WORKERS' COMPENSATION REPORTER

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WorkSafeBC

(the Workers' Compensation Board)

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WORKSAFE BC

WORKING TO MAKE A DIFFERENCE

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The mandate of WorkSafeBC, in concert with workers and employers, is to:

- *Promote the prevention of workplace injury, illness, and disease*
- *Rehabilitate those who are injured and provide timely return to work*
- *Provide fair compensation to replace workers' loss of wages while recovering from injuries*
- *Ensure sound financial management for a viable workers' compensation system*

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 John Panusa at 604 233-4043.

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

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Resolutions of the Board of Directors

Decisions of the Review Division

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Publishing Criteria for Board of Director Decisions

Decisions of WorkSafeBC'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 Consequential, housekeeping and other minor changes will not be published in the *Workers' Compensation Reporter*.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 WorkSafeBC.

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 WorkSafeBC 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: 2005/04/19-01
Date: May 17, 2005
Subject: Amendments to the *Board of Directors' Manual*

WHEREAS:

Pursuant to section 81 of the *Workers Compensation Act* (the "Act"), RSBC 1996, Chapter 492 and amendments thereto, the lieutenant governor in council has appointed a Board of Directors (the "BOD") for the Workers' Compensation Board of British Columbia (the "WCB");

AND WHEREAS:

Pursuant to section 82(2)(g)(ii) of the Act, the BOD is responsible for enacting bylaws and passing resolutions for the conduct of the business and the functions of the BOD including enacting bylaws respecting the manner in which the policies of the BOD are to be published;

AND WHEREAS:

Effective September 17, 2003, the BOD approved a *Board of Directors' Manual* (the "Manual") for the conduct of the business and functions of the BOD (Resolution 2003/09/17-03);

AND WHEREAS:

In June 2004, the BOD approved changes to the Manual to reflect new governance practices, changes to reporting relationships, new policies and certain other developments that occurred since September 17, 2003 (Resolution 2004/07/20-01);

AND WHEREAS:

The BOD's Priorities and Governance Committee has recommended further revisions to the Manual and has presented such recommendations to the BOD for approval;

THE BOARD OF DIRECTORS RESOLVES THAT:

1. The *Board of Directors' Manual* is revised to consist of the following sections:

SECTION I — WCB Mandate

Introduction to the Workers' Compensation Board	TAB 1
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2. The additions and revisions to the Manual as set out in Appendix "A" attached (additions in bold, deletions struck through) are approved.

3. Tabs 1–33 of the Manual will be published on the WCB's web site.

DATED at Richmond, British Columbia, May 17, 2005.

Appendix A

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Section VI Reference

TERMS OF REFERENCE FOR THE BOARD OF DIRECTORS

I. INTRODUCTION

A. Created by statute, the WCB's purposes are determined by the people of British Columbia acting through the Provincial Legislative Assembly. These purposes are unusually broad and embrace the following areas

i) administrative;

ii) adjudicative/appellate;

iii) policy and regulation making;

iv) provision of direct services; and

v) enforcement.

B. On January 2, 2003, the *Workers Compensation Act* was amended to provide for a new governing body for the WCB. This body, the "Board of Directors", was made responsible for setting and superintending the policies and direction of the WCB and planning for its future.

II. PURPOSE

A. The powers and duties of the Board of Directors (the "BOD)" are set out in Section 82 of the *Workers Compensation Act.*

B. The Board of Directors (the "BOD") has been entrusted with stewardship of the WCB. The BOD has the responsibility to oversee the conduct of the WCB's business and to supervise management, which is responsible for the day-to-day operation of the Corporation. The BOD has overall responsibility for ensuring that the organization fulfills the purposes for which it was created. In doing so, it accepts, subject to the statutory enactments of the Legislative Assembly, complete and final responsibility for the policies, direction and future of the provincial workers' compensation system.

C. The BOD must appropriately balance the resources and time it allocates to its roles, as specified in the legislation, in the three major areas –

administrative, adjudicative/appellate and policy and regulation making - for which it has overall responsibility. In addition, the BOD must maintain a close working relationship with the Board Chair of the Workers' Compensation Appeal Tribunal (the "WCAT") which is external to and independent of the WCB.

D. These terms of reference are prepared to assist the BOD and management in clarifying responsibilities and ensuring effective communication between the BOD and management.

III. COMPOSITION

A. The BOD of the WCB is appointed by the Minister of Skills Development and Labour (the "Minister") and consists of:

i) 7 voting directors appointed by the Lieutenant Governor in Council as follows:

a) one director, representative of workers;

b) one director, representative of employers;

c) 2 directors, representative of the public interest;

d) one additional director, representative of the public interest, who is Board Chair;

e) one director who at the time of appointment is a professional providing health care or rehabilitation services to persons with disabilities; and

f) one director who at the time of appointment is an actuary.

ii) The President and Chief Executive Officer (the "CEO") is a non-voting director.

TERMS OF REFERENCE FOR THE BOARD OF DIRECTORS

B. The interests of workers - the beneficiaries of the compensation, rehabilitation and prevention principles fundamental to the workers' compensation system, and the interests of employers - who fund the system, are recognized through the composition of the BOD. It is appropriate that both workers' and employers' views and interests are represented.

C. The *Workers Compensation Act* reflects important social policies of interest to society as a whole. As such, the public interest is also recognized through the composition of the BOD. In addition, many of the issues that face the BOD require knowledge and understanding of the needs of persons with disabilities as well as expertise in the investment of funds and an understanding of actuarial principles.

D. To enable the BOD to function effectively, individual directors must see their primary responsibility as acting in the best interests of the organization and all its stakeholders. Directors are selected because of their particular knowledge, experience and background and are expected to utilize these perspectives when undertaking their responsibilities. However, this does not diminish their primary responsibility as directors to act with a view to the best interests and objectives of the workers' compensation system as a whole.

IV. BOARD OF DIRECTORS' ORGANIZATION

A. The BOD operates by delegating to management certain of its authorities, including spending authorizations, and by reserving certain powers to itself. The current spending authorizations are outlined in Tab 28 of the Board of Directors' Manual.

B. Certain of the BOD's responsibilities may be delegated to committees. The responsibilities of those committees will be as set forth in their terms of reference, as amended from time to time.

C. The BOD retains the responsibility for managing its own affairs including the responsibility to:

i) annually review the skills and experience represented on the BOD in light of the WCB's strategic direction, for the purpose of

recommending the criteria and potential candidates who meet the criteria to the Minister when appointing directors;

ii) make recommendations to the Minister regarding the criteria the Minister should consider in making appointments to the BOD;

iii) on the recommendation of the Board Chair, appoint, determine the composition of and set the terms of reference for, BOD committees;

iv) implement an appropriate process for assessing the effectiveness of the BOD, the Board Chair, committees and directors in fulfilling their responsibilities;

v) assess the adequacy and form of director compensation and make recommendations to the Minister;

vi) assume responsibility for the WCB's governance practices as outlined in the Board of Directors' Manual and ensure they meet the needs of the Minister, the WCB, and the public;

vii) approve the Board of Directors' Manual; and

viii) appoint and monitor the performance of the Director, Governance.

V. DUTIES IN RELATION TO WCB ADMINISTRATION

A. The CEO and WCB Management

The BOD has the responsibility to:

i) appoint the CEO;

ii) approve the terms of reference for the CEO;

iii) monitor and annually review the CEO's performance and provide advice and counsel in the execution of the CEO's duties;

iv) review the appointment for all senior executive officers;

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v) review and approve the compensation policy and parameters for all senior executive officers;

vi) ensure that adequate provision has been made for management succession; and

vii) approve certain matters relating to all employees including:

a) the WCB's broad employee compensation strategy and philosophy,

b) new employee benefit programs or material changes to existing programs,

c) material changes to employee pension plans; and

d) the collective agreement between the WCB and the Compensation Employees' Union.

B. Other Appointments

The BOD has the responsibility to:

i) appoint the Director, Governance;

ii) review the appointment of the Director, Research Secretariat;

iii) approve and monitor the terms of reference for the Vice President, Policy and Review Division, the Director, Governance and the Director, Research Secretariat.

C. Strategies, Plans and Mandate

The BOD has the responsibility to:

TERMS OF REFERENCE FOR THE BOARD OF DIRECTORS

i) monitor the WCB's progress in fulfilling its purpose under the legislation and alter its direction through management if necessary;

ii) participate with management in the development of, and ultimately approve, the WCB's strategic and service plans;

iii) approve annual business plans, operating and capital budgets that support the WCB's ability to meet its strategic plan;

iv) direct management to develop, implement and maintain a reporting system that accurately measures the WCB's performance against its strategic, business and service plans;

v) monitor the WCB's progress towards the approved strategic objectives and performance against business, operating and capital plans, and to alter its direction in light of changing circumstances; and

vi) review and approve significant changes to the plans.

D. Financial and Risk Issues

The BOD has the responsibility to:

i) take reasonable steps to ensure the implementation and integrity of the WCB's internal control and management information systems;

ii) ensure management identifies the principal financial and non-financial risks of the WCB and implements appropriate systems and programs to manage these risks;

iii) approve the Enterprise Risk Management Plan (the "ERMP") and the Business Continuity Plan (the "BCP");

iv) monitor operational and financial results;

v) approve annual and quarterly financial statements, and approve release thereof by management;

TERMS OF REFERENCE FOR THE BOARD OF DIRECTORS

vi) appoint external auditors and approve auditors' fees; and

vii) approve the following:

a) financial expenditure authority policy;

b) major programs and expenditures;

c) capital variances in excess of amounts set by policy from time to time;

d) property purchases and disposition in excess of amounts set by policy from time to time;

e) adequate funding of the accident fund; and

f) investment guidelines for the accident fund in accordance with the requirements imposed under the *Workers Compensation Act.*

E. Policies, Arrangements and Agreements

The BOD has the responsibility to:

i) approve:

a) interjurisdictional agreements under Sections 8.1 and 114(2) or otherwise with other workers' compensation and occupational health and safety/occupational environment authorities;

~~b)agreements with associations, groups of persons, organizations and large institutions under Section 21(6) for the provision of health care; and~~

~~c)~~**b)** establishment and maintenance of a WCB Superannuation Plan under Section 86(3).

ii) approve and monitor compliance with all policies and all significant procedures by which the WCB is operated.

VI. DUTIES IN RELATION TO POLICY AND REGULATION MAKING AND IN RELATION TO RESEARCH

A. Compensation and Rehabilitation

The BOD has the responsibility to determine all policy concerning compensation and rehabilitation matters including:

i) approval of all amendments to the Rehabilitation Services and Claims Manual;

ii) amendments to the Permanent Disability Evaluation Schedule; and

iii) approval of policies relating to:

a) funeral and other expenses under Section 17(2);

b) interest on retroactive spousal benefits under Section 19; and

c) interest on retroactive compensation under Section 258(6)

B. Assessments

The BOD has the responsibility to determine all policy concerning assessment matters including:

i) approval of all amendments to the Assessment Policy Manual;

ii) setting of assessment rates;

iii) creation and rearrangement of the classification structure;

iv) approval of changes to the Classification and Rate List;

v) adoption of experience rating system;

TERMS OF REFERENCE FOR THE BOARD OF DIRECTORS

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

vii) approval of policies relating to interest under Section 96(7) on refund of employer assessments and penalties on appeal.

C. Occupational Health and Safety/Prevention

The BOD has the responsibility to determine all policy concerning occupational health and safety/prevention matters including:

i) approval of all amendments to the policy statements in the Prevention Manual;

ii) making of exemption policies for the application of Section 106 and orders exempting employers or workers from the application of Part 3 of the Act; and

iii) approval of policies relating to interest under Section 96(7) and Section 196(6) on refund of employer administrative penalties on appeal.

D. Regulations

The BOD has the responsibility to exercise the WCB's authority to make regulations under the *Workers Compensation Act*, including regulations under the following sections, if the matter is required to be dealt with by regulation:

Section 1	recognizing an occupational disease for general application
Section 4(1), (2) (and S. 15 of Fishing Regs.)	for commercial fishing

TERMS OF REFERENCE FOR THE BOARD OF DIRECTORS

Section 6(4.1)	adding to or deleting occupational diseases, industries and processes from Schedule B
Section 7(3.1)	amending Schedule D in respect of ranges of hearing loss, percentages of disability and methods or frequencies to be used to measure hearing loss
Section 21(1)	for furnishing health care to injured workers and for payment of it
Section 24(1)	for the application of Section 24 (reconsidering "old" claims for compensation to determine whether the pension fairly reflects the worker's loss of earnings)
Section 38(1)	for the timing of filing of payroll information
Section 38(2)	for penalties imposed for failure to provide payroll information
Section 40(2)	for penalties imposed for failure to pay assessments
Section 47(1)	for penalties imposed for failure to pay assessments on time
Section 53(3)	for the form of report of injury or occupational disease by the worker to the employer
Section 54(4)	for the form of employer's report of injury
Section 54(6)	defining and prescribing a category of minor injuries not required to be reported and the time at which the obligation to report commences
Section 55(1)	for the form of the application for compensation
Section 56(1)	for the form of the physician's report of injury

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Section 75(1)	for the due administration and carrying out of the Act and prescribing of the form and use of payrolls, records, reports, certificates, declarations and documents that may be necessary
Section 75(3)	for the fine for failure to comply with a regulation or order made under Part 1
Section 158(1) and (2)	in relation to hazardous substances and other substances that are potentially harmful to workers
Section 161(1)	requiring employers to establish medical monitoring programs where advisable given the nature or conditions of a work activity
Section 162(1)	requiring employers to ensure workers performing work are medically certified as to their physical fitness for a specific type of work where advisable given the physical requirements of that work
Section 225(1) and (2)	in relation to occupational health and safety and occupational environment

E. Amendment of Statutes and Lieutenant Governor in Council Regulations

The BOD has the responsibility to make recommendations to the Minister with respect to the amendment of the *Workers Compensation Act* and regulations made by the Lieutenant Governor in Council under that Act.

F. Inquiries into Occupational Health and Safety Matters

The BOD has the responsibility to:

i) inquire into and report to the Minister on any matter referred to the WCB by the Minister within the time specified by the Minister.

ii) ensure things are done by the WCB that the Minister or the Lieutenant Governor in Council directs be done.

G. Research

The BOD has the responsibility to approve all expenditures from the annual research allocation.

VII. DUTIES IN RELATION TO THE APPELLATE SYSTEMS

A. Introduction to the Workers' Compensation Appeal Tribunal (the "WCAT")

The WCAT is independent of and external to the WCB. However, there are certain requirements that the BOD is responsible for in relation to the external appeal process.

B. Section 245 – Board of Directors' Records and Policies

Upon notice from WCAT, the BOD has the responsibility to provide the appeal tribunal with copies of all current policies of the BOD respecting the matter under appeal as soon as practicable.

C. Section 251 – Unlawful Policy Referrals

The BOD has the responsibility to:

i) within 90 days of notice from the WCAT Chair, review unlawful policy referrals and determine whether the appeal tribunal may refuse to apply the policy;

ii) provide the following with an opportunity to make written submissions when reviewing unlawful policy referrals:

a) the parties to the appeal in question; and

b) the parties to any appeals that were pending before the appeal tribunal on the date the WCAT Chair sent notice to the BOD and were suspended by the WCAT Chair.

iii) refer the matter back to the appeal tribunal (WCB's decision is binding).

TERMS OF REFERENCE FOR THE BOARD OF DIRECTORS

Timeline for Section 251 Process		
Day #	**# of Days**	**Description**
1-2	2	Board Chair, BOD receives notice from Chair, WCAT. Legal Services and Policy & Research Division also receives a copy of the notice from WCAT.
3-4	2	Policy & Research Division ensures that a letter is sent to "parties to the appeal" inviting submissions on WCAT referral and giving 2 weeks deadline for submissions.
5-18	14	2 week period when submissions come in.
19	1	Collate all submissions for sending out to all parties to the appeal. Policy & Research Division ensures that letter is sent to all parties asking for rebuttal, giving 2 weeks deadline for submissions.
20-33	14	2 week period when rebuttals of submissions come in.
5-33	29	Policy & Research Division, through its Legal Advisor, researches and analyzes policy; and researches legal issue and develops legal analysis and opinion on lawfulness of policy. Research and analysis reviewed with Legal Services. **The BOD may retain independent counsel to provide third party advice on Section 251 referrals.**
34-51	18	Policy & Research Division reviews results of submissions received and develops BOD submission with recommendation(s) and rationale. Impact of views expressed in submissions on research and analysis evaluated during this process and appropriately reflected.
52-54	3	Board Chair's Office reviews submission and submission is sent to BOD by Board Chair's Office.
55-68	14	BOD members review submission.
69-75	7	BOD meets and makes decision. (Allow room for scheduling of BOD meeting (leave 5 days minimum for scheduling of BOD meeting)
76-85	10	Policy & Research Division drafts BOD decision letter (with reasons) for Board Chair's signature.
86	1	Letter sent to Board Chair, WCAT.

TERMS OF REFERENCE FOR THE BOARD OF DIRECTORS

Timeline for Section 251 Process		
Day #	**# of Days**	**Description**
Notes: • There is no control over scheduling of the BOD meeting. • Assumes that the BOD meeting is not a fixed date. • Assumes that decision will be made in one BOD meeting. Does not consider that complex issues may require two meetings. • Assumes that standard letters (e.g., to parties to appeal) and forms (e.g., from the WCAT identifying names and addresses of parties to appeal) are already established.		

