47) The application for reconsideration is, therefore, denied.

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

WORKERS' COMPENSATION
REPORTER

Decision of the Appeal Division

Number: **2002-2482**
Date: **September 25, 2002**
Panel: **John Steeves**
Subject: **Appeal Division's Authority to Review Decisions of the Former Board of Commissioners**

RECONSIDERATION, APPEAL DIVISION (PRACTICE AND PROCEDURE) (COMMISSIONERS' DECISIONS) (NEW EVIDENCE) — A surviving granddaughter of a worker who died in 1959 requests a reconsideration of the 1959 decision by the former Board of Commissioners (the commissioners) to suspend the worker's claim for compensation for silicosis — At issue is whether the new evidence provisions of section 96.1 of the *Workers Compensation Act* (1996) (the Act) can apply by virtue of section 17(5) of the *Workers Compensation Amendment Act 1989* — The granddaughter submitted there were errors in interpreting medical evidence, and discrimination against her grandfather contrary to the anti-discrimination sections found in division 5 of the Act — The Appeal Division panel determined that section 17(5) of the *Workers Compensation Amendment Act 1989* only provides authority to reconsider the commissioners' decisions that were made under sections 91 and 96 of the Act as it read immediately before the amendments enacted came into force and the Appeal Division panel found that the 1959 decision was not made under section 91 or 96 of the former Act — The Appeal Division panel did not decide the precise date when the former Act came into force — Anti-discrimination sections of the Act were found not to apply retroactively before October 1, 1999 — The Appeal Division panel applied a standard of patently unreasonable to the 1959 decision pursuant to section 96(2) of the Act and concluded that there was no error of law going to jurisdiction — Appeal denied.

Law: *WCA* (1996): s. 96.1, s. 96(2); *Workers Compensation Amendment Act* (1989, Bill 27)

Policy: *RSCM*: #14.10, #14.20, #17.11, #22.10, #22.11, #74.11, #84.54, #111.10; #115.30, Appeal Division Decision No. 152; Decision No. 8 of the Governors 7 *Workers' Compensation Reporter*;

Decisions: *Atchison* v. *Workers' Compensation Board*, 2001 B.C.S.C. 1661, Victoria Registry, under appeal; *Chandler* v. *Alberta Association of Architects*, [1989] 2 S.C.R. 848; Appeal Division Decision No. 2001-0779 (published on Board website); Appeal Division Decision No. 92-0818, 8 *Workers' Compensation Reporter* 211; Appeal Division Decision No. 93-0640, 10 *Workers' Compensation Reporter* 101; Appeal Division Decision No. 00-0668, 16 *Workers' Compensation Reporter* 287

18 *Workers' Compensation Reporter* p. 881

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(1) This decision arises from a claim for silicosis by the worker which was made in 1958.

(2) Ultimately the Board suspended the worker's claim for compensation and he had an untimely death in 1959.

(3) In October 2001 the worker's granddaughter wrote to the Board requesting information about her grandfather's death. She challenged the Board's decision to suspend the worker's claim for silicosis and the Board confirmed the original 1959 decision in a decision dated November 2, 2001.

(4) The worker's granddaughter now requests reconsideration of the 1959 decision of the Board.

Issue(s)

(5) Whether the new evidence provisions of section 96.1 of the *Workers Compensation Act* apply to this application. Alternatively, whether the 1959 decision of the Board of Commissioners contains an error of law going to jurisdiction, applying authority pursuant to section 96(2) of the Act assigned to the Appeal Division.

Background

(6) The Board file indicates that the worker was employed as a hard rock miner from 1929 to 1947. There are various what appear to be routine medical examination reports from 1941 to 1947 and 1952 which indicate that the worker's health was normal.

(7) On August 25, 1958 the worker's union submitted an application for compensation on his behalf. This application was for work-related silicosis and the first date of disablement was listed as 1956. It appears that the worker stopped work as a miner on or about 1947.

