WORKERS' COMPENSATION REPORTER

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Workplace safety and health is our challenge.
Quality rehabilitation and fair compensation is our commitment.
World leadership is our goal.

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

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

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Decisions of the Panel of Administrators

Decisions of the Appeal Division

Decision of the Panel of Administrators

Number: 1
Date: July 17, 1995
Subject: Discharge of Governor Policy-making Function

WHEREAS:

A. the lieutenant-governor-in-council has appointed a Panel of Administrators to discharge the powers, duties and functions of the governors under the legislation administered by the Workers' Compensation Board; and

B. Section 82 of the *Workers Compensation Act* provides that the governors shall approve and superintend the policies and direction of the W.C.B., including policies respecting compensation, assessment, rehabilitation and occupational safety and health:

THE PANEL OF ADMINISTRATORS CONFIRMS THAT:

1. they will discharge the powers, duties and functions of the governors with respect to policy matters arising under the legislation administered by the Workers' Compensation Board;

2. all policies of the governors in effect immediately prior to the appointment of the Panel will continue to apply;

3. policy decisions made by the Panel of Administrators are policies of the governors for purposes of the legislation administered by the Workers' Compensation Board; and

4. governors' "published policy" includes decisions of the Panel of Administrators declared to be policy decisions.

Decision of the Panel of Administrators

Number: 2
Date: August 3, 1995
Subject: Statement of the Duties of the Voting Governors of the Workers' Compensation Board

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WHEREAS:

A. the lieutenant-governor-in-council has appointed a Panel of Administrators to discharge the powers, duties and functions of the governors under the legislation administered by the Workers' Compensation Board; and

B. Section 82 of the *Workers Compensation Act* provides that the governors shall enact bylaws and pass resolutions for the conduct of the business and functions of the governors:

THE PANEL OF ADMINISTRATORS RESOLVES THAT:

1. the Panel makes the attached STATEMENT OF THE DUTIES OF THE VOTING GOVERNORS OF THE WORKERS' COMPENSATION BOARD;

2. during the appointment of the Panel of Administrators, the following shall apply with respect to the STATEMENT:

   (a) "Board of Governors" means the Panel of Administrators appointed under Section 83.1 of the *Act*;

   (b) "Chair" means the member of the Panel of Administrators designated under Section 83.1(4) of the *Act*;

   (c) "Governor" or "Voting Governor" means any of the individuals appointed under Section 83.1(1) of the *Act*;

   (d) "Governors" or "Voting Governors" means either the Panel of Administrators appointed under Section 83.1 of the *Act* or two or more individuals appointed under Section 83.1(1) as the context requires; and

3. Bylaw No. 2 — Statement of Roles and Responsibilities of the Voting Governors of the Workers' Compensation Board — made by the governors on October 7, 1991, is rescinded.

STATEMENT OF THE DUTIES OF THE VOTING GOVERNORS OF THE WORKERS' COMPENSATION BOARD

Preamble

The Workers' Compensation Board of British Columbia is a unique organization. Charged with the administration of the *Workers Compensation Act*, the *Workplace Act* and the *Criminal Injury Compensation Act*, its operations impact on most British Columbians in some way.

Created by statute, the Workers' Compensation Board's purposes are determined by the people of British Columbia acting through the Provincial Legislative Assembly. These purposes are unusually broad and embrace three distinctively different areas:

(a) administrative,

(b) appellate, and

(c) policy- and regulation-making.

On June 3, 1991, the *Workers Compensation Act* was amended to provide for a new governing body for the W.C.B. This body, the "Board of Governors," is responsible for approving and superintending the policies and direction of the W.C.B. and planning for its future.

The Board of Governors has thus been entrusted with stewardship of the Workers' Compensation Board. It has overall responsibility for ensuring that the organization fulfills the purposes for which it was created. In doing so, it accepts, subject to the statutory enactments of the Legislative Assembly, complete and final responsibility for the policies, direction and future of the provincial workers' compensation system.

Introduction

The interests of workers — the beneficiaries of the compensation, rehabilitation and prevention principles fundamental to the workers' compensation system — and the interests of employers — who fund the system — are recognized through the composition of the Board. It is appropriate that both workers and employers participate in the initiation, development and approval of the strategies, policies, programs and procedures of the Workers' Compensation Board.

In addition, the *Workers Compensation Act*, the *Workplace Act* and the *Criminal Injury Compensation Act* reflect important social policies of interest to society as a whole. The public interest is also recognized through the composition of the Board.

To enable the Board of Governors to function effectively, individual governors must see their primary responsibility as acting in the best interests of the organization and all its stakeholders. Governors are selected because of their particular knowledge, experience and background and are expected to utilize these perspectives when undertaking their responsibilities. However, this does not diminish their primary responsibility as governors to act in the best interests of the organization and the stakeholders generally.

Governors must appropriately balance the resources and time the Board of Governors allocates to its roles, as specified in the legislation, in the three major areas — administrative, appellate and policy- and regulation-making — for which they have overall responsibility.

Governors' Duties

Specific responsibilities of the governors are outlined in the following three appendices:

- Appendix A — Duties in relation to W.C.B. administration
- Appendix B — Duties in relation to the appellate systems, and
- Appendix C — Duties in relation to policy- and regulation-making.

In general, governors must, in making their decisions, assume the following duties:

(a) Duty of Honesty — to act honestly and in good faith

(b) Duty of Loyalty — to give his or her undivided loyalty to the organization

(c) Duty of Care — to act in a prudent and diligent manner, keeping himself or herself informed as to the policies, business and affairs of the organization

(d) Duty of Diligence — to make those inquiries which a person of ordinary care in his or her position or in managing his or her own affairs would make

(e) Duty of Skill — to exercise the degree of skill to be reasonably expected from a person of his or her knowledge and experience

(f) Duty of Prudence — to act carefully, deliberately and cautiously trying to foresee the probable consequences of each proposed course of action.

The governors occupy a position of trust. The highest personal fiduciary standards will apply to their conduct.

Conflicts of Interest

On appointment to office, and thereafter, individual governors shall arrange their private affairs in a manner that will prevent real, potential or apparent conflicts of interest from arising. If such a conflict arises between the private interests of a governor and the duties and responsibilities of that governor, the governor will resolve the conflict in favour of his or her duties and responsibilities as a governor.

Conflicts of interest, for this purpose, are defined below:

(a) A "real conflict of interest" occurs when a governor has knowledge of a private interest that is sufficient to influence the exercise of his or her duties and responsibilities as a governor.

(b) A "potential conflict of interest" occurs when there exists some private interest that could influence the exercise of a governor's duty or responsibility, provided that he or she has not yet exercised that duty or responsibility.

(c) An "apparent conflict of interest" exists when there is a reasonable apprehension that reasonably well-informed persons could properly have that a real conflict of interest exists on the part of a governor.

A "conflict of interest" may be economic or otherwise. A "conflict of interest" may be either "direct," i.e., pertaining to the governor personally, or "indirect," i.e., pertaining to the governor's family, dependants, associates or employer.

When a governor considers that he or she has a real, potential or apparent conflict of interest with respect to a particular issue, that governor will advise the chair prior to discussion or decision on the issue by the governors and will absent himself or herself during the discussion and decision.

A governor who identifies a possible real, potential or apparent conflict of interest on the part of another governor will advise the chair and the governor perceived as having the conflict of interest immediately.

In the case of a difference over the presence of a real, potential or apparent conflict of interest, the chair shall determine where such a conflict of interest exists. In the case of the chair, a majority of the voting governors present at the meeting shall decide.

Other Ethical Considerations

Other types of conduct by governors, listed below, are considered to be inappropriate:

(a) interfering with the president's day-to-day administration of the W.C.B. by contacting individual W.C.B. officers and employees in order to influence their conduct, decisions, etc., with respect to individual matters or otherwise.

(b) interfering with the exercise of the quasi-judicial decision-making authority of the W.C.B. by contacting the chief appeal commissioner or individual appeal commissioners to influence their decisions, or personally making representations to the Appeal Division or an officer of the W.C.B.

(c) accepting transfers of economic benefits, except compensation authorized by law, that are connected directly or indirectly with the performance of a governor's duties and responsibilities as a governor, other than customary hospitality or other benefits normally and legitimately received as an incident of the protocol or social obligations accompanying those duties and responsibilities.

(d) stepping out of a governor's role as a governor to assist private entities or persons in their dealings with the W.C.B. where this would result in preferential treatment to any person.

(e) knowingly benefiting from information that is obtained in the course of a governor's duties and responsibilities as a governor and that is not generally available to the public.

(f) disclosing any matter or thing that comes to a governor's knowledge by reason of his or her appointment and that the Board of Governors has decided should remain confidential.

(g) disclosing information contained in individual claim files or pertaining to the claim of an injured or disabled worker, except as authorized by law.

(h) using a governor's office as governor to seek to influence a decision to be made by another person, and to further his or her private interest.

(i) engaging in personal conduct that exploits for personal gain a governor's position of authority.

(j) remaining a governor after having been elected as a member of the House of Commons or of the Legislative Assembly of the Province of British Columbia.

Postappointment Conduct

Governors shall not act, subsequent to their appointment as governors, in such a manner as to take improper advantage of their appointment. The highest standards will apply to their conduct in relation to the Workers' Compensation Board.

A governor shall not, for a period of six months for each year of appointment as a governor to a maximum of eighteen months after ceasing to be a governor, directly or through any other person or persons, communicate with a governor, voting or non-voting, or with an officer or employee of the W.C.B. for the purpose of influencing, for personal gain, the Board of Governors or the W.C.B. on any matter that was part of the governor's duties and responsibilities, or is part of the duties and responsibilities of a governor.

This prohibition does not, however, extend to a former governor acting in the course of his or her responsibilities and duties as an official of a recognized worker or employer organization, or as an official of the Government of the Province of British Columbia, or of Canada, or of a government body under one of them.

For the same period of time, the governors shall not conduct official business with a former governor acting on behalf of himself or herself, or on behalf of another person or entity, except as an official of the Government of the Province of British Columbia, or of Canada, or of a government body under them.

Except in extraordinary cases or in emergencies and then only as an interim measure, a governor shall not serve as an employee of, or enter into a contract for services with, the W.C.B. for a period of three months following the end of his or her appointment as governor. Nor shall a governor seek employment with, or enter into negotiations for a contract for services with, the W.C.B. during that period.

Implementation

Existing governors will sign a document certifying that they have read and understood this statement and that, as a condition of their appointment, they will observe the statement.

Future governors will, before or on assuming their official duties and responsibilities, sign a document certifying that they have read and understood this statement and that, as a condition of their appointment, they will observe the statement.

It is the responsibility of all governors to review their obligations under this statement at least once a year.

Conforming to this statement will not absolve a governor of the responsibility to take such additional action as might be necessary to prevent real, potential or apparent conflicts of interest.

Conforming to this statement will not absolve a governor from conforming to any specific references to conduct contained in the *Workers Compensation Act* or to the relevant provisions of legislation of more general application, such as the *Criminal Code*.

APPENDIX "A"

DUTIES OF THE VOTING GOVERNORS IN RELATION TO W.C.B. ADMINISTRATION

1. The President and W.C.B. Management

A. appoint the president

B. select and define the functions of the president

C. monitor the president's performance and provide advice and counsel in the execution of the president's duties

D. approve the appointment and remuneration of all senior executive officers, acting on the advice of the president

E. ensure that adequate provision has been made for management succession

2. General Administration of the Board

A. monitor the W.C.B.'s progress in fulfilling its purposes under the legislation and alter its direction through management if necessary

B. participate with management directly, or through its committees, in developing and approving the strategies by which the W.C.B. will fulfill its purposes

C. approve and monitor compliance with all policies and all significant procedures by which the W.C.B. is operated

3. Specific Administrative Duties

A. Financial

(i) approve:

(a) operating and capital budgets

(b) major programs and expenditures

(c) property purchases and disposition

(d) establishment and maintenance of an accounting system satisfactory to the minister of finance

(e) adequate funding of the accident fund

(f) investment of the accident fund

(g) certain grants and awards

(h) budget variances in excess of $1,000,000

B. Arrangements and Agreements

(i) approve:

(a) interjurisdictional agreements under Section 8.1 or otherwise with other workers' compensation authorities

(b) contracts under Section 21(6) with physicians, nurses and other persons authorized to treat human ailments, and with hospitals, and other institutions, for the provision of health care

(c) arrangements under Section 71(9) with the Government of Canada or of any other province or territory whereby their inspectors carry out duties of O.S.H./prevention inspectors under B.C. *Workers Compensation Act* or B.C. O.S.H./prevention inspectors carry out duties of their inspectors under any of their Acts

(d) establishment and maintenance of a W.C.B. Superannuation Plan under Section 86(3) or arrangements with the lieutenant-governor-in-council under Section 86(5) that the *Pension (Public Service) Act* apply to W.C.B. employees

(e) the collective agreement between the W.C.B. and the Compensation Employees' Union

C. Annual Reports

(i) approve annual reports under the *Workers Compensation Act*, *Workplace Act* and *Criminal Injury Compensation Act*

D. Plan for the future of the Board

E. Duties in relation to the Board of Governors

(i) enact bylaws for the conduct of the business and functions of the governors including the quorum for a meeting and the manner in which policies shall be published

(ii) establish and give direction to committees

APPENDIX "B"

DUTIES OF THE VOTING GOVERNORS IN RELATION TO THE APPELLATE SYSTEMS

APPEAL DIVISION:

1. Introduction

The legislation indicates that the governors may not interfere with the quasi-judicial decision-making authority of the Appeal Division on individual matters. However, the governors are responsible for ensuring that the Appeal Division is properly administered.

2. Chief Appeal Commissioner

A. appoint the chief appeal commissioner

B. select and define the functions of the chief appeal commissioner

C. monitor the chief appeal commissioner's performance in the administration of the Appeal Division and provide advice and counsel on the execution of those duties

D. ensure that adequate provision has been made for succession

3. Administration of the Appeal Division

A. set policies on selecting appeal commissioners

B. approve the appointment of part-time or temporary appeal commissioners

C. set policies on administering the Appeal Division

MEDICAL REVIEW PANELS:

1. Medical Review Panel Department

A. ensure effective administration of the Medical Review Panel process through the Medical Review Panel Department

B. ratify semi-annual changes in Medical Review Panel fees

APPENDIX "C"

DUTIES OF THE VOTING GOVERNORS IN RELATION TO POLICY- AND REGULATION-MAKING

1. Compensation and Rehabilitation

A. determine all policy concerning compensation and rehabilitation matters including:

(i) approving all amendments to the *Rehabilitation Services and Claims Manual*

(ii) adding or deleting occupational diseases to or from Schedule B

(iii) amending the *Permanent Disability Evaluation Schedule*

(iv) paying interest on retroactive compensation under Section 92(3)(a)

(v) paying interest under Section 96(7) on refund of employer assessments and penalties on appeal

(vi) paying interest on retroactive spousal benefits under Section 19

2. Assessments

A. determine all policy concerning assessment matters including:

(i) approving all amendments to the *Assessment Policy Manual*

(ii) setting assessment rates

(iii) creating and rearranging classes and subclasses

(iv) approving changes to the *Classification and Rate List*

(v) adopting the experience rating system

(vi) making exemption policies for the application of Section 2(1) and of orders exempting employers or workers from the application of the *Act*

3. Occupational Safety and Health/Prevention

A. determine all policy concerning occupational safety and health/prevention matters including:

(i) approval of all amendments to the *Occupational Safety and Health Division Policy and Procedure Manual*

(ii) the making of occupational safety and health/prevention regulations, including:

(a) industrial health and safety regulations, regulations for agricultural operations, fishing operations regulations, W.H.M.I.S. regulations, and first aid regulations under the *Workers Compensation Act*

(b) regulations for the health, safety and comfort of persons in factories, offices and shops, for W.H.M.I.S. regulations, and for the enforcement of decisions, orders or rulings made, and of penalties imposed, and for appeals from them, under the *Workplace Act*

4. Criminal Injury Compensation

A. determine all policy concerning criminal injury compensation matters

5. Regulations

A. exercise the Board's authority to make regulations under the following sections of the *Workers Compensation Act*:

Section 1	for recognizing an occupational disease for general application
Section 4(1) (and Section 15 of Fishing Regs.), Section 4(2)	for commercial fishing
Section 7	for amending Schedule D in respect of ranges of hearing loss, percentages of disability, and methods or frequencies to be used to measure hearing loss
Section 21(1)	for furnishing health care to injured workers and for payment of it

Section 24(1)	for the application of Section 24 (reconsidering "old" claims for compensation to determine whether the pension fairly reflects the worker's loss of earnings)
Section 38(1)	for the timing of filing of payroll information
Section 38(2)	for penalties imposed for failure to provide payroll information
Section 40(2)	for penalties imposed for failure to pay assessments
Section 47(1)	for penalties imposed for failure to pay assessments on time
Section 53(3)	for the form of report of injury or occupational disease by the worker to the employer
Section 54(4)	for the form of employer's report of injury
Section 54(6)	for defining and prescribing a category of minor injuries not required to be reported and the time at which the obligation to report commences
Section 55(1)	for the form of the application for compensation
Section 56(1)	for the form of the physician's report of injury
Section 70	for occupational first aid requirements
Section 71(1) and (1.1)	for occupational safety and health/prevention regulations, including W.H.M.I.S. regulations
Section 72(9)	for conferring rights on union officials or other workers with respect to worker representation on inspections
Section 72(10)	for abridging the rights conferred by Section 72 where an inspection visit exceeds one day
Section 75(1)	for the due administration and carrying out of the *Act* and prescribing of the form and use of payrolls, records, reports, certificates, declarations and documents that may be necessary
Section 75(3)	for the fine for failure to comply with a regulation or order made under any section except Section 71

B. exercise the Board's authority to make regulations under the following sections of the *Workplace Act*:

Section 4(1)	for the protection of the health, safety and comfort of persons in factories, offices and shops; for medical examinations of these persons and fees for those examinations; for W.H.M.I.S. regulations; for fees and charges for services and functions provided and performed by the Board under the *Workplace Act*; for the enforcements of decisions, orders or rulings made, or penalties imposed, under the *Workplace Act* and for appeals from them; for the administration of the *Workplace Act*

6. Statutory Amendment

A. make recommendations to the minister of skills, training and labour with respect to the amendment of the *Workers Compensation Act* and the *Workplace Act* and recommendations to the attorney general with respect to the amendment of the *Criminal Injury Compensation Act*

Decision of the Panel of Administrators

Number: 3
Date: August 3, 1995
Subject: Board of Governors Procedural Bylaw

WHEREAS:

A. the lieutenant-governor-in-council has appointed a Panel of Administrators to discharge the powers, duties and functions of the governors under the legislation administered by the Workers' Compensation Board; and

B. Section 82 of the *Workers Compensation Act* provides that the governors shall enact bylaws and pass resolutions for the conduct of the business and functions of the governors:

THE PANEL OF ADMINISTRATORS RESOLVES THAT:

1. the Panel makes the attached BOARD OF GOVERNORS PROCEDURAL BYLAW;

2. during the appointment of the Panel of Administrators, the following shall apply with respect to the BYLAW:

   (a) "Board of Governors" means the Panel of Administrators appointed under Section 83.1 of the *Act*;

   (b) "Chair" means the member of the Panel of Administrators designated under Section 83.1(4) of the *Act*;

   (c) "Governor" or "Voting Governor" means any of the individuals appointed under Section 83.1(1) of the *Act*;

   (d) "Governors" or "Voting Governors" means either the Panel of Administrators appointed under Section 83.1 of the *Act* or two or more individuals appointed under Section 83.1(1), as the context requires; and

3. Bylaw No. 3 — Board of Governors Procedural Bylaw — made by the governors on October 7, 1991, is rescinded.

THE WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA

BOARD OF GOVERNORS PROCEDURAL BYLAW

SECTION 1 — INTERPRETATION

1.1 *Definitions* — In this Bylaw, unless the context otherwise requires:

(a) "*Act*" means the *Workers Compensation Act*, R.S.B.C. 1979, c. 437, as amended;

(b) "Board of Governors" means the Governors;

(c) "Chair" means the Governor appointed under Section 81(1)(a)(i) of the *Act*;

(d) "Governor" means any one of the individuals appointed by the Lieutenant Governor in Council under Section 81(1) of the *Act*, the President appointed under Section 84(1) and the Chief Appeal Commissioner appointed under Section 85(1)(a);

(e) "this Bylaw" means this BOARD OF GOVERNORS PROCEDURAL BYLAW;

(f) "Voting Governors" means all of the Governors other than the President and the Chief Appeal Commissioner; and

(g) "Conflict of Interest" means any one of a Real Conflict of Interest, a Potential Conflict of Interest or an Apparent Conflict of Interest, all as described and defined in the Statement of Duties of the Voting Governors of the Workers' Compensation Board.

1.2 *Definitions in* Act *to apply* — Unless otherwise indicated, all terms contained in this Bylaw which are defined in the *Act* shall have the meanings given to such terms in the *Act*.

SECTION 2 — MEETINGS OF THE BOARD OF GOVERNORS

2.1 *Regular meetings* — Regular meetings of the Board of Governors shall be held not less than ten (10) times in each calendar year, at the call of the Chair, at any place in British Columbia that the Chair decides after consultation with the Governors, except that in no case shall more than two (2) months elapse between regular meetings.

2.2 *Annual meeting* — One (1) of the regular meetings each year shall be designated the Annual Meeting and shall be held on such day in February or March of the year that the Chair decides after consultation with the Governors. The Annual Meeting shall deal with, among other matters which may be presented, the review and approval of the annual report (including the annual financial statements) which is required to be made by March 25 each year.

2.3 *Notice of regular meetings* — To ensure the availability of the Governors, the Chair shall, at least seven (7) days prior to each regular meeting, deliver a copy of the agenda for the meeting to each Governor. The agenda so delivered shall constitute notice of the meeting, except that failure to deliver the agenda within the time specified shall not invalidate the meeting provided the agenda is delivered at least forty-eight (48) hours prior to the meeting.

2.4 *Agenda* — The agenda for a regular meeting shall, subject to Section 2.5, be set by the Chair, and:

(a) Shall describe the date, time and place of the regular meeting;

(b) Shall be sufficiently descriptive of the matters to be decided that the Governors will be able to identify the matters without disclosing any information which, for reasons of confidentiality, is not to be disclosed to persons other than the Governors;

(c) Shall include reports from the President and Chief Appeal Commissioner concerning their respective areas of responsibility and events affecting those areas since the previous Governors' meeting;

(d) Shall be accompanied by supporting materials in a standard format, with an executive summary, relating to the matters set out in the agenda whenever possible; and

(e) Shall contain the proposed schedule of regular meetings for the following six (6) months.

2.5 *Request of Governors* — Upon the written request of at least two (2) Voting Governors received at least seven (7) days prior to a regular meeting, the Chair shall place a matter on the agenda for the regular meeting.

2.6 *Distribution of supporting materials* — If it has not been possible to distribute all of the supporting materials with an agenda for a regular meeting, all such supporting materials shall be distributed to each Governor at least twenty-four (24) hours prior to the regular meeting unless all Voting Governors present at such meeting consent to the distribution of particular material at the meeting.

2.7 *Special meetings* — The Chair may call a special meeting of the Board of Governors at any place in British Columbia that the Chair decides, by delivering written notice to each Governor at least twenty-four (24) hours prior to the special meeting; and the written notice shall include the date, time, place and purpose of the special meeting.

2.8 *Request of Governors* — Upon the written request of at least two (2) Voting Governors, the Chair shall forthwith call a special meeting at any place in British Columbia that the Chair decides, by delivering written notice to each Governor at least seven (7) days prior to the special meeting; and the notice shall include the date, time, place and purpose of the special meeting.

2.9 *Postponement or cancellation* — Subject to Section 2.1, the Chair may, after consultation with the Governors, postpone or cancel a meeting of the Board of Governors, except a special meeting called under Section 2.8, by delivering written notice to each Governor of the postponement or cancellation at least twenty-four (24) hours prior to the scheduled time for the meeting.

SECTION 3 — QUORUM

3.1 *Quorum* — A majority of the Voting Governors then in office shall constitute a quorum at a meeting of the Board of Governors and no business shall be conducted unless a quorum is present in the meeting.

3.2 *Participation by telephone* — A Governor may participate in a meeting of the Board of Governors by means of such telephone or other communications facilities as permit all persons participating in the meeting to hear each other, and a Governor participating in a meeting by such means is deemed to be present at the meeting and shall be counted in the quorum.

3.3 *Telephone meeting* — At the discretion of the Chair, a meeting of the Board of Governors may be held with respect to an urgent matter by such telephone or other communications facilities as permit all persons participating in the meeting to hear each other, and each Governor participating by such means shall be counted in the quorum. All decisions made at telephone meetings shall be presented for ratification at the next regular or special meeting.

SECTION 4 — CONDUCT OF MEETINGS

4.1 *Chair to preside* — The Chair shall preside at all meetings of the Board of Governors and, subject to this Bylaw, shall decide the procedure to be followed, with due regard for the views of the other Governors.

4.2 *Robert's Rules of Order* — The Chair may, in resolving procedural disputes, if necessary, refer to Robert's Rules of Order, 1990 Edition, which shall govern where applicable and not inconsistent with the *Act* or this Bylaw. The Chair's decision on the interpretation of such Rules of Order shall govern.

4.3 *Matters to be decided* — Unless otherwise agreed by all Voting Governors present, only matters set out in the agenda for a regular meeting shall be decided at that regular meeting and only matters set out in the notice for a special meeting shall be decided at that special meeting.

4.4 *New business* — A Governor may raise, as "new business", a matter not set out in the agenda for a regular meeting, and the Chair shall place the matter on the agenda for the next or a subsequent regular meeting.

4.5 *Vacancy* — A vacancy in the membership of the Governors does not impair the right of the other Governors to act.

SECTION 5 — CONSENSUS AND DECISION-MAKING BY THE VOTING GOVERNORS

5.1 *How matters are to be decided* — The goal of the Voting Governors is to achieve consensus on all substantive matters associated with the mandate of the Board of Governors.

5.2 *Meaning of consensus* — Consensus means that all Voting Governors have reached a general agreement on an issue or set of issues before them. General agreement means that there is no substantive disagreement and that there will be no public expression of dissent by any Voting Governor.

