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WorkSafe™

WORKERS' COMPENSATION BOARD OF BC

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

Sections and excerpts from the *Workers Compensation Act*, Revised Statutes of British Columbia 1996, Chapter 492 are provided for convenience and are to be used for informational purposes only.

For more information about the *Workers' Compensation Reporter*, please call Sheryl Wynne at 604 279-7594.

To order copies of the *Workers' Compensation Reporter*, please contact Jim McGowan at 604 276-3143.

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Publishing Criteria for Board of Director Decisions

Decisions of the WCB's Board of Directors are published in the *Workers' Compensation Reporter* where:

- The decision results in an amendment to a regulation made under the *Workers Compensation Act*. This includes amendments to the *Occupational Health and Safety Regulation, Regulations for Agricultural Operations, Industrial Health and Safety Regulation, Fishing Industry Regulations,* and the *Occupational Disease Recognition Regulation.*

- The decision results in substantive amendments to the published policies of the Board of Directors. A policy amendment may be considered substantive if it results in change to worker or dependant benefit levels or employer obligations. It may also be considered substantive where it results from a change in policy interpretation or new legislation. Consequential, housekeeping and other minor changes will not be published in the *Workers' Compensation Reporter*.

- The decision constitutes a policy decision but does not amend any of the published policy manuals of the WCB.

Publishing Criteria for Review Division Decisions

The Review Division applies the criteria outlined below to the selection of key decisions for publication:

Criteria

1. The decision will facilitate in the understanding of workers' compensation because it offers a thorough analysis of significant concepts or offers new insights including:

   - Summarizes the legislative history behind key statutory provisions
   - Sets out a thorough analysis of law and policy in relation to a key issue
   - Draws on relevant jurisprudence
   - Applies important principles of statutory interpretation
   - Discusses/analyzes changes in the law, policy, or practice

2. The decision signals to the workers' compensation community the direction that the Review Division is taking on certain issues in an effort to provide greater certainty, recognizing that the Review Division is not bound by precedent but that like cases are generally treated alike.

3. The decision will facilitate consistency and improved decision-making.

4. The decision will assist individuals in pursuing a remedy or providing representation on workers' compensation, assessment, prevention, and other matters by explaining in clear, plain language the criteria for considering or adjudicating particular issues, or the procedures for pursuing a remedy.

5. The decision assists in understanding important jurisdictional questions relating to the new legislation or to the new appellate structure.

6. The decision assists in interpreting new key statutory provisions.

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* A decision that is a final decision of the Board with no further appeal rights, may, for that reason, in conjunction with the above noted criteria, have added value for publication as a decision of note.

Publishing Criteria for Workers' Compensation Appeal Tribunal Decisions

The Workers' Compensation Appeal Tribunal (WCAT) applies the criteria outlined below to the selection of key WCAT decisions for publication in the *Workers' Compensation Reporter*:

1. The decision will assist individuals in pursuing a remedy or providing representation on compensation, assessment, prevention, or other matters by explaining in clear, plain language the criteria for considering or adjudicating particular issues, or the procedures for pursuing a remedy.

2. The decision will aid in the understanding of workers' compensation by offering a thorough analysis of a significant concept or a new insight. The decision may:

   (a) Summarize the legislative history behind a key statutory provision

   (b) Set out a thorough analysis of law and policy in relation to a key issue

   (c) Draw on relevant jurisprudence

   (d) Apply important principles of statutory interpretation, or

   (e) Discuss/analyze a change in the law, policy, or practice

3. The decision signals the direction that WCAT is taking on certain issues to provide greater certainty and predictability:

   (a) While WCAT is generally not bound by precedent (except in the case of decisions by panels appointed under section 238(6)), recognizing that consistency and predictability are important values in decision-making, or

   (b) By providing a precedent which is binding on future WCAT decision-making, unless the circumstances are clearly distinguishable or a policy relied upon in the decision is changed (pursuant to section 238(6) and 250(3))

4. The decision assists in understanding important jurisdictional questions relating to the new legislation or to the new appellate structure.

5. The decision assists in interpreting new statutory provisions, regulations, or policies.

WCAT also assists in identifying key decisions of the courts on matters affecting the interpretation and administration of the Act or other matters of interest to the community.

Resolution of the Board of Directors

Number: 2003/02/11-04
Date: February 11, 2003
Subject: Policies of the Board of Directors

WHEREAS:

Pursuant to section 81 of the *Workers Compensation Act*, RSBC 1996, Chapter 492 and amendments thereto ("Act"), the lieutenant governor in council has appointed a Board of Directors (the "directors") as the governing body of the Workers' Compensation Board (the "Board");

AND WHEREAS:

Pursuant to section 82 of the Act, the directors must set and revise as necessary the policies of the Board of Directors, including policies respecting compensation, assessment, rehabilitation, and occupational health and safety;

THE BOARD OF DIRECTORS RESOLVES THAT:

1. The attached Board of Directors' Bylaw Re Policies of the Board of Directors is approved.

2. This resolution is effective February 11, 2003.

DATED at Richmond, British Columbia, February 11, 2003.

Board of Directors' Bylaw

Subject: Policies of the Board of Directors

As made by the directors of the Workers' Compensation Board of British Columbia, a policy, resolution and bylaw relating to the policy of the directors is made and enacted as follows:

1.0 Policies of the Directors

1.1 As of February 11, 2003, the policies of the directors consist of the following:

(a) The statements contained under the heading "Policy" in the *Assessment Manual;*

(b) The *Occupational Safety and Health Division Policy and Procedure Manual*;

(c) The statements contained under the heading "Policy" in the *Prevention Manual;*

(d) The *Rehabilitation Services and Claims Manual* Volume I and Volume II, except statements under the headings "Background" and "Practice" and explanatory material at the end of each Item appearing in the new manual format;

(e) The *Classification and Rate List*, as approved annually by the Directors;

(f) *Workers' Compensation Reporter* Decisions No. 1−423 not retired prior to February 11, 2003; and

(g) Policy decisions of the former Governors and the former Panel of Administrators still in effect immediately before February 11, 2003.

1.2 After February 11, 2003, the policies of the directors consist of the documents listed in paragraph 1.1, amendments to policy in the four policy manuals, any new or replacement manuals issued by the directors, any documents published by the Workers' Compensation Board that are adopted by the directors as policies of the directors, and all decisions of the directors declared to be policy decisions.

2.0 Application of Policy of the Directors

2.1 In the event of a conflict between policy in a manual identified in Section 1.1 (a), (b), (c), or (d) of this bylaw, and policy in *Workers' Compensation Reporter* Decisions No. 1−423 identified in Section 1.1(f), policy in the manual is paramount.

2.2 In the event of any other conflict between policies of the Directors:

(a) If the policies were approved by the directors on the same date, the policy most consistent with the *Act* or Regulations is paramount.

(b) If the policies were approved on different dates, the most recently approved policy is paramount.

3.0 Records of Director Decisions

3.1 Originals of the directors' decisions with respect to their policies shall be retained by the Office of the Board of Directors in the manner directed by the chair.

4.0 Manner of Publication

4.1 The policies of the directors shall be published in print.

4.2 The policies of the directors may also be published through an accessible electronic medium or in some other fashion that allows the public easy access to the policies of the directors.

4.3 The chair shall supervise the publication of the *Workers' Compensation Reporter.* It will include decisions of the directors and selected decisions of the Workers' Compensation Appeal Tribunal ("WCAT"). It may also include key decisions of the courts on matters affecting the interpretation and administration of the Act or other matters of interest to the community.

4.4 WCAT decisions do not become policy of the directors by virtue of having been published in the *Workers' Compensation Reporter*. WCAT decisions are published in the Reporter to provide guidance on the interpretation of the Act, the Regulations and Board policies, practices and procedures.

5.0 Decision No. 86 and No. 1 and Effective Date

5.1 This bylaw and policy replaces Decision of the Governors No. 86 (Bylaw No. 4) dated November 16, 1994 (10 *Workers' Compensation Reporter* 781) and Decision No. 1 of the Panel of Administrators dated July 17, 1995 (11 *Workers' Compensation Reporter* 465) and comes into effect on February 11, 2003.

THIS POLICY, RESOLUTION AND BYLAW has been passed by the directors at a meeting of the directors duly called for that purpose on February 11, 2003.

Date: February 11, 2003

Resolution of the Board of Directors

Number: 20030617-01
Date: June 17, 2003
Subject: Retirement of Old Reporter Decisions

WHEREAS:

Pursuant to section 82 of the *Workers Compensation Act*, RSBC 1996, Chapter 492 and amendments thereto ("Act"), the Board of Directors must set and revise as necessary the policies of the Board of Directors, including policies respecting compensation, assessment, rehabilitation, and occupational health and safety;

AND WHEREAS:

On February 11, 2003, the Board of Directors issued a bylaw identifying the policies of the Board of Directors under the *Workers Compensation Act*;

AND WHEREAS:

Among the policies listed in the bylaw are those decisions among *Workers' Compensation Reporter* Decisions No. 1−423 ("Old Reporter Decisions") that were not retired prior to February 11, 2003;

AND WHEREAS:

The Old Reporter Decisions are decisions of the former commissioners made between 1973 and 1991 (mostly between 1973 and 1984) and adopted as "policy" by the former governors in 1991;

AND WHEREAS:

The workers' compensation system has gone through significant statutory and policy change since the Old Reporter Decisions were first issued;

AND WHEREAS:

Some of the policy statements in the Old Reporter Decisions have been consolidated over the years into the policy manuals;

AND WHEREAS:

A number of Old Reporter Decisions have already been retired from "policy," but 243 Decisions remain, creating a potential for complexity and confusion in the workers' compensation system; and

AND WHEREAS:

The Policy and Regulation Development Bureau ("Policy Bureau") has presented to the Board of Directors a list of 118 Old Reporter Decisions that, based upon the Policy Bureau's research, appear to be no longer in use;

THE BOARD OF DIRECTORS RESOLVES THAT:

1. The 118 Old Reporter Decisions listed in the attached Appendix "A" are retired from the Board of Directors policies as of the effective date of this resolution ("retirement date"). As of the retirement date, the listed decisions are no longer "policy" under the Board of Directors Bylaw Re Policies of the Board of Directors. However, the status of the listed decisions as "policy" prior to the retirement date remains unaffected by this resolution. The listed decisions remain applicable in decision-making on historical issues to the extent they were applicable prior to the retirement date.

2. The Policy Bureau is directed to accelerate the making of recommendations for the retirement of the remaining 125 Old Reporter Decisions (with consolidation into the policy manuals as appropriate).

3. Where a policy statement in an Old Reporter Decision retired under this resolution also appears in a policy manual, the retirement of the Old Reporter Decision does not affect the applicability of the policy statement in the manual.

4. This resolution is effective June 17, 2003.

DATED at Richmond, British Columbia, on June 17, 2003.

Appendix "A"

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Resolution of the Board of Directors

Number: 2003/06/17-02
Date: June 17, 2003
Subject: Policy Clarification of Appeal Rights — Policy Item #108.50 of the *Rehabilitation Services and Claims Manual*

WHEREAS:

Pursuant to section 82 of the *Workers Compensation Act*, RSBC 1996, Chapter 492 and amendments thereto ("Act"), the Board of Directors must set and revise as necessary the policies of the Board of Directors, including policies respecting compensation, assessment, rehabilitation, and occupational health and safety;

AND WHEREAS:

Chapter 14 — Reopenings and Reconsiderations — was deleted from the *Rehabilitation Services and Claims Manual*, Volumes I and II, effective March 3, 2003 as part of the policy changes made by the former Panel of Administrators ("Panel") to implement the *Workers Compensation Amendment Act (No. 2), 2002* (or "Bill 63");

AND WHEREAS:

Policy item #108.50 — Appeals Against Decisions on Applications for Reconsideration — was among the policies in Chapter 14 deleted by the former Panel;

AND WHEREAS:

Policy item #108.50 states (in part):

> Where the application questions the validity of the original decision, there is no doubt that a decision denying the application on its merits may be appealed to the review board, the Appeal Division or a Medical Review Panel, as the case may be. However, no appeal lies from a decision on the preliminary question whether any grounds for a reconsideration have been submitted in support of the application. That decision is essentially preliminary and discretionary whereas a decision on the merits (once the sufficiency of grounds has been accepted) involves an application of law and policy to the facts.;

AND WHEREAS:

Policy item #108.50 does not apply to Workers' Compensation Board ("WCB") decisions on reconsideration made on or after March 3, 2003;

AND WHEREAS:

An issue has arisen as to whether policy item #108.50 applies to the consideration by the WCB Review Division ("Review Division") or the Workers' Compensation Appeal Tribunal ("WCAT"), under the Bill 63 transitional provisions or otherwise, of pre-March 3, 2003 WCB decisions on reconsideration;

AND WHEREAS:

In view of the wording and substance of policy item #108.50, the Board of Directors does not consider that the policy item was intended to apply in regard to matters before the Review Division or WCAT, however they may arise;

AND WHEREAS:

The Board of Directors wishes to facilitate the disposition of matters to be decided under the Bill 63 transitional provisions in order to achieve finality in relation to them;

AND WHEREAS:

The Board of Directors considers that it would be advisable to establish certainty and avoid disputes by providing clarification in relation to the applicability of policy item #108.50;

THE BOARD OF DIRECTORS RESOLVES THAT:

1. For greater certainty, policy item #108.50 of the *Rehabilitation Services and Claims Manual*, Volumes I and II, was not intended to, and does not, apply to the consideration by the Review Division or by WCAT of pre-March 3, 2003 WCB decisions on reconsideration matters.

2. This policy clarification applies from March 3, 2003, when Bill 63 generally came into force.

3. This policy clarification constitutes a policy decision of the Board of Directors.

DATED at Richmond, British Columbia, on June 17, 2003.

Resolution of the Board of Directors

Number: 2003/06/17-03
Date: June 17, 2003
Subject: Amendments to Chapter 1, Volumes I and II, *Rehabilitation Services and Claims Manual*

WHEREAS:

Pursuant to section 82 of the *Workers Compensation Act*, RSBC 1996, Chapter 492 and amendments thereto ("Act"), the Board of Directors must set and revise as necessary the policies of the Board of Directors, including policies respecting compensation, assessment, rehabilitation, and occupational health and safety;

AND WHEREAS:

Effective June 30, 2002, the *Workers Compensation Amendment Act, 2002* ("Bill 49") significantly amended the *Workers Compensation Act* ("Act") in relation to benefits for injured workers;

AND WHEREAS:

To facilitate the implementation of policies in regard to Bill 49, it became necessary to restructure the *Rehabilitation Services and Claims Manual* ("*RS&CM*") into Volume I and Volume II;

AND WHEREAS:

Policy amendments are required to Chapter 1 of Volume I and Volume II of the *RS&CM* to further clarify the distinction between the two volumes and to explain why subsequent policy changes have been made to Volume I;

AND WHEREAS:

Policy amendments are also required to Chapter 1 of Volume I to incorporate into Volume I the "recurrence" policy previously approved for Chapter 1 of Volume II;

THE BOARD OF DIRECTORS RESOLVES THAT:

1. In relation to Chapter 1 of Volume I of the *RSCM*:

   (a) The policy amendments attached as Appendix "A" to this resolution are approved.

   (b) The policy amendments are not intended to change substantive decision-making.

   (c) The amendments to transitional rule 4 in policy item 1.03(b) reflect the status quo by inserting the policy on the meaning of "recurrence" in section 35.1 of the Act that was previously approved effective October 16, 2002, and only inserted into Volume II.

   (d) The remaining amendments to policy items #1.00, #1.01, #1.02 and #1.03 are for purposes of clarification only and do not change the substance of the policies approved effective June 30, 2002.

2. In relation to Chapter 1 of Volume II of the *RS&CM*:

   (a) The policy amendments attached as Appendix "B" to this resolution are approved.

   (b) The policy amendments to policy items #1.00, #1.01, #1.02 and #1.03 are for purposes of clarification only and do not change the substance of the policies approved effective June 30, 2002 and October 16, 2002.

3. This resolution is effective June 17, 2003.

DATED at Richmond, British Columbia, on June 17, 2003.

Appendix "A"

Additions in **bold;** deletions in ~~strikethrough~~

CHAPTER 1

SCOPE OF VOLUME I OF THIS *MANUAL*

#1.00 INTRODUCTION

In 2002, the *Workers Compensation Act* underwent significant legislative amendment. This resulted in the restructuring of the *Rehabilitation Services & Claims Manual* into two volumes — Volume I and Volume II. This policy sets out an overview of the legislative changes and explains how readers of this *Manual* can determine which volume is applicable to their particular circumstances.

#1.01 Legislative Amendments

(a) *Workers Compensation Amendment Act, 2002* ("*Amendment Act, 2002*")

The *Amendment Act, 2002* is also referred to as "Bill 49". It primarily amended the *Workers Compensation Act:*

- **effective June 30, 2002 in relation to benefits for injured workers (including the calculation of average net earnings, duration of temporary benefits, integration of CPP disability benefits, indexing of compensation benefits, worker obligations to provide information, mental stress and permanent disability awards); and**
- **effective January 2, 2003 in relation to the establishment of a new Board of Directors as the governing body of the Workers' Compensation Board.**

(b) *Workers Compensation Amendment Act (No. 2), 2002* ("*Amendment Act (No. 2), 2002*")

The *Amendment Act (No. 2), 2002* is also referred to as "Bill 63". It primarily amended the *Workers Compensation Act* effective March 3, 2003 in relation to a new review/appeal structure and to the Board's authority to reopen matters previously decided or to reconsider previous decisions.

#1.02 Scope of Volume I and Volume II of this Manual

The *Rehabilitation Services & Claims Manual* was restructured into two volumes to facilitate the implementation of the new benefits policies resulting from the *Amendment Act, 2002*. The new policies were incorporated into Volume II, and the policies in place immediately prior to June 30, 2002 became Volume I. (For policies in effect prior to the Volume I policies, readers are referred to the Board's archives.)

Volume I and Volume II apply to different groups of injured workers. Whether the benefits for an injured worker are to be determined under Volume I or Volume II depends upon the transitional rules set out in policy item #1.03 below. It is the responsibility of decision-makers to determine whether Volume I or Volume II applies to each case before them.

Due to the fact that Volume I covers a finite group of injured workers, its relevance to the workers' compensation system will gradually decrease over time. It is anticipated that there will be very few future amendments to the policies in Volume I. Any major amendments will be listed, for convenience, in the Addendum to this chapter.

Volume II includes injuries occurring on or after June 30, 2002. Its relevance to the workers' compensation system will therefore continue over time. Volume II policies will be subject to amendment from time to time, in the same manner as policies in other policy manuals. Amendments to policies in Volume II will be archived in the Board's records and documented publicly.

#1.03 Scope of Volumes I and II in Relation to Benefits for Injured Workers

(a) General

Subject to subsequent amendments, Volume I sets out the law and policies that were in effect immediately prior to June 30, 2002 in relation to compensation for injured workers. For convenience, the law and policies in effect immediately prior to that date, as amended, will be called the "former provisions".

Volume II sets out the law and policies in effect on or after June 30, 2002, as they may be amended from time to time, in relation to worker benefits. For convenience, the law and policy on or after that date, including any subsequent amendments, will be called the "current provisions".

~~Effective June 30, 2002, the *Workers Compensation Act* was amended by the *Workers Compensation Amendment Act, 2002* (*"Amendment Act, 2002"*). The amendments changed the law in relation to compensation benefits for injured workers. For convenience, the law and policy as they were immediately before being changed will be called the former provisions and the law and policy after the changes will be called the current provisions. Volume I of this *Manual* sets out the former provisions. Volume II of this *Manual* sets out the current provisions.~~

~~Unless~~ **Except as** otherwise stated **and except in relation to matters covered by the *Amendment Act (No. 2), 2002***, ~~*"Act"*~~ in Volume I ~~of this *Manual*~~ **"*Act*"** refers to the *Workers Compensation Act*, as it read immediately before June 30, 2002. The *Interpretation Act*, RSBC 1996, Chapter 238, applies to the *Act*, unless a contrary intention appears in either the *Interpretation Act* or the *Act*.

(b) *Amendment Act, 2002* (Bill 49) Transitional Provisions

The following rules apply to determining whether the former provisions (Volume I) or the current provisions (Volume II) apply in a particular case. These rules are based upon the transitional rules in section 35.1 of the *Workers Compensation Act*, as amended by the *Amendment Act, 2002*.

~~Section 35.1 of the *Act,* as amended by the *Amendment Act, 2002*, contains the following transitional rules:~~

1. Except as noted in ~~items~~ **rules** 3, 4, and 5, the former provisions apply to an injury that occurred before June 30, 2002.

2. The current provisions apply to an injury that occurs on or after June 30, 2002.

3. Subject to ~~the transition~~ rule **4** respecting recurrences ~~(item 4)~~, if an injury occurred before June 30, 2002, but the first indication that it is permanently disabling occurs on or after June 30, 2002, the current provisions apply to the permanent disability award with two modifications:

   (i) 75% of average earnings (former provisions) is used for calculating the award rather than 90% of average net earnings (current provisions); and

   (ii) no deduction is made for disability benefits under the Canada Pension Plan (former provisions).

   Under this ~~transitional~~ rule, for an injury that occurred before June 30, 2002, where the first indication of permanent disability also occurs before June 30, 2002, the permanent disability award will be adjudicated under the former provisions. Where the first indication of permanent disability is on or after June 30, 2002, the award will be adjudicated under the current provisions, using the modified formula described in ~~items~~ (i) and (ii) above. The determination of when permanent disability first occurs will be based on available medical evidence.

   An example of when this ~~transitional~~ rule applies is where a worker, injured before June 30, 2002, shows no signs of permanent disability before that date. However, on or after June 30, 2002, the worker has surgery, which first causes permanent disability. The permanent disability award will be adjudicated under the current provisions, using the modified formula.

4. If an injury occurred before June 30, 2002, and the disability recurs on or after June 30, 2002, the current provisions apply to the recurrence.

   ~~This transitional rule only applies to a recurrence. A recurrence is to be distinguished from a deterioration. An example of a recurrence is where there has been total recovery from a disability and wage-loss payments have been terminated. Subsequently, there is a recurrence of the disability and the claim is reopened. An example of a deterioration is where a disability award has been assessed and the disability subsequently worsens.~~

   For the purposes of this policy, a recurrence includes any claim that is re-opened for:

   - **any additional period of temporary disability where no permanent disability award was previously provided in respect of the compensable injury or disease;**

- **any additional period of temporary disability where a permanent disability award was previously provided in respect of the compensable injury or disease; and,**

- **any permanent changes in the nature and degree of a worker's permanent disability.**

The following are examples of a recurrence:

- **A worker totally recovers from a temporary disability resulting in the termination of wage-loss payments. Subsequently, there is a recurrence of the disability and the claim is re-opened for compensation.**

- **A worker is in receipt of a permanent disability award and the disability subsequently worsens. The claim is re-opened to provide compensation for a new period of temporary disability and/or an increase in entitlement for the permanent disability award.**

5. Regardless of the date of injury or death, the current provisions on indexing apply to compensation paid on or after June 30, 2002. ~~In the case of fatalities, the current provisions are the same as the former provisions.~~ Indexing of retroactive awards payable before June 30, 2002, will be based on the former provisions.

~~Volume I of this *Manual* covers the major issues discussed below.~~

. . .

EFFECTIVE DATE: **June 17, 2003**

APPLICATION: **The policy amendments made effective June 17, 2003 are not intended to change substantive decision-making.**

The amendments to transitional rule 4 in policy item #1.03(b) reflect the status quo by inserting the policy on the meaning of "recurrence" in section 35.1 of the *Act* that was previously approved effective October 16, 2002, and only inserted into Volume II.

The remaining amendments to policy items #1.00, #1.01, #1.02 and #1.03 are for purposes of clarification only and do not change the substance of the policies approved effective June 30, 2002.

Addendum

AMENDMENTS TO VOLUME I ON OR AFTER JUNE 30, 2002

This Addendum lists the major amendments to the policies in Volume I of the *Rehabilitation Services & Claims Manual* on or after June 30, 2002. It has been inserted for convenience only and will be updated by the Director General of the Policy and Regulation Development Bureau as necessary. In some cases, the reader may be referred to the appropriate passages in Volume II.

The "resolutions" referenced in this Addendum are the "resolutions" of the former Panel of Administrators or Board of Directors, as the case may be.

Subject	Policy or Item #	Comments
CPI Adjustments	Various	The dollar amounts in Volume I are not updated to reflect CPI adjustments. Where a policy item in Volume I contains a dollar amount, readers should consult the corresponding policy item in Volume II for the current amount.
Criteria for Commutations	#45.00–#45.60	Policies amended effective October 1, 2002. Amendments apply to new claims received, all active claims awaiting an initial permanent disability award adjudication, and all active claims awaiting initial adjudication of periodic payments of compensation to a dependant of a deceased worker, on or after the effective date. See resolution 2002/08/27-04 if more information is required.
Chronic Pain (or Subjective Complaints)	#22.33, #22.35, #39.01, #97.40	Policies amended effective January 1, 2003. Amendments apply to all new claims received and all active claims awaiting an initial adjudication on or after the effective date. See resolution 2002/11/19-04 if more information is required.
Governance	Various consequential changes	Policies amended effective February 11, 2003 to reflect January 2, 2003 changes to the WCB's governing structure. (None of the amendments affect worker benefits.) See resolution 2003/02/11-05 if more information is required. These amendments resulted from the *Amendment Act, 2002* (Bill 49).

Subject	Policy or Item #	Comments
New Review/ Appeal Structure	**New Chapter 13** **Various consequential changes**	**Chapter 13 (Appeals) deleted and new Chapter 13 (Reviews and Appeals) adopted effective March 3, 2003. Certain policies continued for transitional purposes. Various consequential changes made throughout Volume I, as identified by March 3, 2003 effective date and the matters to which the effective date applies.** **See resolution 2003/01/21-01 if more information is required. These amendments resulted from the *Amendment Act (No. 2), 2002* (Bill 63).**
Policy on Changing WCB Decisions	**New Chapter 14** **Various consequential changes**	**Chapter 14 (Reopenings and Reconsiderations) deleted and new Chapter 13 (Changing Previous Decisions) adopted effective March 3, 2003. Chapter applies to all decisions on and after the effective date.** **Various consequential changes also made throughout Volume I, as identified by a March 3, 2003 effective date and the matters with respect to which the effective date applies.** **See resolution 2002/12/17-02 if more information is required. These amendments resulted from the *Amendment Act (No. 2), 2002* (Bill 63).**
Binding Nature of Policy	**#2.20, #96.10**	**New policy item #2.20 adopted effective March 3, 2003. Amendments apply to all adjudication decisions made on or after the effective date.** **Material also deleted from policy item #96.10 to reflect the amendments.** **See resolutions 2002/12/17-02 and 2003/01/21-01 if more information is required. These amendments resulted from the *Amendment Act (No. 2), 2002* (Bill 63).**

Subject	Policy or Item #	Comments
Other Amendments Resulting from the *Amendment Act (No. 2), 2002* (Bill 63)		
Pension Reviews	**#40.30**	**Policies deleted effective March 3, 2003.**
Provisional Rates	**#66.12**	**Policies amended effective March 3, 2003. Policy applies to provisional rates set on or after the effective date.**
Penalties for Failure to Report	**#94.15**	**Policies amended effective March 3, 2003.**
Preliminary Determination (Formerly Interim Adjudication)	**#96.21**	**Policies amended effective March 3, 2003. Amendments apply to all preliminary determinations made under the policy on or after the effective date.**
Miscellaneous	**Various**	**Other amendments, effective March 3, 2003, include:** **• removal of references to former Part 3 administrative penalty process;** **• amendments to reflect new wording of section 99;** **• changes to disclosure provisions;** **• acknowledgement of WCAT authority to order the Board to pay expenses;** **• acknowledgement of WCAT authority to award costs; and** **• changes to reflect the payment of interest provisions under section 258.** **See resolutions 2002/12/17-02 and 2003/01/21-01 if more information is required. These amendments resulted from the *Amendment Act (No. 2), 2002* (Bill 63).**

Subject	Policy or Item #	Comments
Calculation of Lump-sum Payment or Commutation	**#45.61**	**Direction in policy on calculation of lump-sum payments or commutations after a review or appeal reinserted effective April 8, 2003, with appropriate changes to reflect new review/ appeal structure.** **See resolution 2003/04/08-01 if more information is required.**

Appendix "B"

Additions in **bold;** deletions in ~~strikethrough~~

CHAPTER 1

SCOPE OF VOLUME II OF THIS *MANUAL*

#1.00 INTRODUCTION

In 2002, the *Workers Compensation Act* underwent significant legislative amendment. This resulted in the restructuring of the *Rehabilitation Services & Claims Manual* into two volumes — Volume I and Volume II. This policy sets out an overview of the legislative changes and explains how readers of this *Manual* can determine which volume is applicable to their particular circumstances.

#1.01 Legislative Amendments

(a) *Workers Compensation Amendment Act, 2002* ("*Amendment Act, 2002*")

The *Amendment Act, 2002* is also referred to as "Bill 49". It primarily amended the *Workers Compensation Act:*

- **effective June 30, 2002 in relation to benefits for injured workers (including the calculation of average net earnings, duration of temporary benefits, integration of CPP disability benefits, indexing of compensation benefits, worker obligations to provide information, mental stress and permanent disability awards); and**
- **effective January 2, 2003 in relation to the establishment of a new Board of Directors as the governing body of the Workers' Compensation Board.**

(b) *Workers Compensation Amendment Act (No. 2), 2002* ("*Amendment Act (No. 2), 2002*")

The *Amendment Act (No. 2), 2002* is also referred to as "Bill 63". It primarily amended the *Workers Compensation Act* effective March 3, 2003 in relation to a new review/appeal structure and to the Board's authority to reopen matters previously decided or to reconsider previous decisions.

#1.02 Scope of Volume I and Volume II of this Manual

The *Rehabilitation Services & Claims Manual* was restructured into two volumes to facilitate the implementation of the new benefits policies resulting from the *Amendment Act, 2002*. The new policies were incorporated into Volume II, and the policies in place immediately prior to June 30, 2002 became Volume I. (For policies in effect prior to the Volume I policies, readers are referred to the Board's archives.)

Volume I and Volume II apply to different categories of injured workers. Whether the benefits for an injured worker are to be determined under Volume 1 or Volume II depends upon the transitional rules set out in policy item #1.03 below. It is the responsibility of decision-makers to determine whether Volume I or Volume II applies to each case before them.

Due to the fact that Volume I covers a finite group of injured workers, its relevance to the workers' compensation system will gradually decrease over time. It is anticipated that there will be very few future amendments to the policies in Volume I. Any major amendments will be listed, for convenience, in the Addendum to Chapter 1 in Volume I.

Volume II includes injuries occurring on or after June 30, 2002. Its relevance to the workers' compensation system will therefore continue over time. Volume II policies will be subject to amendment from time to time, in the same manner as policies in other policy manuals. Amendments to policies in Volume II will be archived in the Board's records and documented publicly.

#1.03 Scope of Volumes I and II in Relation to Benefits for Injured Workers

(a) General

Subject to subsequent amendments, Volume I sets out the law and policies that were in effect immediately prior to June 30, 2002 in relation to compensation for injured workers. For convenience, the law and policies in effect immediately prior to that date, as amended, will be called the "former provisions".

Volume II sets out the law and policies in effect on or after June 30, 2002, as they may be amended from time to time, in relation to worker benefits. For convenience, the law and policy on or after that date, including any subsequent amendments, will be called the "current provisions".

~~Effective June 30, 2002, the *Workers Compensation Act* was amended by the *Workers Compensation Amendment Act, 2002* (*"Amendment Act, 2002"*). The amendments changed the law in relation to compensation benefits for injured workers. For convenience, the law and policy as they were immediately before being changed will be called the former provisions and the law and policy after the changes will be called the current provisions. Volume I of this *Manual* sets out the former provisions. Volume II of this *Manual* sets out the current provisions.~~

Unless otherwise stated, in Volume II of this *Manual*, the "*Act*" refers to the *Workers Compensation Act*, as amended ~~by the *Amendment Act, 2002*~~ **on or after June 30, 2002**. The *Interpretation Act*, RSBC 1996, Chapter 238, applies to the *Act*, unless a contrary intention appears in either the *Interpretation Act* or the *Act*.

(b) *Amendment Act, 2002* (Bill 49) Transitional Provisions

The following rules apply to determining whether the former provisions (Volume I) or the current provisions (Volume II) apply in a particular case. These rules are based upon the transitional rules in section 35.1 of the *Workers Compensation Act*, as amended by the *Amendment Act, 2002*.

~~Section 35.1 of the *Act* contains the following transitional rules:~~

1. The current provisions apply to an injury that occurs on or after June 30, 2002.

2. Except as noted in ~~items~~ **rules** 3, 4, and 5, the former provisions apply to an injury ~~occurring~~ **that occurred** before June 30, 2002.

3. Subject to ~~the transition~~ rule **4** respecting recurrences ~~(item 4)~~, if ~~the~~ **an** injury occurred before June 30, 2002, but the first indication that it is permanently disabling occurs on or after June 30, 2002, the current provisions apply to the permanent disability award with two modifications:

   (i) 75% of average earnings (former provisions) is used for calculating the award rather than 90% of average net earnings (current provisions); and

   (ii) no deduction is made for disability benefits under the Canada Pension Plan (former provisions).

   Under this ~~transitional~~ rule, for an injury that occurred before June 30, 2002, where the first indication of permanent disability also occurs before June 30, 2002, the permanent disability award will be adjudicated under the former provisions. Where the first indication of permanent disability is on or after June 30, 2002, the award will be adjudicated under the current provisions, using the modified formula described in ~~items~~ (i) and (ii) above. The determination of when permanent disability first occurs will be based on available medical evidence.

   An example of when this ~~transitional~~ rule applies is where a worker, injured before June 30, 2002, shows no signs of permanent disability before that date. However, on or after June 30, 2002, the worker has surgery, which first causes permanent disability. The permanent disability award will be adjudicated under the current provisions, using the modified formula.

4. If ~~the~~ **an** injury occurred before June 30, 2002, and the disability recurs on or after June 30, 2002, the current provisions apply to the recurrence.

   For the purposes of this policy, a recurrence includes any claim that is re-opened for:

   - any additional period of temporary disability where no permanent disability award was previously provided in respect of the compensable injury or disease;

   - any additional period of temporary disability where a permanent disability award was previously provided in respect of the compensable injury or disease; and,

   - any permanent changes in the nature and degree of a worker's permanent disability.

The following are examples of a recurrence:

- A worker totally recovers from a temporary disability resulting in the termination of wage-loss payments. Subsequently, there is a recurrence of the disability and the claim is re-opened for compensation.

- A worker is in receipt of a permanent disability award and the disability subsequently worsens. The claim is re-opened to provide compensation for a new period of temporary disability and/or an increase in entitlement for the permanent disability award.

5. Regardless of the date of injury or death, the current provisions on indexing apply to compensation paid on or after June 30, 2002. ~~In the case of fatalities, the current provisions are the same effect as the former provisions.~~ Indexing of retroactive awards payable before June 30, 2002, will be based on the former provisions.

~~The former provisions are found in Volume I of this *Manual*.~~

~~Volume II of this *Manual* covers the major issues discussed below.~~

EFFECTIVE DATE: ~~October 16, 2002~~**June 17, 2003**

APPLICATION: ~~To all adjudication decisions made on or after the effective date.~~ **The policy amendments made effective June 17, 2003 are not intended to change substantive decision-making.**

The amendments to policy items #1.00, #1.01, #1.02 and #1.03 are for purposes of clarification only and do not change the substance of the policies approved effective June 30, 2002 and October 16, 2002.

Resolution of the Board of Directors

Number: 2003/06/17-04
Date: June 17, 2003
Subject: Consolidation of Prevention Policies Into the *Prevention Manual*

WHEREAS:

Pursuant to section 82 of the *Workers Compensation Act,* RSBC 1996, Chapter 492 and amendments thereto ("Act"), the Board of Directors must set and revise as necessary the policies of the Board of Directors, including policies respecting compensation, assessment, rehabilitation, and occupational health and safety;

AND WHEREAS

The policies respecting occupational safety and health ("prevention policies") are found in a variety of sources, including the *Prevention Manual*, the Prevention Division's *Policy and Procedure Manual*, and certain decisions among Decisions Nos. 1−423 of the *Workers' Compensation Reporter* series;

AND WHEREAS

In response to direction from the former Panel of Administrators, the Policy and Regulation Development Bureau ("Policy Bureau") has initiated an "editorial" consolidation project to review all prevention policies not found in the *Prevention Manual*, and bring forward recommendations to the Board of Directors for consolidation in the *Prevention Manual* and/or retiring policies as appropriate;

AND WHEREAS

The Policy Bureau has presented recommendations to the Board of Directors with respect to retiring certain policies from the *Policy and Procedure Manual;*

THE BOARD OF DIRECTORS RESOLVES THAT:

1. The policies listed in Appendix "A" ("listed policies") are "retired" from the Prevention Division's *Policy and Procedure Manual* as of the effective date of this resolution ("retirement date"). As of the retirement date, the listed policies are no longer "policy" under the Board of Director's Bylaw Re Policies of the Board of Directors. However, the status of the listed policies as "policy" prior to the retirement date

remains unaffected by this resolution. The listed policies remain applicable in decision-making on historical issues to the extent that they were applicable prior to the retirement date.

2. This resolution is effective July 1, 2003.

DATED at Richmond, British Columbia, June 17, 2003.

Appendix "A"

LIST OF *POLICY AND PROCEDURE MANUAL* POLICIES TO BE RETIRED

POLICY NO.	POLICY TITLE
1.2.4	Board Authority under the Regulations
1.3.11	Inspection Procedures for Juvenile Employees
1.7.1	Education and Training
1.9.3	Medical Screening and Biological Monitoring
1.9.4	Certification of Medical Fitness
17.10(3)	Reverse Flow Check Valves
26.22	Guarding Moving Parts
32.22	Minimal Acceptable Bracing and Ties for Scaffolds
70.0.2.04	Absence of Specific Regulations
70.0.6.02	Accident Reports and Investigations

Resolution of the Board of Directors

Number: 2003/06/17-06
Date: June 17, 2003
Subject: *Permanent Disability Evaluation Schedule*

WHEREAS:

Pursuant to section 82 of the *Workers Compensation Act*, RSBC 1996, Chapter 492 and amendments thereto ("Act"), the Board of Directors must set and revise as necessary the policies of the Board of Directors, including policies respecting compensation, assessment, rehabilitation, and occupational health and safety;

AND WHEREAS:

As a result of legislative changes to the Act relating to permanent partial disability awards and the government's core review of workers' compensation legislation and policies, the WCB has undertaken a review of the *Permanent Disability Evaluation Schedule*;

AND WHEREAS:

Following the review of the *Permanent Disability Evaluation Schedule*, a number of items in the *Permanent Disability Evaluation Schedule* and the permanent disability award policies were identified for revision to reflect current medical and scientific information and current practices regarding the assessment of permanent partial disabilities;

AND WHEREAS:

The Policy and Regulation Development Bureau has developed policies in regard to these items and presented the policies to the Board of Directors for consideration;

THE BOARD OF DIRECTORS RESOLVES THAT:

1. To implement the amendments to the *Permanent Disability Evaluation Schedule*, the following are approved:

   (a) the changes to the *Permanent Disability Evaluation Schedule* contained in Appendix 4 of the of the *Rehabilitation Services and Claims Manual*, Volume II, attached as Appendix A;

(b) the changes to policies contained in Chapter 6, Permanent Disability Awards of the *Rehabilitation Services and Claims Manual*, Volume II, attached as Appendix B, and

(c) the insertion of a statement in Volume I of the *Rehabilitation Services and Claims Manual* to refer readers to the appropriate policies in Volume II of the *Rehabilitation Services and Claims Manual*, attached as Appendix C.

2. Miscellaneous changes to policy item #31.40 of the *Rehabilitation Services and Claims Manual*, Volume I and II, to correct an error in the percentage of permanent partial disability for hearing loss in one ear are approved as set out in Appendix D.

3. This resolution applies to all section 23(1) award assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003.

4. This resolution is effective on August 1, 2003.

DATED at Richmond, British Columbia, June 17, 2003.

Appendix "A" Volume II

Additions in **bold;** deletions in ~~strikethrough~~

APPENDIX 4

PERMANENT DISABILITY EVALUATION SCHEDULE — #39.10

EXPLANATION OF THE SCHEDULE

This is the Schedule used for guidance in the measurement of partial disability under section 23(1). The Schedule attributes a percentage of total disability to each of the specified disablements. For example, an amputation of the arm, middle, third of humerus, is indicated to be 65%. When that percentage rate is applied, it means that a ~~claimant~~ **worker** will receive ~~by way of pension~~ **a section 23(1) award based on** 65% of 90% of average net earnings as determined by the *Act*.

The Schedule does not necessarily determine the ~~rate of pension~~ **final amount of the section 23(1) award**. The Board is free to take other factors into account. Thus, the Schedule provides a guideline or starting point for the measurement rather than providing a fixed result.

Only a minority of disabilities are listed in the Schedule. In other cases, however, a Schedule can still be of some guidance value if the injury is similar to one that is listed.

Where a worker is over the age of 45 at the effective date of the award, the percentage rate is increased by 1% of the assessed disability for each year over 45 up to a maximum of 20% of the assessed disability. For example, if the claimant were aged 55 at the effective date of the award and the rate indicated in the Schedule for the particular disablement is 50%, the age adaptability factor would be 10% of 50%, making an overall disability rating of 55% of total disability.