(8) The worker attended a medical examination at the Board on December 16, 1958. The history taken indicated that he had been short of breath for five to six years. Also, at the beginning of 1958 he had been diagnosed as having cancer of the throat and had an operation for removal of his larynx and further related surgery in November 1958. An x-ray taken December 16, 1958 showed "widespread bilateral nodal silicosis with enlargement of both hylar shadows." The recommendation of the medical examination was as follows,

> This man has had extensive surgery for carcinoma of the throat. The x-rays while possibly showing some early silicotic changes, in our opinion, are more likely to be due to secondary cancer, particularly in view of the rapid progression in the last few months. In view of the fact that the man worked regularly until the beginning of the present year, we do not feel that we can determine that he had a substantially lessened capacity for work due to silicosis. We would recommend that the claim be put in suspense.

(9) This recommendation was accepted by the Board of Commissioners and communicated to the worker in a decision dated December 30, 1958.

(10) Beginning in January 1959 the worker's attending physician wrote to the Board to suggest that there was a bona fide medical dispute over the suspension of the worker's claim. Consideration was given to referral of the worker's claim to a panel of not less than three medical specialists pursuant to the then section 54A of the *Workmen's Compensation Act*. This was considered by the former Board of Commissioners, who then had responsibility for these matters, and a memo from the Board solicitor dated March 2, 1959 is as follows,

> This 64 year old workman has had extensive surgery for carcinoma of the throat. [Drs. K and M] indicate there may be some early silicosis but that the changes in the lungs are probably due to secondary cancer. They do not feel this workman has any substantially lessened capacity for work due to silicosis.

> We have received a letter from [Dr. B] who *thinks* that there is a bona fide medical dispute. This workman's last employment in the mining industry was in 1947 and he did not file an application until August 1958, more than five years after leaving the industry.
>
> *QUESTION?* Should this claim be allowed to proceed under Section 54A?
>
> [emphasis in original]

(11) There were three commissioners at the time. One answered the question posed by the solicitor as no, one answered "Discretionary No" and one answered yes.

(12) On this basis the solicitor of the Board advised the worker in a letter dated March 19, 1959 that his case did not appear to be one which was properly reviewable under section 54A of the *Workmen's Compensation Act*.

(13) The worker's condition deteriorated and he underwent a number of treatments including nitrogen mustard introduced into the chest cavity on several occasions. Unfortunately he died on September 12, 1959. An autopsy was performed on September 15, 1959 and widespread metastases involving several organs including the lungs was noted. The final pathological diagnoses were as follows,

1. Epidermoid Carcinoma of Larynx (Removed).
2. Widespread Metastases.
3. Right Pleural Effusion.
4. Hemorrhagic Cystitis.
5. Tracheostomy.

Submissions

(14) The granddaughter's efforts to seek information about her grandfather's compensation history began when she requested disclosure of his claim file, pursuant to freedom of information legislation, on October 9, 2001. This was provided on October 16, 2001. She then wrote to the Board on October 20, 2001 to request a review of the claim.

(15) The application before me begins with a letter dated November 7, 2001 from the Board to the granddaughter of the worker. The letter set out some of the history of the worker's claim and it included a copy of the memo dated March 2, 1959. The Board advised the granddaughter that there was no potential claim arising from the worker's silicosis condition or death. The letter also provided incorrect information about a right of appeal to the Review Board.

(16) On December 7, 2001 the granddaughter replied to the Board's letter. She included information she obtained from research she had done on her grandfather and she submitted he had been dismissed from his work because of his political beliefs. Division 5 of the Act, the protection against discriminatory action, was relied on. She requested that the Board "present" her

appeal to the Review Board or Appeal Division. A subsequent letter (May 6, 2002) from the Board advised the granddaughter that her grandfather's political views played no part in the decision that his cancer was not compensable.

(17) The granddaughter's request for an appeal ultimately was received by the Appeal Division and, in a letter dated April 19, 2002, she was advised by the Appeal Division of the remedies available to her. Since the decision she was challenging was a decision of the former Board of Commissioners she could apply for a reconsideration of that decision on the basis of new evidence pursuant to section 96.1 of the Act or on the basis of an error of law or breach of the *Canadian Charter of Rights and Freedoms*.

(18) The granddaughter provided a submission dated May 23, 2002 to the Appeal Division. By this time she had obtained information from her grandfather's claim file as a result of a request she made pursuant to freedom of information legislation. Her submission can be summarised as follows;

(a) She relied on sections 96(2) and 96.1 of the Act.