5.3 *Administrative matters* — In putting the consensus principles into practice, it is recognized that many administrative matters (e.g. location and timing of meetings, etc.) and other matters which are not central to the substantive purpose of the Board of Governors will be handled by the Chair.

5.4 *Principles of consensus*

(a) Each Voting Governor has an obligation to express their point of view, listen to proposals and build agreement by proposing alternatives.

(b) Each Voting Governor has the right to expect:

(i) adequate time to become informed and discuss issues in relation to the relative complexity and importance;

(ii) a clear and accurate expression of areas of agreement and disagreement, if any;

(iii) an opportunity for reconsideration on the basis of new evidence which is substantial and material to the decision.

(c) When unable to support a consensus, a Voting Governor has an obligation to:

(i) demonstrate that the item at issue is a substantive issue;

(ii) demonstrate it justifies further consideration; and

(iii) propose alternatives or options for consideration and a time frame for decision.

(d) The Voting Governors have an obligation to:

(i) act in the best interests of the Workers' Compensation Board and all its stakeholders;

(ii) address proposals pertinent to the mandate of the Board of Governors when presented by any Governor;

(iii) creatively seek solutions where disagreements occur;

(iv) balance the views of each Voting Governor while weighing the collective public interest of matters before them.

(e) The Voting Governors recognize that consensus seeking is facilitated by:

(i) careful listening and respect for everyone's views;

(ii) patience with requirements for fair process;

(iii) sincere attempts to identify alternatives that promote agreement;

(iv) understanding the need to make decisions in a timely manner;

(v) willingness to submit items of controversy to objective analysis;

(vi) respect for colleagues.

5.5 *Decision-making*

(a) In the event a Voting Governor requires more time, the matter is set aside to enable the Chair and the Voting Governors to formulate an approach acceptable to the other Voting Governors.

(b) Where consensus cannot be reached, and where each person who wishes to speak has been heard and where the Voting Governors have invested time in seeking consensus, the Chair is granted the discretion to take one of the following steps:

(i) continue the discussion in the current meeting;

(ii) table the item for further discussion in a future meeting;

(iii) refer the item to committee or staff for further discussion and formulation of recommendations, or other arena for resolution; or

(c) Where the step described in Section 5.5(b) above has been taken and there is still no consensus, the Voting Governors may vote to have the issue decided by the Chair.

5.6 *Role of the Chair* — The Chair facilitates consensus. The Chair is expected to offer relevant information, clarify views, help define common ground, and suggest options.

5.7 *Reconsideration of decisions* — A Voting Governor can raise through the Chair a request to have the Voting Governors reconsider a decision on the basis of new evidence which is substantial and material to the decision.

5.8 *Criticism by individual Voting Governors* — Disagreement becomes destructive if it is projected outside of the Board of Governors as a way of discrediting the process and/or participants. The Voting Governors agree to raise criticisms of the process or the emerging decisions as agenda items for resolution rather than "take them to the street".

5.9 *Common front* — The Voting Governors will present a common front externally when a decision has been taken. The objective of this consensus model is to ensure a thorough and thoughtful examination of issues before the Voting Governors, but to ensure a position of unity once the decision has been made.

SECTION 6 — COMMUNICATIONS

6.1 *Chair to be spokesperson* — The Chair or the Chair's designate is the chief spokesperson regarding the operations and decisions of the Board of Governors.

6.2 *Public expressions of opinions* — In public discussions about any matters, other Governors will make it clear that they are expressing their personal opinions and not those of the Board of Governors.

SECTION 7 — CONFLICTS OF INTEREST

7.1 *Conflict of Interest of a Governor* — Where a Governor considers that he or she has a Conflict of Interest with respect to a particular matter, that Governor shall advise the Chair prior to discussion or decision on the matter by the Governors and shall withdraw from the meeting during the discussion and decision on the matter.

7.2 *Possible Conflict of Interest of another Governor* — A Governor who identifies a possible Conflict of Interest on the part of another Governor with respect to a particular matter shall advise the Chair and the Governor perceived as having the Conflict of Interest immediately, and, except in the case described in Section 7.3, if the Governor perceived as having the Conflict of Interest agrees or, in the case of a disagreement, if the Chair decides that there is a Conflict of Interest, the Governor perceived as having the Conflict of Interest shall withdraw from the meeting during the discussion and decision on the matter.

7.3 *Conflict of Interest of the Chair* — In case of a difference over the presence of a Conflict of Interest on the part of the Chair, a majority of the Voting Governors present at the meeting shall decide whether such a Conflict of Interest exists. If it is decided that a Conflict of Interest exists, the Chair shall designate an acting chair under Section 10.1 for, and shall withdraw from the meeting during, discussion and decision on the matter. The acting chair may vote on the matter.

SECTION 8 — MINUTES

8.1 *Minutes to be taken* — Minutes shall be recorded of each meeting of the Board of Governors evidencing the decisions taken and shall be presented for the approval of the Governors at the next or a subsequent meeting.

8.2 *Signature of Chair* — Upon approval by the Governors with or without amendment, the minutes shall be signed by the Chair and the minutes, if purported to be signed by the Chair, shall be evidence of the proceedings which were taken at the meeting.

8.3 *Effect of Chair's signature* — Where minutes of a meeting have been entered and signed in accordance with Sections 8.1 and 8.2, the meeting shall be deemed to have been duly held and convened and all proceedings at the meeting shall be deemed to have been duly taken until the contrary is proved.

8.4 *Preservation of minutes* — Minutes of all meetings of the Board of Governors and copies of all supporting materials relating to the matters dealt with at the meetings shall be retained by the Office of the Board of Governors in the manner directed by the Chair.

SECTION 9 — COMMITTEES

9.1 *Committees* — The Board of Governors may, from time to time by resolution, constitute, dissolve or reconstitute standing committees and special committees consisting of such Governors and having such procedures as the Board of Governors may decide, provided that:

(a) The Chair shall be an ex officio member of all committees;

(b) The Board of Governors shall appoint a chair of each committee; and

(c) Minutes shall be taken of all meetings of standing committees, with original copies of the minutes retained by the Office of the Board of Governors in the manner directed by the Chair and photocopies of the minutes sent to all Governors.

9.2 *Authority of committees* — Every committee so constituted shall have the authorities, powers and discretions which are delegated to it by resolution of the Board of Governors and shall act in accordance with the directions, including the procedures to be followed, which the Board of Governors imposes on it.

SECTION 10 — CHAIR DESIGNATE

10.1 *Chair may designate* — The Chair may designate a Governor representative of the public interest to act in the Chair's place during the Chair's temporary absence, and while so acting the designated Governor shall have the power and authority of the Chair.

SECTION 11 — DELIVERY

11.1 *Method of delivery* — All agendas, supporting materials for meetings, notices, statements and other documents in writing required or permitted under this Bylaw to be delivered to Governors may be mailed, postage prepaid, addressed to a Governor or

may be delivered to a Governor either personally or by leaving it at his or her usual place of business or residential address, or may be sent by telegram, telex, facsimile or other method of transmitting visually recorded messages.

SECTION 12 — REMUNERATION OF THE GOVERNORS

12.1 *Governors' remuneration* — In consideration of carrying out their responsibilities under the *Act*, the Voting Governors shall be paid out of the accident fund:

(a) Remuneration in an amount determined by the Lieutenant-Governor-in-Council, and

(b) Reasonable and actual travelling and out-of-pocket expenses necessarily incurred by them in discharging their duties.

12.2 *Calculation of per diem* — Where the remuneration determined by the Lieutenant-Governor-in-Council is in whole or in part a per diem rate, then, unless otherwise fixed by the Lieutenant-Governor-in-Council, the amount to be paid in respect of the per diem rate to a Voting Governor shall be calculated as follows:

(a) For less than four (4) hours of work in a day, a Governor shall be entitled to one-half of the per diem rate;

(b) For more than four (4) hours of work in a day, a Governor shall be entitled to the full per diem rate;

(c) Only one full per diem payment shall be made to a Governor for each twenty-four (24) hour day;

(d) Preparation time of up to one (1) day per regular meeting, special meeting, committee meeting or other meeting of the Board of Governors shall be remunerated; and

(e) Reasonable travel time shall be included in qualifying time.

12.3 *Time for claiming* — A Governor shall only be paid remuneration under Section 12.1(a) or be reimbursed for expenses under Section 12.1(b) where the Governor has submitted a claim for such remuneration or expenses within three (3) months of the meeting of the Board of Governors in respect of which the remuneration is to be paid or the expenses were incurred.

SECTION 13 — ANNUAL REVIEW

13.1 *Annual review* — This BOARD OF GOVERNORS PROCEDURAL BYLAW shall be reviewed by the Board of Governors within one (1) year of being made and thereafter annually or when a new Governor is appointed.

Decision of the Appeal Division

Number: 95-0747
Date: June 29, 1995
Panel: Connie Munro
Subject: Fishers' Wage Rate

This is an appeal by the worker from Review Board findings dated October 4, 1994. The issue as stated by the Review Board was whether the wage rate set on the worker's claim was correct. The worker's adviser states that is the same issue on this appeal. The Review Board found the worker's wage rate should be based on the 1992 earnings of another worker in a similar position averaged over 12 months. In this appeal the worker's representative reiterates the position taken at the Review Board that the amount of money earned on the first three fishing trips ought to be averaged over the time it took to complete those trips. I agree entirely with the reasoning of the Review Board in rejecting that argument.

Undoubtedly, fishers have unique average earnings problems. They receive, in a relatively short period of time, their entire annual earnings despite the fact that they might be actively engaged in activities related to fishing during much of the remaining portion of the year. There may be an argument that a more sophisticated governors' policy ought to be devised to address those differences. In my view, however, the procedure that was utilized in this case provides an equitable result and complied with the spirit of both existing governors' policy and the published Appeal Division decision dealing with fishers' wage rates.

The second argument advanced by the worker's adviser is that the charge for food deducted by the employer from the crew share ought to be added back to fairly represent the worker's gross employment earnings. This matter was not dealt with by the Review Board. The worker's adviser cites the *Rehabilitation Services and Claims Manual* items #71.21 and 66.13 in support of his contention that some allowance ought to be made for the cost of food. Policy item #71.21 provides that the dollar value of the room and board provided to a worker is normally included in the calculation of average earnings. Policy item #66.13 refers to the average earnings of a fisher who owns a fishing vessel and provides that the purchase of food is not deducted from gross income as it is considered a direct benefit to the fisher and is a reasonable return for the activities of fishing. The idea behind these policies is that, in estimating earnings to establish a wage rate, anything of value received as consideration for work done should be included because it constitutes economic gain to the worker.

In the case before me, the question arises, therefore, as to whether the contractual arrangement the fishers had with their employer was such that food was a consideration received for their fishing activities. I find that it was. Under that arrangement, part of the sale of the catch would go to the fishers directly in cash. Another part would go towards paying for their food. Therefore, the fisher would have received both a payment in money and a payment in kind. Including both types of payments in the calculation of their average earnings is consistent with the substance of policy items #71.21 and #66.13. Had the worker not been injured, he would have "earned" the replacement's share of the sale of catch — a share received partly in cash terms and partly in kind. Therefore, in calculating the applicable wage rate for this worker, it is appropriate to take into account the value of the food allotted to the replacement in addition to the $34,540.78 cash he received.

On the basis of the settlement sheets entered in evidence, the worker's representative submits that, in four out of the five settlements, the value of that food amounted to $3,608.73 and that amount should be included in the replacement's average earnings. I accept the representative's submission that the known value of food allotted to the replacement should be added to the $34,540.78 for a total of $38,149.51. The worker's wage rate should be based on that figure averaged over 12 months.

THE WORKER'S APPEAL IS ALLOWED IN PART AS OUTLINED ABOVE.

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

Decision of the Appeal Division

Number: 95-0914
Date: July 31, 1995
Panel: Herb Morton, Patrick L. Byrne, Cassandra Kobayashi
Subject: *Criminal Injury Compensation Act* — Deduction from Benefits

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The victim was awarded compensation under the *Criminal Injury Compensation Act* (the *C.I.C. Act*) for injuries received in an assault on June 27, 1993.

On September 16, 1993, the Criminal Injury Section sent a form to the B.C. Maritime Employer's Association requesting information concerning the victim's employment and earnings. A representative of the Employee Services Department, Waterfront Employers of B.C., completed the form. The employer representative advised that the victim had contributed 72 cents per hour worked to a self-administered sick benefit plan, and had received weekly indemnity benefits from June 27 to August 2, 1993. The space for a response to the question: "Are sick benefits paid in whole by you?" was left blank.

By decision dated November 30, 1993, the Board officer concluded that the victim was entitled to compensation in the amount of $5,725.00. The decision stated:

> [The victim] was employed as a longshoreman at the time of this incident. He worked on a first call basis at an hourly wage of $21.41. He received weekly indemnity benefits through a sick benefit plan into which [the victim] paid .72 [sic] cents per hour. Taking into account the benefits received and calculating the net loss of wages sustained during the period of recovery from the injuries equals an amount of $3,100.00.

The victim's union representative objected by letter of January 11, 1994, stating:

> The *Criminal Injury Compensation Act* section 4(c) discusses applying an offset to the wage loss by any monies "provided wholly at the expense of the employer".
>
> In this case, the benefit that [the victim] received during the period in question was provided wholly at the expense of the employee. The sick benefit in the longshore Plan is solely funded by the employees.

> The obligation of the member is to reimburse the Plan for benefits received from W.C.B. and there is no chance of "double-dipping". A copy of the reimbursement agreement is enclosed.

By letter dated January 19, 1994, a solicitor for the Criminal Injury Section responded by referencing a letter dated January 18, 1994 which had been sent to the union representative on another claim. The enclosed letter stated:

> Section 4(2)(c) of the *Act* provides that in determining the amount of compensation to be awarded to an applicant, the Board shall deduct "any payment, allowance or benefit that the victim may receive from his employer during the period of his disability, including a pension, gratuity or other allowance provided only [sic] at the expense of the employer". Obviously this particular section has no application in the event that the monies received by you for your wage loss were received from your union.
>
> Section 4(1) of the *Act* directs the Board to have regard to all relevant circumstances in determining the amount of compensation.
>
> Section 2(3.1)(b) of the *Act* provides that the Board may award compensation for loss or damage incurred by a victim as a result of total or partial disability affecting the victim's capacity for work.
>
> Considering the sections referenced above, it is the Board's view that the intention of the legislature was that the *Criminal Injury Compensation Act* should be "insurer" of the last resort. That is to say that the program could/would only compensate a claimant for his actual losses, after taking into consideration, and deducting, benefits received for that loss from any other source.
>
> In the event that you are still out of pocket money after taking into account the benefits received from your union disability plan, please feel free to provide me with the particulars of the monies paid to you by the disability insurance plan, and you will be indemnified for the remaining sum that you are out of pocket.

The victim requested an appeal committee review, under Section 22(2) of the *C.I.C. Act*, of the Board officer's decision. In their findings and report of September 23, 1994, the appeal committee found that the Board officer had correctly determined that the victim should be awarded compensation for the net amount of wage loss resulting from his injuries. The appeal committee referred to the text *Criminal Injuries Compensation*, second edition, by Professor Peter Burns, (1992) Butterworths Canada Ltd., and concluded:

> As stated by Burns, the state has voluntarily taken upon itself the responsibility of making payments that it was not legally obligated to make, and any doubts should be resolved in favour of the state. Although the Workers' Compensation Board administers the *Act*, the *Act* is funded by the Province of British Columbia through the Attorney General's Ministry. In administering the *Act* the Board has jurisdiction under Section 4(1) in determining whether to award compensation and the amount. Although it *must* deduct payments from an employer, it has the discretion to determine any amounts to be paid and has the implicit right to determine what deductions it may make from the gross loss suffered by a victim of a crime. The Appeal Committee finds that it has correctly done so in this case.

The victim applied to the chief appeal commissioner under Section 22(3) of the *C.I.C. Act* to obtain a further review of the findings and report of the appeal committee. Leave was granted by the chief appeal commissioner on February 22, 1995 (Appeal Division Decision No. 95-0161), on the basis that the appeal committee's findings, and the submissions of the victim's representative, raise an issue of statutory interpretation of significance beyond this particular case.

The attorney general was invited to participate in the hearing of this matter. By letter of June 22, 1995, a representative advised that the Ministry of the Attorney General did not wish to participate.

Law and Policy

The *Criminal Injury Compensation Act* provides:

> section 2(3)
> The board, on application as prescribed by the board or by the regulations, shall determine whether the applicant is a victim of crime or the dependant of a deceased victim of crime, and may award compensation to the victim or his dependant as provided by this Act.
>
> section 2(3.1)
> Compensation may be awarded for
> (a) expenses actually and reasonably incurred or to be incurred as a result of the victim's injury or death,
> (b) pecuniary loss or damages incurred by the victim as a result of total or partial disability affecting the victim's capacity for work . . .

section 4
(1) Subject to section 5, in determining whether to award compensation and the amount, the board shall have regard to all relevant circumstances, including any behaviour of the victim that may have, directly or indirectly, contributed to his injury or death.

(2) In determining the amount of compensation, if any, to be awarded to an applicant, the board shall deduct

(a) any amount recovered from the person whose act or omission resulted in the injury or death, whether as damages or compensation, under an action at law or otherwise; and

(b) any benefits received or to be received

(i) by the victim for his injury; or

(ii) by the applicant for the death of the victim,

under an Act of Canada or of the Province or of any other province other than benefits under a pension plan or program under such an Act, and, where the claim is for injuries or death caused by a motor vehicle, includes benefits that could have been applied for under a policy of accident insurance; and

(c) any payment, allowance or benefit that the victim may receive from his employer during the period of his disability, including a pension, gratuity or other allowance provided wholly at the expense of the employer. . . .

section 17(4)
Medical or hospital costs payable under a medical or hospital plan established under any Act of Canada or of the Province are not payable under this Act.

Under Section 1 of the *C.I.C. Act*, "board" is defined as meaning the Workers' Compensation Board established under the *Workers Compensation Act*. Section 20(1) of the *C.I.C. Act* provides:

> The board is charged with the administration of this Act, and has all the powers which are given to it under the *Workers Compensation Act*.

Under Section 82 of the *Workers Compensation Act*, the governors are empowered to approve and superintend the policies and direction of the Board. (Effective July 13, 1995, the powers of the governors are exercised by a Panel of Administrators pursuant to Bill 56, the *Workers Compensation Amendment Act, 1995*).

Decision No. 86 of the governors (see *Workers' Compensation Reporter*, 1994, Vol. 10(5): p. 781–783) provides that Decisions No. 1 to 423 of the *Workers' Compensation Reporter* constitute part of the published policies of the governors. This confirms the earlier governors' policy on this point set out in Decision No. 3 (*Workers' Compensation Reporter*, 1991, Vol. 7(1): p. 17–18). Governors' policy includes the following decisions under the *C.I.C. Act*:

W.C.R. Volume	**Decision Number**
1	16 (p. 75), 77 (p. 301);
2	131 (p. 133), 132 (p. 134), 133 (p. 135), 172 (p. 271) , 173 (p. 272), 178 (p. 279), 179 (p. 280), and 181 (p. 283);
3	198 (p. 1)

In Decision No. 75, regarding Appeal Division administration, practice and procedure (*Workers' Compensation Reporter*, Vol. 10(5): p. 753–757), the governors stated (at page 756):

> **5.0 Application of Board Policy by the Appeal Division**
>
> The Appeal Division shall apply and interpret the *Act*, Regulations and existing Board published policy. The Appeal Division does not have the authority to create new policy. . .

Governors' policy in Decision No. 133 (*Workers' Compensation Reporter*, Vol. 2: p. 135–136) concerned a victim of crime who sustained injuries to his right hand when the door of his car was forcibly shut on it by another person. The decision states (at page 136):

> The claimant's net take home pay was approximately $180.00 per week at the time of this incident. He was off work for approximately 21 weeks as a result of his injuries. *He received $1,000.00 in benefits under a provincial automobile insurance policy and approximately $2,500.00 in sick benefits under a private insurance scheme during the period of his disability*. He incurred approximately $120.00 in travel expenses. . .
>
> Section 4(2)(b) of the *Act* provides that the Board shall deduct any benefits received by the victim in respect of his injury under an Act of Canada or of the Province in determining the amount of compensation, if any, to be awarded to an applicant. Deducting the $1,000.00 the claimant received in provincial automobile insurance benefits from the above assessment of

> $8,400.00 leaves a net result of $7,400.00. *The benefits the claimant had received under a private insurance policy are not considered to be deductible within the meaning of that section.*
>
> (emphasis added)

Section 4 has remained essentially unchanged since the *C.I.C. Act* was enacted in 1972. The wording has been slightly simplified, but no substantive changes have been made to Section 4.

Decision No. 133 involved consideration of the clause: "and, where the claim is in respect of injuries or death caused by a motor-vehicle, includes benefits that could have been applied for under a policy of accident insurance." Decision No. 133 must, therefore, have involved consideration as to whether:

- this provision contemplated a deduction of all benefits received from accident insurance policies (i.e., both the *automobile* insurance policy, and any additional general accident insurance policies the victim might carry), or, alternatively,

- this provision only requires the deduction of benefits received under a policy of *automobile* accident insurance.

Both types of policies would fit under the general term "a policy of accident insurance." Decision No. 133 appears to have involved a decision of a policy nature to read this clause restrictively as only requiring the deduction of benefits received under a contract of automobile accident insurance but not other additional general accident insurance the victim might hold.

Decision No. 133 was also described in the *4th Annual Report of the Criminal Injuries Compensation Act*, for 1975, at page 15.

The assertion that the criminal injury compensation scheme operates as an insurer of last resort is inconsistent with Decision No. 133 of governors' policy. The private insurance benefits received in connection with the injuries caused by a motor vehicle in that case could have been deducted based on a literal reading of the wording of Section 4(2)(b), but this published decision had the opposite effect.

This interpretation, of deducting benefits received under a policy of automobile accident insurance but not other general accident insurance policies, may in some respects be seen as consistent with the approach provided in Section 17(4) of the *C.I.C. Act* with respect to medical or hospital costs. That section provides that medical aid costs which are payable under an Act of the province, or of Canada, are not payable under the *C.I.C. Act*. However, there is no bar to payment in respect of medical or

hospital costs paid under a private insurance policy. Section 17(4) is not worded so as to make the criminal injury compensation scheme an insurer of last resort for all purposes, in connection with medical aid costs.

Decision No. 79 of the governors dated October 22, 1994 (see *Workers' Compensation Reporter*, Vol. 10(5): p. 767) states:

> **WHEREAS:**
>
> A. Section 82(b)(i) of the *Workers Compensation Act* authorizes the governors of the Workers' Compensation Board to establish and give direction to committees;
>
> B. on August 12, 1991, the governors established the Criminal Injury Policy Committee and directed the Committee to conduct a comprehensive study into the policies of the criminal injury compensation system in B.C.;
>
> C. on April 13, 1992, the attorney general requested that the governors suspend their policy review pending a more general review of victim assistance programs by the Ministry of the Attorney General and the governors agreed;
>
> D. the Ministry of the Attorney General has studied the criminal injury compensation system and is considering whether statutory amendments should be recommended to the *Criminal Injury Compensation Act* and policy changes made; and
>
> E. the governors have concluded that, in view of the studies conducted by the Ministry of the Attorney General and of the Ministry's broader-based knowledge of victims assistance issues generally, the governors' policy initiatives are no longer required:
>
> **NOW THEREFORE THE GOVERNORS RESOLVE THAT:**
>
> the Criminal Injury Policy Committee established by the governors on August 12, 1991, be wound up by this resolution.

While the governors wound up their committee for developing policy under the *C.I.C. Act*, their resolution did not affect the status of the decisions previously declared to be part of their published policy under the *C.I.C. Act*. Nor did the resolution derogate from the governors' ultimate authority and responsibility for making policy under the *C.I.C. Act*.

Findings and Reasons

In this case, it is clear that the victim's sick benefits were not from a plan wholly funded by the employer. In Decision No. 133 it was concluded that no deduction should be made for sick benefits received by a victim of crime under a private insurance scheme during the period of disability (even where those benefits were received in connection with a claim for injuries or death caused by a motor vehicle).

Decision No. 133 is part of the published policy of the governors and, as such, is generally to be applied unless it is found that it is contrary to the *C.I.C. Act*. The panel has, therefore, proceeded to consider whether governors' policy as contained in Decision No. 133 is consistent with the *C.I.C. Act*.

The deductibility of collateral benefits is the subject of Section 4(2)(b) and (c) of the *C.I.C. Act*. These specifically provide for the deductibility of benefits payable under a policy of accident insurance where the claim is in respect of injuries or death caused by a motor vehicle, or from a pension, gratuity or other allowance provided wholly at the expense of the employer. Governors' policy provides that monies received by way of sick benefits under a general private insurance scheme during the period of disability are not deductible from an award of compensation under the *C.I.C. Act*. This is so, even where the claim is in respect of injuries or death caused by a motor vehicle accident.

In this case, the Board officer resorted to the more general provisions of Sections 4(1) and 2(3.1)(b) with respect to the Board's discretion under the *C.I.C. Act*, to explain the decision reached, conceding that this deduction could not be justified under the specific provisions of Section 4(2)(c).

The maxim *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) is a general principle of statutory construction. In the *Construction of Statutes*, second edition, E.A. Driedger states at page 123:

> Where there are overlapping provisions it is usually a situation where one provision is general and the other provision is a special one within the general. If they can stand together, the question is whether the legislature intended the special provision to be additional or exclusive and the answer of course depends on the context. It would seem that where powers are granted to some authority . . . the courts are likely to hold that the special provision is addition. But where a special procedure or *modus operandi* is prescribed for a special case . . . the courts are likely to regard it as exhaustive, namely, that the legislature has manifested an intention to create a complete legislative code governing the subject-matter.

This principle of statutory interpretation is one which must be applied with utmost caution, as stated by P.A. Cote in *The Interpretation of Legislation in Canada*, second edition, at pages 283–285. Much depends on the context, as the wording may be the result of inadvertence on the part of the draughts person. This approach will not be applied if other indications reveal that its consequences go against the statute's purpose, are manifestly unjust, or lead to incoherence and injustice that could not have been the desire of the legislature.