UPPER EXTREMITY

	Percentage
(A) Amputations:	
1. Proximal, third of humerus or disarticulation at shoulder	70
2. Middle, third of humerus	65
3. Distal, third of humerus to biceps insertion	60
4. Insertion of biceps to middle of forearm	5~~5~~**7**
5. Middle of forearm to wrist	5~~0~~**4**
~~6. Thumb, including metacarpal~~	~~20~~

		Percentage
7.	Thumb at M.P. joint	10
8.	Thumb at I.P. joint	4
	• one half of distal phalanx	2
9.	Thumb and index finger off at M.P. joints	24
10.	Thumb and middle finger off at M.P. joints	20
11.	Thumb and ring finger off at M.P. joints	15
12.	Thumb and little finger off at M.P. joints	15
13.	Fingers, four at M.P. joints	30
14.	Fingers, four at P.I.P. joints	18
15.	Fingers, four at D.I.P. joints	6
16.	Finger, index at M.P. joint	4
17.	Finger, index at P.I.P. joint	2.4
18.	Finger, index at D.I.P. joint	.8
19.	Finger, middle at M.P. joint	.4
20.	Finger, middle at P.I.P. joint	2.4
21.	Finger, middle at D.I.P. joint	.8
22.	Finger, ring at M.P. joint	2.5
23.	Finger, ring at P.I.P. joint	1.5
24.	Finger, ring at D.I.P. joint	.5
25.	Finger, little at M.P. joint	2.5
26.	Finger, little at P.I.P. joint	1.5
27.	Finger, little at D.I.P. joint	.5
28.	Metacarpals	Up to value of finger

		Percentage
~~29.~~	~~Fingers, index, middle and ring at the M.P. joints~~	~~22~~
~~30.~~	~~Fingers, index, middle and little at the M.P. joints~~	~~22~~
~~31.~~	~~Fingers, index, ring and little at the M.P. joints~~	~~19~~
~~32.~~	~~Fingers, middle, ring and little at the M.P. joints~~	~~19~~
~~33.~~	~~Fingers, index and middle at the M.P. joints~~	~~14~~
~~34.~~	~~Fingers, index and ring at the M.P. joints~~	~~11~~
~~35.~~	~~Fingers, index and little at the M.P. joints~~	~~11~~
~~36.~~	~~Fingers, middle and ring at the M.P. joints~~	~~11~~
~~37.~~	~~Fingers, middle and little at the M.P. joints~~	~~11~~
~~38.~~	~~Fingers, ring and little at the M.P. joints~~	~~8~~
~~39.~~	~~Fingers, two or more at the P.I.P. joints~~	~~3/5 combined value~~
~~40.~~	~~Fingers, two or more at the D.I.P. joints~~	~~1/5 combined value~~

		Percentage
(B)	Immobility of Joints:	
~~41.~~ **6.**	Shoulder, complete with no scapular movement (so called frozen shoulder)	35
	(a) Flexion	**14**
	(b) Extension	**3.5**
	(c) Abduction	**7**
	(d) Adduction	**3.5**
	(e) External Rotation	**3.5**
	(f) Internal Rotation	**3.5**
~~42~~. **7.**	Shoulder, gleno-humeral fusion, scapula free	20
~~43.~~	~~Shoulder, limited to 90° of abduction~~	~~5~~

		Percentage
~~44.~~ **8.**	Elbow	20
~~45~~ **9.**	Wrist	12.5
	(a) Flexion	**4**
	(b) Extension	**4**
	(c) Radial Deviation	**2.25**
	(d) Ulnar Deviation	**2.25**
~~46~~ **10.**	Pronation and supination complete in mid position	10
~~47~~ **11.**	Pronation alone	~~3~~ **6**
~~48~~ **12.**	Supination alone	~~5~~ **4**
~~49.~~	~~Thumb, fusion both joints~~	~~Up to 3/5 value of amputation at M.P. joint~~
~~50.~~	~~Thumb, fusion of M.P. or I.P. joints~~	~~To be assessed as a percentage impairment of Item No. 49~~
~~51.~~	~~Finger, all joints~~	~~Up to value of finger~~
~~52.~~	~~Finger, P.I.P. and D.I.P. joints~~	~~Up to 3/5 value of finger~~
~~53.~~	~~Finger, D.I.P. joint~~	~~Up to 1/5 value of finger~~

		Percentage
(C)	**Surgical Procedures**	
13.	**Shoulder replacement arthroplasty**	**6.5**
14.	**Elbow replacement arthroplasty**	**5.8**
(D)	**Upper Extremity Normal Range of Motion Values**	
	SHOULDER	**Degrees**
	Flexion	***158***
	Extension	***53***

		Degrees
Abduction		***170***
Adduction		***50***
*** Internal Rotation**		***70***
*** External Rotation**		***90***

*** Arm in Abduction of 70–90 degrees; if unable to achieve this degree of abduction, internal and external rotation is measured in a neutral position, arm at side. The normal range in neutral position is 68 degrees for each movement**

ELBOW		
Flexion		**146**
Extension		**0**
FOREARM		
Pronation		**71**
Supination		**84**
WRIST		
Flexion		**73**
Extension		**71**
Radial Deviation		**19**
Ulnar Deviation		**33**
FINGERS		
DIPJ	**Flexion**	80
	Extension	0
PIPJ	**Flexion**	100
	Extension	0
MPJ	**Flexion**	90
	Extension	0
THUMB		
IPJ	**Flexion**	**81**
	Extension	**0**
MPJ	**Flexion**	**53**
	Extension	**0**
CMCJ	**Flexion**	**15**
	Extension	**50**
	Palmar Abduction	**50**

LOWER EXTREMITY

		Percentage
(A)	Amputations:	
~~54~~ **15.**	Hip disarticulation or short stump	65
~~55~~ **16.**	Thigh, sight of election or end bearing (requiring false knee joint)	50
~~56~~ **17.**	Short below knee stump suitable for conventional B.K. prosthesis	45
~~57~~ **18.**	Below knee, suitable for B.K. prosthesis (Patellar bearing)	35
~~58~~ **19.**	Leg, at ankle end bearing **(Syme's Amputation)**	25
~~59~~ **20.**	~~Through foot~~ **Midtarsal (Chopart's Amputation)**	~~10~~ **25**
21.	**Tarsometatarsal (Lisfranc's Amputation)**	**15**
~~60~~ **22.**	Toes, all toes	5
~~61~~ **23.**	Toes, great	2.5
	• with head of metatarsal	5
~~62~~ **24.**	Toes, great at distal	1
~~63~~ **25.**	Toes, other than great, each	.5
	• metatarsal, each	.5
~~64~~ **26.**	Toe, little with metatarsal	2

LOWER EXTREMITY IMMOBILITY

		Percentage
(B)	Immobility:	
~~65~~ **27.**	Hip	30
	(a) Flexion	9
	(b) Extension	2
	(c) Abduction	7
	(d) Adduction	3
	(e) External Rotation	6
	(f) Internal Rotation	**3**
~~66~~ **28.**	Knee	25
~~67.~~	~~Knee, Flexion limited to 90°~~	~~5~~
~~68~~ **29.**	Ankle	12
~~69~~ **30.**	Great toe, ~~both joints~~ **MP Joint**	~~2.5~~ **1.25**
~~70~~ **31.**	Great toe, distal	.5
~~71~~ **32.**	(a) Talocalcaneal arthrodesis, up to	4.25
	(b) Triple arthrodesis	7.0

		Percentage
(C)	Shortening:	
~~72~~ **33.**	(a) ~~2.5~~ **1.5** cm~~s~~ **or less**	~~1.5~~ **0**
	(b) **1.6 cm to 2.5** ~~5.0~~ cm~~s~~	~~6.0~~ **2**
	(c) ~~7.5~~ **2.6 cm to 3.5** cm~~s~~	~~15.0~~ **3**
	(d) **3.6 cm to 4.5 cm**	**4**
	(e) 4.6 cm to 5.5 cm	**6**
	(f) 5.6 cm to 6.5 cm	**8**
	(g) 6.6 cm to 7.4 cm	**10**
	(h) 7.5 cm or more	**15**

	Percentage
(D) Miscellaneous Surgical Procedures	
34. i. Total Hip Prosthesis	**6**
35. ii. Total Knee Prosthesis or Hemiarthroplasty	**9**
36. iii. Ligamentous Laxity of Knee	
(a) ACL or PCL	
Grade I/Mild (5−9 mm)	**1.67**
Grade II/Moderate (10−14 mm)	**3.34**
Grade III/Marked (15 mm or more)	**5**
(b) MCL or LCL	
Grade I/Mild (5−9 mm)	**0.83**
Grade II/Moderate (10−14 mm)	**1.66**
Grade III/Marked (15 mm or more)	**2.5**
iv. Ligamentous Laxity of Ankle, Medial or Lateral	**0−2**

	Degrees
(E) Lower Extremity Normal Range of Motion Values	
HIP	
Flexion	**113**
Extension	**28**
Abduction	**48**
Adduction	**31**
Internal Rotation	**30**
External Rotation	**45**
KNEE	
Flexion	**134**
Extension	**0**
ANKLE	
Dorsiflexion	**18**
Plantar Flexion	**40**
SUBTALAR	
Inversion	**5**
Eversion	**5**

		Degrees
GREAT TOE		
IPJ	**Flexion**	**60**
	Extension	**0**
MPJ	**Flexion (Plantar Flexion)**	**37**
	Extension (Dorsi Flexion)	**63**

DENERVATION

		Percentage
~~73~~ **37.**	Median nerve complete at elbow	40
	Median nerve complete at wrist	20
~~74~~ **38.**	Ulnar nerve complete at elbow	10
	Ulnar nerve complete at wrist	8
~~75~~ **39.**	Peroneal, complete	10
~~76~~ **40.**	Femoral nerve	12.5

IMPAIRMENT OF VISION

~~77~~ **41.**	Enucleation	18
~~78~~ **42.**	Industrially blind, single eye	16
~~79~~ **43.**	Cataract or aphakia	12
~~80~~ **44**.	Double aphakia	20
~~81~~ **45**.	Hemianopia, right or left field	25
~~82~~ **46**.	Diplopia, all fields	10
~~83~~ **47**.	Scotomata, depending on location and extent	Up to 16

		Percentage
Loss of Visual Acuity:		
~~84~~ **48**.	20/30	0
~~85~~ **49**.	20/40	1
~~86~~ **50**.	20/50	2
~~87~~ **51**.	20/60	4
~~88~~ **52**.	20/80	6
~~89~~ **53**.	20/100	8
~~90~~ **54**.	20/200 or poorer	16

IMPAIRMENT OF HEARING

Unilateral Hearing Loss:		
~~91~~ **55**.	Difference of 20 dB average at 500 cps, 1000 cps and 2000 cps	1
~~92~~ **56**.	Difference of 30 dB average at 500 cps, 1000 cps and 2000 cps	2
~~93~~ **57**.	Difference of 40 dB average at 500 cps, 1000 cps and 2000 cps	3
Bilateral Hearing Loss:		
~~94~~ **58**.	35 dB ANSI (25 ASA) in single ear	0.2
~~95~~ **59**.	40 dB ANSI (30 ASA) in single ear	0.3
~~96~~ **60**.	45 dB ANSI (35 ASA) in single ear	0.5

		Percentage
~~97~~ **61**.	50 dB ANSI (40 ASA) in single ear	0.7
~~98~~ **62**.	55 dB ANSI (45 ASA) in single ear	1.0
~~99~~ **63**.	60 dB ANSI (50 ASA) in single ear	1.3
~~100~~ **64**.	65 dB ANSI (55 ASA) in single ear	1.7
~~101~~ **65**.	70 dB ANSI (60 ASA) in single ear	2.1
~~102~~ **66**.	75 dB ANSI (65 ASA) in single ear	2.6
~~103~~ **67**.	80 dB ANSI (70 ASA) in single ear	3.0

SCHEDULE D

NON-TRAUMATIC HEARING LOSS
(Section 7)

~~104~~ **68**.	Complete loss of hearing in both ears	15.0
~~105~~ **69**.	Complete loss of hearing in one ear with no loss in the other	3.0

Loss of hearing in dbs measured in each ear in turn (ANSI)	**Percentage of total disability Ear most affected PLUS ear least affected**	
0–27	0	0
28–32	0.3	1.2
33–37	0.5	2.0
38–42	0.7	2.8
43–47	1.0	4.0
48–52	1.3	5.2
53–57	1.7	6.8

Loss of hearing in dbs measured in each ear in turn (ANSI)	Percentage of total disability Ear most affected PLUS ear least affected	
58–62	2.1	8.4
63–67	2.6	10.4
68 or more	3.0	12.0

VISCERAL LOSS

		Percentage
~~106~~ **70**.	Loss of Kidney	15
~~107~~ **71**.	Loss of Spleen	10

THE SPINE

(Codified March 1, 1990)

This ~~s~~**S**chedule recognizes that anatomical loss or damage resulting from injury or surgery may contribute to physical impairment of the spine. When anatomic and/or surgical impairment is present as well as loss of range of movement of the spine, the **final** ~~impairment~~ **disability** rating will be based on the greater of the two.

Range of movement of the spine is difficult to assess on a consistent basis because the joints of the spine are small, inaccessible and not externally visible. Only movement of a region of the spine can be measured; it is not possible to measure mobility of a single vertebra. Spine movement also varies with an individual's body type, age and general health. Because of these, a judgment factor will continue to be necessary in spine assessment.

Cervical Spine:

		Percentage
~~108~~ **72**.	(a) Compression fractures	
	(i) Up to 50% compression	0–2% impaired
	(ii) Greater than 50% compression	2–4% impaired
	(b) Impairment resulting from surgical loss of intervertebral disc C1 to D1	~~0~~–2% per level
	(c) Ankylosis (fusion) C1 to D1 including surgical loss of intervertebral disc	3% per level

		Percentage
~~109~~ **73.**	Loss of range of motion	
	Flexion	0–6%
	Extension	0–3%
	Lateral flexion right and left	each 0–2%
	Rotation right and left	each 0–4%
	Maximum ~~impairment of function~~ **disability rating** not to exceed	21%
~~Dorsal~~ **Thoracic** Spine:		
~~110~~ **74.**	(a) Compression fractures	
	(i) Up to 50% compression	0–1% impaired
	(ii) Over 50% compression	1–2% impaired
	(b) Impairment resulting from surgical loss of intervertebral disc D1 to D12	~~0~~–1% per level to a maximum of 6%
	(c) Ankylosis (fusion) D1 to D12 including surgical loss of intervertebral disc	1% per level to a maximum of 6%
	(d) Loss of Range of Motion Rotation, Right and Left, Each	**0–3%**
	Maximum ~~impairment of function~~ **disability rating not to exceed**	~~not to exceed~~ 6%
Lumbar Spine:		
~~111~~ **75.**	(a) Compression fractures to include D12	
	(i) Up to 50% compression	0–2%
	(ii) Over 50% compression	2–4%
	(b) Impairment resulting from surgical loss of intervertebral disc D12 to S1	~~0~~–2% per level
	(c) Ankylosis (fusion) D12 to S1 including surgical loss of intervertebral disc	4% per level

		Percentage
~~112~~ **76**.	Loss of range of motion	
	Flexion	0~~–79~~**–79** %
	Extension	0~~–35~~**–35** %
	Lateral flexion right and left	each 0~~–25~~**–25** %
	~~Rotation right and left~~	~~each 0–5 %~~
	Maximum ~~impairment of function~~ **disability rating not to exceed**	~~not to exceed~~ 24 %

Spine Normal Range of Motion Values

	Degrees
CERVICAL SPINE	
Flexion	**40**
Extension	**40**
Lateral Flexion	**30**
Rotation	**60**
THORACIC SPINE	
Rotation	**45**
	0
LUMBAR SPINE	
Flexion	**60**
Extension	**25**
Lateral Flexion	**25**

Psychological Disability

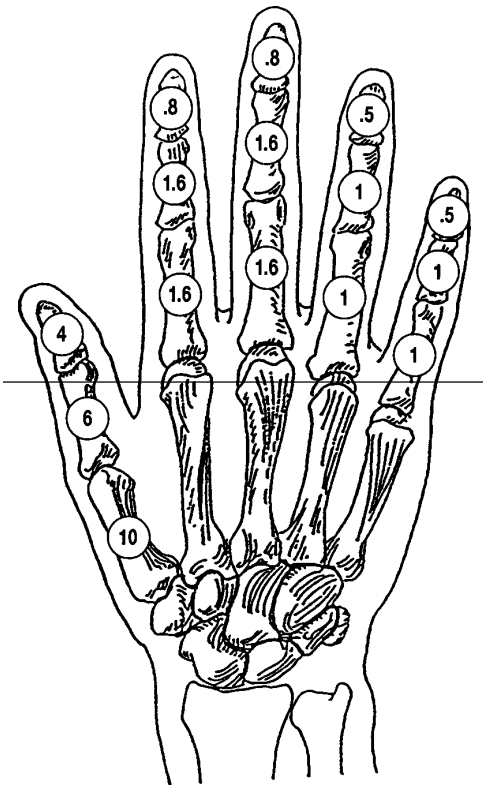
~~The categories and descriptions are based on the American Medical Association *Guides to the Evaluation of Permanent Impairment* (4th Edition). The Board follows the principles of assessment set forth in that publication in assessing permanent psychological impairment.~~

~~113~~ 77	**Aphasia and Communication Disturbances**	**%**
(a)	Mild — minimal disturbance in comprehension and production of language symbols of daily living	0–25%
(b)	Moderate — moderate disturbance in comprehension and production of language symbols of daily living	30–70%
(c)	Marked — inability to comprehend language symbols. Production of unintelligible or inappropriate language for daily activities	75–95%
(d)	Extreme — complete inability to communicate or comprehend language symbols	100%
~~114~~ 78	**Disturbances of Mental Status and Integrative Functioning**	
(a)	Mild — some impairment but ability remains to satisfactorily perform most activities of daily living	0–25%
(b)	Moderate — impairment necessitates direction and supervision of daily living activities	30–70%
(c)	Marked — impairment necessitates directed care under continued supervision and confinement in home or other facility	75–95%
(d)	Extreme — individual is unable without supervision to care for self and be safe in any situation	100%
~~115~~ 79	**Emotional (Mental) and Behavioural Disturbances** The impairment levels below relate to activities of daily living, social functioning, concentration, and adaptation	
(a)	Mild — impairment levels are compatible with most useful functioning	0–25%
(b)	Moderate — impairment levels are compatible with some, but not all useful functioning	30–70%

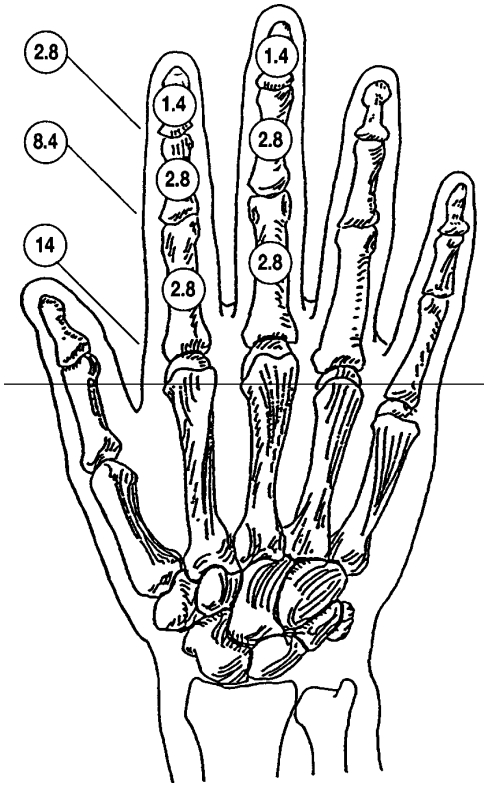
(c)	Marked — impairment levels significantly impede useful functioning	75–95%
(d)	Extreme — impairment levels preclude most useful functioning	100%

Disability ratings greater than 0% are made in 5% increments.

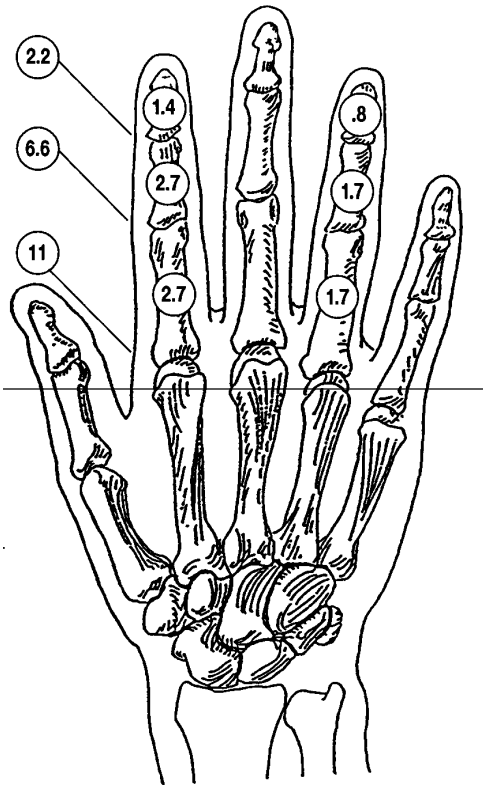
~~CHART 1~~
~~THUMB OR SINGLE FINGER~~



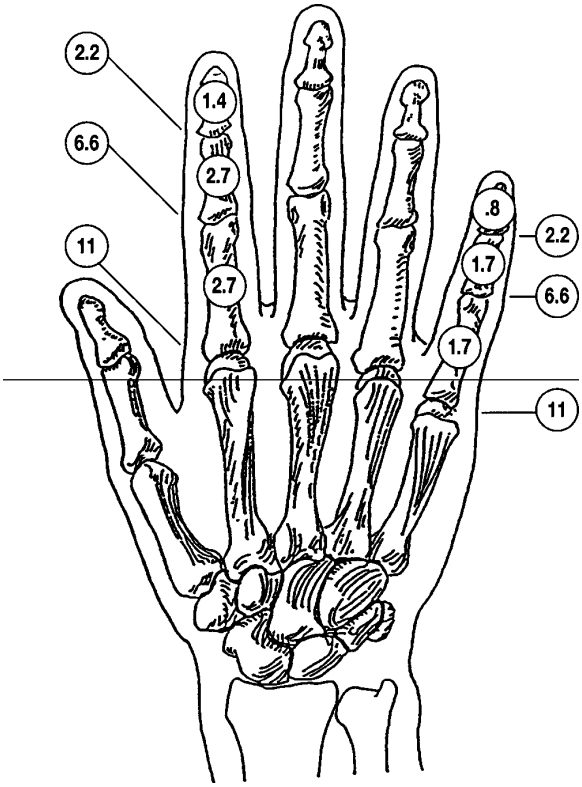
~~CHART 2~~
~~INDEX AND MIDDLE~~



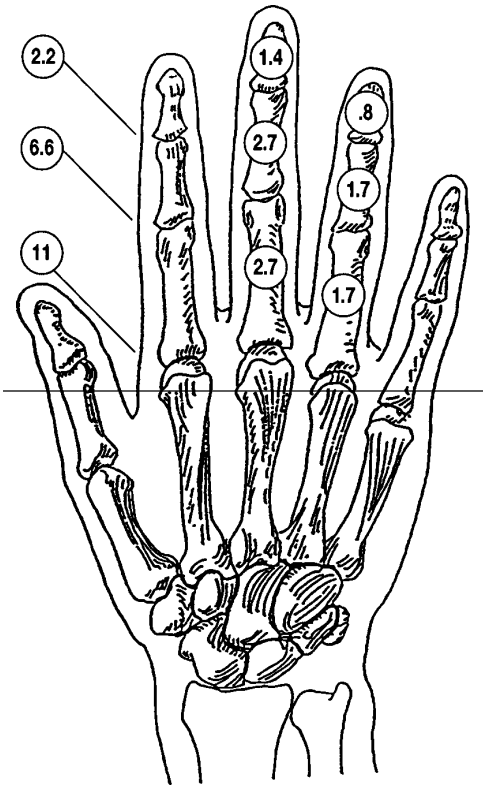
~~CHART 3~~
~~INDEX AND RING~~



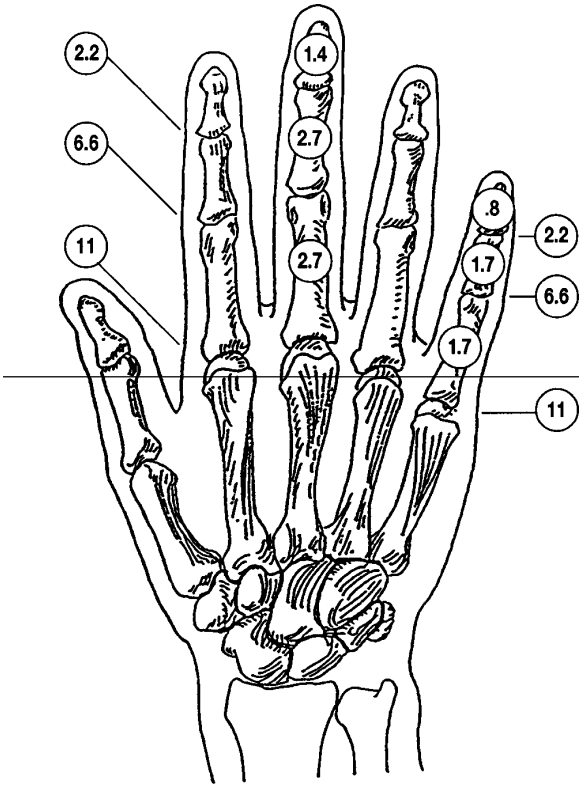
~~CHART 4~~
~~INDEX AND LITTLE~~



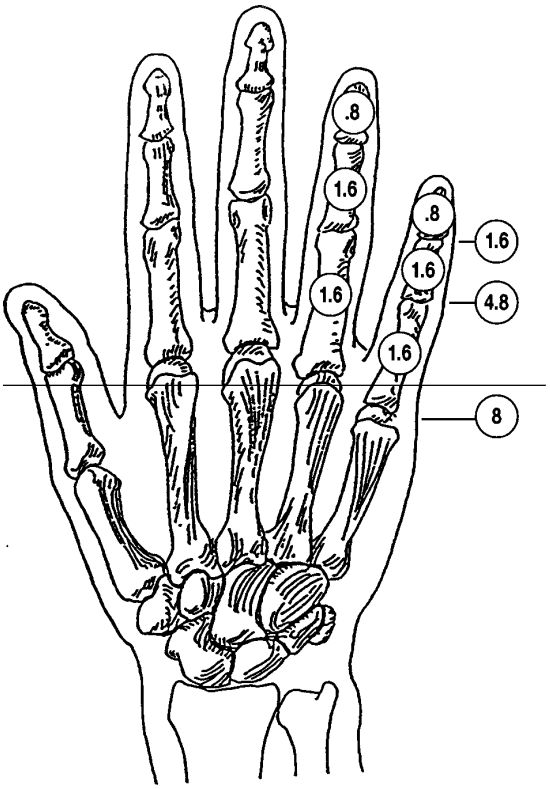
~~CHART 5~~
~~MIDDLE AND RING~~



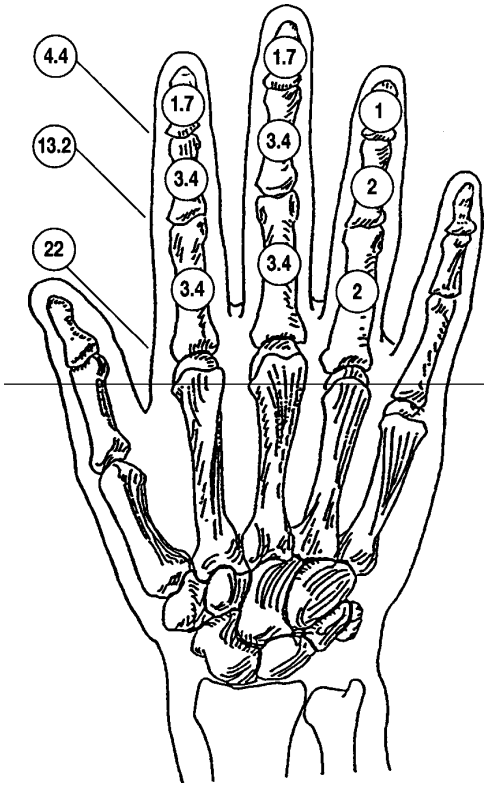
~~CHART 6~~
~~MIDDLE AND LITTLE~~



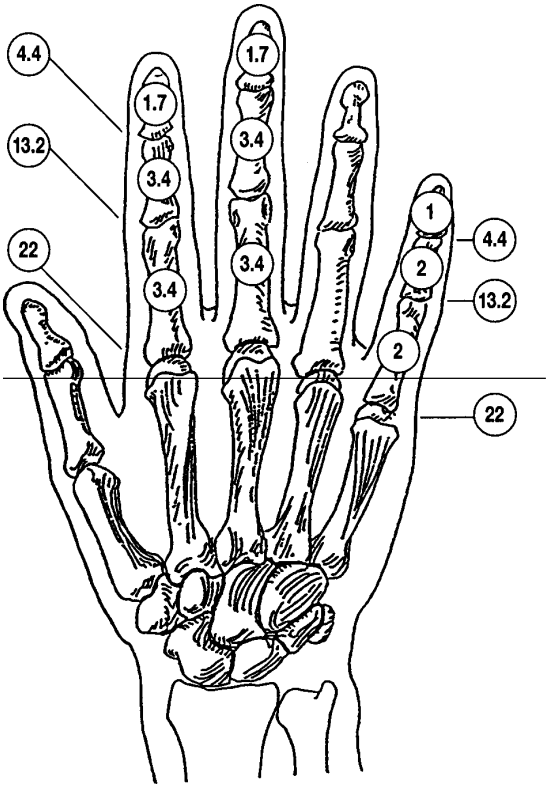
~~CHART 7~~
~~RING AND LITTLE~~



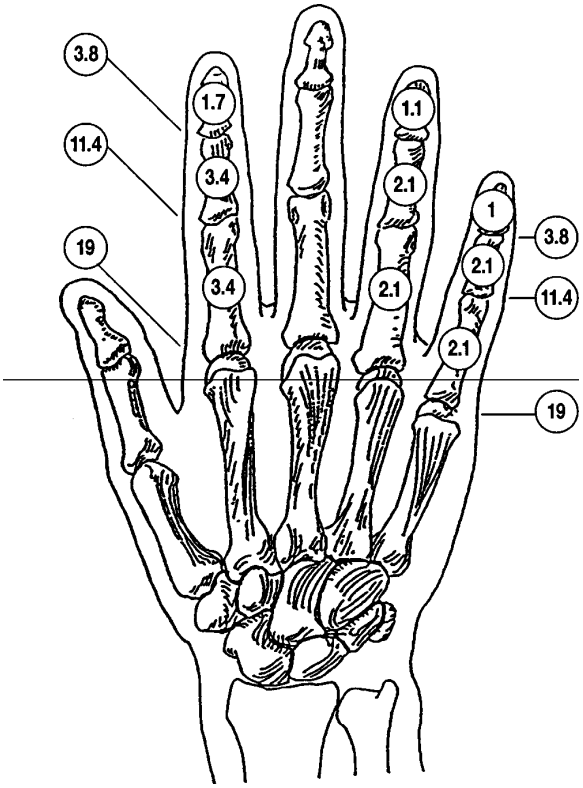
~~CHART 8~~
~~INDEX, MIDDLE AND RING~~



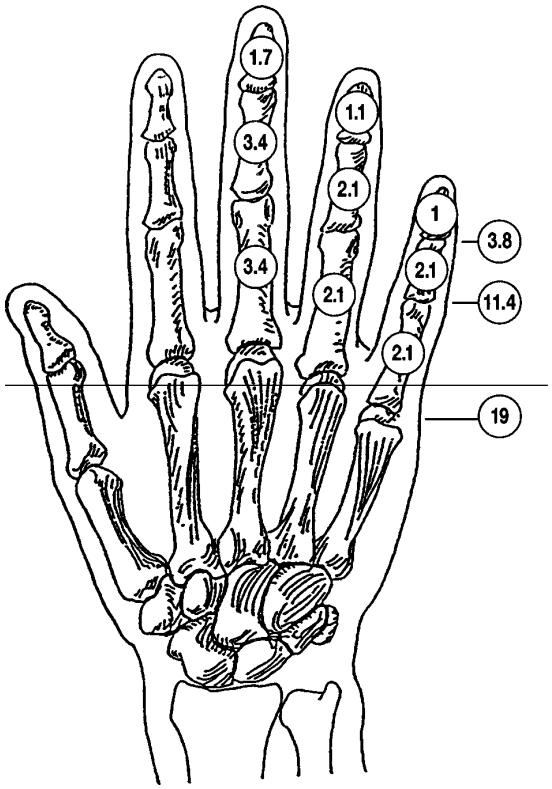
~~CHART 9~~
~~INDEX, MIDDLE AND LITTLE~~



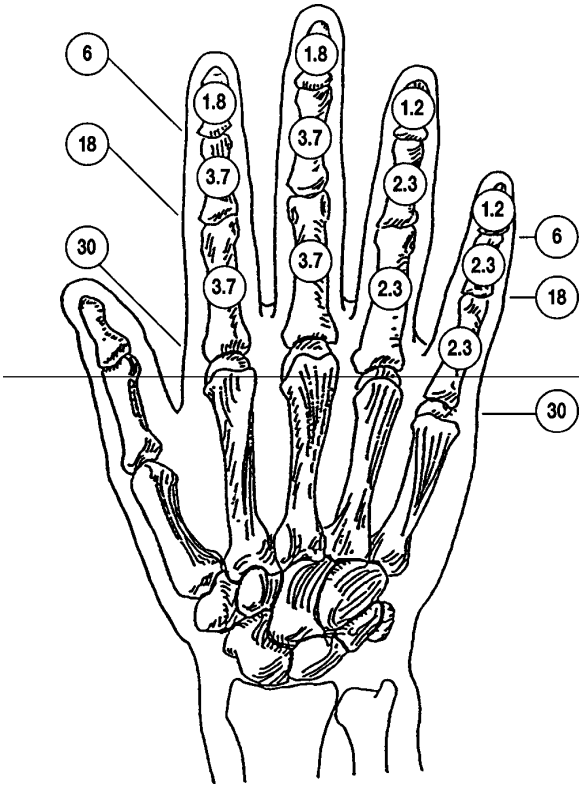
~~CHART 10~~
~~INDEX, RING AND LITTLE~~



~~CHART 11~~
~~MIDDLE, RING AND LITTLE~~



~~CHART 12~~
~~ALL FOUR FINGERS~~



HAND CHARTS

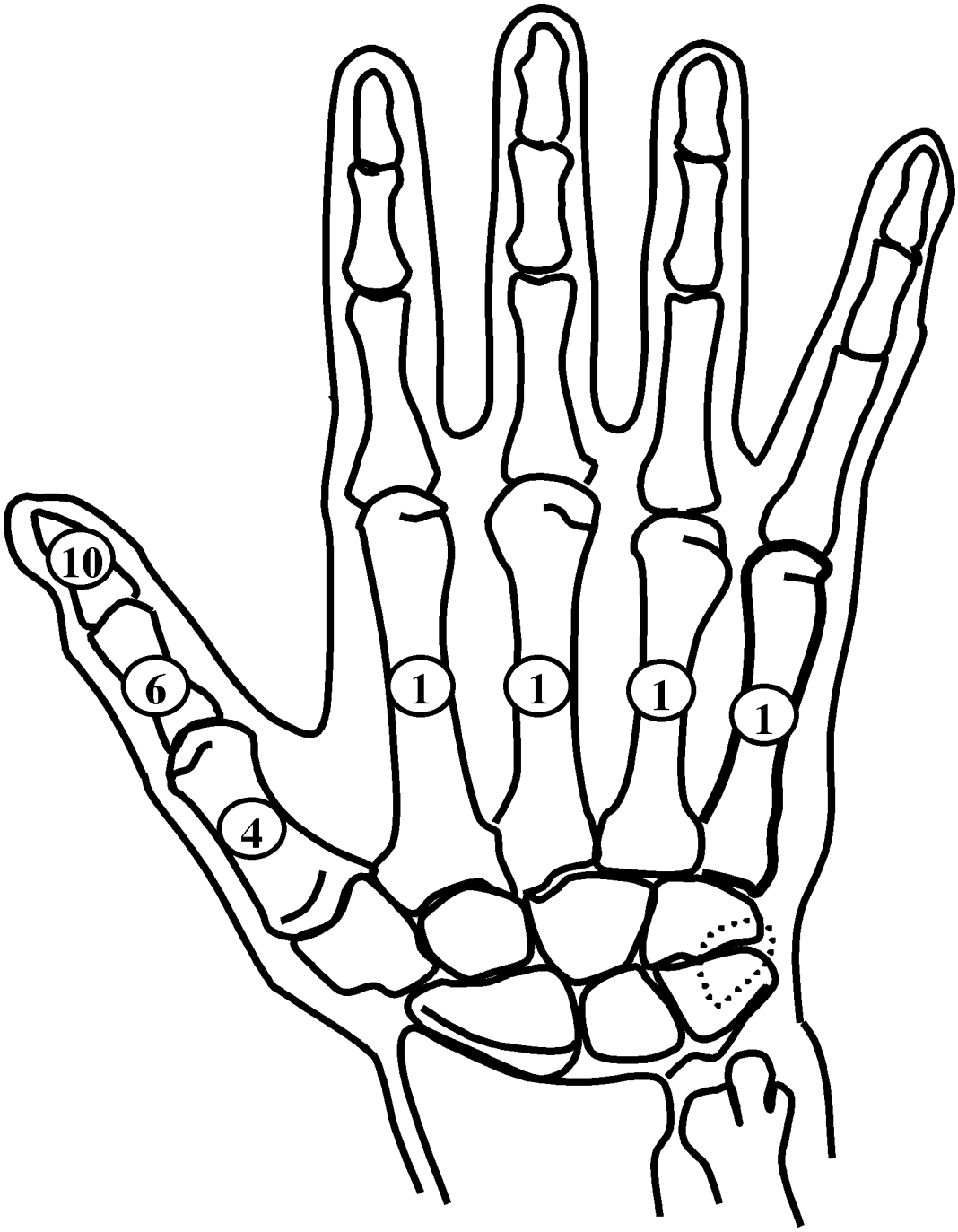


CHART 1
THUMB AND METACARPALS

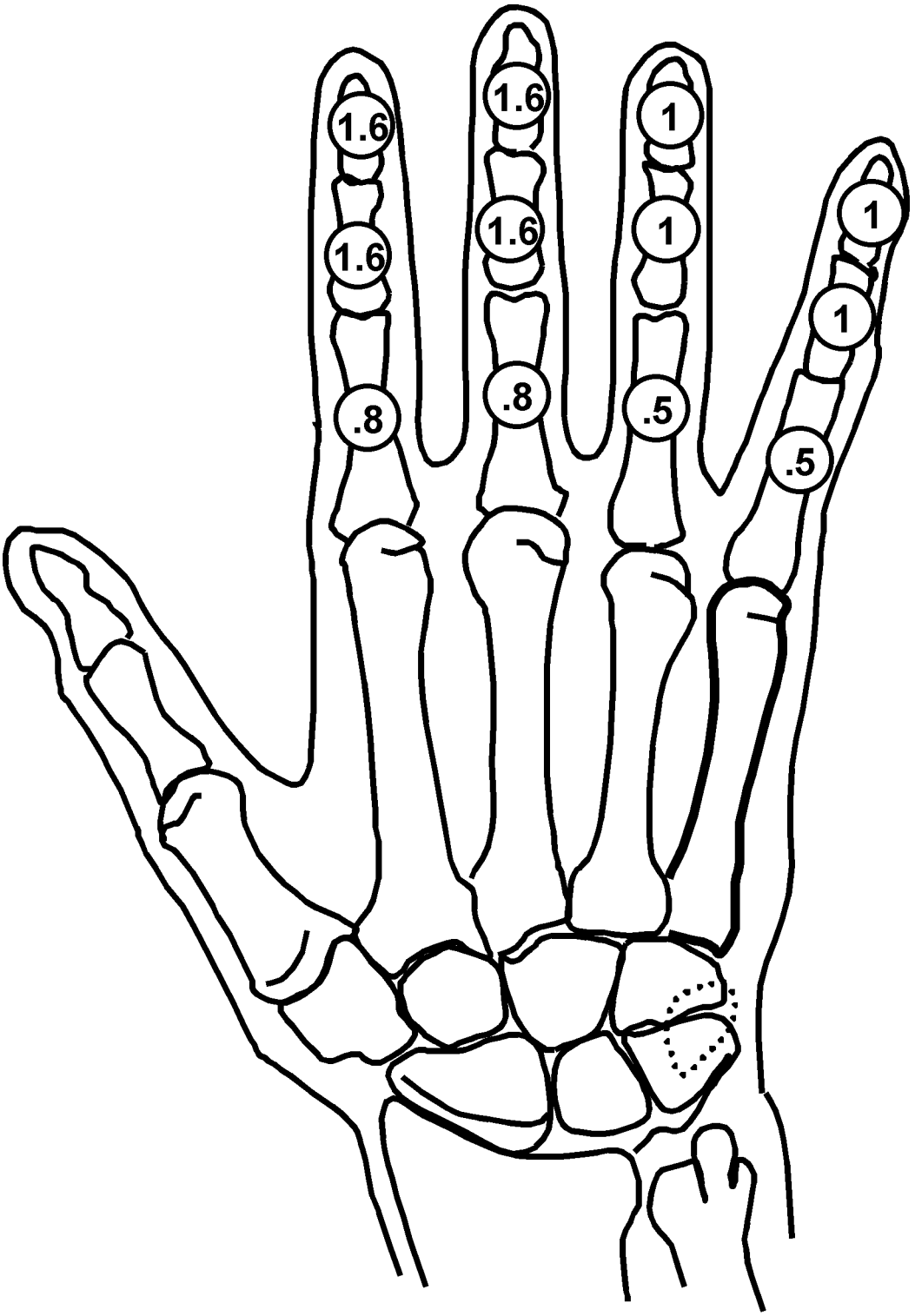


CHART 2
SINGLE FINGER

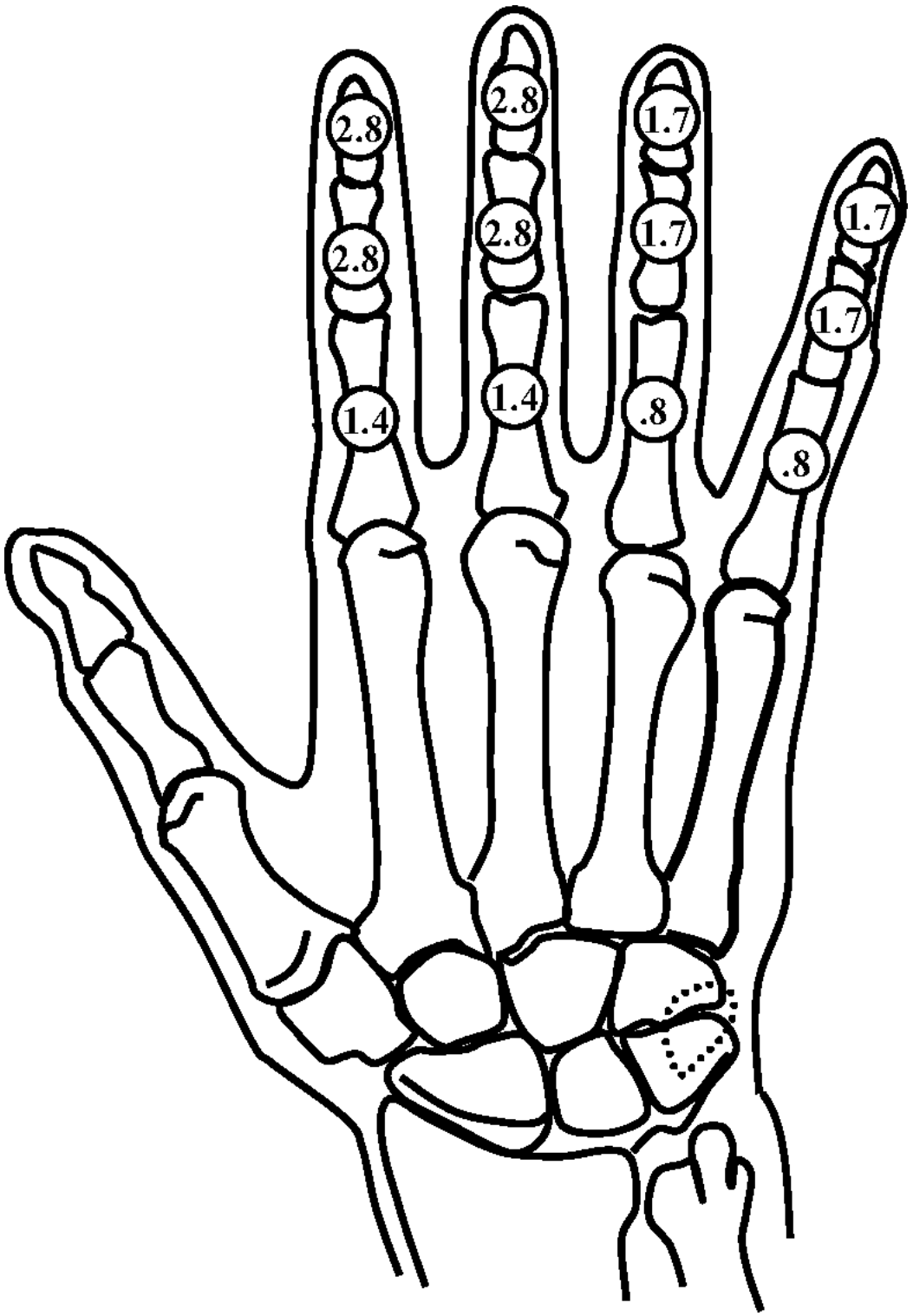


CHART 3
TWO FINGERS

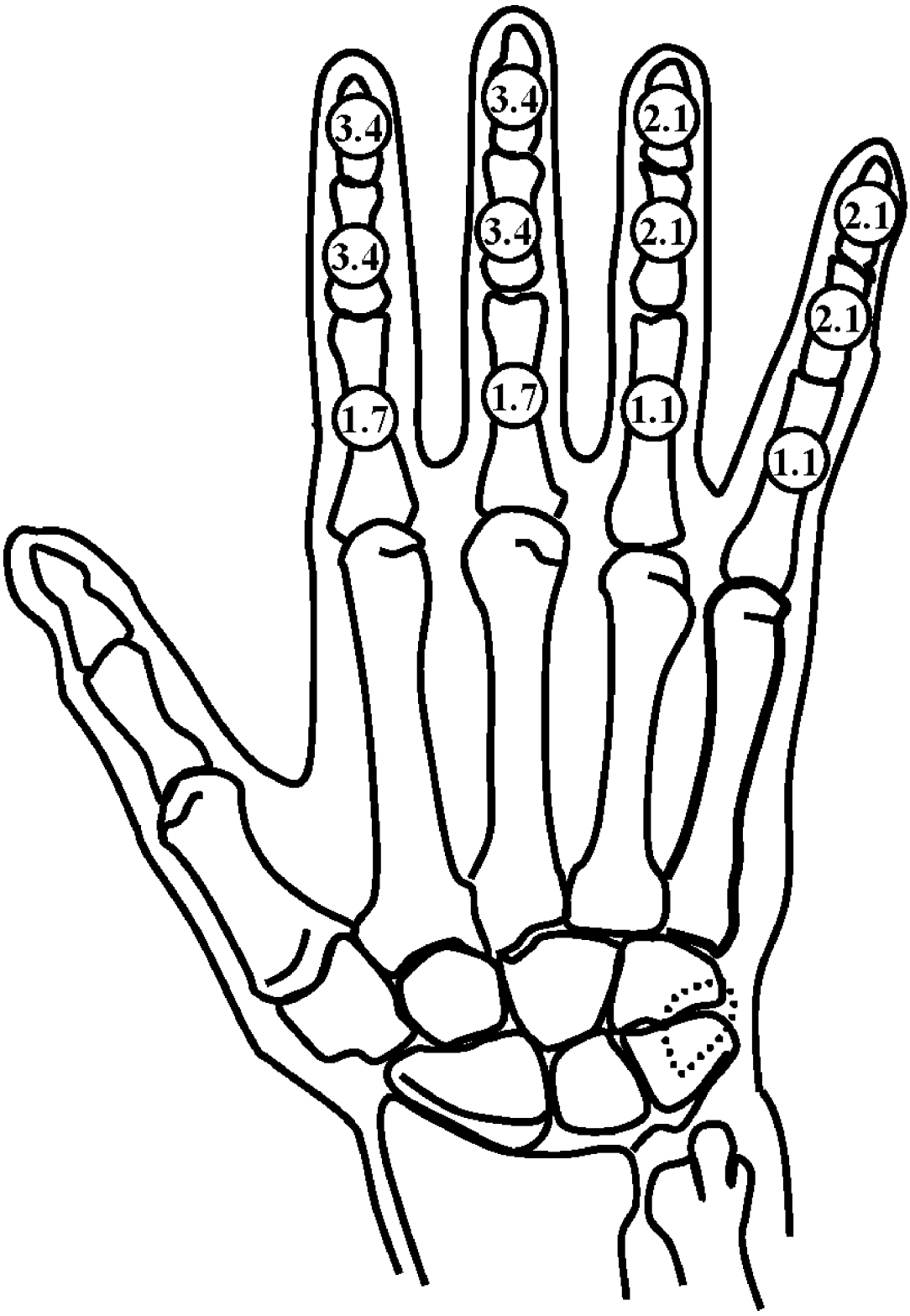


CHART 4
THREE FINGERS

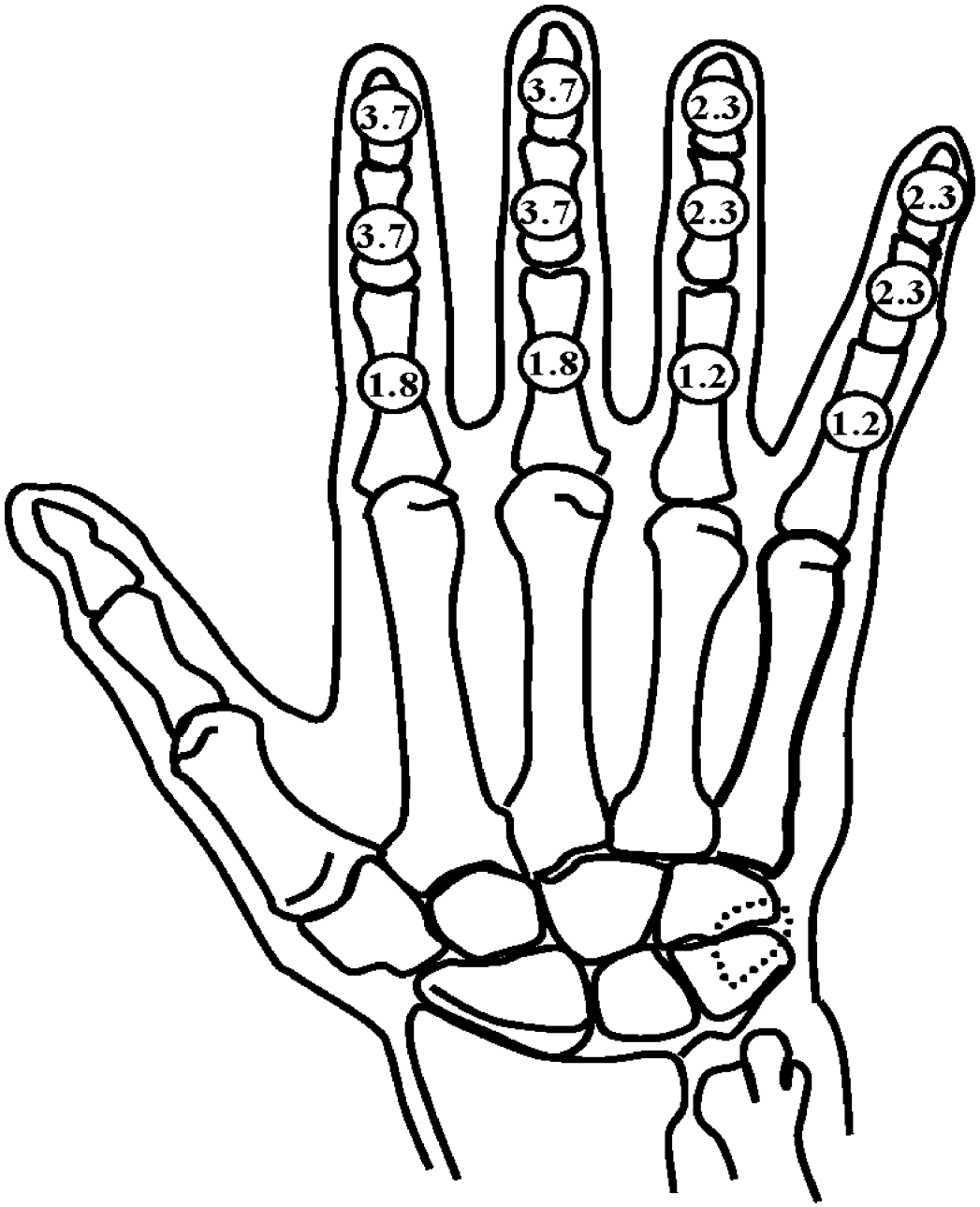


CHART 5
FOUR FINGERS

Appendix "B" Volume II

Additions in **bold;** deletions in ~~strikethrough~~

CHAPTER 6

PERMANENT DISABILITY AWARDS

#36.22 *Determination of the Amount of a CPP Disability Benefit that is Attributed to the Compensable Work Injury*

CPP disability benefit entitlement is based on total disablement which may encompass a work injury, other disabling conditions or a combination of both.