VIII. GOVERNMENT AND STAKEHOLDER COMMUNICATIONS

The BOD must pay particular attention to the fact that it operates within a highly public environment. The actions of the WCB have a significant public impact and there is a need to ensure communications with the Minister and the public is effective and appropriate.

The BOD has the responsibility to:

A. ensure the WCB has in place a plan/policy to enable management and the BOD to communicate effectively with the Minister, and consult with stakeholders and the public generally;

B. ensure the financial performance of the WCB is adequately and promptly reported to the Minister and the public;

C. ensure financial results are reported fairly and in accordance with governing laws and generally accepted accounting principles;

D. ensure timely reporting of any other developments that have a significant and material effect on the WCB; and

E. report annually to the Minister on the BOD's stewardship for the preceding year (Annual Report) and the performance measures and results for the preceding three years (Service Plan).

TERMS OF REFERENCE FOR THE BOARD OF DIRECTORS

IX. GENERAL LEGAL OBLIGATIONS OF THE BOARD OF DIRECTORS

A. Where the BOD considers it appropriate, specific responsibilities of the directors may be delegated to the CEO or an officer of the WCB, subject to any terms and conditions set out in the delegation.

B. In accordance with section 84 of the *Workers Compensation Act*, a director, when exercising the powers and performing the functions and duties as a member of the BOD, must:

i) act honestly and in good faith;

ii) act with a view to the best interests and objectives of the workers' compensation system;

iii) exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances; and

iv) act in a financially responsible and accountable manner.

C. The directors occupy a position of trust. The highest fiduciary standards will apply to their conduct.

CODE OF CONDUCT AND CONFLICT OF INTEREST GUIDELINES

1. INTRODUCTION

The fundamental relationship between each director and the Workers' Compensation Board (the "WCB") must be one of trust; essential to trust is a commitment to honesty and integrity. Ethical conduct within this relationship imposes certain obligations.

2. COMPLIANCE WITH THE LAW

a) Directors must act at all times in full compliance with both the letter and the spirit of all applicable laws.

b) In his or her relationship with the WCB, no director shall commit or condone an unethical or illegal act or instruct another director, employee, or supplier to do so.

c) Directors are expected to be sufficiently familiar with any legislation that applies to their work to recognize potential liabilities and to know when to seek legal advice. If in doubt, directors are expected to ask for clarification.

d) Falsifying the record of transactions is illegal.

e) The WCB is continually under public scrutiny. Therefore, directors must not only comply fully with the law, but must also avoid any situation which could be perceived as improper or indicate a casual attitude towards compliance.

3. CONFLICTS OF INTEREST

a) Definitions:

i) A "Real Conflict of Interest" occurs when a director has knowledge of a private interest that is sufficient to influence the exercise of his or her duties and responsibilities as a director.

ii) A "Potential Conflict of Interest" occurs when there exists a private interest that could influence the exercise of a director's duty or responsibility, provided that he or she has not yet exercised that duty or responsibility.

CODE OF CONDUCT AND CONFLICT OF INTEREST GUIDELINES

iii) An "Apparent Conflict of Interest" exists when there is a reasonable apprehension that reasonably well-informed persons could properly have that a "Real Conflict of Interest" exists on the part of a director.

iv) A "Conflict of Interest" may be economic or otherwise. A "Conflict of Interest" may be either "direct", i.e., pertaining to the director personally or "indirect", i.e., pertaining to the director's family, dependants, associates or employer. **Under the *Workers Compensation Act,* the majority of Directors are nominated by and are representative of various stakeholder groups and professional associations. As such, it would not be considered an indirect conflict of interest if the director advocated on behalf of the constituency he/she represented, so long as the director acts with a view to the best interests and objectives of the workers' compensation system as a whole.**

b) Principles:

i) It is not sufficient for a director to act within the law. Directors have an obligation to act in a manner that will bear the closest public scrutiny.

ii) Therefore, on appointment to office, and thereafter, individual directors shall arrange their private affairs in a manner that will prevent Real, Potential or Apparent Conflicts of Interest from arising. In addition, on appointment to office, directors shall disclose in writing any Real, Potential or Apparent areas of Conflict of Interest, as well as at any later date when new interests or holdings that may give rise to such a conflict are acquired.

iii) If, despite these actions, a conflict arises between the private interests of a director and the duties and responsibilities of that director, the director is expected to disclose the conflict and resolve it in favour of his or her duties and responsibilities as a director.

c) Disclosure:

i) When a director considers that he or she has a Real, Potential or Apparent Conflict of Interest with respect to a particular issue, that director will ~~advise~~ **declare that conflict before** the Board Chair or, in the case of a matter before a committee, the committee Chair prior to any discussion or decision on the issue.

CODE OF CONDUCT AND CONFLICT OF INTEREST GUIDELINES

ii) **In the case of a conflict of interest,** ~~The~~ **the** director will absent himself or herself during the discussion and decision, and not attempt to influence the discussion or decision in any way. **Upon declaration of a potential conflict, the BOD Chair or Committee Chair will determine whether the director should be given the option of participating in the discussion of the issue.**

iii) A director who identifies a possible Real, Potential or Apparent Conflict of Interest on the part of another director will **bring his or her concern to the other director's attention or to the attention of the BOD or Committee Chairs and request that the conflict be declared. If the other director refuses to declare the conflict, the director should inform the BOD Chair** ~~advise the Board of Directors (the "BOD") or committee Chair and the director perceived as having the Conflict of Interest~~ immediately.

iv) In the case of a disagreement about the presence of a Real, Potential or Apparent Conflict of Interest, the Board Chair shall determine where such a Conflict of Interest exists. In the case of a Real, Potential or Apparent Conflict of Interest on the part of the Board Chair, a majority of the directors present at the meeting shall decide whether such a Conflict of Interest exists.

v) If it is decided that a Real, Potential or Apparent Conflict of Interest exists on the part of the Board Chair, the Board Chair shall designate an acting Chair in accordance with the BOD Operating Guidelines. The Board Chair shall absent himself or herself during the discussion and decision on the issue, and not attempt to influence the discussion or decision in any way. The acting Chair may vote on the issue if there is a tie.

d) Guidance regarding potential conflicts:

i) A director must not use his or her position with the WCB to pursue or advance the director's personal interests, the interests of a related person[1], director's business associate, corporation, union or partnership, or the interests of a person to whom the director owes an obligation. **Under the *Workers Compensation Act,* the majority of Directors are nominated**

[1] *related person* means a spouse, child, parent or sibling of a director.

CODE OF CONDUCT AND CONFLICT OF INTEREST GUIDELINES

by and are representative of various stakeholder groups and professional associations. As such, it would not be considered an indirect conflict of interest if the director advocated on behalf of the constituency he/she represented, so long as the director acts with a view to the best interests and objectives of the workers' compensation system as a whole.

ii) A director must not directly or indirectly benefit from a transaction with the WCB over which a director can influence decisions made by the WCB.

iii) A director must not take personal advantage of an opportunity available to the WCB unless the WCB has clearly and irrevocably decided against pursuing the opportunity, and the opportunity is also available to directors or the public.

iv) A director must not use his or her position with the WCB to solicit clients for the director's business, or a business operated by a close friend, family member, business associate, corporation, union or partnership of the director, or a person to whom the director owes an obligation.

v) There are several situations that could give rise to a conflict of interest. The most common are accepting gifts, favours or kickbacks from suppliers, close or family relationships with outside suppliers, passing confidential information to stakeholders and using privileged information inappropriately. The following are examples of the types of conduct and situations that can lead to a conflict of interest:

Samples of Possible Examples

- Influencing the WCB to lease equipment from a business owned by the director's spouse.
- Influencing the WCB to direct funds to an institution where the director works or is involved with.
- Participating in a decision by the WCB to hire or promote a relative of the director.

- Influencing or participating in a decision of the WCB that will directly result in the director's own financial gain. This would include any discussions involving a collective agreement that applies to the director.

4. OTHER ETHICAL CONSIDERATIONS

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

a) Interfering with the CEO's day-to-day administration of the WCB by contacting individual WCB officers and employees in order to influence their conduct, decisions, etc., with respect to individual matters or otherwise.

b) Interfering with the exercise of the quasi-judicial decision-making authority of the WCB or the Workers' Compensation Appeals Tribunal (the "WCAT"), by contacting an officer of the WCB or the Board Chair of the WCAT and/or his or her representatives to influence their decisions or personally making representations to an officer of the WCB or the WCAT.

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

d) Stepping out of a director's role to assist private entities or persons in their dealings with the WCB where this would result in preferential treatment to any person.

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

f) Disclosing any matter or thing that comes to a director's knowledge by reason of his or her appointment which the BOD has decided should remain confidential.

g) Disclosing information pertaining to the claim of an injured or disabled worker, except as authorized by law.

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

i) Engaging in personal conduct which exploits for personal gain a director's position of authority.

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

5. OUTSIDE BUSINESS INTERESTS

a) Directors must declare possible conflicting outside business activities at the time of appointment. Notwithstanding any outside activities, directors are required to act in the best interest of the WCB.

b) No director may hold a significant financial interest, either directly or through a relative or associate, or hold or accept a position as an officer or director in an organization that has a relationship with the WCB, where by virtue of his or her position in the WCB, the director could in any way benefit the other organization by influencing the purchasing, selling or other decisions of the WCB, unless that interest has been fully disclosed in writing to the WCB.

c) A "significant financial interest" in this context is any interest substantial enough that decisions of the WCB could result in a personal gain for the director.

d) These restrictions apply equally to interests in companies that may compete with the WCB in all of its areas of activity.

6. CONFIDENTIAL INFORMATION

a) Confidential information includes proprietary technical, business, financial, legal, or director information that the WCB treats as confidential.

b) Directors may not disclose such information to any outside person unless authorized.

CODE OF CONDUCT AND CONFLICT OF INTEREST GUIDELINES

c) Similarly, directors may never disclose or use confidential information gained by virtue of their association with the WCB for personal gain, or to benefit friends, relatives or associates.

d) Directors are advised to seek guidance from the Board Chair or the President and Chief Executive Officer (the "CEO") with respect to what is considered confidential.

7. INVESTMENT ACTIVITY

Directors may not, either directly or through relatives or associates, acquire or dispose of any interest, including publicly traded shares, in any company while having undisclosed confidential information obtained in the course of work at the WCB which could reasonably affect the value of such securities.

8. OUTSIDE EMPLOYMENT OR ASSOCIATION

A director who accepts a position with any organization that could lead to a conflict of interest or situation prejudicial to the WCB interests, shall discuss the implications of accepting such a position with the Board Chair recognizing that acceptance of such a position may require the director's resignation from the BOD.

9. ENTERTAINMENT, GIFTS AND FAVOURS

a) It is essential to efficient business practices that all those who associate with the WCB as suppliers, contractors or directors have access to the WCB on equal terms.

b) Directors and members of their immediate families should not accept entertainment, gifts or favours that create or appear to create a favoured position for doing business with the WCB. Any firm offering such inducement shall be asked to cease; a sustained business relationship will be conditional on compliance with this Code.

c) Similarly, directors may not offer or solicit gifts or favours in order to secure preferential treatment for themselves or the WCB.

d) Under no circumstances may directors offer or receive cash, preferred loans, securities, or secret commissions in exchange for preferential treatment. Any director experiencing or witnessing such an offer must report the incident to the Board Chair or Corporate Secretary immediately.

e) Gifts and entertainment may only be accepted or offered by a director in the normal exchanges common to established business relationships. An exchange of such gifts and entertainment shall create no sense of obligation.

f) Inappropriate gifts received by a director should be returned to the donor and may be accompanied by a copy of this Code.

g) Full and immediate disclosure to the Board Chair of borderline cases will always be taken as good-faith compliance with this Code.

10. USE OF THE WCB'S PROPERTY

a) A director requires the WCB's approval to use property owned by the WCB for personal purposes, or to purchase property from the WCB unless the purchase is made through the usual channels also available to the public.

b) Even then, a director must not purchase property owned by the WCB if that director is involved in an official capacity in some aspect of the sale or purchase.

c) Directors may be entrusted with the care, management and cost-effective use of the WCB property and should not make significant use of these resources for their own personal benefit or purposes. Clarification on this issue should be sought from the Board Chair and/or the Corporate Secretary.

d) Directors should ensure all WCB property that may be assigned to them is maintained in good condition and should be able to account for such property.

e) Directors may not dispose of the WCB property except in accordance with the guidelines established by the WCB.

11. POST APPOINTMENT CONDUCT

CODE OF CONDUCT AND CONFLICT OF INTEREST GUIDELINES

a) Directors shall not act, subsequent to their appointment as directors, in such a manner as to take improper advantage of their appointment. The highest standards will apply to their conduct in relation to the WCB.

b) A director shall not, for a period of six months for each year of appointment as a director to a maximum of eighteen months after ceasing to be a director, directly or through any other person or persons**,** communicate with a director or with an officer or employee of the WCB for the purpose of influencing, for personal gain, the BOD or the WCB on any matter that was part of the director's duties and responsibilities or is part of the duties and responsibilities of a director.

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

d) For the same period of time, the directors shall not conduct official business with a former director acting on behalf of himself or herself, or on behalf of another person or entity, except as an official of a recognized worker or employer organization, or as an official of the Government of the Province of British Columbia, or of Canada, or of a government body under them.

e) Except in extraordinary cases or in emergencies**,** and then only as an interim measure, a director shall not serve as an employee of, or enter into a contract for services with, the WCB for a period of 3 months following the end of his or her appointment as director. Nor shall a director seek employment with, or enter into negotiations for a contract for services with, the WCB during that period.

12. BREACH OF CODE

A director found to have breached his/her duty by violating the Code of Conduct will be liable to censure or a recommendation for dismissal to the Minister of Skills Development and Labour.

13. IMPLEMENTATION

CODE OF CONDUCT AND CONFLICT OF INTEREST GUIDELINES

a) The WCB is determined to behave, and to be perceived, as an ethical organization.

b) Each director must adhere to the standards described in this Code of Conduct, and to the standards set out in applicable policies, guidelines or legislation.

c) Integrity, honesty, and trust are essential elements of the WCB's success. Any director who knows or suspects a breach of this Code of Conduct and Conflict of Interest Guidelines has a responsibility to report it to the Board Chair or the Corporate Secretary.

d) Conforming to this Code will not absolve a director of the responsibility to take such additional action as might be necessary to prevent Real, Potential or Apparent Conflicts of Interest.

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

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

g) To demonstrate determination and commitment, the WCB requires each director to review and sign the Code ***annually***. The willingness and ability to sign the Code is a requirement of all directors.

14. WHERE TO SEEK CLARIFICATION

The Board Chair or the Corporate Secretary will provide guidance on any item in this Code of Conduct and Conflict of Interest Guidelines. The Board Chair may at his/her discretion or at the request of a director, seek the advice of outside Counsel.

I ACKNOWLEDGE that I have read and considered the Code of Conduct and Conflict of Interest Guidelines for Directors of the WCB of British Columbia and agree to conduct

CODE OF CONDUCT AND CONFLICT OF INTEREST GUIDELINES

myself in accordance with the Code of Conduct and Conflict of Interest Guidelines for Directors.

_____
Signature

_____ _____
Print Name Date

TERMS OF REFERENCE FOR THE VICE PRESIDENT, POLICY AND RESEARCH DIVISION

I. FUNCTION

A. The Vice President, Policy and Research Division ("Vice President, Policy and Research") is responsible for the leadership and management of the Workers Compensation Board's (the "WCB") Policy and Research Division ("PRD").

B. The PRD's mandate is to ensure that the Board of Directors (the "BOD") is provided with thoroughly researched "public interest" policy, research and regulatory alternatives and options which incorporate the views of the major constituents (workers, employers and the WCB administrative operating divisions).

C. The Vice President will, from time to time, lead projects which require direct involvement in undertaking analysis, developing alternatives and presenting options and recommendations in support of the BOD's policy and regulatory priorities.