Governors' policy has clearly taken a restrictive approach to the deductibility of benefits under Section 4(2) of the *C.I.C. Act*. The maxim *expressio unius est exclusio alterius* supports the interpretation taken of the *C.I.C. Act* by the governors. For the purposes of this decision, it is not necessary for the panel to consider whether the governors, as a matter of policy, might have adopted a different interpretation of the *C.I.C. Act*. While recognizing the caution which must be utilized in applying the *expressio unius* maxim, we find no basis for concluding that the policy of the governors is unlawful.

We find that the decision of the Board officer and the findings and report of the appeal committee are contrary to the published policy of the governors as set out in Decision No. 133 of the *Reporter*. The plain effect of governors' policy as expressed in that decision is that the criminal injury compensation scheme does not operate as an insurer of last resort. The provisions in Section 4(2)(b) and (c) of the *C.I.C. Act* are specific in terms of the deductions authorized by the *C.I.C. Act* from the compensation otherwise payable to a victim or dependent. The panel finds that the deduction of *employee-funded* sick leave benefits would be contrary to the policy of the governors with respect to the application of these provisions of the *C.I.C. Act* concerning the deductibility of collateral benefits.

Governors' policy in Decision No. 133 which provides, in effect, that the criminal injury compensation scheme is not an insurer of last resort is lawful. There are no particular circumstances of this case which make that policy inapplicable, or which require a departure from the policy. The panel finds, therefore, that the victim is entitled to claim the amount of the employee-funded sick leave benefits which were incorrectly deducted from his award.

In conclusion, the victim is entitled to claim the full amount of his lost wages without any deduction for the amount received under the employee-funded sick benefit plan.

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

Decision of the Appeal Division

Number: 95-0991
Date: August 23, 1995
Panel: Connie Munro, Cassandra Kobayashi, Herb Morton
Subject: Status of Deceased Worker's Estate

The estate of the deceased worker appeals the February 23, 1995 Review Board finding.

(a) Issues

This case raises the jurisdictional questions of whether a deceased worker's estate has standing to continue appeal proceedings instituted by the worker before the Review Board and whether the estate has standing to initiate an appeal of the Review Board finding to the Appeal Division.

The substantive issue is whether the deceased worker's permanent disability pension should have been adjusted for age. According to the governors' published policies, the percentage rate attributed to a disability is increased by one percent of the assessed disability for each year that the worker is over 45, up to a maximum of 20 percent of assessed disability. The policies specify that the adjustment is not made in the case of non-scheduled awards, although "the worker's age is one of the overall considerations in making the judgment."

(b) Background

The facts of the case are relatively simple. The worker was employed from September, 1954 until he retired in April, 1976. In 1981, at the age of 71, he was diagnosed as having bladder cancer. He applied for compensation on February 12, 1987. The Board accepted his claim. A senior pension adjudicator granted the worker a permanent partial disability pension of 24 percent of total effective August 13, 1982 (the day following the worker's surgery to remove his bladder, prostate, urethra, and seminal vesicles). However, in a decision dated October 18, 1989, the prior commissioners concluded the worker was entitled to receive compensation only as of February 12, 1987 (the date of the worker's application for compensation). The prior commissioners did not seek reimbursement of the compensation paid for the period prior to February 12, 1987. In findings dated December 27, 1990, the Review Board increased the worker's pension,

rating it at 53 percent of total disability effective February 12, 1987 (48 percent for removal of his urethra, seminal vesicles, bladder and urinary diversion and five percent for sexual impotence). In implementing these findings, the Board refused to adjust the pension award for age on the basis that most of the award was "non-scheduled" and age adaptability does not apply to awards for sexual impotence. In 1991, the worker appealed this refusal to the Review Board. In 1992, while the appeal proceedings were in progress and before the hearing was held, the worker died.

In findings dated February 23, 1995, the Review Board panel stated:

> 1. The estate has no right to carry on an appeal where the worker dies after initiating it.
>
> 2. In the alternative and if we are wrong in law, the entire amount of the worker's award is a non scheduled award and age adaptability is not payable.

The estate administrator authorized the deceased's union to pursue an appeal on behalf of the worker's estate. Submissions have been provided by legal counsel retained by the union, on behalf of the estate, regarding the jurisdictional and substantive questions and requesting the reimbursement of legal fees and costs. Counsel for the employer advises that the employer does not wish to address the jurisdictional questions. He has made submissions on the substantive issue and the request for reimbursement of legal fees and costs.

(c) Preliminary Issues — Standing of the Estate

Whether or to what extent the estate of a deceased worker may stand in for the worker in seeking the remedies available under the *Workers Compensation Act* ("the *Act*") is a broad issue that covers a number of questions. For example:

- An injured worker dies before filing a claim. Can the estate file an application for any compensation benefits to which the worker would have been entitled prior to his death?

- An injured worker files a claim but dies before it is adjudicated. Is the claim thereby extinguished or can the estate continue the claim?

- An injured worker files a claim and is awarded benefits, but dies before the award is paid. Are the benefits payable to the worker's estate? Would the benefits be payable if the award were made by the Review Board or the Appeal Division?

- An injured worker files a claim and is awarded benefits but the employer appeals to the Review Board and the worker subsequently dies. What is the status of the appeal? Does the worker's estate become a party to the appeal?

- An injured worker files a claim which is denied; the worker initiates an appeal to the Review Board then dies. Is the appeal extinguished?

- An injured worker files a claim which is denied and dies before initiating an appeal to the Review Board. Can his estate initiate that appeal?

- An injured worker's appeal is rejected by the Review Board; the worker initiates an appeal to the Appeal Division then dies. Is the appeal extinguished?

- An injured worker's appeal is rejected by the Review Board; the worker dies. Can the estate initiate an appeal to the Appeal Division?

- An injured worker's appeal is allowed by the Review Board; the worker dies. The employer wishes to appeal the findings to the Appeal Division. Can the appeal be initiated after the worker's death? Is the worker's estate a party to the proceedings?

- An injured worker's appeal is allowed by the Review Board. The employer appeals the findings to the Appeal Division; the worker dies. Does the appeal proceed? Can the worker's estate become a party to the proceedings?

Similar types of questions about the role of an estate may arise in connection with Medical Review Panel appeals and the reconsideration of Appeal Division decisions. As well, similar questions may arise if the estate of a deceased employer tries to assume the employer's role for the purpose of proceedings under the *Act*.

In general terms, the questions identified pertain to whether an estate may initiate proceedings, continue proceedings initiated by the deceased, or receive moneys payable to the deceased. It may be that some of these questions have different answers, depending on whether the proceedings involved concern an appeal or adjudication in the first instance. That is, finding an estate may initiate an appeal need not entail finding the estate could have filed the claim in the first instance. Similarly, the question of whether an estate has standing to initiate an appeal may have a different answer than whether it has standing to continue an appeal. It is important to treat these questions as distinct so as not to overlook the possibility that they may yield different answers. To decide this case, the panel must determine both whether a worker's estate may continue an appeal (at the Review Board), and initiate one (to the Appeal Division).

At common law, the estate of a deceased person did not automatically inherit all the rights of the deceased. For example, the estate could not sue for a wrong committed against the deceased for which only unliquidated damages would be recoverable. Statutory law has given the estate of a deceased person rights (and obligations) where there were none at common law; the extent to which the rights (and obligations) of a

deceased person vest in his estate is, therefore, basically a statutory matter. In the case of the estate of a deceased worker who was entitled to workers' compensation, the relevant statutes are the *Act* and possibly the *Estates Administration Act*.

Before looking at the relevant legislation, we note published Appeal Division Decision No. 94-0313, *Appeal Continued by a Worker's Estate* (see *Workers' Compensation Reporter*, Vol. 10(4): p. 661–663), in which the panel found that the worker's estate could continue the appeal process initiated by the worker before the Review Board. In another published Appeal Division decision, the panel made findings on the basis that the worker's estate could initiate an appeal before the Appeal Division (*Workers' Compensation Reporter*, Vol. 8(6): p. 545–549).

We note that Professor Larson discusses the heritability of claims and benefits in *Workmen's Compensation Law*, Vol. 1C, p. 10–492.284 to 10–492.316. He gives numerous examples of American court decisions holding that the death of a worker does not extinguish a claim and unpaid but accrued benefits are collectible by the estate of the deceased (see, the examples given on p. 10–492.285 to p. 10–492.289). More specifically, where a claim has been filed by the injured worker, but no award made at the time of his death, it appears that many courts will find the claim *not* to be extinguished by the worker's death; the same holds if the death occurs during an appeal (see p. 10–492.303 to 10–492.313). The courts are more divided on whether the estate has the right to file a claim (see p. 10–492.303).

While the American jurisprudence on workers' compensation is by no means determinative of how B.C. workers' compensation legislation is to be interpreted, Larson's discussion is noteworthy in suggesting that the questions of whether an estate may initiate proceedings, continue proceedings instituted by the deceased or collect moneys payable to the deceased are best analyzed separately. It also suggests that, in determining the rights of an estate to assume the deceased worker's role for the purpose of collecting benefits, one may wish to ask whether (or in what sense) the benefits at issue accrued to the worker prior to his death.

The Ontario Workers' Compensation Appeals Tribunal has rendered several decisions on the heritability of workers' compensation claims and benefits. The Ontario decisions have generally held that the estate of a deceased worker has standing to initiate and continue appeal proceedings. Like several of the American decisions cited by Larson, Ontario attaches significance to when benefits may be said to have accrued to the deceased worker. The Ontario workers' compensation legislation does not explicitly provide whether or to what extent the estate can assume the deceased worker's role. In a series of unpublished decisions, the Tribunal held that an estate can assume the worker's role for the purpose of maintaining a claim with respect to any benefits that may be found to have accrued to the worker up to the time of his death. On that footing,

the Tribunal allowed the estate of a deceased worker both to continue an appeal initiated by the worker (see Decision No. 148/87 and Decision No. 461/90), and to initiate an appeal (see Decision No. 176/88). In published Decision No. 113/89 (see W.C.A.T.R., 10, p. 355) and Decision No. 667/39I (see W.C.A.T.R., 29, p. 176), the Tribunal held there may be circumstances where a deceased worker's right to a lump sum payment has accrued to the point where a payment may be made after death. In Decision No. 667/39I, the Tribunal considered a case in which a worker died after a request for commutation was denied. The worker's father subsequently appealed the denial. The Tribunal found the worker's estate (not the father) was entitled to pursue the worker's claim to a lump sum because, under the applicable statutory provision, the worker had been entitled to a commutation. The right to a commutation crystallized with the granting of a pension of 10 percent or less and the worker had been granted such a pension. Since the commutation right accrued to the worker prior to his death, the Tribunal reasoned that the worker's estate was entitled to pursue the worker's claim to that benefit.

Do the governors' published policies provide any guidance on whether or to what extent the estate of a deceased worker may assume the worker's role for proceedings under the *Act*? The governors' published policies refer to a deceased worker's estate in Decision No. 135 (*Workers' Compensation Reporter*, 1975, Vol. 2: p. 139–140). That case involved a worker who suffered a compensable permanent partial disability. After the worker died of unrelated causes, the disability awards officer, unaware of the death, sent a letter addressed to the worker granting an award, rated at 1.45 percent of total disability. Because the award was small, the letter indicated the monthly disability benefits were commuted into a cash payment and attached a cheque to the letter. The prior commissioners denied a request by the deceased worker's wife that the cheque be re-issued to her but stated:

> [T]he file should be reviewed . . . to determine whether there were any arrears of *compensation benefits* due to the worker on the date of his death *in respect of the disability up to that time*, and any arrears found to be due should be paid into the estate of the worker, or to the widow, according to whether Section 33(4) [now 35(4)] is applicable.
>
> (emphasis added)

At the very least, this policy provides that, where an award is made prior to the worker's death, any compensation benefits due but not paid to the deceased during his lifetime are payable to his estate. There is no implication that awards made at the first level of adjudication should be given a different effect than awards made in the context of an appeal.

Does the *Act* provide support to a broader interpretation of Decision No. 135? More specifically, does it support the notion that any benefits to which the deceased was

entitled during his lifetime may be pursued by his estate, regardless of whether an award was made before the worker's death? Section 15 of the *Act* is relevant to the matter in hand. It states:

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

The section speaks of "a sum payable as compensation . . . [passing] to a personal representative . . . ." The words "personal representative" typically refer to the executors and administrators of a deceased person. The words "a sum payable as compensation" could be taken to mean a sum already awarded. In that case, Section 15 merely states that, where a compensation award was made before the worker's death, a sum payable to the worker during his lifetime becomes payable to his personal representative after his death. On the other hand, if the words "a sum payable as compensation" mean a sum that must be paid as compensation by virtue of the worker's entitlement under the *Act*, then whether or not an award was actually made before the worker's death is irrelevant. Once a worker has an injury or contracts a disease for which the statute provides compensation, benefits accrue to a worker and are, therefore, payable. On that footing, Section 15 implies that the personal representative of a deceased worker may assume the role of the deceased until the award is made and paid. The worker's right to compensation passes to the personal representative. Accordingly, a deceased worker's estate may continue proceedings to have the worker's right to compensation recognized and to collect the compensation payable.

In sum, the wording of Section 15 supports the notion that the death of a worker does not extinguish a claim, if an award was made prior to the worker's death. The award is payable to the worker's estate. But the wording can also support the broader notion that the death of a worker does not extinguish a claim, even if it occurs before the award is made. The estate may pursue the claim. That would hold, whether the claim is under consideration in the first instance or on appeal. A narrow construction of the word "payable" in Section 15 to mean "already awarded" would mean delays — deliberate or inadvertent — would minimize the payment of compensation benefits.

In light of the above, the panel concludes that Section 15 of the *Act* and the relevant published policy (Decision No. 135) may reasonably be interpreted as allowing the estate of a deceased worker to collect the compensation benefits to which the deceased was entitled during his lifetime, where the benefits were awarded prior to the worker's death; and to maintain a claim to such benefits where the worker died before an award was made.

The wording of other relevant statutory provisions is consistent with that conclusion. Section 35(4) of the *Act* states:

> Any compensation owing or accrued to a worker or pensioner for a period not exceeding 3 months before his death may, at the discretion of the board, be paid to a widow, widower or a person who takes charge of the funeral arrangements, free from debts of the deceased.

This provision may be seen as allowing the Board to divert some of the compensation passing to the deceased worker's estate to the person who takes charge of the funeral arrangements; in that sense, it may be reconciled with Section 15. Furthermore, the words "owing or accrued" in the provision can be reconciled with the word "payable" in Section 15, if "payable" is interpreted to mean both awarded (and, therefore, owing) or accrued but not yet awarded.

The wording of Section 35(4) supports, therefore, reading Section 15 as allowing the estate of a deceased worker to maintain the worker's claim to compensation benefits which accrued during the worker's lifetime. The wording of the statutory provisions concerning applications for compensation, appeals (putting aside Medical Review Panel appeals) and reconsideration requests does not undermine that conclusion either.

Section 55, which sets out the time requirement for applications for compensation, begins:

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

While it may be argued that the section does not authorize a deceased worker's estate to file an application for compensation since it requires a worker (or his dependant) to sign the application form, once the worker (or his dependant) has signed the form, there is a valid claim. The wording of the section gives no reason to infer that the death of a worker would invalidate the claim — i.e., that the estate would have no standing to continue the proceedings initiated by the worker. There is no explicit or implicit requirement in the section that the worker remain alive throughout the proceedings.

Section 90 concerns appeals to the Review Board. The section states:

> (1) Where an officer of the Workers' Compensation Board makes a decision under this *Act* with respect to a worker, the worker, or, if deceased, his dependants, or his employer, or a person acting on behalf of the worker, his dependants or employer, may, not more than 90 days from

the day the decision is communicated to the worker, dependants or employer, or within another time the review board allows, appeal the decision to the review board in the manner prescribed by the regulations.

(2) Where the employer of a worker referred to in subsection (1) has ceased to be an employer within the meaning of Part 1, the review board may, for the purposes of an appeal under subsection (1), deem an organized group of employers which includes as members employers in the subclass of industry to which the employer belonged to be the employer of the worker.

(3) Every finding of the review board, together with its reasons, shall be recorded in writing and promptly sent to the appellant and his employer or worker, or the dependants, as the case may be, and to the Workers' Compensation Board.

(4) No action shall be maintained or brought against the chairman, any vice chairman or temporary vice chairman or any member or temporary member of the review board in respect of an act, omission or finding done or made in the belief that it was within the jurisdiction of the review board.

The only requirements for a valid appeal under Section 90 are that "the worker, or, if deceased, his dependants, or his employer, or a person acting on behalf of the worker, his dependants or employer may, not more than 90 days . . . appeal the decision . . . ." If the worker has appealed a Board decision within the requisite time, there is a valid appeal. The section does not contemplate the abatement and extinguishment of such an appeal by the death of the worker.

Section 91 concerns the Appeal Division. It states:

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

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

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

(a) 90 days of the date on which the appeal is commenced,

(b) 90 days of a reconsideration by the review board under subsection (2), or

(c) a longer period the chief appeal commissioner may designate where the appellant requests a delay in the proceedings or where the chief appeal commissioner considers the longer period necessary because of an act or omission of the appellant or because of the complexity of the matter under appeal.

The only requirements for a valid appeal under Section 91 are that "the worker, the worker's dependants, the worker's employer or the representative of any of them may, not more than 30 days after the finding is sent out . . . appeal the finding . . . ." If the worker has appealed a finding within the requisite time, there is a valid appeal. Like Section 90, this section does not contemplate the abatement and extinguishment of a properly-instituted appeal by the death of the worker.

Section 96.1 concerns the reconsideration of Appeal Division decisions. It states:

(1) Subject to this section and sections 58 to 66, a decision of the appeal division is final and conclusive.

(2) 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 of the appeal division on the grounds that new evidence has arisen or has been discovered subsequent to the hearing of the matter decided by the appeal division.

(3) Where the chief appeal commissioner considers that the evidence referred to in subsection (2)

(a) is substantial and material to the decision, and
(b) did not exist at the time of the hearing or did exist at that time but was not discovered and could not through the exercise of due diligence have been discovered,

he may direct that

(c) the appeal division reconsider the matter, or
(d) the applicant may make a new claim to the board with respect to the matter.

Nothing in the wording of this section suggests that, once a worker has applied to the chief appeal commissioner for reconsideration of an Appeal Division decision, his death puts an end to the proceedings.

On the basis of the above analysis of Sections 15, 35(4), 55, 90, 91 and 96.1, the panel finds that the estate of a deceased worker has standing to continue proceedings initiated by the worker, where the worker was seeking to have his entitlement to compensation benefits recognized or given full effect. We find further that this general proposition holds whether the proceedings initiated by the worker were at the first level of adjudication or on appeal (except for Medical Review Panel appeals which warrant a separate analysis). Although the wording of Sections 90, 91 and 96.1 would be broad enough to allow the estate to maintain any claim initiated by the worker, including a claim for discretionary benefits, the wording of Section 15 is somewhat limiting. As indicated above, the Section refers to "a sum payable as compensation." These words suggest some entitlement to compensation rather than discretionary benefits. It is, therefore, reasonable to interpret the statute as allowing a deceased worker's estate to maintain a claim with respect to a sum payable as *compensation*, as that term is defined under the *Act*, but possibly not with respect to discretionary benefits.

The question arises as to whether the statute allows a deceased worker's estate to initiate an appeal of Review Board findings to the Appeal Division. Section 91 concerning the Appeal Division specifically allows a worker's "representative" to appeal Review Board findings to the Appeal Division. Can the word "representative" be interpreted to include a personal representative? In other words, can it be read as referring not only to a person empowered to act on behalf of a worker who is alive but also to the executor or administrator of an estate?

Under "representative," *Black's Law Dictionary* states:

> . . . "Representative" includes an agent, an officer of a corporation or association, and a trustees executor or administrator of an estate, or any other person empowered to act for another . . . .

Under "representative," *The Oxford Companion to Law* states:

> A person who represents or stands in the place of another. Thus the executor or administrator of a deceased is called his personal representative, as representing him in respect of his estate. Prior to 1925 there might be a real representative . . . .

The word "representative" used in Section 91 is broad enough to include the executor or administrator of an estate. Admittedly, some statutory provisions such as Section 15 and Section 103(1) specifically refer to "a personal representative." The question may be

posed as to why the words "personal representative" do not appear in Section 91, if the section was truly intended to allow the executor or administrator of an estate to assume the role of the deceased. As is apparent from the definitions in *Black's Law Dictionary* and *The Oxford Companion to Law*, the word "representative" has a broader meaning than "personal representative." It includes the executor or administrator of an estate but it also includes an agent empowered to act for someone who is alive. Use of the words "personal representative" is logical, therefore, in provisions intended to limit certain rights (or obligations) to the executors or administrators of estates. For example, according to Section 15, a sum payable as compensation can only pass to one type of representative, namely, the executor of administrator of a worker's estate; it cannot pass to the agent of a living worker. That does not mean that the legislation intends to deprive the executors and administrators of estates of the rights granted under the general category of "representative." A reasonable construction of the legislation is that some rights attach to all representatives, including the executors and administrators of estates; other rights attach only to the executors and administrators of estates — hence, the need to specify in certain provisions "personal representative."

Does the wording of Section 90 which concerns appeals to the Review Board weaken the notion that an estate may initiate an appeal to the Appeal Division? If Section 90 clearly excluded appeals initiated by an estate, it would be difficult to construe Section 91 as including such appeals. That is, it would be difficult to rationalize why an estate could not initiate an appeal to the Review Board but could initiate one to the Appeal Division. Section 90 does not contain, however, explicit limitations in that regard. It confers the right to initiate an appeal to "the worker, or, if deceased, his dependants, or his employer, or a person acting on behalf of the worker . . . ." The words "or a person acting on behalf of the worker" are open to interpretation. We recognize that the word "representative" suggests more strongly than the words "or a person acting on behalf of a worker" an intent to include the executors and administrators of estates. Still the words used in Section 90 do not prohibit appeals initiated by estates; they are inconclusive. Furthermore, the fact that the wording of the legislation confers upon a deceased worker's estate the right to initiate an appeal to the Appeal Division would be consistent with an intent to confer upon the estate the right to initiate an appeal to the Review Board. Just as it would be difficult to rationalize the right for an estate to appeal a Review Board finding to the Appeal Division, if the legislation barred estates from appealing Board decisions to the Review Board, it is difficult to rationalize why estates would have a right of appeal to the Appeal Division but not to the Review Board. That said, the question of whether a deceased worker's estate may initiate an appeal to the Review Board is not before us and, therefore, we need not specifically answer it. However, we must determine whether the estate of a deceased worker has standing to initiate an appeal to the Appeal Division. The panel has concluded that the wording of Section 91 of the *Act* is broad enough to give the estate of a deceased worker standing to initiate an appeal to the Appeal Division. Having regard to Section 15 of the *Act*, such an appeal must, however, concern some entitlement to compensation benefits.

We have considered whether the *Estates Administration Act* impacts upon the rights (and obligations) of an estate under the *Act*. The relevant sections in the *Estates Administration Act* are Sections 66(2) and 66(9). Section 66(2) states in part:

> The executor or administrator of a deceased person may continue or bring and maintain an action for all loss or damage to a person or property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, be entitled . . . .

Section 66(9) states:

> This section is subject to section 10 of the *Workers Compensation Act*, and nothing in this section shall prejudice or affect a right of action under section 103 of that Act or the *Family Compensation Act*.

Section 10(1) of the *Workers Compensation Act* provides:

> The provisions of this Part are in lieu of any right and rights of action . . . to which a worker, dependant or member of the family of the worker is or may be entitled against the employer of the worker, or against any employer within the scope of this Part, or against any worker, in respect of any personal injury, disablement or death arising out of and in the course of employment and no action in respect of it lies . . . .

When read in conjunction with Section 10 of the *Act*, Section 66(9) of the *Estates Administration Act* effectively bars the estate of a deceased worker from court action against a worker or employer within the scope of Part 1 of the *Workers Compensation Act*. That would suggest an intent to allow an estate to seek the remedies available under the *Act* — otherwise, an estate would be barred from pursuing any remedy. Such an outcome would be difficult to justify, in the absence of unambiguous language in the *Act* to that effect. The *Estates Administration Act* appears to support reading the *Act* as giving the estate of a deceased person the right to seek all the remedies that would have been available to the deceased during his lifetime, subject to the specific terms of the relevant provisions contained in the *Act*.

In conclusion, an examination of the *Act* persuades the panel that:

- the estate of a deceased worker has standing to continue an appeal initiated by the worker to the Review Board concerning a claim for arrears of compensation;

- the estate of a deceased worker has standing to initiate an appeal, to the Appeal Division, of Review Board findings concerning a claim for arrears of compensation.

(d) Arrears of Compensation

In this case, in order to make a determination on the standing of the deceased worker's estate to continue the proceedings initiated by the worker to the Review Board, and to initiate an appeal to the Appeal Division, the panel must decide whether these proceedings concern a claim for arrears of compensation benefits. Under Section 15, a deceased worker's estate may maintain a claim with respect to "a sum payable as compensation" but possibly not with respect to benefits under the *Act* which are not "compensation." Not every benefit payable under the *Act* is "compensation."

The substantive issue in this appeal is whether the deceased worker's permanent disability pension should be adjusted for age. This concerns the level of the pension which was payable to the worker (up to the date of his death), under Section 23 of the *Act*. Both Section 23(1) and 23(3) contain the phrase "and the compensation shall be a periodic payment . . . ." This appeal, therefore, concerns a claim for "compensation," as that term is defined under the *Act*, rather than to some other type of benefit under the *Act*. The panel finds that the deceased worker's estate has standing to continue the proceedings initiated by the worker to the Review Board and to initiate this appeal to the Appeal Division, in relation to the amount of the pension benefits which were payable to the worker up to the date of his death. As stated by governors' policy in Decision No. 135, it is necessary:

> to determine whether there were *any arrears of compensation benefits due to the worker on the date of his death in respect of the disability up to that time*, and any arrears found to be due should be paid into the estate of the worker, or to the widow, according to whether Section 33(4) [now section 35(4)] is applicable.
>
> (emphasis added)

For the reasons previously expressed in this decision, the panel considers that the proper consideration as to whether there were any arrears of compensation benefits due to the worker up to the date of death, includes consideration of any appeal brought by the estate concerning the amount of compensation which was payable to the worker up to the date of death.

The panel has proceeded to consider the substantive issue raised by this appeal, as to whether the deceased worker's permanent disability pension should have been adjusted for age.