When a worker is disabled because of the work injury and there is evidence that leads the Board to determine that the disability benefits being issued under CPP are only related to the injury, 50% of the entire CPP disability benefits paid to the worker will be deducted from the worker's permanent disability award payable by the Board.

Where a worker is disabled because of the work injury and it is unclear what amount of CPP disability benefits is attributable to the compensable work injury, the amount of the CPP disability benefits attributable to the compensable work injury is determined as follows:

- Where the permanent disability award is calculated under the ~~loss of function~~ **section 23(1)** method of ~~pension~~ assessment, the amount of the CPP disability benefits attributable to the injury is determined by using the same proportion to the total CPP disability benefits as the worker's assessed percentage of disability using the ~~Scheduled or Non-scheduled~~ **section 23(1)** method. The Board deducts 50% of the calculated amount from the worker's permanent disability award.

- Where the permanent disability award is calculated under the ~~projected loss of earnings~~ **section 23(3)** method of ~~pension~~ assessment, the amount of the CPP disability benefits attributable to the injury is determined by using the same proportion to the total CPP disability benefits as the worker's estimated loss of earnings bears to the worker's average net earnings. The Board deducts 50% of the calculated amount from the worker's permanent disability award.

Where a worker is disabled because of the work injury and there is evidence that leads the Board to determine that the disability benefits being issued under CPP are not related to the injury, the Board will not deduct CPP disability benefits from the worker's permanent disability award.

EFFECTIVE DATE: **August 1, 2003**
APPLICATION: **To all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003.**

#37.00 PERMANENT TOTAL DISABILITY

Section 22(1) of the *Act* provides:

> Subject to sections 34 and 35, if a permanent total disability results from a worker's injury, the Board must pay the worker compensation that is a periodic payment that equals 90% of the worker's average net earnings.

Some examples of permanent total disability are paraplegia, quadriplegia, hemiplegia, and total or near total blindness. Combinations of permanent partial ~~physical impairments~~ **disabilities** can also become permanent total disabilities, such as bilateral amputations of arms and legs.

Permanent total disability periodic payments continue until a worker reaches age 65, or later if the Board is satisfied that the worker would have worked past age 65. (Policy item #41.00)

On reaching retirement age, a worker who has received a permanent disability award is entitled to a retirement benefit (policy item #116.00). Permanently totally disabled workers are also entitled to rehabilitation and health care services and personal supports after reaching retirement age (policy item #116.30). Board policies on the retirement benefit are contained in Chapter 18 of the *RS&CM*.

EFFECTIVE DATE: **August 1, 2003**
APPLICATION: **To all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003.**

#39.01 Decision-Making Procedure under Section 23(1)

Section 23(1) assessments are undertaken once a worker reaches medical plateau.

A Board officer in the Disability Awards Department is responsible for ensuring that the necessary examinations and other investigations are carried out with respect to the assessment and making a decision on a worker's entitlement to a permanent partial disability award.

~~Permanent functional impairment~~ **Section 23(1)** evaluations may be conducted by either a Disability Awards Medical Advisor or a Board authorized External Service Provider. The Rehabilitation & Compensation Services Division sets protocols and procedures for these evaluations. The Board determines whether the evaluation is referred to a Disability Awards Medical Advisor or an External Service Provider based on the nature of the injury and other relevant criteria as set out in the protocols. The Board officer in Disability Awards may determine the worker's ~~functional impairment~~ **section 23(1) entitlement** without examination by a Disability Awards Medical Advisor or a Board authorized External Service Provider, if there is sufficient medical information on file to complete the assessment.

The determination of whether there is a permanent psychological impairment, and the severity of the impairment, is made by either a Board Psychologist or a Board authorized External Service Provider. Once this evaluation is completed, the claim is referred to the Psychological Disability Committee to assess the percentage of disability resulting from the permanent psychological impairment.

The Board officer in Disability Awards assesses any percentage of disability for physical impairment and, in conjunction with the Committee's percentage of psychological disability, decides the worker's permanent disability award under the section 23(1) method.

EFFECTIVE DATE: **August 1, 2003**
APPLICATION: **To all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003.**

#39.10 Permanent Disability Evaluation Schedule

Section 23(1) awards may be made with reference to the *Permanent Disability Evaluation Schedule* **("*Schedule*")**, which is set out in Appendix 4. This is a rating schedule of percentages of ~~impairment~~ **disability** for specific injuries or mutilations. (3)

The ~~Permanent Disability Evaluation Schedule~~ ***Schedule*** is a set of guide-rules, not a set of fixed rules. The Board officer in Disability Awards is free to apply other variables in arriving at a final award; but the "other variables" referred to means other variables relating to the degree of physical or psychological impairment, not other variables relating to social or economic factors, nor rules (including schedules and guide-rules) established in other jurisdictions. In particular, the actual or projected loss of earnings of a worker because of the disability is not a variable which can be considered. (4)

~~Any revision of the schedule must be undertaken by procedures that are appropriate to changes of a legislative nature. It will not be done through appeal decisions in individual cases. The schedules in use in other jurisdictions are part of the material that would be looked at in any revision of the schedule used here; but they are not part of the material relevant in the decision of any individual claim.~~

In cases where the specific impairment is not covered by the ~~schedule~~ ***Schedule***, but the part of the body in question is covered, the Board officer in Disability Awards must first determine the percentage loss of function in the damaged area. This determination is based on the findings of the ~~permanent functional impairment~~ **section 23(1)** evaluation and other medical and non-medical evidence available. The final award is arrived at by taking this percentage of the percentage allocated in the ~~schedule~~ ***Schedule*** to the disabled part of the body. Because the ~~schedule~~ ***Schedule*** is used in the calculation, this type of award is still considered as a scheduled one. For example, the amputation of an arm down to the proximal third of the humerus or its disarticulation at the shoulder is scheduled at 70% of total disability. Suppose a worker suffers a severe crush injury to the arm which culminates in a permanent loss of half its function. The final assessment would be 50% of 70%, i.e. 35% of total disability.

EFFECTIVE DATE: **August 1, 2003**
APPLICATION: **To all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003.**

#39.12 Enhancement

The combined effect of two separate disabilities may be greater than the separate effect of each. Therefore, where a worker has an additional disability which pre-existed the injury or the injury causes more than one disability, the Board may, in certain situations, increase the overall percentage of disability that would otherwise be awarded. This is known as the "enhancement factor".

One situation where this may be done is where the worker has impairment in both arms or both legs. An enhancement factor of 50% of the lesser disability may be added to the total of the percentages awarded for each separate disability. Suppose, for example, a worker suffers an injury causing total immobility in the right ankle. That would be assessed pursuant to the ~~schedule~~ ***Schedule*** at 12% of total disability. There may be an adjustment for age; but suppose it appeared that, at the time of the work injury, the worker was already suffering from a serious disability involving total immobility in the left knee. The Board officer in Disability Awards may well conclude that having regard to the impaired mobility that the worker was already suffering through the disability in the left leg, the compensable disability in the right ankle results in a greater degree of ~~physical impairment~~ **disability** than it would for a person with a normal left leg.

Enhancement factors applied where more than one finger of the same hand is affected are dealt with in policy items #39.2~~2~~**1, #39.31** ~~to~~ **and** #39.32.

Prior to October 27, 1977, the Board did not normally permit an enhancement factor in respect of spinal column disabilities. However, subsequent to that date, the Board has concluded that such a factor may be added for combinations of disabilities when one of those disabilities involves the spinal column and that disability is shown to have been enhanced by the others. A factor of 50% of the disability attributed to the spine is added. Therefore, if the disability in the back is 10%, and the sum of the other disabilities is 16%, the enhancement factor is 5% and the total disability awarded 31%. This has not been retroactively applied to awards made prior to October 27, 1977.

EFFECTIVE DATE: **August 1, 2003**
APPLICATION: **To all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003.**

#39.21 Amputation of ***Digits of the Hand*** ~~*One Finger*~~

It is usually considered that there must be shortening of the bone before an award is granted for ~~finger~~ amputation~~s~~ **of a digit of the hand**.

The percentages of disability awarded in respect of **an** amputations ~~of the fingers~~ **a digit of the hand** are set out in **hand charts 1 and 2 of** the ~~Permanent Disability Evaluation Schedule~~ ***Schedule***~~(items 13 to 40)~~.

In considering the ~~index and middle~~ fingers **and thumbs**, if the amputation of the portion of the distal phalanx involves:

(a) less than 1/4 of the phalanx, it is not normally considered significant enough to have any impact on future earning capacity.

(b) Partial amputation of the phalanx ~~of a thumb~~ is considered in the following fractions: 1/4, 1/3, 1/2, 2/3, 3/4. ~~1/4 to 3/4 of the phalanx, it is considered as an amputation equivalent to 1/2 the value of the whole phalanx.~~

(c) **greater than** 3/4 of the phalanx ~~or greater, it~~ is considered as an amputation equivalent to the whole phalanx.

~~In considering the ring and little fingers, if the amputation of the portion of the distal phalanx involves:~~

~~(a) less than 1/2 of the phalanx, it is not normally considered significant enough to have any impact on future earning capacity.~~

~~(b) 1/2 to 3/4 of the phalanx, it is considered as an amputation equivalent to 1/2 of the value of the whole phalanx.~~

~~(c) 3/4 of the phalanx or greater, it is considered as an amputation equivalent to the whole phalanx.~~

~~These are guidelines and discretion can be used in this area. For example, it is possible that with a loss of less than 1/2 of the distal phalanx of the ring finger there may be scarring and sensitivity remaining. Discretion could then be exercised because of the additional disabilities and an award considered.~~

Multiple Digit Amputations:

Where a thumb and one or more fingers is amputated, the percentage of disability of the thumb is determined and the percentage of disability for the finger or fingers is determined. Normally, an enhancement factor of 100% of the lesser of these disabilities is then added.

Where more than one finger is amputated, hand charts 3, 4 and 5 are used and the enhancement factors for multiple finger disabilities are built into the *Schedule*.

EFFECTIVE DATE: **August 1, 2003**
APPLICATION: **To all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003.**

#39.22 Amputation of More than One Finger

Enhancement factors for multiple finger disabilities are built into the hand charts, in the Permanent Disability Evaluation Schedule. To determine what chart or combinations of charts apply to particular multiple finger disabilities, the following procedure is used.

1. Determine the most distal component(s) of the finger(s) involved. Use the applicable chart and record the percentage of disability.

2. Follow this procedure for each next level involved.

3. Total the percentages from each common level to determine the overall percentage of disability.

Examples Using the Permanent Disability Evaluation Schedule

1. Index finger amputated at M.P. joint, middle finger amputated at D.I.P. joint.

   Take Chart #2

   distal phalanx of index 1.4%

   distal phalanx of middle 1.4%

   Take Chart #1

   middle phalanx of index 1.6%

   proximal phalanx of index 1.6%

   Overall Award 6.0%

2. Index finger amputated at M.P. joint, middle finger at P.I.P. joint, and ring finger at D.I.P. joint.

   Take Chart #8

   distal phalanx of index 1.7%

   distal phalanx of middle 1.7%

   distal phalanx of ring 1.0%

   Take Chart #2

   middle phalanx of index 2.8%

   middle phalanx of middle 2.8%

~~Take Chart #1~~

~~proximal phalanx of index~~	~~1.6%~~
~~Overall Award~~	~~11.6%~~

~~#39.23 Amputation of Thumb~~

~~Partial amputation of the phalanx of a thumb is considered in the following fractions: 1/4, 1/3, 1/2, 2/3, 3/4. For example, if a worker suffered an amputation of the thumb involving 2/3 of the distal phalanx, an award of 2/3 of 4% or 2.67% would be considered.~~

~~#39.24 Amputation of Thumb and One or More Fingers~~

~~The percentage of disability of the thumb is determined and the percentage of disability for the finger or fingers is determined. Normally, an enhancement factor of 100% of the lesser of these two disabilities is then added. The Board officer in Disability Awards does have discretion, based on the severity of the injuries, to adjust the enhancement factor, but normally a 100% multiple of the lesser is used.~~

~~More serious disabilities of this type are awards listed in the Permanent Disability Evaluation Schedule, items 9-12.~~

#39.30 Restrictions of Movement in Arms or Legs

Restrictions of movement in the joints of the body are measured and documented during the ~~permanent functional impairment~~ section 23(1) evaluation. The Board officer in Disability Awards then applies the measurement to the appropriate item in the ~~Permanent Disability Evaluation Schedule~~ ***Schedule***.

These awards are always scheduled.

EFFECTIVE DATE: **August 1, 2003**
APPLICATION: **To all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003.**

#39.31 Finger Restrictions

~~When considering restriction of finger movement, the full range of flexion restriction is taken into consideration, but only 50% of the range of restricted extension. This is because extension is not considered as vital as flexion.~~ The formula used to compute a percentage value for restriction of finger movement is:

$$\frac{\text{Restriction Degrees}}{\text{Normal Degrees}} \times 3/4 \times \text{amputation value at the joint concerned}$$

This formula is used as it is normally considered that a fused finger joint is equal to 3/4 of the value of an amputation at the same level.

~~Items #51, #52 and #53 of the Permanent Disability Evaluation Schedule allow a higher value to be applied if necessary (up to value of amputation). These are normally used when the fused finger is essentially useless and there would be no difference in the disability if the finger had been amputated.~~

When more than one finger is involved, the appropriate multiple finger chart from the ~~Permanent Disability Evaluation Schedule~~***Schedule*** is used to determine the amputation value at the joint concerned, thus building in any enhancement factor.

EFFECTIVE DATE: **August 1, 2003**
APPLICATION: **To all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003.**

#39.32 Thumb Restrictions

The basic principles set out in policy item #39.31 also apply here. The formula used to compute a percentage value for restriction of thumb movement is:

$$\frac{\text{Restriction Degrees}}{\text{Normal Degrees}} \times 1/2 \times \text{amputation value at the joint concerned}$$

This formula is used in that it is normally considered that a fused thumb joint is equal to 1/2 of the value of an amputation at the same level.

Where a finger and thumb are affected, **hand chart 1 and 2 of the *Schedule* are used. An enhancement factor of 100% of the lesser of these two disabilities is then added. Where the thumb and multiple fingers are affected, hand charts 3 to 5 are used and an enhancement factor of 100% of the lesser of the disabilities is then added** ~~an enhancement factor is added in the manner set out in policy item #39.24~~.

EFFECTIVE DATE: **August 1, 2003**
APPLICATION: **To all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003.**

#39.40 Sensory Losses

Some sensory losses are specifically listed in the ~~Permanent Disability Evaluation Schedule~~ ***Schedule***. Others, though not specifically referred to, may be assessed on a judgment basis as part of the overall disability incurred in a part of the body covered in the schedule.

The complete loss of the major nerves in the arms and legs is covered in items ~~73~~ **38** to ~~76~~ **41** of the ~~Permanent Disability Evaluation Schedule~~ ***Schedule***. When the fingers lose sensitivity as the result of an injury, an award of up to the full amputated value of the joint can be granted. This especially relates to the thumb, index and middle fingers, when the pinch grip is involved.

Awards for hearing loss are dealt with in policy item #31.00.

EFFECTIVE DATE: **August 1, 2003**
APPLICATION: **To all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003.**

#39.50 Non-Scheduled Awards

Any award where the ~~schedule~~ ***Schedule*** is not directly or indirectly used in the assessment is a non-scheduled award. This covers impairments in all parts of the body not listed in the ~~schedule~~ ***Schedule***. Disabilities resulting from multiple injuries or occupational diseases may also involve non-scheduled awards. The rules governing respiratory and skin diseases are set out in policy item #29.00 and policy item #30.50 respectively.

In the case of non-scheduled awards, the Board officers in Disability Awards use their own judgment to arrive at a percentage of disability appropriate to the particular claimant's impairment. Regard will be had to, inter alia, the ~~permanent functional impairment~~ **section 23(1)** evaluation, the circumstances of the claimant, medical opinions of Board or non-Board doctors, and to schedules ~~of disability~~ used in other jurisdictions.

Neither the age adaptability or enhancement factors nor devaluation are formally applied in respect of non-scheduled awards. (The exception is that an enhancement factor may be added with respect to spinal injuries as outlined in policy item #39.12.) However, in making a judgment as to the correct percentage of disability, the Board officer in Disability Awards will have regard to the age of the worker, to existing disabilities in other parts of the worker's body, or to the combined effect of more than one disability in the same part of the body.

EFFECTIVE DATE: **August 1, 2003**
APPLICATION: **To all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003.**

Appendix "C" Volume I

Additions in **bold;** deletions in ~~strikethrough~~

CHAPTER 6

PERMANENT DISABILITY AWARDS

#39.10 Scheduled Awards *Permanent Disability Evaluation Schedule*

For all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003, please refer to the *Permanent Disability Evaluation Schedule* in Appendix 4 of Volume II and the appropriate policies in Chapter 6 of Volume II on the application of the *Schedule*.

Scheduled awards are awards made under the Permanent Disability Evaluation Schedule, which is set out in Appendix 4. This is a rating schedule of percentages of impairment for specific injuries or mutilations. (4)

The Permanent Disability Evaluation Schedule is a set of guide-rules, not a set of fixed rules. The Disability Awards Officer or Adjudicator in Disability Awards is still free to apply other variables in arriving at a final pension; but the "other variables" referred to means other variables relating to the degree of physical impairment, not other variables relating to social or economic factors, nor rules (including schedules and guide-rules) established in other jurisdictions. In particular, the actual or projected loss of earnings of a worker because of the disability is not a variable which can be considered. (5)

Any revision of the schedule must be undertaken by procedures that are appropriate to changes of a legislative nature. It will not be done through appeal decisions in individual cases. The schedules in use in other jurisdictions are part of the material that would be looked at in any revision of the schedule used here; but they are not part of the material relevant in the decision of any individual claim.

In cases where the specific impairment is not covered by the schedule, but the part of the body in question is covered, the Disability Awards Officer or Adjudicator must first determine the percentage loss of function in the damaged area. This determination is based on the findings of the permanent functional impairment evaluation and other medical and non-medical evidence available. The final award is arrived at by taking this percentage of the percentage allocated in the schedule to the disabled part of the body. Because the schedule is used in the calculation, this type of award is still considered as a scheduled one. For example, the amputation of an arm down to the proximal third of the humerus or its disarticulation at the shoulder is scheduled at 70% of total disability. Suppose a worker suffers a severe crush injury to the arm which culminates in a permanent loss of half its function. The final assessment would be 50% of 70%, i.e. 35% of total disability.

#39.12 Enhancement

For all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003, please refer to the *Permanent Disability Evaluation Schedule* in Appendix 4 of Volume II and the appropriate policies in Chapter 6 of Volume II on the application of the *Schedule*.

The combined effect of two separate disabilities may be greater than the separate effect of each. Therefore, where a worker has an additional disability which pre-existed the injury or the injury causes more than one disability, the Board may, in certain situations, increase the overall percentage of disability that would otherwise be awarded. This is known as the "enhancement factor".

One situation where this may be done is where the worker has impairment in both arms or both legs. An enhancement factor of 50% of the lesser disability may be added to the total of the percentages awarded for each separate disability. Suppose, for example, a worker suffers an injury causing total immobility in the right ankle. That would be assessed pursuant to the schedule at 12% of total disability. There may be an adjustment for age; but suppose it appeared that, at the time of the work injury, the worker was already suffering from a serious disability involving total immobility in the left knee. The Disability Awards Officer or Adjudicator in Disability Awards may well conclude that having regard to the impaired mobility that the worker was already suffering through the disability in the left leg, the compensable disability in the right ankle results in a greater degree of physical impairment than it would for a person with a normal left leg.

Enhancement factors applied where more than one finger of the same hand is affected are dealt with in #39.22-32.

Prior to October 27, 1977, the Board did not normally permit an enhancement factor in respect of spinal column disabilities. However, subsequent to that date, the Board has concluded that such a factor may be added for combinations of disabilities when one of those disabilities involves the spinal column and that disability is shown to have been enhanced by the others. A factor of 50% of the disability attributed to the spine is added. Therefore, if the disability in the back is 10%, and the sum of the other disabilities is 16%, the enhancement factor is 5% and the total disability awarded 31%. This has not been retroactively applied to awards made prior to October 27, 1977.

#39.13 Devaluation

For all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003, please refer to the *Permanent Disability Evaluation Schedule* in Appendix 4 of Volume II and the appropriate policies in Chapter 6 of Volume II on the application of the *Schedule*.

The percentages set out in the Permanent Disability Evaluation Schedule represent the loss occurring when a disability exists alone in an otherwise healthy limb or body. When a disability exists alongside another disability in the same or another part of the body, adjustments may have to be made. This adjustment may be in an upward direction. For instance, as

indicated in #39.12, an enhancement factor may be added in certain cases when the combined effect of two disabilities in different areas of the body exceeds the sum of the schedule percentages allocated to each disability. On the other hand, where the sum of the schedule percentages allocated to several disabilities exceeds their actual combined effect, a downward adjustment is required. This is known as "devaluation".

If the schedule provides that the total loss of a particular part of the body causes a certain percentage loss of future earning capacity, then a partial loss of the use of that particular part will leave only a portion of the function of that part of the body remaining. If the schedule allocates 70% to the amputation of an arm at the shoulder, the occurrence of a fused index finger and thumb, worth 18%, will leave only 52% of the value of the arm. Any subsequent disabilities will be measured by reference to the remaining percentage, not the whole percentage set out in the schedule, i.e. 52% rather than 70% in the above example. Therefore, if, following the fused index finger and thumb, the claimant suffers a fused elbow, and then a frozen shoulder, the relevant percentages of disability awarded will be as follows:

A.	Value of whole arm in schedule	70% of total
B.	Value of fused index finger and thumb in schedule	18% disability
C.	Remaining value of arm (A−B)	52%
D.	Value of fused elbow in schedule	20%
E.	Percentage awarded for fused elbow $\left(\frac{D}{A} \times C\right)$	14.9%
F.	Remaining value of arm (C−E)	37.1%
G.	Value of frozen shoulder in schedule	35%
H.	Percentage awarded for frozen shoulder $\left(\frac{G}{A} \times F\right)$	18.6%
I.	Total percentage of disability awarded (B + E + H)	51.5%

A claimant will never receive more than 70% for disabilities existing in one arm.

#39.21 Amputation of One Finger

For all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003, please refer to the *Permanent Disability Evaluation Schedule* in Appendix 4 of Volume II and the appropriate policies in Chapter 6 of Volume II on the application of the *Schedule*.

It is usually considered that there must be shortening of the bone before an award is granted for finger amputations.

The percentages of disability awarded in respect of amputations of the fingers are set out in the Permanent Disability Evaluation Schedule (items 13 to 40).

In considering the index and middle fingers, if the amputation of the portion of the distal phalanx involves:

(a) less than 1/4 of the phalanx, it is not normally considered significant enough to have any impact on future earning capacity.

(b) 1/4 to 3/4 of the phalanx, it is considered as an amputation equivalent to 1/2 the value of the whole phalanx.

(c) 3/4 of the phalanx or greater, it is considered as an amputation equivalent to the whole phalanx.

In considering the ring and little fingers, if the amputation of the portion of the distal phalanx involves:

(a) less than 1/2 of the phalanx, it is not normally considered significant enough to have any impact on future earning capacity.

(b) 1/2 to 3/4 of the phalanx, it is considered as an amputation equivalent to 1/2 of the value of the whole phalanx.

(c) 3/4 of the phalanx or greater, it is considered as an amputation equivalent to the whole phalanx.

These are guidelines and discretion can be used in this area. For example, it is possible that with a loss of less than 1/2 of the distal phalanx of the ring finger there may be scarring and sensitivity remaining. Discretion could then be exercised because of the additional disabilities and an award considered.

#39.22 Amputation of More than One Finger

For all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003, please refer to the *Permanent Disability Evaluation Schedule* in Appendix 4 of Volume II and the appropriate policies in Chapter 6 of Volume II on the application of the *Schedule*.

Enhancement factors for multiple finger disabilities are built into the hand charts, in the Permanent Disability Evaluation Schedule. To determine what chart or combinations of charts apply to particular multiple finger disabilities, the following procedure is used.

1. Determine the most distal component(s) of the finger(s) involved. Use the applicable chart and record the percentage of disability.

2. Follow this procedure for each next level involved.

3. Total the percentages from each common level to determine the overall percentage of disability.

Examples Using the *Permanent Disability Evaluation Schedule*

1. Index finger amputated at M.P. joint, middle finger amputated at D.I.P. joint.

   Take Chart #2

distal phalanx of index	1.4%
distal phalanx of middle	1.4%

   Take Chart #1

middle phalanx of index	1.6%
proximal phalanx of index	1.6%
Overall Award	6.0%

2. Index finger amputated at M.P. joint, middle finger at P.I.P. joint, and ring finger at D.I.P. joint.

   Take Chart #8

distal phalanx of index	1.7%
distal phalanx of middle	1.7%
distal phalanx of ring	1.0%

   Take Chart #2

middle phalanx of index	2.8%
middle phalanx of middle	2.8%

   Take Chart #1

proximal phalanx of index	1.6%
Overall Award	11.6%

#39.23 Amputation of Thumb

For all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003, please refer to the *Permanent Disability Evaluation Schedule* in Appendix 4 of Volume II and the appropriate policies in Chapter 6 of Volume II on the application of the *Schedule*.

Partial amputation of the phalanx of a thumb is considered in the following fractions: 1/4, 1/3, 1/2, 2/3, 3/4. For example, if a worker suffered an amputation of the thumb involving 2/3 of the distal phalanx, an award of 2/3 of 4% or 2.67% would be considered.

#39.24 Amputation of Thumb and One or More Fingers

For all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003, please refer to the *Permanent Disability Evaluation Schedule* in Appendix 4 of Volume II and the appropriate policies in Chapter 6 of Volume II on the application of the *Schedule*.

The percentage of disability of the thumb is determined and the percentage of disability for the finger or fingers is determined. Normally, an enhancement factor of 100% of the lesser of these two disabilities is then added. The Disability Awards Officer or Adjudicator in Disability Awards does have discretion, based on the severity of the injuries, to adjust the enhancement factor, but normally a 100% multiple of the lesser is used.

More serious disabilities of this type are awards listed in the Permanent Disability Evaluation Schedule, items 9–12.

#39.30 Restrictions of Movement in Arms or Legs

For all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003, please refer to the *Permanent Disability Evaluation Schedule* in Appendix 4 of Volume II and the appropriate policies in Chapter 6 of Volume II on the application of the *Schedule*.

Restrictions of movement in the joints of the body are measured and documented during the permanent functional impairment evaluation. The Disability Awards Officer or Adjudicator in Disability Awards then applies the measurement to the appropriate item in the Permanent Disability Evaluation Schedule.

These awards are always scheduled.

#39.31 Finger Restrictions

For all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003, please refer to the *Permanent Disability Evaluation Schedule* in Appendix 4 of Volume II and the appropriate policies in Chapter 6 of Volume II on the application of the *Schedule*.

When considering restriction of finger movement, the full range of flexion restriction is taken into consideration, but only 50% of the range of restricted extension. This is because extension is not considered as vital as flexion. The formula used to compute a percentage value for restriction of finger movement is:

$$\frac{\text{Restriction Degrees}}{\text{Normal Degrees}} \times 3/4 \times \text{amputation value at the joint concerned}$$

This formula is used as it is normally considered that a fused finger joint is equal to 3/4 of the value of an amputation at the same level.

Items #51, #52 and #53 of the Permanent Disability Evaluation Schedule allow a higher value to be applied if necessary (up to value of amputation). These are normally used when the fused finger is essentially useless and there would be no difference in the disability if the finger had been amputated.

When more than one finger is involved, the appropriate multiple finger chart from the Permanent Disability Evaluation Schedule is used to determine the amputation value at the joint concerned, thus building in any enhancement factor.

#39.32 Thumb Restrictions

For all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003, please refer to the *Permanent Disability Evaluation Schedule* in Appendix 4 of Volume II and the appropriate policies in Chapter 6 of Volume II on the application of the *Schedule*.

The basic principles set out in #39.31 also apply here. The formula used to compute a percentage value for restriction of thumb movement is:

$$\frac{\text{Restriction Degrees}}{\text{Normal Degrees}} \times 1/2 \times \text{amputation value at the joint concerned}$$

This formula is used in that it is normally considered that a fused thumb joint is equal to 1/2 of the value of an amputation at the same level.

Where a finger and thumb are affected, an enhancement factor is added in the manner set out in #39.24.

#39.40 Sensory Losses

For all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003, please refer to the *Permanent Disability Evaluation Schedule* in Appendix 4 of Volume II and the appropriate policies in Chapter 6 of Volume II on the application of the *Schedule*.

Some sensory losses are specifically listed in the Permanent Disability Evaluation Schedule. Others, though not specifically referred to, may be assessed on a judgment basis as part of the overall disability incurred in a part of the body covered in the schedule.

The complete loss of the major nerves in the arms and legs is covered in items 73 to 76 of the Permanent Disability Evaluation Schedule.

When the fingers lose sensitivity as the result of an injury, an award of up to the full amputated value of the joint can be granted. This especially relates to the thumb, index and middle fingers, when the pinch grip is involved.

Awards for hearing loss are dealt with in #31.00.

APPENDIX 4

PERMANENT DISABILITY EVALUATION SCHEDULE — #39.10

For all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003, please refer to the *Permanent Disability Evaluation Schedule* in Appendix 4 of Volume II and the appropriate policies in Chapter 6 of Volume II on the application of the *Schedule*.

EXPLANATION OF THE SCHEDULE

This is the Schedule used for guidance in the measurement of partial disability using the physical impairment method. The Schedule attributes a percentage of total disability to each of the specified disablements. For example, an amputation of the arm, middle, third of humerus, is indicated to be 65%. When that percentage rate is applied, it means that a claimant will receive by way of pension 65% of 75% of average earnings as determined by the Act.

The Schedule does not necessarily determine the rate of pension. The Board is free to take other factors into account. Thus, the Schedule provides a guideline or starting point for the measurement rather than providing a fixed result.

Only a minority of disabilities are listed in the Schedule. In other cases, however, a Schedule can still be of some guidance value if the injury is similar to one that is listed.

Where a claimant is over the age of 45 at the effective date of the award, the percentage rate is increased by 1% of the assessed disability for each year over 45 up to a maximum of 20% of the assessed disability. For example, if the claimant were aged 55 at the effective date of the award and the rate indicated in the Schedule for the particular disablement is 50%, the age adaptability factor would be 10% of 50%, making an overall disability rating of 55% of total disability.

Appendix "D" Volume I

Additions in **bold;** deletions in ~~strikethrough~~

CHAPTER 4

COMPENSATION FOR OCCUPATIONAL DISEASES

#31.40 Amount of Compensation under Section 7

No temporary disability payments are made to workers suffering from non-traumatic hearing loss.

Hearing loss pensions are determined on the basis of audiometric tests conducted at the Audiology Unit of the Board or on the basis of prior audiometric tests conducted closer in time to when the worker was last exposed to hazardous occupational noise if in the Board's opinion the results of such earlier tests best represent the true measure of the worker's hearing loss which is due to exposure to occupational noise.

Section 7(3.1) of the Act provides:

"The board may make regulations to amend Schedule D in respect of

(a) the ranges of hearing loss,
(b) the percentages of disability, and
(c) the methods or frequencies to be used to measure hearing loss."

Where the loss of hearing amounts to total deafness measured in the manner set out in Schedule D, but with no loss of earnings resulting from the loss of hearing, Section 7(2) provides that compensation shall be calculated as for a disability equivalent to 15% of total disability. Where the loss of hearing does not amount to total deafness, and there is no loss of earnings resulting from the loss of hearing, Section 7(3) provides that compensation shall be calculated as for a lesser percentage of total disability, and, unless otherwise ordered by the Board, shall be based on the percentages set out in Schedule D. Schedule D is set out below.

SCHEDULE D

Non-Traumatic Hearing Loss

Complete loss of hearing in both ears equals 15% of total disability. Complete loss of hearing in one ear with no loss in the other equals ~~2.5~~ **3**% of total disability.

	Percentage of Total Disability	
Loss of Hearing in Decibels Measured in Each Ear in Turn	**Ear Most Affected PLUS Ear Least Affected**	
0–27	0	0
28–32	0.3	1.2
33–37	0.5	2.0
38–42	0.7	2.8
43–47	1.0	4.0
48–52	1.3	5.2
53–57	1.7	6.8
58–62	2.1	8.4
63–67	2.6	10.4
68 or more	3.0	12.0

The loss of hearing in decibels in the first column is the arithmetic average of thresholds of hearing measured in each ear in turn by pure tone, air conduction audiometry at frequencies of **500,** 1000~~,~~ **and** 2000 ~~and 3000~~ Hertzian waves, the measurements being made with an audiometer calibrated according to standards prescribed by the Board.

In assessing permanent disability awards under Section 7, there is no automatic allowance for presbycusis. In some cases, however, the existence of presbycusis may be relevant in deciding whether the worker has suffered a hearing loss due to their employment. The age adaptability factor is not applied to awards made under Section 7.

Where a worker has an established history of exposure to noise at work, and where there are other non-occupational causes or components in the worker's loss of hearing, and where this non-occupational component cannot be accurately measured using audiometric tests, then "Robinson's Tables" will apply. "Robinson's Tables" will only be applied where there is some positive evidence of non-occupational causes or components in the worker's loss of hearing (for example, some underlying disease) and will not be applied when the measured hearing loss is greater than expected and there is only a speculative possibility without evidential support that this additional loss is attributable to non-occupational factors.

"Robinson's Tables" were statistically formulated to calculate the expected hearing loss following a given exposure to noise. In applying these tables, the cumulative period of noise exposure is calculated. A factor for aging is then added. For pension purposes, the resulting

calculation is then compared on "Robinson's Tables" to the worst 10% of the population (i.e., at the same levels and extent of noise exposure, 90% of individuals will have better hearing than the worker).

In some cases, it will be found that a worker has already suffered a conductive hearing loss in one ear, unrelated to their work, which might well have afforded some protection against work-related noise-induced hearing loss in that ear. The normal practice in this situation would be to allocate the higher measure in Schedule D (the "ear least affected" column) to the other ear which has the purely noise-induced hearing loss.

A difficulty occurs where the worker is not employed at the time when their disability commenced. If there are no current earnings on which to base the pension, the Adjudicator should generally refer back to the employments in which the worker was most recently engaged and base the pension on their previous earnings thus discovered.

EFFECTIVE DATE: **August 1, 2003**
APPLICATION: **To all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003.**

Appendix "D" Volume II

Additions in **bold;** deletions in ~~strikethrough~~

CHAPTER 4

COMPENSATION FOR OCCUPATIONAL DISEASES

#31.40 Amount of Compensation under Section 7

No temporary disability payments are made to workers suffering from non-traumatic hearing loss.

Workers who develop non-traumatic noise induced hearing loss are, subject to the time periods referred to in section 23.1 of the *Act*, assessed for a permanent disability award under section 23 of the *Act*.

Hearing loss permanent disability awards are determined on the basis of audiometric tests conducted at the Audiology Unit of the Board or on the basis of prior audiometric tests conducted closer in time to when the worker was last exposed to hazardous occupational noise if, in the Board's opinion, the results of such earlier tests best represent the true measure of the worker's hearing loss which is due to exposure to occupational noise.

Section 7(3.1) of the *Act* provides:

> The Board may make regulations to amend Schedule D in respect of
>
> (a) the ranges of hearing loss,
> (b) the percentages of disability, and
> (c) the methods or frequencies to be used to measure hearing loss.

Where the loss of hearing amounts to total deafness measured in the manner set out in Schedule D, but with no loss of earnings resulting from the loss of hearing, section 7(2) provides that compensation shall be calculated as for a disability equivalent to 15% of total disability. Where the loss of hearing does not amount to total deafness, and there is no loss of earnings resulting from the loss of hearing, section 7(3) provides that compensation shall be calculated as for a lesser percentage of total disability, and, unless otherwise ordered by the Board, shall be based on the percentages set out in Schedule D. Schedule D is set out below.

SCHEDULE D

Non-Traumatic Hearing Loss

Complete loss of hearing in both ears equals 15% of total disability. Complete loss of hearing in one ear with no loss in the other equals ~~2.5~~ **3**% of total disability.

	Percentage of Total Disability	
Loss of Hearing in Decibels Measured in Each Ear in Turn	**Ear Most Affected PLUS Ear Least Affected**	
0–27	0	0
28–32	0.3	1.2
33–37	0.5	2.0
38–42	0.7	2.8
43–47	1.0	4.0
48–52	1.3	5.2
53–57	1.7	6.8
58–62	2.1	8.4
63–67	2.6	10.4
68 or more	3.0	12.0

The loss of hearing in decibels in the first column is the arithmetic average of thresholds of hearing measured in each ear in turn by pure tone, air conduction audiometry at frequencies of **500**, 1000~~,~~ **and** 2000 ~~and 3000~~ Hertzian waves, the measurements being made with an audiometer calibrated according to standards prescribed by the Board.

In assessing permanent disability awards under section 7, there is no automatic allowance for presbycusis. In some cases, however, the existence of presbycusis may be relevant in deciding whether the worker has suffered a hearing loss due to their employment. The age adaptability factor is not applied to awards made under section 7. Where a worker has an established history of exposure to noise at work, and where there are other non-occupational causes or components in the worker's loss of hearing, and where this non-occupational component cannot be accurately measured using audiometric tests, then "Robinson's Tables" will apply. "Robinson's Tables" will only be applied where there is some positive evidence of non-occupational causes or components in the worker's loss of hearing (for example, some underlying disease) and will not be applied when the measured hearing loss is greater than expected and there is only a speculative possibility without evidential support that this additional loss is attributable to non-occupational factors.

"Robinson's Tables" were statistically formulated to calculate the expected hearing loss following a given exposure to noise. In applying these tables, the cumulative period of noise exposure is calculated. A factor for aging is then added. For permanent disability award purposes, the resulting calculation is then compared on "Robinson's Tables" to the worst 10% of the population (i.e., at the same levels and extent of noise exposure, 90% of individuals will have better hearing than the worker).

In some cases, it will be found that a worker has already suffered a conductive hearing loss in one ear, unrelated to their work, which might well have afforded some protection against work-related noise-induced hearing loss in that ear. The normal practice in this situation would be to allocate the higher measure in Schedule D (the "ear least affected" column) to the other ear which has the purely noise-induced hearing loss.

A difficulty occurs where the worker is not employed at the time when their disability commenced. If there are no current earnings on which to base the permanent disability award, the Board officer should generally refer back to the employments in which the worker was most recently engaged and base the award on their previous earnings thus discovered.

If the worker is retired and under the age of 63 years as of the commencement of the hearing loss permanent disability award, periodic payments are made until the date the worker reaches 65 years of age. If the worker is retired and is 63 years of age or older as of the commencement of the hearing loss permanent disability award, periodic payments are made for two years following such date. See policy item #41.00, Duration of Permanent Disability Periodic Payments.

EFFECTIVE DATE: **August 1, 2003**
APPLICATION: **To all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003.**

Resolution of the Board of Directors

Number: 2003/06/17-09
Date: June 17, 2003
Subject: Rate Change to Employer Classification Units
2003 Base Assessment Rates

WHEREAS:

Pursuant to section 82 of the *Workers Compensation Act*, RSBC 1996, Chapter 492 and amendments thereto (the "Act"), the Board of Directors (the BOD) must set and revise the policies of the BOD, including policies respecting compensation, assessment, rehabilitation, and occupational health and safety;

AND WHEREAS:

Section 39(1) of the Act requires that the Workers' Compensation Board (the Board), for the purposes of creating and maintaining an adequate accident fund, assess and levy on and collect from independent operators and employers in each class . . . sufficient funds, according to an estimate to be made by the Board;

AND WHEREAS:

Section 42 of the Act provides that the Board shall establish subclassifications, differentials, and proportions in assessment rates as between the different kinds of employment in the same class as may be considered just;

AND WHEREAS:

Sections 37(1) and (2) of the Act authorize the Board to create and rearrange classes;

AND WHEREAS:

By resolution dated October 17, 2002, the Panel of Administrators for the purpose of assessment:

(a) approved the Schedule of Employer Classification Units and 2003 Base Assessment Rates, and

(b) incorporated the rates approved by that Resolution into the *2003 Classification and Rate List* to form part of the published policy of the Board;

AND WHEREAS:

The British Columbia Ferry Corporation, a deposit account for the purpose of paying assessments, ceased operating on April 1, 2003, and its operations were transferred to the British Columbia Ferry Services Inc.;

AND WHEREAS:

The Finance Division has recommended that the base rate for Classification Units 732014 and 732038 be changed effective April 2, 2003 to an average of the following,

(a) the rate that represents charging the current base rate of $2.38 per $100 of payroll from January 1 to April 1, 2003, inclusive, and

(b) a new base rate of $1.85 per $100 of payroll for the remainder of the 2003 calendar year;

THE BOARD OF DIRECTORS RESOLVES THAT:

1. The base rate for Classification Units 732014 and 732038 be changed effective April 2, 2003 to an average of the following:

   (a) the rate that represents charging the current base rate of $2.38 per $100 of payroll from January 1 to April 1, 2003, inclusive, and

   (b) a new base rate of $1.85 per $100 of payroll for the remainder of the 2003 calendar year;

2. This resolution constitutes a policy decision of the Board of Directors.

DATED at Richmond, British Columbia, on June 17, 2003.

Resolution of the Board of Directors

Number: 2003/07/15-01
Date: July 15, 2003
Subject: Amendments to Various Sections of the *Occupational Health and Safety Regulation* (B.C. Reg. 296/97, as amended), the *Regulations for Agricultural Operations* (B.C. Reg. 146/93, as amended) and the *Industrial Health and Safety Regulation* (B.C. Reg. 585/77, as amended), Pertaining to Occupational Exposure Limits

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WHEREAS:

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

AND WHEREAS:

The *Occupational Health and Safety Regulation* (*"OHSR"*), the *Regulations for Agricultural Operations* ("*RAO*") and the *Industrial Health and Safety Regulation* ("*IHSR*") contain requirements regarding a worker's exposure to chemical substances;

AND WHEREAS:

The American Conference of Governmental Industrial Hygienists ("ACGIH") is recognized worldwide as one of the leading bodies for establishing workplace occupational exposure limits;

AND WHEREAS:

The WCB, pursuant to its mandate under the Act, has proposed amendments to relevant sections of the *OHSR, RAO,* and *IHSR* and has given notice of the proposed amendments and held a public hearing on the proposed amendments in accordance with section 226(1) of the Act;

AND WHEREAS:

The Board of Directors has considered the expertise, resources and review processes established by the ACGIH for the development and setting of Threshold Limit Values for chemical substances;

AND WHEREAS:

The Board of Directors, after due consideration of all presentations to the WCB, considers it necessary and advisable in accordance with the WCB's mandate under the Act in relation to occupational health and safety and occupational environment to amend sections of the *OHSR*, *RAO*, and *IHSR* pertaining to occupational exposure limits;

AND WHEREAS:

Policy has been developed to provide exposure limits for chemical substances where it is determined that the adoption of the corresponding Threshold Limit Value, as developed by the ACGIH, is not appropriate or where it is determined that an exposure limit is required for a substance in absence of a corresponding Threshold Limit Value;

AND WHEREAS:

An internal review committee is recommended to facilitate an ongoing review of exposure limits provided for in policy and proposed new Threshold Limit Values developed by the ACGIH;

AND WHEREAS:

Pursuant to the Provincial Government's Regulatory Reform Policy, the Board of Directors has evaluated the proposed regulatory amendments according to the established regulatory criteria;

THE BOARD OF DIRECTORS RESOLVES THAT:

1. The regulatory amendments to various sections of the *OHSR, RAO,* and *IHSR* as set out in Appendices A, B, and C are approved.

2. The statements under the heading POLICY in Item R5.48-1, as set out in Appendix D, are approved and the Item will be added to the *Prevention Manual*.

3. The director general of the Policy and Regulation Development Bureau will establish terms of reference for an internal review committee, which will be responsible for facilitating an ongoing review of exposure limits contained in policy and proposed new Threshold Limit Values as developed by the ACGIH.

4. The proposed structure of the internal review committee will be brought forward to the Board of Directors for approval and will be established on an annual basis.

5. The Regulatory Criteria Checklist in Appendix E is approved.

6. The above amendments to the *OHSR*, *RAO*, and *IHSR* will be deposited with the registrar of Regulations in such form as may be required by the registrar.

7. The above amendments to the *OHSR*, *RAO*, and *IHSR* come into force 90 days after their deposit under the *Regulations Act.*

8. The amendment to the *Prevention Manual* is effective on the date the above noted regulatory amendments come into force.

DATED at Richmond, British Columbia, July 15, 2003.

Appendix A

THE BOARD OF DIRECTORS RESOLVES THAT:

1 Section 1.1 of the Occupational Health and Safety Regulation, B.C. Reg. 296/97, is amended by adding the following definitions:

"mg/m^{3}" means milligrams of a substance per cubic metre of air;

"ppm" means parts of a vapour or a gas per million parts of contaminated air by volume at a temperature of 25 degrees Celsius and an atmospheric pressure of 760 millimetres of mercury;

2 Section 4.42 (4) (a) is amended by striking out "provided in Table 5.4 in Part 5 (Chemical and Biological Substances)," *and substituting* "established by section 5.48,".

3 Section 5.1 is amended

(a) by striking out "8-hour exposure limit" *and substituting* "8-hour TWA limit",

(b) by striking out "15-minute exposure limit" *and substituting* "short-term exposure limit" or " STEL",

(c) by adding the following definitions:

"ACGIH" means the American Conference of Governmental Industrial Hygienists publication entitled "Threshold Limit Values and Biological Exposure Indices", dated 2002, as amended from time to time;

"IARC" means the International Agency for Research on Cancer publication "Monographs on the Evaluation of Carcinogenic Risks to Humans", as amended from time to time;*, and*

(d) in the definition of carcinogen, by striking out "Table 5-4" *and substituting* "section 5.57 (1)".

4 Section 5.48 is repealed and the following is substituted:

Exposure limits

5.48 Except as otherwise determined by the board, the employer must ensure that no worker is exposed to a substance that exceeds the ceiling limit, short-term exposure limit, or 8-hour TWA limit prescribed by ACGIH.

5 Section 5.49 is repealed and the following substituted:

Excursion limits

5.49 If a substance referred to under section 5.48 has an 8-hour TWA limit, the employer must, in addition to the requirement of section 5.48, ensure that a worker's exposure to the substance does not exceed

(a) three times the 8-hour TWA limit for more than a total of 30 minutes during the work period, and

(b) five times the 8-hour TWA limit at any time.

6 Section 5.50 (1) is amended by striking out "exposure" *wherever it occurs and in each case substituting* "TWA".

7 Section 5.51 is repealed and the following substituted:

Additive effects

5.51 If there is exposure to a mixture of 2 or more substances with established exposure limits which exhibit similar toxicological effects, the effects of such exposure must be considered additive unless it is known otherwise, and the additive exposure must not exceed 100% when calculated as follows:

$$AE = \%EL_1 + \%EL_2 + \ldots \%EL_n$$

where

(a) AE is the calculated additive exposure to the mixture,

(b) $\%EL_1$ is the measured exposure to component 1 of the mixture expressed as a percentage of its exposure limit,

(c) $\%EL_2$ is the measured exposure to component 2 of the mixture expressed as a percentage of its exposure limit, and

(d) $\%EL_n$ is the measured exposure to any additional components of the mixture expressed as a percentage of their respective exposure limits.