D. The Vice President, Policy and Research is an ex officio member of the Priorities and Governance Committee~~ and the Research Priorities Committee of the BOD.~~**.**

II. RESPONSIBILITIES

The Vice President, Policy and Research shall:

A. lead and manage the PRD;

B. recommend annual plans and objectives to the BOD for approval;

C. direct and monitor the activities of the PRD in a manner that ensures that plans and objectives approved by the BOD are met;

D. recommend the PRD's operating and capital budgets for approval by the President and CEO and monitor achievement of established operating plans;

TERMS OF REFERENCE FOR THE VICE PRESIDENT, POLICY AND RESEARCH DIVISION

E. develop and recommend to the President and CEO the overall PRD organizational structure and staffing including hiring and evaluating the performance of Policy Directors;

F. function as a dynamic, contributory member of the BOD's Priorities and Governance Committee through responsible participation in the development and ranking of policy and regulatory initiatives;

G. ensure thoroughly analyzed and fully developed policy, research, regulatory and legislative amendment options are presented to the BOD;

H. undertake extensive consultation with WCB constituents, where appropriate, and establish consultative mechanisms appropriate to the issues being considered including the holding of public hearings;

J. develop and maintain a strong working relationship with key internal and external stakeholders including the Chair of the Workers' Compensation Appeal Tribunal (the "WCAT");

K. inform, consult with and take advice from the President and Chief Executive Officer ("CEO") on policy and regulatory matters ;

L. function as a dynamic and contributing member of the Senior Executive Committee (SEC) and work closely with SEC to ensure the impact of any proposed policy or regulatory changes on the corporate side of the WCB are clearly understood before options are presented;

M. utilize expertise and resources from other WCB's operating divisions as required;

N. analyze the impact of any proposed policy, regulatory or legislative change to the safety or health of workers, the compensation and rehabilitation of injured workers and the cost benefit to employers;

J. establish committees and subcommittees as required using secondments from other divisions and representatives from the worker and employer communities;

K. Work with policy and research counterparts in other jurisdictions to explore opportunities to share expertise and information and to harmonize

TERMS OF REFERENCE FOR THE VICE PRESIDENT, POLICY AND RESEARCH DIVISION

policies and policy processes and research priorities and initiatives where appropriate; and

L. manage sensitive situations and resolve them.

III. REPORTING RELATIONSHIPS

A. The Vice President, Policy and Research shall report to the President and CEO.

B. The Vice President, Policy and Research shall have direct access to the BOD Chair for the purpose of providing independent policy advice.

C. The Vice President, Policy and Research shall maintain a strong working relationship with the Chair of the Research Advisory Committee.

TERMS OF REFERENCE FOR THE DIRECTOR, RESEARCH ~~SECRETARIAT~~

I. FUNCTION

A. The role of the Director, Research ~~Secretariat~~ is to provide leadership and direction to the Research Secretariat through the fulfillment of the functions and responsibilities that have been created for it.

B. The purpose of the Research Secretariat is to bring the necessary focus and governance to research and the related expenditures and to ensure accountable, continued scientific study as well as dissemination and application of ways to reduce injury, disease, impairment or disability arising from employment.

C. The Research Secretariat reviews proposals, supports the work of the Research Advisory Committee (the "RAC"), and ensures strong links with the research community and other research organizations at the local, national and international levels.

D. The Director, Research ~~Secretariat~~ is a non-voting member of the RAC of the Research Secretariat.

~~**E.**The Director, Research Secretariat is a non-voting member of the Research Priorities Committee ("RPC") of the Board of Directors ("BOD").~~

II. RESPONSIBILITIES

The Director, Research ~~Secretariat~~ shall:

A. Function as a dynamic, contributory member of the RAC ~~and RPC~~ through responsible participation; development and ranking of research priorities, proposals, and initiatives; and development of annual plans.

B. Assist the BOD where the ~~RPC~~ **Priorities and Governance Committee** contemplates not following the recommendation of the RAC on issues/projects and facilitate the BOD's decision-making in this respect.

C. Ensure that research priorities reflect the needs of workplaces as identified by stakeholders through the RAC as well as through the Workers' Compensation Board (the "WCB") *Strategic Plan.*

TERMS OF REFERENCE FOR THE DIRECTOR, RESEARCH ~~SECRETARIAT~~

D. Liaise with the Senior Executive Committee and other WCB personnel to ensure that research priorities do not conflict with WCB strategic initiatives.

E. Actively explore opportunities to develop the research function and Secretariat to assist the WCB in meeting its strategic objectives.

F. Work with the Vice-President, Policy and Research and the Chair, RAC to develop the Terms of Reference for the RAC and an annual research plan, based on the recommendations of the RAC, for review and final approval by the BOD.

G. Ensure that research priorities and plans approved by the BOD are met and that administrative efficiencies are maximized.

H. Ensure that a comprehensive, fair and consistent process is used to evaluate research proposals and outcomes. Ensure that research outcomes are tracked and that a needs and benefits analysis is applied prior to continuation of funding.

I. Retain external researchers to conduct in-house projects in accordance with established research priorities and criteria.

J. Maintain strong links and foster a close relationship with the research community. Represents the WCB on the AWCBC Research Committee and other research committees, as required.

K. Liaise with parallel agencies in other provincial and federal jurisdictions. Collaborate with other jurisdictions/organizations to avoid duplication of effort and to pursue joint projects and/or funding.

L. Recommend the Research Secretariat's operating and capital budgets for approval by the Vice-President, Policy and Research and monitor achievement of established operating plans.

M. Include in quarterly reports to the BOD, updates on the plans, accomplishments, and work in progress of the Secretariat and the RAC.

N. In conjunction with Finance, Legal Services, and others as necessary, ensure the effective and responsible use of monies awarded to researchers through the Secretariat's annual research competitions.

TERMS OF REFERENCE FOR THE DIRECTOR, RESEARCH ~~SECRETARIAT~~

O. Arrange and support publication, dissemination and application of research findings.

P. Develop and oversee a central database of WCB research activities and findings.

III. RELATIONSHIPS

A. The Director, Research ~~Secretariat~~ shall be hired by and report to the Vice President, Policy and Research.

B. The Director, Research ~~Secretariat~~ shall maintain a strong working relationship with the Chair of the RAC.

COMMITTEE MEMBERSHIP ROSTER

I. AUDIT COMMITTEE

Chair: Peter Morse
~~Arlene Ward~~**Terry Brown**
Doug Enns
Director, Governance (ex officio)

II. HUMAN RESOURCES AND COMPENSATION COMMITTEE

Chair: ~~Cal Lee~~**Roslyn Kunin**
~~Stephen Hunt~~**Arlene Ward**
Doug Enns
President & CEO (ex officio)
Vice President, Human Resources and Facilities (ex officio)
Director, Governance (ex officio)

III. PRIORITIES AND GOVERNANCE COMMITTEE

Chair: ~~Roslyn Kunin~~**Cal Lee**
~~Terry Brown~~**Stephen Hunt**
Doug Enns
President & CEO (ex officio)
Vice President, Policy & Research Division (ex officio)
Director, Governance (ex officio)

~~IV.RESEARCH PRIORITIES COMMITTEE~~

~~Chair: Arlene Ward~~
~~Roslyn Kunin~~
~~Terry Brown~~
~~Stephen Hunt~~
~~Doug Enns~~
~~Chair, Research Advisory Committee~~
~~President & CEO~~
~~Director, Research (ex officio)~~
~~Vice President, Policy and Research Division (ex officio)~~
~~Director, Governance (ex officio)~~

TERMS OF REFERENCE FOR THE AUDIT COMMITTEE

I. PURPOSE

A. The primary audit function of the Audit Committee (the "Committee") is to assist the Board of Directors (the "BOD") in fulfilling its oversight responsibilities by reviewing:

i) the financial information that will be provided to the Province and the public;

ii) the systems of internal controls, that management and the BOD have approved;

iii) all audit processes;

iv) oversight of the investment fund and environmental management program; and

v) compliance with laws, regulations and policies that may apply to the Workers' Compensation Board (the "WCB").

B. Primary responsibility for the financial reporting, information systems, risk management and internal controls of the WCB is vested in management and is overseen by the BOD.

II. COMPOSITION AND OPERATIONS

A. The Committee shall be composed of not fewer than three directors and not more than five directors.

B. All Committee members shall be financially literate, at least one shall have accounting or related financial experience[1] and one must be the director, who at the time of appointment, is an actuary.

C. Committee members must be independent of management and must be

[1] The BOD has defined "financial literacy" as: the ability to read and understand a balance sheet, income statement and a cash flow statement in accordance with Canadian GAAP. Where there is a requirement for a director to have accounting or financial experience this means the director shall have the ability to analyze and understand a full set of financial statements, including the notes attached thereto in accordance with Canadian GAAP.

TERMS OF REFERENCE FOR THE AUDIT COMMITTEE

free from any interest and any business or other relationship that could, or could reasonably be perceived to, materially interfere with their ability to act with a view to the best interests of the workers' compensation system.

D. The WCB's auditors shall be advised of the names of the Committee members and will receive notice of and be invited to attend Committee meetings, and to be heard at those meetings on matters relating to the auditor's duties.

E. The Committee shall meet with the external auditors as it deems appropriate to consider any matter that the Committee or auditors determine should be brought to the attention of the BOD.

F. The Committee shall meet at least four times each year. Meetings will be held not later than:

i) March – for approval of audited financial statements and receipt of external auditor's report; review of capital expenditures;

ii) May - for review of first quarter financials and capital expenditures;

iii) ~~August~~ **July**- for review of first half financials and capital expenditures; and

iv) October - for review of third quarter financials and capital expenditures.

G. The Committee has access to the WCB's senior management and documents as required to fulfill its responsibilities and is provided with the resources necessary to carry out its responsibilities.

H. The Committee provides open avenues of communication among management, employees, external and internal auditors and the BOD.

I. The Committee shall have the power to conduct or authorize investigations into any matters within the Committee's scope of responsibilities. The Committee shall be empowered to retain independent counsel, accountants, or others to assist it in the conduct of any investigation.

TERMS OF REFERENCE FOR THE AUDIT COMMITTEE

III. DUTIES AND RESPONSIBILITIES

Subject to the powers and duties of the BOD, the Committee will perform the following duties:

A. Financial Statements and Other Financial Information

i) Review and, where appropriate, approve or recommend for approval to the BOD financial information that will be made available to the Government and the public. This includes:

a) review and recommend for approval the WCB's annual audited financial statements and report to the BOD before the statements are approved by the BOD;

b) review and recommend for approval WCB's quarterly financial statements;

c) review and recommend to the BOD for approval, the financial content of any quarterly reports;

d) review and recommend approval of content of Annual Report, including Management's Discussion and Analysis;

e) review and recommend approval of the service plan, annual business plan and operating and capital budgets;

ii) The Committee will review and discuss:

a) the appropriateness of accounting policies and financial reporting practices;

b) any significant proposed changes in financial reporting and accounting policies and practices to be adopted by the WCB;

c) any new or pending developments in accounting and reporting standards that may affect the WCB; and

TERMS OF REFERENCE FOR THE AUDIT COMMITTEE

d) management's key estimates and judgments that may be material to financial reporting.

B. Risk Management, Internal Control and Information Systems

The Committee will review and obtain reasonable assurance that the risk management, internal control and information systems are operating effectively to produce accurate, appropriate and timely management and financial information. This includes:

i) review the WCB's process for assessing significant risks or exposures and the steps management have taken to minimize such risks to the WCB;

ii) obtain reasonable assurance that the information systems are reliable and the systems of internal controls are properly designed and effectively implemented through discussions with and reports from management, the internal auditor and the external auditor;

iii) review management's steps to implement and maintain appropriate internal control procedures including a review of significant financial policies;

iv) review adequacy of security of information, information systems and recovery plans;

v) monitor compliance with statutory and regulatory obligations;

vi) review the appointment of the Chief Financial Officer taking into consideration, among other factors, previous employment by the Corporation's external auditor;

vii) review the adequacy of accounting and finance resources; and

viii) review the financial expenditure authority policy.

TERMS OF REFERENCE FOR THE AUDIT COMMITTEE

C. Internal Audit

The Committee will oversee the WCB's internal audit function and the internal audit relationship with the auditor and with management. This includes:

i) review the organization and independence of the internal auditor;

ii) review goals, resources and work plans;

iii) review any restrictions or problems;

iv) review recommendations and significant responses;

v) meet periodically and at least annually, with the Director, Internal Audit without management present; and

vi) review and approve proposed changes in the position of Director, Internal Audit.

D. External Audit

The external auditor is ultimately responsible to the Committee and the BOD. The Committee will review the planning and results of external audit activities and the ongoing relationship with the external auditor. This includes:

i) review and recommend to the BOD the engagement of the external auditor;

ii) review the annual external audit plan, including but not limited to the following:

a) engagement letter;

b) objectives and scope of the external audit work;

c) changes in independent accounting and auditing standards;

TERMS OF REFERENCE FOR THE AUDIT COMMITTEE

d) materiality limit;

e) areas of audit risk;

f) staffing;

g) timetable; and

h) proposed fee;

iii) meet with the external auditor to discuss the Corporation's quarterly and annual financial statements and the auditor's report including the appropriateness of accounting policies and underlying estimates;

iv) review and advise the BOD with respect to the planning, conduct and reporting of the annual audit, including but not limited to:

a) any difficulties encountered, or restriction imposed by management, during the annual audit;

b) any significant accounting or financial reporting issue;

c) the auditors' evaluation of the WCB's system of internal controls, procedures and documentation;

d) the post audit or management letter containing any material findings or recommendation of the external auditor, including management's response thereto and the subsequent follow-up to any identified internal control weaknesses; and

e) any other matters the external auditor brings to the Committee's attention;

v) assess the performance and consider the annual appointment of external auditors for recommendation to the BOD;

TERMS OF REFERENCE FOR THE AUDIT COMMITTEE

vi) review the auditor's report on any material subsidiaries;

vii) review and receive assurances on the independence of the external auditor;

viii) review the non-audit services to be provided by the external auditor's firm or its affiliates (including estimated fees), and consider the impact on the independence of the external audit; and

ix) meet periodically, and at least annually, with the external auditor without management present.

E. External Actuary

The external actuary is ultimately responsible to the Committee and the BOD as representatives of the shareholder. The Committee will review the planning and results of external actuary's activities and the ongoing relationship with the external actuary. This includes:

i) review and recommend the engagement of the external actuary;

ii) review and recommend to the BOD the engagement of the external actuary;

iii) review the nature of all services and related fees;

iv) meet with the external actuary to discuss the Corporation's quarterly and annual financial statements and the actuary's report including the appropriateness of actuarial policies and underlying estimates; and

v) review and receive assurances on the independence of the external actuary.

TERMS OF REFERENCE FOR THE AUDIT COMMITTEE

F. Investment Fund

The Committee shall:

i) review the investment fund policy and make appropriate recommendations;

ii) review nominations of independent members of the Investment Committee;

iii) semi-annually review the performance of the Investment Committee; and

iv) ensure that the Investment Committee and Minister of Finance are satisfied that the investment fund is being managed within established policy.

G. Environment

The Committee shall:

i) receive reports concerning the WCB's environmental management program at least once per year; and

ii) review ongoing environmental compliance issues as they occur.

H. Other

The Committee shall:

i) review with the external auditor, internal auditor and the actuary, the relationships existing between them to ensure an effective liaison in the coordination of audit effort regarding completeness of coverage, avoidance of redundant efforts, and the effective use of audit resources;

ii) review insurance coverage of significant business risks and uncertainties;

TERMS OF REFERENCE FOR THE AUDIT COMMITTEE

iii) review material litigation and its impact on financial reporting and meet at least annually with the Corporation's General Counsel to review outstanding legal issues relating to WCB;

iv) ensure the WCB has established procedures for the receipt and treatment of complaints received by the Corporation regarding accounting or audit matters and anonymous submissions by employees of concerns regarding questionable accounting or auditing matters;

v) retain the right to the opportunity to undertake exit interviews with senior financial staff;

vi) review policies and procedures for the review and approval of officers' expenses and perquisites;

vii) review the overall reasonableness of expenses incurred and claimed by the Board Chair ~~and the President and Chief Executive Officer (the "CEO");~~ ;

viii) review the process for BOD purchases, including the engagement of independent counsel;

ix) review single source and confidential purchase decisions approved by the BOD, including the contract for service and the outcome of the contract (confidential purchase decisions to be reviewed in-camera);

x) review the terms of reference for the Committee annually and make recommendations to the BOD as required;

xi) evaluate the performance of the Audit Committee annually;

xii) receive regular reports from the Vice-President, Finance regarding the Division's major activities and initiatives;

xiii) ratify all agreements over $6 million with associations, groups of persons, organizations and large institutions under Section

TERMS OF REFERENCE FOR THE AUDIT COMMITTEE

21(6) of the *Workers Compensation Act* for the provision of health care and report such approvals to the BOD at its next regular meeting; and

~~**xiii)**~~**xiv)** perform such other functions as assigned by law or the BOD, and may review other items of an internal control or risk management nature that may from time to time be brought before the Committee.

IV. ACCOUNTABILITY

A. The Committee shall report to the BOD on a regular basis all such action it has taken since the previous report. In addition, the Audit Committee shall report its findings and observations with respect to the WCB's audited financial statements and, if appropriate, recommend approval by the BOD.

B. The Audit Committee shall also report its findings relative to the adequacy of financial systems and controls and its observations from in-camera discussion with the external auditor and internal auditors and where appropriate, shall liaise with the Human Resources and Compensation Committee on the performance of senior officers as they relate to fiscal responsibility and management.

C. In the absence of express authority from the BOD, the Audit Committee does not have the responsibility or authority for altering the financial statements or the accounting procedures of the WCB.

V. COMMITTEE TIMETABLE

The timetable on the following pages outlines the Committee's schedule of activities.