(e) Age Adaptability Factor

By decision of October 18, 1989, the former commissioners considered the requirements of Section 6(1) and 55 of the *Act*. They concluded that the worker was entitled to medical aid and pension benefits effective from the date of his application for compensation, but that no wage-loss benefits were payable in view of his retirement from employment in 1976.

In a decision of the Appeal Division on another case (No. 92-1314, July 23, 1992), the majority of the panel concluded that the requirement of Section 6(1)(a), that a worker be disabled from earning full wages at the work at which he was employed by reason of their industrial disease, was a prerequisite to the payment of wage-loss or pension benefits. This requirement concerning industrial diseases (now "occupational diseases") is currently stated in governors' policy at item #26.30 of the *Rehabilitation Services and Claims Manual* (the "*Manual*"). The decision by the former commissioners that a pension was payable on the worker's claim for an industrial disease is not part of the appeal before this panel, and it is not necessary for the panel to address that issue for the purposes of this decision.

The worker subsequently obtained an extension of time to appeal the November 10, 1988 decision of the senior pension adjudicator to the Review Board. In a finding dated December 27, 1990, the Review Board concluded that the worker's pension award should be increased to 53 percent of total. This finding was implemented by the disability awards claims adjudicator on March 7, 1991. The March 7, 1991 letter stated:

> Your representative had requested that age adaptability be applied to your award. Age adaptability is taken into consideration but is not normally applied to non-scheduled awards. The bulk of your award is considered to be non-scheduled. The only portion of the award that might be considered scheduled would be that pertaining to impotence. However, inherent in the scale of awards for impotence is an age factor and as such no separate age adaptability factor is applied.

The worker's appeal from this decision resulted in the February 23, 1995 Review Board finding, which is the subject of this appeal. The Review Board addressed this aspect of the worker's appeal as follows:

> In the event we are wrong in the foregoing analysis [that the estate has no right to carry on an appeal where the worker dies after initiating it], we make the following alternative findings.
>
> . . . Board policy is clear and we have no basis upon which to conclude it is unlawful. Age adaptability factors are not added to non-scheduled awards. The worker's award was broken down by the [December 27,

1990] Review Board as 48% for bladder and organ removal and 5% for sexual impotence. The former figure is derived from the American Medical Association Guide and is a non-scheduled award. Age adaptability does not apply to this. The Claims Adjudicator and Review Board called the sexual impotence award a scheduled award but this is an error. We find that the only items which are "scheduled" are those which appear in or are based on the Board's Permanent Disability Evaluation Schedule. Sexual impotence, along with impairments such as loss of taste or smell, appear in the Manual with very specific values attached to these losses, but they do not appear in the Schedule. We find that the entire amount of the worker's award is an unscheduled award. Therefore, an age adaptability factor is not applicable to this award.

Governors' policy provides, at item #39.11 of the *Rehabilitation Services and Claims Manual*:

> *Age Adaptability Factor*
>
> The percentage rate derived by use of the simple physical impairment method is modified by the application of an age variable. This age adaptability factor is used for claimants over the age of 45 where the disability is calculated in accordance with the schedule. The disability is increased by 1% of the assessed disability for each year over 45 up to a maximum of 20% of the assessed disability. . .
>
> The worker's age at the effective date of the disability award is used, not his or her age at the time of the injury.
>
> *The age adaptability factor is not applied to non-scheduled awards. However, the worker's age is one of the overall considerations in making the judgment.*
>
> The age adaptability factor set out above has only been applied since October 2, 1958 . . .
>
> (emphasis added)

Governors' policy at item #39.50 of the *Manual* further states:

> Neither the age adaptability or enhancement factors nor devaluation are formally applied in respect of non-scheduled awards. . . *However, in making a judgment as to the correct percentage of disability, the Disability Awards Officer or Adjudicator will have regard to the age of the claimant*, to existing disabilities in other parts of the claimant's body, or to the combined effect of more than one disability in the same part of the body.
>
> (emphasis added)

Mr. Justice Tysoe noted on page 281 of his 1966 *Royal Commission Report*:

> AGE FACTOR
>
> It seems generally to be conceded that where possible and where appropriate the age of the workman should be considered in arriving at an award. It is obvious that the ability of the permanently disabled workman to rehabilitate and adapt himself to a disabling condition, particularly in so far as it affects his re-employment, varies with the workman's age and with his occupation and skills or lack of them.
>
> The British Columbia Board recognizes the first of these, age, to some extent. It has for many years had an age factor of one kind or another which applies in scheduled cases, and rightly so. The older a man is the more difficult it is for him to adapt to a new type of work, and if his age is sufficiently advanced, it may well bar his re-employment as it sometimes bars the employment of a fully fit man . . . .
>
> . . . The evidence as to whether or not age is taken into consideration in non-scheduled awards is not at all clear. Mr. A, the Disability Awards Officer, said that when he is given the disability percentage arrived at by the medical officers in a non-scheduled case, he does not himself apply any age adaptability factor, as referred to above as being in use in scheduled cases, and that the medical officer has already taken the age factor into consideration in arriving at his percentage. I am satisfied Mr. A considers that this is done by the medical officers, but I am not certain from their evidence that it in fact is. It does not seem to be done as a matter of settled policy. The evidence of Dr. B indicates that factors such as age are not considered in the medical assessment. . . . *I am of the opinion that age can and should properly be given consideration in non-scheduled awards for the reasons stated, and that the Commissioners should give a directive to this effect*.
>
> (emphasis added)

In Decision No. 8 (*Re the Measurement of Partial Disability*, *Workers' Compensation Reporter*, Vol. 1: p. 27–40), which introduced the dual system for spinal injuries, the commissioners concluded:

> (a) The degree of physical impairment will be calculated as at present, *modified by age as at present*, and a pension estimated according to present routines.
> (b) A pension will be calculated according to the projected loss of earnings method described under heading 6 above.

(c) The higher of these two results will then be used as the pension.

(emphasis added)

No guidelines are provided by governors' policy as to the manner in which the discretion is to be exercised, in having regard to the age of the claimant in making a judgment as to the correct percentage of disability in non-scheduled awards. The reasoning expressed by Mr. Justice Tysoe suggests that this involves consideration of the ability of the permanently disabled worker to rehabilitate and adapt to a disabling condition, particularly in so far as it affects his re-employment.

In published Appeal Division Decision Nos. 92-0658, 92-0659, and 92-0660 (see *Workers' Compensation Reporter*, 1992, Vol. 8(3): p. 145–150), the panel considered the claim of a worker who was diagnosed with bladder cancer in 1986, and had surgeries in 1986 and 1987. The worker retired from employment in 1988 at the age of 62. The panel stated on page 150:

> **Age Adaptability**
>
> The above award will not be a Scheduled award. Nevertheless, item #39.50 of the *Manual* states that a disability awards officer will have regard to the age of the claimant. We are not certain that the worker's age is a very relevant factor here as he was close to retirement and not seeking other employment. The disability awards officer will need to consider the effect of the worker's age in determining the disability award here.

In this particular case, the worker's pension involved a non-scheduled award to which no age adaptability factor applies. With respect to the discretionary consideration to be given to the worker's age, mandated by governors' policy concerning non-scheduled awards, the panel notes that the worker retired from employment in April, 1976. It was not until 1981, at the age of 71, that he was diagnosed as having bladder cancer. The worker had, therefore, retired long before his bladder cancer was diagnosed. In the circumstances, the panel finds no basis for increasing the worker's functional impairment pension award due to the worker's age, in exercising the discretion provided in governors' policy at item #39.11 and item #39.50 of the *Manual*. The panel sees no basis for contemplating any additional award with regard to the worker's ability to rehabilitate and adapt himself to his disability, in view of his retirement in 1976. We find, therefore, that the worker's pension was properly determined without any increase in regard to the worker's age at the effective date of the pension award.

The panel denies the request for legal fees and costs. Governors' policy provides that these are not payable by the Board, and the panel finds no unusual or extraordinary grounds for departing from this policy in the circumstances of this case. In view of the

panel's conclusion that legal fees and costs would not be payable in any event, it is not necessary that the panel determine whether the estate of the deceased worker could make a claim for such costs as "the successful party to a contested claim for compensation or to any other contested matter" within the meaning of Section 100 of the *Act*.

In conclusion, the panel finds that the estate of the deceased worker has standing to continue the worker's appeal to the Review Board and to initiate an appeal to the Appeal Division. On the substantive issue, however, the panel denies the appeal. The worker's pension was properly determined without any increase in regard to the worker's age at the effective date of the pension award.

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

Decision of the Appeal Division

Number: 95-1037
Date: September 8, 1995
Panel: Patrick L. Byrne
Subject: Management of a Logging Operation

The employer appeals the June 8, 1994, decision of a hearing officer in the Variance and Sanction Review Section of the Prevention Division to impose a penalty assessment of $15,000.00. The hearing officer concluded that the employer had violated Industrial Health and Safety Regulation 60.02 and the circumstances warrant a type III penalty assessment.

Section 96(6) of the *Workers Compensation Act* (the *Act*) grants employers the right of appeal from such additional or "penalty" assessments on the grounds of error of fact, error of law or contravention of a published policy of the governors. The employer relies on all three grounds. The issues in this appeal are:

1. Whether there was a breach of the duty of procedural fairness.

2. Whether there was a violation of regulation 60.02.

3. Whether the penalty assessment was appropriate in the circumstances.

Background

The employer contracted with R Co. Ltd. (R Co.), to harvest timber near Okanagan Falls. On November 17, 1993, the skid crawler operated by one of the principals of R Co. rolled over downhill. The operator was thrown or jumped from the machine which rolled onto him causing fatal injuries. A Board occupational safety officer (O.S.O.) investigated the accident and issued an inspection report citing the employer for a violation of regulation 60.02. The O.S.O. completed an accident investigation report and forwarded a memorandum dated December 3, 1993, recommending a penalty assessment:

> The accident occurred at approximately 0920 hours involving [S] an employee and part owner of [R Co]. The investigation revealed that the contractor was working under the direction and control of [the employer]

> on a 50%+ slope on grounds where the stability and the control of the machine could not be maintained.
>
> It was [the employer] who planned, evaluated and prepared the P.H.S.P. [pre-harvest silviculture prescription] and applied for a cutting permit for this area to be logged. They failed to consider safety and health as a integral part of the work process.

By letter dated January 19, 1994, the employer was advised the Board was considering a penalty assessment of $15,000.00 for the reported violation of regulation 60.02. Attached to that letter were copies of the O.S.O.'s December 3, 1993, memorandum, the inspection report and photographs of the accident site. The employer was invited to either attend an oral hearing or to provide a written submission. By letter dated March 28, 1994, the employer was sent an additional 27 documents related to the proposed penalty. Some of that material included information attached to the proposed penalty letter. Copies of the documents were forwarded to both the employer and R Co. A divisional oral hearing was held on April 14, 1994, in Kamloops. The employer was represented by counsel, R Co. did not attend. The hearing officer found a violation of regulation 60.02 and concluded a penalty assessment was appropriate in the circumstances. By letter dated June 8, 1994, the hearing officer imposed a penalty assessment of $15,000.00.

An oral hearing was held on May 10, 1995. The employer, represented by counsel, provided additional documents and submissions.

Issue #1

The employer submits that the Board "owed a duty of procedural fairness during the investigation when it issued the January 19, 1994, penalty letter." Further, the duty of procedural fairness was breached in two ways:

1. The board failed to raise clearly or at all the allegation that the employer coerced the contractor into using the harvesting method which resulted in the accident.

2. The board failed to raise clearly or at all the allegation with the employer while conducting its field investigation.

O.S.O.s provide a variety of functions, including investigating accidents, inspecting places of employment, and issuing inspection reports setting out any regulation violations. Once an inspection report has been issued citing violations an O.S.O. could recommend a warning letter be sent to the employer, could recommend a penalty assessment be considered or, could recommend prosecution or, could take no further

action aside from ensuring the employer complied with the regulation(s) cited. If an O.S.O. recommends a penalty assessment and a manager concurs, a letter proposing a penalty is sent to the employer. The employer is invited to provide written submissions or to attend an oral hearing. The matter is heard by a hearing officer who decides whether the reported violation(s) occurred and, if it did, whether a penalty assessment would be appropriate using the guidelines set out in the published policy of the governors. The O.S.O. in this case was not authorized to impose "penalty" assessments under Section 73(1).

The employer's submission points to a number of court cases setting out the duty of fairness. In this case the employer said the Board failed to raise, or to raise clearly, the allegation of the employer's conduct "while conducting its field investigation." The field investigation was conducted by an O.S.O. The results of the investigation led to a recommendation for a penalty assessment. The recommendation was, in substance, a recommendation and did not affect the rights of the employer. The recommendation was not determinative of the outcome. Once accepted, the recommendation initiated a full inquiry into whether a penalty assessment ought to be applied. Once the matter was brought before a hearing officer the employer was entitled to know the substance of the case against them. At that point a decision could affect the rights of the employer and they were entitled to know the case against them and to have a meaningful opportunity to respond. They were notified that a penalty assessment was being considered for the reported violation of regulation 60.02 and were provided with copies of the relevant documents. One document was not disclosed and that will be discussed later.

The employer was given an opportunity at an oral hearing to present their case. On appeal, the employer said they did not know there was an allegation of coercion and therefore were unable to address the matter before the hearing officer. The specific allegation made by the O.S.O. was discussed in his accident investigation report at page 4:

> *EXPLANATION AS TO THE PRIMARY CAUSE OF THE ACCIDENT:*
>
> 1. Attempting to skid on the 50%+ slope with a crawler.
>
> 2. *Pressure from Licensee* to log sidehill without trails or sidecutting.
>
> 3. Failure to follow safe work practices, maintain and control stability of machine.
>
> (emphasis added)

And at page 6:

> Conversation and statements indicate that [S] and [J] of R Co. asked for a site meeting with Logging Superintendent [J M] and [A H], because of the concern they had about the steep hillside. This meeting was held about a week before this accident occurred. [J M] stated that this was the only site they had for [R Co.] and to log the area as it had been agreed to. No other method to log this hill was suggested, neither was the Ministry of Forests called to sidecut or trail the hillside.

I have no doubt the employer is entitled to know the substance of the case against them and to have a meaningful opportunity to respond. However, the Board did inform the employer of the case against them and the specific allegation of the employer's conduct. The allegation was contained in the accident investigation report which was provided to the employer. The employer ought to have known the contents of the accident investigation report would be considered.

One document on file was not forwarded to the employer by the Prevention Division prior to the divisional oral hearing. The document is a December 17, 1993, memorandum from the then director of Field Services to the Board's Legal Department. The memo states:

> I understand that [the O.S.O.] spoke to you about the possibility of initiating a prosecution of this firm. I have attached the recommendation for sanction and a copy of the Fatal Investigation Report completed by [the O.S.O.] into the death of [S] co-owner of R Co. R Co. was the company employed to log the area known as C.P. 49, Block 2. The planning and layout was done by [the employer]. The principals of R Co. were concerned about the steepness of the terrain in one section and expressed their concerns to [the employer] to no avail.
>
> Your review of this recommendation is appreciated.

The employer's position seems to be that this undisclosed memo was the foundation of the allegation of coercion against them. I cannot agree. As I have said earlier, the allegation was made in the accident investigation report referred to as the "Fatal Investigation Report" by the director. The director's memo seems to be a reiteration of the allegation and a request for the Board to consider prosecution. In my view the memo does not change the substance of the allegations against the employer and I do not see how the lack of disclosure could be prejudicial to the employer in this case. The substance of the case against the employer was contained in the documents provided to the employer by the Prevention Division. I do not agree that the allegation of the employer's misconduct was unclear. The accident investigation report is not ambiguous on the point. I cannot find the breaches of the duty of procedural fairness alleged by the employer.

Issue #2

Was there a violation of regulation 60.02? That regulation provides:

> The management of every logging operation shall plan and conduct such operations in a manner consistent with these regulations and with recognized safe working practices.

There are two questions that arise here. Is the employer the "management" of a logging operation, and if they are, did they plan and conduct the operation in a manner consistent with the regulations and with recognized safe work practices?

The employer contends they were not the "management" of the logging operation. They said for the purposes of the Board's regulations R Co. was the "management" of the logging operations. They entrusted the management to R Co. and the employer did not have on-site continuous supervision. The employer also said they shared the management with R Co. in planning of some functions.

The *Act*, regulations and published policies do not specify who is to be considered the "management" for the purposes of regulation 60.02. The submissions did not say how the term ought to be interpreted. The term appears in three places in the *Act*, in the definition of "worker" and "outworker," as well as in Section 50. The term also appears in regulations 60.02, 60.22, 60.24(2)(a) and 4.02. It appears the term "management" could be interpreted in several ways. It could refer to the management personnel of the employer. Thus making only the employer of the involved workers responsible for compliance under regulation 60.02. Alternatively, the term "management" could be interpreted more broadly to include those who have authority and control over the logging operation. In some cases that might be the direct employer of the involved workers or it could be another employer. The regulations and the *Act* do not seem to use the term in a consistent way. The regulations ought to be interpreted in a way most consistent with the objectives of the regulations and the *Act*. That is, the regulation ought to be interpreted in a way that would best achieve the goal of accident prevention. It makes more sense from an accident prevention perspective to require those who have authority and control to properly plan and conduct the logging operations. Therefore, the question here is whether the employer had authority and control over the logging operation. In my view the employer exercised considerable authority and control over R Co. and the logging operation. The employer did not have a hands-off contractual relationship with R Co. The employer was the licensee. They attained and were responsible for the pre-harvest silviculture prescription license issued by the Ministry of Forests. They employed a logging superintendent who was responsible for overall planning and overseeing the contractors. They also employed a logging supervisor. R Co. entered into a three-year agreement with the employer and worked almost exclusively for the

employer. They were allocated a quota for harvesting and were subject to performance reviews. The employer implemented a program so that the contractors could not build skid trails without their permission. While R Co. had control over some matters the employer retained ultimate control over much of the important decision making on the site. These and other factors referred to in the file convince me that the employer had control and authority and was the "management" of the logging operation.

The second question is whether the logging operation was planned and conducted in a manner consistent with the regulations and with recognized safe work practices. One week prior to the accident the accident victim, a principal of R Co., met with the employer's logging supervisor and logging superintendent. They were considering how to log a sloped area. The employer's evidence was that five options were considered. The first was to push a number of skid trails in and use skidders. That option was eliminated apparently due to environmental sensitivity concerns. The second option was to use draws. Apparently that option was eliminated largely for the same reasons. The third option was to wait until there was sufficient snow on the ground. That would mean suspending that logging operation. It seems that option was not given serious consideration. The fourth option was to build a road and winch the timber to the upper trail using long lines. The superintendent said that was his preferred option. The fifth option was to random skid down the road with the cat. Ultimately, the contractor conducted random skidding on slopes ranging from 45 to 50 percent.

There has been much discussion concerning who made the ultimate decision with regards to which option to choose and what pressures, if any, were exerted on the contractor. In my view the issue is much simpler. The employer said they did not have the expertise to choose and the contractor was in the best position to make the choice of which option to take. The employer said ultimately that would lead to a safer job site. The evidence of the employer's superintendent was that the employer had ultimate decision-making authority but the contractor could say whether or not they would perform the work. The employer knew the work involved tree harvesting on ground with a significant slope. Knowledge of the actual slope is critical in determining the method of removing the logs. Neither the employer nor the contractor measured the slope at the time of the discussions of the various options. They did not have the equipment on site to measure the slope. The employer's accident investigation report and the coroner's inquiry recommended such equipment be used. There is some mention of the slope in the pre-harvest silviculture plan but little evidence the slope was compared to the maximum allowable slopes for the crawler tractor during the discussions of the various options. The O.S.O. in his accident investigation report set out the various standards for maximum slopes on which to employ crawler tractors. None allow crawler tractors to be used on slopes greater than 40 percent. The employer said the various standards created some confusion. I do not agree. The standards appear relatively straightforward.

The employer said they relied on the expertise of the contractor. While it seems appropriate to consult the contractor, the employer retained the ultimate decision-making authority and control. Thus, they were responsible for the decisions that were made. Measuring the slopes and comparing them to the maximum allowable slopes for certain equipment does not seem overly technical. As the employer has the authority and control, they must be responsible for the decisions whether they rely on the contractor or their own staff. In my view the lack of proper consideration of the slope permitted for the crawler tractor amounted to inadequate planning and conduct of a logging operation. I find a violation of regulation 60.02.

Issue #3

The third issue in this case is whether a penalty assessment was appropriate in the circumstances. The employer points to their contractor safety program and other efforts in ensuring compliance. I do not agree with all of the reasoning of the hearing officer with respect to whether a penalty assessment was appropriate. In my view too great an emphasis was placed on the employer's failure to build skid trails. I do, however, concur with the conclusion that a penalty assessment was appropriate in the circumstances. It appears to me that the employer's program of compliance is somewhat deficient, particularly with respect to measuring and considering slopes for the purposes of choosing a work method. I am not convinced that the hearing officer *contravened* the published policy of the governors by imposing the penalty assessment. As the violation involved a fatality the quantum of $15,000.00 was appropriate.

There was no error of fact, error of law or a contravention of a published policy of the governors in the decision under appeal. Therefore, the employer's appeal is denied.

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

Decision of the Appeal Division

Number: 95-1062
Date: September 15, 1995
Panel: Herb Morton
Subject: Section 17, *Workers Compensation Act*

The widow of the deceased worker appeals the January 24, 1995 Review Board finding.

The widow was born on September 2, 1966. She was 27 years of age when the worker was killed in a parachuting accident on May 1, 1994.

By decision dated June 28, 1994, a lump sum payment was made to the widow under Section 17(3)(d) of the *Workers Compensation Act* (the *Act*). The widow appealed this decision to the Review Board, seeking a monthly pension award calculated under Section 17(3)(c) of the *Act*. She argued that the granting of a lump sum payment, rather than a monthly pension award which would be payable for life, constitutes age discrimination and contravenes the *Canadian Charter of Rights and Freedoms*. By finding dated January 24, 1995, the Review Board denied the widow's appeal.

Notice of the widow's appeal from the Review Board finding to the Appeal Division, and the arguments made under Section 15 of the *Charter*, was provided to the attorney general of Canada and the attorney general of British Columbia as required by Section 8 of the *Constitutional Question Act*. Both declined to participate.

The issues raised by the widow's appeal have come before the Appeal Division in several previous cases. In the first such case, the chief appeal commissioner invited submissions both from the parties and from the workers' compensation community. The Appeal Division decision in that case was published in the *Workers' Compensation Reporter*, 1994, Vol. 10(1): p. 53–85, Decision No. 93-1222. The panel concluded that:

- Sections 17(3)(c), (d) and (e) of the *Act* discriminate on the basis of age and are contrary to the equality provisions of Section 15(1) of the *Charter*;
- This discrimination is not saved by Section 1 of the *Charter*;
- Sections 17(3)(d) and (e) and the words "and is fifty years of age and older" in Section 17(3)(c) were of no force or effect in that case;

- The widow in that case was entitled to receive benefits calculated under Section 17(3)(c) of the *Act* as if that section applied to all widow(er)s without children.

In another published decision dated March 30, 1994 (*Jurisdiction to Grant Remedies Under the Charter*, *Workers' Compensation Reporter*, 1994, Vol. 10(4): p. 617–620, Decision No. 94-0433), a panel of the Appeal Division similarly concluded that to the extent of the distinctions based on age alone, Sections 17(3)(c), (d) and (e) of the *Act* are contrary to the equality provisions of Section 15(1) of the *Charter* and are not saved by Section 1 of the *Charter*. The panel concluded that the Appeal Division has remedial authority to read down or sever offending legislation.

No submissions have been made concerning the present appeal by the widow or the accident employer. In considering the widow's appeal, I have focused in particular on the reasons given by the Review Board for denying her appeal. The Review Board found:

> Section 1 of the *Constitution Act* must be read before Section 15(1) as the former recognizes that there can be instances of laws where "reasonable limits" of discrimination can be "justified in a free and democratic society".
>
> We must remember that we presently live in a society of age limitations, restrictions, and entitlements. Examples of age limitations, restrictions and entitlements, are licensed driving age, legal drinking age, elector voting age, and age qualifications for Old Age Security and Canada Pension Plan. Certainly, two of the most contentious age limitation examples in the society at present involves the *Young Offenders Act* and compulsory retirement.
>
> It would therefore seem appropriate that the legislature make distinctions regarding the financial needs of a widow and it therefore uses age, the dependency of children, and invalidism, as governing factors.
>
> Obviously it is much more difficult for an invalid, or a mother with children or an older aged widow, to provide a monthly income, and therefore the *Act* reflects this to provide monthly support income.
>
> In [this widow's] situation, at age 28, without children and not an invalid, the panel finds that she does not require a monthly support income, that the Board was within the *Workers Compensation Act*, and its policy, in the treatment given to [her], and finally that she has not had her "rights and freedoms" . . ."infringed or denied".

The central reason provided by the Review Board for denying the widow's argument that she was being discriminated against by reason of her age and that this contravened the *Charter*, was that "we presently live in a society of age limitations, restrictions, and

entitlements." The examples listed by the Review Board, however, all concerned ages relating to the transition from childhood to adulthood, or the transition from work to retirement. Without addressing in detail the specifics of each example, it may be noted that these two periods of transition are generally recognized watersheds in peoples' lives.

In Appeal Division Decision No. 94-0331, the usage of the age of 18 years in the definition of the term "child" under Section 17 of the *Act* (to suspend benefits for children of a deceased worker who reach age 18 and are not still attending school) was found not to contravene Section 15(1) of the *Charter* (see *Workers' Compensation Reporter*, 1994, Vol. 10(3): p. 323–337). Frequent use of an age to make distinctions in society will not necessarily mean that any distinction based on that age will be acceptable under the *Charter* (see Appeal Division Decision No. 94-0659 in the *Workers' Compensation Reporter*, 1994, Vol. 10(4): p. 665–675). It does, however, provide a basis for considering whether the designated age involves a distinction between the treatment of two groups which exist as reasonably distinct groups in society.