8 Section 5.55 (1) is amended by striking out "listed in Table 5-4" *and substituting* "established under section 5.48".

9 Section 5.57 is repealed and the following substituted:

Designated substances

5.57 (1) If a substance identified in ACGIH or IARC by any of the following notations, abbreviations, or endnotes is present in the workplace, the employer must replace it, if practicable, with a material which reduces the risk to workers:

(a) ACGIH A1 or A2, or IARC 1, 2A or 2B carcinogen,

(b) reproductive critical effects,

(c) sensitization critical effect or SEN notation, or

(d) L endnote.

(2) If it is not practicable to substitute a material which reduces the risk to workers, in accordance with subsection (1), the employer must implement an exposure control plan to maintain workers' exposure as low as reasonably achievable below the exposure limit established under section 5.48.

(3) The exposure control plan must meet the requirements of section 5.54.

10 Section 5.58 (1) is repealed and the following substituted:

Protective policy

5.58 (1) At any worksite where a worker is exposed to a substance which is identified in section 5.57 (1) as having a reproductive critical effect, a sensitization critical effect or SEN notation, the employer must develop policy and procedures appropriate to the risk, which may include protective reassignment.

11 Table 5-1 (Recirculation of discharged air) following section 5.70 is amended

(a) in the first sentences opposite "Recirculation permitted without written approval" ***by striking out*** "exposure" ***wherever it occurs and in each case substituting*** "TWA", ***and***

(b) in the third sentence opposite "Recirculation permitted without written approval" ***by striking out*** "A welding fume (including its components designated as ALARA under section 5.57 and its associated gases)" ***and substituting*** "A welding fume (including its components identified under section 5.57(1))",

(c) in the last sentence opposite "Recirculation permitted without written approval" ***by striking out*** "exposure" ***and substituting*** "8-hour TWA", ***and***

(d) in the sentence opposite "No recirculation permitted" ***by striking out*** "An ALARA substance" ***and substituting*** "A substance identified under section 5.57(1)".

12 ***Table 5-4: Exposure limits and Designations, following section 5.102, is repealed.***

13 ***In section 9.1, the definition of*** "harmful substance" ***is amended by striking out*** "listed in Table 5-4 in Part 5 (Chemical and Biological Substances)" ***and substituting*** "referred to under section 5.48".

14 ***Section 12.135 is amended by striking out*** "sensitizing agent" ***and substituting*** "sensitizing agent referred to in section 5.57 (1),".

15 ***Section 30.8 (2) (b) is amended by striking out*** "listed in Table 5-4 in Part 5 (Chemical and Biological Substances)" ***and substituting*** "referred to under section 5.57 (1)".

16 ***Section 31.32 is amended by striking out*** "in Part 5 (Chemical and Biological Substances)" ***and substituting*** "established under section 5.48".

17 ***The above amendments come into force 90 days after their deposit under the Regulations Act.***

DATED at Richmond, British Columbia, July 15, 2003.

Appendix B

THE BOARD OF DIRECTORS RESOLVES THAT:

1 Section 57 (b) of the Regulations for Agricultural Operations, B.C. Reg. 146/93, is amended by striking out "18%" *and substituting* "19.5%".

2 Section 58 is repealed and the following substituted:

Ventilation and precleaning

58 If tests made under section 57 indicate unsafe conditions, the employer must

(a) ventilate or clean the confined space, or both, and then retest it to ensure that harmful substances are at or below the exposure limits established under section 5.48 of the Occupational Health and Safety Regulation, and

(b) ensure that the oxygen concentration in the confined space is greater than 19.5% by volume before a worker enters or re-enters the confined space.

3 Section 85 is repealed and the following substituted:

When required

85 (1) If workers are or may be exposed to an atmosphere with less than 19.5% oxygen or to concentrations of air contaminants in excess of the exposure limits established under section 5.48 of the Occupational Health and Safety Regulation, mechanical means or engineering design must be used to prevent or to eliminate the hazardous exposure conditions.

(2) If

(a) the prevention or elimination of the hazardous exposure conditions is not reasonably practicable, or

(b) if the exposure results from temporary or emergency conditions only,

every worker who may be exposed must wear protective respiratory equipment.

4 The above amendments come into force 90 days after their deposit under the Regulations Act.

DATED at Richmond, British Columbia, July 15, 2003.

Appendix C

THE BOARD OF DIRECTORS RESOLVES THAT:

1 Section 8.56 (3) (a) of the Industrial Health and Safety Regulation, B.C. Reg. 585/77, is repealed and the following substituted:

(a) the substances have an exposure limit greater than 1.0 mg/m^3 as established under section 5.48 of the Occupational Health and Safety Regulation, and

2 Appendices A and B are repealed.

3 The above amendments come into force 90 days after their deposit under the Regulations Act.

DATED at Richmond, British Columbia, July 15, 2003.

Appendix D

RE: Chemical and Biological Substances — Exposure Limits and Designations **ITEM: R5.48-1**

BACKGROUND

1. Explanatory Notes

Section 5.48 provides established limits for a worker's exposure to hazardous chemical substances. Generally, these exposure limits are established according to the Threshold Limits Values adopted by the American Conference of Governmental Industrial Hygienists. However, the Board has authority to make exceptions and adopt occupational exposure limits for specific chemical substances that are not consistent with the Threshold Limit Values established by the American Conference of Governmental Industrial Hygienists.

2. The Regulation

Section 5.48:

> Except as otherwise determined by the board, the employer must ensure that no worker is exposed to a substance that exceeds the ceiling limit, short-term exposure limit, or 8-hour TWA limit prescribed by ACGIH.

Section 5.57:

> (1) If a substance identified in ACGIH or IARC by any of the following notations, abbreviations, or endnotes is present in the workplace, the employer must replace it, if practicable, with a material which reduces the risk to workers:
>
> (a) ACGIH A1 or A2, or IARC 1, 2A or 2B carcinogen,
> (b) reproductive critical effects,
> (c) sensitization critical effect or SEN notation, or
> (d) L endnote.
>
> (2) If it is not practicable to substitute a material which reduces the risk to workers, in accordance with subsection (1), the employer must implement an exposure control plan to maintain workers' exposure as low as reasonably achievable below the exposure limit established under section 5.48.

3. Preamble to Policy

The following is a preamble to be applied to those exposure limits developed by the Board as an exception to the Threshold Limit Values established by the American Conference of Governmental Industrial Hygienists:

> *An exposure level is a maximum allowed airborne concentration and is not intended to represent a fine line between safe and harmful conditions. In determining an exposure limit, it is not possible to take into account all factors that could influence the effect that exposure to the substance may have on an individual worker. Therefore, for all hazardous substances, regardless of any assigned exposure limit, the guiding principle is elimination of exposure or reduction to the lowest level that is reasonably achievable below the exposure limit.*
>
> *Due to a wide variation in individual susceptibility, some workers may experience discomfort from some substances at concentrations at or below the exposure level. Others may be affected more seriously by aggravation of a pre-existing condition, or by development of an occupational disease. Furthermore, other workplace contaminants may affect an individual's response. The effects of combined chemical exposures are often unknown or poorly defined.*

POLICY

As presented in the table below, the Board has determined exposure limits for specific substances, notwithstanding the Threshold Limit Values established by the American Conference of Governmental Industrial Hygienists.

Substance/Chemical Name	CAS No.	Unit	8-hour TWA Limit	Short-term Limit, STEL	Ceiling Limit	Notation, Abbreviation, Endnote	Critical Health Effect
ABATE (TEMEPHOS), RESPIRABLE	3383-96-8	mg/m3	3				
ABATE (TEMEPHOS)	3383-96-8	mg/m3	10	20			
ACETAMIDE	60-35-5					2B	
ACETONE	67-64-1	ppm	250	500			
ACETONE CYANOHYDRIN, as CN	75-86-5	mg/m3			3.5	Skin	
ALLYL AMINE	107-11-9	ppm	2				
ALUMINUM HYDROXIDE, RESPIRABLE	21645-51-2	mg/m3	3				
ALUMINUM OXIDE, RESPIRABLE, as Al2O3	1344-28-1	mg/m3	3				
ALUMINUM, RESPIRABLE, as Al	7429-90-5	mg/m3	3				

Substance/Chemical Name	CAS No.	Unit	8-hour TWA Limit	Short-term Limit, STEL	Ceiling Limit	Notation, Abbreviation, Endnote	Critical Health Effect
AMMONIUM SULFAMATE, RESPIRABLE	7773-06-0	mg/m3	3				
BARIUM SULFATE, RESPIRABLE	7727-43-7	mg/m3	3				
BENOMYL, RESPIRABLE	17804-35-2	mg/m3	3				
BENZIDINE-BASED DYES						2A	
BENZYL CHLORIDE	100-44-7	ppm			1		
BISMUTH TELLURIDE, UNDOPED, RESPIRABLE, as Bi2Te3	1304-82-1	mg/m3	3				
BROMOCHLOROMETHANE	74-97-1	ppm	200	250			
BUTANE	106-97-8	ppm	600	750			
n-BUTANOL	71-36-3	ppm	15				
n-BUTYL ACETATE	123-86-4	ppm	20				
n-BUTYL METHACRYLATE	97-88-1	ppm	50				
CALCIUM ARSENATE, AS As	7778-44-1	mg/m3	0.01				
CALCIUM CARBONATE (incl. LIMESTONE, MARBLE), INHALABLE	1317-65-3	mg/m3	10				
CALCIUM CARBONATE (incl. LIMESTONE, MARBLE), RESPIRABLE	1317-65-3	mg/m3	3				
CALCIUM SILICATE, RESPIRABLE	1344-95-2	mg/m3	3				
CALCIUM SULFATE, RESPIRABLE	7778-18-9	mg/m3	3				
CARBON DIOXIDE	124-38-9	ppm	5000	15,000			
CARBON DISULFIDE	75-15-0	ppm	4	12		Skin	
CARBON TETRACHLORIDE	56-23-5	ppm	2			Skin; A2, 2B	
CELLULOSE, RESPIRABLE	9004-34-6	mg/m3	3				
CHLOROACETIC ACID	79-11-8	ppm	0.3				
p-CHLOROANILINE	106-47-8					2B	
CHLOROBROMOMETHANE	74-97-5	ppm	200	250			

Substance/Chemical Name	CAS No.	Unit	8-hour TWA Limit	Short-term Limit, STEL	Ceiling Limit	Notation, Abbreviation, Endnote	Critical Health Effect
1-CHLORO-1,1-DIFLUOROETHANE	75-68-3	ppm	1000				
CHLORODIFLUOROMETHANE	75-45-6	ppm	500	1250			
CHLOROFORM	67-66-3	ppm	2			2B	Reproductive
4-CHLORO-o-TOLUIDINE	95-69-2					2A	
2-CHLORO-6-(TRICHLOROMETHYL)-PYRIDINE, RESPIRABLE (NITRAPYRIN)	1929-82-4	mg/m3	3				
CHLOROTRIFLUOROMETHANE	75-72-9	ppm	1000				
CLOPIDOL, RESPIRABLE	2971-90-6	mg/m3	3				
CHROMIUM, WATER INSOLUBLE, Cr VI COMPOUNDS	7440-47-3	mg/m3	0.025		0.1	A1, 1	
CUMENE	98-82-8	ppm	25	75			
2,4-DIAMINOANISOLE	615-05-4					2B	
2,4-DIAMINOTOLUENE	95-80-7					2B	
1,2-DIBROMO-3-CHLOROPROPANE	96-12-8					2B	
2,6-DI-tert-BUTYL-p-CRESOL	128-37-0	mg/m3	10	20			
DICHLOROMETHANE	75-09-2	ppm	25			2B	
2,2′-DICHLORODIETHYL SULFIDE (MUSTARD GAS)	505-60-2					1	
2,2′-DICHLORO-n-METHYLDIETHYLAMINE (NITROGEN MUSTARD)	51-75-2					2A	
DICYCLOPENTADIENYL IRON (FERROCENE), RESPIRABLE	102-54-5	mg/m3	3				
DICYCLOHEXYLMETHANE-4,4′-DIISOCYANATE	5129-30-1	ppm	0.005		0.01		
2,4-DICHLOROPHENOXYACETIC ACID AND ITS ESTERS	94-75-7	mg/m3	10	20			
DIETHYL SULFATE	64-67-5					2A	
DIISOCYANATES, N.O.S.		ppm	0.005		0.01		
3,3′-DIMETHOXYBENZIDINE	119-90-4					2B	

Substance/Chemical Name	CAS No.	Unit	8-hour TWA Limit	Short-term Limit, STEL	Ceiling Limit	Notation, Abbreviation, Endnote	Critical Health Effect
DIMETHOXYMETHANE	109-87-5	ppm	1000	1250			
3,3′-DIMETHYLBENZIDINE	119-93-7					2B	
DIMETHYL ETHER	115-10-6	ppm	1000				
1,2-DIMETHYLHYDRAZINE	540-73-8					2B	
DIMETHYL SULFATE	77-78-1	ppm			0.1	Skin, 2A	
n-DIOCTYL PHTHALATE	117-84-0	mg/m3	5				
DIPHENYL ETHER, MIXED WITH DIPHENYL	101-84-8	ppm	1	2			
DIPROPYLENE GLYCOL METHYL ETHER	34590-94-8	ppm	100	150			
DYFONATE	944-22-9	mg/m3	0.1				
EMERY, RESPIRABLE	12415-34-8	mg/m3	3				
ENFLURANE	13838-16-9	ppm	2				
EPICHLOROHYDRIN	106-89-8	ppm	0.1			Skin, 2A	
ETHYL ACETATE	141-78-6	ppm	150				
ETHYL METHACRYLATE	97-63-2	ppm	50				
ETHYLENE DIBROMIDE	106-93-4	ppm	0.5			Skin, 2A	
ETHYLENE DICHLORIDE (1,2-DICHLOROETHANE)	107-06-2	ppm	1	2		2B	
ETHYLENE GLYCOL, PARTICULATE	107-06-2	mg/m3	10	20			
ETHYLENE GLYCOL, VAPOUR	107-21-1	ppm			50		
ETHYLENE OXIDE	75-21-8	ppm	0.1	1		A2, 1	Reproductive
FLUORINE	7782-41-4	ppm	0.1				
FLUROXENE	406-90-6	ppm	2				
FORMALDEHYDE	50-00-0	ppm	0.3		1	SEN, A2, 2A	
FURFURYL ALCOHOL	98-00-0	ppm	5	10		Skin	
GLYCERIN MIST, RESPIRABLE	56-81-5	mg/m3	3				

Substance/Chemical Name	CAS No.	Unit	8-hour TWA Limit	Short-term Limit, STEL	Ceiling Limit	Notation, Abbreviation, Endnote	Critical Health Effect
GYPSUM, INHALABLE	13397-24-5	mg/m3	10	20			
GYPSUM, RESPIRABLE	13397-24-5	mg/m3	3				
HALOTHANE	151-67-7	ppm	2				Reproductive
HEXAMETHYL PHOSPHORAMIDE	680-31-9					2B	
n-HEXANE	110-54-3	ppm	20			Skin	
HEXANE, ALL ISOMERS except n-HEXANE		ppm	200				
HYDROGEN FLUORIDE, as F	7664-39-3	ppm			2		
HYDROQUINONE	123-31-9	mg/m3			2		
IRON PENTACARBONYL	13463-40-6	ppm	0.01				
ISOPROPYL GLYCIDYL ETHER (IGE)	4016-14-2	ppm			50		
LITHIUM HYDROXIDE	1310-65-2	mg/m3			1		
MAGNESITE (MAGNESIUM CARBONATE), RESPIRABLE	546-93-0	mg/m3	3				
MAGNESIUM OXIDE, RESPIRABLE DUST AND FUME, as Mg	1309-48-4	mg/m3	3	10			
MERCURY, ARYL COMPOUNDS	7439-97-6	mg/m3	0.05			Skin	
MERCURY, METHYL see Table 1 (MERCURY, ALKYD)	7439-97-6	mg/m3				2B	
MESITYL OXIDE	141-79-7	ppm	10	25			
METHOXYFLURANE	76-38-0	ppm	2				
1-METHOXY-2-PROPANOL	107-98-2	ppm	50	75			
2-METHOXY-1-PROPANOL	1589-47-5	ppm	20	40			
1-METHOXYPROPYL-2-ACETATE	108-65-6	ppm	50	75			
2-METHOXYPROPYL-1-ACETATE	70657-70-4	ppm	20	40			
4,4'-METHYLENEDIANILINE	101-77-9	ppm	0.01			Skin, 2B	
METHYL ETHYL KETONE (MEK)	78-93-3	ppm	50	100			
METHYL PROPYL KETONE	107-87-9	ppm	150	250			

Substance/Chemical Name	CAS No.	Unit	8-hour TWA Limit	Short-term Limit, STEL	Ceiling Limit	Notation, Abbreviation, Endnote	Critical Health Effect
alpha-METHYL STYRENE	98-83-9	ppm	50	75	100		
1,5-NAPHTHYLENE DIISOCYANATE	3173-72-6	ppm	0.005		0.01		
NICKEL, SOLUBLE INORGANIC COMPOUNDS (NOS), INHALABLE		mg/m3	0.05			1	
NICKEL, INSOLUBLE INORGANIC COMPOUNDS (NOS), INHALABLE		mg/m3	0.05			A1, 1	
NICKEL CARBONYL	13463-39-3	ppm	0.001			1	
NITROGEN DIOXIDE	10102-44-0	ppm			1		
2-NITROPROPANE	79-46-9	ppm	5				
NITROPYRENE, MONO-, DI-, TRI, TETRA, ISOMERS	5522-43-01 57835-92-4					2B	
n-NITROSODIETHANOLAMINE	1116-54-7					2B	
n-NITROSODIETHYLAMINE	55-18-5					2A	
n-NITROSOMETHYLETHYLAMINE	10595-95-6					2A	
n-NITROSOMORPHOLINE	59-89-2					2B	
n-NITROSOPIPERIDINE	100-75-4					2B	
n-NITROSOPYRROLIDINE	930-55-2					2B	
NITROUS OXIDE	10024-97-2	ppm	25				Reproductive
OIL MIST, MINERAL, MILDLY REFINED		mg/m3	0.2				
OIL MIST, MINERAL, SEVERELY REFINED		mg/m3	1				
PENTAERYTHRITOL, RESPIRABLE	115-77-5	mg/m3	3				
PERLITE, RESPIRABLE	60476-38-2	mg/m3	3				
PETROLEUM GAS, LIQUIFIED	68476-85-7	ppm	1000	1250			
PHENYL ISOCYANATE	103-71-9	ppm	0.005		0.01		
PHENYL MERCAPTAN	108-98-5	ppm			0.1		
PICLORAM, RESPIRABLE	1918-02-1	mg/m3	3				

Substance/Chemical Name	CAS No.	Unit	8-hour TWA Limit	Short-term Limit, STEL	Ceiling Limit	Notation, Abbreviation, Endnote	Critical Health Effect
PIPERAZINE DIHYDROCHLORIDE	142-64-3	mg/m3	0.3	1			Sensitization
PIPERIDINE	110-89-4	ppm	1				
PLASTER OF PARIS, RESPIRABLE	26499-65-0	mg/m3	3				
PLASTER OF PARIS, INHALABLE	26499-65-0	mg/m3	10				
POLYVINYL CHLORIDE, INHALABLE	9002-86-2	mg/m3	5				
PORTLAND CEMENT, RESPIRABLE	65997-15-1	mg/m3	3				
RHODIUM, METAL AND INSOLUBLE COMPOUNDS, as Rh	7440-16-6	mg/m3	0.1	0.3			
RHODIUM, SOLUBLE COMPOUNDS, AS Rh	7440-16-6	mg/m3	0.001	0.003			
ROUGE, RESPIRABLE		mg/m3	3				
SELENIUM AND COMPOUNDS, AS Se	7782-49-2	mg/m3	0.1				
SESONE, RESPIRABLE	136-78-7	mg/m3	3				
SILICA, AMORPHOUS:							
DIATOMACEOUS EARTH, UNCALCINED, INHALABLE	61790-53-2	mg/m3	4				
DIATOMACEOUS EARTH, UNCALCINED, RESPIRABLE	61790-53-2	mg/m3	1.5				
PRECIPITATED SILICA and SILICA GEL, INHALABLE	112926-00-8	mg/m3	4				
PRECIPITATED SILICA and SILICA GEL, RESPIRABLE	112926-00-8	mg/m3	1.5				
SILICA FUME, INHALABLE	69012-64-2	mg/m3	4				
SILICA FUME, RESPIRABLE	69012-64-2	mg/m3	1.5				
SILICON, RESPIRABLE	7440-21-3	mg/m3	3				
SILICON TETRAHYDRIDE (SILANE)	7803-62-5	ppm	0.5	1			
SILVER, METAL, AS Ag	7440-22-4	mg/m3	0.01	0.03			
STARCH, RESPIRABLE	9005-25-8	mg/m3	3				

Substance/Chemical Name	CAS No.	Unit	8-hour TWA Limit	Short-term Limit, STEL	Ceiling Limit	Notation, Abbreviation, Endnote	Critical Health Effect
STODDARD SOLVENT	8052-41-3	ppm	50	100			
STYRENE	100-42-5	ppm	50	75		2B	
SUCROSE, RESPIRABLE	57-50-1	mg/m3	3				
TEREPHTHALIC ACID, RESPIRABLE	100-21-0	mg/m3	3				
1,1,2,2-TETRACHLORO-1,2-DIFLUOROETHANE	76-12-0	ppm	200				
TETRAETHYL LEAD, as Pb	78-00-2	mg/m3	0.075			Skin	
TETRAMETHYL LEAD, as Pb	75-74-1	mg/m3	0.075			Skin	
4,4'-THIObis(6-tert-BUTYL-m-CRESOL), RESPIRABLE	96-69-5	mg/m3	3				
TITANIUM DIOXIDE, RESPIRABLE	13463-67-7	mg/m3	3				
TOLUENE DIISOCYANATE (TDI)	584-84-9	ppm	0.005	0.01		2B	Sensitization
1,1,2-TRICHLORO-1,2,2-TRIFLUOROETHANE	76-13-1	ppm	500	1250			
TRIMETHYL HEXAMETHYLENE DIISOCYANATE	ppm	0.005		0.01			
TRI-n-BUTYLTIN COMPOUNDS		mg/m3	0.05				
URANIUM COMPOUNDS, NATURAL, SOLUBLE & INSOLUBLE, as U	7440-61-1	mg/m3	0.05			A1	
VANADIUM PENTOXIDE, DUST or FUME, RESPIRABLE, as V2O5	1314-62-1	mg/m3			0.05		
VEGETABLE OIL MIST, RESPIRABLE FRACTION, EXCEPT CASTOR, CASHEW NUT, OR SIMILAR IRRITATING OILS	8008-89-7	mg/m3	3				
VINYLIDENE CHLORIDE	75-35-4	ppm	1				
VINYL TOLUENE	25013-15-4	ppm	25	75			
WOOD DUST							
ALLERGENIC		mg/m3	1			1	
NON-ALLERGENIC, HARDWOOD		mg/m3	1			A1, 1	
NON-ALLERGENIC, SOFTWOOD		mg/m3	2.5			1	

Substance/Chemical Name	CAS No.	Unit	8-hour TWA Limit	Short-term Limit, STEL	Ceiling Limit	Notation, Abbreviation, Endnote	Critical Health Effect
ZINC STEARATE, INHALABLE	557-05-1	mg/m3	10				
ZINC STEARATE, RESPIRABLE	557-05-1	mg/m3	3				

PRACTICE

For any relevant PRACTICE information, readers should consult the Prevention Division's Guidelines available on the WCB website.

EFFECTIVE DATE: *(TBD)*
AUTHORITY: **s. 5.48, Occ*upational Health and Safety Regulation***
CROSS REFERENCES:
HISTORY:
APPLICATION:

Appendix E

REGULATORY CRITERIA CHECKLIST

A. Background

On March 11, 2002 the provincial government introduced a new Regulatory Reform Policy ("Policy"). The Policy is intended to "support the government's commitment to reducing the regulatory burden in British Columbia by one-third over three years." The Policy applies to all proposed legislation and regulations.

The Policy requires the chair of the Board of Directors to ensure that proposed regulations are evaluated according to regulatory criteria set out in the Policy, and to sign and make public the "Regulatory Criteria Checklist" ("Checklist") when regulations are enacted. The criteria are designed to ensure that all new regulations are results-based and contribute to a more competitive regulatory environment.

The Policy provides for exemptions from the Checklist if the head of the regulatory agency certifies that, in his or her opinion, the regulation satisfies one or more of the following conditions:

- Is non-regulatory in nature;
- Changes fees in respect of a financial year by an annual rate that has been approved by Treasury Board;
- Relates only to the procedures or practices of a court or tribunal;
- Is required under a national uniform legislation or regulatory scheme or by federal legislation that has already been assessed against criteria similar to that provided in the Checklist;
- Is fundamentally declaratory or machinery in nature such as housekeeping changes that clarify or correct a provision without changing procedural requirements;
- Provides for the commencement of an Act or regulation or the commencement of a provision of an Act or regulation;
- Is consolidated and reviewed under the reversion powers in Part 2 of the *Regulations Act*;
- Is transitional in nature;
- The special circumstances of the case, as identified by the responsible minister or head of the regulatory authority, make it impracticable to comply with the Regulatory Criteria.

The proposed regulatory amendments regarding occupational exposure limits do not meet the criteria for an exemption from the Checklist.

B. Proposed Regulatory Amendments

The *Occupational Health and Safety Regulation* currently contains a table (Table 5-4) of occupational exposure limits for 860 chemical substances. This table serves to restrict the exposure of workers to hazardous chemical substances in the workplace. The exposure limits are set at levels where, it is generally accepted, that repeated daily exposure would not cause health problems in most workers.

Appendices A and B of the *Industrial Health and Safety Regulation* also contain a list of exposure limits, which is referenced in the *Regulations for Agricultural Operations*.

The proposed regulatory amendments would replace the existing occupational exposure limits for chemical substances with the 2002[1] Threshold Limit Values ("TLVs") as established by the American Conference of Governmental Industrial Hygienists ("ACGIH").

The proposed amendments are intended to provide:

- A mechanism for ongoing review of the WCB's regulation of exposure to chemical substances. The TLVs are subject to continual expert reviews by professionals in the field of study. The expertise, resources, and review processes established by the ACGIH provide considerable credibility to the TLVs, which cannot be easily and reasonably duplicated within the WCB. The proposed regulatory and policy amendments should enable the WCB to achieve its mandate to ensure that adopted exposure limits are consistent with workplace practices, technological advances and other changes affecting occupational health and safety.

- Greater harmonization with the regulatory approach taken in other Canadian jurisdictions. Each of the other Canadian jurisdictions has adopted the ACGIH TLVs in whole or in part.[2]

- An improved level of safety in the workplace. The scientific documentation supporting each TLV is significantly more comprehensive and defensible that the documentation supporting the current exposure limits. Further, for a number of substances, the adoption of the TLV will result in lower exposure limits.[3]

C. Explanatory Notes

1. Reverse Onus: Need for Regulation is Justified

Regulatory requirements are necessary to protect workers from harmful exposure to hazardous chemical substances. Many of these substances are known carcinogens.

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[1] The proposed amendments would specifically adopt the 2002 TLVs, "as amended from time to time," in order to ensure that the standard adopted by the WCB remains current.

[2] Alberta, Saskatchewan, Ontario, and Quebec have established review procedures to provide for exceptions where it is determined that a specific TLV is inappropriate given a particular industrial context.

[3] WCB policy has been drafted to maintain the status quo where the adoption of a TLV would result in an increase in exposure limits and where no TLV is provided for a substance that is currently regulated by the WCB.

2. Regulatory Design is Results-Based

The proposed amendments are prescriptive in nature due to the level of risk associated with exposure to hazardous chemical substances.

3. Transparent Development of Regulatory Requirements

Section 226 of the *Workers Compensation Act ("*Act*")* requires that before making a regulation under Part 3, the WCB must give notice of the proposed regulation in the BC Gazette and at least three newspapers and must hold at least one public hearing on the proposed regulation.

On February 21, 2003 notice of the public hearing was published in the *Vancouver Sun*, *Vancouver Province*, *Prince George Citizen*, *Victoria Times Colonist*, and in Part 1 of the *BC Gazette*. Notice was also provided on the WCB's website.

The public hearings were held in Prince George on March 25, 2003 and in Richmond on March 27, 2003. In addition to the oral hearing process, written submissions were accepted until April 10, 2003.

A total of 52 submissions were received providing specific comment on the proposal to adopt the ACGIH TLVs. 60% of the total number of submissions expressed support for the proposed regulatory amendments. Generally, the submissions provided in opposition to the proposed amendments expressed concern over the differences between the occupational exposure limits currently provided in the regulations and the proposed TLVs developed by the ACGIH.

The concerns raised during the public hearing process were represented in the options presented to the Board of Directors for decision.

4. Cost-Benefit Analysis Completed

A formal cost-benefit analysis was not considered necessary due to the similarities between the WCB's occupational exposure limits and the proposed TLVs. For the vast majority of substances, the proposed amendments will not result in a change in acceptable level of exposure.

The public hearing process provided stakeholders with an opportunity to identify any implementation issues, which may be associated with a proposed TLV due to a reduction in exposure limits.

Policy has been drafted to provide exposure limits for chemical substances where it is determined that a specific TLV is not appropriate in British Columbia due to health and safety factors or economic feasibility. An internal review process would be established to provide an ongoing review of excluded substances and proposed new TLVs. This process would ensure meaningful stakeholder participation.

5. Competitive Analysis Completed

The proposed regulatory amendments to adopt the ACGIH TLVs for chemical substances is consistent with the approach taken in each of the other Canadian workers' compensation jurisdictions. As a result, the proposed amendments are anticipated to result in positive implications for British Columbia's economic competitiveness.

6. Avoid or Eliminate Duplication with Other Jurisdictions

The proposed amendments do not duplicate requirements imposed by other regulatory jurisdictions.

7. Timeliness of Regulatory Response

Notice of changes to regulations must be deposited with the Registrar of Regulations and, pursuant to section 227 of the Act, may only come into force at least 90 days after their deposit under the *Regulations Act*.

The 90-day time period is considered sufficient to ensure successful implementation of the new requirements.

The amended regulation would be made available on the WCB's website and notice of the changes would also appear in the *WorkSafe Magazine*. The Prevention Division has drafted guidelines for workplace parties to provide additional clarity on the new requirements and assist with compliance.

8. Plain Language

The proposed amendments are drafted in plain language.

9. Sunset Review and Expiry Provisions

A sunset review and expiry provision is not required. Section 228 of the Act requires the WCB to undertake a process of ongoing review of and consultation on it regulations to ensure that they are consistent with current workplace practices, technological advances and other changes affecting occupational health and safety and occupational environment.

10. Replacement Principle Applied

The proposed amendments will result in a reduction of 1,261 regulatory requirements.

Appendix E

Government of British Columbia Regulatory Reform Policy
Regulatory Criteria Checklist

Title of Legislation/Regulation **Occupational Exposure Limits**

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

Regulatory Criteria	Criteria Met		
1. Reverse Onus: Need for Regulation is justified	☑ Yes		❒ No
2. Regulatory Design is Results-Based	❒ Yes		☑ No
3. Transparent Development of Regulatory Requirements	☑ Yes		❒ No
4. Cost-Benefit Analysis	Formal Cost-Benefit Analysis Completed ❒ Yes	☑ No	❒ Not required
	If *Not Required*, Impacts have been Analyzed ❒ Yes		❒ No
5. Competitive Analysis Completed	❒ Yes		☑ No
6. Regulatory Requirements Avoid or Eliminate Duplication with Other Jurisdictions	☑ Yes		❒ No
7. Timeliness of Regulatory Response	☑ Yes		❒ No
8. Plain Language	☑ Yes		❒ No
9. Sunset Review and Expiry Provisions	Sunset Review provision	❒ Yes	☑ No
	Sunset Expiry provision	❒ Yes	☑ No
10. Replacement Principle Applied	☑ Yes		❒ No

Number of Regulatory Requirements to be added:
Number of Regulatory Requirements to be eliminated:
Net Change: 1261

Resolution of the Board of Directors

Number: 2003/07/15-03
Date: August 12, 2003
Subject: Pensioner Retirement Benefit Reserve (PRBR)

WHEREAS:

Pursuant to section 82 of the *Workers Compensation Act,* RSBC 1996, Chapter 492 and amendments thereto (the "Act"), the Board of Directors ("BOD") must set and revise as necessary the policies of the Board of Directors, including policies respecting compensation, assessment, rehabilitation, and occupational health and safety;

AND WHEREAS:

Sections 23.2 to 23.4 of the Act require the Workers' Compensation Board ("WCB") to:

(a) establish a reserve (the "PRBR") in the accident fund into which the amounts to be set aside by the WCB must be deposited,

(b) invest the funds in the reserve, and

(c) pay the worker upon retirement the accumulated investment income earned on those amounts as well as the amounts set aside pursuant to section 23.2;

AND WHEREAS:

The Finance Division of the WCB has made recommendations concerning the investing and reporting of the PRBR as part of the accident fund and how income will be allocated to the PRBR;

THE BOARD OF DIRECTORS RESOLVES THAT:

1. All amounts deposited by the WCB into the PRBR, pursuant to section 23.4(1) of the Act, will be invested as part of the accident fund.

2. The worker has no right of access or ownership to any of the amounts deposited, or the accumulated investment income earned, until retirement benefits are payable pursuant to section 23.3 of the Act.

3. The WCB will separately disclose the liability for the PRBR under the Benefit Liabilities section of the WCB's annual financial statements.

4. The WCB will determine investment income earned in each year by the PRBR on the basis of :

   (a) the normal accounting method used by the WCB for computing its rate of return on investments in the accident fund, minus 7% of that rate of return, or

   (b) the average monthly 90-Day Federal T-Bill rate,

   whichever is the greater.

5. This resolution is a policy decision of the Board of Directors and is effective January 1, 2003.

6. This policy decision will be reviewed by the Board of Directors on or before September 2004.

DATED at Richmond, British Columbia, August 12, 2003.

Resolution of the Board of Directors

Number: 2003/08/01-01
Date: August 6, 2003
Subject: Accident Fund and Assessments
Decisions 990824-01, 990824-02, 990824-03, and 990824-04, 15 *Workers' Compensation Reporter* 565 to 582

WHEREAS:

Pursuant to section 82 of the *Workers Compensation Act*, RSBC 1996, Chapter 492 and amendments thereto (the "Act") the Board of Directors ("BOD") must set and revise as necessary the policies of the BOD, including policies respecting compensation, assessment, rehabilitation, and occupational health and safety, and set and supervise the direction of the Workers' Compensation Board ("WCB");

AND WHEREAS:

Pursuant to sections 36, 37, 42 and 82 of the Act, the former Panel of Administrators ("Panel") passed resolutions 990824-01, 990824-02, 990824-03, and 990824-04, reported as published policy decisions at 15 *Workers' Compensation Reporter* 565 to 582 (the "Resolutions");

AND WHEREAS:

By Resolution 990824-02, the Panel resolved that, concurrent with the implementation of a revised experience rating plan that considered three years of claims costs in calculating an experience rating, the WCB would develop and implement:

(a) proposals to address claims avoidance activities, and

(b) rate modification programs that considered factors other than claims cost, including claim frequency, severity, rehabilitation, and return to work programs;

AND WHEREAS:

In 2000, the WCB created a Special Investigation Branch (the "SIB") whose responsibilities include investigation of claims avoidance activities, including mis- and non-reporting of injuries and extent of disability, and the effect of those activities on employers' experience rating and assessment rates;

AND WHEREAS:

The SIB has reported to the BOD that investigation has revealed apparent significant claims avoidance activities, including mis and non-reporting, taking place among some employers covered by the Act;

AND WHEREAS:

The BOD has identified employer non-compliance with the Act, and specifically employer non-compliance with claims reporting obligations under the Act, as priority concerns that must be addressed**;**

AND WHEREAS:

The Appeal Division of the WCB recently considered the application of the Resolutions to a specific employer and concluded that certain payments based on the employer's injury reporting and claim experience during the time period material to the Resolutions were payable to the employer, notwithstanding that the SIB had reported that, based on its investigation, it appeared the employer was engaged in claims avoidance activities, including mis and non-reporting during that time period;

AND WHEREAS:

The BOD is of the opinion that the validity of the Resolutions and their application to employers is contingent upon the accuracy and credibility of employer injury reporting to the WCB in compliance with the Act;

AND WHEREAS:

As a result of the Appeal Division decision and in order to ensure:

(a) the integrity of the Resolutions and the classification, assessment, and injury reporting provisions of the Act, and

(b) accuracy and fairness in regard to the assessment obligations of all employers under the Act, particularly those employers in the same rate group who would unfairly pay the financial consequences of a mis-reporting or non-reporting employer,

the BOD is of the view that policy and direction is necessary in regard to the application and implementation of the Resolutions and section 96(7) of the Act.

THE BOARD OF DIRECTORS RESOLVES THAT:

1. The following direction applies to the application and implementation of the Resolutions and Division 4 of the Act:

a) The application of the Resolutions and assessment decisions under Division 4 of the Act in regard to an employer is subject to investigation by the WCB to determine whether the employer has engaged in claims avoidance activities, including mis-reporting and non-reporting of injuries or extent of disability.

b) If the WCB is satisfied that there is evidence that the employer is engaged in claims avoidance activities, including mis-reporting or non-reporting of injuries or extent of disability, the application of the Resolutions, and the payment of any monies to the employer pursuant to them, may be suspended at the discretion of the WCB and the WCB will conduct or continue an inquiry as authorized by section 88 of the Act (the "inquiry").

c) The WCB will, at the conclusion of the inquiry, implement the Resolutions in a manner that gives full force and effect to the decisions reached by the WCB arising out of the inquiry and may, pursuant to section 96(7) of the Act, set aside previous decisions.

d) The obligations of an employer to pay assessments which become payable under the Act during a period of suspension of the Resolutions as contemplated above, continue and nothing in this Resolution affects those obligations to pay.

e) If, at the conclusion of the inquiry, the WCB determines that an employer has engaged in claims avoidance activities including, mis-reporting or non-reporting of injuries or extent of disability to the WCB,

f) the WCB will make the adjustments and disposition of the funds, reserves and accounts pertaining to that employer as it considers just, expedient and advisable, including but not limited to, surplus funds and rates of assessment or special rates of assessment, and in this regard may set aside previous decisions pursuant to section 96(7) of the Act.

g) The employer will be given full disclosure of evidence of apparent or perceived claims avoidance activities, including mis-reporting or non-reporting, and will be given an opportunity to respond and explain its activities in this respect.

2. This Resolution constitutes a policy decision of the Board of Directors and applies to all monies paid and payable under the Resolutions and Division 4 of the Act.

DATED at Richmond, British Columbia, August 6, 2003.

Review Decision

Subject: **Review Reference #439**
Board Decision Under Review: November 27, 2002
Date: **July 10, 2003**
Review Officer: **Kevin Molnar**

The worker requests a review of the decision of the Workers' Compensation Board (the "Board") dated November 27, 2002. In support of this request for review, the worker provided a written submission. The worker provided further information during a telephone interview conducted by this review officer on June 16, 2003. The employer was provided with notice of the review and has chosen not to participate.

Section 40 of the transitional provisions to the *Workers Compensation Act* (the "Act") and section 96.4 of the Act give a review officer authority to conduct this review.

Issue

The issue on this review is the Board's decision to deny the worker's claim for benefits.

Background

The worker is a 40-year-old woman employed as a janitor. The worker states that she injured her back at work on October 26, 2002. The Board denied the worker's claim for benefits in a decision letter dated November 27, 2002. The worker has requested a review of that decision.

Facts and Evidence

The following are the relevant facts and evidence I have considered in conducting this review:

- The worker contends that she suffered a back injury on October 26, 2002.
- The worker submitted an application and report of injury for occupational disease on November 1, 2002. The worker describes her injury as, "bent over to clean toilet — back seized — sharp pain."
- The worker's physician, Dr. P., submitted a physician's first report relating to an office visit on October 28, 2002. Dr. P. diagnosed a lumbar back strain. Dr. P. describes the injury as "bent over to clean toilet, sudden pain in center low back."

- The worker had a detailed discussion with a Board officer on November 12, 2002 with respect to the alleged injury. The worker explained that she bent forward to clean a toilet with a brush when she felt pain in her lower back. The pain was in the same place as a previous area of injury. The worker clarified that she was bending straight forward and was not standing at the side of the toilet when she felt pain in her lower back. The worker did not describe any twist, slip, lift of a heavy object, or any additional motion that would put a strain on her back.

- The worker had fully recovered from a 1996 back injury and had not experienced back problems for approximately two years.

- A Board medical advisor (the "MA") wrote a medical opinion with respect to the worker's injury on November 21, 2002. The MA notes that the worker has a prior history of back problems. However, there is nothing recent and she has recovered from her prior problems.

- The MA also notes that simply bending over would not be expected to cause any back injury. In addition, bending forward at the waist is the type of movement performed many times during activities of daily living. The MA expresses an opinion that the worker's onset of pain is likely a matter of coincidence rather than a specific work causation.

- In a telephone interview conducted June 17, 2003, the worker confirmed that her injury was the result of simply bending over and there was no slip or twist associated with the injury. The worker also advised that she participates in Tai Kwon Do and has recently started training for a triathlon.

Law and Policy

The Act

The law that applies is found in section 5(1) of the Act. Section 5(1) provides that an injury must arise out of and in the course of employment before benefits can be paid.

Policy

The policy relating to this review is found in the *Rehabilitation Services and Claims Manual* ("*RSCM*") Volume II.

Policy item #15.00, *Natural Causes* provides that an injury is not compensable simply because it happened at work. It must be one arising out of and in the course of employment. If it happened at work, that usually indicates that it arose in the course of employment. But it must also have arisen out of the employment. This means that there must have been something in the employment relationship or situation that had causative significance in producing the injury.

Policy item # 15.20, *Injuries Following Motions at Work*, distinguishes between work-required and non-work-required motions. It notes that some motions are considered natural or normal bodily functions, and the only connection between them and the employment is the coincidental fact that the worker was on the job at the time of the injury.

Reasons and Decision

The worker reports that she was standing in front of a toilet with a toilet brush in one hand and a cleanser agent in the other hand. When she bent down to clean the toilet, her back seized up and she felt a sharp pain in her lower back. The worker confirms that the onset of pain relates to the simple act of bending over and she did not slip or twist her back while cleaning the toilet.

There is no dispute that bending forward to clean a toilet is a work-related motion and is a job-related requirement for this worker. Further, the evidence indicates that any prior back injuries had fully resolved and there is no indication this case involves the aggravation of a pre-existing condition. The issue that must be determined is whether the worker's back strain arose out of her employment.

Policy item #15.20 recognizes that certain types of motions are performed equally at work and outside of work. While the policy is somewhat unclear, it acknowledges that not all work-required motions will give rise to a compensable injury. Injuries resulting simply from natural body motions, such as bending, will not arise out of the employment although the motion could be categorized as work-required. However, such motions may acquire work status. The policy provides an example of a worker who is forced into an awkward position and experiences pain when arising and suggests that "it might well be that the only reasonable conclusion is that the apparently minor incident was causative." This suggests that a normal body motion may acquire "work status" if the circumstance in which it occurs enhances the risk of an injury occurring.

In order to decide whether the injury is compensable, I must determine whether there was an added risk to the worker's normal body motions as a result of her work. It is clear that the simple act of bending over is a common body movement that does not generally cause an injury. In this case, the work required motion is similar to a bending motion engaged in at home and is not an unaccustomed movement. There is no evidence that the worker was in an awkward position or experienced a slip or twist. The are no enhanced risk factors associated with the worker's general activities or the specific motion of bending over to clean a toilet that indicate the action has "work status."

Policy item #15.00 indicates the necessity of distinguishing between injuries resulting from employment and injuries resulting from purely natural causes. An injury is not compensable simply because it happened at work. There must be something in the employment relationship or situation that has causative significance in producing the injury. The Board MA expresses an opinion that the worker's onset of pain is likely a matter of coincidence rather than a specific work causation. I agree, in the absence of enhanced risk factors or other evidence, a causal relationship to the worker's employment is speculative. Further, the worker does engage in non-work related activities, such as Tai Kwon Do, which present risk factors for such injuries.

I find that the worker's injury did not arise out of and in the course of her employment.

As a result, I deny the worker's request for review.

Conclusion

As a result of this review, I confirm the Board's decision of November 27, 2002.

Review Decision

Subject: **Review Division Reference #503**
Board Decision Letter of October 22, 2001
Date: **March 31, 2003**
Chief Review Officer: **Louise Logan**

The worker seeks an extension of the 90-day statutory time limit to request a review of the October 22, 2001 decision of the Workers' Compensation Board ("Board"). The statutory time limit expired January 27, 2002. This included the eight-day grace period for the mailing of decisions provided for in subsection 221(2) of the *Workers Compensation Act (*"Act"*)*. The Review Division received the worker's request for review on March 5, 2003, 428 days beyond the statutory time limit to request a review.

The worker has also requested reviews of two subsequent decisions dated February 4, 2003 and February 20, 2003, both of which relate to the October 22, 2001 decision. The Review Division received those requests within the statutory time limit.

Subsection 96.2(4) of the Act authorizes the chief review officer to extend the time to file a request for review where special circumstances existed which precluded the filing of a request for review within the 90-day time period and where an injustice would otherwise result.

Issue

At issue is whether special circumstances existed which precluded the filing of a request for review within the 90-day time period, and, if so, would an injustice otherwise result if an extension were not granted.

Background

In a decision letter dated October 22, 2001, the Board granted a permanent functional impairment award to the worker for his left shoulder impairment. It was determined that the worker did not have a loss of earnings since he had returned to employment on a full-time basis (40 hours per week). The decision letter advised the worker that he had 90 days to commence an appeal to the former Review Board, if he wished to do so. The worker was unrepresented at the time.

On December 11, 2001, the worker's physician, Dr. A., provided a medical report (Form 11) to the Board. Dr. A. reported that the worker's shoulder was still symptomatic and that he had reduced his workweek to 32 hours. However, Dr. A. gave the worker the option of increasing his work hours if his shoulder improved.

There was no contact between the worker or his doctor and the Board until July 9, 2002, at which time Dr. A. provided another Form 11, advising that the worker continued to work 32 hours per week because he could not manage 40 hours per week.

The worker advised in a voice mail message to a Board officer on August 16, 2002 that he was still working 32 hours per week. He asked for "top-up" benefits at the same time.

On October 10, 2002, a Board officer rendered a decision that the worker's file would not be referred to the Disability Awards Department for a reassessment of his pension because there was no evidence of a significant deterioration of his right shoulder condition.

The worker, who had been represented on a previous appeal to the Review Board by his union, again sought representation through his union. On November 4, 2002, a union representative asked the Board to review the worker's claim, owing to the change in his employment status. A Board officer referred the representative to the October 10, 2002 decision.

The representative then wrote to the Disability Awards Department on January 7, 2003, asking for reconsideration of the October 22, 2001 pension decision.

In a letter dated February 4, 2003, the disability awards officer found there was no evidence that the worker's right shoulder had significantly deteriorated since the time of his functional impairment evaluation. She concluded that the worker's file would not be referred to the Disability Awards Department for a reassessment of his pension.

The worker has requested a review of the Board's decision dated February 4, 2003 and a decision dated February 20, 2003, in which the worker was advised again that the Disability Awards Department would not be reassessing his pension.