TERMS OF REFERENCE FOR THE AUDIT COMMITTEE

Agenda Items	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
A. Financial Statements and Other Financial Information												
i) Review and recommend financial information including:												
a) annual audited financial statements			✓									
b) quarterly financial statements (including reports of significant monthly administrative budget variances)					✓		✓			✓		
c) financial content of quarterly reports					✓		✓			✓		
d) Annual Report			✓									
e) service plan, annual business plan and operating and capital budgets										✓		
ii) Review and discuss:												
a) appropriateness of accounting policies and financial reporting practices			✓									
b) significant proposed changes in financial reporting and accounting policies			✓									✓
c) new or pending developments in accounting and reporting standards			✓									✓

TERMS OF REFERENCE FOR THE AUDIT COMMITTEE

Agenda Items	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
d) management's key estimates			✓									✓
B. Risk Management, Internal Control & Information Systems												
i) Review process for assessing significant risk or exposures and steps taken to minimize such risks			✓									
ii) Obtain reasonable assurance that information systems are reliable and internal control systems are properly designed and effectively implemented			✓									
iii) Review management steps to implement and maintain appropriate internal control procedures			✓									
iv) Review adequacy of security of information, information systems and recovery plans	~~✓~~		✓									
v) Monitor compliance with statutory and regulatory obligations							✓					
vi) Review appointment of CFO	**as required**											
vii) Review adequacy of accounting and finance resources			✓									
viii) Review financial expenditure policy	✓											
ix) Review Enterprise Risk										✓		

TERMS OF REFERENCE FOR THE AUDIT COMMITTEE

Agenda Items	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
C. Internal Audit												
i) Review organization and independence of internal auditor	✓											
ii) Review goals, resources and work plans	✓				✓		✓			✓		
iii) Review restrictions or problems	✓				✓		✓			✓		
iv) Review recommendations and significant responses	✓				✓		✓			✓		
v) Meet with Director, Internal Audit without management present	✓				✓		✓			✓		
vi) Review and approve proposed changes in the position of Director, Internal Audit	**as required**											
D. External Audit												
i) Review and recommend engagement of external auditor					✓							
ii) Review annual external audit plan										~~✓~~		✓
iii) Meet with external auditor to discuss quarterly and annual financial statements and auditor's report			✓									
iv) Review and advise BOD on planning, conduct and reporting of annual audit										~~✓~~		✓

TERMS OF REFERENCE FOR THE AUDIT COMMITTEE

Agenda Items	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
v) Assess performance and consider annual appointment of external auditors for recommendation to BOD					✓							
vi) Review auditor's report on material subsidiaries			✓									
vii) Review and receive assurances on independence of external auditor										~~✓~~		✓
viii) Review non-audit services to be provided by external auditor or its affiliates and consider impact on independence of external audit										~~✓~~		✓
ix) Meet with external auditor without management present.			✓							~~✓~~		✓
E. External Actuary Review planning and results of external actuary's activities and ongoing relationship with external actuary including: i) Nomination or discharge of external actuary			✓		~~✓~~							
ii) Review and recommend engagement of the external actuary			✓		~~✓~~							
iii) Review nature of all services and related fees			✓		~~✓~~							

TERMS OF REFERENCE FOR THE AUDIT COMMITTEE

Agenda Items	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
iv) Meet with external actuary to discuss quarterly & annual financial statements and actuary's report	✓				~~✓~~		✓			~~✓~~		
v) Review and receive assurances on independence of external actuary	✓									~~✓~~		
F. Investment Fund												
i) Review investment fund policy and make recommendations	✓						✓					
ii) Review nominations of independent Investment Committee members	✓											
iii) Review Investment Committee performance	✓						✓					
iv) Ensure Investment Committee & Finance Minister are satisfied with fund management and policy	✓											
G. Environment												
i) Receive reports on environmental management program			✓									
ii) Review ongoing environmental compliance issues			✓									
H. Other												
i) Review relationships between external & internal auditors and actuary			✓									

TERMS OF REFERENCE FOR THE AUDIT COMMITTEE

Agenda Items	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
ii) Review insurance coverage of significant business risks and uncertainties			~~✓~~		✓							
iii) Review material litigation and its impact on financial reporting	✓		✓				✓			✓		✓
iv) Ensure there are procedures for receipt and treatment of complaints regarding accounting or audit matters and anonymous submissions by employees regarding questionable accounting or auditing matters							~~✓~~			✓		~~✓~~
v) Retain the right to the opportunity to undertake exit interviews with senior financial staff	**as required**											
vi) Review policies and procedures to review and approve officers' expenses and perquisites	✓											
vii) Review expenses claimed by Board Chair ~~and CEO~~	✓		✓		✓		✓			✓		✓
viii) Review process for BOD purchases, including the engagement of independent counsel												✓
ix) Review single source and confidential Purchase Decisions approved by BOD	As Required											

TERMS OF REFERENCE FOR THE AUDIT COMMITTEE

Agenda Items	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
x) Review and recommend terms of reference for the Committee	✓											
xi) Evaluate Audit Committee performance	✓											
xii) Review and discuss activity reports made by the Vice-President, Finance	✓		✓		✓		✓			✓		✓
xiii) Audit Chair to meet in-camera with key employees in relation to accounting or auditing matters to discuss whistle blowing procedure										✓		
xiv) Ratify health care contracts over $6 million	**As Required**											
~~xiv~~**xv**) Review other items of an internal control or risk management nature	As Required											
I. Bring Forward Items												
i) Real estate plan – update	✓						✓					
ii) Report of significant write-offs			~~✓~~		✓							✓
iii) Audit business intelligence (review employer compliance and reporting and remitting requirements)					✓							
iv) Claims Management Project Updates	**As Required**											

TERMS OF REFERENCE FOR THE HUMAN RESOURCES AND COMPENSATION COMMITTEE

I. PURPOSE

The purpose of the Human Resources and Compensation Committee (the "Committee") is to provide advice and recommendations to the Board of Directors (the "BOD") on significant issues related to human resources and employee compensation that will assist in ensuring that:

A. human resources management and employee compensation policies are consistent with the goals of the organization and the practices of other comparable Crown Agencies and meet applicable requirements set by Government;

B. human resources management and employee compensation policies meet the test of public scrutiny;

C. the BOD has the necessary information to make appropriate decisions with respect to human resources management and employee compensation issues; and

D. the proper analysis has been done before human resources management and compensation issues are forwarded to the BOD for approval.

II. DEFINITIONS

Where used herein, the following expressions have the respective meanings attributed to them unless modified by the context:

A. "Bargaining Unit Staff" includes, separately, those employees covered by the Collective Agreement between the BOD and the Compensation Employees' Union, and those physicians covered by the Administrative Policy between the Workers' Compensation Board (the "WCB") and the Salaried Physicians;

B. "Directly Reporting Employees" means the President and Chief Executive Officer ("CEO") and the Director, Governance.

C. "Executive Management" means all directly reporting employees, the Vice Presidents and the General Counsel and Secretary to the BOD;

TERMS OF REFERENCE FOR THE HUMAN RESOURCES AND COMPENSATION COMMITTEE

D. "Management" means directors, managers and professional employees of the WCB who are not Executive Management; and

E. "Exempt Support Staff", means employees who are not members of a bargaining unit but who are in union equivalent positions.

III. COMPOSITION AND ORGANIZATION

A. The Committee shall consist of at least three, and not more than five BOD Directors. The CEO will be an ex-officio member of the Committee.

B. The Committee shall meet not less than four times per year.

IV. DUTIES AND RESPONSIBILITIES

Subject to the powers and duties of the BOD, the BOD hereby assigns to the Committee the following powers and duties and responsibilities as they pertain to the WCB administrative organization led by the CEO.~~.~~

A. Duties and Responsibilities to lead and implement.

The Committee shall:

i) Design the process for the annual evaluation of the CEO and the Director, Governance.

ii) Ensure the above processes are approved by the BOD.

iii) Ensure the evaluation processes are implemented each year.

B. Duties and Responsibilities to Review and Make Recommendations to Board of Directors

The Committee shall review the following matters and provide recommendations to the BOD for approval from time to time:

TERMS OF REFERENCE FOR THE HUMAN RESOURCES AND COMPENSATION COMMITTEE

i) the salary structures, benefit programs and salary increase budgets for Executive Management, Management and Exempt support staff, and changes to them;

ii) the compensation policy and parameters for Executive Management, and changes to them;

iii) the terms of employment, including employment contracts, if any, of Directly Reporting Employees, which the Committee will jointly negotiate with the Board Chair and jointly submit to the BOD for approval;

iv) the criteria and the signing authority under which exception to policy may be made with respect to an individual employee's coverage under the terms of the Superannuation Plan or any other employee benefit plan;

v) policies with respect to payments to employees and to BOD ~~directors~~ **members** (e.g. business travel and expenses, relocation assistance, executive vehicles, severance policy);

vi) the mandate within which the WCB will negotiate an agreement with Bargaining Unit Staff;

vii) the settlement arising from negotiations with Bargaining Unit Staff, which the Committee will jointly review with the Board Chair and jointly submit to the BOD for approval;

TERMS OF REFERENCE FOR THE HUMAN RESOURCES AND COMPENSATION COMMITTEE

viii) a process by which performance agreements are to be made between the BOD and Directly Reporting Employees and by which performance evaluations are to take place, which the Committee will jointly develop with the Board Chair and jointly submit to the BOD for approval. This process will include the scheduling of meetings between the BOD and Directly Reporting Employees to review the previous year's performance plans and establish new performance agreements for the coming year.

C. Duties and Responsibilities to Review and Keep the Board of Directors Advised

The Committee shall review and provide advice to the BOD on the following matters:

i) the WCB's Annual Human Resources Business Plan, including activities, priorities, objectives, key action plans, milestones and measurements;

ii) the WCB's organization structure, including associated policies, and planned significant changes;

iii) the WCB's annual training and development plan for employees, including details of intended training and development and the results of the previous year;

iv) the CEO's succession plans for Executive Management, including specific development plans and career planning for potential successors to Executive Management positions;

v) all appointments to Executive Management before they are made;

vi) Standards of Conduct and Conflict of Interest Guidelines for Employees;

vii) Regular reports from the VP, Human Resources on significant Divisional activities and initiatives;

viii) Regular reports on progress during collective bargaining; and

TERMS OF REFERENCE FOR THE HUMAN RESOURCES AND COMPENSATION COMMITTEE

ix) Requirements of the *Public Sector Employers' Act* regarding compensation practices and the terms and conditions for the termination of management employees and any changes to those requirements and their impact on WCB's existing policies and practices.

V. ACCOUNTABILITY

A. A copy of the approved Minutes of each meeting of the Committee shall be included for information with the agenda items for the next meeting of the BOD, and the inclusion of these minutes will be deemed to be the Committee's advice to the BOD with respect to its activities.

B. Any of the Committee's activities that require action or approval on the part of the BOD will be separately included on the agenda of the next regular meeting of the BOD.

VI. COMMITTEE TIMETABLE

The major annual activities of the Committee are outlined in the schedule on the following page. This schedule will be updated annually in anticipation of the following year's activities.

TERMS OF REFERENCE FOR THE HUMAN RESOURCES AND COMPENSATION COMMITTEE

Agenda Items	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
A. Lead and Implement i) Design process to evaluate CEO and other Directly Reporting Employees			√									
ii) Ensure evaluation processes from item i) are approved by the BOD						√						
iii) Ensure evaluation processes from item i) are implemented annually										√		
B. Review and Make Recommendations i) Salary structures, benefit programs and salary increase budgets for Executive Management, Management and Exempt support staff, and changes to them			√			√						
ii) Compensation policy and parameters for Executive Management and changes to them			√			√						
iii) Terms of employment of Directly Reporting Employees												√
iv) Criteria and signing authority under which exception to policy may be made with respect to an employee's coverage under the Superannuation Plan or any other benefit plan												√
v) Policies with respect to payments to employees and directors						√						
vi) The mandate within which WCB will negotiate agreement with Bargaining Unit Staff	*as required*											
vii) The settlement arising from negotiations with Bargaining Unit Staff and jointly submit to the BOD for approval.	*as required*											

TERMS OF REFERENCE FOR THE HUMAN RESOURCES AND COMPENSATION COMMITTEE

Agenda Items	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
viii) The process by which performance agreements are to be made between the BOD and Directly Reporting Employees and by which performance evaluations and any bonus payments are to take place.												√
C. Review and Keep the BOD Advised												
i) HR Business Plan			√							√		
ii) Organization Structure			~~√~~			~~√~~				√		
iii) Annual training and development plan for employees			√			~~√~~						
iv) CEO's succession plans for executive management			√			~~√~~						
v) All appointments to Executive Management	*as required*											
vi) Code of Conduct and Conflict of Interest Guidelines for Employees										√		
vii) Report from VP on significant Divisional Activities and Initiatives			√			√				√		√
viii) Collective Bargaining Progress Reports	*as required*											
ix) Requirements of the *Public Sector Employers' Act* regarding compensation practices and terms and conditions for termination of management employees and any changes to those requirements and their impact on existing policies and practices.						√						

TERMS OF REFERENCE FOR THE PRIORITIES AND GOVERNANCE COMMITTEE

I. PURPOSE

A. The purpose of the Priorities and Governance Committee (the "Committee") is to provide a focus on governance that will enhance the organization's performance. The Committee's purpose is to develop and recommend the **research, policy and regulatory** priorities for the Board of Directors (the "BOD"). In developing the priorities, the Committee shall take into consideration the mandate of the BOD, the needs of the organization, the views of the stakeholders and the time available for BOD deliberation.

B. The Committee's purpose includes recommending operating guidelines and procedures for the BOD, assessing and making recommendations regarding the BOD's effectiveness, **making recommendations regarding the funding of research projects** and establishing a process for recommending the criteria for new directors to the Minister of Skills Development and Labour (the "Minister").

C. While stakeholder views in all these areas will be a significant factor in formulating Committee recommendations, the Committee will act in the best interests of the organization and all stakeholders in advising the BOD. In each case, the final decision will rest with the BOD.

II. COMPOSITION AND ORGANIZATION

The Committee shall consist of:

A. **At least** three directors, one of whom shall be the Board Chair. **The Chair of the disbanded Research Priorities Committee shall attend meetings when matters of research are discussed and shall be a member of the Committee during such discussions.**

B. The President and Chief Executive Officer (the "CEO") and the Vice President, Policy and Research Division will be ex-officio members of the Committee.

C. The Committee shall meet not less than four times per year.

TERMS OF REFERENCE FOR THE PRIORITIES AND GOVERNANCE COMMITTEE

III. DUTIES AND RESPONSIBILITIES

The Committee has the responsibility to:

A. Develop and recommend the priorities for the BOD on a quarterly basis. A plan and time frame for addressing the priorities should be presented to the BOD each quarter.

B. Review and provide advice on specific policy proposals as required.

C. **Develop and recommend research priorities for the BOD on an annual basis. This includes integrating the priorities of the WCB administrative organization, the Policy and Research Division and the WCB's stakeholders. A plan and timeframe for addressing the research funding cycle should be presented to the BOD each year.**

D. **Develop recommendations for the BOD on the funding of research projects and the allocation of research funds. The recommendations must consider the advice and recommendations of the Research Advisory Committee.**

~~**C.**~~**E.** Meet with major stakeholder groups on an as needed basis to receive their thoughts and ideas regarding the priorities the BOD might be addressing.

~~**D.**~~**F.** Draft, and annually review, for BOD approval, a BOD Manual. This Manual must outline the operating policies and procedures by which the BOD operates including terms of reference, agendas and BOD Operating Guidelines and processes.

~~**E.**~~**G.** Annually develop, and update a long-term plan for BOD composition that considers the current strengths, skills and experience of the Board of Directors, terms and the strategic direction of the WCB, for approval by the BOD.

~~**F.**~~**H.** Develop recommendations regarding the essential and desired experiences and skills for potential directors, taking into consideration the BOD's short-term needs and long-term succession plans.

TERMS OF REFERENCE FOR THE PRIORITIES AND GOVERNANCE COMMITTEE

~~G.~~**I.** In consultation with the Board Chair, recommend to the BOD for subsequent recommendation to the Minister, criteria and potential candidates for consideration when it is appointing directors.

~~H.~~**J.** Review the directors' compensation program and make recommendations to the BOD for subsequent recommendation to the Minister as required.

~~I.~~**K.** Ensure there is a system that enables a committee or director to engage separate independent counsel in appropriate circumstances, at the WCB's expense, and be responsible for the ongoing administration of such a system.

~~J.~~**L.** Recommend to the BOD, and implement on an annual basis, an appropriate evaluation process for the BOD as a whole, the Board Chair, committees and Board members individually.

~~K.~~**M.** Review, monitor and make recommendations regarding the orientation and ongoing development of directors.

~~L.~~**N.** Recommend to the BOD any reports on corporate governance that may be required or considered advisable.

~~M.~~**O.** At the request of the Board Chair or the BOD, undertake such other corporate governance initiatives as may be necessary or desirable to contribute to the success of the WCB.

IV. ACCOUNTABILITY

The Committee shall report to the BOD at its next regular meeting all such action it has taken since the previous report.

V. COMMITTEE TIMETABLE

The major annual activities of the Committee are outlined in the schedule on the following page.