In Decision No. 93-1222, the Appeal Division panel noted at page 72:

> The factor of age is different than the other grounds enumerated in Section 15(1) of the *Charter* as it may not identify a group or groups that are otherwise distinct in Canadian society. The factors of race, national origin, colour, religion, sex and disability identify groups that have distinct existences in our society. These distinctions exist apart from any particular law that is challenged under Section 15(1) of the *Charter*. However distinctions based on age may or may not identify groups that exist as a group apart from the law in question. The age of majority creates an identifiable, distinct group in Canada as the age of majority is used for various purposes. The ages of 60 or 65 are also commonly used to make distinctions and, to that extent, establish an identifiable group. *However, distinctions based on other particular ages are not common and do not identify groups that are otherwise distinct groups in society. The major distinctions in Sections 17(3)(c)(d) and (e) of the* Act *are at ages 40 and 50. However, except for these particular provisions, people under 40, people between 40 and 49, and people 50 and over do not constitute distinct or common groups in society*. We found no material to establish that these distinctions exist for other purposes or that those under 40 are routinely treated different from those over 40 or over 50.
>
> (emphasis added)

Court decisions dealing with complaints of age discrimination under the *Charter* for the most part involve the two areas of transition noted above, namely, from childhood to adulthood and from the workforce to retirement. In the case of *Silano* v. *R. in Right of British Columbia* (1987) 16 B.C.L.R. (2d) 113, however, the British Columbia Supreme

Court considered a challenge to a regulation under the *Guaranteed Available Income for Need Act*, which involved a distinction based on an age which did fall within these two periods of transition. This regulation provided that a single recipient of support under the *G.A.I.N. Act* who was less than 26 years of age would receive, for the first eight months during which the support allowance was paid, $25 less than a single recipient aged 26 or older. The court considered the effect of that age distinction as follows (at pages 119–120):

> To achieve the stated purposes the applicants are placed into categories rather than dealt with on an individual basis. A welfare scheme based entirely upon individual need with no guidelines about qualification for help and the amount of assistance would be unworkable. Some criteria must needs be fixed and the legislature, by statute or by delegated regulatory power, is the proper body to fix it. It cannot, however, be fixed in a way that discriminates contrary to s. 15(1). The effect of choosing age 26 as the dividing line between the categories of those who are to receive $25 per month more than others, is, with great respect to those who fixed the policy, neither reasonable or fair. The reasons why that age was chosen are set out in Mr. C's affidavit at para. 32. I quote it in full:
>
> > 32. The $25 differential between in (sic) the basic benefits available to single persons and couples under 26 for the first eight months of income assistance was implemented as part of the government's assessment as to where the reductions could best be borne. It was considered that persons in this age group, because of their youth and because they did not have dependent children, had greater mobility to seek work than older persons and persons of the same age group with dependent children. In addition, it was considered that persons in this age group and situation were able to obtain greater support from their families while seeking work. This is set out in the statements made by the Minister of Human Resources on March 6, 1984 and March 8, 1984, recorded in *Hansard*, a copy of which is attached hereto and marked as Exhibit "D" to this my Affidavit.
>
> The qualities of mobility and the potential for family support are thus attributed to all persons under the age of 26, whether or not they have them, and are prescribed to be absent from all persons over the age of 26, whether or not they are. I can think of no reason why a 26-year-old single male who has worked in construction camps should be less able to leave town and find employment elsewhere than a 19-year-old female who has recently lost her remaining parent on whom she formerly depended.

> Many other examples could be suggested but that is unnecessary. The point is, in my respectful opinion, that there is no logical basis for the grounds of distinction recorded in Mr. C's affidavit. *The distinction, in its effect, is unreasonable and unfair and unduly discriminatory of those under 26, many of whom are in precisely the same position as those over 26. That age has no connection with any other recognized age limit already accepted by society as a watershed in the lives of its citizens*. I make reference here to the use of the age of 19 years as a provincial voting qualification and as the ordinary cut-off age for support under the *Family Relations Act*. That age, with great respect, would seem more logically referable to a young person's ability to call upon his or her family for assistance.
>
> (emphasis added)

Having found that the regulation contravened Section 15(1) of the *Charter*, the court went on to consider whether it was saved by Section 1 of the *Charter* (at pages 120–122):

> That section guarantees the plaintiff's constitutional rights, including the right to the equal benefit of the law without discrimination based on age, but subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The age limit set by the regulation is one imposed by law, so it is the last part of the test that I must consider. . . .
>
> The right to be treated equally under the law regardless of age is not as important a right under the Constitution as are some other protected rights, for example, the rights preserved by ss. 2 and 3 and by ss. 7 to 14 inclusive. I say that because many societies, including Canada, which we accept as being relatively free and democratic, usually use age as a criterion for applying laws to different groups in different ways. Most of such cases would be found to be non-discriminatory in the sense that word is now defined. . ., but their existence shows that we accept age as an appropriate reason for distinguishing between groups in society. That, I think, entails the corollary that even where an age distinction is discriminatory, as in the case at bar, the law should be ready to accept a less rigorous threshold of justification than for the infringement of some other rights.
>
> . . . Endless examples could be constructed, but all prove the same point, that the amount at stake is of real importance to many of those affected by the $25 difference. That, coupled with the absence of a logical basis for the selection of age 26 as the distinguishing factor between those said to be more or less capable of mobility to find employment or more or less likely to receive family support, persuades me that this incidence of discrimination is not saved by the application of s. 1 of the *Charter*. Also, setting aside

> the effect of the regulation and considering its means, *I am of the view that the absence of any logical basis as described above deprives this regulation of any sufficient proportionality between its twin purposes and the selection of age 26 as a cut-off to achieve either a conserving of provincial financial resources or their allocation among various claimants in accordance with their needs. Other measures for distinguishing between the needs of various G.A.I.N. applicants could have been devised which are more sensitive to the particular circumstances of individuals and so treat people who are similarly situated in a sufficiently similar way without producing a scheme devoid of workable day-to-day regulations and categories*.
>
> (emphasis added)

The *Silano* decision was cited with approval by the Ontario Court of Appeal in their August 16, 1994 decision in the case *Ontario Human Rights Commission* v. *Ontario*, 19 O.R. (3d) 387. While that case was decided under the Ontario *Human Rights Code*, rather than the *Charter*, the Ontario Court of Appeal referred to the reasoning from the *Silano* case in concluding that a 71-year-old man who was legally blind could not be denied financial assistance in purchasing a closed-circuit television magnifier by reason of his age alone. The Court of Appeal reasoned (at page 404):

> When the [Ministry of Health's Assistive Devices Program] was first introduced, children presented a manageable group in terms of size. They were a group for whom special facilities existed within the community; as a group they would likely require assistive devices for the greatest number of years. Although this basis of selection was understandable, it was not rational. The expert evidence before the board of inquiry indicated that young people were less likely to be visually disadvantaged and that they compensated better than older persons who were similarly disadvantaged. Now there is no age restriction for funding for some categories of assistive devices while others have an age limit of 30. This current selection process remains devoid of rationale. In terms of funding, persons under 30 are more likely to be able to access other sources of government funding directed to assisting those in school or to obtain work. Thus, the arbitrary age limit of 30 for the vision aids category results in the funding of a group who have the least need, both in terms of the extent of their disability and access to other sources of funding. In as much as government resources are finite, assisting those least affected with a visual disadvantage has the effect of depriving those most affected by the same disadvantage from assistance. Although the government's bona fide intent is to alleviate hardship, the effect of the programs cannot be ignored. . . .

> The decision in *Silano v. British Columbia* (1987) 42 D.L.R. (4th) 407, 33 C.R.R. 331 (B.C.S.C.), supports the view that government programs which provide a benefit to disadvantaged persons, but which result in the infringement of other rights not central to their purpose, are properly subject to judicial review. . . .
>
> The court in *Silano* rejected the argument that, if the legislation was discriminatory, it was saved by s. 15(2) of the *Charter* which preserves the validity of any law or program which has as its object the amelioration of conditions of disadvantaged individuals or groups. It did so on the basis that those over age 26 were not shown to be more disadvantaged by reason of age when compared to those under 26. Similarly, the absence of any logical factor for choosing age 26 meant that the discrimination was not saved by s. 1 of the *Charter*.

I find the reasoning expressed by the British Columbia Supreme Court in the *Silano* case to be cogent and compelling. The court's reasoning, while expressed in a different context, is in its logic equally applicable to the issues raised in the present case. In the *Silano* case, justifications for the impugned regulation were expressed which, in an abstract sense, may have been meritorious. Their fallacy, however, as pointed out by the court, was that there was no sufficient justification for making a delineation at age 26 years. In an abstract sense, it might be argued that younger single persons might be more mobile, or might be more likely to avail themselves of familial assistance. In reality, however, the specific age distinction did not withstand judicial scrutiny under the *Charter* as the effect of the age distinction was "unreasonable and unfair and unduly discriminatory." As noted by the court, examples readily came to mind to illustrate the arbitrariness and capriciousness of the age distinction contained in the regulation, which did not permit consideration of the range of individual circumstances of persons within these age categories.

The same is true in respect of the age distinctions under Section 17(3)(c), (d) and (e) of the *Workers Compensation Act*. It might, for example, be argued in an abstract sense that younger widow(er)s have a greater number of years available to them to overcome (through education, retraining and employment) the financial effects of the loss of their spouse. This justification seems implicit to the archive materials considered by the Appeal Division panel at pages 76–78 of Decision No. 93-1222. However, no sufficient basis has been established for the distinctions made at ages 40 and 50. As in the *Silano* case, examples come readily to mind which reveal the unreliability and arbitrariness of these age distinctions. As stated by the Appeal Division panel at pages 79–80 of Decision No. 93-1222:

> Generally, while there may be differences in the extent of widow(er)s' financial dependency on their deceased spouse, we are unable to find that

> age is a sufficiently reliable factor on its own on which to make a distinction. The death of a husband may have a much more negative effect financially on a widow of 35 who has been married for 15 years, who is fully trained but works in a low paying occupation, has a large mortgage and had little life insurance on her husband, than on a widow of 55 who had been married for two months prior to the death of her husband, is fully trained and works in a high paying occupation, has no debts and had significant life insurance coverage on her husband. One can adjust those facts in different ways to show that age alone is not a reliable factor. That is, age does not necessarily subsume nor outweigh other relevant factors.

In considering the widow's appeal in the present case, I adopt the reasons expressed in the published Appeal Division Decisions No. 93-1222 and No. 94-0433. Those decisions have been published in the *Workers' Compensation Reporter*, and no arguments have been made concerning the reasoning expressed in those decisions. I will not repeat the analysis set out in those decisions. The reasoning expressed by the British Columbia Supreme Court in the *Silano* case also supports the widow's appeal in this case. I find, therefore, that:

- Sections 17(3)(c), (d) and (e) of the *Act* discriminate on the basis of age and are contrary to the equality provisions of Section 15(1) of the *Charter*;

- This discrimination is not saved by Section 1 of the *Charter*;

- Sections 17(3)(d) and the words "and is fifty years of age and older" in Section 17(3)(c) are of no force or effect in this case;

- The widow in this case is entitled to receive benefits calculated under Section 17(3)(c) of the *Act* as if that section applied to all widow(er)s without children.

In Appeal Division Decision No. 92-1222, the panel noted the following qualifications to its decision:

> It is important to note that we have not rewritten the *Act* for all cases. We have decided only this claimant's case. We note that other possible legislative solutions may be constitutional. We have chosen the solution we find involves the least interference with legislative intent while avoiding the unconstitutionality. It is not an attempt to rewrite the *Act* or indicate what should be done if these sections are redrafted. Further, we note that the claimant is entitled to these benefits from the date of her first entitlement until any legislative change is made by the legislature. That is, our decision grants her benefits which could be changed in the future if the legislature decides to redraft Sections 17(3)(c), (d) and (e) in a way that makes distinctions in a constitutionally valid way.

The decision in this widow's case is subject to these same limitations.

In conclusion, the widow's appeal is allowed. The claim file will be referred to the disability awards claims adjudicator to initiate a monthly pension award to the widow under Section 17(3)(c) of the *Act*.

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

Decision of the Appeal Division

Number: 95-1185, 95-1186
Date: October 12, 1995
Panel: Connie Munro, Herb Morton, Hilrie Reimer
Subject: Section 58(5)

The April 19, 1995 Review Board finding has been appealed by the employer under Section 91(1) of the *Workers Compensation Act*. It has also been referred to the Appeal Division by the president under Section 96(4) of the *Act*.

The president's memorandum to the Appeal Division states:

> This matter is referred to you on the ground that the Review Board decision is contrary to published policy of the Board of Governors. The Review Board decision quite consciously contravenes paragraphs 103.13 and 103.12 of the *Rehabilitation Services and Claims Manual*. The Review Board concludes that the Board may not exercise its discretion under s. 58(5) of the *Act* to initiate a Medical Review Panel where a worker or employer has not fully complied with the technical requirements of ss. 58(3) or 58(4). That conclusion is contrary to the published policy contained in paragraphs 103.12 and 103.12 (sic) of the *Rehabilitation Services and Claims Manual*. The Review Board improperly limits the discretion of the Board to determine substantive compliance with the requirements of ss. 58(3) and (4).
>
> The Review Board findings are also contrary to the published policy of the Board of Governors contained in paragraphs 103.11 and 103.12 of the *Rehabilitation Services and Claims Manual*. The Review Board concluded that the Board is not permitted to determine preliminary issues such as whether or not the Certificate of a worker or employer's doctor properly defines a *bona fide* medical dispute and contains sufficient particulars to define the question in issue. The limitations on the Board discretion expressed by the Review Board are contrary to the published policy of the Board of Governors.

I am also referring this file to you on the ground that the Review Board decision contains errors of law. The errors of law which the Review Board made are as follows:

1. In concluding that the published policy of the Board of Governors described in paragraphs 103.11, 103.12 and 103.13 are unlawful and are not consistent with the wording of the *Workers Compensation Act*.

2. In misunderstanding and misinterpreting the case of *Caputo v. Workers' Compensation Board of British Columbia* 13 B.C.L.R. (2d) 145.

3. In relying on a partial quotation out of context in the *Caputo* case and failing to properly consider the whole case.

4. In misinterpreting and misunderstanding the provisions of ss. 58 and 59 of the *Workers Compensation Act*.

5. In misunderstanding or misapplying the Reasons for Judgment in the case of *Napoli v. Workers' Compensation Board* 27 B.C.L.R. 306.

6. In misunderstanding or misapplying the Reasons for Judgment in *Kooner v. Workers' Compensation Board of British Columbia* 78 D.L.R. (4th) [38].

7. In drawing principles from the *Caputo*, *Napoli* and *Kooner* cases which are not supported by those cases and then reaching a decision based on those principles.

An oral hearing was held by the Appeal Division on August 29, 1995. At the oral hearing, the worker's lawyer submitted that the Review Board has the authority to consider the lawfulness of governors' policy. Subject to that qualification, however, he agreed with the points outlined in the president's referral memorandum concerning the Review Board finding in this case. He submitted that governors' policy concerning the use of Section 58(5) to cure a technical or procedural breach of the time limitation requirements of Section 58(3) or (4), where there has been substantial compliance with those requirements, correctly reflects the law as stated by the British Columbia Court of Appeal in the *Caputo* case. A written submission was also received from the workers' advisors office, taking a similar position that this policy correctly reflects the decision of the B.C.C.A. in the *Caputo* case. The employer was represented at the oral hearing by the employers' adviser, who expressed agreement with the worker's lawyer with respect to the validity of the points outlined in the president's referral memorandum.

The worker and employer are in agreement, therefore, that the Review Board finding contravened lawful governors' policy. Notwithstanding this agreement by the worker and employer, it remains the responsibility of the Appeal Division to consider the issues raised by the president's referral, to determine whether the Review Board finding contravened governors' policy and if so, whether that policy is lawful under the *Act*.

Background

The employer seeks to appeal to a Medical Review Panel from an Appeal Division decision dated July 26, 1991 (Decision No. 91-0179). That decision denied the employer's appeal, stating:

> In this case, the decision by the officer of the Workers' Compensation Board stated that there was a pre-existing condition. The decision implied that [the worker's] benefits in the future could be limited due to an underlying non-compensable condition. This, if left unchallenged, implies that the worker's compensation benefits would be calculated under the terms of Section 5(5) of the *Act* whereby the compensation allowed would be only for the portion of the disability following the personal injury. If there was no pre-existing condition, the compensation would be computed and paid in accordance with Section 5(1) of the *Act*. The panel finds that the decision made by the officer of the Board in respect of [the worker] could affect him financially. Therefore, it was within the jurisdiction of the Review Board to hear and rule on the appeal. . .
>
> The Review Board found *no pre-existing disability* was present at the time of [the worker's] injury of May 1, 1988. This panel finds that the minor pre-existing changes were of no significance in the issue under consideration, which is relative to the surgery at L5-S1 levels.
>
> (emphasis added)

By letter dated September 24, 1991, the employer wrote to the Board stating an intention to appeal the July 29, 1991 Appeal Division decision to a Medical Review Panel. This letter was received by the Board October 4, 1991, within 90 days of the Appeal Division decision. By letter of October 10, 1991, the Medical Review Panel appeals clerk forwarded the employer forms for requesting a Medical Review Panel examination. On January 20, 1992, the employer completed a *Request for Examination by a Medical Review Panel*. On the same date, Dr. D completed a *Certificate for Appeal to a Medical Review Panel*. These two completed forms were received by the Board on January 22, 1992.

By decision dated January 29, 1992, the medical appeals officer advised the employer that she had reviewed this documentation. The employer's September 24, 1991 letter was accepted in lieu of the *Request for Examination by a Medical Review Panel* form. She further advised that Dr. D's certificate would be considered on the basis of the Board's discretion under Section 58(5) of the *Act*. She concluded Dr. D had provided sufficient particulars to define the medical question at issue, and advised the employer that the worker would be referred to a Medical Review Panel for examination.

The worker appealed the January 29, 1992 decision by the medical appeals officer to the Review Board. By submission dated May 31, 1994, the worker's lawyer argued that the medical certificate submitted by the employer did not define a valid medical dispute. The employer also provided a submission dated August 15, 1994 to the Review Board, arguing:

> The presence or absence of a pre-existing condition, disease or disability is appealable to the Medical Review Panel. If this were not the case why would the decision of the Panel be focussed on the existence or non existence of a disability, its nature and extent and its cause(s).

By findings dated April 20, 1995, the Review Board allowed the worker's appeal. The Review Board concluded the Board could not use its discretion under Section 58(5) to accept a medical certificate for appeal to a Medical Review Panel submitted more than 90 days after the medical decision by the Board. The Review Board stated:

> . . . we find that portions of the Board's policy which state that the Board may exercise its discretion under Section 58(5) in such a way as to overcome the time restrictions placed on employers under Section 58(4) are contrary to the *Act* and law, and we decline to follow them.

The Review Board further concluded that:

> the board lacks the jurisdiction to determine whether a bona fide medical dispute exists as a preliminary determination and in effect decide whether or not a Board decision under appeal should go forward to a Medical Review Panel. We find that such a decision is a medical one dealing with the merits of an appeal and the determination of which should be in the hands of a Medical Review Panel.

In light of the Review Board's conclusions on these two issues, it did not proceed to address the submissions by the worker and employer as to whether the medical certificate provided by Dr. D defined a medical dispute as required by Section 58(4) of the *Act*.

Law and Policy

Section 58

> (4) An employer or former employer of a worker is entitled to have the worker examined by a medical review panel if, not later than 90 clear days after the making of a medical decision by the review board or a medical decision by the board, the employer or former employer
>
> (a) writes to the board expressing that the employer or former employer is aggrieved by the medical finding or decision, and
>
> (b) sends with the writing a certificate from a physician certifying that, in the physician's opinion, there is or may be a bona fide medical dispute to be resolved, and stating sufficient particulars to define the question in issue.
>
> (5) The board may decide that the worker shall be examined by a medical review panel, in which case he shall be so examined in the manner provided in this section.

Section 96

> (1) The board has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising under this Part. . .

The relevant governors' policy in effect at the time of the decisions by the Board officer and the Review Board is set out below. The provisions in the *Rehabilitation Services and Claims Manual* concerning Medical Review Panel appeals were subsequently revised effective May 1, 1995. However, those changes do not affect the particular issues in this case. Furthermore, while the powers, duties and functions of the governors are currently discharged by a panel of public administrators pursuant to Section 83.1 of the *Act*, as amended by *Bill 56*, we continue to utilize the term "governors' policy" in this decision. There has been no amendment of Section 82 of the *Act* concerning the policy-making authority of the governors.

Rehabilitation Services and Claims Manual

#103.11 What is a Medical Decision or Finding?

> Under its general jurisdiction to determine matters within the scope of the *Act*, the Board is responsible for determining whether there has been a medical decision. Authority to make this determination is exercised by the Medical Appeals Officers who are responsible for the administration

of Medical Review Panel appeals. A decision of a Medical Appeals Officer as to whether there has been a medical decision is appealable to the review board.

#103.12 Certificate of Bona Fide Medical Dispute

The Board determines whether or not there is a bona fide medical dispute. The decision is made by the Medical Appeals Officer with the decision being appealable to the review board.

#103.13 Commencement of Appeal

Sections 58(3) and 58(4) require that both an adequate doctor's certificate and the worker's or employer's application must be received within the 90-day time limit. However, *where one of these documents is received within that period and the other is received within a reasonable period thereafter, the Board considers that there is substantial compliance with the time requirements. While the Board cannot extend the 90-day time limit and authorize the appeal to proceed under #103.10, where there has been substantial compliance, the Board will exercise its power under #103.20 [section 58(5)] to refer the matter to a Medical Review Panel. This referral is subject to the same conditions regarding expenses as if the appeal were one initiated by the worker or employer and to them meeting the normal requirements for a Medical Review Panel found in #103.10 other than those relating to the time limit. This means in particular that they must satisfy the requirement that a certificate be provided from a physician certifying a bona fide medical dispute.*

There are guidelines established as to the meaning of a "reasonable period" as referred to in the preceding paragraph. This requirement applies both to the submission of a second appeal document and to the provision of a further medical certificate or clarification of a medical certificate. A "reasonable period" is considered to be 90 days. This 90-day "reasonable period" will commence with the expiry of the 90-day time limit specified under Sections 58(3) and 58(4) where one of the required appeal documents has not been submitted, or upon the making of a decision that a physician's certificate has not defined or provided sufficient particulars to define a bona fide medical dispute.

Where there has been substantial compliance and the requirements with respect to a "reasonable period" have been met as outlined above, the Medical Appeals Officer will allow the matter to proceed to a Medical Review Panel under #103.20.

(emphasis added)

#103.20 Authority of the Board to Refer Claims to a Medical Review Panel

> The expiry of the 90-day time limit on the worker's and employer's right to appeal to a Medical Review Panel is not in itself a valid reason for exercising the power given by Section 58(5). The Legislature has omitted to give the Board any authority to extend that time limit and it cannot be the purpose of Section 58(5) to remedy the absence of such a power. The Board's power under Section 58(5) cannot be used to cure a complete failure to meet the requirements of Section 58(3) or 58(4), although it may be used to refer a matter to a Medical Review Panel where there has been substantial compliance with these requirements as described under #103.13.

In Decision No. 219 (*Workers' Compensation Reporter*, 1976, Vol. 3: p. 45–50) at page 48–49:

> It has been suggested that the Board has no authority to determine whether or not there has been a medical dispute when a physician sends in a certificate under Section 55(3)(a) and (b). These sub-sections only require that "in the opinion of such physician" there is a bonafide medical dispute. They also provide that the worker "shall" be examined by the Panel when the certificate is sent in. Therefore, it is argued, the Board is bound to grant a Medical Review Panel whenever a certificate is presented to it. Such an interpretation is not accepted by the Board. The obvious purpose of Section 55 is to provide some finality in disputes over medical issues. The panel of specialists constituting a Medical Review Panel is highly qualified to perform this function, but not to determine matters of non-medical fact or legal interpretation. The distinction between a medical and non-medical decision is one which can be difficult to make and cannot be left to the attending physician. The Board must determine whether or not there is a medical dispute to fulfill its responsibility under Section 79 for interpretation of the statute.
>
> Other than what is required in the wording of Section 55, no legal technicalities or procedural requirements are placed in the way of persons wishing to apply to a Panel. Part of the Legal Administrator's job is to help applicants clarify what exactly is the nature of their dispute and to explain why it may not be suitable for a Panel. Where the Legal Administrator is satisfied that there is a bona fide medical dispute, the appeal will not fail, for example, because the correct forms were not completed. . .

Findings and Reasons

(a) Time Limit for Appealing to a Medical Review Panel

The employer's request that the worker be examined by a Medical Review Panel was received on October 4, 1991, within 90 days of the Appeal Division decision. The medical certificate submitted by a physician in support of the employer's request was received by the Board on January 22, 1992, within the additional 90 days permitted by the policy concerning "substantial compliance" with the requirements of Section 58(3) and (4) of the *Act*. The Review Board found the employer's request for a Medical Review Panel appeal must be denied as out of time, on the basis that the policy allowing an appeal to proceed under Section 58(5) in such circumstances is contrary to the *Act*.