Submissions

The worker's representative seeks an extension of time to request a review of the Board's decision dated October 22, 2001. Her submission, dated February 8, 2003, reads, in part, as follows:

> With respect to his failure to take any action with respect to the October 2001 pension decision letter, the worker states that he simply had no idea that there was anything he could do to change the pension decision. The worker is an immigrant from Portugal. Although he has been in Canada for many years, he is not sophisticated. He was operating under the impression that the monthly pension was all that he was entitled to for his injury. One of his coworkers finally suggested he contact the WCB and ask them to provide him with further compensation for his lost earnings, and the worker called the WCB in October 2002. The worker had no idea that this issue was covered by the October 2001 pension decision that he had already received, or that his vehicle for seeking compensation for his permanent reduction in working capacity was an appeal from that letter. We submit that his inability to understand the significance of the October 2001 pension decision is very reasonable, given his background and education.

Practices and Procedures

Item B.3.2 of the *Review Division Practices and Procedures* provides guidance in determining whether to grant an extension of time. The chief review officer must first be satisfied that special circumstances existed which precluded the filing of a request for review within the 90-day time period. The chief review officer will only consider the applicant's reasons for not filing the request for review on time. No consideration is given to the merits of the request for review. If the applicant's reasons do not amount to special circumstances, no further consideration will be given to the extension request.

Where special circumstances are found to exist, the chief review officer will then consider whether an injustice would result if the time limit were not extended. It is only when it is found that both special circumstances exist and an injustice would otherwise result that an extension will be granted.

Decision and Reasons

I find that the worker's reasons for not filing a request for review do not amount to special circumstances.

There are a number of factors to be considered when determining whether special circumstances existed, but two key factors are evidence of the worker's intention to request a review within the 90-day time limit and the length of delay.

With respect to the worker's intention to request a review, it is unlikely that he had any intent to do so prior to December 11, 2001 when he told his doctor that he was working reduced hours. The worker had been advised of his appeal rights at the time and he was well within the 90-day period to exercise those rights. Approximately eight months passed before the worker contacted the Board on August 16, 2002. This was the first indication that the worker intended to request a review of the Board's October 22, 2001 decision.

In response, the worker's representative submits that the worker is not sophisticated and unfamiliar with the process, and that he did not understand the significance of the October 22, 2001 decision.

In some cases, a worker's or an employer's sophistication can be a relevant factor, but the intention to request a review remains a key consideration. When an unsophisticated worker or employer expresses their dissatisfaction about a decision to the decision-maker within the 90-day review period, but lacks sufficient knowledge of the review process to make a timely request for review, a special circumstance may arise.

In this instance, however, the worker did not voice his objection within the 90 days. If the worker had difficulty understanding the significance of the October 21, 2001 decision letter, he was aware that he could seek representation either through his union or elsewhere, as he had done in the past.

Without any indication before August 16, 2002 that the worker was dissatisfied with the Board's decision of October 22, 2001, I am unable to find that special circumstances precluded the worker from requesting a review until March 5, 2003. There is, therefore, no need to determine whether an injustice would otherwise result if an extension of time were not granted.

Conclusion

I deny the worker's application for an extension of time to file the request for review.

PLEASE NOTE:

Pursuant to section 4 of the *Workers Compensation Act Appeal Regulation*, this decision may not be appealed to the Workers' Compensation Appeal Tribunal.

Review Decision

Subject: **Review Reference #520**
Board Decision Under Review: December 2, 2002
Date: **July 29, 2003**
Review Officer: **Andrew Waldichuk**

The worker requests a review of the decision of the Workers' Compensation Board (the "Board") dated December 2, 2002. In support of this request for review, the worker provided wage loss information on April 17, 2003, and a written submission dated April 25, 2003, which enclosed additional wage loss information. The employer was provided with notice of the review and has chosen to participate, but did not provide any submissions.

Section 40 of the transitional provisions to the *Workers Compensation Act* (the "Act") and section 96.4 of the Act give a review officer authority to conduct this review.

Issue

At issue is a review of the Board's decision to base the worker's long-term average earnings for a worker employed less than 12 months on the "all workers" statistical class average.

Background

The worker, who is 44 years old, was struck by a vehicle while in the course of his duties as a truck driver on September 11, 2002. The Board accepted the worker's claim for a mild traumatic brain injury and soft tissue injuries to his neck and upper back.

The worker began working for the employer on June 20, 2002. For the first 10 weeks (September 12, 2002 to November 24, 2002) of his claim, the worker received wage loss benefits based on his earnings from June 20, 2002 to September 10, 2002. The Board conducted a 10-week rate review and, effective November 25, 2002, paid the worker wage loss benefits based on the statistical class average for long haul truck drivers in the third quarter of 2002. This was communicated to the worker in a letter dated December 2, 2002.

The worker submits that his long-term earnings should be higher. He has provided various earnings information for long haul truck drivers in support of his position.

Facts and Evidence

The following are the relevant facts and evidence I have considered in conducting this review:

- For the 10-week initial payment period (September 12, 2002 to November 24, 2002), the Board paid the worker wage loss benefits based on his earnings of $12,487.26 from June 20, 2002 until September 10, 2002, as reported by the employer. This resulted in a net weekly wage rate of $712.85.

- In an effort to determine the worker's long-term average earnings at the 10-week point, the Board officer contacted the worker's employer to obtain earnings information.

- On November 27, 2002, the Board officer noted that the employer was unable to provide a reasonably accurate estimate of the average annual earnings for workers that were in a similar classification as the worker because these earnings are highly variable on account of seniority, available work, and routes.

- On the same day, the Board officer requested the class average for long haul truck drivers for the third quarter in 2002 from the Board's Statistical Services Department. He was advised that the estimated monthly wage for "full-time" workers was $3,500, whereas the estimated monthly wage for "all workers" was $3,040.

- Since the worker was relatively new to the employer, junior in seniority and subject to periods of possible layoff during slow-downs, the Board officer determined that the "all workers" rate would be a more reasonable reflection of the worker's average earnings.

- Effective November 25, 2002, the worker was paid wage loss benefits based on the "all workers" class average earnings of long haul truck drivers for 12 months in the amount of $36,480 (12 x $3,040). This resulted in a net weekly wage rate of $479.91.

- By letter dated May 22, 2003, the Board terminated the worker's wage loss benefits effective May 18, 2003.

- I spoke to the employer on May 30, 2003. I was advised that the two other drivers who were doing a southbound run, as the worker had been doing, would have had a "set run" five days a week. The worker, on the other hand, was required to do longer trips. As a result, the employer said that it would be difficult to provide the average earnings of a person of similar status employed in the same type and classification of employment as the worker. The employer was asked to confirm this in writing, but did not respond.

Worker's Submission

The worker's letter of February 28, 2003, which initiated this review, indicates that he started driving for a freight company approximately three years earlier. The worker claims that he was in line to earn between $60,000 to $70,000 with full benefits.

The worker's letter of April 17, 2003 contains a job offer to be a truck driver that was made to the worker in March 2003. There are also various advertisements for employment as a long haul truck driver and the associated earnings attached to his letter.

Finally, the worker's submission of April 25, 2003 describes how he was working on the southbound highway fleet at the time of his injury. He claims that there was not one driver in that fleet making less than $50,000 a year with benefits, given that it was unionized work. To support his position, the worker relies on newspaper advertisements for truck driving jobs, records of trips that he made for the accident employer and the company for which he worked in 2002 before starting with the accident employer, and pay stubs that he received from the accident employer.

Law and Policy

The Act

Section 33.3 is relevant. It reads as follows:

> In the case of a worker employed, on other than a casual or temporary basis, by the employer for less than 12 months immediately preceding the date of the injury, the Board's determination of the amount of average earnings under section 33.1(2) must be based on the gross earnings, as determined by the Board, for the 12 month period immediately preceding the date of injury, of a person of similar status employed in the same type and classification of employment
>
> (a) by the same employer, or
>
> (b) if no person is so employed, by an employer in the same region.

Subsection 96.4(8)(b) allows the review officer to refer a matter back to the Board division that made the initial decision with or without directions.

Policy

The policy relating to this review is found in the *Rehabilitation Services and Claims Manual*, Volume II.

Policy item #67.50, *Workers Employed with their Employer for Less than 12 Months,* provides that where a worker, who is not a casual or temporary employee, has been employed by the employer for less than 12 months, the Board will contact the employer to determine the average earnings of a person of similar status to the worker. Where this information is not available, the Board may contact a similar employer in the same region to obtain the average earnings of a person of similar status employed in the same type and classification of employment. The Board is not limited to obtaining wage rate information from a single employer; it may rely on the information from employers in the region.

Reasons and Decision

On September 11, 2002, the worker had been working for his employer for less than 12 months. The evidence on file, including the Employer's Report of Injury (Form 7) dated September 28, 2002, indicates that the worker was working full-time when he was injured. Since the worker was not employed on a casual or temporary basis at the time of his injury, I accept that section 33.3 and policy item #67.50 required the Board officer to determine the worker's long-term average earnings by relying on the average earnings of a person of similar status employed in the same type and classification of employment as the worker.

The Board officer noted on November 27, 2002 that the employer was unable to provide the average earnings of another worker who was of similar status to the worker and employed in the same type and classification of employment as the worker. The employer confirmed on May 30, 2003 that it was unlikely that this information could be provided.

It is Board practice to rely on a regional class average when the relevant earnings information is not reasonably available from the accident employer. There is no policy with respect to the category of worker — "all workers" or "full-time" — that can be relied upon in this situation. I note, however, that it is Board practice to use a regional class average for "full-time" workers if the worker was employed full-time. This better represents the intent of the Act, which is to compensate the worker in accordance with their history of full-time employment.

It is also Board practice that Board officers should request the class average for each of the four quarters in the 12-month period preceding the date of injury, since this is consistent with what the Act requires. The four quarterly wage rates should then be averaged, producing a monthly figure that can be multiplied by 12 to arrive at an equivalent annual amount.

The Board officer relied on the "all workers" statistical class average for long haul truck drivers to calculate the worker's long-term average earnings at the 10-week point. He based his decision to rely on this category on the worker's status as a new employee who was junior in seniority and subject to possible layoff. As policy item #67.50 does not discuss statistical class averages, let alone what category of worker to use, I accept that it would have been more appropriate in this instance to follow the Board practice to use the "full-time" category for the worker, given that he was employed on a full-time basis at the time of the injury.

Item 1.4.2 of the Review Division's *Practices and Procedures* allows a review officer to refer an issue back to the Board division that made the initial decision where significant further investigation or assessment would be required that would be beyond the scope of the review function.

Pursuant to subsection 96.4(8)(b) of the Act, I refer the Board's decision of December 2, 2002 back to the Rehabilitation and Compensation Services Division for the Board officer to re-calculate the worker's long-term average earnings effective November 25, 2002. Consistent with Board practice, I direct the Board officer to use the "full-time" class average of long haul truck drivers, in the appropriate region, for the four quarters in the year preceding the worker's injury to arrive at an equivalent annual amount.

Conclusion

As a result of this review, I refer the Board's decision of December 2, 2002 back to the Rehabilitation and Compensation Services Division with directions, as outlined above.

Review Decision

Subject: **Review Reference #572**
Board Decision Under Review: February 10, 2003
Date: **May 8, 2003**
Chief Review Officer: **Louise Logan**

The employer requests a review of the decision of the Workers' Compensation Board (the "Board") dated February 10, 2003. The employer has provided written submissions in support of this request for review. The worker was provided notice of the review but has not participated in the review.

Section 40 of the *Workers Compensation Act* (the "Act") and section 96.2 of the Act give the chief review officer authority to conduct this review.

Issue

The issue on this review is the Board's decision to accept the worker's claim for mental stress.

Background

On July 30, 2002, the worker was involved in an incident at work when she was operating a potroom vehicle. The incident involved power shorting through the worker's vehicle. The incident resulted in the worker making, and the Board accepting, a claim for mental stress. Payment of one day of wage loss was made. The employer objects to the acceptance of the claim.

Facts and Evidence

I do not find it necessary to relate the details of the incident on July 30, 2002 in order to deal with the issue before me. There is no dispute that an electrical incident occurred while the worker was working on July 30, 2002. It did not result in any physical injury to the worker, but the worker was quite understandably upset as a result. Following the incident, the worker reported to First Aid, where she was advised to see her family physician. The worker returned to the line to inform her foreman of her departure, and then went to see her family physician.

There is one medical report on file from Dr. B., the worker's family physician. The report is dated July 30, 2002. It includes a diagnosis of "stress" and goes on to state:

> At approximately 11:00 July 30 she [the worker] was up in a crane when she "shorted out" lines which resulted in an obvious electrical incident at work fortunately, she herself was not affected by the electrical current but she was obviously quite "shook up" due to the incident. She was seen at 1st Aid.

Law and Policy

The Act

The law that applies is found in section 5.1 of the Act. This section deals specifically with mental stress. It provides that a worker is only entitled to compensation for mental stress that does not result from an injury for which the worker is otherwise entitled to compensation, when the following three conditions are met:

- the stress is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment;

- the worker's condition is diagnosed by a physician as a condition that is described in the most recent *American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders* at the time of the diagnosis; and

- the condition is not caused by a decision of the employer relating to the worker's employment.

Applicable Policy

The policy relating to this review is found in the *Rehabilitation Services and Claims Manual* ("*RSCM*") Volume II, policy #13.30. Policy #13.30 repeats the requirements of the Act, and expands on them by providing definitions of "acute reaction" and "traumatic" event.

Reasons and Decision

My review of the worker's claim file indicates that the Board accepted the worker's claim for "stress" based on:

- the nature of the incident according to information provided by both the worker and the employer,

- the fact the worker had witnessed what the Board characterized as a "life threatening" event, and

- the physician's diagnosis of "stress" as reported on the Form 8.

The employer objects to the acceptance of the claim on the basis that the Board's decision is not in keeping with policy #13.30. Specifically, the employer is questioning:

- whether the Board conducted sufficient investigation of personal factors when assessing the work-relatedness of the worker's condition; and

- whether the physician's diagnosis was made in accordance with the *American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders*.

I do not intend to address in detail the question of work-relatedness that was raised by the employer. I accept from the evidence on the file that was supplied by both the worker and the employer that a specific incident occurred at work, and that the incident caused the worker to feel upset and shaken. I do not find it necessary in these circumstances to consider whether personal factors played a role in the worker's reaction.

With respect to the more general question of whether the Board's decision was in keeping with section 5.1 of the Act and policy #13.30, I have concluded that it is not.

In reaching my conclusion, I note that:

- The diagnostic requirement in section 5.1(b) has not been met. While Dr. B. indicated "stress" as the diagnosis on the Form 8, this is not a diagnosis found in the *American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders,* 4th Edition. Nor do the symptoms and condition of the worker as reported by Dr. B. correlate to any such diagnosis.

- Section 5.1(a) requires both an "acute reaction" and an "unexpected traumatic event." An "acute reaction" is defined in policy #13.30 as one of "severe emotional shock, helplessness and/or fear." The policy defines an "unexpected traumatic event" as a "severely emotionally disturbing event" such as a horrific accident, an armed robbery, a hostage taking, an actual or threatened physical violence, an actual or threatened sexual assault, or a death threat.

- The workplace electrical incident, while obviously upsetting, cannot be characterized as "traumatic" in the sense of "severely emotionally disturbing" as required by policy #13.30. Nor is the incident in keeping with the examples provided by the policy, all involving significant incidents of violence or horrific accident.

- Following the incident, the worker was able to continue working for a short time, report to First Aid, and then return to the line to inform her foreman of her departure before going to see her family physician. I also note that apart from her visit to Dr. B. on the day of the incident, the worker did not seek any form of medical or psychiatric treatment or counseling for her condition. Rather, the worker returned to work after an absence of one day. These actions are not consistent with the worker being in a state of "severe emotional shock, helplessness or fear." Rather, they are in keeping with the worker being "shook up," as described by Dr. B. on the Form 8.

As a result, I allow the employer's request for review.

Conclusion

As a result of this review, I vary the Board's decision of February 10, 2003 and deny acceptance of the worker's claim for mental stress.

Review Decision

Subject: **Review Reference #661**
Board Decision Under Review: February 20, 2003
Date: **June 9, 2003**
Review Officer: **Sam Isaacs**

The worker requests a review of the decision of the Workers' Compensation Board (the "Board") dated February 20, 2003. In support of this request for review, the worker's representative has provided a written submission. The employer was provided with notice of the review and has chosen not to participate.

Section 40 of the transitional provisions of the *Workers Compensation Act* (the Act) and section 96.4 of the Act give a review officer authority to conduct this review.

Issue

The issue on this review is the Board's decision that the worker's full loss of earnings pension should be compensated at 75% of the worker's pre-injury earnings.

Background

Details of this claim need not be stated for the purpose of this review. I note that the worker's claim for an injury occurring on April 24, 1997 was accepted. As the injury resulted in a permanent disability, the claim was referred to the Board's Disability Awards Department to determine pension benefits. The decision letter of February 20, 2003 outlines the extent of these benefits. The worker's permanent disability was assessed at 13.87% of a totally disabled person but the effect of this injury on his ability to return to work was considered greater. The worker was determined to no longer be competitive in the employment market and was therefore entitled to a full loss of earnings pension. Although the wage rate fell below the Board's statutory minimum benefit, the pension was calculated on the basis of 75% of the worker's gross earnings.

Submission

The worker's advisor has provided an extensive submission relating to the law and reasons why the loss of earnings pension should be calculated at 100% of the wage rate, given the worker's earnings are below the Board's statutory minimum.

Facts and Evidence

The following are the relevant facts and evidence I have considered in conducting this review:

- The worker's wage rate, for pension purposes, is $983.00 per month at the time of injury, which is below the Board's statutory minimum.

- With the worker being considered to be unemployable as a result of his permanent disability, the Board calculated the worker's pension benefit on the basis of 75% of $983.00 per month.

Law and Policy

The Act

The law that applies to this review is found in sections 22, 23, and 29 of the Act, as it read immediately before June 30, 2002.

Section 22 directs that benefits for permanent total disability are to be paid in an amount equal to 75% of the worker's average earnings, but not to fall below the Board's statutory minimum.

Section 23 provides the Board authority for paying permanent partial disability benefits. Section 23(3) applies to loss of earnings pensions, and directs that the benefit is to be calculated based on 75% of the difference between what the worker was earning before the injury and the amount the worker is able to earn after the injury. Section 23(4) directs that the minimum compensation awarded shall be calculated in the same manner as referenced for temporary total disability, but to the extent only of the partial disability.

Section 29 pertains to temporary total disability and directs that benefits under this provision are paid at 75% of the worker's average earnings, except in cases where the average earnings fall below what is known as the Board's statutory minimum. In these cases, the worker is to receive compensation in an amount equal to the average earnings.

Also applicable is section 99 of the Act, as it currently reads. Section 99 specifies that the Board is not bound by legal precedent and that the Board must make a decision based on the merits and justice of the case. In doing so, the Board must apply a policy of the Board of Directors that is applicable in that case.

Applicable Policy

The policies relating to this review are found in the *Rehabilitation Services and Claims Manual* ("*RSCM*"), Volume I. Specific policy items include:

- Policy item # 37.21 *Dual System of Measuring Disability* limits the use of the statutory minimum to permanent total disability benefits under the physical impairment method. It does not apply to benefits under the loss of earnings method, where a worker is found to be unemployable.

- Policy item #39.60 *Minimum Pension* states that the "minimum for permanent total disability does not apply simply because a worker is found to be totally unemployable under Section 23(3)."

- Policy item #40.10 *Assessment Formula* sets out the rules for calculating loss of earnings pensions.

Reasons and Decision

The worker's representative submits that loss of earnings pension benefits should be subject to the same rules and calculation requirements that are applicable to temporary disability and loss of function pension benefits, with respect to the statutory minimum. This would require calculation of such benefits based on 100% of the worker's average earnings, rather than 75%.

I note that this specific issue has previously been subject to appeal, and has recently been addressed by the Appeal Division. In Decision #2002-1284, the appeal commissioner wrote:

> Pensions based on loss of function and those based on loss of earnings are as a result of two fundamentally different approaches. The worker is entitled, under the dual system of pension determination, to the method that provides the largest pension. There is no real relationship between the two methods.

The appeal commissioner found that the specific statement contained in section 23(3), requiring that the loss of earnings pension be a periodic payment of 75% of the difference in earnings, overrides the application of other legislative provisions pertaining to the statutory minimum. The Board was found to be correct in determining that the worker's loss of earnings pension was properly calculated based on 75% of the worker's pre-injury earnings.

Under Decision #2002-1658, the appeal commissioner agreed with the reasoning referenced above.

Section 99 does not require me to be bound by these decisions. However, I must apply a policy of the Board of Directors that is applicable.

Policy item #40.10 expressly requires that the loss of earnings pension "will then be 75% of the amount by which the earnings level [post injury] is less than the average earnings prior to the injury." This policy is consistent with section 23(3). Neither the legislation pertaining to loss of earnings pensions, nor the Board's policy, provide for an alternate calculation.

Although policy items #37.21 and #39.60 do not deal explicitly with the issue on this review, they do provide that the minimum benefit for permanent total disability in section 22 of the Act does not apply to a total loss of earnings benefit under section 23(3). The principle behind these policies is that the statutory minimums only apply to the assessment of the permanent disability award under the physical impairment method.

Section 23(3) provides for a separate, and self-contained alternative method of assessment that is then compared with the results of the physical impairment method (including the application of the minimums to the physical impairment method). The higher of the two

methods is then awarded. The worker benefits from the minimum since he or she only receives the loss of earnings award if it exceeds the amount resulting from the application of the minimum to the physical impairment method.

I therefore find that the Board correctly calculated the worker's loss of earnings pension benefit, in accordance to section 23(3) of the Act and policy item #40.10. As a result, I deny the worker's request.

Conclusion

As a result of this review, I confirm the Board's decision of February 20, 2003.

Review Decision

Subject: **Review Reference #1504**
Board Decision Under Review: March 12, 2003
Date: **July 21, 2003**
Review Officer: **Nick Attewell**

The employer requests a review of the decision of the Workers' Compensation Board (the "Board") dated March 12, 2003. In support of this request for review, the employer's accountant ("AL") has made submissions dated March 27 and May 5, 2003. Comments were made by the Assessment Department in a June 4, 2003, submission, which was disclosed to AL. This resulted in a telephone call on June 23, 2003, from AL.

Sections 96.2 and 96.4 of the *Workers Compensation Act* (the "Act") give a review officer authority to conduct this review.

Issue

The issue on this review is whether the Board correctly determined that the effective date of a change of classification from Classification Unit ("CU") 720149 (Siding, Awning, or Gutter installation) to CU715020 (Glass shop) was January 1, 2002.

Background

During an audit on March 12, 2003, the assessment officer found that the firm was incorrectly classified. A change in classification was made effective January 1, 2002. The employer contends that the change should be retroactive to 1996 since the business has not changed and the Board should have noted the error during an audit in 1999.

Facts and Evidence

The following are the relevant facts and evidence I have considered in conducting this review:

- From 1994 to December 31, 1999, the employer was classified in subclass 070600 (Building construction). The description of the business in the Board's records is "Installing shower doors or windows."

- In 1996, the employer incorporated the business. At that time, a "classification change" form was completed on which it was stated "Oct. 24, 1996-Per call from Mr. L....., accountant, he advised that Mr. M..... has a retail glass shop (used glass) but this is a very small % of his total revenue right now. Most of the work he does is labour only installing shower doors and windows. I advised class 070600 is correct. No adjustment necessary."

- The Assessment Department has no record of an audit done in 1999.

- From January 1, 2000, to December 31, 2001, the employer was classified in CU720149. (This change resulted from a change to the Board's classification system.)

- The employer was audited by an assessment officer on March 12, 2003, during which the officer found that the employer was incorrectly classified. The description of the business at that time in the Board's records is "glass shop, window installation, window glass repair or replacement."

- In the phone conversation on June 23, 2003, with AL, she advised that there was no disagreement with the statement in the classification change form completed in 1996. She advised that the employer has continued to operate its business in the same way since then. The employer obtains most of its glass from buildings about to be demolished. It then uses this glass on construction projects, such as installing shower doors, windows, etc. This is most of the employer's work. AL distinguished this work from that of a "retail glass shop," which would cover sales to the general public over the counter. She said this was a very small part of the employer's business. She advised in this call that she would seek documentary evidence of the 1999 audit and the employer's business activities, but none was received.

- In 2003, the assessment rate for CU721049 is $7.79 and for CU715020 is $3.38.

Law and Policy

The Act

Section 37 of the Act sets up the classification system used for the purpose of paying assessments and gives the Board authority to change the classifications to which employers are assigned.

Applicable Policy

The policy relating to this review is found in AP1-37-3 (Classification — Changes) of the *Assessment Manual.* The policy lists the following five main reasons why a classification will change:

1. Board error
2. Change in firm's operations — Distinct
3. Change in firm's operations — Evolution
4. Change in Board classification practice
5. Misrepresentation

For each of these reasons, the policy sets out the criteria for determining effective dates where the change results in an increase or decrease in assessment rates, and whether experience rating will transfer.

Reasons and Decision

In applying Policy AP1-37-3, the assessment officer considered that reason 3 applied — "Change in firm's operations — Evolution." With respect to that reason, the policy states that a decrease in the assessment rate takes effect on the date when the change in the business has reasonably been verified to have taken place or on January 1 of the year prior to the year in which the Board became aware of the change, whichever is later. The policy notes that "the firm should have advised the Board of the change when it occurred." I find that this reason does not apply as the employer's business has not substantially changed for the period in question.

The employer is presumably arguing that reason 1 in the policy applies — Board error. "Board error" is defined in the policy as follows:

> This occurs if the information is available and complete to allow the proper classification to be applied but a clear error is made in classifying a firm; it includes an improper classification continuing after a Board officer has audited a firm. It does not include borderline classification questions requiring a judgment decision. Nor does it include situations where the information supplied by the firm is incomplete or inaccurate, regardless of whether this was deliberate or inadvertent.

When a "Board error" has occurred, the policy states that, for a rate decrease, the Board may use the date when the error was made.

In considering whether a Board error was made, it is necessary to distinguish the period prior to 2000 from the subsequent period. On January 1, 2000, the Board introduced a new classification system. This involved the creation of a large number of new classifications and a process for transferring employers from the old to the new.

Prior to 2000, the employer was classified in subclass 070600. This was a residual classification for employers in the construction industry not covered in other more specific classifications. There were a number of classifications relating to activities relating to glass, but none specifically covering the installation of windows and shower doors on construction projects. For example, subclass 060236 covered "glass shops which grind or polish," including "installation of replacement window glass." However, this subclass specifically excluded the "construction of glass walls, facades, etc which is part of the general building construction industry." The Classification Unit ("CU") to which the employer is now assigned, 715020, did not come into existence until January 1, 2000. I conclude that the Board did not commit an "error" in assigning the employer to subclass 070600 prior to 2000.

Under the new system, effective January 1, 2000, the employer was placed in CU721049 (Siding, Awning or Gutter Installation, Service, or Repair). This assignment was in error since the description for that CU bears no relationship to what the employer does. Furthermore, the description specifically states "Excluded from this classification unit are employers PRIMARILY engaged in installing windows or window units." The employer on January 1, 2000, should have been placed in CU715020.

Because the Assessment Department had to transfer a large number of employers to new classifications for the new classification system, it was concerned about the possibility of error. Sometimes the transfers were based on limited information and it was not practicable to

contact every employer individually. To reduce the risk of error, a standard letter was sent out to employers in 1999 advising them of what their classification would be in the new system and giving them a chance to object. The employer was sent a letter advising that it would be classified in CU715020 but made no objection. It also filed later payroll reports based on this classification without objection. No objection was made until the audit in 2003.

The question arises whether the employer's failure to object brings the situation into the "misrepresentation" category of Policy AP1-37-3. The policy defines "misrepresentation" as

> "(5) A firm may misrepresent its operations deliberately or inadvertently. Misrepresentation can be by omission of information, submission of false information, or by words which, though reasonably interpreted, do not accurately reflect the firm's operations."

A "misrepresentation" does not necessarily imply fault on the part of the employer. In the case of misrepresentation, the policy states that a rate decrease takes effect on January 1st of the year the Board became aware of the situation.

This case may also fall within the "change in Board classification practice" category of the policy since the need for change originated from the implementation of the new classification system on January 1, 2000. Under this category, a rate decrease takes effect from "January 1st of the year the definitions/parameters were changed." Application of this category would produce the same result as the Board error category in this case.

The Policy is silent on what happens when more than one of the five reasons for a classification change could apply. However, the policy lists these reasons as the "five main reasons why a firm's classification would change." It appears from this that in a case where more than one reason may apply a reasonable approach is to determine the main one. In this case, I have concluded that the main reason was the change of classification system and the Board error that lead to the misapplication of the new system on January 1, 2000, leading to the result that the classification change should be retroactive to that date.

To the extent that there was any "misrepresentation" by the employer it was by omission and innocent. As the employer was in the construction subclass prior to 2000, it may not have seemed unusual to it that it would be assigned to the siding, awning and gutter CU in 2000. The employer would not be familiar with the subtleties of the classification system. The assessment rates were similar, $5.74 in 1999 and $6.11 in 2000. It might have been different if a radically different classification in another industry had been assigned to the employer with a significantly different rate, for example, operation of a parking lot. Greater weight might then be given to the employer's failure to object.

I find that the employer's assignment to CU715020 should be backdated to January 1, 2000. As a result, I allow the employer's request in part.

Conclusion

As a result of this review, I vary the Board's decision of March 12, 2003.

Decision of the Workers' Compensation Appeal Tribunal

Number: 2003-00896-AD
Date: June 11, 2003
Panel: Marguerite Mousseau, Vice Chair
Subject: Status Determination: Worker or Independent Operator

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Introduction

On August 2, 2000, the plaintiff was driving her vehicle southbound on Highway 99, approaching the Deas Tunnel. Traffic was moving slowly because of congestion at the entrance to the tunnel. A dump truck, owned by the defendant Harjit & Sons Enterprises Ltd. (Harjit) and driven by the defendant Gursharan Singh Dhaliwal, approached the slow moving line of traffic and struck several vehicles, including that driven by the plaintiff.

The defendant Harjit and the third party, Insurance Corporation of British Columbia (ICBC), request a determination under section 11 of the *Workers Compensation Act* (the Act).

Issue(s)

The issues are: 1) whether the plaintiff was a worker within the meaning of Part 1 of the Act on August 2, 2000; and, if so, 2) whether injuries she sustained in the accident arose out of and in the course of her employment; 3) whether the defendant Harjit was an employer engaged in an industry within the meaning of Part 1 of the Act; and, 4) whether the defendant Gursharan Singh Dhaliwal was a worker within the meaning of Part 1; and, if so, 5) whether the alleged negligence arose out of and in the course of his employment.

Jurisdiction

This application for a determination under section 11 of the Act was filed with the Appeal Division before March 3, 2003. Effective March 3, 2003, section 11 of the Act was repealed, and the Review Board and Appeal Division were replaced by the Workers' Compensation Appeal Tribunal (WCAT). These changes were contained in the *Workers Compensation Amendment Act (No. 2), 2002*. WCAT has jurisdiction to provide a certificate to the court under section 257 of the amended Act. Paragraph 39(1)(c) of the transitional provisions contained in *Workers Compensation Amendment Act (No. 2), 2002* provides that section 11 proceedings that were pending before the Appeal Division on March 3, 2003, are continued and must be completed as proceedings before WCAT (except that no time frame applies to the making of the WCAT decision). This means that WCAT will consider this application under the former section 11, but the new WCAT provisions apply (WCAT must apply policy of the Board of Directors pursuant to subsection 250(2) and section 251 of the Act and section 42 of the amending act, and WCAT precedent decisions are binding under subsections 238(6) and 250(3)).

Section 11 of the Act obliged the Workers' Compensation Board to make determinations and provide a certificate to the court in certain matters which are relevant to the legal action. It is for the court to determine the effect of the certificate on the legal action.

Status of the Plaintiff

Background and Evidence

At the time of the accident, the plaintiff was employed full-time as the community development coordinator for the Muscular Dystrophy Association of Canada. This employment is not relevant to this legal action since she was not engaged in any activity related to this employment when the accident occurred.

In addition to her employment with the Muscular Dystrophy Association, the plaintiff also worked part-time as a rehabilitation assistant. This employment is relevant to the legal action because the plaintiff was on her way to White Rock to provide rehabilitation services to a client when the accident occurred. The plaintiff provided these services under an agreement between herself and Glenn Kerr, the proprietor of Sierra Rehabilitation Assistance (Sierra). The issue is whether, in providing services under this agreement, the plaintiff was operating as a labour contractor/worker or an independent operator.

Counsel for the plaintiff submits that the plaintiff was an independent operator who did not have Personal Optional Protection and she is therefore not covered by the Act. Counsel for the defendant Harjit and third party submits that the plaintiff was a worker within the meaning of Part 1 of the Act, either as an employee or a labour contractor who was not registered with the Board and did not have Personal Optional Protection.

The plaintiff was examined for discovery on September 26, 2002. At that time, she provided evidence regarding the nature of her activities as a rehabilitation assistant. She also provided evidence on this issue in an affidavit sworn on November 26, 2002 and in an unsworn statement dated January 13, 2003 made in response to interrogatories.

The plaintiff has an educational background in leisure studies and physical education. (Q. 670–673.) She stated that she was "on contract" with Sierra for the provision of rehabilitation services and had been doing this since March 25, 1998. (Q. 686–688.)

She stated that Glenn Kerr owned the company called Sierra Rehabilitation Assistance and that he obtained referrals from ICBC or occupational therapists or physiotherapists for people who were at a stage of rehabilitation where they would be going to a gym and getting "back up to speed fitness wise." Her job was to monitor programs such as using a gym, walking, tennis or hiking or other activities which were set up with an occupational therapist or physiotherapist. (Q. 725.)

In the affidavit sworn on November 26, 2002, the plaintiff stated that she was not an employee of Sierra and she received no employee benefits. She stated that she was an independent contractor with regard to her duties as a rehabilitation assistant and that she had never applied for workers' compensation coverage. She stated that she declared her income for

income tax purposes under the Statement of Professional Activities and that she earned this personally and not as a corporate entity. She agreed with the substance of an affidavit by Glenn Kerr appended to her affidavit as Exhibit A.

In this affidavit, Glenn Kerr said that the plaintiff was not an employee of his company. He stated her rate of pay as $20 per hour for "regular" time, $10 per hour for travel time and mileage at $.32 per km. He stated that her hours varied throughout the year but based on invoices she had faxed to him it appeared that she worked an average of 8−12 hours (no time frame is specified). He states that she was paid biweekly and that she averaged $300−$400 per month.

In response to interrogatories provided by counsel for the defendant, dated December 19, 2002, the plaintiff responded that she did not have a written contract with Glenn Kerr. With regard to the terms of her employment she stated that Glenn Kerr would contact her to see if she was available to work with a client. If the location, time, dates and type of injury suited her, she would agree to meet with the potential client, and the occupational therapist or physiotherapist. Glenn Kerr provided the contact number for the therapist and she would call the therapist directly.

The schedule of activities, types of activities, location of activities, and duration of rehabilitation program would be determined by the plaintiff and the occupational therapist or physiotherapist. She submitted her progress reports directly to the occupational therapist or physiotherapist. The location of activities depended on the objectives of the rehabilitation program, which were set by the occupational therapist or physiotherapist.

The plaintiff invoiced Glenn Kerr twice a month. In addition, she submitted summary reports of dates, times, duration, location, and activity to Glenn Kerr once per month. She prepared her reports and other paper work in her home. She was reimbursed for expenses such as entrance fees to facilities, tubing bands, squeeze balls, etc.

The plaintiff stated that she did not provide rehabilitation services under any arrangement other than the agreement with Glenn Kerr.

In his unsworn statement dated January 9, 2003, Glenn Kerr stated that he is a self-employed rehabilitation assistant. He has a business license but is not a registered company. He said that, when he became too busy or was on vacation, he would refer his clients to another rehabilitation assistant or he would "contract the assistant to fill in for me."

He stated that prior to starting this arrangement with the plaintiff he "sat down with her for an afternoon and went through a policy and procedures manual that I use personally." They had also discussed rates and billing procedures at that time and agreed on the rate of compensation previously described.

He said that the plaintiff might get two or three cases from him per year. She submitted an invoice to him every second week and he paid her directly. He stated "Then I would bill my client's fee payer (usually ICBC or WCB) monthly." He said that he could not remember if the plaintiff occasionally got her own clients but, even if she did, she would have handled them through Glenn Kerr. He said that this was at her request as "she did not have a vendor number with ICBC or the WCB and did not want to deal with the administration."

He said that he would write a cheque directly to the plaintiff for her services and they had agreed that she would look after her own taxes. He paid her the amounts on her invoice and did not pay for benefits or make any deductions. He understood that she did not contract to provide rehabilitation assistance with anyone else. He would put the plaintiff in touch with the occupational therapist who would direct the therapy. If equipment was necessary, the plaintiff would have billed him for it and he would then bill the client.

He said that the plaintiff did not report to him, she reported directly to the occupational therapist. He also stated "All I have on file for Donna is her résumé and invoices. I have had other people work for me, about 6 people have contracted to me over 7 years."

The plaintiff travelled directly from her home to see clients. She did not need to stop by his home/office first. He said that, on the day of the accident, she had been on her way to see a client who was a referral from the WCB. He could not remember whether the occupational therapist had called him or the plaintiff, but, in either case, he would have invoiced the WCB as usual.

In a subsequent undated statement received at the Appeal Division on January 29, 2003, Glenn Kerr said that he did not consider himself an employer nor did he consider the plaintiff an employee. With regard to the client that the plaintiff was going to see when the accident occurred, he believed that the occupational therapist had contacted the plaintiff directly.

He said that he did not direct the plaintiff in how she performed her work, when she performed her job, how often she performed her job, what tools she used or with whom she worked. He said that he did the paperwork and billed clients on her behalf "and for that I charge a small fee." He said that they had agreed on this fee before entering the relationship. He again said that the plaintiff submitted invoices on a biweekly basis, which he used to bill the fee payer "on her behalf." He said that the plaintiff could have done this but she "did not want the hassle of having to get a vendor number from ICBC or WCB." And, "She also preferred getting some money twice a month instead of having to wait for the fee payer which took 2–3 months."

Further, he said that the plaintiff "was being paid for her travel time by the WCB at the time of the accident" and she was working for herself and was not a worker or employed by him. He stated that, based on the definition of worker under the Act, he considered that the plaintiff had a contract with the Workers' Compensation Board, "who agreed to enlist her services and with the Occupational Therapist who initiated her involvement." He said that the plaintiff did not have this kind of contract with him.

Reasons and Findings

1. *The first issue is whether the plaintiff was a worker under Part 1 of the Act when the accident occurred.*

As of the date of the accident, under section 82 of the Act, the governors had authority to approve and superintend the policies and direction of the Board, and those duties were then being discharged by a Panel of Administrators under section 83.1 of the Act. Governors' policy included the *Rehabilitation Services and Claims Manual*, the *Assessment Policy Manual*, and,

Decisions No. 1−423 of the *Workers' Compensation Reporter*. (See Governors' Decision No. 86 (*Bylaw No. 4 — Published Policy of the Governors*, 10 *Workers' Compensation Reporter* 781), and the Panel of Administrators' Decision No. 1 (*Discharge of Governor Policy-making Function*, 11 *Workers' Compensation Reporter* 465)).

Since then a number of relevant *Workers' Compensation Reporter* decisions were "retired" and the *Assessment Policy Manual* was superseded by the *Assessment Manual* as of January 1, 2003. My decision refers to the law and policy that existed as of the date of the accident. However, I also note that the above noted changes do not alter the substance of the applicable law and policy.

The Act creates three categories: employer, worker, and independent operator. "Worker" and "employer" are defined in section 1 of the Act. The definition of "worker" includes:

> a) a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise;

It also includes an independent operator admitted by the Board under subsection 2(2) of the Act. The term "independent operator" is not defined in the Act.

The policies of the governors utilize a fourth category which is not contained in the Act, namely, that of "labour contractor." Item #6.10 of the *Rehabilitation Services and Claims Manual* (Manual) which is entitled, "Nature of Employment Relationship" provides:

> Where a person contracts with another to provide labour in an industry covered by the *Workers Compensation Act*, the Board considers that the contract may create one of three types of relationship. The persons doing the work may be independent firms, labour contractors, or workers.

Item #20:20:00 of the *Assessment Policy Manual* provides the following with regard to labour contractors:

> A labour contractor is an unincorporated party who supplies essentially labour only or one piece of major equipment and works for one concern at a time. Labour contractors can take out Personal Optional Protection even if they have no workers or they can register to cover their workers only. If they are unregistered they and anyone they employ to assist them will be regarded as workers of and covered by the prime contractor.

The *Assessment Policy Manual* provides guidance in establishing the status of firms and persons. It states generally as follows at #20:10:30:

> The commencement and termination of an employment relationship and distinguishing a relationship of employment from a relationship between independent contractors is considered in Workers' Compensation Reporter Series Decisions 26, 32, 138 and 255. . . . The current policy used to determine whether an individual is an independent contractor and is therefore eligible for registration will be discussed further in Section 20:30:20 of this manual.

Item #20:30:20 of the *Assessment Policy Manual* commences as follows:

> The current operational policy for the administration of registration requirements or eligibility is set out in Workers' Compensation Reporter Series Decision Number 255. That decision sets out the spirit and intent of registering firms.
>
> From a registration viewpoint, there are three basic categories to consider when determining the registration requirements of an employer; independent firms, labour contractors and workers. Each of these categories is discussed below and represents guidelines in determining the registration requirements or eligibility. Individual cases must be viewed as to whether the application o[f] the policy is appropriate for that case.

Decision No. 255 (3 *Workers' Compensation Reporter* 155) states, in part, at pages 155–156:

> *Decisions 32 and 138* also lay down the factors considered by the Board in determining how the relationship between the parties to a contract should be classified. These factors include, for example, the degree of control exercised over the supplier of labour by the person for whom he works, whether the supplier of labour or the person for whom he works provides the necessary equipment or licenses, and whether the supplier of labour engages continuously and indefinitely for one person or works intermittently and for different persons. **The major test, which largely encompasses these factors, is to ask whether the supplier of labour has any existence as a business enterprise independently of the person for whom he works.**
>
> . . .
>
> No business organization is completely independent of all others. It is a question of degree whether a contractor has a sufficient amount of independence to warrant his registration as an employer.
>
> [emphasis added]

Decision Nos. 26, 32, 138, and 255 list several factors as being significant in determining whether a person is an independent firm, labour contractor, or a worker. These factors were previously summarized at #7.44 of the *Rehabilitation Services and Claims Manual* (the Manual) as follows:

> (a) Control
> (b) Ownership of Equipment or Licences
> (c) Terms of Work Contract
> (d) Independent Initiative, Profit Sharing, and Piecework
> (e) Employment of Others
> (f) Continuity of Work
> (g) Separate Business Enterprise

Items (a) to (g) were headings from #7.44; the policy also included discussion with respect to the application of these criteria. Also of relevance is the comment in Decision No. 32 that, "In distinguishing between an employment relationship and one of independent contractors there is no single test that can consistently be applied."

By resolution dated October 3, 1994, the governors deleted #7.44 from the Manual, effective November 1, 1994, as part of a package of revisions to the Manual and *Assessment Policy Manual*. The accompanying explanatory notes concerning these revisions indicated that they did not effect any change in the policies other than those necessitated by *Workers Compensation Amendment Act, 1993* and a court decision concerning First Nations operations on reserve land. There was an intent to avoid duplication between the two manuals, and to remove policies from the Manual which concerned assessment issues.

Counsel have applied the concepts indicated by items (a) to (g) to the agreement between Glenn Kerr (Sierra Rehabilitation Assistance) and the plaintiff with differing results. Counsel have also cited several prior decisions of the Appeal Division, together with argument as to why they should be followed (or distinguished) in this case. Counsel for the plaintiff cited Appeal Division Decision #92-1672 [*Independent Operator*, 9 *Workers' Compensation Reporter* 627] in support of her position. Counsel for the defendant cited Appeal Division Decision #94-0455 [*Labour Contractors*, 10 *Workers' Compensation Reporter* 589] and Appeal Division Decision #92-1967 [*Interpretation of "Worker," "Employer," and Independent Contractor*, 9 *Workers' Compensation Reporter* 55]. Decisions of the Appeal Division do not constitute policy but the reasoning expressed in those decisions may assist in considering the application or interpretation of governors' policy (now the policies of the directors).

Counsel for the plaintiff relies particularly on Decision #92-1672 (supra) and submits that the facts of that case are very similar to those of the plaintiff in this case. Decision #92-1672 involved a request for a certificate under section 11 with respect to the status of a party who operated a cleaning business. The panel applied the seven principles described above and concluded, in the facts of that case, that the party was an independent operator.

The facts included that, the cleaner was in control of his business, he was not required to do most of his work or much of it for any other firm, and no one directed his work. He owned all the equipment, licenses, insurance etc. required to operate his business and he was not operating under some other firm's license. There were no continuing terms in the claimant's work that would indicate he was under a contract of service and no evidence that he was required to take certain contracts or of any non-competition clauses which would indicate interdependence. He did not share profit or losses but his profit or loss depended entirely on his own independent initiative in getting those contracts and establishing a viable contract price. He contracted with a variety of firms and people and was not engaged continuously and indefinitely by just one or two firms.

The panel concluded that all of the above led to the conclusion that the cleaning business was indeed an independent enterprise and the cleaner was not a labour contractor.

Decision #92-1967 (supra) dealt with a decision of the Assessment Department and involved consideration of whether a group of managers were independent operators or workers. It is useful for its discussion of the term "worker" in workers' compensation law and some of the larger policy considerations which are reflected in determinations of who is an employer. The panel in that case also applied the seven criteria described in the policy and determined that the group of managers, despite contractual language to the contrary, were workers.

Decision #94-0455 (supra) dealt with an application for a determination under section 11 as to the status of a carpet cleaner. This decision is also useful for its review of the various terms used in the Act and the policies. The panel in that case determined that the cleaner was a worker.

In the present case, the plaintiff's employment as a rehabilitation assistant does not meet the criteria for a labour contractor as defined in policies at item #20:20:00 and #20:30:20. The central issue is whether her relationship with Sierra is an employment relationship or a relationship between two independent operators. This involves consideration of her employment activities in light of the seven factors described in the policies.

Control

The discussion under this heading in the policy states that "this is the traditional common law test which asks whether one party controls or has the right to control the manner in which the other party carries out the work contracted for." The policy goes on to say that "The test is now rather discredited, but is applied along with the other tests in suitable cases."

Counsel for both parties have applied this test, each emphasizing a different aspect of the relationship between Sierra and the plaintiff. Counsel for the defendant notes that all of the work done by the plaintiff, as a rehabilitation assistant, came from Sierra. Glenn Kerr was the only one who referred work to her and he controlled the flow of that work. Accordingly, counsel submits that this points to more of an employer/employee relationship.

Plaintiff's counsel submits that the plaintiff was in control of the work she accepted, what work she would do, and how she would do it. She was neither directed nor monitored in her work product by Sierra. Accordingly, she should be viewed as an independent operator.

Both of these submissions are largely consistent with the evidence but do not fully speak to the test as it is described above because of the relatively unusual circumstances of this case. It is unusual in that neither Sierra nor the plaintiff had a significant degree of control over the manner in which the work was carried out. This is by virtue of the work itself and the role of a rehabilitation assistant, whose functions are performed under the direction of a therapist. Although the plaintiff could decide not to take a referral, once she had accepted the referral the nature of the service she provided, including the equipment that would be used, would largely be determined by the therapist — albeit with the plaintiff's input. Accordingly, the "control" test is not particularly suited to this arrangement and the results of attempting to apply it are equivocal at best.