TERMS OF REFERENCE FOR THE PRIORITIES AND GOVERNANCE COMMITTEE

Agenda Items	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
A. Develop and recommend priorities to the BOD		√		√			√		√			
B. Review and advise on specific policy proposals	*as required*											
C. Stakeholder meetings.	*as required*											
D. Review and recommend changes to BOD Manual as required, including committee terms of reference and the following:									√			
E. Review long term BOD composition									√			
F. Develop recommendations regarding essential and desired experiences and skills for potential directors									√			
G. Recommend criteria and potential candidates for consideration when appointing directors	*as required*											
H. Review & recommend directors' compensation program									√			
I. Ensure there is a system that enables a committee or director to engage separate independent counsel in appropriate circumstances, at the WCB's expense, and be responsible for the ongoing administration of such a system.									√			

TERMS OF REFERENCE FOR THE PRIORITIES AND GOVERNANCE COMMITTEE

Agenda Items	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
J. Recommend and implement evaluation process for BOD, Chair, committees and BOD members				√								
K. Review the orientation and ongoing development of BOD members				√								
L. Recommend any reports on corporate governance that may be required or considered advisable	*as required*											
M. At the request of the Board Chair or the BOD, undertake such other corporate governance initiatives as may be necessary or desirable	*as required*											
Research Priorities: **Recommended Priorities**									✓			
Recommended Projects for Funding							✓					

TERMS OF REFERENCE FOR THE RESEARCH PRIORITIES COMMITTEE

~~I. PURPOSE~~

~~A. The purpose of the Research Priorities Committee (the "Committee") is to provide a focus on governance that will enhance the Research Secretariat's performance. The mandate of the Research Secretariat is to establish and maintain a credible, effective and transparent research funding program. The Committee's purpose is to develop and recommend annual research priorities for the Board of Directors (BOD). In developing the priorities, the Committee shall take into consideration the mandate of the BOD and the Research Secretariat, the needs of the organization, the views of the stakeholders expressed through the Research Advisory Committee and the time available for BOD deliberation.~~

~~B. The Committee's purpose includes making recommendations to the BOD regarding the funding of research projects. In doing so, the Committee considers the advice and recommendations of the Research Advisory Committee.~~

~~C. While the views of the Research Advisory Committee will be a significant factor in formulating Committee recommendations, the Committee will act in the best interests of the organization and all stakeholders in advising the BOD. In each case, the final decision will rest with the BOD.~~

~~II. COMPOSITION AND TERM OF OFFICE~~

~~A. The Committee shall consist of at least three members of the BOD. The President and CEO and the Chair of the Research Advisory Committee will be members of the Committee. The Director of the Research Secretariat and the Vice President, Policy and Research will be ex-officio members of the Committee.~~

~~B. A member of the BOD shall be the Chair of the Committee. The Committee shall serve as a standing committee of the BOD.~~

~~C. Members of the Committee are eligible for re-appointment at the will of the BOD.~~

~~D. The Committee shall meet not less than twice per year.~~

TERMS OF REFERENCE FOR THE RESEARCH PRIORITIES COMMITTEE

~~III.DUTIES AND RESPONSIBILITIES~~

~~A.Develop and recommend research priorities for the BOD on an annual basis. This includes integrating the priorities of the WCB administrative organization, the Policy and Research Division and the WCB's stakeholders (through the Research Advisory Committee). A plan and time frame for addressing the Secretariat's funding cycle should be presented to the BOD each year.~~

~~B. Develop recommendations for the BOD on the funding of research projects and the allocation of research funds. The recommendations must consider the advice and recommendations of the Research Advisory Committee.~~

~~C. Develop and recommend an Annual Board Forward Agenda.~~

~~D.Develop, and review, terms of reference for the Director of the Research Secretariat and the Chair of the Research Advisory Committee as required for approval by the BOD.~~

~~IV.ACCOUNTABILITY~~

~~The Committee will report to the BOD at its next regular meeting all such action it has taken since the previous report.~~

TERMS OF REFERENCE FOR THE RESEARCH PRIORITIES COMMITTEE

~~V. COMMITTEE TIMETABLE~~

~~The major annual activities of the Committee are outlined in the schedule below.~~

~~V. RESEARCH PRIORITIES COMMITTEE~~

~~Agenda Items~~	~~Jan~~	~~Feb~~	~~Mar~~	~~Apr~~	~~May~~	~~June~~	~~July~~	~~Aug~~	~~Sept~~	~~Oct~~	~~Nov~~	~~Dec~~
~~Recommend priorities. III(A)~~										~~√~~		
~~Recommend projects for funding.~~							~~√~~					
~~Develop annual board agenda. III(D)~~												~~√~~
~~Review terms of reference for the Director of the Research Secretariat and the Chair of the RAC. III(E)~~												~~√~~

ORIENTATION AND ONGOING DEVELOPMENT OF DIRECTORS

I. PURPOSE

A. Orientation is intended to prepare new directors for their role at the WCB. Orientation is also extremely useful for all directors to ensure they are operating from the same page. Orientation is a strong team-building activity that will be conducted once a year, either before a regular Board of Directors (BOD) meeting or during the annual BOD retreat -- particularly after new directors have been recruited.

B. The Priorities and Governance Committee, the BOD Chair and the CEO share the responsibility to ensure that there is a new director orientation program and that directors receive continuing education/development as required.

C. New directors will be provided with an orientation and education program, which will include written information about the duties and obligations of directors, the business and operations of the Corporation, documents from recent BOD meetings, as well as opportunities for meetings and discussion with senior management and other directors.

D. The orientation program for each new director will be tailored to that director's needs and areas of interest. As well, there may be occasion for all directors to participate in special orientation sessions that are to educate and inform on issues of strategic importance to the Corporation.

E. In addition to orientation, Directors should be provided with continuing education and development opportunities so that individuals may maintain and enhance their

skills and abilities as directors, as well as to ensure their knowledge and understanding of the WCB's business remains current.

II. BOARD OF DIRECTORS' ORIENTATION

The following information is to be conveyed to new BOD members at their time of orientation. The focus of the orientation will be tailored to the specific needs of each Director. New Directors will be given the opportunity to meet with the Board Chair and the President and CEO to discuss their specific needs prior to the orientation.

Information	Issues	Presentation Options
	About the WCB	
Program	Offer new BOD members a feel for the work of the WCB – the program philosophy – what it does, whom it serves, what value it adds- to get them emotionally and intellectually connected and motivated.	• Tour of facilities • Introduction to SEC • Observation of program activities (e.g. Call Centre) • Verbal Presentations • Written Materials
Finances	Help new BOD members become informed about funding, spending and the overall state of the WCB's financial health, including their role in making decisions that impact the Accident Fund and the funding status. How to read a financial statement. Overview of Investment Function.	• Presentation by CFO and Treasurer • Background materials (financial statements and most recent audits, budget, estimates, investment policy, FEAP)

ORIENTATION AND ONGOING DEVELOPMENT OF DIRECTORS

Information	Issues	Presentation Options
History	Provide sufficient knowledge about the past so that the present makes sense. Also help new BOD members see their own participation as part of the organization's ongoing story.	• Presentation on Historic Compromise and the evolution of WCB and its Governance Model
Strategic Direction	Present a framework for new members to participate effectively. Clarify the mandate, mission, vision, guiding principles and premises and their implementation, and goals that inform strategic initiatives and actions.	• Presentation/Discussion by CEO and BOD Chair • Copy of Strategic Plan and Annual Report and Service Plan
Organizational Structure	Help new BOD members understand who does what and lines of accountability.	• Organization Chart • Introductions to Senior Executive • Presentation Overviews of major operating areas
	About the BOD	
BOD Roles	Ensure that new Directors understand the roles of the BOD.	• Presentation/discussion • Written materials
Major BOD Responsibilities	Ensure that new Directors understand their responsibilities and BOD members.	• Presentation/discussion • Conflict Guidelines • BOD and Director Terms of Reference • Legislation
BOD Operations	Help new Directors understand how the BOD operates so that they may participate effectively.	• BOD Manual • Committee Terms and Member Lists

BOD Members	Facilitate new Director integration with other Directors	• Meeting Schedule • Minutes from Previous meetings • One-on-one meetings with Committee Chairs • List of BOD Members and biographical data • Time set aside for social interaction

III. ONGOING DEVELOPMENT

One BOD meeting will be held each year to discuss emerging issues in governance and related matters. An expert in governance or another relevant field will facilitate the session and will provide a re-fresher on governance responsibilities and best practices.

Significant legal cases on governance issues will be provided and discussed as well as case scenarios of conflict issues.

The Session will also provide an opportunity for BOD members to identify where particular development opportunities may be required (e.g., financial literacy).

Each year, Directors will receive information regarding available director/governance education and development opportunities. Directors will be encouraged to participate in such opportunities from time to time and/or when a knowledge or skill gap has been identified. Enrolment in the Director Programs offered by the Institute of Corporate Directors and the Conference Board of Canada-or one or more of the modules offered by these two programs- will be encouraged.

ORIENTATION AND ONGOING DEVELOPMENT OF DIRECTORS

The enrolment costs of such programs will be covered by the WCB. Time for travel, preparation and course attendance, however, is not reimbursable

A sufficient amount of resources will be allocated each year for Director education/training programs. The annual budget amount will be approved by the Chair of the Priorities and Governance Committee.

PROCESS FOR BOD PURCHASES, INCLUDING THE ENGAGEMENT OF INDEPENDENT COUNSEL

1. PURPOSE

Full discretion in certain purchasing decisions (including the engagement of independent counsel) is a key element in enabling the BOD to make decisions that will assist the BOD (and ultimately the WCB) in fulfilling its mandate.

Normally, BOD purchases will be made through the established WCB purchasing guidelines. However, certain purchasing decisions (including the engagement of independent counsel) made *in camera* will be executed through the process outlined below.

2. PROCESS

All BOD purchase decisions will be made by the BOD as a whole after discussing the issue during a regular or special meeting.

A. Normal Course BOD Purchase Decisions

i) All BOD purchase decisions over $100,000 will be executed following the established WCB Corporate Supply Management ("CSM") guidelines.

ii) All BOD purchase decisions, the effect of which are determined by the BOD to pose a significant risk to the reputation or integrity of the BOD and WCB, will be executed following established CSM guidelines. Such decisions may include purchases of advice or services that are widely available and do not require a subjective judgement as to their effectiveness.

iii) A reputational risk includes repeated, sole source purchase decisions from a single vendor.

B. Single Source BOD Purchase Decisions

i) BOD single source purchase decisions made *in camera* and which have been determined not to pose a risk to the reputation or integrity of the BOD and WCB will not be executed following established CSM guidelines.

ii) Such decisions may include the selection of an individual or firm that provides highly specialized advice or independent counsel, where trust in, and reliability of, the advice or counsel are paramount to the BOD.

iii) Single source purchase decisions approved by the BOD will be communicated in writing to the Director, Governance, who will instruct CSM to execute a contract with the service provider on behalf of the BOD on terms and conditions determined by the BOD.

iv) The Director, Governance will place the purchase decision, the contract for service and the outcome of the contract before the Audit Committee at its next scheduled meeting.

C. Confidential BOD purchase decisions

In rare circumstances, the BOD may wish to purchase a professional service with regard to a highly sensitive issue that should not be disclosed to management in the best interests of the WCB. Such a service may include legal, audit, or other technical advice.

i) BOD confidential purchase decisions made *in camera* and deemed by the BOD to be of a highly sensitive nature that should not be disclosed to management will not be executed following CSM guidelines.

ii) The BOD will instruct the Director, Governance in writing to execute a contract with the selected individual or firm.

iii) The Director, Governance will contact the individual or firm and execute a contract or letter of understanding, including terms and conditions as determined by the BOD. The Director, Governance will ensure that all invoices and outputs are delivered to the Director, Governance who will retain all records for audit purposes.

iv) The Director, Governance will execute a cheque request and will deliver the cheque request to a designated individual in Accounts Payable. The Director, Governance will not supply CSM with any details of the contract unless otherwise instructed by the BOD.

PROCESS FOR BOD PURCHASES, INCLUDING THE ENGAGEMENT OF INDEPENDENT COUNSEL

v) The Director, Governance will ensure that the purchase decision, contract, invoice and contract outputs are placed before the *in camera* session of the Audit Committee at the next scheduled meeting.

vi) The Director, Governance will ensure that confidential BOD purchase decisions are consistent with WCB purchasing policies as much as practicable.

BOARD OF DIRECTORS' REMUNERATION AND EXPENSES

I. APPLICATION

A. A "director" shall mean a member of the Board of Directors (the "BOD") of the Workers' Compensation Board (the "WCB").

B. In consideration of carrying out their responsibilities under the *Act*, the directors shall be paid out of the accident fund:

i) remuneration in an amount determined by the Lieutenant Governor in Council; and

ii) reasonable and actual traveling and out of pocket expenses necessarily incurred by them in discharging their duties.

II. CALCULATION OF PER DIEM

Where the remuneration determined by the Lieutenant Governor in Council is in whole or in part a per diem rate, then, unless otherwise fixed by the Lieutenant Governor in Council, the amount to be paid in respect of the per diem rate to a Director shall be calculated in accordance with Treasury Board Directive 1/04 as follows:

A. for meetings which last four (4) hours or less in a twenty-four hour day, a director shall be entitled to one-half of the established meeting/per diem rate;

B. for meetings that last more than four (4) hours in a twenty-four hour day, a director shall be entitled to the established meeting/per diem rate;

C. no distinction will be made between participation in person and participation by video, telephone, or such other mode that permits an appointee to hear, and be heard by, all other participants;

D. only one full per diem/meeting payment shall be made to a director for each twenty-four (24) hour day;

BOARD OF DIRECTORS' REMUNERATION AND EXPENSES

F. directors who are requested by the Chair to undertake duties on behalf of the board are entitled to payment at a daily rate equivalent to the meeting/per diem fee:

- for four hours or less work in a twenty-four hour day, appointees will be entitled to one-half of the meeting/per diem fee
- for more than four hours of work in a twenty-four hour day, appointees will be entitled to a full meeting/per diem fee
- appointees will not be compensated for time spent attending conferences, speaking engagements or social events, including meals and receptions.

G. There will be no remuneration for travel to and from a meeting unless incurred by a Director who resides more than thirty-two kilometres from the meeting location.

H. professional duties and membership fees will not be reimbursed.

I. directors are not subject to deductions for the Canada Pension Plan or for Employment Insurance.

J. remuneration is to be reported annually to the Canada Customs and Revenue Agency on a T4A Supplementary Slip.

K. remuneration will only be paid to the person named on the instrument appointing that person to the board.

BOARD OF DIRECTORS' REMUNERATION AND EXPENSES

III. COMPENSATION SCHEDULE

Item	Compensation
Board Chair – Annual Retainer	$15,000
Board Chair – Per Meeting	$500 (2005)
Director – Annual Retainer	$7,500
Director – Per Meeting	$500

A. For each fiscal year, the maximum remuneration for the Chair and directors is as follows:

Chair: Annual Retainer plus 60 meetings per year
Director: Annual Retainer plus 30 meetings per year

IV. EXPENSES

A. A director shall only be paid remuneration or be reimbursed for expenses where the director has submitted a claim for such remuneration or expenses within three (3) months of the meeting of the BOD in respect of which the remuneration is to be paid or the expenses were incurred.

B. Directors are entitled to "reasonable travel and out of pocket expenses necessarily incurred in discharging their duties" (section 81(8)(b) of the Act).

C. Directors who use their own vehicles to attend a Board meeting will be reimbursed mileage at the rate in effect for WCB employees. The rate is currently ~~44~~ **46** cents per kilometer.

BOARD OF DIRECTORS' REMUNERATION AND EXPENSES

V. SUBMITTING CLAIMS FOR PER DIEMS AND EXPENSES

A. A sample per diem and expenses form appears at this Tab along with guidelines for submitting expense forms. To ensure prompt payment of per diems and reimbursement of expenses, the following points should be noted:

i) Per diem and expense forms, with receipts, should be submitted directly to Sheila Wong.

ii) The form must bear the original signature of the director in the space marked "Director signature" or it will not be accepted by the WCB Accounting Department. (Photocopies or FAXES are not accepted.)

iii) Original receipts (not copies) must be submitted.

iv) Forms for payment of per diem and reimbursement of expenses should be submitted as soon as possible after each meeting.

VI. FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

A. The WCB is a public body to which the Freedom of Information and Protection of Privacy Act applies. Any person may obtain copies of WCB records with respect to the remuneration and expenses for each director by making a request under the Act.

BOARD OF DIRECTORS' REMUNERATION AND EXPENSES

Board of Directors
Workers' Compensation Board
6951 Westminster Highway
Richmond BC V7C 1C6

Please forward all requests directly to Sheila Wong, Office of the Board of Directors.

PAYABLE TO:_____

ADDRESS:_____
DEPARTMENT NO: 14-00

PER DIEM TO BOARD MEMBER (if applicable)
PAYROLL USE ONLY

DATE	TYPE OF MEETING	RATE/DAY	TOTAL
	TOTAL PER DIEM (paid through Human Resources)		$

PER DIEM TO BOARD MEMBER'S ORGANIZATION (if applicable)
ACCOUNTING USE ONLY
ACCOUNT #06010

DATE	TYPE OF MEETING	RATE/DAY	TOTAL
	TOTAL PER DIEM		$

BOARD OF DIRECTORS' REMUNERATION AND EXPENSES

EXPENSES **ACCOUNTING USE ONLY** ACCOUNT #07000 (Please attach receipts)						
DATE	MILEAGE @ ~~.44~~ **.46**/KM	PARKING	TAXI/ TRAVEL	PHONE CHARGES	MISC.	TOTAL
		TOTAL EXPENSES (paid through Accounting)				$

Date Submitted:_____For the Month of:_____

Director Signature: _____

Approval: _____
Douglas Enns, Chair, Board of Directors

BOARD OF DIRECTORS' REMUNERATION AND EXPENSES

I. Guidelines

All expense forms should be forwarded to Sheila Wong, Office of the Board of Directors.