(b) She submitted that the Board applied improper procedures to her grandfather's claim for compensation and there was inconsistency of procedure and negligence.

(c) She submitted that the medical evidence was not properly assessed and appraised when it was looked at in 1963.

(d) The granddaughter pointed out that an x-ray report of December 16, 1958 described "wide-spread bilateral silicosis." On the basis of this report it is "questionable" and "mysterious" that the worker's claim was denied.

(e) The worker's union had written to the Board on July 16, 1959 to assist the worker. This was not given proper consideration, according to the granddaughter.

(f) The third concern of the granddaughter was that the Board's solicitor had questioned why the worker's claim had not been brought up each year since it was only suspended in 1958.

(g) Finally, the granddaughter relied on the autopsy report of September 15, 1959. She submits that it "neither confirms or excludes" that the cause of death was silicosis. The Board did not properly consider this report and, instead, "made up its own mind and decided to close the case."

(19) The worker's employer at the time of his claim in 1958 is no longer registered with the Board. The Appeal Division provided notice of the granddaughter's application to an industry association and invited their participation. This was done pursuant to the published practice and procedure of the Appeal Division. The industry association retained counsel who provided a submission dated July 24, 2002.

(20) Counsel points out that the industry association received only three documents with the invitation to participate. These were the granddaughter's letters of December 7, 2001 and May 23, 2002 and the Board's decision of March 2, 1959. This was done because the granddaughter received only the March 2, 1959 decision from the Board when she made her initial request for a review. It is the practice of the Appeal Division to provide limited disclosure of sensitive claim files in the case of most applications for reconsideration. If grounds for reconsideration are established then the Division provides full disclosure to the parties in order to redetermine the merits of the appeal.

(21) In this case the granddaughter was provided with the same disclosure as the employer but she was also able to get disclosure of the worker's file through freedom of information legislation. Apparently the industry association did not apply or, if they did apply, they were not entitled to disclosure on this basis. In these circumstances I considered whether to provide full disclosure to the industry association so they would have the same information as the granddaughter. However, in light of the decision I have made, I decided not to open up the appeal process again to provide disclosure and then receive submissions.

(22) Counsel for the industry association makes a number of jurisdictional arguments as part of a general submission that the Appeal Division does not have authority to consider the granddaughter's appeal.

Appeal Division Jurisdiction on an Application for Reconsideration

(23) The Appeal Division has the authority to reconsider previous decisions from two sources.

Section 96.1 of the Act

(24) Section 96.1 of the Act can apply to reconsiderations in two ways. First, that provision states that the Appeal Division can reconsider its own decisions on the basis of new evidence that is material, substantial and which complies with a due diligence test. Since the matter before me is an application to reconsider a former Board of Commissioners' decision, and not a decision of the Appeal Division, section 96.1 has no application to my decision.

(25) The legislature has also authorized the Appeal Division to reconsider former Board of Commissioners' decisions on the basis of the new evidence provisions in section 96.1. This is provided for in section 17(5) of the *Workers Compensation Amendment Act* (1989, Bill 27) in the following terms,

> A worker, the worker's dependants, the worker's employer or the representative of any of them may apply to the chief appeal commissioner for reconsideration of a decision made under section 91 or 96 of the former *Workers Compensation Act* on the same grounds and in the same manner as that set out in section 96.1 of the new *Workers Compensation Act*.

(26) Bill 27 also defines "former *Workers Compensation Act*" to mean,

> . . . the *Workers Compensation Act* as it read immediately before the amendments enacted by this Act came into force;

(27) As will be seen these provisions are significant for my decision.

(28) Since this does provide authority to reconsider former Board of Commissioners' decisions and since the granddaughter specifically relies on this provision it is clearly a matter I must consider. Counsel for the industry association submits that section 17(5) has no application.

The Common Law

(29) There is common law authority for the Appeal Division to reconsider its own decision if that decision is a nullity (*Atchison* v. *Workers' Compensation Board*, 2001 B.C.S.C. 1661, Victoria Registry, under appeal; *Chandler* v. *Alberta Association of Architects*, [1989] 2 S.C.R. 848). Where a tribunal has made an error of jurisdiction, it is entitled to correct that error. Again, the application before me does not involve a request to reconsider an Appeal Division decision.