The *Caputo* case also concerned an employer's request that a worker be examined by a Medical Review Panel. In that case, the employer submitted a medical certificate from a physician registered in another province. Section 58(3) and (4) require that a certificate be provided by a "physician." The term "physician" is defined by Section 1 of the *Act* as meaning "a person registered under the *Medical Practitioners Act*" of British Columbia. As the certificate was from a physician registered in another province, it was not a valid certificate within the strict wording of Section 58(4). The Board decided to utilize its discretion under Section 58(5) to prevent the employer's appeal from failing due to this technical breach of the requirements of Section 58(4) of the *Act*. Following an application for judicial review, the B.C. Court of Appeal found the Board's decision lawful under the *Act*. The B.C.C.A. expressed the following reasons in its decision:

> With respect to the argument that the power to remedy procedural defects was not contained within the meaning of the general language of s. 58(5) of the *Act*, it seems to me that ss. 58 to 65 of the *Act* constitute a code in respect of medical review panels and that s. 58(5) gives the board a broad general power to deal with both procedural and substantive matters relating to the appointment of medical review panels . The wide discretionary power granted in s. 58(5) made it unnecessary for the legislature to confer specific remedial powers on the board. . . .
>
> In my opinion, the "plenary and independent power" granted to the board in s. 58(5) was a very necessary power to enable the board to grant relief in respect of technical defects in applications made pursuant to ss. 58(3) and 58(4).
>
> I do not agree that the effect of the interpretation placed by the board on s. 58(5) was to amend the *Act*. In my opinion, *it would not be open to the board in the exercise of its discretion under s. 58(5) to appoint a medical review*

> *panel, solely for the purpose of avoiding substantial compliance with the procedural requirements of ss. 58(3) and 58(4). For example, if a worker or an employer attempted to appeal after more than a year had elapsed, it would not be open to the board to have the worker examined by a medical review panel solely for the purpose of relieving the worker or employer from substantial compliance with the mandatory requirements of ss. 58(3) and 58(4). So to do would be to render ss. 58(3) and 58(4) meaningless and, in effect, to amend the statute.* That is not what the board has done in this case. The board has acted under s. 58(5) by referring the matter to a medical review panel in order to prevent an appeal failing by reason of a technical defect in the procedure followed by the employer. Thus the board has not flouted the legislative mandate contained in s. 58(4) but has used the remedial powers granted under s. 58(5) so as to avoid an appearance of injustice which might flow from a rigid and overly technical approach.
>
> The [discretionary provisions of the *Act*] demonstrate, in my opinion, a legislative intent that the compensation scheme outlined in the *Act* be administered by the board in accordance with practical, equitable and non-technical principles, "according to the merits and justice of [each] case." *It follows, therefore, that by granting the board broad and general powers in s. 58(5) the legislature intended that the board should be empowered to grant curative relief in respect of "appeals" made by workmen and employers under ss. 58(3) and 58(4). It could not have been the intention of the legislature that there be strict adherence to the procedural requirements set forth in ss. 58(3) and 58(4) but not in respect of mandatory procedures prescribed in other parts of the* Act.
>
> . . . it seems to me, the legislature intended, by the words which it used, to give "plenary independent power" to the board in respect of all matters relating to the appointment of medical review panels. There is nothing in s. 58(5), or for that matter in the Tysoe report, which would preclude the board from using its powers to remedy technical errors made by workers or employers in attempting to comply with ss. 58(3) and 58(4).
>
> (emphasis added)

The passages emphasized in the above excerpts from the Court of Appeal decision in the *Caputo* case are those which were quoted in the Review Board finding. Reading these highlighted passages in the context of the surrounding text, and the court decision as a whole, it is apparent that the Review Board panel misconstrued the effect of the Court of Appeal decision. The decision by the B.C. Court of Appeal provided a clear direction to the Board as to the legislative intent that the compensation scheme established by the *Workers Compensation Act* be administered by the Board in accordance

with practical, equitable and non-technical principles, according to the merits and justice of each case. Discretionary powers granted to the Board, including Section 58(5), should be exercised in this light. The court emphasized the appropriateness of the Board utilizing its plenary independent power to remedy technical errors made by workers or employers in attempting to comply with Sections 58(3) and 58(4). In stating that the Board could not use its discretion under Section 58(5) *solely for the purpose of relieving the worker or employer from substantial compliance* with the mandatory requirements of Sections 58(3) and 58(4), the court confirmed the appropriateness of utilizing Section 58(5) where there had been "substantial compliance" with the mandatory requirements of Sections 58(3) and (4).

Section 58(5) confers a discretion on the Board. The governors have utilized their authority under Section 82 of the *Act* to provide direction concerning the use of this discretion. This involved a legitimate exercise of the governors' policy-making authority under the *Act*. While other options would be open to the governors in exercising their policy-making authority, we find no basis for concluding the policy on this issue is unlawful.

We conclude, therefore, that the Review Board finding on this issue contravened governors' policy and the *Workers Compensation Act*. The Review Board erred in finding the employer's request that the worker be examined by a Medical Review Panel must be denied as out of time.

(b) The Board's Jurisdiction

The Review Board found the Board lacks the jurisdiction:

> to decline to initiate the process of a Medical Review Panel for the reason that, in the Board's view, a bona fide medical dispute does not exist, or that the particulars are insufficient, or that the Board decision appealed from is not a medical decision.

This issue was considered by the B.C. Supreme Court in the case of *Bujar* v. *Workmen's Compensation Board* (1960) 33 W.W.R. 417. In that case, the Board rejected the worker's request for examination by a Medical Review Panel due to the inadequacy of the medical certificate submitted by the worker's physician. The Court upheld the Board's decision, stating:

> The [worker], following the procedure set out in sec. 54A of the *Act*, as amended in 1959, submitted what purported to be a certificate from a physician that there was a bona fide medical dispute to be resolved. The certificate is in the form of a letter dated November 4, 1959, addressed to [the worker's lawyer], and set out that:

> the history he gave me was of an injury, falling about 5' at work, twisting his back, following which he did not recover.

He then went on to state that if the history he was given was true he thought the patient had "just reason to seek appeal" and that he believed "he does have a *bona fide* medical complaint which is related to the accident he claims." This is not a certificate contemplated by the *Act*. It is conditional upon the history given him by the patient being true, and of course he goes beyond the *Act* in referring to the patient's "just reason to seek appeal".

The board had correspondence with the doctor after receiving a copy of his letter of November 4, 1959, and on January 19, 1960, the solicitor for the board wrote to [the worker], and sent a copy to his solicitor, stating that the history given to [the worker's doctor]

> apparently differs considerably from that on our file and the doctor states he is only able to certify "that there is a *bona fide* medical dispute if the history is true". If it is not true he is unable to certify that there is a *bona fide* medical dispute.

The letter closed with this paragraph:

> As the happening of an accident and the manner of its occurrence are questions of fact for the board to decide the conditional certification contained in the letter of November 4, 1959, is unacceptable as a certificate. We are therefore unable to take any further proceedings at this time.

The court concluded by finding:

> As the matter now stands there is no certificate within the meaning of sec. 54A(3). . . . I see no way in these proceedings of resolving the difficulties of the [worker].

This decision by the British Columbia Supreme Court in 1960 upheld the decision by the Board in its consideration of the adequacy of a physician's certificate submitted for appeal to a Medical Review Panel, and in its rejection of the certificate on the basis that it did not meet the requirements of the *Act*. We recognize that this decision must be utilized with caution, in view of its age and its brevity. The case also concerned the requirements of natural justice, which have expanded in the past 35 years.

In the case of *Uszkalo* v. *Workers' Compensation Board* (unreported, No. A840332, Vancouver Registry), the British Columbia Supreme Court stated in oral reasons for judgment:

> In the course of the submissions of counsel I asked whether or not the position was that what is required in Section 58(4) is in effect a key to open the door for the Medical Review Panel to commence its enquiry and to review all of the matters which are generally set out in Section 61. It seems to me that that is the case. The Board itself under Sub-section (5) of Section 58 have the right to require a Medical Review Panel to start an enquiry which is not limited in any way to any particular medical dispute. The employer and the employee are limited by what is set out in Section 58 insofar as invoking the jurisdiction of the Medical Review Panel. That is, *unless there can be compliance with Sub-section (4) of Section 58, an employer cannot ask a Medical Review Panel to start to work on its enquiry. If that test can be met of a bona fide medical dispute to be resolved, then that in my view does set in motion the entire review process* which is available under Section 61.
>
> (emphasis added)

In the case of *Kooner* v. *Workers' Compensation Board*, (1991) 54 B.C.L.R. (2d) 83, the British Columbia Court of Appeal stated (at page 92):

> The board has wide power to decide when to appoint a medical review panel of its own motion under s. 58(5). But its powers with respect to the appointment of panels under s. 58(3) or s. 58(4) are circumscribed. So soon as *a proper request* is made by claimant or employer, the board must proceed with the establishment of the panel. It must therefore be subject to rules of fairness in deciding the speciality from which nominees are to be chosen, in framing the terms of reference and generally with respect to proceedings leading to the decision and also with respect to its implementation.
>
> (emphasis added)

The phrase "a proper request" must be interpreted in light of the court decision in the *Bujar* case, and the statutory framework established by the *Workers Compensation Act*. Under the *Act*, Medical Review Panels are appointed in each case where the requirements for initiating an appeal or referral to a Medical Review Panel have been met. The Medical Review Panels do not have any continuous existence. We find, in light of the provisions of Sections 58 and 59 of the *Act*, and the court decisions noted above, that no Medical Review Panel can be properly appointed until a determination has been made that the requirements of Sections 58(3), (4), or (5) have been met. A Medical Review

Panel cannot be established for the purpose of making such a preliminary determination. Such authority resides with the Board under its exclusive jurisdiction to determine all matters and questions of fact and law arising under Part 1 of the *Act*, pursuant to Section 96(1) of the *Act*.

Our decision is based upon a consideration of the legal requirements of the *Act*. While not necessary to this decision, we also note the results which could flow from a contrary interpretation. It would be wasteful of the expertise of the specialists who serve on Medical Review Panels to appoint a panel to examine a worker only to discover that the worker or employer's dispute did not involve a medical decision. Clearly, this could not have been the legislature's intention.

We are cognizant of the caution expressed in Appeal Division Decision No. 91-0944 (*Medical Review Panel: Enabling Certificate*, *Workers' Compensation Reporter*, Vol. 8(1): p. 5–11). The panel stated (at page 11):

> . . . the legislature has carved out from the Board's jurisdiction a separate appeal process before a medical review panel. The medical review panel determines its own procedure and determines what evidence it will receive. The decision of a medical review panel is binding on the Board, and there is no appeal from their decision.
>
> However, the Board controls access to medical review panel appeals: the Board determines the sufficiency of the enabling certificate, and other preliminary matters in an appeal to a medical review panel. *The Board should not unduly restrict access to this appeal process.* The *Act* requires the Board to ensure that the statutory requirements are met. The addition of any preliminary requirements defeats the legislative intention that employers and workers have access to this avenue of appeal outside the Board.
>
> (emphasis added)

We adopt these reasons in making this decision. We must diligently guard against the real and serious potential for the Board attempting to insulate decisions from appeal to Medical Review Panels by abusing their role in the administration of the preliminary processes. We note that the governors have utilized their policy-making authority with respect to the use of the discretion under Section 58(5) to facilitate access to Medical Review Panels, by preventing appeals from failing due to technical defects. Control of access to Medical Review Panel appeals involves the dual requirements of ensuring that the provisions of the statute are satisfied, while at the same time ensuring that applications do not fail due to technical defects.

We find that under Section 58(3) or (4) of the *Act*, no Medical Review Panel may be appointed unless the requirements for certification as to the existence of a bona fide medical dispute, with sufficient particulars to define the question in issue, are satisfied. The consideration of the adequacy of the physician's certificate submitted under Section 58(3) or (4) is a task which properly falls to the Board to determine. We find, therefore, that the Review Board finding on this issue contravened governors' policy and the *Act*. As grounds for the president's referral have been established, the Review Board finding must be redetermined under Section 96(4) of the *Act*.

(c) The Physician's Certificate

The worker's appeal to the Review Board concerned his objections to the acceptance of the physician's certificate in this case. These objections were not addressed by the Review Board in its finding, due to the Review Board's conclusions on the two issues addressed above. In view of our conclusion with respect to the validity of the president's referral of the Review Board finding under Section 96(4), these issues remain to be addressed. This panel considers it necessary to proceed to consider the adequacy of the physician's certificate submitted under Section 58(4) of the *Act*. This issue is implicit to the general issue raised by the president's referral concerning the authority of the Board to consider whether the worker's request for examination by a Medical Review Panel met the requirements of Section 58 of the *Act*.

In his written submission dated September 1, 1995, the worker's lawyer argues:

> As per s. 5(5) of the *Act*, [the worker's] compensation eligibility cannot be defeated by any M.R.P. finding that he merely had a "pre-existing non-compensable condition," the very words used in Dr. D's certificate at question #3. Again, then, what is the point to be served by an M.R.P. referral?

In the September 8, 1995 submission by the employers' adviser, she argues:

> Neither the worker nor his representative appealed the finding concerning the bona fides of the medical dispute.
>
> There is no appeal before the Appeal Division on the bona fides of the medical dispute.

Decision No. 75 of the governors (*Workers' Compensation Reporter*, 1994, Vol. 10(5): p. 753–757) provides at item 1.0 (at page 753):

> The Appeal Division has a discretion to initiate and to conduct a full inquiry into all of the issues arising out of an appeal once the matter is before it.

Appeal Division Decision No. 1 concerning the practice and procedure of the Appeal Division (*Workers' Compensation Reporter*, Vol. 7: p. 33–52) stated at item 3.4:

> All matters raised in the decision letter which was appealed to the Review Board, and in the Review Board finding, may be considered issues in the appeal. The Appeal Division will ensure that the issues in an appeal are identified during the course of the appeal so that all parties may understand and have an opportunity to respond.

The general issue raised by the employer's appeal to the Appeal Division concerns whether the employer has met the requirements of Section 58 for initiating an appeal to a Medical Review Panel. Furthermore, as grounds for the president's referral have been established, the Review Board finding must be redetermined under Section 96(4). We find that the issue as to whether the physician's certificate submitted in support of the employer's application meets the requirements of Section 58(4) is an issue properly before this panel. This issue was addressed in the initial decision of the medical appeal officer, was appealed by the worker to the Review Board, was identified as an issue by the panel at the oral hearing before the Appeal Division and was canvassed in the submissions by the parties at the oral hearing before the Appeal Division.

We note, as well, that at the oral hearing concerns were expressed with respect to the delays and multiplicity of appeals involved on this claim. The employer's request for a Medical Review Panel concerns a decision rendered by the Appeal Division four years ago (on July 26, 1991). We have proceeded to consider Dr. D's certificate of January 20, 1992, as to whether it satisfies the requirements of Section 58(4) that there be:

> a certificate from a physician certifying that, in the physician's opinion, there is or may be a bona fide medical dispute to be resolved, and stating sufficient particulars to define the question in issue.

The form of certificate signed by Dr. D contained the statement:

> I believe that there exists a bona fide medical dispute.

Section 58(4), which concerns appeals by employers, only requires that a physician certify that there "is or may be" a bona fide medical dispute. Dr. D has chosen to certify on the higher standard of certainty required by Section 58(3). The initial requirement of Section 58(4), for certification that there is or may be a medical dispute, is clearly satisfied.

Governors' policy at item #103.12 of the *Manual* stated, prior to May 1, 1995:

> The Board determines whether or not there is a bona fide medical dispute.

We find it would be contrary to Section 58 of the *Act* to read this policy as meaning that a decision was to be made by the Board officer as to the "bona fides" of the medical dispute, in terms of rendering a judgment on the validity or merits of the opinion provided by the certifying physician. The decision required by Section 58 involves consideration as to whether the physician has certified the existence of a bona fide medical dispute, and whether the certificate provides sufficient particulars to define a medical question in issue.

Effective May 1, 1995, governors' policy was amended to eliminate the ambiguity contained in the former item #103.12. The policy currently states, at item #103.41:

> The certifying physician has to provide sufficient particulars to define the question in issue. The physician does not have to provide further information to show, for example, that the physician's opinion is conclusively supported by general medical opinion.

We have proceeded to consider whether Dr. D's certificate provided sufficient particulars to define a medical question in issue with reference to the July 26, 1991 Appeal Division decision.

The essential finding in the July 26, 1991 Appeal Division decision was stated in the final paragraph:

> The Review Board found *no pre-existing disability* was present at the time of [the worker's] injury of May 1, 1988. This panel finds that the minor pre-existing changes were of no significance in the issue under consideration, which is relative to the surgery at L5-S1 levels.
>
> (emphasis added)

The July 26, 1991 Appeal Division decision discussed both Sections 5(5) and 39(1)(e) of the *Act*. In terms of the worker's entitlement to compensation, the issue before the Appeal Division was the application of proportionate entitlement under Section 5(5) of the *Act*. The test for this is whether the worker suffered from a pre-existing disability. Section 5(5) does not authorize the application of proportionate entitlement based upon the existence of a pre-existing condition or disease.

Section 39(1)(e) allows the Board to grant relief of claim costs to an employer "for that portion of the disability enhanced by reason of a pre-existing disease, condition or disability." For the reasons expressed in Appeal Division Decision No. 93-0389 (see *Workers' Compensation Reporter*, Vol. 9(3): p. 361–372), which were adopted under current governors' policy at item #103.42 of the *Manual*, a decision under Section 39(1)(e) is not appealable to a Medical Review Panel as it does not affect a worker's entitlement to compensation. Thus, issues as to the existence of a pre-existing condition or disease, do not involve a medical decision appealable to a Medical Review Panel.

In order to define a medical dispute which would be appealable to a Medical Review Panel in this case, therefore, the physician's certificate must identify a medical dispute in relation to the Appeal Division's determination with respect to the worker's entitlement under Section 5(5) of the *Act*. A dispute as to whether there was any pre-existing condition or disease would only be relevant to a request for relief of costs under Section 39(1)(e), which does not affect the worker's entitlement, and could not give rise to a Medical Review Panel appeal.

The wording used by Dr. D in his certificate relates primarily to whether or not the worker had a pre-existing condition. The employer's advisor submits the physician cannot be expected to be familiar with the technical meaning of the terms utilized in the workers' compensation field. She contends it is clear that the certificate defines a medical dispute. In order to consider this argument, it is necessary to examine the particulars provided in Dr. D's certificate which states:

1. I believe that there exists a bona fide medical dispute.

2. I am a physician registered under the *Medical Practitioners' Act* of British Columbia.

3. The medical decision which I dispute is the decision that: [the worker] had no pre-existing condition involving his lower lumbar spine.

4. The reasons why I believe a medical dispute exists are:

   The Appeal Division has based their decision that there was no pre-existing disease at the L4-5 and L5-S1 disc spaces on misleading medical reports. Dr. E states that there was a pre-existing condition, namely adolescent osteochondrosis, that predisposed [the worker] to back disease. This is true, in my opinion, to the extent that he would be predisposed to degenerative changes in the affected part of his spine — namely the thoracic and upper lumbar spine; but not in the low lumbar spine. Dr. F has pointed this out as the basis of his assertion that "this man's disc herniation was an acute event". In my opinion, Dr. F has gone too far. I agree that there was no evidence of underlying adolescent osteochondrosis at L4-5 and L5-S1 that predisposed the worker to disc herniation. However, to conclude that the disc herniation was "acute" rather than gradual cannot be inferred from this fact. The following comments made by Dr. E in Memo #8 of 26 September 1988 are most relevant:

> Whereas traditionally one thinks of acute disc herniation as occurring suddenly after a specific traumatic event, this is only identified in about 40% of disc herniation. The more common finding is that the disc comes on gradually and the extrusion of the disc occurs over a period of time. . .
>
> I further point out the observation that the worker had a history of left sided nerve root irritation as early as 1979, at the time of a Workers' Compensation Board reported back injury. This observation could well fit with a hypothesis that the worker's lower lumbar disc degeneration had been progressive over many years. The gradual degeneration of the discs at L4-5 and L5-S1 may have progressed over the intervening year to the point where they became acutely and persistently symptomatic in May 1988. Dr. G's observation, as quoted by the Appeal Division, that there was no muscle wasting to indicate longstanding radiculopathy should not be viewed as support for the absence of progressive disc degeneration. All that is inferred from that observation, was that the nerve root had not been crushed for long. Such a crushing likely was an acute event, but one that may have occurred as the end result of a more gradual degeneration of the disc. *If one accepts the proposition that disc degeneration had occurred gradually rather than acutely, the next question would be how much of the end result (the acute or subacute disc herniation) can be attributed to his work [with this employer] and how much to other activities, such as work done elsewhere or during recreational activities.*
>
> This concludes my review of the files presented to me concerning [the worker's] claim. . . .
>
> (emphasis added)

We have carefully considered the reasoning expressed in Dr. D's certificate, bearing in mind the submission by the employer's advisor that the physician cannot be expected to be familiar with the technical definition of terms used by the Workers' Compensation Board. We find Dr. D's reasons are clearly and plainly expressed, in suggesting that the worker's disc had been gradually degenerating prior to the acute event at work in 1988. While questioning the extent to which the acute event in 1988 was responsible for the worker's ensuing disability, Dr. D does not suggest anywhere in his certificate that the pre-existing degeneration of the discs had progressed to the point that there was any pre-existing disability. In fact, the opposite would seem to be the case, inasmuch as Dr. D speaks of the disc degeneration progressing gradually "to the point where they became acutely and persistently symptomatic in May 1988."

Section 5(5) of the *Act* provides:

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

The precondition to consideration of proportionate entitlement under Section 5(5) of the *Act* is an "already existing disability." We find nothing in Dr. D's lengthy certificate indicating an opinion that the worker had any "already existing disability" prior to the acute event in 1988. In the circumstances, therefore, we are unable to conclude that any medical dispute has been identified concerning the worker's entitlement which would be appealable to a Medical Review Panel.

Dr. D's certificate does not state sufficient particulars to define a medical question in issue within the meaning of Section 58(4) of the *Act*. The employer's request that the worker be examined by a Medical Review Panel must, therefore, be denied.

Dr. D's reasoning that the worker suffered from a pre-existing condition or disease is relevant to Section 39(1)(e) of the *Act*. We adopt the reasoning expressed in Appeal Division Decision No. 93-0389, and governors' policy, in concluding that any dispute on this basis is not appealable to a Medical Review Panel. We note, in any event, that by decision dated October 4, 1988, the claims adjudicator advised the employer:

> Section 39(1)(e) of the *Workers Compensation Act* provides that the Workers' Compensation Board administer a fund "to provide and maintain a reserve for payment of that portion of the disability enhanced by reason of a pre-existing disease, condition or disability". It has been decided that the costs of medical aid and wage loss benefits following September 4, 1988 shall be released to your company and charged to Section 39(1)(e).

In Memo #35, the claims adjudicator noted that Section 39(1)(e) had been applied effective September 4, 1988, and that Section 5(5) had been applied but that decision was overturned by the Review Board and was no longer applicable. In Memo #45 dated July 9, 1990, and in Memo #62 dated January 31, 1992, the disability awards officer concluded that Section 39(1)(e) would not apply in respect of the worker's pension award. This latter determination, however, does not appear to have been communicated

to the employer in a decision letter. We interpret the Review Board and Appeal Division decisions on this claim as only determining the issue as to whether the worker had any pre-existing disability within the meaning of Section 5(5) of the *Act*. It is, therefore, open to the disability awards claims adjudicator to issue a decision concerning whether the employer is entitled to any relief of costs under Section 39(1)(e) in respect of the costs associated with the worker's pension award. The employer should contact the disability awards claims adjudicator if they wish to obtain a decision on that issue.

(d) A Second Certificate

Current governors' policy at item #103.40 of the *Rehabilitation Services and Claims Manual*, effective May 1, 1995, states that where there has been substantial compliance with the requirements of Section 58(3) or (4), a Medical Review Panel appeal may proceed if:

> (c) after a decision has been made following the initial ninety days that the physician's certificate does not contain a bona fide medical dispute, a valid certificate is received within ninety days of the date of that decision.

A similar provision was contained in item #103.13 of the *Manual* at the time of the medical appeals officer's decision. Governors' policy provides, in effect, that if a medical certificate for appeal to a Medical Review Panel is rejected, the reasons for this rejection will be explained to the appellant and to the physician, and a further opportunity will be granted to the physician to provide a proper certificate. In this case, the medical appeals officer erroneously concluded that an adequate physician's certificate had been provided.

The general effect of the policy at item #103.40 is that a further 90-day period will be granted for the provision of a valid certificate following "a decision" that a physician's certificate does not define a bona fide medical dispute. In the present case, this Appeal Division decision is the first decision that the physician's certificate does not define a medical dispute.

Having regard to the decision of the British Columbia Court of Appeal in the *Caputo* case with respect to the application of Section 58(5) to prevent a Medical Review Panel application from failing due to a technical defect, we find that the employer should be placed in the same position they would have been in had their Medical Review Panel application been correctly considered in the first instance. The certificate should have been found inadequate, with the reasons for this explained to the employer with a further 90 days granted to furnish a second certificate. In the circumstances, fairness requires that the employer be allowed this further opportunity to obtain and submit a second medical certificate to the Board, within 90 days of this Appeal Division decision.

(e) Legal Fees and Costs

The worker's lawyer has requested an award of legal fees and costs be made against the employer under Section 100 of the *Act*. Governors' policy at item #100.70 of the *Manual* provides:

> this section is limited to cases where the worker or employer abuses their respective rights under the *Act*. For instance, the worker or employer may put the opposite party to the expense of an appeal for no good reason. In other words, it may appear that an appeal was pursued simply because the right of appeal existed and without any substantial grounds on which the position could be argued.

The employer's advisor points out that the employer's appeal to the Appeal Division concerned the same issues raised by the president's referral of the Review Board finding to the Appeal Division. This followed the initial acceptance of the employer's Medical Review Panel application by the Board. We find no basis for concluding there has been any abuse by the employer of their appeal rights under the *Act*. Nor do we find that any award of legal fees and costs by the Board is otherwise warranted in the circumstances of this case. The worker's request for an award of costs under Section 100 is denied.

Conclusion

The employer's appeal is allowed in part. We find that the Review Board finding was based upon an error of law and contravention of the published policy of the governors. Governors' policy which permits a Medical Review Panel appeal to proceed under Section 58(5) where there has been substantial compliance with the requirements of Section 58(3) or (4) of the *Act*, involves a lawful exercise of the Board's discretion under Section 58(5). Responsibility for reviewing the adequacy of a physician's certificate submitted for appeal to a Medical Review Panel, with respect to the requirements for certification as to a bona fide medical dispute and for the provision of sufficient particulars to define a medical question in issue, rests with the Board. We allow the employer's appeal, and find that grounds for the president's referral were established, on this basis. This panel proceeded, therefore, to redetermine the Review Board finding in accordance with Sections 91(1) and 96(4) of the *Act*.

We find that the physician's certificate submitted in this case does not state sufficient particulars to define a medical question in issue within the meaning of Section 58(4) of the *Act*. No medical dispute has been identified in connection with the medical decision that the worker did not suffer from any pre-existing disability, and that proportionate entitlement under Section 5(5) was therefore not applicable. The employer's request that the worker be examined by a Medical Review Panel must, therefore, be denied. The worker's request for an award of costs under Section 100 is also denied.

The employer has been granted relief of costs by the claims adjudicator of the costs of medical aid and wage loss following September 4, 1988; it is open to the employer to request a decision from the disability awards claims adjudicator if they wish to seek relief of costs under Section 39(1)(e) in respect of the costs associated with the worker's pension award.