Indicate in the Payable To field whether the payment should be made to yourself or your organization. If payments are to be made to both, please submit separate forms. The following departments will be responsible for the payments:

Payee	Per Diems	Expenses
Individual Board Member	Payroll	Accounting
Board Member's Organization	Accounting	Accounting

Salary Per Diem Fixed Rate as determined by appointment.

Expenses

*Employee Travel & Business Expense Reimbursement Policy Excerpts (*Please see Chapter 3.4 of the Corporate Controller's Handbook for the entire policy)

Transportation

- **Mode of Transportation.** The most economical method of travel will be used for WCB travel purposes (e.g. ground vs. air travel).
- **Rental Vehicle.** Rental vehicles are only to be used when the nature of the trip or the locations of the customers being visited is such that the use of local transportation is not practical, is more expensive or is not available. The economy/compact size requirement will be applicable to individual travellers. Mid-size cars will be permitted where two or more travellers are involved.
- **Personal Vehicle in Lieu of Air Travel.** When a personal vehicle is permitted in lieu of air travel, the reimbursement will be the lesser of the amount of mileage or the amount of the lowest logical fare which would have been paid by the WCB to transport the individual.
- **Local Travel by Personal Vehicle.** An allowance will be paid for all work-related distances to cover car operating expenses, regardless of the number of passengers carried. Employees will be reimbursed at the applicable mileage rate for each business kilometer driven (See Per Diems & Allowances).

Lodging/Accommodation. Employees should normally stay in standard single rooms, unless other room types are less expensive or the same rate. Board policy does not provide suite accommodation nor allow travellers to spend up to the maximum.

Meal Per Diems & Allowances. Please note that meal per diems are only allowed when meals are not provided.

- Mileage allowance: ~~$0.44~~ **$0.46**/km
- Breakfast per diem: $~~10.00~~**10.50**
- Lunch per diem: $~~12.00~~**12.25**
- Dinner per diem: $23.00
- Incidentals per diem: $6.00 (overnight stay required)
- In-country lodgings excluding taxes: maximum $115.00 (amended May 3, 2000)
- In Richmond, hotels will be booked by the designated travel agency per negotiated rate offered and availability. For other locations within the province, the provincial government listing will be used.
- Out-of-country lodgings including tax: maximum $150.00 U.S.

BOARD OF DIRECTORS' REMUNERATION AND EXPENSES

Other Receiptable Expenses. For other miscellaneous expenses (e.g. parking and taxi), please attach original receipts.

Decision of the Review Division

Number: **13828**
Date: **September 9, 2004**
Chief Review Officer: **Joe Pinto**
Subject: **Extension of Time — New Evidence**

The employer seeks an extension of the 90-day statutory time limit to request a review of a July 2, 2003 decision of the Workers' Compensation Board (the "Board").

The statutory time limit expired on October 8, 2003. This includes the eight-day grace period provided for mailing of decisions in subsection 221(2) of the *Workers Compensation Act* (the "Act"). The employer's request for review was received on February 18, 2004, 133 days beyond the statutory time limit to request a review.

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

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

Background

The Board's July 2, 2003 decision letter advised the employer that its application for relief of costs had been denied. The Board officer had determined that there was no evidence of a pre-existing condition that enhanced the disability accepted under the claim.

The final two paragraphs of the letter read as follows:

> Please call me if the information in this letter is unclear or you wish to discuss your claim. You may call my direct line, 250-314-6075 or the toll free line at 1-888-922-6622.
>
> If you disagree with this decision, you have the right to request a review by the Review Division. A request for review of this decision must be filed within 90 days from the date of this decision. The attached pamphlet provides instructions.

Submissions

The employer submits that there is new medical information in support of its position which was not available until after the expiry of the statutory limitation period.

Practices and Procedures

Item B2.4.2 of the Review Division's *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 the request for review within the 90-day time period. No consideration is given to the merits of the request for review. If the employer'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 otherwise result if the time limit were not extended. It is only when it is found that both special circumstances existed and an injustice would otherwise result that an extension of time will be granted.

Reasons and Decision

Special Circumstances

I find the employer's reasons do amount to special circumstances which precluded the filing of a request for review within the statutory time limit under section 96.2(4) of the Act.

This request for an extension of time raises the issue of whether "new evidence" would support a finding that there were "special circumstances" which precluded the filing of a request for review within the statutory time period. In considering this issue, I have reviewed a number of decisions from the Workers' Compensation Appeal Tribunal ("WCAT"). I have found these decisions useful in determining how the Review Division should approach "new evidence" cases.

In my opinion, "new evidence" may result in a finding that there were "special circumstances" within the meaning of section 96.2(4) of the Act. (This is similar to the approach taken by the WCAT chair in WCAT Decision #2003-01810.)

However, whether I make this finding in any particular case will depend upon the circumstances of the case. The factors that I will consider include:

- whether the "new evidence" is relevant to the issue in dispute,

- whether, at the time the Board officer's decision was issued, the "new evidence" did not exist, or existed but was not discovered and could not, through the exercise of reasonable diligence, have been discovered,

- whether the requester delayed the filing of a request for review to give the requester an opportunity to seek the "new evidence,"

- whether the requester initiated the request for review within a reasonable period of time after becoming aware of the "new evidence,"

- whether the "new evidence" is of an objective nature for example, if there were findings at surgery that revealed a previously unknown condition, I would be more inclined to find that "special circumstances" existed, than if the "new" evidence" merely consisted of a medical opinion that such a condition likely existed, and

- any other relevant factors.

In this case, a review of the claim file indicates that the worker's claim was accepted on December 11, 2002 for a shoulder strain. The July 2, 2003 decision to deny relief of costs to the employer was made on this basis. On September 5, 2003, the worker underwent surgery which revealed some degenerative changes in the shoulder. On November 27, 2003, a Board medical advisor identified which of these changes could be attributed to the compensable injury and which changes could not be so attributed. The worker and the employer were advised of the decision to not accept a claim for these unrelated degenerative changes on January 20, 2004, approximately three and a half months after the expiry of the 90-day period.

The findings at the September 5, 2003, surgery were relevant and, in fact, went to the very heart of the issue being disputed by the employer. They did not exist at the time the Board officer denied relief of costs on July 2, 2003; nor could they have been discovered through the exercise of reasonable diligence. The employer filed its request for review on February 18, 2004, less than one month after the January 20, 2004 decision was issued. The findings at surgery were of a very objective nature, and it was not until the Board made its decision that some of these findings were non-compensable pre-existing degenerative changes that the employer was in a position to dispute the Board officer's July 2, 2003 decision to deny relief of costs.

I distinguish this case from cases where an employer or worker has delayed in filing a request for review, pending the seeking of further evidence, medical or otherwise. In those cases, I am not inclined to grant an extension of time. It is the responsibility of employers and workers to file their requests within the statutory time period and then seek whatever additional evidence they consider necessary to support their request. In this case, the employer has no reason to believe that the "new evidence" existed. It arose quite independently.

In the circumstances, I have concluded that "special circumstances" existed that precluded the filing of the employer's Request for Review within the 90-day statutory time period.

Injustice

In addition to finding that special circumstances existed, I must also find that an injustice would result if an extension of time were not granted. This involves having regard to the significance of the matter that is the subject of the request for review and the degree of prejudice to the worker that would result from a denial of the requested extension of time.

In this case, I conclude that injustice would result if I were not to grant an extension. The issue in dispute on this request for review involves the employer's assessment rate. This issue could have a significant financial impact on the employer, which would be prejudiced by a denial of the requested extension of time.

Conclusion

I allow the application for extension of time to file the request for review with respect to the July 2, 2003 decision letter. The request for review is accepted as of the date of this decision letter. I note, however, that, in granting this extension of time, I am not making a finding with respect to the merits of the employer's dispute with the July 2, 2003 decision letter. I am merely finding that the statutory requirements for an extension of time have been met and the decision should be reviewed by a review officer.

Decision of the Review Division

Number: **14519**
Date: **September 29, 2004**
Review Officer: **Nick Attewell**
Subject: **"Disabled From Earning Full Wages" Under Section 6(1)**

The worker requests a review of the decision of the Workers' Compensation Board (the "Board") dated December 10, 2003. In support of this request for review, the worker's representative has provided written submissions. The employer was given notice of the review and is not participating.

Section 96(6) of the *Workers Compensation Act* (the "Act") gives a review officer authority to conduct this review.

Issue

This is a review of the Board's decision that the worker's permanent partial disability is equal to 8% of a totally disabled person.

Background

The worker, now 57 years old, was employed as a heavy duty mechanic, when he began experiencing symptoms which were eventually diagnosed as Hand-Arm Vibration Syndrome ("HAVS"). The worker filed an application for compensation on November 1, 1999 and the Board accepted the worker's claim under the provisions of section 6 of the Act as resulting from use of vibrating tools.

Following a Review Division decision, the worker's claim was referred to the Board's Disability Awards Department for assessment of a permanent partial disability on November 3, 2003. The Board granted the worker a permanent partial disability award in the amount of 8% of total disability effective September 1, 1999. 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 initially saw his attending physician, Dr. H, for pain in his fingers on July 26, 1999.

- On January 17, 2000, tests were conducted by Dr A, of which the results were positive for Raynaud's phenomenon.

- After being examined by another specialist, Dr. C2, on February 22, 2000, who recommended further testing, a diagnosis of HAVS was eventually confirmed on May 30, 2000, by Dr. T.

- On July 13, 2000, the medical advisor ("MA") stated that he agreed with Dr. T's findings and that the worker should be advised against using vibrating tools and avoid exposure to cold. If he did not, his condition would likely progress.

- On September 26, 2000, the worker advised the Board that he had been doing modified duties at work for approximately five weeks with no loss of pay.

- In a letter dated April 15, 2002, a disability awards officer ("DAO") found that the worker was not entitled to a permanent partial disability award.

- On May 1, 2002, the employer advised that it had accommodated the worker to permanent modified work duties without loss of salary. However, it did not intend to continue paying the worker at a trade journeyman mechanic while working as a sign maintenance worker.

- On July 17, 2002, Dr. H reported a worsening of symptoms, but the worker was still working at his modified work.

- On August 16, 2002, the employer advised the claims adjudicator ("CA") that it had created a position for the worker as a maintenance worker until the end of August. He would continue in that position, but his rate of pay was going to change. He was a journeyman mechanic and was currently being paid $5.00 more than his regular rate. That change would occur at the end of the month.

- On September 12, 2002, the MA advised that it was not probable that the worker's HAVS had progressed if he no longer had significant occupational exposure to handheld vibrating equipment.

- The worker advised the CA on January 14, 2003, that the employer was downsizing as of March 1, 2003 and 19 positions would be lost, possibly including his job. The worker had to choose between working until March 1 and receiving wages up to November 1, 2003, or to continue working until September 1, 2003, at which time modified duties would no longer be available. The worker chose the voluntary departure package. The worker also advised that vascular studies done on January 13, 2003 showed deterioration in his condition.

- On January 16, 2003, the CA was advised by the employer that the worker had taken a "voluntary departure package." It also stated that, if he had not opted for this, the employer could have provided no light duties after March 1, 2003.

- As part of this review, the worker's representative provided a February 27, 2003, report from Dr. C2, advising that the worker's symptoms had progressed. The report also referred to "escalation of morning stiffness and hand function being impaired with Raynaud's and osteoarthritis being aggravated."

- In a letter dated February 28, 2003, a CA advised that, because the worker's job situation had changed, he was being referred to Vocational Rehabilitation ("VR") on a preventative basis. The CA also concluded that any progression in his HAVS had not been caused by his employment duties since he had been on modified work.

- The vocational rehabilitation consultant ("VRC") reported on March 5, 2003, that the worker took the voluntary departure package because the employer had indicated workers would be laid off in September 2003 and they would not receive the severance package. The worker advised the VRC that he intended to work until age 60. The VRC found that the worker was not eligible for VR assistance because he had left his employment voluntarily and there had been no significant change in his HAVS. The VRC advised the worker of this in a letter dated March 18, 2003.

- A claim log entry dated March 6, 2003 documented a telephone conversation in which the employer advised that the worker was not at risk of being laid off due to the downsizing because of his seniority.

- An October 20, 2003, the Review Division found there was new evidence that, while doing modified duties, the worker could have been exposed to vibrating tools. The review officer returned the decision of February 28, 2003 back to the Board to: 1) determine whether the worker's HAVS symptoms had progressed; 2) investigate whether the worker had significant occupation exposure to hand-held vibrating equipment; and 3) assess the relationship of any progression of HAVS symptoms to his work activities. The review officer also found that the worker was entitled to preventative VR assistance because there was medical evidence that the worker was at undue risk of permanent disability if he returned to work as a mechanic.

- A Board medical advisor, Dr. G, reviewed the reports of two vascular surgeons, Dr. T (May 30, 2000), and Dr. A (January 19, 2000), and Dr. C2, specialist in physical medicine, (February 2, 2000). Based on these reports, Dr. G recommended a permanent functional impairment ("PFI") of 8%.

- A DAO completed a Form 24 with respect to the worker's PFI award on November 28, 2003. The DAO accepted the MA's PFI recommendation. The worker was not granted a loss of earnings award because his unemployment was due to his accepting a voluntary buy-out. The worker's award was made effective September 1, 1999.

- On April 26, 2004, the Workers' Compensation Appeal Tribunal ("WCAT") dismissed the appeal against the April 15, 2002, decision as there was no appealable issue. The worker had been granted a permanent disability award in the December 10, 2003, decision and this was under review by the Review Division.

Law and Policy

Significant changes occurred to the Act effective June 30, 2002. This in turn led to significant changes in Board policy. The determination of the issues on this review affects the determination of whether the pre- or post-June 30, 2002, law and policy applied. I will therefore set out the applicable law and policy in the course of my reasoning below.

Reasons and Decision

The worker's representative argues that the worker's PFI assessment is not accurate as it is based on medical information from 2000; the worker's condition has deteriorated since that time. The representative argues that the worker is also entitled to a loss of earnings award. However, there are two more basic questions I must consider before dealing with the worker's concerns. These are whether there is a legal bar to his being granted an award at all because the December 10, 2003, decision represented an invalid reconsideration of a previous decision and because the worker has not met the requirements of section 6(1)(a) of the Act.

Reconsideration of Previous Decision

Section 96(4) of the Act grants discretion to the Board to reconsider its past decisions. Under section 96(5)(a), the Board may not exercise this power if more than 75 days have elapsed since that decision or order was made. Under section 1, "reconsider" means to make a new decision in a matter previously decided where the new decision confirms, varies or cancels the previous decision or order. The December 10, 2003, decision might be considered as a reconsideration of the April 15, 2002, decision on the grounds that it dealt with the same subject matter and varied its conclusions. Since more than 75 days had elapsed since the April 15, 2002, decision, there may be a basis for finding the decision an invalid exercise of authority by the Board.

There are certain exceptions to the general rule that the Board cannot reconsider after 75 days. One major exception is where another section of the Act authorizes a new decision outside the 75 days. In particular, section 96(2)(a) authorizes a reopening of a previous decision where there has been "a significant change in a worker's medical condition that the Board has previously decided was compensable." In this case, section 96(2) would allow a reopening on the basis of a progression of the worker's condition referred to in the reports from the worker's doctors.

Two other relevant sections of the Act are section 96.4(9), which states that a Review Division decision is final and must be complied with by the Board, and section 255, the equivalent provision for WCAT. If it is necessary to change a prior decision in order to implement a Review Division or WCAT decision, that change must be made without regard to the limits in section 96(5). As the December 10, 2003, decision was made in order to implement the Review Division decision of October 20, 2003, it is not an invalid reconsideration under section 96(5).

One difficulty with relying on section 96.4(9) is that the December 10, 2003, decision appears in part to have gone beyond the scope of the Review Division decision in dealing not just with the progression of the worker's condition. It granted a permanent disability award retroactive to 1999, when the worker first reported his symptoms. However, as discussed below, the

retroactive part of the award is in any event invalid pursuant to section 6(1)(a) of the Act. The fact that part of the December 10, 2003, decision may contradict section 96(5) does not affect the validity of the remaining part that implemented the Review Division decision.

Section 6(1)(a) of the Act

HAVS is compensated as an occupational disease. Therefore, claims must meet the requirements of section 6(1)(a), which provides that "where a worker suffers from an occupational disease and is thereby disabled from earning full wages at the work at which the worker was employed," compensation is payable to the worker. Even though section 23 provides for the granting of permanent disability awards where a permanent disability results from an injury or occupational disease, section 23 only applies to occupational disease cases that meet the requirements of section 6(1). In other words, unless the claim meets the requirement of section 6(1) for "disabled from earning full wages at the work at which the worker was employed," no compensation for permanent disability is payable. There is a question whether the worker in this case meets this requirement. This issue also affects the commencement date for any permanent disability award to which he may be entitled.