(30) Section 96(2) of the Act gives the Board a broad power to, at any time and at its discretion, reopen, rehear and redetermine any matter which has been dealt with by the Board or by an officer of the Board.

(31) In Decision No. 8 of the governors (7 *Workers' Compensation Reporter* 171) the governing body of the Board assigned to the Appeal Division the authority to reopen, rehear and redetermine previous decisions of the Board of Commissioners. It is in the following terms,

> RESOLVED THAT the Appeal Division of the Workers' Compensation Board of British Columbia shall exercise the authority of the Workers' Compensation Board of British Columbia under section 96(2) of the *Workers Compensation Act* to reopen, rehear and redetermine any decision made by the former Commissioners prior to June 3, 1991, where the Chief Appeal Commissioner finds that the decision was based upon an error of law or involved or involves an issue under the *Canadian Charter of Rights and Freedoms*; and that the appropriate amendments be made to the *Rehabilitation Services and Claims Manual*, *Assessment Policy Manual* and *Occupational Safety & Health Division Policy and Procedure Manual*.

(32) In Decision #93-0640 (10 *Workers' Compensation Reporter* 101 at 108) a former chief appeal commissioner considered the assignment from the governors and whether the Appeal Division had the authority, at common law, to reconsider a previous decision of the Board of Commissioners or the Appeal Division. Her conclusion was that the Appeal Division had the authority to review prior decisions on the basis of an error of law going to jurisdiction, including breaches of the rules of natural justice or for clerical mistakes or omissions and fraud. Further, when the Appeal Division applies the "error of law" review to a decision protected by a privative clause

the patently unreasonableness test is used, unless the issue is one involving issues of natural justice in which case the test is a broader one of correctness (Decision #92-0818, 8 *Workers' Compensation Reporter* 211 at 217).

(33) The result is that the Appeal Division can reconsider a former Board of Commissioners' decision on the basis of an error of law, error of law going to jurisdiction including breaches of natural justice, clerical mistakes, omissions, fraud or an issue involving the *Charter*. This authority is specifically relied on by the granddaughter in the case before me. Counsel for the industry association submits there was no error of law or violation of the *Charter* in the 1959 decision of the Board.

(34) I note that the *Canadian Charter of Rights and Freedoms* came into force in 1982 and 1985. For this reason the *Charter* has no application to the matter before me.

Decision and Reasons

(35) As above I am required to consider the application before me on the basis of new evidence that complies with section 96.1 of the Act (on the basis of section 17(5) of the W*orkers Compensation Amendment Act 1989)* and on the basis of the section 96(2) reconsideration power assigned to the Appeal Division by the former Board of Governors.

Reconsideration on the Basis of New Evidence

(36) Again, the facts before me are that the worker's application for compensation was suspended in a decision of the former Board of Commissioners from March 1959. I am authorized by the legislature (pursuant to section 17 of the 1989 legislation) to reconsider a decision of the former Board of Commissioners on the basis of new evidence as long as the decision of the commissioners was made under "section 91 or 96 of the former *Workers Compensation Act*."

(37) A threshold question arises as to whether the application before me raises a "decision made under section 91 or 96 of the former *Workers Compensation Act*." The key phrase here is "former" and the obvious intent of section 17(5) was to provide authority for decisions made by the Board of Commissioners under the former Act, rather than all previous Acts.

(38) As counsel for the industry association points out a similar situation was considered in a previous decision of the Appeal Division, #2001-0779. The estate of the widow of a worker requested reconsideration of a 1956 decision of the former Board of Commissioners. In Decision #99-1606 a panel found that grounds for reconsideration existed on the basis of new medical evidence and applying section 96.1 of the current legislation and section 17(5) of the 1989 legislation. However a subsequent panel in Decision #2001-0779 found that Decision #99-1606 was tainted by an error of law going to jurisdiction and that it should be reconsidered by the Appeal Division.

(39) The reasoning of the panel in Decision #2001-0779 relied on the phrase "former *Workers Compensation Act*" from section 17 of the 1989 legislation. The summary of the panel's decision includes the following,

> I have determined that the 1956 and 1957 decisions of the Board were made by the commissioners of the Board. They were, however, not decisions "made under Section 91 or 96 of the former *Workers Compensation Act"* is (sic) defined in Section 17(1) as "the *Workers Compensation Act* as it read immediately before the amendments enacted by this Act came into force". On a purposive analysis, this does not include decisions made under other similar sections of the Act, which over time became Sections 91 or 96. (Paragraph 77).