Ownership of Equipment or Licenses

This involves the question of who owned any major equipment used in the provision of the labour or service or who held the licenses necessary to provide the service. In this case, the provision of services did not involve equipment provided by either party. In addition, no licenses were required. However, it is of some significance that the plaintiff had no capacity to bill the clients with whom she worked since she did not have a vendor number in relation to either ICBC or the WCB. The ownership of a license is significant because it assists in determining the capacity of the parties to function independently of each other. If the individual or firm that provides the labour does not have a license to provide that labour but relies on the license of another party, this argues against the labour provider being an independent operator. Similarly, the fact that the plaintiff did not have a vendor number and could not therefore bill directly for her services denotes dependence on the other party, Sierra, more consistent with a worker than an independent operator.

In this regard, I note that Glenn Kerr, in his statement of January 9, 2003, described the clients he referred to the plaintiff as his clients. He also said that he did not remember if the plaintiff had occasionally "got her own clients" but even if she did she would still have to go through him because she did not have a vendor number.

Terms of Work Contract

This factor involves consideration of whether the terms of the agreement between the parties are more consistent with an employment contract or an agreement between two independent contractors. Although there was no written contract in this case, the parties had an agreement with regard to the amount of remuneration, the frequency of invoicing, and the frequency and contents of reports provided by the plaintiff to Sierra. In addition, the plaintiff and Glenn Kerr had reviewed his policy and procedures manual before he referred any clients to her. The plaintiff could choose not to accept a referral but once she accepted it, the terms of the agreement with Sierra applied to the services she provided.

The plaintiff was paid on an hourly basis and she did not/could not bill clients directly. In this regard, I also note the final submission from Sierra in which Glenn Kerr states that the plaintiff paid Sierra a small fee for the provision of financial services, and the amount of this fee had been agreed upon before they entered their arrangement. As counsel for the defendant has noted, this "fee" was not previously mentioned by either party in their direct statements describing the arrangement. And, since the payment of such a fee would perhaps favour characterizing the relationship as one of independent parties this statement is in the interest of Glenn Kerr, since the plaintiff would be viewed as his worker if she is characterized as a worker. In view of these factors, I have not placed undue weigh on this statement.

On the other hand, the fact that Sierra did not deduct taxes or make other deductions such as those required for EI or CPP is consistent with the view that Glenn Kerr did not intend to assume responsibility for the plaintiff as an employee. However, the nature of an agreement under the Act is not largely determined by the stated intent of the parties or, for that matter, how they might characterize themselves in a written agreement.

In Decision #32 (*Re The Employment Relationship*, 1 *Workers' Compensation Reporter* 127) the former commissioners considered the status of a group of taxi drivers and concluded that the drivers were employees of the taxi company. The company had a contract with each driver which described the driver as an "independent contractor." After considering all aspects of the arrangement between the taxi drivers and the company the commissioners concluded that the taxi drivers were employees of the company. In arriving at this conclusion, the commissioners made the following statements at page 128 which are relevant to the situation in this case:

> One point that has been stressed is that the drivers want to be treated as self-employed businessmen. We accept that this is a genuine desire of the drivers and that they are not being unduly influenced by the company. But to recognize the wishes of the drivers as being legally relevant would be inconsistent with the principle of compulsory coverage, and inconsistent with the terms of section 13.

Section 13 of the Act, as it was then, prohibited workers from waiving or foregoing benefits to which the worker was entitled under the Act. Section 13(1) of the current legislation contains the same provision.

In the plaintiff's case, the fact of an hourly rate of pay, the inability to bill payers directly, the need to provide reports regarding the manner in which her time was spent, and the review of a policy and procedures manual before entering the agreement are all consistent with an employment relationship. They denote a substantial degree of dependence on the part of the plaintiff despite whatever intentions or perceptions the parties may have had with regard to the classification of their relationship.

Independent Initiative, Profit Sharing, and Piecework

Where there are opportunities for independent initiative or profit sharing this is indicative, but not determinative, of an independent operator.

Counsel for the plaintiff submits that the plaintiff ran her own independent business. Accordingly, there was no basis for sharing in business profits. She also submits that the initiative regarding the volume of work and level of income was entirely the plaintiff's. The factors of initiative and profit sharing, however, relate more to the opportunities for the party or parties to find their own clients, and to assume risk in order to acquire greater profits. In this situation, it was solely Sierra that obtained the clients and to the extent that there was any risk involved, it was assumed by Sierra.

Employment of Others

The employment of others is also a factor which would weigh more in favour of an independent operator or firm. The plaintiff, however, did not have employees.

Continuity of Work

The policy describes this as a test concerning "whether one party is engaged continuously and indefinitely for the same party or intermittently for different parties."

Counsel for the plaintiff states that this was a part-time enterprise and the plaintiff had worked with a variety of injured people over the years. On this point, there is no dispute that the plaintiff worked part-time but all of her referrals came from Sierra during the period in question. There is no evidence that she accepted referrals from other rehabilitation assistants and she could not take direct referrals from the WCB and ICBC. Although her work activities involved assisting different injured people, these people were not her "clients" in the sense that they paid her for her services. She was paid by Sierra to provide rehabilitation assistance to them.

Although the plaintiff had the ability to refuse a referral, once a referral was accepted, she delivered her rehabilitation assistance to the injured person in return for the compensation she received from Sierra. The contract for services was between the plaintiff and Sierra.

Separate Business Enterprise

This test is described as a test of "whether one party has an existence as an independent businessperson separate from the relationship with the other party." The policy states that the test largely encompasses the factors described above.

The circumstances of the plaintiff in this case differ substantially from those of the cleaner in Decision #92-1672 (supra). Of particular significance is the fact that the cleaner had all licenses, insurance etc. necessary to conduct his business. He obtained his own clients and he negotiated the contract prices. None of these circumstances are present in this case.

The agreement between Sierra and the plaintiff, when viewed in light of the factors described above, is more consistent with an employment relationship than a relationship between two independent operators. In this regard, I consider it quite significant that the plaintiff did not have a vendor number with the WCB or ICBC and there is no evidence that she had developed the capacity to acquire other clients outside of those referred to her Sierra. The fact that she could refuse clients is not a sufficient indicator of an independent operator when that person has no capacity to obtain clients by other means. Many part-time employees are permitted to turn down shifts that do not suit their circumstances; this does not alter the status of the person from an employee to an independent contractor.

Although the absence of a vendor license is a primary consideration, most of the other factors also point to a relationship that is more consistent with that of an employer/employee than a relationship between independent operators. Accordingly, I find that she was a worker at the time the accident occurred.

2. *The next issue is whether the plaintiff's alleged injuries arose out of and in the course of her employment.*

Counsel for the plaintiff made no submissions on the issue of whether the plaintiff's accident arose out of and in the course of employment. Counsel for the defendant acknowledges that accidents occurring in the course of travel from a worker's home to their place of employment are not compensable. He submits, however, that the plaintiff comes within the exceptions to this general rule.

He states that her employment required her to work at various sites and at various times and to travel to those locations. Accordingly, he submits that the plaintiff would be covered under the Act from the time she left her home according to the policy on irregular starting points (item #18.32 of the Manual).

In addition, he submits that travelling was a substantial part of the service for which the plaintiff was employed. Accordingly, her travel would be considered part of her employment. Furthermore, she was paid on an hourly basis for the time she spent travelling. In view of these two factors, the same principles should apply as is applied to travelling salesmen.

The policies with respect to travelling employees are set out in items #18.00 to #18.42 of the Manual. The general rule is set out in item #18.00 as follows:

> The general position is that accidents occurring in the course of travel from the worker's home to the normal place of employment are not compensable. But where a worker is employed to travel, accidents occurring in the course of travel are covered. This is so whether the travel is a normal part of the job or is exceptional.

The policies address various circumstances in which injuries that occur in the course of travel are compensable. The policy at item #18.32, *Irregular Starting Points,* provides:

> *#18.32 Irregular Starting Points*
>
> There are a number of different situations that have to be considered under this heading. One is where the worker is injured in the course of a journey between home and a normal or regular operating base. That situation is substantially similar to the case of a worker travelling between home and a fixed place of employment and an injury occurring in the course of that journey would not be covered.
>
> . . .
>
> A further situation arises when the job function requires the worker to report at what might be called irregular starting points. That is, different starting points on different days or different months and terminating employment at different termination points. This could apply, for example, to bus drivers. In cases where such a driver must first report to the depot to receive an assignment, travel from home to the depot would not be covered under compensation. The question as to whether the driver's travel from the depot to the point where the run will begin should be covered as being in the course of employment is distinct from that of union members who go from a hiring hall to different work locations and, perhaps, to different employers each day. There is only one employer in this case and the worker is sent from the employer's premises. In such a situation, once the worker has been dispatched from the depot to journey to the point where the run will begin, as long as the worker is proceeding toward that place with reasonable expedition and without substantial deviation, the worker.
>
> Where a worker has a regular or usual place of employment and is assigned temporarily to work at a place other than the regular place of employment, the worker is covered for compensation while travelling to and from that temporary place, and this is so whether the worker goes there from the regular place of employment or goes there directly from home. The same rule applies, for example, to a delivery person who goes direct from home to make deliveries.

Item #18.22, *Payment of Travel time and/or Expenses by Employer,* provides, in part:

> The payment of wages or travelling allowances etc. may in some circumstances be a factor to be considered, but it usually will not be a significant factor, nor is it ever the sole criteria in determining the acceptability of a claim.

There is also a decision of the former commissioners which deals with wages for travelling. Decision No. 190 [*Re The Coverage of Workers' Compensation*, 2 *Workers' Compensation Reporter* 299], which has not been retired, involved a miner who was fatally injured in a motor vehicle accident on his way to work. All employees of the mine were paid a "travel allowance" of $1.50 per day. This amount was paid regardless of whether an employee used his own transportation or the bus that was subsidized by the company.

A majority of the Board of Review had found that the payment of the travel allowance was sufficient to bring the journey to work within the scope of employment. The commissioners, however, found that the test was "whether or not the journey itself is a substantial part of the service for which the worker is employed." They went on to discuss the effect of the travel allowance and whether it served to bring the travel within the course of employment. On this point, the commissioners said:

> Clearly, if the payment was an hourly wage for travelling time one could easily infer the establishment of an employment relationship. However, in this case there is no suggestion that the workers were being compensated for time spent on the road per se. Neither was the $1.50 intended to cover the worker's actual expenses of travel . . . It is fairly clear that the intent of the payment was to encourage regular and continuous employment rather than to compensate for time spent in travel.

Item #18.40 of the Manual, *Travelling Employees*, provides:

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

The issue of injuries occurring while a worker is travelling has been considered in a number of published Appeal Division decisions. In several published decisions Appeal Division panels applied the policy on irregular starting points without taking into account whether the worker had a usual place of employment.

In Decision #97-0191 [*Travel to regular starting points*, 15 *Workers' Compensation Reporter* 145] the Appeal Division panel questioned this approach. In a subsequent Appeal Division decision, Decision #98-0869 [*Irregular Starting Points (No. 3)*, 15 *Workers' Compensation Reporter* 205], another panel considered the same policy. That decision also involved a section 11 certificate. The plaintiff was employed as a painter and he was involved in an accident while on his way to his assigned work site for the day.

The panel concluded that the policy on irregular starting points was not intended to extend coverage to an employee while travelling to their employment solely on the basis that the worker's employment involved travel to different starting points. The panel was of the view that, "the existence of a 'regular or usual place of employment' is a condition precedent to the application of the policy at #18.32 . . . in respect of providing coverage for travel to a different work location." In the absence of any other factors that would serve to bring the journey to work within the course of employment, the panel concluded that the painter's accident in that case had not occurred in the course of his employment.

I agree with the interpretation of the policy on irregular starting points as expressed in these two decisions, #97-0195 and #98-0869. A worker is not covered under the Act while travelling to work solely by virtue of having employment which requires him or her to start work at various locations. The fact that a worker's employment involves irregular starting points and that he or she has no usual starting place may, however, be indicative that the worker is a travelling employee, as contemplated by the policy in item #18.40 of the Manual.

Under item #18.40, an employee whose job involves travel is covered for the journey from home to the first work site or client of the day because this travel is considered part of his employment. If this person travels to the employer's premises first, the journey from home to the employer's premises is not covered, in keeping with the general rule that travel to the place of employment is not covered.

In this case, the plaintiff had no usual place of employment or work site. Accordingly, the policies regarding irregular starting points would not apply to her travel to see a client.

The more significant consideration is whether the plaintiff is a travelling employee, such that a trip to meet with a client would be covered under the Act. The policy in item #18.00 states that, "where a worker is employed to travel, accidents occurring in the course of travel are covered." Item #18.40, states that "Employees whose job involves travelling on a particular occasion or generally are covered while travelling." I have also found Decision 190 useful in that the former commissioners formulated the test as "whether or not the journey itself is a substantial part of the service for which the worker is employed."

In that decision, the commissioners drew on the following example from *Larson's Compensation Law* to illustrate this point:

> Suppose that an employee who lives a considerable distance from the mine where he is employed, has as part of his job, the duty of returning to the mine at night and throwing the switch to turn on the pumps so that the mine will be ready for operations in the morning. His actual work consists of a single motion which takes but a fraction of a second, the closing of the switch, but anyone appraising that job as a whole would immediately agree that the essence of the service performed was the making of the journey to the mine and back at the precise time when the pumps had to be turned on. It follows that the entire journey to and from the mine is in the course of employment.

It is clear in this example that the travel was a substantial part of the service and yet the miner would not be considered a travelling employee in the usual sense of that term.

The plaintiff in this case does not have a usual place of employment but she is also not engaged in travel in the same way that the more traditional travelling employee (travelling salesperson) would be. Had she worked as a rehabilitation assistant full-time then her situation would be very similar to that of a travelling salesperson or anyone who travels from client to client in order to provide a service for their employer. In that situation, the necessity of travel combined with the payment of an hourly rate to travel makes a clearer case for coverage of the travel as part of the employment.

The plaintiff, however, worked part-time only. She was paid $300 to $400 per month at a rate of $20 per hour for rehabilitation assistance and $10 per hour for travel. Given these numbers and the existence of a full-time job it seems unlikely that she would have seen more than two clients consecutively and, more likely, she saw only one on any given day.

On the other hand, the capacity to provide rehabilitation assistance to clients in various locations was integral to the service provided by Sierra. As a result, travel was a significant aspect of the overall service provided by Sierra and, consequently, the service provided by the plaintiff for Sierra's clients.

The payment of an hourly rate specifically for travel time is also a factor to take into account in determining whether the plaintiff was employed to travel. The policy at item #18.32 cautions against over-emphasizing the significance of "wages or travelling allowances" in determining whether the journey to work was within the course of employment but recognizes that they may be a factor to take into account. In this case, the combined hourly rate paid to travel and the travel allowance were substantial enough that they would not be characterized as anything other than payment for travel and the costs of travel. At a minimum, the rate of pay for travel and the additional travel allowance provide additional evidence of the significance of the travel in relation to the overall service provided.

In view of the nature of the service provided and the rate of pay for travel, I consider that travel was a substantial aspect of the plaintiff's employment and, as a result, that she was a travelling employee. Accordingly, I find that her journey from home to the client in White Rock occurred in the course of her employment. Since she sustained injuries as a result of an accident which occurred in the course of her employment, the rebuttable presumption under section 5(4) of the Act, that the injuries also arose out of the employment, is brought into play. In the absence of evidence that would rebut the presumption, the plaintiff's injuries arose out of and in the course of her employment.

Given the above, I find that injuries sustained by the plaintiff as a result of the accident on August 2, 2000 arose out of and in the course of her employment.

In summary, I find that, at the time of the accident on August 2, 2000, the plaintiff was a worker under Part 1 of the Act and any injuries sustained in that accident arose out of and in the course of her employment.

Status of the Defendants

Status of Harjit & Sons Enterprises Ltd.

A December 6, 2002 memorandum from the policy manager, Assessment Department indicates that the defendant was registered with the Board at the time of the accident. In an affidavit sworn on April 28, 2003 Harjit Hans stated that he is a co-owner of Harjit and on the date of the accident, August 2, 2000, Gursharan Singh Dhaliwal, his employee, was driving the dump truck that was involved in the accident. Accordingly, at the time of the accident Harjit was an employer engaged in an industry within the meaning of Part 1 of the Act.

Status of Gursharan Singh Dhaliwal

No submissions have been received with respect to this defendant nor was any direct evidence provided with respect to his status. There is an affidavit of service for documents served on the defendant, including the Writ of Summons and Statement of Claim with respect to this action. However, correspondence from the Appeal Division to the defendant, which was delivered to the address for service, was returned to the Appeal Division as 'unclaimed.'

The only evidence with respect to the status of Mr. Dhaliwal is the affidavit provided by Harjit Hans. Harjit Hans states that Mr. Dhaliwal was an employee of Harjit and was operating the dump truck that was involved in the accident on August 2, 2000. He also states that, at the time the accident occurred, "Gurshuran Singh Dhaliwal was in the course of his employment with Harjit & Sons Enterprises Ltd."

The question of whether the alleged breach of duties which gave rise to the legal action arose out of and in the course of Mr. Dhaliwal's employment is a determination which requires the application of the law and policies to the facts in a particular case. The statement by Harjit was that Mr. Dhaliwal was "in the course of his employment" is not evidence it is a submission. There is insufficient evidence in this affidavit from which to make a determination as to the whether Mr. Dhaliwal's alleged breach of duty arose out of and in the course of his employment.

The parties have indicated that there is no dispute between them as to the status of Gurshuran Singh Dhaliwal but that also is not sufficient to provide a basis for a certificate. If the parties require a certificate with respect to the status of the defendant Gurshuran Singh Dhaliwal, a request for that certificate may be submitted to the WCAT with the supporting evidence and argument.

Conclusion

I find that, at the time of the August 2, 2000 accident:

1) The plaintiff, Donna Gallagher, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

2) The injuries suffered by the plaintiff arose out of and in the course of her employment within the scope of Part 1 of the Act.

3) The defendant, Harjit & Sons Enterprises Ltd., was an employer in an industry within the meaning of Part 1 of the Act.

I make no finding with respect to the status of the defendant Gurshuran Singh Dhaliwal for the reasons provided.

NO. M0110123
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1996, CHAPTER 492

BETWEEN:

DONNA GALLAGHER

PLAINTIFF

AND:

HARJIT & SONS ENTERPRISES LTD. and
GURSHARAN SINGH DHALIWAL

DEFENDANTS

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

THIRD PARTY

C E R T I F I C A T E

UPON APPLICATION of the Defendant, HARJIT & SONS ENTERPRISES LTD. and Third Party, INSURANCE CORPORATION OF BRITISH COLUMBIA, in this action for a determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action and other interested persons of the matters relevant to this action and within the jurisdiction of the Workers' Compensation Appeal Tribunal;

AND AFTER an opportunity having been provided to all parties and other interested persons to submit evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the evidence and submissions;

THE WORKERS' COMPENSATION APPEAL TRIBUNAL DETERMINES THAT AT THE TIME THE CAUSE OF THE ACTION AROSE, August 2, 2000:

1. The plaintiff, DONNA GALLAGHER, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

2. The injuries suffered by the plaintiff, DONNA GALLAGHER arose out of and in the course of her employment within the scope of Part 1 of the *Workers Compensation Act*.

3. The defendant, HARJIT & SONS ENTERPRISES LTD., was an employer in an industry within the meaning of Part 1 of the *Workers Compensation Act*.

CERTIFIED this 11th day of June, 2003.

Decision of the Workers' Compensation Appeal Tribunal

Number: 2003-01116-AD
Date: June 25, 2003
Panel: Jill Callan, Chair
Subject: Application for Reconsideration

Introduction

The worker, who is unrepresented, seeks reconsideration of Appeal Division Decision #2002-1370 dated June 3, 2002. The appeal before the Appeal Division panel had been brought by the employer and concerned the issue of whether the worker had sustained a back injury that arose out of and in the course of her employment. The Appeal Division panel had allowed the employer's appeal and determined that the worker's back injury was not compensable.

The worker has sent various letters to the Appeal Division including submissions dated August 21 and November 26, 2002 and January 22, 2003. She has submitted new evidence in the form of a "Supervisor's Accident Investigation Report." She has also indicated that witness statements may be available. In addition, the worker has made a series of arguments as to why the Appeal Division panel ought to have found that her back injury was compensable. Accordingly, I read the worker's submissions as seeking reconsideration on the basis of new evidence and on common law grounds.

The worker's application for reconsideration under section 96.1 of the *Workers Compensation Act* (the Act) was filed to the Appeal Division before March 3, 2003. Effective March 3, 2003, section 96.1 of the Act was repealed, and the Workers' Compensation Review Board (Review Board) and the Appeal Division were replaced by the Workers' Compensation Appeal Tribunal (WCAT). These changes were contained in Bill 63, the *Workers Compensation Amendment Act (No. 2), 2002*. WCAT has jurisdiction to reconsider its decisions and decisions of the Appeal Division on the basis of new evidence pursuant to section 256 of the amended Act. Sections 39(1)(b) and 39(2) of the transitional provisions contained in Part 2 of Bill 63 provide that proceedings for reconsiderations of decisions that were pending before the Appeal Division on March 3, 2003, are continued and must be completed as proceedings before WCAT. This means that WCAT will consider the application on the basis of new evidence under the former section 96.1.

The employer is participating in this application and has provided a submission dated December 23, 2002. The employer takes the position that the worker's reconsideration request should be denied.

Issue(s)

The issue is whether Appeal Division Decision #2002-1370 should be reconsidered on the basis of new evidence or on common law grounds.

Background

The history that has led to the worker's reconsideration application is as follows:

- On December 14, 1999 the worker completed a report of injury in which she indicated she had injured her back at work on December 8, 1999.
- By letter dated May 12, 2000, an entitlement officer of the Workers' Compensation Board (the "Board") informed the worker that her claim had not been accepted.
- The worker appealed the May 12, 2000 decision to the Review Board.
- By findings dated November 15, 2001, the majority of the Review Board panel allowed the worker's appeal and concluded that she had suffered a compensable back injury.
- The employer appealed the Review Board findings to the Appeal Division.
- In Decision #2002-1370 the Appeal Division panel concluded that the worker had not sustained a compensable injury. Accordingly, the panel allowed the employer's appeal.

The worker now seeks reconsideration of Appeal Division Decision #2002-1370.

The New Evidence

The former section 96.1 of the Act provides:

> (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 or she 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.

In the letters she has provided in support of her reconsideration application, the worker has, among other things, listed the witnesses who would have been available to provide statements related to her injury. She has also provided the "Supervisor's Accident Investigation Report"

that had been completed on behalf of the employer on December 14, 1999. It states that the worker had experienced pain in her lower back after unloading material from a truck. In the section of the form entitled "direct cause of incident" the supervisor has written "lifting."

In order for an Appeal Division decision to be reconsidered on the basis of new evidence, the new evidence must be "substantial and material to the decision" as required by paragraph 96.1(3)(a). I consider that "material" evidence is evidence with obvious relevance to the decision of the Appeal Division panel. I consider that "substantial" evidence is evidence which has weight and supports a conclusion opposite to the conclusion reached by the panel. In addition to being material and substantial, the new evidence must either be evidence that "did not exist at the time of the hearing" or evidence that meets the due diligence requirement outlined in paragraph 96.1(3)(b). In this case, the Supervisor's Accident Report existed at the time of the hearing. Accordingly, I must consider the due diligence requirement.

In Appeal Division Decision #91-0724 (*Workers' Compensation Reporter* Vol. 7, p. 145), the chief appeal commissioner stated the following in respect of the due diligence requirement (at pages 148 and 149):

> I find, first of all, that the test of "due diligence" applies to the person requesting reconsideration rather than to the decision-maker. The most reasonable interpretation of Section 96.1 is that it constitutes a bar to reconsideration to an applicant, where the basis for their request is that . . . the Appeal Division did not consider evidence which the applicant could through the exercise of due diligence have obtained and submitted prior to the making of the impugned decision.
>
> The effect of this provision is to place some onus on an appellant for ensuring that the Appeal Division is in possession of the information necessary to the proper consideration of their appeal in the first instance. *While the Appeal Division functions on an inquiry basis, and may itself seek out additional information, an appellant should be aware of the ramifications of Section 96.1 if they proceed with their appeal without taking reasonable steps to ensure that the evidence on file is complete.*
>
> It is important to note, however, that the test of "due diligence" includes a concept of reasonableness as to the nature and scope of the inquiries an appellant is expected to have pursued. The fact that information previously existed and could have been obtained upon inquiry is not conclusive as to whether it could through the exercise of "due diligence" have been discovered. The circumstances of the particular case must also be considered, with regard to the extent of the inquiries which due diligence would have required.
>
> The question is not simply whether the appellant could have obtained the particular information if they had made diligent inquiries for the purpose of obtaining it. The requirement of "due diligence" is more properly interpreted as referring to the degree of care which a prudent and reasonable appellant would have exercised in ensuring that the Appeal Division had all relevant information necessary to the proper consideration of their appeal. If, for example, certain information existed, but it was not reasonably foreseeable that it would be germane to the Appeal Division's consideration, "due diligence" would not

> have required the appellant to search it out. To interpret the requirement of "due diligence" otherwise would be to create an artificial and unrealistic legal barrier to reconsideration which, in my view, was not intended by the statute. The requirements of section 96.1 of the Act must be interpreted in a fair and meaningful fashion, with regard to the realities of the appeal process.
>
> [emphasis added]

I adopt the analysis in Appeal Division Decision #91-0724. I note that this analysis may also be of assistance in interpreting section 256(3) of the amended Act.

I find the Supervisor's Accident Investigation Report does not meet the due diligence requirement. Such evidence was obviously germane to the question before the Appeal Division panel and a reasonable appellant would have provided all evidence related to the injury prior to the issuance of the Appeal Division decision. The reconsideration process is generally intended for rather extraordinary circumstances. It is not intended to be a vehicle by which appellants can re-argue the appeal and provide evidence that ought to have been provided to the original Appeal Division panel. While the worker has not provided witness statements, she has stated that they would be available. It seems to me that the same analysis would be applicable to witness statements. That is, a reasonable appellant would have provided the Appeal Division panel with all available evidence relevant to the acceptance of the claim at the time of the appeal to the Appeal Division.

Given that the evidence does not meet the due diligence requirement, I find it unnecessary to determine whether it is substantial and material.

Common Law Grounds

The worker has made numerous comments concerning the evidence relevant to her claim and the manner in which that evidence ought to have been weighed by the Appeal Division panel.

In Appeal Division Decision #93-0740 (*Workers' Compensation Reporter*, Vol. 10, p. 127), the chief appeal commissioner concluded that the common law grounds for reconsideration of Appeal Division decisions include a clerical mistake or omission, fraud, and "an error of law going to jurisdiction." A denial of natural justice would constitute such an error.

In Appeal Division Decision #97-0743 (*Workers' Compensation Reporter* Vol. 14, p. 61), which also involved the reconsideration of an Appeal Division decision, the panel stated (at page 79):

> The fact that a decision is problematic, flawed or incomplete in some respects is not by itself a sufficient reason to set it aside. In accordance with Section 96.1 of the Act, Appeal Division decisions are "final and conclusive" subject to Medical Review Panel certificates and new evidence within the meaning of the provision. Taking into account the privative clause in Section 96.1, published Appeal Division Decision No. 93-0740 concluded that a decision must contain an "error of law going to jurisdiction" before it may be set aside. A patently unreasonable interpretation (or application) of a statutory provision would amount to an "error of law going to jurisdiction". A patently unreasonable finding of fact would amount to an "error of law going to jurisdiction".

I agree with this analysis and find that Appeal Division and WCAT decisions must be treated with substantial deference. It appears that a similar approach will apply to reconsideration applications concerning WCAT decisions.

In most cases, an error of law going to jurisdiction will not be established on the basis of the manner in which a panel has handled the evidence. This is the case even if another panel would have reached a different conclusion. However, there are some situations in which the manner in which evidence has been dealt with will constitute an error of law going to jurisdiction. For instance, there may be such an error if important evidence has been disregarded or uncontradicted material evidence has been rejected without explanation. There may also be such an error if a finding of fact on which the decision turns is not supported by any evidence. In this case, I find there was evidence in support of the panel's findings of fact. I find no error of law going to jurisdiction has been established in respect of the manner in which the panel handled the evidence.

Conclusion

Grounds for reconsideration have not been established. Appeal Division Decision #2002-1370 stands as final and conclusive.

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

Decision of the Workers' Compensation Appeal Tribunal

Number: 2003-01153-RB
Date: June 25, 2003
Panel: Nora Jackson, Vice Chair
Subject: Mental Stress — Section 5.1

Introduction

In a decision letter dated October 21, 2002, a Workers' Compensation Board (Board) case manager advised the worker that her claim for compensation for stress had been denied. The worker appeals that decision (Appeal A).

Issue(s)

Was the mental stress suffered by the worker compensable under the *Workers Compensation Act* (the Act)?

Jurisdiction

This appeal was filed with the Review Board. Pursuant to Bill 63, the *Workers Compensation Amendment Act (No. 2), 2002*, the former Review Board and Appeal Division have been replaced by the Workers' Compensation Appeal Tribunal (WCAT) effective March 3, 2003. Section 38 of the legislation provides that all Review Board appeals are to be transferred to WCAT to be completed as WCAT appeals, unless a panel of the Review Board had completed an oral hearing, or unless written submissions were completed and a panel of the Review Board had commenced deliberations, before March 3, 2003.

As this appeal was not considered by a Review Board panel by March 3, 2003, it was transferred to WCAT and has been considered as a WCAT appeal except that no statutory time frame applies to the making of this decision. One effect of this change is that WCAT must apply policies set by the Board of Directors and the former governors of the Board.

Background and Evidence

I have reviewed the evidence in the claim file, the evidence presented at the oral hearing held in Prince George, British Columbia on May 27, 2003, the Act and applicable Board policy as set out in the *Rehabilitation Services and Claims Manual Volume II* (*RSCM*). Interested parties have full disclosure of the claim file available to them, and the medical and claim history will not be repeated in detail here except as relevant to the current appeal.

The worker's twin sister was employed by the employer as a labourer in the lay-up line. In 2002, the worker was 32 years old; she had started working for the employer in August 1991. On September 23, 2002, the worker's sister was killed in an accident when she was working at the mill. The worker was not working at the time of the fatality, did not witness it, was not being paid at the time of its occurrence, and did not witness the effects of the fatality on the workplace. She was at home when she received a call from her partner, after which she called the employer, who told her to go to the local hospital, where she would be told what had happened to her sister. The worker got a babysitter for her son and went to the hospital, where she found her sister dead and, as described by the worker, "with her skull crushed in."

The worker had been scheduled to work on the following "alternate" shift with the same employer. She was due to start work on 8:00 a.m. on September 24, 2002, but did not go to work on that date, nor had she gone back to work since. She submitted an application for compensation to the Board on October 15, 2002, citing the severe stress she was experiencing with regard to the traumatic fatality of her twin sister.

In a decision letter dated October 21, 2002, a Board case manager denied the worker's claim. The case manager cited the amendment to the Act, effective June 30, 2002, which provided that compensation was payable for mental stress only if that stress was an **acute** reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment. In this case, the worker was not working when her sister died, was not being paid by the employer, was not on the employer's premises, and did not witness the affects of the fatality on the workplace. It was the opinion of the case manager that the worker's stress, which she acknowledged and with which she sympathized, did not arise out of and in the course of the worker's employment.

In support of her appeal of the October 21, 2002 decision, the worker has submitted a note dated February 5, 2003 from Dr. Bruce W. , her attending physician. Dr. W. noted that the worker had lost her sister in the mill accident. The worker worked at the same mill, and her workstation overlooked the station where her sister was killed. The worker had been seen several times for anxiety and grief counselling, and was off work from grief and anxiety until January 6, 2003, when she returned to work.

Oral Hearing

The worker told the panel that both she and her sister started working at the mill in 1986. The worker was 16 years old when she started working at the mill; this was the only job the worker has ever had. Another sister also worked there for a time, as had her father. Her two brothers-in-law worked at the mill, as did her common-law husband. On September 23, 2002, the worker's sister died at the mill, at a press located 30 to 40 feet from the station where the worker herself works.

The worker was not at the mill at the time of her sister's death, but, rather, received a telephone call at home. She advised that the mill closed down for a week after the death; the other employees received full wages for that week; it was the worker's evidence that she received only 60 percent of her usual wages through the employer's weekly indemnity program. She noted that other family members had filed claims for compensation for stress to the Board,

and two of their claims had been accepted. However, it was clarified that these family members were present at the mill at the time of the death. The worker's husband had also requested compensation; his claim had also been denied.

It was the worker's evidence that the company offered psychological counselling to assist her in her grief. The worker attended two sessions, but was told that she was grieving in the right way. She was supported in her grief by her family and colleagues. When asked why she returned to work after January 3, 2003, the worker advised that her attending physician had advised that she could try to return to work. She did so, and has been working at her pre-injury employment ever since. Her colleagues have been supportive, and she has not lost any further time from work since returning in January.

Received and accepted at the oral hearing was a written submission from the worker's representative, which is now part of the claim file, and will not be repeated in detail here. It was his argument that as the worker's sister died at her place of work, at a spot some 30 to 40 feet from the worker's own workstation, that death would be always present. He argued that the mere fact that the worker was not at work at the time of the tragic accident did not lessen the effect of the death occurring there. The worker had suffered an acute reaction to an unexpected traumatic event; therefore, the resulting mental stress should be compensable. The worker's representative asked that the panel accept the worker's claim for mental stress, and direct the Board to pay wage loss and health care benefits from September 24, 2002 to January 6, 2003, when the worker returned to work.

Although the employer's representative was invited to make a submission, she declined to do so, and took no position on the worker's appeal. She reiterated that there was no doubt that the worker had suffered acute stress at the death of her sister, and that the only question to be decided by the panel is whether that stress is compensable under the Act.

Post Hearing Submissions and Investigations

Subsequent to the oral hearing on this matter, the panel received and accepted a further submission from the employer. Dated June 6, 2003, that submission clarified information provided at the oral hearing which had previously been provided to the worker. As the submission was brief, it will be repeated here in full:

> During this hearing it was reported that following the fatality at our mill the mill shut down for one week and employees where [sic] compensated 100% for that period of time. It was stated that [the worker] was not paid for this week but instead received WI benefits at 60% of her wages. This raised concern for me and I've gone back and checked the records as it would not be fair to [the worker] if this was the case. The records do indicate that [the worker] was paid her regular wages for the week the mill was shut down and then started her WI benefits. I have also confirmed this with [the worker].

Findings and Reasons

The Act was amended, effective June 30, 2002. On and after that date, a worker is entitled to compensation for mental stress under section 5.1(a) of the Act only if the mental stress "is an acute reaction to a sudden and traumatic event arising out of and in the course of the worker's employment," is diagnosed by a physician as one of the mental or physical conditions listed in the American Psychiatric Association's guide at the time the condition is diagnosed, and is not the result of a decision by the employer with regard to the worker's terms of employment.

The Board's policy with regard to mental stress is set out in item #13.30 of the Volume II of the *RSCM*. It explains that in order for mental stress to be compensable under section 5.1(a) of the Act, a three-part test must be met. First, the worker must have an acute reaction to a sudden and unexpected traumatic event. The second part of the test is that the acute reaction to the traumatic event must arise out of and in the course of the worker's employment. Finally, in order for mental stress to be compensable under the Act, the worker's mental stress must be diagnosed by a physician as a mental or physical condition that is described in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* current at the time of the diagnosis.

In this case, it seems clear that the first prong of test has been met. The worker had no prior history of mental stress or illness. Her condition was not chronic. Rather, it arose in response to a sudden and unexpected and naturally traumatic event. That event, the death of the worker's twin sister, was clear and identifiable, the result of a horrific accident. Neither the Board nor the employer doubted that the worker had suffered mental stress, nor does this panel.

The second question which must be answered in the affirmative in order for stress to be compensable is whether it arose out of and in the course of the worker's employment. The panel finds that, in this case, it did not. Policy sets out, and common sense demands, that in considering the matter of work-relatedness, we must determine if there is a connection between the employment and the resulting acute reaction.

Here, the worker did not directly witness the accident which caused her sister's death. She was not on the employer's premises when it occurred. Her injury was caused neither by the employer, nor while she was acting for her employer, nor by her co-workers. Her injury, the mental stress which there is no question she suffered, was caused by the death of her sister, and would have been present had the sister died in a car accident or even, at such a young age, by natural causes. The worker's mental stress did not arise out of and in the course of her employment.

With regard to the third part of the test, the worker was not diagnosed with a mental or physical condition that is described in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* current at the time of the diagnosis. The only medical report on file is a note, dated February 5, 2003, from the worker's attending physician, indicating that the worker had suffered grief and anxiety and was, for that reason, off work; however, neither grief nor anxiety meet the diagnostic criteria required for compensation under the Act.

Conclusion

I deny the worker's appeal. The Board's October 21, 2002 decision is confirmed. No expenses are awarded by the panel.

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

Decision of the Workers' Compensation Appeal Tribunal

Number: 2003-01744-RB
Date: July 28, 2003
Panel: Iain M. Macdonald, Vice Chair
Subject: Retroactive Rehabilitation Benefits

Findings and Reasons

The worker's entitlement in this case is adjudicated under the provisions of the Act that preceded changes contained in the *Workers Compensation Amendment Act, 2002* (Bill 49). WCAT panels are bound by published policies of the Workers' Compensation Board (the Board) pursuant to the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). Policy relevant to this appeal is set out the *Rehabilitation Services and Claims Manual* (*RSCM*) Volume I, which relates to the former (pre-Bill 49) provisions of the Act.

The worker maintains that he is eligible to receive rehabilitation assistance on a retroactive basis, between June 23, 1999 and December 2001. Rehabilitation assistance is not a matter of right, but is one of eligibility. Section 16(1) of the Act states:

> To aid in getting injured workers back to work or to assist in lessening or removing a resulting handicap, the Board may take the measures and make the expenditures from the accident fund that it considers necessary or expedient, regardless of the date on which the worker first became entitled to compensation.

The Board has exercised its discretion under section 16 in favour of providing rehabilitation assistance. The policies and guidelines under which Board officers are to evaluate a worker's eligibility to receive discretionary rehabilitation benefits are set out in Chapter 11 of the *RSCM*.

It is sometimes suggested that rehabilitation assistance cannot be provided on a retroactive basis in any event. This reasoning relates to the provision of active rehabilitation such as retraining. Where no rehabilitation program was being undertaken in the past, history cannot be rewritten as the result of an appeal or reconsideration. New or additional active rehabilitation measures can normally only be offered prospectively. There are however situations where the worker has undertaken an educational, training, or job search program on his or her own initiative and it will subsequently be determined that this should have been accepted as a Board responsibility, resulting in a retroactive rehabilitation payment.

In considering whether the worker should be provided with retroactive vocational rehabilitation benefits, I note that a specific policy direction concerning the payment of allowances on a retroactive basis is not present in the *RSCM*. Prior Review Board and the Appeal Division panels have both found that retroactive vocational rehabilitation benefits can be paid under certain circumstances, consistent with the very broad discretion provided under section 16(1)

of the Act. In order to consider payment of retroactive vocational rehabilitation benefits, it has generally been held that a worker must demonstrate active involvement in vocational rehabilitation efforts during the period in question, consistent with the principles of vocational rehabilitation as set out in item #85.30 of the *RSCM*. The second and fifth principles have particular relevance to the issue of retroactive vocational rehabilitation benefits:

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

- Effective vocational rehabilitation recognizes workers' personal preferences and their accountability for independent vocational choices and outcomes.

I agree with the approach adopted by the prior Review Board and Appeal Division panels, and find that it should be applied to the circumstances of this case.

The evidence shows that the worker was not involved in an educational or training program on his own initiative between June 23, 1999 and December 2001. Although he undertook some job search activity on his own, this was not sustained, or well documented, and the records are at best anecdotal.

It would not be fair in every case to hold an unsupported worker to the more demanding standard of proof of active rehabilitation effort required by the Board of a worker who is in receipt of ongoing rehabilitation assistance. Ongoing financial and other assistance provided through the Board's Rehabilitation Services Department enables a worker to mount a far more comprehensive job search, and gives access to significant resources that are not reasonably available to an unsupported worker.

On the other hand, while it is reasonable to accept a lesser level of active rehabilitation effort from a worker who had to rely solely on his own resources at the time, it would not be proper to provide benefits on a retroactive basis to support rehabilitation efforts if, during the period in question, the worker made none.

I hold that a worker should be eligible for retroactive payment of rehabilitation assistance where there is evidence of meaningful and purposive rehabilitation efforts on the part of that worker during the period in question. The sufficiency of the worker's efforts must be assessed in the context of each case. Factors to be considered include the extent of effort exerted by the worker in the context of available resources, the nature of the effort expended, the duration of the effort, and whether the effort was undertaken in good faith.

In this case, the worker approached the Board and said that he wished to be rehabilitated. When the Board initially said no, the worker appealed that decision. I find that in the interim, the worker did not make reasonable efforts to pursue a credible job search, or to undertake some form of retraining. The welding course earlier referred to was taken on the advice of the worker's doctor so that the worker could stay busy, rather than as a meaningful attempt to enhance his competitive employability. I find in this case that the effort expended by the worker to secure suitable alternate employment, or to obtain retraining was minimal and sporadic, and that the evidence in support of the worker's efforts is largely anecdotal and

unconfirmed. Accordingly I find that the worker's effort was not sufficient to render him eligible to receive vocational rehabilitation benefits retroactive to June 23, 1999. I deny the worker's appeal on that issue.

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

Decision of the Workers' Compensation Appeal Tribunal

Number: 2003-01800-AD
Date: July 30, 2003
Panel: Jill Callan, Chair
Subject: Lawfulness of Policy — Use of Class Average

Introduction

This is a determination under section 251(3) of the *Workers Compensation Act* (the Act). Pursuant to section 251(2) of the Act, a vice chair has determined that item #67.21 of the *Rehabilitation Services and Claims Manual*, Volume 1 (*RSCM*, Volume 1) should not be applied in the adjudication of the worker's appeal. In a memo to me dated May 27, 2003, the vice chair has concluded that item #67.21 is patently unreasonable because it conflicts with section 33(1) of the Act as it existed prior to the changes that flowed from the *Workers Compensation Amendment Act, 2002* (Bill 49). Pursuant to section 251(3) of the Act, I am required to determine whether item #67.21 should be applied in deciding the worker's appeal.

The worker is represented by counsel. The vice chair's May 27, 2003 memo has been disclosed to counsel and he has been invited to make submissions. He responded that the worker has not instructed him to make a submission on the lawfulness of item #67.21.

Although invited to do so, the employer is not participating in the worker's appeal.

Issue(s)

The issue is whether item #67.21 of the *RSCM*, Volume 1 is so patently unreasonable that it is not capable of being supported by the Act.

Background

The appeal before the WCAT vice chair is from findings of the Workers' Compensation Review Board (the Review Board) dated October 31, 2002. The issue before the Review Board panel was whether the worker is entitled to an increase to his permanent partial disability pension. The Review Board panel denied the worker's appeal.

The worker appealed the Review Board findings to the Appeal Division and specifically took issue with the pension wage rate. Counsel's position is that the worker's wage rate should be based on a class average for full-time labourers because the worker was a 28-year-old new immigrant at the time of the injury.

On March 3, 2003, the Appeal Division and Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). As the appeal had not been considered by an Appeal Division panel before that date, it will be decided as a WCAT appeal in accordance with section 39 of Part 2 of the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63).

Section 33(1) of the former Act provides:

> The average earnings and earning capacity of a worker must be determined with reference to the average earnings and earning capacity at the time of the injury, and may be calculated on the daily, weekly or monthly wages or other regular remuneration which the worker was receiving at the time of the injury, or on the average yearly earnings of the worker for one or more years prior to the injury, or on the probable yearly earning capacity of the worker at the time of the injury, as may appear to the board best to represent the actual loss of earnings suffered by the worker by reason of the injury, but not so as in any case to exceed the maximum wage rate, **except that where, owing to the shortness of time during which the worker was in the employment of his or her employer, or in any employment, or the casual nature of his or her employment, or the terms of it, it is inequitable to compute average earnings in the manner described in this subsection, regard may be had to the average daily, weekly or monthly amount which, as shown by the records of the board, was being earned during the one or more years or other period previous to the injury by a person in the same or similar grade or class of employment.**
>
> [emphasis added]

Item #67.21 of the *RSCM*, Volume 1 is entitled "Class Averages/New Entrants to Labour Force." It reproduces the words I have emphasized in section 33(1) and goes on to state:

> The persons covered by this provision are those whose actual earnings record is not sufficient to allow a determination of what best represents their long-term loss of earnings. For example, it may cover recent entrants into the labour force or new immigrants. In these cases, a class average is obtained when an 8-week rate review is being considered. **If the class average is equal to or greater than the worker's rate of pay at the date of injury no change is *usually* made in the compensation rate. If the class average is lower, the compensation *may* be reduced accordingly.**
>
> A class average may occasionally be used at the outset of a claim where the particular circumstances show it to be the best representation of the claimant's loss.
>
> When considering using a class average, the Claims Adjudicator should also have regard to other information that might warrant a variation from that average. For example, the Adjudicator should consider the last grade completed in school, any special training, any plans for future education, on what date the individual arrived in the province and what prior education, skills, occupation, etc. the worker had in another province or country.
>
> [emphasis added]

The policy goes on to set out the method the Workers' Compensation Board (the Board) employs in computing class averages. It concludes by stating:

> A number of [class] averages are available, one involving all workers in the class and others involving restricted categories of workers in the class. The one generally used is the average for all workers in the class.

The Vice Chair's May 27, 2003 Memo

In his memo, the vice chair stated, in part:

> Section 33(1) provides for the use of class averages in circumstances in which it would be inequitable to calculate the worker's average earnings in the manner prescribed in the initial part of section 33(1). The use of a class average, according to Board policy, is generally restricted to young workers who have recently entered the labor force or new immigrants. Those classes of workers are generally employed in entry-level positions and are generally paid at the lowest levels for the job categories in which they find themselves. The intent of the class average provision is to recognize that as workers gain experience and skills they will generally move on to higher paying positions. **Utilizing a class average is designed to prevent a young worker or a new immigrant who suffers a permanent functional impairment from having any monetary award that impairment may attract from under-representing his or her long term earning capacity because of his or her low average earnings at or around the time of injury or onset of occupational disease.**
>
> **The sentences emphasized above from policy #67.21 appear contrary to the intent of the class average concept as set out in the legislation.** A plain reading of those two sentences in essence puts an "equal to or less than" restriction on the use of class averages. As currently written, it means that any class average that is higher than the worker's rate of pay at the date of injury will result in a capping of the worker[']s long-term wage rate at the level of the provisional wage rate determined by the Board, if the provisional rate was set based on the date of injury earnings. Any class average that is lower than the worker's rate of pay at the date of injury will result in a reduction in the worker's average earnings. **Generally, the wording of that segment of the present policy is entirely inconsistent with the intent of the legislation.**
>
> [emphasis added]

He also referred to the following passage from Appeal Division Decision #00-0761 (available online at: http://www.worksafebc.com/appeal_decisions/appealsearch/advancesearch.asp):

> The issue is not directly before us, and we are not as a matter of law addressing the lawfulness of policy item #67.21. However, we specifically note the statements in the policy item providing:

> If the class average is equal to or greater than the worker's rate of pay at the date of injury no change is usually made in the compensation rate. If the class average is lower, the compensation may be reduced accordingly.

These two sentences appear, to us, to conflict with the stated purpose of "class averages" in section 33(1), which is to arrive at a more equitable method of calculation. We consider that these two sentences fetter the Board's section 33(1) discretion to provide the worker with the higher rate determined by the class average. We note that the sentences use permissive language, such as "no change is usually made" and "may be reduced accordingly." However, it is clear that the intent is to use the class average only to reduce a worker's rate, and not to increase it. The only sensible interpretation of those two sentences is inconsistent with section 33(1) and, we suspect, with actual Board practice regarding class averages. We recommend that policy item #67.21 be reviewed.