Policy item #26.30, *Disabled from Earning Full Wages at Work*, directs that no compensation other than health care benefits are payable to a worker who suffers from an occupational disease unless the worker is "disabled from earning full wages at the work at which he was employed." The policy states that "disabled from earning full wages at the work at which he was employed" refers to the work at which the worker was regularly employed on the date he or she was disabled by the occupational disease. This means that there must be some loss of earnings from such regular employment as a result of the disabling affect of the disease, and not just an impairment of function. The policy provides that disablement for the purposes of section 6(1) may result from, for example:

- An absence from work to recover from the disabling affects of the disease;
- An inability to work full hours at such regular employment due to the disabling affects of the disease;
- The need to change jobs due to the disabling affects of the employment.

Neither section 6(1)(a) nor policy item #26.30 materially changed on June 30, 2002.

Meeting the requirements of section 6(1) does not require a permanent or ongoing inability to continue in the worker's employment. A temporary period of absence from work due to the disabling effects of the compensable condition, even for a short time, is sufficient. (See Appeal Division Decisions #00-1188 and #0089.) However, this does not help the worker in the present case since there is no evidence of his losing any time from work because of his compensable disability.

It is also clear from past appeal decisions that, if a worker's compensable disability first occurs after he or she has retired from working, he or she does not meet the requirements of section 6(1), and no permanent disability award can be made (WCAT Decision #2004-00583-RB).

However, though the worker accepted a voluntary departure package from his employer, the evidence does not indicate that he intended to retire. He advised the VRC on March 5, 2003, that he intended to work until age 60.

There is medical evidence suggesting that the worker's condition would worsen if he continued in his prior employment involving the use of vibrating tools and exposure to cold. Though his employer did accommodate him in modified work, the worker was referred for VR assistance on a preventative basis when it became known in early 2003 that his position would end. This was under policy C11-88.80, *Preventative Rehabilitation*. Preventative VR benefits were initially refused but allowed by the October 20, 2003, Review Division decision. The December 10, 2003, decision under review does not discuss the question whether the worker had met the requirements of section 6(1)(a), but may rest on an assumption that they were met because of the provision of VR benefits.

The simple fact that the worker had been found eligible for VR benefits is not a ground for finding that section 6(1)(a) has been complied with. Otherwise, the worker's entitlement would depend on whether the Board performed an administrative act or decided to exercise its discretion to provide VR assistance under section 16 of the Act. Whether the worker met the requirements of section 6(1)(a) must depend on criteria that are independent of Board acts or failures to act under another section of the Act.

Policy item #26.30 does not discuss the situation where staying in the worker's employment may worsen his or her disability and for that reason he or she leaves that employment. However, some support for finding a disablement from earning full wages in such cases might be derived from policy item #31.50, *Loss of Earnings Awards under Section 7*, which states in the context of hearing loss claims:

> Where a noise-induced hearing loss has been incurred, if a worker then changes employment to a lower paid but quieter job, that triggers consideration by the Board of a loss of earnings pension notwithstanding that it may seem reasonable that with hearing protection, the worker may have stayed at the former employment. There is no obligation to stay in the employment with hearing protection rather than take lower paying work and claim compensation . . . (The policy is worded slightly differently after June 30, 2002, but the difference is not material to this case.)

This policy is not directly on point since it deals with the meaning of different wording in section 7(4) of the Act: "If a loss or reduction in earnings results from the loss of hearing . . ." Nonetheless, it appears that the same principle might reasonably be applied to section 6(1)(a).

It may be said that the worker did not leave his employment to obtain less risky, lower paid employment. The worker moved to alternative work with his current employer. It is also clear that this work initially involved no loss of earnings. However, the evidence is unclear as to the later period. The employer advised that it could not continue to pay the worker's former rate for the modified job, but it is not clear whether it actually made a change. If the employer did reduce the worker's rate because of the move to modified duties at any time, this would meet the requirement for a disablement from earning full wages under section 6(1)(a).

At the time when the worker took the voluntary departure package, he had been advised by the employer that his modified duties would not continue. I consider that, under the principle discussed above in policy item #31.50, the worker was not required to continue in his former employment, knowing that this would likely worsen his condition. The worker did not move to lower paying employment, but has, after the notice period paid for under the package, found himself unemployed with no earnings. Therefore, whether or not the worker had reduced earnings while engaged in the modified work, he met the disablement from earning full wages requirement of section 6(1)(a) when he left that employment.

The October 10, 2003, Review Division decision considered evidence that even the modified duties involved exposure to power tools and cold weather. It referred the claim back to the Board to consider whether the worker's symptoms had progressed as a result. In a memo dated October 24, 2003, the CA accepted that, if there had been a progression of the worker's disability, it was causally related to the worker's modified duties. Therefore, even if the employer had been willing to continue the modified work duties, the worker would meet the requirements of section 6(1)(a) in voluntarily leaving his employment.

Date of Disablement

As a result of the above reasoning, the date of disablement under section 6(1)(a) would at the latest be the date in 2003 when the worker finally left his employment. However, it could have been earlier if the worker at any time had reduced earnings from being moved to the modified duties. This date is the one that determines the law and policy applicable to this case.

Section 35.1(2) of the Act has the effect that the Act as it stands after June 30, 2002, "applies to an injury that occurs on or after" that date. Section 6(1) states that compensation is payable for an occupational disease "as if the disease were a personal injury." Section 6(2) states that the "date of disablement must be treated as the date of the injury." The evidence indicates that, if the worker did suffer any reduction in earnings before he left his employment in 2003, such loss occurred after June 30, 2002. Although the employer advised the Board in May 2002 that it could not continue paying the worker his previous rate, there is no evidence that there might have been a reduction in the worker's earnings until August 2002, and that evidence is unclear. While the current evidence suggests that the Act in effect after June 30, 2002, should apply, the Board should make further inquiries on this to determine whether more certainty can be obtained.

The date of disablement referred to above is also the date when any permanent disability award granted to the worker should commence. An error was made in making the award retroactive to 1999. Even though the worker's physical disability may have existed in 1999, no benefits can start until the worker meets the requirements for a disablement under section 6(1). The worker will not have to repay the benefits already paid to him but any additional benefits that might be considered following this decision would have to date from the date of disablement.

Percentage of Disability

PFI awards are made under section 23(1) of the Act, which requires the Board to estimate the impairment of earning capacity from the nature and degree of the worker's injury. Policy item #39.44 sets out specific criteria for assessing permanent disabilities for HAVS. This policy formerly required as a condition of receiving a permanent disability award that the worker "has not returned to the worker's or equal paying occupation." This requirement was deleted in respect of decisions adjudicated under section 23(1) after November 19, 2002. The revised policy applies in this case, but the worker would in any event have met the requirements of the former policy.

The worker's representative objects to the assessment of the 8% PFI in the December 10, 2003, decision on the basis that it was based on the medical information in 2000 and did not take account of the further medical information available in 2003 after Dr. H first reported a progression in the worker's symptoms. The memos referring the claim to Dr. G, who did the assessment for the Board, and Dr. G's memo setting out his conclusions appear to only refer to the 2000 information, but this is not clear. I have decided to refer the claim back to the Board under section 96.4(8)(b) to consider and, if necessary, make a new decision on this.

Entitlement to Loss of Earnings Award

If, as suggested above, the law applicable after June 30, 2002, applies, any entitlement to a permanent disability award on a loss of earnings basis will be considered under sections 23(3) to 23(3.2) of the Act. The December 10, 2003, decision was made under the different provisions applicable prior to June 30, 2002.

The Board denied an award on a loss of earnings basis on the basis that the worker had accepted the voluntary departure package and therefore his loss of earnings was not due to his compensable disability. My conclusion above that the worker was disabled from earning full wages from his employment for the purpose section 6(1)(a) necessarily leads to a conclusion that the December 10, 2003, decision must be reconsidered. The worker's loss cannot be attributed to his voluntary act if by staying in the employment he would have caused a progression in his disability. On the other hand, my finding does not necessarily mean that he has a loss of earnings or should receive a loss of earnings award. The Act envisages that loss of earnings awards are only granted in exceptional cases. In addition, the loss of earnings assessment involves consideration of not just the worker's previous employment but also other types of employment.

I have decided to refer this claim back to the Board under section 96.4(8)(b) to make a new decision on the worker's loss of earnings entitlement under section 23 of the Act as it exists following June 30, 2002.

Conclusion

As a result of this review, I return the Board's decision of December 10, 2003, to the Board under section 96.4(8)(b) to make a new decision on the worker's entitlement to a permanent disability award, with the following directions:

- The Board will make additional inquiries to determine whether the worker suffered reduced earnings from moving to the modified work before he left his employment in 2003. If new evidence is obtained, the Board will make a new determination as to the "date of disablement." In the absence of new evidence being obtained, the "date of disablement" for the purpose of section 6(1)(a) and therefore the date of commencement of any additional permanent disability award is the final date the worker ceased working for his employer in 2003.

- The applicable law is the Act in effect after June 30, 2002, unless the Board determines on the basis of new evidence that the "date of disablement" occurred before that date.

- With regard to the percentage of disability, the 8% awarded is confirmed if Dr. G considered the medical information from 2003, but if not, a new assessment will be made.

- The normal policy, practice and process for determining entitlement of a worker to a permanent disability award on a loss of earnings basis should be followed.

- A loss of earnings award must not be declined for the sole reason that the worker took a voluntary departure package from his employer at the time the claim was made.

Decision of the Review Division

Number: **16563**
Date: **July 5, 2004**
Review Officer: **Sam Isaacs**
Subject: **Health Care Benefit Reimbursement**

The worker requests a review of the decision of the Workers' Compensation Board (the "Board") dated February 12, 2004. The worker has provided additional information with her request for review. The employer was given notice of this review and is participating. The employer has provided a submission which was disclosed to the worker for comment. The worker has requested an oral hearing. I find that an oral hearing is not necessary, as there is no factual dispute or issue of credibility that requires an oral hearing to resolve. I have spoken to the worker by telephone in order to clarify information pertaining to her request for review.

Section 96(6) of the *Workers Compensation Act* (the "Act") gives a review officer authority to conduct this review.

Issue

This is a review of the Board's decision to deny paying the full costs of massage therapy treatment.

Background

The Board accepted this worker's claim for an injury that occurred on March 25, 2003, which included a right index finger puncture wound. This subsequently developed into necrotizing fasciitis involving the worker's right upper arm. The worker has undergone several surgeries as a result of the compensable injuries, and has developed chronic lymphaedema. The worker has required intensive massage therapy for the lymphaedema, which has resulted in the massage therapist charging a rate approximating $65 per hour. In the decision under review, the Board officer advised the worker that rates charged by a massage therapist that are over and above the "WCB rates" are not covered by the Board. Although the massage therapist was billing the worker $30 per session over and above "the negotiated WCB massage therapy rate," the excess amount would not be covered by the Board.

The worker, in her request for review, writes that she initially required three one-hour treatments per week, to treat the lymphaedema. She further writes that "manual lymph drainage therapy" is time consuming and necessary for the rest of her life. Although treatment time has been reduced because of affordability, the worker incurred extra costs. These extra costs were also not covered by her extended medical insurance carrier. The worker requests reimbursement of the monies she had paid out in therapy over and above what the Board had already covered. The worker enclosed a summary of her treatments from June 5, 2003 up to and including December 9, 2003, totalling $970. Treatment has continued beyond this date.

The employer submits that the Board has the authority to establish fee schedules and that rates over and above the set fee schedule are not to be covered by the Board.

Facts and Evidence

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

- The worker's Application for Compensation documented the circumstances resulting in the work injury of March 25, 2003.

- A log entry dated May 30, 2003 documented a conversation with the worker. The worker had inquired about massage therapy, advising that the massage therapist was charging $65 for the first session. The Board officer advised the worker that massage therapy would be authorized "but would only be covered at the Board's rates." The team assistant was to confirm the Board's rates for the worker.

- A log entry dated June 9, 2003 documented a conversation with the massage therapist. The massage therapist explained the nature of the treatment provided, which was affected by removal of the lymph nodes in the worker's right axilla. The treatment was estimated to take approximately one hour. The Board officer advised that the "multiple areas was fine and that [the Board officer] thought there was an extended treatment fee she could charge for." Massage therapy was authorized starting June 5, 2003 up to July 30, 2003.

- In a letter dated June 15, 2003, the massage therapist documented the nature and complexity of the treatment and noted that "the continuing costs of treated lymphedema are expensive."

- A consultation report from specialist Dr. O. dated June 26, 2003 confirmed that the worker had chronic lymphedema. The massage therapy that the worker was undergoing was also very effective. The surgery that had been undertaken caused a significant amount of lymphedema. Continued massage techniques and wearing a Jobst stocking for compression were recommended.

- A log entry dated July 14, 2003 documented a conversation with the worker. The worker was concerned about the permanent condition and need for manual lymph drainage for the rest of her life.

- A log entry dated September 4, 2003 documented a conversation with the massage therapist, and her concern that the worker will require some form of treatment as the worker's condition was permanent.

- A log entry also dated September 4, 2003 documented a team meeting discussion regarding the worker's claim. The medical opinion was that the massage therapy was reasonable and that a further two months would be medically appropriate.

- In a letter dated October 28, 2003, the worker requested that the Board cover the full cost of her manual lymph drainage treatment, as recommended by her specialist.

- A log entry dated November 3, 2003 documented a conversation with the massage therapist, who had expressed concern that they had not yet received payment from the Board.

- A log entry dated November 4, 2003 documented a meeting with the worker. The worker raised the issue of costs associated with continued treatment for her lymphedema. She provided further details regarding the specific activities involved in this specialized treatment.

- A log entry dated December 4, 2003 documented the Board's decision to authorize continued massage therapy to assist in the worker's lymphedema.

- A log entry dated December 4, 2003 documented a conversation with the worker's physician, who advised that the worker would likely require "once weekly lymphatic drainage treatment indefinitely."

- A log entry dated December 9, 2003 documented a conversation with the massage therapist. The massage therapist was under the impression that the Board had authorized the full cost of the treatment. The Board officer advised that he was "bound by law and policy to pay the Workers' Compensation Board rate." The massage therapist was of the understanding that the physician and Board medical advisor had reached an agreement on costs. The Board officer advised that the medical advisor "is not in a position to negotiate fee schedules." Continued massage therapy was approved.

- A log entry dated February 12, 2004 documented a query from the Board's payment officer, regarding billing for the massage therapy. The Board had previously been paying for the cost of the visit plus "3 additional areas for a total of 4," which was the maximum reported as being payable.

- A response entry dated February 12, 2004 from the Board officer confirmed that "the four areas are covered under this claim."

- I spoke to the worker on May 19, 2004. The worker advised that she is currently getting approximately one-half hour treatments, but needs at least 45 minutes. The worker explained that the previous treatment sessions were an hour in duration, as she required extra time in order for gauze pressure bandages to be applied and removed. Currently, the use of Jobst garments cuts down on the time required.

Law and Policy

The Act

The law that applies to this review is found in section 21 of the Act. Section 21 provides that the Board may furnish or provide the injured worker with various medical aid benefits that might "cure and relieve from the effects of the injury or alleviate those effects." The Board may adopt rules or regulations regarding the payment of such medical aid. Any health care provided under this section must at all times be subject to the direction, supervision and control of the Board. All questions as to the necessity, character and sufficiency of this health care must be determined by the Board.

Section 21(6) allows the Board to contract with persons authorized to treat human ailments, and to agree on a scale of fees or remuneration for that medical aid. The fees or remuneration shall not be more than would be properly and reasonably charged to the worker if the worker were paying, and the amount shall be "fixed and determined by the board, and no action for an amount larger than that fixed by the board shall lie in respect of medical aid."

Policy

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

- Policy item #72.00, *Introduction*, confirms that the Board is responsible for the cost of health care benefits for compensable injuries and occupational diseases. This includes treatment provided by recognized health care professionals.

- Policy item #78.10, *Direction, Supervision, and Control of Treatment*, provides direction on when the Board will exercise its authority to direct or control treatment. Where a treatment is deemed reasonably necessary, and if more than one type is suitable, the choice will be left to the treating practitioner and the worker. However, where there is a significant difference in cost, of equally effective treatments, the Board will authorize the less costly.

- Policy item #73.20, *Duration of Medical Assistance*, confirms that coverage for necessary health care continues for as long as the worker continues to experience the effects of a compensable injury.

- Policy item #78.30, *Fees or Remuneration*, provides direction with respect to fees and schedules, under section 21(6). The policy states in part that:

  > The doctor is not permitted to bill the worker for any balance of the account regarding a compensable condition which the Board has not agreed to pay. If the doctor does this, the Board reimburses the worker, but deducts the amount from any future account the doctor submits to the Board.

- Policy item #78.31, *Adjudication of Health Care Benefits Accounts*, provides direction where the Board may decide to limit medical treatment, even though a worker's ongoing complaints are considered to be compensable. In such cases, the Board normally will pay accounts up to the date of the decision letter. The general policy is that "if a person has provided a medical service, it should be paid for."

Reasons and Decision

In the decision under review, the Board officer advised the worker that the excess amount that the worker was being charged for her specialized massage therapy would not be covered by the Board. The worker has advised that she required, and will continue to require this treatment, as a result of her compensable injury. As a result, she is requesting reimbursement by the Board for the therapy costs that she has paid out.

The medical evidence confirms that the specialized massage treatments are a reasonably necessary treatment directly required as a result of the compensable injury. The worker needed this treatment on a long-term basis previously, and continues to need this treatment. No alternate treatment approaches have been offered, apart from reducing the extensiveness of the treatment through the wearing of a Jobst garment.