We further find that the employer must be granted a further 90 days, from the date of this decision, to submit a second medical certificate (or clarification from Dr. D of his certificate), for consideration by the medical appeals officer. Such a certificate would, for the reasons outlined above, need to address the issue as to whether the worker's 1988 work injury was superimposed on an already existing disability.

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

Decision of the Appeal Division

Number: 95-1231
Date: October 23, 1995
Panel: David Van Blarcom, Herb Morton, Hilrie Reimer
Subject: Dual Medical Review Panels

The president of the Board has referred a Review Board finding dated June 2, 1995 to the Appeal Division for redetermination pursuant to Section 96(4) of the *Workers Compensation Act*.

The referral memorandum dated June 30, 1995 states:

> By findings dated June 2, 1995, a Review Board Panel concluded (at page 6) that:
>
> > As the *Act* specifically sets out the requirement that each appeal to a Medical Review Panel is to be considered by a panel of two members and a Chairman, we conclude that the Board's policy regarding dual panels is contrary to the *Act* . . .
> >
> > . . . As result we unanimously find that [the worker's] appeal to a Medical Review Panel has to be considered by a panel consisting of a Chairman and two members. The members will both come from the same list of specialists for her particular class of disability; she will appoint one, and her employer will appoint the other. The Board will appoint the Chairman.
>
> Item #103.52 of the *Manual* states:
>
> > Where the medical question in dispute is in a borderline area between specialties, the Registrar may:
> >
> > – choose the specialty that is of primary relevance to the matter in dispute and send out the list for that specialty; or
> >
> > – set up a separate Panel for each specialty under a common Chairman.

> I have consulted with the Acting Registrar, Medical Review Panel Department, regarding the matter and refer you to the enclosed memo of June 22, 1995. This memo provides in greater detail the substance of the matter being referred.
>
> In the course of consulting with the Acting Registrar, I inquired about the operation of a so-called "dual panel." I was advised that two separate panels are set up, each conducting its own examination and issuing its own certificate. They are, however, chaired by the same Medical Review Panel Chairman.
>
> (reproduced as written)

The appellant and respondent in the Review Board proceeding were given notice of this reference, but neither has provided a submission. The parties themselves have not appealed the Review Board findings. This decision is limited to the reference by the president, and does not deal with the other finding at the Review Board, which was that the adequacy of the Statement of Foundational Non-Medical Facts is not an appealable issue.

Background

The worker applied for workers' compensation benefits on October 24, 1989. She was a computing analyst and attributed her disabling allergic condition to conditions at her workplace. The worker's claim was denied for reasons set out in a letter from a claims adjudicator dated December 20, 1989.

The worker appealed that letter to the Review Board which denied the appeal in findings dated May 24, 1991. Those findings were appealed to the Appeal Division. In a decision dated February 27, 1992, the Appeal Division also denied her appeal, and concluded the most likely hypothesis as to the cause of the worker's problems was her psychological profile, as identified in a psychiatric report.

The worker's physician filed a certificate for appeal to a Medical Review Panel on March 30, 1992, disputing the Appeal Division decision on the basis that the worker was damaged at work, and that there were objective findings in support of that damage. Her physician said her problem was not psychiatric. Another physician filed a certificate for appeal to a Medical Review Panel on April 21, 1992 which said the Appeal Division erred in finding the worker does not suffer from chemical hypersensitivity due to workplace exposure. He said this was supported by an assessment by the Environmental Health Center in Dallas, Texas.

In response to those certificates, the worker was advised in a letter dated December 7, 1993:

> You are to be examined by a Medical Review Panel as provided for by the *Workers Compensation Act*.
>
> Enclosed is a list of specialists in the particular class of injury or ailment for which you claimed compensation, as well as a "Nomination of Specialist" form. Your Medical Review Panel will consist of specialists from the list of Psychiatrists and Immunologists/Allergists.

On December 17, 1993 the worker wrote the president of the Board. Her letter raised a number of concerns, including:

> In conversation with [the medical appeals officer] on December 13, 1993, I learned that my medical review is to be two panels — one composed of psychiatrists and the other to be specialists from Immunology/Allergy. In the documentation received on Dec. 10, there is no statement that there will be *two* medical panels and there is only one form for nomination of a specialist.
>
> I wish to appeal the decision to place any psychiatrist on my medical review panel. Psychiatrists will have no knowledge of chemical hypersensitivity and no basis on which to judge the effects of indoor air pollution.

By a memo dated January 18, 1994, the registrar of Medical Review Panel wrote the medical appeals officer, having been advised of the worker's concern. He said:

> I have designated a dual panel of these two specialties in order to give the fairest possible opportunity to resolve the medical issues presented.
>
> On the worker's file, there have been extensive psychological evaluations, with no resolution. A panel of psychiatrists will be helpful on this aspect of the medical issues.

The worker's concerns were referred to a senior medical appeals officer, who wrote the worker on March 4, 1994. She cited the memo from the registrar of the Medical Review Panels and the conclusion of the Appeal Division panel as reasons for confirming the decision to have the matter considered by a "dual panel."

The worker appealed that decision to the Review Board. In findings dated June 2, 1995, the Review Board noted the policy of the governors set out in item #103.52 (item #103.32 before the amendments of May 1, 1995) of the *Rehabilitation Services and Claims Manual* which says:

> Both the worker and the employer must receive the same list of specialist members. A Medical Review Panel cannot include different specialties.
>
> Where the medical question in dispute is in a borderline area between specialties, the Registrar may:
>
> - choose the specialty that is of primary relevance to the matter in dispute and send out the list for that specialty; or
>
> - set up a separate Panel for each specialty under a common Chairman.

The Review Board said the second of these options was the "dual panel format" chosen for the appeal. The Review Board then reviewed some sections of the *Act* pertaining to the appointment of Medical Review Panels: Sections 58(2), 58(3), 58(4), and Sections 59(1) and 59(3). They concluded:

> As the *Act* specifically sets out the requirement that each appeal to a Medical Review Panel is to be considered by a panel of two members and a Chairman, we conclude that the Board's policy regarding dual panels is contrary to the *Act*. We do note that the *Act* does provide support for the policy which suggests that an appointed panel could obtain consultation reports from specialists in other areas . . . We further note that in accordance with Section 58(5) the Board could, under its own initiative, set up another Medical Review Panel, presumably with its own choice of specialty. However, in the case that is before us the Board has not, to date, suggested that it wishes to follow this course. As a result we unanimously find that [the worker's] appeal to a Medical Review Panel has to be considered by a panel consisting of a Chairman and two members.

In seeking a referral of the Review Board findings to the Appeal Division under Section 96(4), the assistant to the registrar of the Medical Review Panels wrote in a memo dated June 22, 1995:

> . . . this particular policy of the Board is in our opinion a sound policy and we wish to retain it. The specific wording of this policy is one which recently received approval by the Governors following extensive consultation with the public. In addition the essential characteristic of this policy has remained unchanged for many years.
>
> The application of the policy to particular facts was considered by the B.C. Court of Appeal in *Kooner vs. Workers' Compensation Board* (1991 (sic) 54 B.C.L.R. 83. In that case, purporting to act under authority of this

policy, the Board decided to appoint one panel of specialists to determine the medical question in dispute. When that panel reported and the Board was dissatisfied with its findings, it attempted to appoint a second panel composed of different specialists. While the Court found that application of the policy in that manner was patently unreasonable it affirmed the propriety of the policy itself.

In referring to the multiple panel policy that applies when the Board considers that the resolution of a medical dispute may require the appointment of more than one panel, the Court stated as follows:

> The *Manual* . . . has been prepared on the basis of the Board's experience and seems to deal quite appropriately with this problem. Paragraph 103.32 [now #103.52] headed "Medical Dispute Concerns Two Specialties", says:
>
> > . . . .
> > In certain exceptional circumstances, this will result in a need for two Medical Review Panel appeals on a claim, in different areas of specialization . . . .

The Court went on to discuss the Board's options in the *Kooner* case in the following words:

> So it was open to the Board to take either of the courses described in its Manual — to refer the whole dispute to a Panel composed of neurological experts with a view to having that Panel dispose of any psychiatric issues which might arise as well as the neurological issues or, alternatively, to advise the claimant and employer that there would be two Panels, the first to dispose of the neurological issues and the second to decide thereafter the psychiatric questions . . . .

The policy which the Review Board has identified as being contrary to the *Act* has therefore been affirmed on judicial review by the B.C. Court of Appeal.

Reasons and Decision

Section 58(5) of the *Act* says:

> The board may decide that the worker shall be examined by a medical review panel, in which case he shall be so examined in the manner provided in this section.

That section was also considered by the Court of Appeal in the *Kooner* case. The court held at page 92:

> The board has wide power to decide when to appoint a medical review panel of its own motion under s. 58(5). . . . For such an independent review procedure to be effective, the broad discretionary authority which the board normally enjoys must be qualified.

In finding the Board's powers under Section 58(5) are circumscribed, the court concluded:

> It cannot be enough to entitle the board to initiate another review that it has changed its mind, after the first panel has reversed the board's decision, and has decided that a problem which it knew at all times might involve two specialties ought to have been submitted partly to one panel, and partly to another, rather than wholly to one.

As noted above, the B.C. Court of Appeal concluded in the *Kooner* case, upon consideration of the policy formerly set out at item #103.32 of the *Manual*, that (at page 95):

> . . . it was open to the board to take either of the courses described in the manual — to refer the whole dispute to a panel composed of neurological experts with a view to having that panel dispose of any psychiatric issues which might arise as well as the neurological issues, or, alternatively, to advise the claimant and employer that there would be two panels, the first to dispose of the neurological issues and the second to decide thereafter the psychiatric questions which might remain should the first panel find no neurological disability.

The establishment of two panels, with different areas of expertise, was therefore approved by the Court of Appeal with reference to the policy which existed at item #103.32 in the *Manual* at the time of the medical appeal officer's decision of March 4, 1994. The May 1, 1995 amendments to governors' policy at item #103.52 of the *Manual* both confirm and clarify the basis for establishing such panels.

In this case, the Board has in fact and substance followed the process approved in *Kooner*, although the description of this process in the Board vernacular as a "dual panel" has created confusion. The expression "dual panel" gives the impression of a single panel, with a single chair and four specialists from two specialties. The Review Board is correct in finding there is no authority for the establishment of such a panel.

However, in substance, the Board has established two panels, each with two specialists and a chair. The chair of both panels is the same person.

The *Act* provides in Section 58(3) that a worker is entitled to be examined by a Medical Review Panel, and the worker's request has been accommodated by appointing a panel consisting of a chair and two specialists.

The *Act* also provides in Section 58(5) that the Board may decide the worker shall be examined by a Medical Review Panel, and that has been done by appointing the second panel consisting of a chair and two specialists in a different field.

The policy set out in item #103.52 (item #103.32 at the time the Medical Review Panel was requested by the worker) provides for the appointment of two panels of three doctors each, not a single panel of five doctors. The policy now clearly states the registrar may "set up a separate Panel for each specialty under a common Chairman" although it does not specify that the jurisdiction for doing so flows from Section 58(5).

We do not find any provision of the *Act* which precludes each panel having the same chair.

In considering this matter, we adopt the reasoning expressed in Appeal Division Decision No. 92-1459 (see *Workers' Compensation Reporter*, Vol. 9(1): p. 63–74). The Appeal Division panel concluded in that case that while it was open to the Board to establish two Medical Review Panels, it would be contrary to the *Act* to establish a three-member panel composed of a chair and members from two different specialties.

The Medical Review Panel file shows the senior medical appeals officer had prepared separate sets of issues for the immunologist/allergist panel and the psychiatric panel, to which each panel was separately asked to respond.

This is the procedure which was approved by the B.C. Court of Appeal in the *Kooner* decision. Unlike the Review Board, we find the Board has in fact under its own initiative set up another Medical Review Panel pursuant to Section 58(5). It would be helpful if the Board would expressly state in such cases that it is establishing a panel under its own initiative pursuant to Section 58(5), but we do not find that it must expressly so state in order to validly establish such a panel.

The British Columbia Court of Appeal also considered Section 58(5) of the *Workers Compensation Act* in the case of *Re Caputo and Workers' Compensation Board of British Columbia*, (1987) 38 D.L.R. (4th) 458. The court found (at page 463):

> . . . it seems to me that ss. 58 to 65 of the *Act* constitute a code in respect of medical review panels and that s. 58(5) gives the board a broad general power to deal with both procedural and substantive matters relating to the appointment of medical review panels. The wide discretionary power granted in s. 58(5) made it unnecessary for the Legislature to confer specific remedial powers on the board.

The court further concluded (at page 466):

> In my opinion, while the Tysoe report is helpful in determining legislative intent, it cannot be used so as to defeat the plain meaning of the words used in s. 58(5). While, no doubt, the Legislature intended that the board be given an independent mandate in respect of the appointment of medical review panels to accomplish the purposes set forth in the Tysoe report, it does not follow that the powers of the board under section 58(3) should be restricted to those purposes. Rather, it seems to me, *the Legislature intended, by the words which it used, to give "plenary independent power" to the board in respect of all matters relating to the appointment of medical review panels. . . .*
>
> (emphasis added)

We find that it is an appropriate exercise of the Board's "plenary independent power" under Section 58(5) to provide for the establishment of two essentially concurrent Medical Review Panels, where an appeal under Section 58(3) or (4) of the *Act* raises issues which cannot be fully addressed by a single panel.

Neither governors' policy, nor the reasoning expressed by the court in the *Kooner* case, clearly specifies the legal basis for establishing two Medical Review Panels in response to an application under Section 58(3) or (4). We find the establishment of two Medical Review Panels (which although held consecutively, are established concurrently) is supported by Section 58(3) and (5) of the *Act* operating together.

In reaching this conclusion, we considered the alternative possibility that two Medical Review Panels might be established as a result of an application under Section 58(3) without recourse to Section 58(5). The policy at item #103.32 of the *Manual*, in effect at the time the decision to establish two panels was made, stated it is generally necessary to decide which is the "main" problem, or the major disability, involved in the appeal. The policy noted, however, that "in certain exceptional circumstances, this will result in a need for two Medical Review Panel *appeals* on a claim." (emphasis added)

Inasmuch as a Section 58(5) referral by the Board is not an "appeal" in the technical meaning of that term, this suggests the policy contemplated a situation in which a request for a Medical Review Panel examination might properly be considered as involving two appeals. In other words, in certain circumstances the two aspects of a decision might be so interlinked, and so integral to the proper consideration of the matter, that the dispute might properly be characterized as involving two appeals. It would not necessarily matter whether there were two separate decisions on file, with two separate sets of appeal forms, or whether there was only one decision document and one set of appeal forms, so long as the "dual" nature of the decision was present. We find that the initial decision to establish two Medical Review Panels might also be supported on the basis of this alternative analysis.

The recent amendments to governors' policy, which are relied upon by the president in this referral, specifically set out the authority of the Medical Review Panel registrar to establish two separate panels for each specialty under a common chair. The policy further states that where only one panel is appointed, before it reaches a decision the chair may recommend that the registrar set up a second panel in a different specialty. We prefer to analyse this authority to establish a second panel as deriving from Section 58(5) of the *Act*. We recognize, however, that it is arguable that such a procedure is also viable in connection with an application under Section 58(3) or (4) of the *Act*, without recourse to Section 58(5).

We conclude, therefore, that the Review Board finding was contrary to both governors' policy and the *Workers Compensation Act* in its finding that the Board could not establish two Medical Review Panels (with immunologists/allergists and with psychiatrists) in this case. As grounds for the president's referral have been established, we proceeded under Section 96(4) of the *Act* to redetermine the Review Board finding on this issue. We confirm the decision by the medical appeals officer to establish two separate Medical Review Panels in this case both of which may have the same chair. We find, therefore, that the worker and the employer must both be invited to nominate two specialists, one from the list of immunologists/allergists, and the other from the list of psychiatrists.

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

Decision of the Appeal Division

Number: 95-1476, 95-1477, 95-1478, 95-1479
Date: November 30, 1995
Panel: Connie Munro
Subject: Criminal Injury Awards

In Decisions No. 94-1490, No. 94-1491, No. 94-1942 and No. 94-1943, I granted leave for a further review of the appeal committee's findings and report of May 17, 1994. Leave was granted on the basis that the appeal committee ("the committee") had not addressed an issue before it, namely, the reimbursement of expenses incurred by the applicants in obtaining expert evidence.

In granting leave, I stated that all of the committee's findings and report would be open for review. Although I did not make explicit mention of it then, the findings and report raise several interpretative issues warranting an in-depth discussion of statutory provisions. Leave for a further review could have been equally granted on that basis. I, therefore, consider it appropriate to review the findings and report in their entirety rather than addressing only the issue missed by the committee.

The applicants are four sisters awarded $10,000 each by the Board in compensation for rape, and sexual and physical assaults endured over years at the hands of their foster father who was convicted and sentenced in relation to the offences. The Board also offered them counselling for one year, with the opportunity to have their need for further counselling reviewed. The $10,000 award was increased by the committee to $20,000. The applicants remain dissatisfied, however, with the awards. No suggestion was made that it would be appropriate to differentiate between the applicants in setting the quantum of compensation. The psychiatrists' and psychologists' reports on file attest to the long-term debilitating effects which the years of abuse have had on the four applicants equally.

Preliminary Issue

An examination focused on questions of statutory interpretation need not entail a reweighing of all of the evidence. I must decide, therefore, whether the review contemplated by the legislation requires, allows or precludes a reweighing of all the evidence (including fresh evidence). Must the word "review" be interpreted to mean a

de novo hearing involving an entire rehearing upon all matters of fact (including fresh evidence) and questions of law? Or does it mean a more limited inquiry? Is there some latitude in how the term may be interpreted?

The *Criminal Injury Compensation Act* (the *Act*) uses the word "review" to describe the committee's examination of a Board officer's decision as well as the Appeal Division's examination of the Board officer's decision or the committee's findings and report. Section 22 states in part:

> 22. (1) The board may act on the report of any if [sic] its officers, and any inquiry or examination which it considers necessary to make may be made by any officer of the board or other person appointed to make the inquiry or examination; but a decision of the officer or appointed person may be reviewed by an appeal committee composed of members as may be appointed by the board.
>
> (2) At the request of the victim, a dependent of the victim or the Attorney General, the appeal committee shall review the decision of an officer of the board or appointed person under subsection (1), and the board may act on the findings and report of the appeal committee. . . .
>
> (3) By leave of the appeal committee, or of the chief appeal commissioner of the board, the Appeal Division may further review the decision, or the findings and report.

The Oxford Companion to Law defines review as a "reconsideration on appeal." *Black's Law Dictionary* defines the term as a "reconsideration," a "second view or examination," a "revision," a "consideration for purposes of correction"; it specifies that the term is used especially for "the examination of a cause by an appellate court or appellate administrative body."

Neither *The Oxford Companion to Law* nor *Black's Law Dictionary* discuss whether a review requires an entire rehearing or may consist of a more limited inquiry. By equating a review with an appeal, the texts shed little light on that question since there are various forms of appeals. Appeals may involve a *de novo* hearing or may lie only on questions of law. The term "appeal" is broad enough to encompass different types of scrutiny. The definitions of the term "review" in *The Oxford Companion to Law* and *Black's Law Dictionary* suggest that the same applies to this term. The meaning of the term "review" will, therefore, depend upon its use in any given statute.

As contemplated by the *Act*, the Appeal Division's review of a Board decision or of the committee's findings and report is at the committee's or the chief appeal commissioner's discretion. There is no automatic right to a review. This could be seen as indicative

of a legislative intent to narrow the scope of the review process. Where appeals are only at the discretion of the appellate body, the appeal will generally lie only on questions of law as opposed to both questions of law and fact. Alternatively, the *Act* contains a section (Section 22.1) that allows the reconsideration of Appeal Division decisions on the basis of new evidence. Subsection 22.1(3) specifies:

> (3) Where the chief appeal commissioner considers that the evidence referred to in subsection (2)
>
> (a) is substantial and material to the decision, and
>
> (b) did not exist at the time of the hearing or did exist at that time but was not discovered and could not through the exercise of due diligence have been discovered,
>
> he may direct that
>
> (c) the appeal division reconsider the matter, or
>
> (d) the applicant may make a new claim to the board with respect to the matter.

The above provisions imply that, in the course of its review, the Appeal Division may not only examine questions of law but also matters of fact, including fresh evidence. Having regard to these provisions, I concluded in an earlier decision that substantial new evidence would constitute a ground to grant leave for a further review. A decision-maker considering new evidence may have to rehear and reweigh all of the evidence. Consistent with Section 22.1, I find it reasonable, therefore, to interpret the term "review" in the *Act* as providing a *de novo* hearing. Where a review proceeds on the basis of new evidence, a fresh look at all of the facts may be appropriate. On the other hand, where the review concerns a question of statutory interpretation, it may be equally appropriate to accept the facts as found and weighed by the committee or Board officer. In other words, the legislation does not bind the reviewing body to a particular type of hearing. The grounds upon which leave is granted as well as the nature of the case at hand will determine the nature of the hearing. Here, leave was granted because an issue was missed. The case also raises important questions of statutory interpretation. Neither the issue that was missed nor the interpretative questions would require me to reassess and reweigh the evidence. It is only inasmuch as the case ultimately concerns the quantum of damages awarded to victims of crime, that a re-examination of the evidence, although not necessary, may be appropriate.

As indicated, the appeal committee increased the award to each of the applicants from $10,000 to $20,000. In doing so, the appeal committee reasoned:

1) Multiple offences such as endured by each of the sisters must be viewed in their totality rather than as a series or sum of individual offences for the purpose of compensation under the legislation;

2) The maximum amount of compensation payable to each of the sisters for the whole of the abuse they had endured is $50,000;

3) As a very general guideline, awards under the *Act* approximate one-fifth of the quantum of awards given in civil actions; and

4) The sisters' case bears striking similarities to another criminal injury case reported in *The 21st Annual Report of the Criminal Injury Compensation Act of British Columbia* in which the Board awarded the victims of sexual and physical abuse $20,000 as well as provided for further coverage for therapy.

A proper review of the appeal committee's findings and report calls, therefore, for a consideration of whether:

1) Repeated acts or abuse by the same perpetrator against an individual give rise to one claim for the purpose of the maximum amount of compensation applicable under the *Act*;

2) The maximum amount of compensation payable to each applicant in this case is the maximum provided in the 1990 amendment to the legislation, namely, $50,000;

3) One-fifth of the quantum of awards given in civil courts is a reasonable guideline for criminal injury awards.

Counsel for the applicants has identified these issues as "policy" issues and has specifically requested the Appeal Division clarify its position with respect to them. The Appeal Division does not have the authority to make policy under the *Act*. That authority resides with the governors whose powers are currently exercised since July 13, 1995 by a Panel of Administrators pursuant to Bill 56, the *Workers Compensation Amendment Act*, 1995. The Appeal Division has the authority only to make decisions in individual cases. It must exercise this authority, irrespective of whether published policies exist. The same applies for all adjudicators throughout the system. Where there are no policy statements, the onus falls on the adjudicators to sort out the statutory complexities relative to the issues and within the framework of decisions in the individual cases. The absence of policy on the key issues arising out of the committee's report and findings requires me, therefore, to engage in a more detailed analysis than may have been otherwise necessary; it requires me to discuss these issues to an extent that may prove to be beyond the applicants' immediate interest. It necessitates a detailed legal analysis that, regrettably, precludes compliance with the governors' direction that Appeal Division decisions "shall be written in plain language" (*Workers' Compensation Reporter*, Vol. 7(1): p. 7–11). The issues are, however, of general importance and, as urged by counsel, need to be fully addressed. In some earlier unpublished decisions (Decisions No. 95-0814 and No. 95-0815, both dated July 17, 1995), I noted that

the criminal injury policy committee established by the governors on August 12, 1991 was wound up by a resolution dated October 22, 1994 (see governors' Decision No. 79 in the *Workers' Compensation Reporter*, Vol. 10(5): p. 767). Reference was made in the resolution to the fact that the Ministry of the Attorney General was considering recommending statutory changes to the *Act* — changes that have been effected since. In light of that, I stated in the unpublished decisions that a resumption of the policy initiative might be appropriate and that I would draw this matter to the administrators' attention. The issues raised by the case(s) before me make the need for published policy all the more evident.

* * * * * * * * * * * * * * * * * * * *

Does the *Act* permit viewing repeated acts of sexual and physical abuse over a period of years as a continuous act for the purpose of determining the amount of compensation payable to the victim, in which case the maximum lump sum payable under the legislation would apply to the totality of the abuse as opposed to each individual act? The statutory provisions relevant to that question are primarily in Sections 1, 2 and 13 of the *Act*.

Section 1 states:

> "victim" means a person injured or killed in the circumstances set out in s. 2(2).
>
> "injury" and "injured" means bodily harm, and includes mental or nervous shock and pregnancy.

Section 2 specifies a victim's right to compensation. The section has been amended recently but the amendments are immaterial to this case. As amended, the section states:

> **Right to compensation**
>
> 2. (1) Every victim of crime is, or, if he has been killed, his immediate family members are, entitled to apply, in the manner provided in this *Act*, to the board for compensation.
>
> (2) For the purpose of this *Act*, a victim of crime is a person injured or killed in the Province by an act or omission of another resulting from
>
> (a) the commission of an offence within the description of a criminal offence mentioned in the Schedule, except an offence arising out of the operation of a motor vehicle, but including assault by means of a motor vehicle;
>
> (b) the lawful arrest or attempt to arrest an offender or suspected offender, or assisting a peace officer in making or attempting to make an arrest; or

(c) the lawful prevention or attempt to prevent the commission of a criminal offence or suspected offence, or assisting a peace officer in preventing or attempting to prevent the commission of the offence or suspected offence.

(3) The board, on application as prescribed by the board or by the regulations, shall determine whether the applicant is a victim of crime or the immediate family member of a deceased victim of crime, and may award compensation to the victim or his immediate family members as provided by this *Act*.

(3.1) Compensation may be awarded for

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

(b) pecuniary loss or damages incurred by the victim as a result of total or partial disability affecting the victim's capacity for work,

(c) pecuniary loss or damages incurred by immediate family members as a result of the victim's death,

(d) maintenance of a child born as a result of rape,

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

(f) non-pecuniary loss or damage for pain, suffering, mental or emotional trauma, humiliation or inconvenience.

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

(4) The board may award compensation to a mother who is herself maintaining a child born to her as a result of an offence in the Schedule and, if the mother dies, compensation may be paid to any person who, in the opinion of the board, is maintaining the child.