This passage has been referenced with approval in Appeal Division Decisions #00-0989 and #2001-2064.

Standard of Review

Section 251(1) of the Act provides:

> The appeal tribunal may refuse to apply a policy of the board of directors only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations.

Section 42 of Part 2 of Bill 63 provides, for the purposes of appeals adjudicated under section 39(2), policies of the governors (such as item #67.21) are to be treated as policies of the Board of Directors. Accordingly, the question for determination is whether item #67.21 is patently unreasonable in light of section 33(1) of the former Act.

The standard of patent unreasonableness is frequently used by the courts in considering applications for judicial review of decisions of administrative tribunals. Accordingly, the legislature's choice of the patent unreasonableness standard means that the test in section 251(1) can be interpreted through reference to judgments that have considered that standard.

In *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, the Supreme Court of Canada noted that the three standards of review for judicial review of administrative decisions are patent unreasonableness, reasonableness *simpliciter*, and correctness. These standards have come to reflect the degree of deference that a court is granting to the administrative tribunal. The least degree of deference is granted where the correctness standard is applied. The standard of patent unreasonableness involves a significant degree of deference.

For instance, in *Canada (A.G.)* v. *Public Service Alliance of Canada*, [1993] 1 SCR 941 at 964, the court explained that under the patently unreasonable test a court should only interfere with the decisions of a tribunal if the decision is "clearly irrational." Cory J., writing for the majority, stated:

> It is said that it is difficult to know what "patently unreasonable" means. What is patently unreasonable to one judge may be eminently reasonable to another. Yet any test can only be defined by words, the building blocks of all reasons. Obviously, the patently unreasonable test sets a high standard of review. In the Shorter Oxford English Dictionary "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "[n]ot having the faculty of reason; irrational. . . . Not acting in accordance with reason or good sense". Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction. This is clearly a very strict test.
>
> . . .
>
> It is not enough that the decision of the Board is wrong in the eyes of the court; it must, in order to be patently unreasonable, be found by the court to be clearly irrational.

In *Law Society of New Brunswick v. Ryan*, (2003), 223 DLR (4th) 577 (SCC) at 596, Iacobucci J. made the following comments concerning the standard of patent unreasonableness:

> . . . a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective . . . A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

Analysis

In order to consider the use of class averages under section 33(1) and item #67.21, it is important to first consider the general framework for setting wage rates under the Act and policies. Throughout this analysis I will be referring to the policies in *RSCM*, Volume 1 as that is the policy scheme relevant to the issue before me.

Item #66.00 (Wage-Loss Rates on New Claims) provides that, except in certain circumstances, "wage-loss payments made at the outset of a claim are based on the worker's rate of pay at the date of injury up to the maximum wage rate permitted by the Act." It also sets out that this wage rate continues until the wage rate is reviewed at the eight-week rate review.

Pursuant to item #67.20 (Eight-Week Rate Review), when wage loss benefits based on the worker's date of injury rate of pay have continued for eight weeks, a Board officer conducts a review which "consists of an enquiry and determination of what earnings rate best represents the long-term earnings loss suffered by the worker by reason of the injury." Where a permanent disability is anticipated, the Board officer is also required to consult with an officer in Disability Awards (in order to provide consistency between the wage rate set for wage-loss benefits and that set for Disability Awards purposes). The policy provides that the worker's earnings in the one-year period prior to the injury are "normally" used to set the wage rate for wage loss and pension purposes. However, the policy also provides other options, such as use of the

three-year or five-year periods of pre-injury earnings, if various circumstances exist. The fundamental principle derived from section 33(1) is that the Board must use the approach "as may appear to the board best to represent the actual loss of earnings suffered by the worker by reason of the injury."

At the time of the eight-week review, a worker's wage rate may remain the same, decrease or increase. If the worker has been in the same job with the same employer without any salary increases over the previous year and he or she has worked steadily, the wage rate will likely remain the same. If, for some reason, the worker was making less money on the date of injury than he or she had earned prior to the injury, the wage rate may increase. Finally, if the worker's average earnings for the period prior to the injury are less than the date of injury earnings, the wage rate may decrease. This often happens in a situation in which the worker works in an industry in which there are frequent layoffs. These examples are not exhaustive but illustrate the potential impact of the eight-week review.

Item #68.00 (Permanent Disability Pensions) provides that the wage rate established at the eight-week point is normally used for pension purposes. However, "a different rate can be used if there are valid reasons for this."

Given the framework for setting wage rates, if the use of class averages were not permitted by section 33(1) and item #67.21, immigrants and new entrants to the work force could be significantly disadvantaged. Their earnings histories might not reflect their earning capacity and, if their earnings were averaged over a period of time such as a year, the eight-week review might lead to a significant reduction of their wage rates from the rates established on the basis of their date of injury earnings. The legislature recognized this problem by granting the discretion to base the wage rate on a class average when it would be inequitable to use the pre-injury earnings to set the wage rate. Item #67.21 is intended to apply to workers, such as "recent entrants into the labour force or new immigrants," "whose actual earnings record is not sufficient to allow a determination of what best represents their long-term loss of earnings."

The essence of the vice chair's concern is that item #67.21 fetters the discretion of Board officers to address potential inequities through the use of the class average. In particular, he contends that the policy provides for use of the class average only when it will result in a decrease in the worker's wage rate. The provision in item #67.21 that is at the heart of the concerns raised by the vice chair sets out that no change is "usually" made to the wage rate if the class average is equal to or greater than the worker's date of injury earnings. However, the wage rate "may" be reduced if the class average is lower.

If the words, "usually" and "may" were not included in item #67.21, I have little doubt that I would conclude that the discretion granted by section 33 (1) has been unlawfully fettered by the policy. The question that I must resolve is whether the words "usually" and "may" are sufficiently permissive to support the conclusion that the discretion has not been unlawfully fettered.

The following passage from D.J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at page 374 recognizes that policies may provide guidance as to the manner in which discretion should be exercised:

> It is accepted without question that statutory authorities charged with the exercise of discretionary powers have authority, even when not specifically

> authorized by statute, to issue policy statements on the subject matter of their discretion and to provide guidelines on how they are likely to exercise that discretion in particular cases.

However, as indicated in the following passage from Jones and de Villars *Principles of Administrative Law,* 3rd ed. (Ontario: Carswell, 1999) at page 177, it is unlawful to fetter discretion:

> Because Administrative Law generally requires a statutory power to be exercised by the very person upon whom it has been conferred, there must necessarily be some limit on the extent to which the exercise of a discretionary power can be fettered by the adoption of an inflexible policy. . . . After all, the existence of discretion implies the absence of a rule dictating the result in each case; the essence of discretion is that it can be exercised differently in different cases. Each case must be looked at individually, on its own merits.

Testa v. *Workers' Compensation Board of British Columbia* (1989), 36 BCLR (2d) 129 (BCCA) is illustrative of an unlawful fettering of the discretion granted by section 33(1). In that case, the Board had applied its normal practice of basing the wage rate on earnings in the one-year period prior to the injury. However, Mr. Testa had been off work on a workers' compensation claim during that period. The court concluded that the Board's decision constituted a patently unreasonable application of section 33(1) because it ignored the statutory basis of the discretion and "involve[d] the blind application of a policy laid down in advance."

A discussion of policy options in situations in which a statute grants a discretion is found in *Skyline Roofing* v. *Alberta (WCB)*, [2001] 10 WWR 651 (Alta. QB). At page 685, the court stated:

> The particular issue here is whether a statutory policy can narrow or foreclose or "fetter" a discretion granted by the statute. If the statute creates a discretionary power, can the policy specify some or all of the circumstances in which the discretion must be exercised in a particular type of case? As has been seen, an informal policy cannot fetter a discretion granted by statute. Does the fettering rule apply to policies authorized by statute? A policy could potentially operate in a number of ways:
>
> (a) The policy could be a fixed and inflexible rule that applies in every case. The policy exhausts the discretion.
> (b) The policy could create a presumption, but each Applicant could argue why the policy should not apply in a particular case.
> (c) [T]he policy could be a summary and weighing of factual and discretionary factors that apply in most cases, but in each particular case the decision-maker must decide if the policy should be applied, an exception should be made, or the policy should be modified.
> (d) The policy could be considered along with all other relevant factors, but it should not be given special weight in individual cases.
>
> The distinction between the second and third options is admittedly subtle, and may only amount to a difference in the burden of proof. The third option has the advantage of emphasizing the duty to consider each case on its own merits. . . . Which option applies to a particular policy authorized by statute must be a matter of statutory interpretation in each case.

The court concluded at page 686 that "[s]o long as the policy runs parallel to the statute there should be no problem, even if the policy suggests when and how the discretion might be exercised." The court referred to *Maple Lodge Farms Ltd.* v. *Canada*, [1982] 2 SCR 2. In that case, MacIntyre J. noted that a policy that provided the circumstances in which a permit would "normally" be issued did not impose a requirement for the issuance of a permit, nor did it confine the discretion given by the statute.

In order to consider whether item #67.21 involves an unlawful fettering of discretion, it is important to note that the class average may be greater than or less than the date of injury earnings. The examples that follow may arise when class averages include all workers in the class. The class average may be higher than the date of injury earnings if there is a wide range in the hourly wages in the occupation in question, the worker is at the lower end of the range and there are few layoffs in the occupation. The class average may be lower if the occupation involves work in a cyclical industry or an industry which does not employ workers year round.

It is also important to consider whether, in setting eight-week wage rates, it would typically be more equitable to use a higher class average rather than the date of injury earnings. The Board's *2002 Annual Report* (available online at http://www.worksafebc.com/ publications/ reports/annual_reports/assets/pdf/ar2002.pdf) states that the average duration of claims for wage loss benefits in 2002 was 46.8 days (see chart on page 7). Based on a five-day work week, this amounts to just over nine weeks. It seems fair to observe that, in setting the eight-week wage rate for many claims, if the choice is between raising the wage rate to equal the class average or continuing the wage rate based on the date of injury earnings, the continuation of the latter may best represent "the actual loss of earnings suffered by the worker by reason of the injury."

Information concerning the percentage of short-term disability or wage loss claims that have the propensity to become long-term or permanent disability claims is set out at page 31 of the *2002 Annual Report*. In 2002, seven percent of short-term disability claims had the propensity to become claims in which a permanent disability pension could be granted. In my view, it is fair to conclude that claims that lead to permanent disability pensions are exceptional. It is noteworthy that a pension wage rate (as opposed to a wage rate for temporary disability benefits) is before the vice chair who has referred this matter to me and was before the panel in Appeal Division Decision #00-0761.

I agree with the vice chair's contention that, when a young worker or a new immigrant is granted a pension, it may be equitable to use a class average that raises his or her wage rate above the date of injury wages because the class average will take the worker's long-term earning capacity into account. On the other hand, if a 63-year-old immigrant were to suffer a compensable permanent disability, it might not necessarily be equitable to use a class average that raises the wage rate over the date of injury earnings. The worker in that scenario may not have enjoyed significant increases in his or her earnings had the injury not occurred. While the wording of item #67.21 is not particularly clear, it grants the Board officer the discretion to consider matters such as education, training, future plans, and skills in determining whether a variation from the class average is warranted.

Item #67.21 does not set out an inflexible rule that must be applied in every case. The use of the words "usually" and "may" allows Board officers the discretion to increase the wage rate to the class average in appropriate cases and leave the wage rate at the date of injury earnings rate in situations in which the class average will result in a lower wage rate. In addition, the policy allows the Board officer to consider a number of factors in determining whether the wage rate should be based on the class average. In many cases, the likely duration of the claim will be limited and fairness will not require that the wage rate be increased to equal a higher class average.

I have concerns about the manner in which item #67.21 is drafted. The policy would benefit greatly from the inclusion of explanations as to why the wage rate is not usually increased when the class average is higher than the date of injury earnings and the circumstances in which it might be appropriate to lower the wage rate to the class average. Examples of situations in which a Board officer should depart from the usual practice and increase the wage rate to equal the class average would also be of assistance. A discussion of the differing considerations that might apply for setting wage rates for short-term and long-term disability benefits would also help to clarify the policy.

I certainly find that the vice chair's referral of item #67.21 to me for a determination of its lawfulness was warranted. However, I find that the policy does not involve an unlawful fettering of discretion and is not patently unreasonable. In fact, I find the policy to be consistent with section 33(1) because it enables Board officers to have regard to the class average when it is inequitable to base the wage rate on historical earnings.

I find item #67.20 must be applied in deciding the appeal. However, I note that, if the class average is greater than the date of injury earnings, when a pension wage rate is under consideration the usual practice of not using the class average to increase the wage rate may not apply. I also note that the policy indicates, in determining whether the class average should be applied, the vice chair may consider the worker's education, training, future plans for education, skills and other factors, as provided in item #67.21.

The Board of Directors may wish to amend item #67.21 to provide greater clarity. However, I am aware that there may be other policy priorities, given that item #67.21 is not applicable to claims involving injuries after June 30, 2002. Many of the remaining cases in which item #67.21 is applicable are appeals that will be decided by WCAT pursuant to sections 38, 39, and 41 of Part 2 of Bill 63. This determination will be available for consideration by WCAT vice chairs.

Conclusion

Item #67.21 of the *RSCM*, Volume 1 is not patently unreasonable. Pursuant to section 251(4) of the Act, I return the file to the vice chair who must apply the policy in rendering his decision on the worker's appeal.

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

Decision of the Workers' Compensation Appeal Tribunal

Number: 2003-01810
Date: July 31, 2003
Panel: Jill Callan, Chair
Subject: Extension of Time to Appeal to WCAT

Introduction

The worker seeks an extension of the 30-day statutory time limit to appeal the March 31, 2003 finding of the Workers' Compensation Review Board (the Review Board), which was mailed on April 2, 2003.

On March 3, 2003, the Appeal Division and the Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). The worker's right to appeal arises under section 41(3) of the transition provisions set out in Part 2 of the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). Section 41(3) allows the worker to appeal the Review Board finding to WCAT "within 30 days after the finding [was] sent out." This language is significantly different from the language in sections 243(1) and 243(2) which indicate the time for appealing Review Division decisions and decisions and orders of officers of the Workers' Compensation Board (the Board) runs from the time the decision or order "being appealed was made." In this case, as the finding was mailed on April 2, 2003, I view April 2 to be the date the finding was "sent out" for the purposes of calculating the 30-day time frame.

When the eight-day period for mailing set out in section 221(2) of the *Workers Compensation Act* (the Act) is taken into account, the statutory time limit for the initiation of the worker's appeal expired on Saturday, May 10, 2003. In calculating the time limit, I have excluded April 2, in accordance with section 25(5) of the *Interpretation Act*. Since the time limit expired on a Saturday, pursuant to section 25(3) of the *Interpretation Act*, the time limit is extended to Monday, May 12, 2003, which was the first WCAT business day after May 10.

The worker's notice of appeal was received at the Kelowna office of the Board on May 22, 2003 and forwarded to WCAT, which received it on May 26, 2003. I find May 22, 2003 to be the date on which the worker filed the notice of appeal because that was the date it was received within the workers' compensation system. As the deadline for filing the appeal was May 12 and the worker filed the appeal on May 22, the appeal was filed ten days beyond the statutory time limit.

Section 41(2) of Part 2 of Bill 63 provides that section 243(3) of the Act applies to the worker's application for an extension of time.

Although invited to do so, the employer has not participated in this application.

Issue(s)

The issue is whether the worker should be granted an extension of time for filing his notice of appeal.

Background

The sequence of events that is relevant to the worker's application for an extension of time is as follows:

- On March 18, 2003, the worker telephoned WCAT to provide notification of his change of address from Calgary to Kelowna.

- On March 31, 2003, the finding was completed by a Review Board panel which had been seized of the appeal pursuant to section 38(3) of Part 2 of Bill 63.

- On April 1, 2003, the worker asked WCAT to mail the Review Board finding to his new address in Kelowna. An entry in the WCAT case management system indicates that an unsigned copy of the March 31, 2003 finding was sent to the worker and that the original finding would be sent to him when it was returned by Canada Post. This suggests, although the original finding was not posted until the next day, it could not be retrieved from the mail.

- On April 2, 2003, the signed original of the Review Board finding was mailed to the worker at his previous address in Calgary.

- On May 22, 2003, the Kelowna office of the Board received a Review Division request for review form from the worker in relation to the Review Board finding. Attached to the request for review form is an unsigned copy of the Review Board finding. The date of the finding and the date of mailing are missing, indicating that this is the copy that WCAT mailed to the worker on April 1, 2003. The attached advisory notice states that the finding is appealable to the Appeal Division. This constitutes an error because, in fact, the finding is appealable to WCAT because the Appeal Division had been replaced by WCAT on March 3, 2003.

- On June 10, 2003, the original of the Review Board finding was returned to WCAT by Canada Post. The finding was mailed to the worker's new Kelowna address.

Criteria for Granting an Extension of Time

Section 243(3) of the Act provides:

> On application, and where the chair is satisfied that
>
> (a) special circumstances existed which precluded the filing of a notice of appeal within the time period required in subsection (1) or (2), and

(b) an injustice would otherwise result,

the chair may extend the time to file a notice of appeal even if the time to file has expired.

I view the new criteria set out in section 243(3) as more stringent than the criteria that were previously applied by the Appeal Division and the Review Board in considering applications for extensions of time to appeal. There are three requirements for an application under section 243(3) to be successful:

- Firstly, the appellant is required to demonstrate that special circumstances precluded the filing of the notice of appeal on time;

- Secondly, it must be determined that an injustice would result if the extension of time were not granted; and

- Thirdly, the chair must exercise the discretion to grant the extension of time in favour of the applicant.

Special Circumstances which Precluded the Filing of a Notice of Appeal

The definition of "special" in *Webster's New Twentieth Century Dictionary of the English Language,* 2nd ed. *(Webster's)* includes "unusual; uncommon; exceptional; extraordinary."

The concept of special circumstances that precluded meeting a statutory time frame is also set out in section 55(3) of the Act, which concerns the situation in which a worker has failed to file an application for compensation within one year from the date of injury or disablement from an occupational disease. Accordingly, decisions by appellate tribunals and policies concerning the application of section 55(3) are of assistance in interpreting section 243(3)(a).

The policy of the Board of Directors concerning section 55(3) is set out in item #93.22 (*Application Made Out of Time*) of the *Rehabilitation Services and Claims Manual, Volume 2*, which provides, in part:

> It is not possible to define in advance all the possible situations that might be recognized as special circumstances which precluded the filing of an application. The particular circumstances of each case must be considered and a judgment made. However, it should be made clear that in determining whether special circumstances existed, the concern is solely with the worker's reasons for not submitting an application within the one-year period.
>
> [italics deleted]

Similarly, it is impossible to enumerate all of the potential special circumstances that could arise in connection with an extension of time application. The facts of each case will have to be considered on their merits. As WCAT decides extension of time applications related to specific appeals, the body of decisions will provide guidance to workers and employers. I am of the view that special circumstances could include the following situations:

- The decision that the appellant seeks to appeal was not provided to the appellant in a timely manner;

- The decision was not sent to the appellant's correct address (provided that the appellant had kept the Board informed of any address changes);

- The decision that the appellant seeks to appeal did not advise the appellant of the right of appeal and the time limit for initiating the appeal;

- The appellant was away when the decision was issued and did not return until after the time frame for appealing had expired; or

- At the time that the decision was issued, evidence to support the appeal either did not exist or existed but was not discovered and could not through the exercise of reasonable diligence have been discovered.

In considering the special circumstances that are advanced by the appellant, it will be important to consider whether the appellant acted promptly to initiate an appeal when he or she became aware of the decision, the time limit for appealing, or the significant new evidence that would support the appeal.

The question of whether acts or omissions of the appellant's representative will constitute special circumstances will have to be resolved in considering future applications involving such fact patterns.

It is not sufficient for the appellant to merely identify special circumstances. The nature of the special circumstances must be such that they precluded the filing of the appeal on time. In determining whether an appellant was "precluded," all reasonable steps that the appellant ought to have taken in order to ensure a timely appeal must be taken into account.

The word "preclude" is capable of being strictly interpreted to mean "prevent" or "make impossible." However, in *Webster's*, "preclude" is more broadly defined to mean:

> to hinder, exclude, or prevent by logical necessity; to bar from access, possession, or enjoyment; to make impossible, especially in advance; as, these facts *precluded* his argument.

Accordingly, "preclude" may be interpreted to include "hinder," which is defined in *Webster's* to mean:

> 1. to make difficult for; to impede; to retard; to check in progression or motion; to obstruct for a time, or to render slow in motion; as cold *hinders* the growth of plants.
>
> 2. to keep back; to restrain; to get in the way of.

In Decision #91-0851 (*Section 55 and Grain Dust Asthma*, 7 *Workers' Compensation Reporter* 211), the Appeal Division considered the appropriate interpretation of "preclude" in the context of section 55 of the Act. At pages 220–221, the panel stated:

> In the final analysis to interpret any statutory provisions one has to determine the substance of its words in the context of the ideas expressed in the whole [A]ct and in light of the social purpose that was a driving force behind the legislation. Considering all of these factors this panel is not satisfied that the stringent interpretation of the word "preclude" is justified. The rigid interpretation of preclude as "absolutely prevent" is harsh and narrow. It has never been adopted by previous commissioners [of the Board] and finds no place in the governors' policy.

Similarly, I find in the context of section 243(3) "preclude" should be interpreted in the broader manner supported by the definition in *Webster's*.

Injustice

Even if special circumstances precluded the filing of the appeal on time, the discretion to grant an extension of time does not arise unless an injustice would result if the extension of time were not granted. In *Webster's*, "injustice" is defined to mean "the quality of being unjust or unfair; lack of justice; wrong."

In the *Core Services Review of the Workers' Compensation Board* by A. Winter (British Columbia: Ministry of Skills Development and Labour, 2002), Mr. Winter concluded (at page 38) that the granting of extensions of time should be exceptional because of the importance of finality. However, he thought it would be appropriate to grant an extension of time "to avoid an injustice."

A discussion of the concepts of finality and justice in the context of an extension of time to appeal a decision of an administrative tribunal is found in the reasons of Marceau, J. in *Tarsem Singh Grewal* v. *Minister of Employment and Immigration* [1985] 2 FC 263. In that case, the Federal Court was considering an application for an extension of time to review and set aside a decision of the Immigration Appeal Board. Marceau, J. stated in part:

> The imposition of time limits to dispute the validity of a legal decision is of course meant to give effect to a basic idea of our legal thinking that, in the interest of society as a whole, litigation must come to an end . . . and the general principles adopted by the courts in dealing with applications to extend those limits were developed with that in mind. Only if the ultimate search for justice, in the circumstances of a case, appears to prevail over the necessity of setting the parties' rights to rest will leave to appeal out of time be granted. Hence the requirement to consider various factors, such as the nature of the right involved in the proceedings, the remedy sought, the effect of the judgment rendered, the state of execution of that judgment, the prejudice to the other litigants in the dispute, the time lapsed since the rendering of the judgment, the reaction of the applicant to it, his reason for having failed to exercise his right of appeal sooner, [and] the seriousness of his contentions against the validity of the judgment. It seems to me that, in order to properly evaluate the situation and draw a valid conclusion, a balancing of the various factors involved is essential.

In the Review Division decisions I have read, the chief review officer has considered the following criteria for determining whether "an injustice would otherwise result," which are set out in item 2.3.2.2 of the *Review Division Practices and Procedures*:

> (a) the significance of the matter that is the subject of the Request for Review (i.e., is there a serious or significant issue to be reviewed); and
>
> (b) the degree of prejudice to the applicant that would arise from the denial of the extension request.

Similarly, I find the significance of the matter under appeal and the prejudice to the appellant if the extension of time were denied are relevant to the question of whether an injustice will result. It seems that these two factors will usually be closely linked as the degree of prejudice to the applicant will often be dependent on the significance of the matter under appeal.

The merits of the appeal will not be considered. However, the question of whether an injustice can be established on the basis of a clear error on the face of the decision under appeal will likely be considered in the context of a future application as will other factors related to the injustice requirement.

Exercise of Discretion

In most cases in which the first two requirements in section 243(3) have been met, the discretion to grant the extension of time will be exercised in favour of the applicant. However, it will be relevant to consider any prejudice to the respondent that will result. Future applications may raise other factors relevant to exercising the discretion.

Analysis

Although the worker used the Review Division's request for review form, I find the use of that form was an effective method of filing the appeal.

The worker asserts that the fact that the Review Board finding was mailed to his former address in Calgary rather than his current address in Kelowna constitutes special circumstances which precluded the filing of the appeal on time.

The worker's argument requires consideration of section 221 of the Act, which provides in part:

> 221 (1) A document that must be served on or sent to a person under this Act may be . . .
>
> (b) sent by mail to the person's last known address, . . .
>
> (2) If a document is sent by mail, the document is deemed to have been received on the 8th day after it was mailed.

I have reviewed the worker's claim file and note that he does not appear to have notified the Board of his change of address. It would be prudent for him to do so. However, in this case, it is appropriate to consider the worker's last known address as communicated to the Review Board and WCAT. That address was the Kelowna address. Although, given my analysis set out below it is not necessary to make a finding in this regard, it is certainly arguable that the time for initiating the appeal did not start to run until WCAT mailed the original Review Board finding to the worker's Kelowna address on June 10, 2003. Although WCAT mailed a copy of the finding to the Kelowna address on April 1, 2003, the copy did not include the date of the finding and the date of mailing, which are key elements when there is time sensitivity.

In any event, I am satisfied that the failure to send the original finding to the worker's Kelowna address when the finding was issued constituted special circumstances. I am also satisfied that the worker was precluded or hindered in initiating the appeal on time because the copy of the finding sent to his correct address on April 1 did not include the dates that would enable him to calculate the time frame for initiating the appeal and misdirected him by stating the finding was appealable to the Appeal Division. I note the worker was diligent in following up with WCAT to ensure that he received a copy of the finding at his correct address and in a timely manner. Also, the worker took reasonable steps to preserve his right of appeal. I find that special circumstances precluded the worker from filing the appeal on time.

I also find that there would be an injustice if the worker were not granted an extension of time. The issue that was before the Review Board panel was whether a particular occupation was a suitable occupation for the worker. This issue has the potential to significantly impact his entitlement to benefits.

I find it is appropriate to exercise the discretion to grant an extension of time in favour of the worker. I have concluded that there will be no prejudice to the employer because the delay in initiating the appeal was short.

Conclusion

The extension of time to appeal the March 31, 2003 Review Board finding, which was mailed on April 2, 2003, is granted. The file will be returned to the Registry for the processing of the appeal.

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

Court of Appeal for British Columbia

Before:	The Honourable Madam Justice Newbury	
	The Honourable Mr. Justice Braidwood	
	The Honourable Madam Justice Levine	
BETWEEN:	LILY ELAINE BURNETT	RESPONDENT (PETITIONER)
AND:	WORKERS' COMPENSATION BOARD	APPELLANT (RESPONDENT)
Counsel for the Appellant, Workers' Compensation Board		S. Nielsen and L. Courtenay
Counsel for the Respondent		P. Willcock and J. Currie
Counsel for the Intervenor, Attorney General of British Columbia		N. Brown
Place and Date of Hearing:		Vancouver, British Columbia April 1, 2003
Place and Date of Judgment:		Vancouver, British Columbia July 2, 2003
Written Reasons by:		The Honourable Madam Justice Levine
Concurred in by:		The Honourable Madam Justice Newbury
		The Honourable Mr. Justice Braidwood

Reasons for Judgment of the Honourable Madam Justice Levine:

Introduction

[1] The issue in this appeal is whether legislation that provides disadvantageous economic treatment to younger, as compared with older, widowed spouses, when their children cease to be dependent, amounts to "discrimination" on the ground of age for the purposes of s. 15(1) of the ***Canadian Charter of Rights and Freedoms***. The question comes down to whether the "human dignity and freedom" of the younger spouses are violated, within the meaning of those words as used by the Supreme Court of Canada in ***Law v. Canada (Minister of Employment and Immigration)***, [1999] 1 S.C.R. 497 and subsequent decisions.

[2] This case challenges provisions of the ***Workers' Compensation Act***, R.S.B.C. 1996, c. 492, that are similar to the provisions of the ***Canada Pension Plan***, R.S.C. 1985, c. C-8 ("***CPP***") considered in ***Law***. In this case, the respondent had a dependent child when her spouse died in a work-related accident. She received a monthly pension. When her son ceased to be dependent, she received a lump sum payment and was no longer entitled to a monthly pension, because she was then under 40 years of age. Had she been age 40 or older when her child ceased to be dependent, she would have been entitled to the monthly pension for the rest of her life.

[3] In ***Law***, the Supreme Court considered provisions of the ***CPP*** that provided a pro-rated pension to able-bodied surviving spouses without dependent children starting at age 35, increasing to a full pension by age 45. The appellant was a 30 year old surviving spouse without dependent children. The Supreme Court of Canada held that the age distinctions in the legislation did not amount to discrimination against younger spouses, as there was no violation of their human dignity.

[4] Distinguishing ***Law***, a Supreme Court justice decided the age distinctions in the ***Act*** violated s. 15(1) of the ***Charter***. He found that the "essential dignity" of the group of under age 40 surviving spouses, who had dependent children at a young age, was violated. (The reasons for judgment of the chambers judge are reported at (2002), 6 B.C.L.R. (4th) 121 (S.C.)).

[5] The Workers' Compensation Board claims the legislative provisions in question promote, rather than undermine, the human dignity of younger widowed spouses and therefore do not "discriminate" within the meaning of s. 15(1) of the ***Charter***.

[6] In my view, the legislative scheme has a significant, disadvantageous, economic impact on younger spouses. I conclude, however, that the differential treatment does not amount to "discrimination" or a violation of s. 15(1) of the ***Charter***.

The Statutory Scheme

Compensation of Dependants

[7] Section 17 of the ***Act*** sets out a scheme for compensating surviving dependants of deceased workers. The relevant portions of s. 17 are reproduced in the attached Appendix.

[8] Sections 17(3)(a) through (e) provide for the payment of compensation to surviving spouses and children. The type of benefit (monthly pension or lump sum) and the amount of the benefit are assessed based on the spouse's age, capacity (whether an "invalid" or not) and number of dependent children, if any, at the date of the worker's death.

[9] This appeal concerns the benefit payable to a surviving spouse, when his or her children, who were dependent at the date of the worker's death, cease to be dependent. A child ceases to be dependent when he or she becomes 18 years old or, if the child is regularly attending an academic, technical or vocational place of education, becomes 21 years old (s. 17(1)).

[10] A surviving spouse who has dependent children at the date of the worker's death is entitled to a monthly pension (ss. 17(3)(a) and (b)). The amount of the pension will vary depending on the number of dependent children.

[11] A surviving spouse who is under the age of 40 and has no dependent children at the date of death of the worker is not entitled to a monthly pension, but to payment of a "capital sum" (s. 17(3)(d)). At June 30, 2002, the capital sum was $40,583.21.

[12] When a surviving spouse who had dependent children at the date of the worker's death no longer has dependent children, or the number of dependent children is reduced, the spouse's entitlement to benefits is reassessed. The spouse is then entitled to the same category of benefits as would have been payable if the death of the worker had occurred on the date that the child or children cease to be dependent (s. 17(4)).

[13] Thus, a surviving spouse who is under the age of 40 when his or her child or children cease to be dependent loses entitlement to the monthly pension, and instead becomes entitled (by the application of s. 17(4) and 17(3)(d)) to the payment of a "capital sum".

[14] By contrast, a surviving spouse who is 40 years of age or over when his or her children cease to be dependent continues to receive the monthly pension. The amount of the monthly pension payable depends on the earnings of the worker at the date of death, subject to a minimum amount. At June 30, 2002, the minimum monthly pension payable to a spouse age 50 or over was $852.12 (s. 17(3)(c)). The amount payable is reduced on a prorated basis where the spouse is between 40 and 49 years of age (s. 17(3)(e)). The monthly pension continues for life.

[15] The chambers judge found (at para. 14) that the purpose of this compensation scheme:

> . . . is to provide those who generally have the poorer prospects for employment and long-term income replacement after the death of their spouse with the greater benefits. The varying entitlements and gradations are based on "informed generalizations" as to employment and income replacement prospects. [Appeal Division Decision, paragraphs 31 and 69; ***Law v. Canada (Minister of Employment and Immigration)***, [1999] 1 S.C.R. 497 at para. 104.]

[16] The chambers judge commented (at para. 19):

> Given average life expectancies it would appear that the present value of a pension benefit payable to those aged 40 or older when their child's dependency ends will be many multiples of the capital amount paid to those under the age of 40.

and found (at para. 49):

> The impact of the loss of the lifetime pension to the petitioner is very substantial.

Vocational Rehabilitation

[17] Section 16(2) of the ***Act*** authorizes the Board to provide vocational training benefits to a surviving spouse:

> **Vocational rehabilitation**
>
> **16** (2) Where compensation is payable under this Part as a result of the death of a worker, the board may make provisions and expenditures for the training or retraining of a surviving dependent spouse, regardless of the date of death.

[18] The Board has established policies with respect to rehabilitation matters, which are set out in the "Rehabilitation Services and Claims Manual". Section #91.00 of the Manual sets out the policies for "Vocational Assistance for Surviving Spouses and Dependants of Deceased Workers".

[19] Sections #91.10 to #91.13 describe the Board's policies regarding training for surviving dependent spouses. The Board may offer training assistance "where the training is designed to improve the spouse's earning capacity or effectiveness in the labour market generally." Spouses who receive periodic pensions and those who receive capital sums are eligible for assistance. A spouse's eligibility for training may be considered regardless of the date of the worker's death, but normally decisions are expected to be made within a year of the death. "Any request received after that time would not necessarily be denied, but the Board would be less likely to conclude that the training was needed because of the death."

[20] "Guidelines" state that assistance is not limited to any particular kind of training, but "this would not involve support of a university program on an indefinite basis."

[21] Sponsorship of a formal training program will normally include payment of tuition fees, books, travel and subsistence expenses and homemaker allowances, including child care. An additional living allowance may be paid to a surviving spouse who is eligible for a capital sum; the spouse "should not be expected to use that sum for maintenance while undertaking a program of training needed as a result of the worker's death." On the other hand, a dependent spouse is expected to use the monthly pension (and other sources of benefits, such as Canada Pension Plan benefits) "to meet ordinary living expenses while completing a training program." If the spouse's monthly income from such sources falls below the "minimum weekly level determined by the Board, the Vocational Rehabilitation Consultant will normally authorize the payment of a training allowance sufficient to raise the spouse's income to the minimum." The Vocational Rehabilitation Consultant may also "supplement the income of the spouse when the actual expenses incurred during the course of the program exceed what is covered by the above items."

[22] The Board argued strenuously on the appeal that spouses who are entitled to receive payment of a capital sum instead of a monthly pension are eligible for "enhanced" or "preferential" vocational rehabilitation benefits, compared to the benefits provided to spouses who continue to receive monthly pensions. The Board's position is that the spouses entitled to receive a capital sum include both those who are under the age of 40 without dependent children at the date of death of the worker, and those who are under age 40 when his or her children cease to be dependent.

[23] There is nothing in the Manual that expressly addresses the latter group. One wonders about the effect on a surviving spouse whose children cease to be dependent many years after the death of the worker, of the statement in the Manual that where a request for training is received more than one year after the death of the spouse, "the Board would be less likely to conclude that the training was needed because of the death."

[24] The chambers judge commented (at para. 48):

> The evidence is not entirely complete in this regard but it appears that surviving spouses, whether over or under age 40, whose children have ceased dependency, are entitled to receive vocational rehabilitation benefits. Those under age 40 receive an enhanced form of rehabilitation benefit. I accept that any enhanced vocational rehabilitation benefit, whether provided by Board policy or legislation, would be of minimal value in comparison to the significant financial gap created by the petitioner being removed from a lifetime monthly pension that the age 40 and over spouses receive.

[25] The Board took no issue with this finding of fact, and provided no additional evidence or explanation of the value of the "enhanced" benefit. Counsel expressly declined to explain the difference between the "additional living allowance" that a spouse who is eligible for a capital sum may receive, and the "training allowance" that may be paid to a spouse receiving a monthly pension and other benefits that are less than "the minimum weekly level determined by the Board".

[26] Furthermore, while counsel argued on the appeal that the policies of the Board are binding on it, it is clear from s. 16(2) and the policies set out in the Manual that the provision of vocational rehabilitation benefits to surviving spouses is at the complete discretion of the Board. An eligible spouse has no claim to any vocational rehabilitation benefit of any kind, form or amount.

The Purpose and Effect of the Statutory Scheme

[27] Sections 16 and 17 of the ***Act***, read together, support the Board's position that the purpose of the statutory scheme is to link the type and amount of compensation provided to surviving spouses with their varying prospects for employment and income replacement, based on age, capacity and parenting responsibilities. While vocational rehabilitation benefits, including any "enhanced" benefits, are discretionary, the express provision for them in the ***Act*** makes it clear that employment prospects and compensation are linked.

[28] There can be no question, however, that the economic effect of the statutory scheme is to provide compensation of significantly lesser value to surviving spouses who are under the age of 40 when their children cease to be dependent than that provided to spouses who are age 40 or older when their children cease to be dependent. The so-called "enhanced" vocational rehabilitation benefits do not in any way compensate for the economic difference between the "capital sum" and a monthly pension for life.

The Respondent

[29] When the respondent's spouse was killed in a work-related accident in 1980, she was 32 years old and her son was 15. The respondent received a monthly pension. When the respondent's son ceased to be dependent on September 30, 1985, he was 20 and the respondent was 37.

[30] The respondent's monthly pension was first terminated when she remarried in 1981. It was retroactively reinstated when the legislation terminating the pension on remarriage was found to violate s. 15 of the ***Charter*** in ***Grigg v. British Columbia***, (1996), 138 D.L.R. (4th) 548 (B.C.S.C.).

[31] In March 1997, the respondent received a payment from the Board of $90,895.89. The payment included the monthly pension which was reinstated from April 17, 1985 (the date s. 15 of the ***Charter*** took effect) to September 30, 1985 (the date her son ceased to be dependent), a "capital sum" of $25,851.33, and interest.

[32] The respondent appealed to the Workers' Compensation Review Board, which denied her appeal on April 28, 1999, and from there to the Workers' Compensation Appeal Division, which denied her appeal on March 30, 2000. She applied to the Supreme Court for judicial review of the decision of the Appeal Division. The chambers judge decided the provisions that terminated her monthly pension and provided a capital sum violated s. 15(1). That is the decision from which the Board appeals to this Court. In accordance with the agreement of the parties, the chambers judge deferred consideration of s. 1 of the ***Charter***.

Section 15(1) and the Law Test

[33] Section 15(1) provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[34] As stated by Deschamps J. in ***Trociuk v. British Columbia (Attorney General)***, [2003] S.C.J. No. 32; 2003 SCC 34 (at para. 9):

> Applications of s. 15(1) are now guided by the test set out in ***Law v. Canada (Minister of Employment and Immigration)***, [1999] 1 S.C.R. 497. In the present case, the first two elements of that test are clearly satisfied. The impugned provisions explicitly draw a distinction on an enumerated ground, and the claimant was subject to differential treatment on the basis of that ground (paras. 39).

[35] The chambers judge found, and I agree, that the ***Act*** provides compensation of significantly lesser economic value to spouses whose children cease to be dependent when they are under age 40, as compared with spouses who are then 40 and older. That finding satisfies the first two of the three inquiries required to determine if the impugned provisions violate s. 15(1) of the ***Charter***. They subject the respondent to differential treatment on the enumerated ground of age.

[36] The question in issue is whether the significant economic disadvantage suffered by the respondent and the group of younger spouses of which she is a member is "discrimination" within the meaning of s. 15(1).

[37] Literally thousands of words have been written by many learned judges concerning the meaning of "discrimination" for the purposes of s. 15(1). The focus of the analysis is the protection of human dignity. In ***Law***, Iacobucci J. for the Court expressed the purpose of s. 15(1) (at para. 51):

> It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

[38] See also: ***Gosselin v. Quebec (Attorney General)***, 2002 SCC 84 at para. 20, *per* McLachlin C.J.C., and ***Lovelace v. Ontario***, [2000] 1 S.C.R. 950 at para. 54.

[39] In describing what is meant by human dignity for the purposes of s. 15(1), Iacobucci J. (in ***Law*** at para. 53) used phrases such as "the realization of personal autonomy and self-determination"; "self-respect and self-worth"; and "physical and psychological integrity and empowerment". He said:

> Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.

[40] As pointed out in ***Trociuk*** and in ***Gosselin*** at para. 18, ***Law*** provides the "governing standard" for the analysis of s. 15(1). ***Law*** mandated a "contextual inquiry", comprising four factors, to determine whether a distinction is discriminatory. The four contextual factors are (as summarized by McLachlin C.J.C. in ***Gosselin*** at para. 25):

> . . . (1) pre-existing disadvantage; (2) correspondence between the ground of distinction and the actual needs and circumstances of the affected group; (3) the ameliorative purpose or effect of the impugned measure for a more disadvantaged group; and (4) the nature and scope of the interests affected.

[41] In ***Gosselin*** (at para. 25) McLachlin C.J.C. held that the issue addressed by the contextual inquiry is:

> . . . whether "a reasonable person in circumstances similar to those of the claimant would find that the legislation which imposes differential treatment has the effect of demeaning his or her dignity" having regard to the individual's or group's traits, history, and circumstances: ***Law***, at para. 60, followed in ***Lovelace***, *supra*, at para. 55.

Age Discrimination: Law and Gosselin

[42] Both ***Law*** and ***Gosselin*** considered legislation that provided benefits of differing economic value to individuals based on their age. In both cases, the Supreme Court of Canada rejected the arguments that younger people suffered from discrimination because they were entitled to benefits of lesser economic value than the benefits older persons were entitled to receive. The Supreme Court found that, despite the economic discrepancy, the legislation was consonant with the human dignity and freedom of younger people. Central to the Court's conclusion in both cases was the finding that younger people do not suffer any pre-existing disadvantage and are advantaged over older people in finding employment.

[43] In ***Law***, Iacobucci J. for the Court summarized his conclusion of the analysis of the contextual factors (at para. 108):

> In these circumstances, recalling the purposes of s. 15(1), I am at a loss to locate any violation of human dignity. The impugned distinctions in the present case do not stigmatize young persons, nor can they be said to perpetuate the view that surviving spouses under age 45 are less deserving of concern, respect or consideration than any others. Nor do they withhold a government benefit on the basis of stereotypical assumptions about the demographic group of which the appellant happens to be a member. I must conclude that, when considered in the social, political and legal context of the claim, the age distinctions in ss. 44(1)(d) and 58 of the CPP are not discriminatory.

[44] In ***Gosselin***, the 30 year old appellant challenged the validity of the social assistance scheme adopted by the Quebec government in 1984 that provided a lower base amount to individuals under age 30 than that payable to those age 30 and over. Recipients of social assistance under age 30 could increase the amount they received to an amount comparable with that received by older recipients by participating in a designated work program or education program. Again, the Supreme Court held that the economic distinction did not amount to discrimination within the meaning of s. 15(1).

[45] McLachlin C.J.C. summarized the conclusions, central to both cases, that younger people do not suffer from pre-existing disadvantage and are advantaged over older people in finding employment: (at paras. 33−4):

> Both as a general matter, and based on the evidence and our understanding of society, young adults as a class simply do not seem especially vulnerable or undervalued. There is no reason to believe that individuals between ages 18 and 30 in Quebec are or were particularly susceptible to negative preconceptions. No evidence was adduced to this effect, and I am unable to take judicial notice of such a counter-intuitive proposition. Indeed, the opposite conclusion seems more plausible, particularly as the programs participation component of the social assistance scheme was premised on a view of the greater long-term employability of under-30s, as compared to their older counterparts. Neither the nature of the distinction at issue nor the evidence suggests that the affected group of young adults constitutes a group that historically has suffered disadvantage, or that is at a particular risk of experiencing adverse differential treatment based on the attribution of presumed negative characteristics: see ***Lovelace***, supra, at para. 69.

With regard to this contextual factor, Ms. Gosselin is in the same position as Mrs. Law. In ***Law***, Iacobucci J. stated (at para. 95):

> Relatively speaking, adults under the age of 45 have not been consistently and routinely subjected to the sorts of discrimination faced by some of Canada's discrete and insular minorities. For this reason, it will be more difficult as a practical matter for this Court to reason, from facts of which the Court may appropriately take judicial notice, that the legislative distinction at issue violates the human dignity of the appellant.

If anything, people under 30 appear to be advantaged over older people in finding employment. As Iacobucci J. also stated in ***Law***, with respect to adults under 45 (at para. 101):

> It seems to me that the increasing difficulty with which one can find and maintain employment as one grows older is a matter of which a court may appropriately take judicial notice. Indeed, this Court has often recognized age as a factor in the context of labour force attachment and detachment. For example, writing for the majority in ***McKinney***, [[1990] 3 S.C.R. 229], LaForest J. stated as follows, at p. 299:
>
> Barring specific skills, it is generally known that persons over 45 have more difficulty finding work than others. They do not have the flexibility of the young, a disadvantage often accentuated by the fact that the latter are frequently more recently trained in the more modern skills.

Iacobucci J. went on to note that "[s]imilar thoughts were expressed in ***Machtinger v. HOJ Industries Ltd.***, [1992] 1 S.C.R. 986, at pp. 998–99, per Iacobucci J., and at pp. 1008–9, per McLachlin J. [and] ***Moge v. Moge***, [1992] 3 S.C.R. 813, at pp. 881–83, per McLachlin J."

[Underlining in original.]

[46] The question is whether the added factor of the surviving spouses having had dependent children, which distinguishes this case from ***Law*** on its facts, also distinguishes it from both ***Law*** and ***Gosselin*** in principle. In my view, it does not.

Age and Dependent Children

[47] The class of persons who are disadvantaged by the ***Act*** are not simply younger than the comparator group (see ***Law*** at paras. 56–8); that is, under 40 as compared with age 40 or older. The younger spouses are parents who, when their youngest child ceases to be dependent, are likely between the ages of 35 and 40.

[48] A surviving spouse whose child or children cease to be dependent when he or she is under the age of 40 had to have become a parent at an early age. The respondent was 17 when her son was born.

[49] In my view, it is a matter of which the Court can take judicial notice that it is unlikely there will be many surviving spouses who had children earlier than age 15. Thus a parent will be, at the youngest, 33 years old when his or her child ceases to be dependent. It is more likely, however, that the group of younger spouses will be at least 35 years of age when their youngest child ceases to be dependent. Those parents who are ages 35 through 39 when their youngest child ceases to be dependent will have had that child between the ages of 17 and 22.

[50] That demographic fact raises two issues for the purposes of this analysis. The first is that the class of younger spouses is only marginally younger than the older spouses. The second is that the younger spouses became parents at an age when young people generally are completing their secondary education, obtaining post-secondary education and training, and starting their careers. I am of the view that the Court can again take judicial notice, this time of the fact that participation of young parents in those types of activities will be restricted, and their long-term participation in the work-force will be affected as a result.

[51] As a result of these two factors, the chambers judge reasoned (at paras. 63−66 and 68) that the provisions of the ***Act***, as they apply to the group of younger spouses, did not adequately take into account their actual needs and circumstances. He found (at para. 60) that "[t]he broad generalization that younger persons have better job prospects than older persons cannot support the distinction created by the impugned legislation . . .". He reasoned (at para. 64) that "[t]he economic vulnerability to the long term effects of the death of a spouse caring for dependent children, as noted in ***Law v. Canada***, *supra*, at para. 103, is not age related." He noted that younger spouses are excluded "although their age will not be significantly less than 40 and the legacy of disadvantage arising during single parenthood will not vary." He pointed out (at para. 65) that younger spouses may have a "worthier case" for long-term benefit assistance because of the very young age at which they started families.