(40) The panel also determined that the 1956 and 1957 decisions at issue were not made under section 91 or 96 as those provisions existed at the material times.

(41) This decision was the subject of an unsuccessful judicial review before the Supreme Court of B.C. This is the *Atchison,* supra, matter which upheld Decision #2001-0779 on judicial review and which is currently on appeal.

(42) The learned chambers judge in that decision concluded that the standard of correctness was appropriate because the issue before him went to the central question of jurisdiction (paragraph 20). He also concluded that Decision #2001-0779 was correct for the following reasons,

> (a) There is no mention of any power to review decisions of the Commissioners in s. 96.1. That power is derived from the transitional provision.
>
> (b) The definition of "former *Workers Compensation Act"* is express and narrow. It is specifically limited to the Act "as it read immediately before the amendments enacted by this Act came into force".
>
> (c) Had the legislature intended "former *Workers Compensation Act*" to mean all predecessor statutes to the *Workers Compensation Act* it would have been a simple matter to say so.
>
> (d) The Board's power to reopen matters (s. 96(2)) was preserved by the 1983 amendments so there was no need to expand the ability of the Appeal Division to review Commissioners' decisions.
>
> I conclude that the traditional (sic) provisions were directed to deal with those cases ongoing at the time of transition. Accordingly, the Appeal Division lacked jurisdiction to review a decision of the Commissioners made in 1956 and 1957. (Paragraph 24).

(43) I agree with the reasoning and conclusion of the panel in Decision #2001-0779. In the case before me I am satisfied that section 17(5) does not apply. For the purposes of this application the legal circumstances were the same in 1959 as they were in 1956 and 1957. The 1959 decision was not one made under section 91 or 96 of the former *Workers Compensation Act*. Between

1959 and 1989 there were numerous changes to workers' compensation legislation in this province. The "former *Workers Compensation Act*" was not the legislation that was in place when the Board of Commissioners made their decision in this case on March 19, 1959.

(44) I read Decision #2001-0779 as seeking to avoid making a specific finding of when 17(5) applies. It seems carefully written to address only the narrow issue that was necessary to decide the matter before her — whether the "former" legislation existed in 1956/57. The conclusion was it did not exist then but it does not give a specific date when it did exist. I adopt the same approach on the basis that it is more appropriate for another case with a particular set of facts to decide the precise date when the "former *Workers Compensation Act*" came into force.

(45) Counsel for the industry association relies on the summary of Decision #2001-0779 and the subsequent judicial review judgement. In this regard I note paragraph 23 of the judicial review judgement in *Atchison*. The learned chambers judge concluded that,

> In the decision under review, the Appeal Division concluded that it was apparent from the wording of section 17 that the provision was intended to provide only for transition in respect of matters that were recently decided by the Board.

(46) With respect, I cannot find that statement in Decision #2001-0779 nor does it follow from the reasoning of the panel. The same paragraph of the judgement then says "more specifically, the summary of the decision reads as follows" and then cites the Appeal Division's summary paragraph, also cited above. Again, I am unable to find anything in the summary paragraph of the panel that supports the conclusion that the transition provisions of the 1989 legislation were "intended to provide only for transition in respect of matters that were recently decided by the Board." A similar problem arises with the court's statement that the "traditional (sic) provisions were directed to deal with those cases ongoing at the time of transition" (paragraph 24). I cannot find where the panel in Decision #2001-0779 reached that conclusion, expressly or by inference.

(47) This is an important matter of jurisdiction and the court is entitled to reach a conclusion that is different from Decision #2001-0779, even when the application before it is denied. It may be that the court merely intended to confirm the plain meaning of section 17 of the 1989 legislation. However, counsel for the industry association suggests that I adopt the court's interpretation of section 17 in a different way and I have considered that suggestion.