(5) Compensation awarded to an applicant under this *Act* shall be paid out of the consolidated revenue fund in the same manner as money is paid under the *Workers Compensation Act*, where a worker employed by the Crown, is injured or killed in the course of his employment.

Prior to the amendment, the section referred to "dependants" rather than "immediate family members" and "dependant" rather than "immediate family member."

Section 13 puts a limit on the amount of compensation payable. It states:

> **Limit on compensation payable**
>
> 13. (1) The amount awarded by the board to be paid for injury or death of a victim shall not,
>
> (a) for a lump sum payment, exceed $50,000, and
>
> (b) for periodic payments, exceed the amount payable to a worker or dependant under sections 17, 22, 23, 29 and 30 of the *Workers Compensation Act*.
>
> (2) Where both lump sum and periodic payments are awarded, one but not both may exceed 50% of the maximum amount that can be awarded under subsection (1)(a) or (b).
>
> (3) Commencing July 1, 1980 and every 6 months after, the board shall adjust periodic payments in the manner provided under section 25 of the *Workers Compensation Act*.
>
> (4) For the purpose of calculating periodic payments to be paid after July 1, 1980, awards of periodic payments made before July 1, 1980 shall be adjusted by the board, to the amount those payments would have been on that date if they had been awarded and adjusted under the *Workers Compensation Act*, and after that awards shall be adjusted as provided in subsection (3).
>
> (5) Subsections (1) and (2) do not apply to amounts awarded in respect of a death or injury occurring in the circumstances referred to in section 2(2)(b) or (c) and the amounts shall not be taken into account in determining maximum awards.

These provisions indicate that a victim is not compensated for the act (or omission) resulting in an injury. The seriousness of the act (or omission) is not *per se* relevant to the question of compensation. The effect of the act (or omission) is what matters; a victim is compensated for the consequences of the injury arising from the act (or omission) — that is, for the damages, loss, expenses or harm resulting from the injury. An appreciation of the victim's loss is the key to determining the quantum of compensation. In the case of a victim of years of physical and sexual abuse, the victim's past, present and future losses are the combined result of the years of abuse. It is reasonable, therefore, to view the victim's claim for compensation as a claim for the combined damages resulting from the years of abuse. This is how the courts in civil actions approach cases where the sexual and physical abuse went on over a period of years. While the courts will tend to make larger awards where the abuse took place over a period of years rather than hours they nonetheless do not think in terms of discrete damages for which conceptually separable awards may be calculated. To the contrary, they calculate the award with reference to the net effect of the years of abuse and apply

the Supreme Court of Canada ceiling for non-pecuniary damages (currently $250,000) on that basis. That is logical since the purpose of that ceiling is to ensure moderation in general damage awards for personal injury. Applying the ceiling to each set of damages deemed to have resulted from each act of abuse would defeat that purpose.

The committee's approach is, therefore, analogous to the courts' approach. Moreover, it is in keeping with the notion that the legislation intends to compensate victims for the consequences of the offences committed against them. When the consequences are cumulative, compensation is best assessed with respect to their ultimate effect on the victim.

I recognize this approach leaves several questions unanswered. What if the same perpetrator were to reoffend against the victim *after* the victim received an award? Presumably, the victim could file a new claim and be granted another award, if new damages result from a further offence. The first sum awarded would not be considered sufficient compensation to cover the new damages. That being the case, one might query whether each of the acts perpetrated prior to the making of the first award should not also be treated as giving rise to discrete damages. Similar questions may be asked where the victim endured abuse at the hands of different perpetrators. For example, what if different members of a foster family subjected the victim to abuse? Or, what if the victim endured abuse at the hands of both her stepfather and her biological father over the same period of time? Would it still be appropriate, in those cases, to assess the damages in terms of the net effect of the multiple abuse on the victim? In other words, when is it no longer legitimate to treat the damages resulting from multiple acts of abuse against a victim as combined rather than discrete?

I need not address these hypothetical questions at this time. What matters for the purposes of this review is that, in considering similar fact patterns, the courts have found it appropriate to focus on the ultimate effect of the repeated abuse. That approach can be reconciled with the wording of the *Act*. If, as counsel for the applicants urges, each individual act of abuse was to be treated as giving rise to distinguishable damages, with each set of damages subject to the statutory ceiling, the total sum awarded would far exceed typical awards made by the courts in similar cases. That cannot be the intent behind the criminal injury compensation legislation and for that reason, I reject counsel's argument on that point.

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Does the *Act* permit applying, as the committee did, the current statutory maximum ($50,000) to the cases before me? When the criminal injury compensation legislation was first enacted in 1972, it fixed the maximum payable as a lump sum at $15,000. A legislative amendment assented to on August 22, 1980 increased the maximum to $25,000. Another legislative amendment assented to on July 27, 1990 and brought into force on October 26, 1990 increased the maximum to $50,000.

The committee's use of $50,000 as the maximum applicable to the four cases before me differs from the approach used by the Criminal Injury Compensation Division (the "division"). Upon my request for information concerning the division's use of the maximum, the Board's general counsel advised me in memoranda (subsequently disclosed to the applicants) that the division uses $25,000 as the maximum lump sum payable where the offences occurred between August 22, 1980 and October 26, 1990 and $15,000 as the maximum lump sum payable where the offences occurred before August 22, 1980. While it is not entirely clear from the files whether the offences committed against the applicants had ceased by the time the 1980 legislative amendment came into effect, it is clear that they had stopped before the 1990 amendment. The contents of the memoranda imply, therefore, that the division would have been using either the $15,000 maximum or possibly the $25,000 maximum as a reference point, but *not* the current $50,000.

That said, I note the division may not have been using the approach outlined in the memoranda consistently. In the case cited by the committee, the offences took place between 1970 and 1978. Yet, in a decision rendered in 1991, the division awarded the victim $20,000, a sum in excess of the statutory maximum fixed by the pre-1980 legislation. On the basis that that case was an aberration, I shall nevertheless refer to the approach outlined in the memoranda as the division's approach.

According to the memoranda, the size of the maximum lump sum payable under the *Act* is fixed by the wording of the statute in existence at the time of the occurrence of the offence giving rise to the injury. The committee, on the other hand, simply used the current maximum without identifying the temporal application of that maximum as an issue. It is possible, therefore, for the committee to have believed it was making an award that put damages at a higher level than those estimated by the division yet to have made an award which, *in relative terms*, put damages at a lower level than (or, alternatively, at the same level as) those estimated by the division: i.e., a $10,000 award out of a maximum of $15,000 is a relatively higher award than a $20,000 award out of a maximum of $50,000 (66 percent as opposed to 40 percent). A $10,000 award out of a maximum of $25,000 is in the same relative order of magnitude as a $20,000 award out of a maximum of $50,000 (40 percent in both cases).

In light of the above, I must determine whether the division's approach is valid or whether the current maximum should be applied to the cases before me. A well-established common law principle is that statutory provisions are not to be applied retroactively, unless the statute so provides, either explicitly or implicitly. The presumption against retroactivity has been generally respected, even where the law has become more generous or liberal. The courts have sometimes restricted the operation of the presumption, where the impact of the legislation is purely beneficial that is, where no prejudice could be traced to any particular person or group. But, more often, considerations such as stability, certainty and costs have reinforced use of the presumption, even where the

impact was purely beneficial. Hence, if the legislation does not provide for retroactivity and if it is retroactive to apply the current maximum to cases where the offence causing the injury was committed before 1990, the approach used by the division would be justified.

The law concerning the temporal application of legislation is difficult and confusing. One of the main difficulties is that the terminology used is unclear. For example, Professor Driedger has drawn a distinction between "retroactive" application, "retrospective" application and interference with vested rights [see his *Construction of Statutes*, second edition (Toronto: Butterworths, 1983) pp. 185–203]. Within his perspective, the application of a provision would be "retroactive," if it changed the *past* legal consequences of completed transactions; it would be "retrospective" if it changed the *future* consequences of completed transactions; and it would be interfering with vested rights if it changed the future consequences of some ongoing status or characteristic. While this analysis has been adopted by the courts on some occasions, several judges have used the terms "retroactivity" and "retrospectivity" interchangeably or else, they have used "retrospectivity" and "interference with vested rights" as one and the same concept.

In an attempt to avoid confusion, both Professor Coté in *The Interpretation of Legislation in Canada*, second edition (Cowansville: Les Editions Yvon Blais Inc. 1991) and Professor Ruth Sullivan in the revised *Driedger on the Construction of Statutes* third edition (Toronto: Butterworths, 1994) have dropped the concept of retrospectivity. They distinguish solely between the "retroactive" application of a provision, meaning its application with respect to already completed situations or transactions, and its immediate application, meaning its application with respect to ongoing situations.

I propose to use Professors Coté's and Sullivan's approach in this decision. Although Professor Driedger's distinctions may be more subtle, I shall refrain from using them because of the confusion around the term "retrospective." In any case, the conclusions reached by the three jurists regarding the temporal application of beneficial legislation are analogous and may be summarized as follows: there is a strong presumption in law that such legislation may *not* be applied retroactively but may be applied immediately. Specifically, while retroactivity should be an issue of concern where beneficial legislation is applied, retrospectivity or interference with vested rights should be of no concern. The immediate application of purely beneficial legislation attracts neither the presumption against retrospectivity nor that against interference with vested rights.

Recognizing whether a given application of a statutory provision is retroactive cannot be done solely by reading the legislation. While several court decisions have helped define "retroactivity," they have yet to provide an unassailable means of recognizing it in particular cases.

A standard definition of retroactivity is:

> A retroactive statute or provision is one that applies to facts that were already passed when the legislation came into force. It changes the law applicable to past conduct or event; in effect, it deems the law to have been different from what it actually was. . . .
>
> (Professor Sullivan's text p. 513)

To apply this definition, one must first identify the facts to which the legislation attaches consequences (i.e., the "legal" facts). As noted by Professors Coté and Sullivan, it is important in this connection to ask oneself whether the provision contemplates momentary, continuing, or successive facts. Momentary facts consist of single acts or discrete events that begin and end within a short period of time, such as an act of theft. Continuing facts endure over time, such as the possession of stolen property, imprisonment, or residency. Successive facts, whether momentary or continuing, occur at separate times such as repeat infractions.

Once the legal facts and their temporal dimension are identified, the concrete facts which correspond to them must be positioned in time. Professor Coté gives the following example: suppose a statutory provision confers a right in "case of arrest." Consider the provision in the *Charter* that states "Everyone has the right on arrest . . . to be informed promptly of the reasons therefore." It expresses the following legal rule: if an individual is arrested, then he is entitled to be informed promptly of the grounds of his arrest. The legal fact contained in the provision is the arrest. It is a momentary fact. In order to determine whether the provision creating rights "in the case of arrest" applies without retroactivity, one must ask: "when was this particular individual arrested?" If he was arrested before the provision came into force, the application would be retroactive. Similarly, if a provision attaches legal consequences to a continuing fact, its application would be retroactive, if the state of affairs, condition or relationship ended before the provision came into force. If a provision attaches legal consequences to successive facts, its application would be retroactive, if the final act in the series ended before the provision came into force. These are the main concepts relevant to determining whether legislation is being applied retroactively.

Section 13(1)(a) of the *Act* was enacted in 1990. The rule expressed in that provision may be read as follows: where the Board awards a lump sum for injury or death, the lump sum shall not exceed $50,000. The legal fact to which the provision attaches consequences is the Board's decision to award a lump sum for injury or death; the legal consequence is that the award shall not exceed $50,000. The decision to award a lump sum can be characterized as a momentary fact. In order to determine whether the provision applies without retroactivity to a given award, one must ask "When was the

decision to award a lump sum made?" If the decision was made before the provision came into force, it would be retroactive to apply the provision with respect to the payment of the award. However, if the decision was made after the provision came into force, applying the provision would not be retroactive. From this perspective, neither the occurrence of an injury or death nor the occurrence of the act or omission that caused the injury or death constitute the legal fact that triggers the consequence attached to awarding a lump sum.

Another analysis of the provision would be to view it as describing successive facts, starting with the decision to award a lump sum followed by the payment of the lump sum. From this perspective, the fact pattern is not complete until the final fact in the series, namely, the payment of the lump sum occurs. That is, it would *not* be retroactive to apply the provision if the decision was made before it came into force but payment was still due. In other words, it would *not* be retroactive to adjust the lump sum upward upon payment to reflect the terms of the provision as long as the payment occurred after its coming into force. (It would be retroactive, however, to apply the 1990 provision to a lump sum awarded and paid before its coming into force, i.e. to go back in time and recalculate lump sums already paid.)

I have considered whether Section 13(1)(a) could be read as attaching legal consequences to the injury such that it would be retroactive to apply the provision if the injury occurred before the provision came into force. In other words, can the injury be construed as the legal fact that triggers the operation of the rule contained in the provision? Suppose the provision was construed as describing successive facts, starting with the occurrence of an injury, followed by the making of a decision to award a lump sum, and culminating in the payment of that lump sum. As indicated, in the case of successive facts, the pattern is not complete until the final fact in the series comes to an end. Therefore, even if the injury occurred before the provision came into force, the application of the provision would not be retroactive as long as payment of the lump sum occurred after it came into force. Another point of note in that regard is the nature of the statutory definition of "injury" and "injured." It is a broad definition which permits viewing an injury as a continuing fact. Thus, even on the footing that the injury by itself triggers the operation of the rule expressed in Section 13(1)(a) (an interpretation I find strained), it would not be retroactive to apply the provision as long as the injury is ongoing. (For example, in the case of sexual abuse where the victim continued to suffer emotional damages after the provision came into force, it would not be retroactive to apply the provision.)

To summarize, in light of the concepts developed in the jurisprudence on the subject, it would not be retroactive to apply Section 13(1)(a) as amended in 1990, where the act or omission leading to an injury or death occurred before 1990. Neither would it be retroactive to apply it where the injury started before but continued after 1990. The argument that it would be retroactive to apply it where the injury started and ended

before 1990 may have some plausibility. The problem, however, with this argument is that the injury or the offence cannot be readily contsrued as the legal fact triggering the operation of the rule in Section 13(1)(a). An offence may fail to cause an injury in which case there would be no reason for the Board to award any compensation. Moreover, an injury may not lead to a compensation award should the Board consider the victim undeserving. Alternatively, it could lead to an award in the form of periodic payments.

While for different reasons, the decision by the B.C. Council of Human Rights on which counsel for the applicants relies (*Linda Dupuis* vs. *Her Majesty in Right of the Province of B.C. as represented by the Ministry of Forests, Forest Sciences Division*) supports the conclusion that the current maximum should be applied to the present cases.

I have considered whether this conclusion yields unacceptable consequences in that victims may receive a different amount of compensation depending on when they applied for compensation. That could be seen as giving victims an incentive to delay application. While there is some merit to these concerns, I note the *Act* sets a one-year limitation period for applying for compensation (see Section 6). A person who applies after the expiration of that period risks being denied compensation. Taking this into account, use of the current maximum could hardly be said to build into the scheme an incentive to delay applying for compensation. I also note that applying the old provision (i.e., the old maximum) to two persons, solely because they were the victims of the same type of offence at approximately the same time, could itself yield unfair results. Consider the case of two victims of the same type of sexual abuse occurring around the same period of time. One of them applies soon after the sexual abuse occurred and is awarded a lump sum subject to the maximum in force at the time of the occurrence of the abuse. The other person applies years later upon realizing that physical and psychological problems are related to the abuse. To grant the second victim an award subject to a maximum reflecting past economic conditions could result in unfairness. Finally, I note that Canadian courts have tended to award damages for non-pecuniary losses by adjusting the maximum set by the Supreme Court of Canada trilogy to present day levels and awarding that amount, regardless of when the tort was committed or the damages first occurred, even though, in the field of civil liability, the victim's rights are crystallized at the moment of the wrongdoing.

In conclusion, the approach used by the division as regards use of the statutory maximum is not supported by the law on the retroactive application of statutes. The language of Section 13(1)(a) strongly suggests that lump sum awards made after 1990 are subject to the terms of the provision, as amended in 1990, irrespective of when the offence occurred. Even if the word "injury" were to be considered the operative word in the provision, lump sum awards made after 1990 would still be subject to the terms of the provision as amended in 1990, except where the injury could be found to have begun and ended before 1990. In the cases before me, while the offences definitely occurred before 1990, the injuries suffered by the applicants are ongoing.

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Does the *Act* specify the effect of the maximum lump sum payable on lump sum awards in general? Does it dictate, for example, that damages be assessed as in an action at common law and then reduced to the maximum if they exceed that limit? That approach, advocated by counsel for the applicants, would result in the victim receiving the maximum in every case in which the courts would make an award higher than that maximum. Alternatively, does the *Act* require damages be assessed in terms of some proportionality principle such as assessing damages in terms of the severity of the injury as a fraction of the severity of injuries warranting full compensation? The *Act* is open-ended in that regard. Moreover, there is no published policy on the matter. The question arises, therefore, as to whether the division and the committee favour a particular approach.

According to the memoranda by the Board's general counsel, it appears the division applies Section 13(1)(a) very restrictively. As discussed earlier, it denies the application of the higher maximum if the offence occurred prior to the date when the increased maximum came into force. But it also applies it restrictively in another sense: even where the offence occurred after an increase in the maximum, the division takes the position that it need not take the higher maximum into account, unless the injury is serious. As I understand it, the victim of an assault occurring today would not automatically have damages assessed in light of the maximum fixed in today's legislation. For the division, the higher maximum would only come into play if the injury were considered serious enough.

This approach to increases in the maximum derives some support from the legislative debates on point. In moving second reading of Bill 61 which contained amendments to the *Act*, the minister in charge stated:

> An amendment to the *Criminal Injury Compensation Act* will double the maximum lump-sum awards available to victims of crime — a very important and significant change from $25,000 to $50,000. This will represent the highest allowable lump-sum maximum in Canada *and will permit the granting of a more meaningful award in certain exceptional and deserving cases*.
>
> (emphasis added)
> Hansard, Vol. 19, Number 14, p. 11097

This statement by the minister is certainly more indicative of an intent to increase the maximum to permit larger awards for the most deserving cases than an intent to increase awards in general. Legislative materials cannot, however, be considered determinative of legislative intent or of the most appropriate interpretation of a provision. Furthermore, how the division initially sets awards remains unclear. Did the division, from its inception, assess damages in terms of a proportionality principle and

then gradually move away from this principle? If awards were initially set in terms of the severity of the injury as a fraction of the severity of injuries warranting the maximum compensation, it would be anomalous *not* to raise all awards proportionately whenever the maximum is increased. It is also unclear whether the division has used the increases in the statutory maximum to maintain the value of the awards in real terms over time. Section 13 contemplates adjustments to periodic payments to reflect changes in the Consumer Price Index. In light of that, it would be reasonable to view increases in the statutory maximum as allowing for upward adjustments to lump sum awards to preserve their real value over time.

In the findings before me, the committee stated that awards under the legislation currently approximate one-fifth of the quantum of awards in civil cases. The committee did not explain how it reached that conclusion. I would think it is based on the observation that courts award a maximum of approximately $250,000 for non-pecuniary damages and the current maximum for lump sum payments is fixed in the legislation at $50,000. Thus, where the courts would award the maximum, a $50,000 award would be justified under the legislation; where the courts would award $125,000, a $25,000 award would be justified and so on.

The appeal committee's one-fifth rule incorporates a proportionality principle inasmuch as it suggests that damages under the legislation should be assessed in proportion to damages awarded in civil actions. Have the courts themselves, however, calculated damages on a sliding scale so that $125,000 would be the appropriate award for a plaintiff suffering half the loss suffered by the plaintiff worthy of the maximum award ($250,000) and so on, assuming that proportional losses can be estimated? It would appear that, in some cases, the courts have adopted such a scale. But in others, the courts have not treated the maximum as imposing a proportionate limit on less serious injuries.

The precise effect of the maximum on lump sum awards is not easy to ascertain from the memoranda by Board's general counsel or from the committee's findings and report. It is clear, however, that neither the division nor the committee consider it appropriate to award the maximum simply on the basis that, for comparable cases, the courts would have awarded a sum in excess of that maximum. Use of such an approach would result in assessing damages of different degrees of severity at the same level namely, the maximum. A victim to whom the courts would award $60,000 would receive the same compensation as the victim to whom the courts would award $250,000. I can appreciate the reluctance to use an approach yielding such results.

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Summarizing my findings concerning the main points arising from the committee's finding and report of May 17, 1994:

- Where the abuse took place over a period of years, it is reasonable for the damages to be assessed with reference to the net effect of the abuse on the victim. Both the legislation and the courts support that approach. In that regard, I am in agreement with the division and the committee.

- The committee's use of the current statutory maximum lump sum payable is proper. The timing of the offence does not determine the size of the maximum that may be paid. In that regard, I disagree with the division's approach, as stated in the memoranda by the general counsel. This approach is not supported by the law and does not appear to have been consistently applied by the division itself.

- The wording of the legislation is broad enough to tolerate different ways of determining the effect of the statutory maximum on lump sum awards in general. Since this is the case, it would be desirable for policy to be formulated and published to provide guidance with respect to that question.

Taking into account both the latitude which the legislation affords and the absence of published policies, I must decide whether the sum awarded by the committee to each of the applicants in this case is appropriate. For that purpose, I have looked at the annual reports published by the division but found it difficult to discern trends in awards for childhood sexual abuse extending for a period of years. The highest reported award by the division for repeated acts of sexual abuse appears to have been the $20,000 award made in Decision No. 91353. The lowest reported award made in the last five years appears to have been $6,500 (see, p. 31 in the *22nd Annual Report of the Criminal Injury Compensation Act of British Columbia*, 1993).

I have also looked at civil sexual assault cases. There are significant differences in the damages awarded in cases of childhood sexual assaults extending over a period of years. Plaintiffs in those cases are not compensated in a consistent fashion across the country. In some provinces, such as Ontario and Manitoba, courts award separate aggravated damages, whereas in others, such as B.C., non-pecuniary damages include aggravated damages. I note that awards in Ontario are generally higher than in B.C. In the last five years, the range in B.C. is from a low of $35,000 to a high of $120,000. In *relative terms* then, the committee's award of $20,000 to each of the applicants falls into the higher end of the range for civil sexual assault cases: a $125,000 award is approximately 50 percent of today's maximum award for non-pecuniary damages as set by the Supreme Court of Canada; $20,000 is 40 percent of the current statutory maximum for lump sum awards. On that basis and since I reject counsel's argument that the full maximum should be awarded in cases where the courts' award would exceed that limit,

I find the committee's award to have been reasonable. In light of the gravity of the injuries sustained by the applicants and their long-term effects, however, I would increase the award to $25,000 each which would be comparable, proportionately, to the highest award made by the B.C. courts.

Reimbursement of Expenses

On behalf of the applicants, counsel has asked for the reimbursement of the sum of $2,309.12 for the expenses incurred in obtaining expert evidence, etc. These expenses are documented on file. The committee never addressed that issue.

The question arises as to whether there are policy provisions concerning the payment of the type of expenses claimed by the applicants. In fact, the question arises as to whether there are any published policies under the *Act*. In Decision No. 95-0914 dated July 31, 1995, a panel of the Appeal Division came to the conclusion that several decisions published in the *Workers' Compensation Reporter* constitute published policy under the *Act*. The panel reasoned that:

- Since Section 1 of the *Act* defines "board" as meaning the Workers' Compensation Board established under the *Workers Compensation Act*;

- Since Section 20(1) of the *Act* entrusts the Board with the administration of the legislation and confers upon it all the powers which are given to it under the *Workers Compensation Act*;

- Since Section 82 of the *Workers Compensation Act* empowers the governors to approve and superintend the policies and direction of the Board (effective July 13, 1995, the powers of the governors are exercised by a Panel of Administrators pursuant to Bill 56, the *Workers Compensation Amendment Act*, 1995);

- Since the governors have declared Decisions Nos. 1 to 623 of the *Workers' Compensation Reporter* (*Reporter*) to be published policies (see Decision No. 3, *Workers' Compensation Reporter*, Vol. 7(1): p. 17 and Decision No. 86, *Workers' Compensation Reporter*, Vol. 10(5): p. 781);

- It follows that there are currently some published policies under the *Act*, namely, Decision No. 16 (*Reporter*, Vol. 1: p. 75), Decision No. 77 (*Reporter*, Vol. 1: p. 301), Decision No. 131 (*Reporter*, Vol. 2: p. 133), Decision No. 132 (*Reporter*, Vol. 2: p. 134), Decision No. 133 (*Reporter*, Vol. 2: p. 135), Decision No. 172 (*Reporter*, Vol. 2: p. 271), Decision No. 173 (*Reporter*, Vol. 2: p. 272), Decision No. 178 (*Reporter*, Vol. 2: p. 279), Decision No. 179 (*Reporter*, Vol. 2: p. 280), Decision No. 181 (*Reporter*, Vol. 2: p. 283), and Decision No. 198 (*Reporter*, Vol. 3: p. 1).

The panel also noted the governors' Decision No. 75 (*Workers' Compensation Reporter*, Vol. 10(5): p. 753) which states that the Appeal Division shall apply existing published policy.

I adopt the reasoning of the Appeal Division panel in Decision No. 95-0914. Accordingly, I find Decision No. 77 (*Workers' Compensation Reporter*, Vol. 1: p. 301) to be relevant policy to the issue of expenses raised by the applicants. To capsulize this decision, the policy provides that this type of expense is reimbursable as administrative costs not as part of compensation. More specifically, the policy provides that it can be reimbursed where it is incurred to produce evidence "of a kind which the adjudicator would have sought himself had it not been produced by the claimant." Decision No. 77 states that:

> 1. Lawyers' fees in connection with any criminal injuries matter are not payable under the *Criminal Injuries Compensation Act*.
>
> 2. Out-of-pocket expenses paid by a claimant or his representative to another for evidence should be reimbursed as an item of administrative cost if the evidence is such that it would have been obtained by the adjudicator had it not been provided by the claimant.

In accordance with the policy stated in Decision No. 77, I find that the Board should reimburse the expenses claimed by the applicants. They are related to psychiatric and psychological assessments of the long-term effects of the abuse endured by the applicants and, as such, I conclude they are necessary expenses for a proper adjudication of the cases before me. I therefore grant the applicants' request in that regard.

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