[52] The chambers judge, in effect, distinguished ***Law*** on all four of the contextual factors: pre-existing disadvantage; the nature and scope of the interests affected; the ameliorative purpose or effect of the impugned measure for a more disadvantaged group; and the correspondence between the ground of distinction and the actual needs and circumstances of the affected group.

[53] He found that the presumption that younger people are generally advantaged compared to older people because they are more employable does not apply to younger spouses. He was of the opinion that younger parents suffer pre-existing disadvantage or vulnerability from the "accumulated detriments" of their early parenting responsibilities which may have limited their education, vocational training and job experience. He concluded that, in scope, the legislation affected a small sub-group of spouses who were not significantly younger than the older spouses. He suggested that younger spouses may be the more disadvantaged group and require more long-term assistance than older spouses, because, he assumed, the younger spouses became parents at a younger age. Finally, as noted above, he held that the legislation did not adequately take into account the actual needs and circumstances of the affected group.

[54] The chambers judge concluded (at para. 69):

> The petitioner's self-respect and self-worth inherent in her dignity as a person is lessened by the failure of the [legislation] . . . to reflect concern, respect and consideration to the under 40 sub-set group of which she is a member, compared to that accorded the remaining members of the cohort of spouses with dependent children at the date of the worker spouse's death.

[55] Thus, the chambers judge held that the disadvantageous economic effect of the legislation on younger spouses violated their human dignity and therefore their equality rights under s. 15(1) of the ***Charter***.

Analysis

[56] With great respect to the chambers judge, in my opinion, in distinguishing ***Law***, he overly narrowed the application of the contextual factors in considering the circumstances of younger spouses. As a result, he failed to draw a logical connection between his analysis of the effect of the legislation and the conclusion that the human dignity of the younger spouses was violated.

[57] Taking a broad view of ***Law*** and subsequent decisions, the Supreme Court of Canada has been at pains to limit the application of s. 15(1) to cases where the individuals affected by the impugned legislation suffer more than economic detriment or disadvantage. Something more is required to find that economic disadvantage is constitutionally significant.

[58] As explained by L'Heureux-Dubé J. in ***Egan v. Canada***, [1995] 2 S.C.R. 513 at paras. 63−4 (referred to in ***Law*** at para. 74 and ***Lovelace*** at para. 88):

> As I noted earlier, the ***Charter*** is not a document of economic rights and freedoms. Rather, it only protects "economic rights" when such protection is necessarily incidental to protection of the worth and dignity of the human person (i.e. necessary to the protection of a "human right"). Nonetheless, the nature, quantum and context of an economic prejudice or denial of such a benefit are important factors in determining whether the distinction from which the differing economic consequences flow is one which is discriminatory. If all other things are equal, the more severe and localized the economic consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory within the meaning of s. 15 of the *Charter*.
>
> Although a search for economic prejudice may be a convenient means to begin a s. 15 inquiry, a conscientious inquiry must not stop here. The discriminatory calibre of a particular distinction cannot be fully appreciated without also evaluating the constitutional and societal significance of the interest(s) adversely affected. Other important considerations involve determining whether the distinction somehow restricts access to a fundamental social institution, or affects a basic aspect of full membership in Canadian society (e.g. voting, mobility). Finally, does the distinction constitute a complete non-recognition of a particular group? It stands to reason that a group's interests will be more adversely affected in cases involving complete exclusion or non-recognition than in cases where the legislative distinction does recognize or accommodate the group, but does so in a manner that is simply more restrictive than some would like.

[59] In ***Law*** (at para. 83), Iacobucci J. stated:

> In every case, though, a court's central concern will be with whether a violation of human dignity has been established, in light of the historical, social, political, and legal context of the claim.

[60] Neither party identified any historical, social, political or legal context for the claim of economic disadvantage advanced in this case, nor am I able to discern any. Nor, in my view, is any affront to human dignity revealed by a proper analysis of the four contextual factors.

[61] Younger spouses do not suffer from a "pre-existing disadvantage", within the meaning of s. 15(1), because of previous child-care responsibilities. Their disadvantage is economic, and has no roots in stereotypes, prejudices or systemic vulnerability.

[62] Nor, in my view, do the impugned provisions fail to adequately take into account the actual needs and circumstances of younger spouses, to the extent they are revealed in the evidence or by judicial notice of certain facts. The application of the "broad generalization that younger persons have better job prospects than older persons" is not completely displaced by the fact that the employability of younger spouses has been impacted by their years of child-care responsibilities — its application is modified. The needs of younger spouses are not excluded or unrecognized. Rather, their different needs at different ages are provided for differently. The ***Act*** acknowledges and provides for the impact on employability of becoming a parent at a young age by providing a monthly pension when the child is dependent and a capital sum when the child is no longer dependent. As Iacobucci J. stated in ***Law*** (at para. 106):

> . . . the fact that the legislation is premised upon informed generalizations which may not correspond perfectly with the long-term financial need of all surviving spouses does not affect the ultimate conclusion that the legislation is consonant with the human dignity and freedom of the appellant.

[63] In assessing the ameliorative purpose or effect of the legislation for older spouses, the assumption applies once again: as a group, older spouses are less employable than younger spouses. Whether the "cut-off" is age 35, as in ***Law***, age 30, as in ***Gosselin***, age 45, as discussed in ***McKinney***, or age 40, as in this case, that assumption is the consistent principle underlying the Supreme Court of Canada's analysis of age-based economic discrimination. In this respect, this case is indistinguishable from ***Law***. Iacobucci J. found (at para. 103) that the legislative purpose of allocating greater benefits to those with greater need, on the basis of age, accorded with the purpose of s. 15(1).

[64] In suggesting that younger spouses may have a "worthier case" for long-term benefits, the chambers judge wrongly assumed, in my view, that they became parents at a younger age than the older spouses. The change in benefits under the ***Act***, from monthly pension to capital sum, occurs when the youngest child of a surviving spouse ceases to be dependent. An older spouse who had more than one child may have had a child or children when he or she was very young. The older child or children may have ceased to be dependent when the parent was under the age of 40. The impugned provisions are relevant only when the youngest child, born when the parent was relatively older, ceases to be dependent. Thus, older spouses may have become parents at the same early age as the younger spouses. The difference is that they are older when their children cease to be dependent.

[65] The final factor is the nature and scope of the interest affected. The fact is that the legislation affects a small sub-group of younger spouses, those 35 through 39 years of age. The younger spouses are not significantly younger than the older spouses, who receive a significantly larger benefit. The arbitrariness of the cut-off, however, is the inevitable consequence of all age-based legislative distinctions (see ***Gosselin*** at para. 57).

[66] The question is whether the human dignity of those in the sub-group is, in the larger context, violated. The significance of the distinction in this case is solely economic. Applying the principles articulated in ***Law*** and ***Gosselin***, I am unable to link the nature and scope of the economic interest of younger spouses with a violation of human dignity.

[67] In summary, I cannot do better than to paraphrase Iacobucci J.'s concluding remarks in ***Law*** (at para. 108):

> In these circumstances, recalling the purposes of s. 15(1), I am at a loss to locate any violation of human dignity. The impugned distinctions in the present case do not stigmatize [younger spouses], nor can they be said to perpetuate the view that [younger spouses] are less deserving of concern, respect or consideration than any others. Nor do they withhold a government benefit on the basis of stereotypical assumptions about the demographic group of which the [respondent] happens to be a member. I must conclude that, when considered in the social, political and legal context of the claim, the age distinction in [ss. 17(4) and 17(3)(d) of the ***Act***] are not discriminatory.

[68] I am not unsympathetic to the position of the respondent. It is not clear that ss. 17(4) and 17(3)(d) were intended to have such a significant economic effect on those parents who are (realistically) between ages 35 and 40. In ***Law***, the "cut-off" was age 35. Legislative consistency suggests that the "cut-off" at age 40 in the ***Act*** might be reappraised.

[69] Having said that, for all of the reasons I have given, I am of the opinion that the legislation does not result in a violation of s. 15(1) of the ***Charter***.

[70] I would allow the appeal.

The Honourable Madam Justice Levine

Court of Appeal for British Columbia

Citation: ***Powell Estate v. Workers' Compensation Board,***
2003 BCCA 470

Date: 20030827

Docket: CA029255

Re: In the Matter of the *Judicial Procedure Act* R.S.B.C. 1996, Chapter 241

In the Matter of the *Workers Compensation Act* R.S.B.C. 1996, Chapter 492

Between:

Duncan Leslie Atchison, Executor of the Estate of Margaret E. Powell, Deceased, and Duncan Leslie Atchison

Appellant
(Petitioner)

And

Workers' Compensation Board

Respondent
(Respondent)

Before: The Honourable Madam Justice Huddart
The Honourable Madam Justice Saunders
The Honourable Madam Justice Levine

D.A. Farquhar, Q.C. and T.G. Ison — Counsel for the Appellant

M.P Carroll, Q.C. and S. Kennedy — Counsel for the Respondent

Place and Date of Hearing: Victoria, British Columbia
December 19, 2002

Place and Date of Judgment: Vancouver, British Columbia
August 27, 2003

Written Reasons by:
The Honourable Madam Justice Saunders

Concurred in by:
The Honourable Madam Justice Huddart
The Honourable Madam Justice Levine

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] The issues are whether a panel of the Appeal Division of the Workers' Compensation Board has jurisdiction to: (a) reconsider a previous decision of a different panel of the Appeal Division, and (b) reconsider decisions of the Workmen's Compensation Board made in 1956 and 1957. Depending on the answers to those questions, the issue may arise of the appropriate remedy for the estate of a person denied a widow's pension by the 1956 and 1957 decisions.

[2] In the judicial review proceedings, Mr. Justice Vickers held that a panel of the Appeal Division: (a) had jurisdiction to review a previous decision of a panel of that same division, and (b) lacked jurisdiction to review the 1956 and 1957 decisions.

The Workers Compensation Proceedings

[3] The genesis of the case was James Atchison's fall from a spar tree in 1937. Mr. Atchison sustained serious injuries, for which he received a permanent partial disability pension from the then named Workmen's Compensation Board. In 1944 Mr. Atchison stopped working and was granted a full permanent disability pension.

[4] Mr. Atchison died in 1955. His widow, Margaret Atchison, applied for a widow's pension. Her application was denied on the basis that her husband's death was not related to his 1937 workplace accident. That decision was upheld by the Commissioners of the Workmen's Compensation Board in 1956, and again in 1957 on an application for reconsideration. In time Margaret Atchison remarried and became known as Margaret Powell.

[5] In 1996 the son of James Atchison, the appellant Duncan Atchison, wrote to the Workers' Compensation Board under the misapprehension that his mother had lost her widow's pension when she remarried in 1964. He sought reinstatement of the benefits. In March 1997 the Workers' Compensation Board advised him that his mother had never been in receipt of a widow's pension, and there was, therefore, no pension to reinstate. Margaret Powell died in May 1997 and Duncan Atchison, as executor of her estate, pursued the issue.

[6] In October 1997 Duncan Atchison sought reconsideration of the 1956 and 1957 decisions which held that Mr. Atchison's death was not work related. The request for reconsideration was refused. In November 1997 Duncan Atchison's solicitor was advised that "Commissioners' decisions are considered to be final and binding on the Board" and that "only the Appeal Division has the authority to review past Commissioners' decisions".

[7] Duncan Atchison then requested of the Chief Appeals Commissioner a reconsideration of the Commissioners' 1956 and 1957 decisions on the basis of new evidence.

[8] In a decision dated October 25, 1999, a panel of the Appeal Division held that the new evidence justified reconsideration and that the Appeal Division had jurisdiction to re-open the 1956 decision.

[9] In February 2000, a panel of the Appeal Division heard the application for reconsideration and allowed what it termed "the appeal", concluding that Mr. Atchison's death was related to his workplace injury.

[10] The Council of Forest Industries immediately sought a reconsideration of the February 2000 decision and on June 8, 2000 an officer of the Workers' Compensation Board advised Duncan Atchison that notwithstanding the February 2000 decision, there was no entitlement to a retroactive widow's pension as the decision of the Appeal Division was outside its jurisdiction, and as the evidence supporting the application for reconsideration post-dated Mrs. Powell's death. The Appeal Division then reconsidered the February 2000 ruling and on April 24, 2001 a panel held that the Appeal Division had erred in holding in February 2000 that it had jurisdiction to reconsider the 1956 and 1957 decisions.

The Judicial Review Proceedings

[11] Duncan Atchison applied to the Supreme Court of British Columbia for judicial review seeking an order quashing the April 24, 2001, decision, setting aside the June 8, 2000 letter and compelling payment of the widow's pension retroactive to 1955.

[12] Mr. Justice Vickers described the issues as:

1. Did the Appeal Division have jurisdiction to embark on a reconsideration of its February 16, 2000 decision?

2. If there is jurisdiction in the appealed decision to reconsider an earlier decision, was the decision concluding that there was no jurisdiction to reconsider the 1956 and 1957 decisions of the Commissioners, correct?

3. If the decision was wrong, what is the appropriate remedy?

[13] In his reasons (***Atchison v. Workers' Compensation Board***, 2001 BCSC 1661), Mr. Justice Vickers held that the Appeal Division could reconsider its earlier decision if that decision was made outside its jurisdiction. Applying the correctness test as the appropriate standard of review, he held that the Appeal Division lacked jurisdiction to reconsider the 1956 and 1957 decisions and that the April 24, 2001 decision was not in error. He dismissed the petition. In reaching the result, Mr. Justice Vickers considered the two review provisions of the ***Workers Compensation Act***, R.S.B.C. 1996, c. 492, s. 96(2) and s. 96.1(2), and a transitional provision in the ***Workers Compensation (Amendment) Act*** (the ***1989 Amending Act***), S.B.C. 1989, c. 42, s. 17:

> **17.** (1) In this section
>
> "former *Workers Compensation Act*" means the *Workers Compensation Act* as it read immediately before the amendments enacted by this Act came into force;
>
> . . .
>
> (5) A worker, the worker's dependants, the worker's employer or the representative of any of them may apply to the chief appeal commissioner for reconsideration of a decision made under section 91 or 96 of the former *Workers Compensation Act* on the same grounds and in the same manner as that set out in section 96.1 of the new W*orkers Compensation Act*.

[14] The impugned decision of April 24, 2001 said as to s. 17:

> I have determined that the 1956 and 1957 decisions of the Board were made by the commissioners of the Board. They were, however, not decisions "made under Section 91 or 96 of the former *Workers Compensation Act*" in the words of Section 17(5). The "former *Workers Compensation Act*" is defined in Section 17(1) as "the *Workers Compensation Act* as it read immediately before the amendments enacted by this Act came into force". On a purposive analysis, this does not include decisions made under other similar sections of the *Act*, which over time became Sections 91 or 96.

[15] Mr. Justice Vickers held that conclusion correct:

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

[16] On appeal Duncan Atchison contends, as he did before Mr. Justice Vickers, that the Appeal Division lacked jurisdiction to reconsider its own decision, and that the Appeal Division had jurisdiction to reconsider the 1956 and 1957 decisions.

Issue 1

Jurisdiction of the Appeal Division to Reconsider its Own Decision

[17] The first question is whether a panel of the Appeal Division has jurisdiction to determine that a decision of another panel of the Appeal Division was a nullity as being made beyond its jurisdiction: ***Chandler v. Alta. Assoc. of Architects***, [1989] 2 S.C.R. 848, citing with approval ***Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster*** (1983), 147 D.L.R. (3d) 637 (B.C.S.C.).

[18] On those authorities, the answer must be, in my view, as found by Mr. Justice Vickers. The Appeal Division was able to reconsider the matter and correct its own jurisdictional error.

Issue 2

Jurisdiction of the Appeal Division to Reconsider Decisions of 1956 and 1957.

[19] The first step is to determine whether the Appeal Division was acting beyond its jurisdiction in reconsidering the 1956 and 1957 decisions.

[20] The system of appeals now found in the ***Workers Compensation Act*** differs substantially from the system in place in 1956 and 1957. The ***Act*** as it read then, (R.S.B.C. 1948, c. 370) defined the "Board" as the Workmen's Compensation Board consisting of three commissioners who formed the only body for appeals of claim decisions. The Board's jurisdiction was established by s. 76:

> **76.** (1) The Board shall have exclusive jurisdiction to inquire into, hear, and determine all matters and questions of fact and law arising under this Part, and the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any Court, and no proceedings by or before the Board shall be restrained by injunction, prohibition, or other process or proceeding in any Court or be removable by certiorari or otherwise into any Court; and without restriction the generality of the foregoing the Board shall have exclusive jurisdiction to inquire into, hear, and determine:—
>
> *(a)* The question whether an injury has arisen out of or in the course of an employment within the scope of this Part:
>
> *(b)* The existence and degree of disability by reason of any injury:
>
> *(c)* The permanence of disability by reason of any injury:
>
> . . .
>
> *(i)* Whether or not any workman in any industry within the scope of this Part is within the scope of this Part and entitled to compensation thereunder:
>
> . . .
>
> (2) Notwithstanding the provisions of subsection (1), the Board shall have full discretionary power at any time to reopen, rehear, and redetermine any matter which has been dealt with by it. R.S. 1936, c. 312, s. 75.
>
> [Emphasis added]

[21] The ***Act*** was revised by S.B.C. 1968, c. 59. While the Board continued as three commissioners, the appeal structure was modified to provide for an intermediate review of claims decisions by a Board of Review. Appeals from a Board of Review fell to the Board under s. 79 which was, except for minor drafting changes to reflect altered drafting style, the same as the 1948 ***Act***:

> **79.** (1) The Board has exclusive jurisdiction to inquire into, hear, and determine all matters and questions of fact and law arising under this Part, and the action or decision of the Board thereon is final and conclusive and is not open to question or review in any Court. . . .
>
> (2) Notwithstanding subsection (1), the Board has full discretionary power at any time to reopen, rehear, and redetermine any matter which has been dealt with by it. R.S. 1960, c. 413, s. 77. (R. Auth. 38)

[22] In 1974 the ***Act*** was again amended and renamed the ***Workers' Compensation Act***. In the 1979 revision, s. 79 became s. 96 with only inconsequential change. The appeal system of intermediate review by a Board of Review and appeal to the Board remained intact. In 1985, s. 96 was amended to provide expressly for rehearing of any matter dealt with by an officer of the Board or by the review board.

[23] In 1989, after extensive study by the Advisory Committee on the Structures of the Workers' Compensation System of British Columbia chaired by Mr. Donald Munroe, wholesale changes were made to the governance provisions of the ***Act***, S.B.C. 1989, c. 42. The amendments separated management functions from adjudicative functions and created an Appeal Division to adjudicate appeals of compensation claims. The jurisdiction of the Board, now numbering 13 voting and two non-voting members, remained essentially the same under s. 96(1). More significant changes occurred to s. 96(2). The relevant parts of s. 96 as it stood in 1989 provided:

> **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, . . .
>
> (2) Notwithstanding subsection (1), the board may at any time at its discretion reopen, rehear and redetermine any matter, (except a decision of the appeal division, which has been dealt with by it or by an officer of the board). (R. Auth. 32)
>
> [Emphasis added]

[24] The Appeal Division derives its jurisdiction from s. 91, which deals with appeals from review boards, which this is not, and from s. 96.1. The latter, on which this case turns, provides:

> **96.1** (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 or she 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.

[25] Section 17 of the ***1989 Amending Act*** provided for transition:

17. (1) In this section

. . .

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

"new *Workers Compensation Act*" means the *Workers Compensation Act* as it reads after the amendments enacted by this Act come into force.

. . . . .

(5) A worker, the worker's dependants, the worker's employer or the representative of any of them may apply to the chief appeal commissioner for reconsideration of a decision made under section 91 or 96 of the former *Workers Compensation Act* on the same grounds and in the same manner as that set out in section 96.1 of the new *Workers Compensation Act*. (R. Auth. 34)

[26] When the ***Act*** was consolidated in the 1996 revision, the transitional provisions of s. 17 were not included, although they have not been repealed.

[27] The issue in this case is whether the 1956 and 1957 decisions of the Board can be said to be decisions under s. 91 or 96 of the former ***Act***, thereby through s. 17(5) engaging s. 96.1 of the new ***Act*** and coming within the jurisdiction of the Appeal Division. If not, the matter may only be reheard under s. 96, that is, by the Board.

[28] The respondent contends, as it did in the Supreme Court of British Columbia, that the definition of "former *Workers Compensation Act*", the ***Act*** as it read immediately before the ***Act*** was amended, did not encompass the 1948 ***Act.*** Accordingly, it says, the reference in s. 17(5) of the ***1989 Amending Act*** to a decision made under s. 96 does not refer to a decision made under s. 76 of the 1948 ***Act***, although those sections, as illustrated above, are substantially the same.

[29] The appellant urges upon this Court the purposive approach discussed in *Driedger on the Construction of Statutes*, 2nd ed. (Butterworths: Toronto, 1983), and says that the scheme of the amendments was to separate the appeal function from the administrative function. It follows, says the appellant, that it was intended that appeals under the predecessor to s. 96 would be appealed under the new s. 96.1.

[30] Although it can be argued that the purpose of the definition of "former *Workers Compensation Act*" in s. 17 of the ***1989 Amending Act*** solely was to distinguish the new from the old, and that all appeals were intended to be brought to the new appeal body, in my respectful view, the specific language of s. 17(5) of the 1989 statute does not permit that view. As observed by Mr. Justice Vickers, the language in s. 17(5) is narrow. With reference to the word 'immediately', it would stretch the language unduly, in my view, to extend that section's application to a section in the 1948 ***Act***, differently numbered and differently worded. In effect, one would have to ignore the word "immediately" found in the definition. While it may be that the legislature could have chosen language that achieved the result urged by the appellant, it did not do so.

[31] It may seem anomalous, and perhaps unwieldy given the present size of the Board, that the matter insofar as it rests on new evidence may only be addressed by the Board. Yet, the result is not inconsistent with the language of the current ***Act***. As observed by Mr. Justice Vickers, the ***Act*** continues in s. 96 to clothe the Board with jurisdiction to rehear and redetermine matters. While the appeal function is now much abridged from what it was, one cannot say that the result it inconsistent with the Board's powers in the current legislation.

[32] It follows that I would dismiss the appeal.

Date: 20030610
Docket: 53426
Registry: Kelowna

In the Supreme Court of British Columbia

Oral Reasons for Judgment
The Honourable Mr. Justice Sigurdson
June 10, 2003

BETWEEN:

THOMAS WILLIAM SOFIAK and LAUDALINA DEJESUS SOFIAK

PLAINTIFFS

AND:

WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA

DEFENDANT

Representative for the Plaintiffs:	L. Blanchette
Counsel for the Defendant:	S. Nielsen L. Courtenay
Place and Date of Hearing:	Kelowna, B.C. June 10, 2003

[1] **THE COURT:** This is an application by the Workers' Compensation Board to dismiss the plaintiffs' action pursuant to Rule 19(24) (a), (b) and (d). The essential grounds are that the claim does not disclose a cause of action and that it is *res judicata.*

[2] A similar application came on before Madam Justice Beames in October 2001. As Madam Justice Beames pointed out, the allegations in the Statement of Claim relate to issues concerning Mr. Sofiak's entitlement to Workers' Compensation benefits and that given the privative clause in s. 96 of the ***Workers' Compensation Act*** (the ***"Act"***), any challenge must be brought within the provisions of the ***Judicial Review Procedure Act***. Mr. Blanchette, who appeared for the plaintiffs, had submitted that the plaintiffs have a claim that goes beyond a claim for judicial review, and their allegations (which had not been pleaded when the matter was before Justice Beames), he said, included a breach of a duty of care, negligence, and something that might be described as abuse of public office.

[3] Justice Beames concluded that the Statement of Claim as presently drafted could not stand. She gave the plaintiffs an opportunity to amend the Statement of Claim, and if they did, that the defendant was at liberty to apply again under Rule 19(24) to apply to strike out the Amended Statement of Claim on the ground that it does not disclose a cause of action.

[4] Madam Justice Beames pointed out that if Mr. Sofiak wished to challenge the defendant's decisions with respect to his entitlement to compensation, he must bring a separate proceeding pursuant to the ***Judicial Review Procedure Act***.

[5] The Sofiaks then did that. That petition, No. 55159, was filed by the Sofiaks and came on for hearing before Mr. Justice Brooke, who in reasons issued April 16, 2002 dismissed the application for judicial review, 2002 BCSC 550. He provided certain background and I will repeat part of his reasons for judgment for the purposes of putting this matter in context at ¶2–8:

> By way of background, Mr. Sofiak was employed as a full-time temporary driver on August 19, 1997. In addition to driving a truck laden with wood chips, Mr. Sofiak's job description required some shovelling. He says that on August 19, 1997, he injured his back in the course of shovelling and then twisting to alight from the truck bed. Mr. Sofiak had suffered from similar back pain, and he did not report the injury to his employer or to the Workers' Compensation Board. His reasons were that he was on holiday for the following week, during which time he thought the injury would resolve, and he hesitated to report an injury given his temporary status with his employer.
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> On September 2nd, Mr. Sofiak returned to work, but his back had not improved to the extent that he was without pain. He, therefore, attended at a walk-in clinic on September 6th where he saw Dr. Powter. On September 27th, he returned to Dr. Powter and in the interval saw a physiotherapist. On November 4, 1997, Mr. Sofiak saw his family doctor, Dr. Remmington, who advised him to discontinue work. In the result, on November 4, 1997, Mr. Sofiak made a claim for worker's compensation and reported the injury to his employer.
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> The claims adjudicator declined to accept the claim as one for an injury arising out of, and in the course of, his employment. Mr. Rivard relied upon the failure of Mr. Sofiak to seek prompt medical attention and the failure of Mr. Sofiak to report the injury or make a claim until November 5th. The claims adjudicator pointed out that Mr. Sofiak had previous claims and was aware of the reporting procedure.
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> Dr. Powter filed a report with the Workers' Compensation Board on or about November 6, 1997. He described the date and time of the injury as "August 19, 1997" and the date and time of treatment as "September 6, 1997". Dr. Powter described the worker's statement of what happened in this report as "acute onset back pain" and the presenting complaint as "back pain". Dr. Powter did not respond to the question on the report form of whether he understood the tasks/activities of the worker's job but answered "no" to the question whether the patient would miss work due to accident/injury/disease.

In Dr. Powter's clinical notes, which were obtained sometime after the claim was denied, the entry for September 6, 1997, is somewhat more extensive and says, in part, this:

> Acute onset back pain x 1 1/2 wks
> Shovelling wood chips
> Tender over (R) (undecipherable) jt
> Rx: heat

The entry for September 27th says this:

> Was settling down
> Started on physio T
> Tender (undecipherable)
> DTR's all (N)
> Rx: heat

Following the refusal of his claim, Mr. Sofiak took an appeal under the ***Act*** to the Workers' Compensation Review Board. On December 1, 1999, the review board told Mr. Sofiak that they were in complete agreement with the claims adjudicator and that there was no significant new information.

[6] Mr. Justice Brooke continued at ¶9–10:

> Mr. Sofiak then took an appeal to the appeal division, and a decision was rendered by the appeal commissioner on October 10, 2000. After hearing oral evidence, reviewing the background of the claim, and considering the extensive report of Dr. Andrew Travlos, a specialist in physical medicine and rehabilitation. Dr. Travlos noted that Mr. Sofiak had a history both of low back pain and workers' compensation claims prior to the injury alleged on August 19, 1997, and he also notes that Mr. Sofiak was involved in two motor vehicle accidents after August 19, 1997: one on November 14, 1997 and the other on September 5, 1998. It was noted that back and leg systems progressively deteriorated after the accident of November 14, 1997, but improvement occurred over the next several months. Following the accident of September 5, 1998, Mr. Sofiak complained of pain in the neck, which gradually resolved over the next three months. He also reported a fight in October of 1998 which led to a flare-up of pain in the back. Further investigation disclosed that Mr. Sofiak suffered from a large disc herniation, which Dr. Travlos believes was present before, but exacerbated by, the injury of August 19, 1997. Surgery was recommended and performed in June 1998. Dr. Travlos concluded that the herniated disc was in existence prior to August 19, 1997, and the accident that day "simply pushed him over the edge". Moreover, he finds that the subsequent accidents and assault exacerbated the back injury. Dr. Travlos thought it unlikely that Mr. Sofiak would return to truck driving, though capable of employment at a lighter level of activity.
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> The issue before the Workers' Compensation Board throughout has been whether Mr. Sofiak sustained an injury arising out of and in the course of his employment on August 19, 1997. The proceeding before the appeal division is in

the nature of a hearing *de novo* rather than a review of the decision of the claims adjudicator or the board of review. I am satisfied, having regard to the jurisdiction accorded the Workers' Compensation Board under s. 96 of the ***Act*** to finally and conclusively deal with all matters of fact and law arising under the ***Act,*** that in order for Mr. Sofiak to succeed in obtaining an order setting aside the decision of the appeal commissioner, he must establish that the decision was patently unreasonabl [e] . ***(Pasiechnyk v. Saskatchewan Workers' Compensation Board,*** [1997] 2 S.C.R. 890.) To be patently unreasonable, the decision of the appeal commissioner must be "openly, evidently, clearly unreasonable". ***(Canada Safeway Limited v. WCB*** (1998), 59 B.C.L.R. (3d) 317 (B.C.C.A.) — leave to appeal to the Supreme Court of Canada refused.) In ***Re Kovach*** (1998), 52 B.C.L.R. (3d) 98, Donald J.A. determined that the test of "patently unreasonable" must be applied to the result, not to the reasons leading to the result and at para. 26 says:

> In other words, if a rational basis can be found for the decision it should not be disturbed simply because of defects in the tribunal' s reasoning.

[7] At ¶16, Justice Brooke concluded this way. He said:

> While I might not have reached the same conclusion, that is not the test. I am bound by the jurisdiction to be found in the ***Judicial Review Procedure Act,*** the complete and comprehensive privitive clause in the ***Act*** and the authorities to which I have referred. There was evidence before the appeal division which provides a rational basis for its decision and, applying the appropriate deference to that decision within the standard of correctness, I must dismiss the petition.

[8] Mr. Justice Brooke, however, noted by way of *obiter* that, "[t]o the extent that the appeal division may reconsider Mr. Sofiak's claim, I would urge it to do so" (at ¶19).

[9] On July 9, 2002 the appeal division did reconsider the matter and by decision of John Steeves, chief appeal commissioner, concluded that the application for reconsideration ought to be denied. Now, that is all by way of background to the current situation.

[10] The Statement of Claim in Action 53426, the action that we are dealing with here, was amended with seven additional paragraphs and a new prayer for relief.

[11] The final paragraph (before the amendments) alleged that the W.C.B. has failed to fulfill their obligation to administer policy under the ***Act*** and, as a result, denied Mr. Sofiak benefits he was legally entitled to, and claimed retroactive compensation, medical costs, and general and punitive damages for stress, hardship, pain, and suffering.

[12] In the amendments to the Statement of Claim, the plaintiffs say that they are making claims for damages due to: the Board's negligence; breach of duty of care; abuse of public office; not acting in a manner consistent with their duties as administrators as dictated by the legislation; imposing a bias on Mr. Sofiak in the judicial process and acting on those assumptions; openly challenging his credibility and integrity in facts pertaining to the events; being negligent in making allegations questioning his credibility and integrity without supporting evidence

beyond bias; acting upon unsupported facts and allegations resulting in harm; refusing to provide supporting evidence to establish the allegations against Mr. Sofiak, thereby denying him fundamental justice and fairness; negligently misleading the plaintiff as to his rights under the law; justifying its conduct under the pretence of absolute and unchallenged discretionary authority; acting in a blatantly unreasonable manner that can be viewed as an abuse of power; failing to perform duties and obligations prescribed by law; and, failing to find contributory negligence given the evidence of the Board's access to knowledge and information that should have alerted the authorities to errors in the administration of the claim.

[13] The plaintiffs seek $800,000.00 for psychological pain and suffering and punitive and general damages.

[14] Under the applicable law, ***Hunt v. Carey Canada Inc.,*** [1990] 2 S.C.R. 959, on a motion to strike pleadings as not disclosing a cause of action, the court must proceed on the assumption that all the facts pleaded are true. The claim may only be struck out if it is plain and obvious that it cannot succeed and the court should be aware that a claim may be amended and further amended.

[15] Under Rule 19(24) (d) a claim may be struck out as *res judicata.*

[16] I should note that although there is no actual plea of a breach of fiduciary duty, the notice of trial purportedly setting the action for trial does refer to that as a cause of action.

[17] The central contention of the defendant on this application is that the Workers' Compensation Board establishes a system under which the Board is authorized and responsible for adjudicating claims in the workplace and establishes a no fault system for compensation for personal injury "arising out of and in the course of employment". A decision of the W.C.B. officer is appealable to the Review Board, which in turn is appealable to the Appeal Division. Under the ***Act*** the decision is final and conclusive. Although there is no appeal to the court, decisions are reviewable for excess of jurisdiction under the ***Judicial Review Procedure Act.*** See for example, ***Pasiechnyk v. Saskatchewan (Workers' Compensation Board),*** [1997] 2 S.C.R. 890.

[18] This proceeding began as a challenge to the decision of the Workers' Compensation Board and as noted by Justice Beames, that had to be brought by way of judicial review. That was then done. It was fully argued before Mr. Justice Brooke and the proceeding was dismissed.

[19] Where the proper route to challenge the decision of the W.C.B. is by judicial review, and that has been done and decided by this court, the question is whether this action, to the extent that it purports to do the same thing again, should be struck out either as a collateral attack where the proper remedy is judicial review or as *res judicata,* on the basis that this court has already determined the issues on their merits, or both.

[20] Not only is judicial review by way of petition and affidavit under the ***Judicial Review Procedure Act*** the appropriate course, but that route has already been taken. The application has been heard by Justice Brooke and dismissed. To the extent that the allegations in the Statement of Claim, as amended, merely duplicate the petitioner's claim for judicial review that has been dismissed, then they are res *judicata.*

[21] ***Bersheid v. Ensign,*** [1999] B.C.J. No. 1172 (S.C.), is one authority that is apt. It concerned a claim where the ***Water Act*** provided the code for water use in British Columbia and the relationship to owners and users. The ***Water Act*** provided for a determination of rates by the Comptroller with an appeal to the Environmental Appeal Board. Mr. Justice Drossos considered the matter *res judicata* in the sense of claims that could have been brought but were not. Under heading *res judicata* he said (at ¶49):

> Failure by the plaintiff to avail himself of the requisite administrative procedures regarding the Comptroller of Water Rights and EAB orders concerning the water licences in question results in the validity of these licences now being *res judicata.* See ***British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.*** . . . [1998] B.C.J. No. 1043 (C.A.) at 9. The EAB is clearly a judicial tribunal of competent jurisdiction for the purposes of determining the validity of a decision of the Comptroller of Water Rights. . . .

[22] Here the issue of the validity of the decision of the Workers' Compensation Board was determined upon judicial review. I note that many of the claims in this proceeding were, in fact, advanced in the judicial review proceedings. In ***Berscheid v. Ensign,*** *supra,* the doctrine of *res judicata* applied simply because the claims could have been properly raised.

[23] Mr. Justice Drossos also spoke of collateral attack and said this at ¶50−52:

> It should be noted that there is a valid distinction between a judicial review and other types of proceedings which, for policy reasons, ought to be maintained: ***O'Reilly et al v. Mackmin et al,*** [1983] 2 A.C. 237 (H.L.). As our Court of Appeal has recognized, it would be a retrograde step to sublimate the process of judicial review with civil litigation . . .
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> . . . a party cannot seek a remedy statutorily provided for by judicial review through civil proceedings. Such an evasion of the judicial review process is known as a collateral attack and is prohibited. Where the legislature clearly intends to confer jurisdiction on an appeal tribunal to hear and determine certain matters, the court lacks the jurisdiction to do so. . . . It is only after the complainant has completed the statutorily imposed administrative process that the avenue of judicial review becomes available and, it should be noted, such judicial review is only available in limited circumstances.
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> Further, where the plaintiff has already commenced proceedings by way of petition for judicial review under the ***Judicial Review Procedure Act*** to challenge the orders of an administrative tribunal, it is an abuse of process to commence subsequent civil proceedings seeking substantially the same remedies against the same parties as set out in the petition.

[24] I conclude that the claim insofar as it is an attack on the decision of the Board, and it is in large part, must fail for two grounds. First, it is an impermissible collateral attack because judicial review is the appropriate remedy. Second, not only could they have been raised, but many of the same allegations were raised and determined and to that extent the claim is *res judicata.* They cannot be litigated any further, other than by a proper appeal from Justice Brooke's decision.

[25] The plaintiff however says that this is a different case, that it is a plea of breach of duty. His representative says that he does not challenge the decision in this proceeding (notwithstanding the wording of the pleadings) but what he challenges are breaches of duties of investigation and administration. He says that there cannot be immunity for discretionary acts. He says that the Workers' Compensation Board is not like a court and there are applicable statutory duties. He says that he relies on cases such as ***Dorman Timber Ltd. v. British Columbia*** (1997), 40 B.C.L.R. (3d) 230 (C.A.), ***Lewis (Guardian ad litem of) v. British Columbia,*** [1997] 3 S.C.R. 1145, ***Ryan v. Victoria (City),*** [1999] 1 S.C.R. 201, and **R.A.R.B.** ***v. British Columbia,*** 2001 BCSC 667, and says that the traditional tort law duty of care will apply to a government agency the same way that it applies to an individual. He says that the privative clause does not remove a claim for breach of duty of care, breach of fiduciary duty or abuse of public office.

[26] The allegations in the Amended Statement of Claim, in my view, attack the quasi-judicial aspects of the Board's decision. The defendant points to these passages in the pleading: blatantly failing to follow its statutory mandate; violating his rights under a judicial process; negligently questioning his credibility; acting upon unsupported allegations; perceived bias; and, failing to find contributory negligence.

[27] The defendant relies on a number of authorities that claims of this kind are not maintainable, but I think the reference to a couple will suffice.

[28] In ***Ridgecrest Investment Consultants Ltd. (c.o.b. Ridgecrest Builder Consultants) v. British Columbia (Workers' Compensation Board)***, [1985] B.C.J. No. 1555, Mr. Justice Spencer said at ¶2–5:

> The cause of action alleged against the defendants is unusual. The defendants Gunn and Van Buekenhout were officers of the Workers' Compensation Board. The defendants Hall and Parr are commissioners of the Board and so was the defendant Scollan at the material times alleged. All, together with the Board itself, are sued for general and special damages for economic loss and for general and punitive damages for negligence or abuse of power in the exercise of a statutory power in excess of their jurisdiction. As well, a declaration is sought against the Board only to the effect that its decision of June 14, 1982 was beyond its jurisdiction. In essence what is happening is that the plaintiffs, being dissatisfied with a decision of the Board that Ridgecrest Investment Consultants Ltd. was an employer and therefore assessable under the provisions of the ***Workers' Compensation Act,*** sue for damages to recover the amount of the assessments and for the economic loss caused to them by the impact which the assessments had upon the Company's business. . . .
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> I shall deal first with the claim for damages. **In my opinion the law prevents the plaintiffs from claiming damages against any of the defendants in this case. Whatever was done by the defendants Gunn and Van Buekenhout as officers employed by the Board was dealt with by the Board's commissioners on appeal by their decision of June 14, 1982. That decision stands in the place of any administrative decisions made formerly by the officers and insulates them from any liability, absent a fraudulent manipulation of the Board on their part. None is alleged.** They are insulated because the operative decision which required the plaintiff Company to pay assessments to the Board was that of the Board's commissioners on June 14, 1982.

Even though the Board's commissioners may have been wrong in that decision, a point about which I am not required here to venture an opinion, error on their part cannot, as a matter of law, found an action for damages. Mr. Stark argued that the commissioners' decision in this case was so patently wrong and unreasonable that it is not protected by the privative clause. **Even if that were so there is authority in this Province, based upon public policy and common sense, which provides that absolute malice, a person discharging a judicial or quasi-judicial office cannot be made liable in damages for an erroneous decision.** Were it otherwise it would be difficult indeed for society to persuade any of its members to assume the already onerous role of a judge. See ***Welbridge Holdings Ltd. v. Metropolitan Corporation of Greater Winnipeg*** (1970), 22 D.L.R. (3d) 470 per Laskin, J. (as he then was) at 476; ***McGillivray v. Kimber,*** [1915] 52 S.C.R. 146 and, **Stark** ***v. Auerbach,*** [19791 3 W.W.R. 563. In the latter case Legg, J. said at p. 565:--

> "Authorities of long standing have held that the Workers' Compensation Board exercises a judicial function when it determines a right of a claimant to compensation:"

Later at p. 567 he said:--

> "I respectfully agree with the reasoning of Munroe, J. in ***Perry v. Heatherington,*** *supra,* that public policy and convenience require that absolute immunity be extended to members of a judicial or quasi-judicial tribunal from action for any statement appearing in a decision made pursuant to a statutory duty imposed on the tribunal."

That was a case involving an alleged libel contained within the reasons for judgment of a board of review under the ***Workers' Compensation Act.*** Although its facts are quite different from this case I am persuaded that there is no difference in principle in granting that immunity to the Board as it was done there and in granting immunity to it or its members against the claim for damages advanced in this case.

The claim for damages against the officers of the Board, the commissioners and the Board itself will therefore be struck out.

[emphasis added]

[291 I refer as well to the decision of Mr. Justice Coultas in ***Polson v. Workers' Compensation Board*** (19 May 1988), Vancouver C881656 (B.C.S.C.), which relied on the same authorities as in ***Ridgecrest*** and reached the same conclusion. There the judge said that the issue that he must determine was whether the Board was exercising a judicial or a quasi-judicial function in its determination of Mr. Polson's right to compensation and in its dealings with him as described in the Statement of Claim. Justice Coultas held that it was and struck out the claim as disclosing no reasonable cause of action. I think that decision is applicable here.

[30] The plaintiff says that he is complaining about the investigative, administrative, regulatory and adjudicative functions. He says in his argument that there is a categorical difference between judicial review and a cause of action, in that judicial review, he argues, focuses on the result, not the reasoning. Judicial review, he says, does not take into account the events leading up to the decision and judicial review does not provide for compensation. He refers to the right to be treated fairly and that there is a duty to act fairly.

[31] The fact that the allegations concern different aspects of the adjudicative process do not, in my view, make the defendant's overall function less a quasi-judicial process particularly as there were a series of internal appeals available to the plaintiff in this situation.

[32] The plaintiff says there is a common law duty of care. The allegation in the pleadings is that the Board did not act in the manner prescribed by the statute.

[33] The plaintiff, as I have mentioned, referred to a number of authorities including and primarily ***Dorman Timber****, supra,* ***Lewis,*** *supra*, **Ryan**, *supra,* and ***R.A.R.B.****, supra.* I do not find that these cases establish that there is a duty of care as the plaintiff contends in these circumstances. First, they are factually very different. ***Lewis*** was a case of a rock falling and killing a driver and the court found that the duty of care established in ***Anns v. Merton London Borough Council,*** [1978] A.C. 728 (H.L.) was applicable once the Ministry undertook maintenance work of the highway. ***Dorman****, supra,* applied ***Anns****, supra,* and, in that respect, let me refer to ¶36 of ***Dorman****:*

> The second is the general common law duty of care imposed when the test set out by Lord Wilberforce in his speech in ***Anns v. Merton L.B.C.,*** [1978] A.C. 728 (H.L.), is met. Lord Wilberforce said (at pp. 751−752, quoted in ***Kripps****, supra* at para. 26):
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> > First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise . . .

[34] The court held in ***Dorman****, supra,* that the district forest manager had a duty to be mindful of the plaintiff's interest which he failed to do by advising that the plaintiff's rights under a timber sale were suspended, when they were not, causing the plaintiff loss. ***Ryan*** was a case where the city of Victoria was responsible for traffic regulation and failed to warn of an obstacle. ***R.A.R.B. v. British Columbia*** concerned a claim for wrongful placement for the children in the care of the Superintendent of Child Welfare.

[35] Obviously, the circumstances were quite different in those cases. To the extent that it could be said that there was sufficient proximity for there to be a *prima facie* duty of care in this case, which I need not decide, I think that there are sound policy reasons against that duty. Those

are that the interaction of the plaintiff and the defendant, which the plaintiff refers to, is in the context of a quasi-judicial function performed by the Board, one in which there is a detailed statutory process with internal appeals that remain subject to judicial review.

[36] I agree with the defendant's submission in that when the Board is, as here, determining the statutory right of the worker to benefits that a private law duty of care is inconsistent with the Board's quasi-judicial function. The recent decision of the Supreme Court of Canada in ***Cooper v. Hobart,*** [2001] 3 S.C.R. 537, 2001 SCC 79 at ¶52 is consistent with that conclusion.

[37] The allegations that I have summarized above appear to be allegations that various members of the Board made an erroneous decision. There is no factually pleaded basis for any allegation of malice in the Board's exercise of its quasi-judicial functions.

[38] The claim on this basis does not disclose a cause of action and must be struck.

[39] The plaintiff's Amended Statement of Claim also contains unparticularized pleadings of abuse of public office and breach of fiduciary duty.

[40] As to the former cause of action, that is the allegation of abuse of public office, it was recently considered by the Court of Appeal in ***Powder Mountain Resorts Ltd. v. British Columbia*** (2001), 94 B.C.L.R. (3d) 14, 2001 ECCA 619 (at ¶7−8):

> Absent some ruling to the contrary by Supreme Court of Canada, it may, I think, now be accepted that the tort of abuse of public office will be made out in Canada where a public official is shown either to have exercised power for the specific purpose of injuring the plaintiff (i.e., to have acted in "bad faith in the sense of the exercise of public power for an improper or ulterior motive") or to have acted "unlawfully with a mind of reckless indifference to the illegality of his act" and to the probability of injury to the plaintiff. . . .
>
> Because abuse of public office remains an intentional tort requiring proof of bad faith, it will in the minds of most observers carry the 'stench of dishonesty'. This court has suggested that where bad faith on the part of a public official is alleged, clear proof commensurate with the seriousness of the wrong should be provided. . . .

[41] There is no material pleading of an allegation of malice or that the defendant's action were deliberately calculated to injure the plaintiff. That is hardly surprising because at its heart, this action is really a collateral attack on the Board's decision on the merits, something I have said it also cannot do. The allegation of abuse of public office, therefore, must fail.

[42] The final claim of breach of fiduciary duty is one that appears in passing only as it does not directly appear in the Statement of Claim but appears in a document purportedly setting this action for trial. The Board has a duty to act judicially. That matter is reviewable under the ***Judicial Review Procedure Act***. An allegation of a fiduciary duty is inconsistent with this quasi-judicial decision making process. Therefore, for the reasons I have expressed, the plaintiff's claim is dismissed. Is the defendant seeking costs?

(SUBMISSIONS RE COSTS)

[43] **THE COURT:** I think this is a very tragic case, obviously. I think in the circumstances, I am going to exercise my discretion not to order costs. I do that on the basis of representations of Mr. Sofiak's mental health and emotional well-being and, on that basis, I decline to make an order of costs.

[44] **MR. NIELSEN:** My Lord, we request an order dispensing with approval as to form and I acknowledge there are no costs.

[45] **THE COURT:** I would like the order to reflect what my judgment is and I think you should send it to Mr. Blanchette. He can look at it. Mr. Blanchette, if the order does not reflect what I have said here, you can get in touch with the registry. The defendant can lodge it for entry ten days after you forward it to Mr. Blanchette. If he has any comments, he can notify the registry that the order is inaccurate.

"Mr. Justice Sigurdson"