(48) I have some concerns that the court's conclusion is not correct. It seems to me that the phrase "ongoing at the time" in the *Atchison* judgement does not mean the same as the phrase in section 17 that the former Act is the *Workers Compensation Act* "as it read immediately before" the 1989 amendments. "Ongoing" appears to refer to applications or "cases" (as the court put it) while "read immediately before" seems to refer to legislation that is to be read. Further, the use of the word "ongoing" by the court suggests that only applications that were filed with the Appeal Division at the time of the 1989 legislation can be decided by the Appeal Division. But the 1989 legislation refers to the former Act "as it read immediately before" the 1989 legislation. The moment in time when the 1989 legislation became effective is not the same as the duration in time when the former Act was in force.

(49) With the introduction of new legislation one might expect what is often called a transitional provision. This type of provision would typically end old legislation in an orderly fashion by, for example, stating that only applications ongoing as of a specific date carry on under the new legislation. In my view section 17 of the 1989 legislation reflects a different legislative intent. A plain reading of this provision supports the view that the legislature intended the reconsideration provisions of the 1989 legislation to apply to a decision made under section 91 or 96 of the former legislation. This evidences an intent to apply the 1989 reconsideration authority retroactively, although for a finite period of time.

(50) I conclude that a correct reading of the 1989 transition provisions requires a focus on the legislation that existed "immediately" before the 1989 transition provisions. The use of "immediately" leads to a conclusion that the intent was to refer only to the legislation before 1989 and not all previous legislation; the intent was to provide for a specific and finite period of time immediately before the 1989 legislation came into force. The interpretative issue relates to how long that previous legislation existed before the 1989 legislation. Decisions made during this period under section 91 and 96 of the Act by the former commissioners and pursuant to the former Act can be reconsidered by the Appeal Division. A similar analysis can be applied to the court's statement that the 1989 transition provisions were "intended to provide only for transition in respect of matters that were recently decided by the Board."

(51) With regard to the application for reconsideration before me I conclude that I am not authorized by the legislature to apply the new evidence provisions of the Act in the matter before me. The legislature has not authorized the Appeal Division to consider the granddaughter's application for reconsideration of the commissioners' decision of 1959. The application is, therefore, denied on that issue.

(52) In the event that I am not correct on this jurisdictional issue I note that the granddaughter has provided some new evidence in the form of a copy of a "Report of Employee Leaving Service" from the worker's employer and dated June 23, 1947.

(53) The granddaughter relies on Division 5 of the Act in her application. This provides for protection against discriminatory action in the context of occupational health and safety. The granddaughter submits that her grandfather was discriminated against on the basis of his political beliefs when he was dismissed by the employer. The 1947 form provided by the granddaughter describes the worker as being "very casual" about observing safety rules. Further, his "strong communistic leanings [illegible] was continually crabbing about conditions in general."

(54) From a workers' compensation point of view the protection against discriminatory action in the Act came into force on October 1, 1999. For this reason these protections are not available for the granddaughter.

(55) For this reason I must conclude that the new evidence submitted is not material since I do not have the authority to apply retroactively protections available only in 1999.

Reconsideration Based on Error of Law Going to Jurisdiction

(56) Section 96(2) of the Act gives the Board broad power to, at any time at its discretion, reopen, rehear and redetermine any matter which has been dealt with by the Board or by an officer of the Board. The former Board of Governors assigned this authority to the Appeal Division with regard to applications for reconsideration based on allegations that former commissioners' decisions contain errors of law or violations of the *Charter.*

(57) It may seem anomalous that there is authority to reconsider decisions that were made more than 40 years ago. However, that decision was made by the legislature and the former Board of Governors and it is not something the Appeal Division has control over. Presumably a policy decision was made that there should be some opportunity to reconsider old decisions of the Board, not on a substitutional basis, but on the serious grounds of error of law and breach of the *Charter.* The limited scope of section 17(5) of the 1989 legislation has no application to this aspect of the reconsideration authority of the Appeal Division because that legislation relates only to applications to reconsider on the basis of new evidence.

(58) A worthwhile starting point is to review what the actual decision was on March 19, 1959.

(59) I note that it was a letter from Dr. B, dated January 5, 1959, which initiated that decision. Dr. B stated that the worker's "story and findings" were consistent with a diagnosis of silicosis and he thought that "a bona fide medical dispute" over the suspension of the worker's claim was "tenable." Dr. B acknowledged that he did not have "x-rays to go on." A consultation with a specialist was requested by Dr. B in order to determine the extent the worker's chest was hindering his ability to work and to determine the "exact pathology." A Request for Examination by a specialist dated January 8, 1959 was signed by the worker and the Board processed this request.

(60) The Board wrote to Dr. B on January 23, 1959 and stated, "It may be that you are unable to certify that there is a bona fide dispute as we note you have not seen the x-rays in this case. . . . You are no doubt aware of another condition from which this workman suffers." Dr. B replied on February 18, 1959. He attempted to contact the worker but was unable to do so and also said,

> I cannot claim to be a radiologist, and hence my opinions on the films would be of little value from the legal aspects involved. Thus when I felt that a definite dispute existed, it was my opinion previously that specialist referral was the obvious way to assess this problem satisfactorily. As I am unable to contact [the worker] again, I cannot carry this solution any further, but when he again contacts me, my opinion re said bona fide dispute still pertains to his claim.

(61) The commissioners then made their decision as recorded in the memo dated March 2, 1959 and the decision letter dated March 19, 1959. A majority of commissioners denied the request for a referral to a specialist. Apart from an inquiry about possible payment there was no further communication from Dr. B's office. The next event was the letter from the union representative, July 16, 1959, and then the unfortunate death of the worker in September 1959.

(62) As above, the standard I must apply is one of patently unreasonableness and a decision can be set aside because of a patently unreasonable finding of fact. There is some earlier authority to the effect that a decision could not be set aside if there was *some* evidence or even "a scintilla" of evidence to support the finding. A more appropriate approach is to apply a reasonableness standard of review to determine whether there is evidence that is reasonably capable of supporting the finding (Donald Brown, John Evans, *Judicial Review of Administrative Action in Canada*, (Canvassback: Toronto, 1998), 15:2142).

(63) I have some difficulty finding an error of law going to jurisdiction with the commissioners' decision. There is the x-ray report of December 16, 1958 which is supportive of a finding of silicosis and the granddaughter obviously urges me to place great weight on that report. Then Dr. B thought the worker's condition was consistent with a diagnosis of silicosis but he did not have the x-rays and he acknowledged his lack of expertise in radiology. He also did not address the Board's suggestion that there may be "another condition," obviously meaning the throat cancer that had been operated on earlier in the same year. The commissioners did have the benefit of a review by two doctors (including physical examination and review of the x-rays). These doctors considered the x-ray report as well as the other medical conditions of the worker, especially the non-compensable throat cancer. The commissioners preferred the opinion of these doctors and concluded a referral to a specialist was not warranted. The fact that the commissioners were exercising discretion rather than a duty is also a factor which requires some deference to their decisions. Overall, I conclude that the facts are reasonably capable of supporting their decision.

(64) The granddaughter also challenges the Board's handling of her grandfather's claim in 1963, after his union had written on July 16, 1959. This involves two events on the file. First, on behalf of the worker the union representative stated that the purpose of the letter was "not to quarrel with the original decision of the Board that [the worker] was not disabled, but to quarrel with the argument that the man is not entitled to appeal under section 54A because the Board has discretionary powers." The Board replied to the union on July 29, 1959 by advising that it would be discussed with the Board and "if any change is agreed upon you will be so advised." The file is silent about any further reply to the union (except for the worker's death in September 1959).

(65) In the context of the level of service that is expected from the Board now I can accept that the Board's response to the union in 1959 was not responsive and perhaps officious. However, I cannot find that these circumstances amount to an error of law going to jurisdiction.

(66) The second event was an inquiry on August 21, 1963, by the Board's solicitor, about the status of the suspended claim. It was also questioned why the claim had not been "brought up each year." The earlier death of the worker was noted and it was noted that "nothing further to be done." The circumstances of this case are that the worker filed an application for compensation in 1958, it was suspended the same year and then the worker died the next year. The death of the worker somehow was lost on the Board until 1963 and the granddaughter is concerned about a lack of sensitivity to her grandfather's death. I appreciate that concern but the rapid developments in the worker's medical condition did not permit a yearly review in any case. I cannot find this gives rise to an error of law going to jurisdiction.

(67) For all of these reasons the granddaughter's application for reconsideration of the Board of Commissioners' decision of March 19, 1959 is denied.

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