Policy item #72.00 confirms that the Board is responsible for the costs of health care benefits for compensable injuries. Policy item #78.10 allows the Board to exercise its authority to control treatment. In certain cases, where there is a choice amongst treatments with a substantial difference in costs, the Board will cover the costs up to the amount that would have been paid for the less costly, but equally effective option.

In this case, there is no alternative, less costly, yet equally effective treatment presented. While policy item #78.10 also suggests caution in the case of coverage for a non-standard treatment program, I do not conclude that this policy allows the Board to unreasonably withhold treatment where the evidence confirms that the treatment is reasonably necessary and where no alternative treatment is available.

Policy item #78.30 confirms that the Board may establish fee schedules and contract with persons authorized to treat human ailments. The principle contained in this policy, which I consider also applies to massage therapists, confirms that the treating provider is not permitted to bill the worker for any balance of the account beyond the fee schedule, which the Board has not agreed to pay. If this happens, the Board is to reimburse the worker and deduct the amount from any future accounts submitted to the Board by the treating practitioner. Policy item #78.31 establishes a principle that where the Board limits medical treatment for a compensable injury, accounts will be paid up to the date of the decision letter, based on the general policy that if a person was provided a medical service, the service should be paid for.

The Board has established a fee schedule for massage therapy, based on a fee for a visit and first area of treatment, with components added for additional areas of treatment, to a limit of four areas in total. This fee structure would only cover a portion of the costs that the massage therapist is charging this worker for her manual lymph drainage therapy. There is no evidence on file to indicate that this type of specialized treatment for this unique injury is, in fact, intended to be covered through the type of fee schedule agreement being referenced by the Board officer. On my review it appears that the required treatment transcends the fee schedule, requiring a different type of massage for a different purpose and treatment outcome, and requiring a different period of time, when compared with more typical soft tissue injuries such as sprains and strains.

The Board's method for determining the manner and amount of payment for such unique requirements is not explained in policy. In addition, the Massage Therapist Association contract, available as a reference document, appears to have expired. However, the previous contract precluded surcharging, defined as charging a patient more than that provided under the fee schedule for treatment to an accepted area or condition.

As a result, I conclude that the Board either has a fee schedule to which the massage therapist has contracted with, or agreed to, and which precludes the billing of costs to the worker; or else there is no contract in place; or the specialized treatment required is not one covered within

the general terms of the contract. If the treatment is one that is not covered by an existing contract, the principle of policy item #78.31 would have relevance, in that the costs of the treatment service provided should be reimbursed.

Under policy item #72.00, the Board remains responsible for the costs of reasonably necessary treatment for compensable injuries. In the absence of alternate, less costly but equally effective treatments, the Board is therefore responsible for paying the costs of the specialized treatment required by this worker. If there is a dispute regarding the costs of the treatment as it relates to an agreed-upon fee schedule, the provider is either not permitted to bill the worker, or where this occurs, the Board reimburses the worker and addresses the matter with the provider separately, as described under policy item #78.30.

Given these policies and the specialized treatment required by the worker, I find that the worker is entitled to be reimbursed by the Board for all costs previously paid by her for her manual lymph drainage therapy. I also find that the worker is entitled to have future costs associated with this treatment to be paid for by the Board, for as long as this specific treatment is considered to be reasonably necessary. In reaching this decision, I conclude that it also remains open to the Board to either negotiate an appropriate fee with the massage therapist for this type of treatment, in accordance with section 21(6); identify an alternate, less costly, but equally effective form of treatment; or exercise the Board's authority under policy item #78.30, as appropriate.

As a result, I allow the worker's request.

Conclusion

As a result of this review, I vary the Board's decision of February 12, 2004.

Decision of the Review Division

Number: 19984
Date: December 17, 2004
Review Officer: Kevin Molnar
Subject: "Due Diligence" Under Part 3

The employer requests a review of two orders issued July 14, 2004 by the Workers' Compensation Board (the "Board") on Inspection Report #2004111810262. A notice was posted in the workplace to identify potential parties who may have an interest in this review. No other parties directly affected by this review were identified. The employer has provided a submission in support of their request for review.

The Board's Compliance Section provided a statement of reasons and information from the employer's prevention file for a one-year period. This information was disclosed to the employer.

Section 96(6) of the *Workers Compensation Act (*the "Act") gives a review officer authority to conduct this review.

Issues

There are two issues with respect to this review:

1. The Board's decision that found the employer in contravention of section 26.82(2) of the Occupational Health and Safety Regulation (the Regulation).

2. The Board's decision that found the employer in contravention of section 26.82(1) of the Regulation.

Background

The employer is a large forestry firm involved in logging operations. A Board officer inspected the employer's workplace on July 14, 2004. The workplace was a forestry service road operated by the employer under permit from the Ministry of Forests and located in an area subject to a tree farm license held by the employer. As a result of his inspection, the Board officer issued two orders finding the employer in contravention of the Regulation.

In the first order the Board officer found the employer failed to remove brush, foliage, and debris from the forest service road that prevented an adequate view of approaching traffic in contravention of section 26.82(2) of the Regulation. In the second order the employer was cited for failing to remove a dangerous tree that was hazardous to road users in contravention of section 26.82(1). The employer disputes the alleged contravention and seeks to have the orders rescinded.

Facts and Evidence

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

- In the first order, the Board officer indicates that brush and foliage was preventing an adequate view of approaching traffic on sharp curves. Portions of Traverse main and the upper Traverse roads were not cleared in order to control the hazards created by limited sight distance. The second order indicates that there was a large tree with exposed roots on a steep hillside above the Traverse main hall road which had not been removed. This presented a hazard to logging trucks hauling on the road.

- In the July 23, 2004 request for review, the employer makes a number of arguments why the orders should be cancelled. The employer contends that they have met their due diligence obligation as a brushing machine was moved onto the site July 14, 2004 in preparation for the planned brushing operation of 20 km of road. The employer acknowledges that their logging trucks started hauling in the area on July 8, 2004; however, no complaints had been received by the logging truck drivers. The employer also contends that the dangerous tree identified by the officer was not easy to detect and could be easily missed.

- A "Statement of Reasons" dated September 3, 2004 was provided by the Board's Compliance Section. The Statement of Reasons indicates that the Board officer determined that log hauling had been underway for at least four days when his inspection occurred. The case officer argues that the employer appears to be conceding both that log hauling commenced in the area as of July 8, 2004 and that brush had not been cleared creating a hazard of limited sight distances especially at sharp curves. The fact that the employer engaged a contractor to do brushing indicates that the employer was aware of the hazard.

  The Statement of Reasons also responds to the employer's contention that the dangerous tree was not easily identified. According to the case officer, the employer does not appear to disagree that the tree posed a hazard. The case officer then explains how the tree came to the officer's attention and why the tree posed a hazard.

- In the October 25, 2004 submission, the employer notes that they retained a brushing contractor to perform brush removal a month prior to the inspection and 20 km of road had already been completed. In addition, the road systems were scheduled to be brushed early this year and the brushing machine was delivered to the site prior to the orders being written. Further, although the logging trucks had started hauling, they were driving according to road conditions. For example, where brush hindered their view the drivers would operate their vehicles at a slower speed thus controlling the hazard.

- The employer's Notice of Project to the Workers' Compensation Board was received in the Nelson office on July 14, 2004. The notice indicates the jobsite location, project, project start date and indicates that a brush cutter is the type of equipment to be used.

Law and Policy

The Act

The law that applies to this review is found in sections 106 and 119 of the Act, and sections 26.82(1) and 26.82(2) of the Regulation.

Section 106 of the Act defines an "owner" as a trustee, receiver, mortgagee in possession, tenant, leasee, licensee or occupier of any lands or premises used or to be used as a workplace.

Section 119 of the Act indicates that every owner of a workplace must provide and maintain the owner's land and premises that are being used as a workplace in a manner that ensures the health and safety of persons at or near the workplace. An owner must also comply with Part 3 of the Act, the regulations, and any applicable orders.

Section 187(1) of the Act states that the Board may make orders for the carrying out of any matter or thing regulated, controlled, required by this Part or the regulations, and may require that the order be carried out immediately or within the time specified in the order.

The Regulation

Section 26.82(1) of the Regulation requires dangerous trees, loose rocks, stumps, or other unstable materials that are hazardous to road users must be removed or cleared for a safe distance back from the roadsides or roadside banks.

Section 26.82(2) of the Regulation requires brush, foliage, or debris which prevents an adequate view by a vehicle operator of traffic approaching at a roadway intersection or on sharp curves must be cleared and all possible precautions must otherwise be taken to control the hazards created by limited site distance.

Reasons and Decision

Issue #1 — The Board's Decision that Found the Employer in Contravention of Section 26.82(2) of the Regulation

The issue that must be determined is whether the employer has contravened section 26.82(2) of the Regulation. In their October 25, 2004 submission, the employer indicates that the workplace is in an area subject to their forest license. Section 119 of the Act establishes general duties of an owner which includes a licensee as defined by section 106 of the Act. An owner is obliged to maintain land and premises used as a workplace, in a manner that ensures the health and safety of workers and comply with the Regulation. The forest service road is the sole responsibility of this employer to maintain and the employer must comply with all the provisions of the Regulation including section 26.82(2).

During his inspection, the Board officer observed that there was brush and foliage that prevented an adequate view of oncoming traffic at sharp curves on portions of the Traverse main and upper Traverse roads. The Board officer determined that this constituted a hazard by

creating limited sight distance. There is no evidence submitted by the employer that calls into question the Board officer's findings. Consequently, I accept as fact that a contravention of section 26.82(2) has occurred.

Although the employer does not dispute the facts established by the Board officer, they do argue that the order should be cancelled because they have met their obligation by way of "due diligence." According to the employer, they had already hired a brushing contractor and the brushing machine was low-bedded to the worksite on the day of the Board officer's inspection. In support, the employer provided a road maintenance pre-work form and a Notice of Project sent to the Workers' Compensation Board. In their October 25, 2004 submission, the employer adds that logging trucks were driven according to road conditions, thus controlling the hazard.

The employer's arguments raise a question regarding the relevance of due diligence as a defense when an order is issued pursuant to the Regulation. Board policy D12-196-10 provides direction on how to assess due diligence in relation to the imposition of administrative penalties. If an employer exercises due diligence to prevent non-compliance with the law or regulations, a penalty cannot be imposed. Due diligence is exercised if the evidence shows that the employer took all reasonable steps to avoid the particular event.

The purpose of orders, other than to impose penalties, is to bring the employer's attention to the fact that a contravention has occurred and to motivate the employer to comply. The need to comply exists whether the employer was, or was not at fault. Therefore, there is limited application of due diligence as a defense when orders are issued. Where the Regulation imposes a specific requirement on an industry, activity, or a party, a defense of due diligence does not normally apply. Due diligence may, however, become relevant in some situations.

Prevention Guideline G-D12-187-1 discusses due diligence in relation to orders issued under the general duty provisions of the Act and Regulation. As a general rule, a party will be held accountable for a contravention if they fail to ensure due diligence with respect to their responsibilities. Consequently, due diligence may be an applicable defense where more than one person could be responsible for a contravention, or where a section of the Act or Regulation in question is so general that failure to consider due diligence would place an unreasonable burden on a person (for example, absolutely guaranteeing a safe workplace).

In this case, the employer is solely responsible for maintaining the forestry service road and there is no prospect of another party being found responsible for a contravention of the Regulation. Further, the orders under review are found in Parts 20–33 of the Regulation that impose very specific requirements on an industry and activity. Section 26.82(2) of the Regulation codifies an owner's duty to ensure that the owner's land is being used in a manner that ensures the health and safety of road users. The employer's argument that they have exercised due diligence does not apply.

Even if due diligence applied in this case, I disagree with the employer's contention that they would have met their obligation. It is an undisputed fact that the employer commenced log hauling operations in the area on July 8, 2004 at least one week prior to the commencement of brushing operations in the area. The purpose of preventative regulations is to mitigate against the potential for hazards in the workplace. Since the work commenced prior to the hazard mitigation efforts by the employer, the facts do not support the employer's contention that they

were duly diligent. The limited sight distance on the forestry service road posed a clear and immediate hazard that should have been addressed prior to log hauling in the area. Accordingly, I find the employer has contravened section 26.82(2) of the Regulation.

As a result, I deny the employer's request on this issue.

Issue #2 — The Board's Decision that Found the Employer in Contravention of Section 26.82(1) of the Regulation

In the second order under review, the Board officer found that a large tree with exposed roots on a steep hillside above the road presented a hazard to logging trucks hauling on the road. It appears from the request for review that the Board officer's evidence is largely uncontested. In their submission the employer argues that the danger tree was not easily detected and could have easily been missed. The employer does not provide any evidence in support of their contention. Again, the employer argues that they were duly diligent as they had hired a logging contractor the previous month to engage in dangerous tree removal.

The employer asks that I cancel the order based on their contention that the danger tree was not easily detected and could have been easily missed. With respect, the danger tree was easily detected and not missed by the Board officer. The Board officer is an occupational health and safety expert and his evidence and expertise is not easily disregarded. At a minimum, the employer is obliged to provide some evidence that the Board officer has erred in judgment before I would consider canceling the order. In the absence of such evidence, I defer to the Board officer's judgment in this matter. Accordingly I find that the employer has contravened section 26.82(1) of the Regulation.

As a result, I deny the employer's request on this issue.

Conclusion

As a result of this review, I confirm the orders contained in the Board's July 14, 2004 inspection report #2004111810262.

Decision of the Review Division

Number: **20779**
Date: **January 27, 2005**
Review Officer: **Marie Johnson**
Subject: **Compensation for a Fatality**

The applicant requests a review of the Board's decision of April 15, 2004. The Workers' Compensation Board (the "Board") decided that the worker, the applicant's daughter, was not in the course of her employment at the time of her death. In support of this review, the applicant has provided extensive submissions. The employer is participating and has also provided submissions. These submissions have been cross-disclosed.

Section 96(6) of the *Workers Compensation Act* (the "Act") gives a review officer authority to conduct this review.

Issue

There are two issues on this review:

1. The preliminary issue is whether the applicant has standing to initiate this review.

2. The primary issue is whether the worker's death arose out of and in the course of her employment.

Background

The deceased worker was employed as a tree planter. On May 20, 2003 she was a passenger in a vehicle that was driven into a lake by a co-worker. The worker drowned. The Board officer concluded that the worker's death did not arise out of and in the course of her employment.

The applicant objects to the Board's decision. He argues that the incident that resulted in his daughter's death occurred in a "captive workplace" and was the result of a fellow employee's negligent act.

The employer submits that the worker's use of the employer's premises was voluntary and the incident that resulted in the worker's death "had no causal connection to the work activities, production or had any benefits for the employer."

Analysis and Decision

Issue #1 — Does the applicant have standing to initiate this review?

As outlined above, this review was requested by the worker's father. There is no suggestion that he was dependent on his daughter. The applicant's submissions suggest that he has applied to the Board as his daughter's next of kin. I take this to mean that the applicant is representing the worker's estate. The Board officer forwarded a "single worker's election form" to the applicant. That form was not completed and the claim was suspended. However, on April 1, 2004 the applicant contacted the Board officer to advise that an insurer obligated to cover funeral costs required confirmation that the Board would not cover those same costs. The Board officer, in a log entry documenting that conversation, confirms that the adjudication of the claim would proceed at the applicant's request. I take this to mean that the Board officer interpreted the request to adjudicate the claim as an election to claim compensation required by section 10(2). I have no reason to reach a contrary conclusion.

The former Appeal Division of the Board has considered the rights of the estate of a deceased person to initiate or continue an appeal on the worker's behalf. Appeal #95-0991, reported at 11 *Workers' Compensation Reporter* 507, explained that, at common law, the estate of a deceased person does not automatically inherit all the rights of the deceased. Generally, with some exceptions, the rights of the deceased are extinguished upon death. The extent to which the rights of a deceased vest in the estate and the standing of the estate to commence or continue an action or an appeal with respect to those rights is a matter of statutory law.

The Act and the *Estate Administration Act* (the EAA) govern the extent to which the rights of a deceased worker to compensation may vest in their estates. In Decision #95-0991, the Panel of the Appeal Division concluded that the estate of a deceased worker had standing to continue an appeal that had been initiated by the worker and standing to initiate an appeal of a decision concerning a claim for arrears of compensation.

Section 96.3(1) provides that a worker, a deceased worker's dependent, or an employer who is directly affected by a decision may request a review of that decision. The applicant was not dependent on the worker and therefore would have standing only as the estate's representative. The Review Division *Practices and Procedures Manual*, item B2.2.1 accepts that the estate of a deceased worker has the right to initiate a review concerning a claim for arrears of compensation up to the date of the worker's death. However, this claim is somewhat unique in that the applicant acknowledges that he will not benefit financially as a result of this claim. The only compensation that would be payable is reimbursement of funeral expenses.

Section 15 provides that "a sum payable as compensation . . ." may pass to a personal representative by operation of law. Section 17(2)(a) discusses funeral expenses and provides, in part, that "in addition to any *other* compensation payable under this section, an amount in respect of funeral and related expenses, . . . must be paid . . ." (my emphasis). This suggests that funeral expenses could be considered "a sum payable as compensation."

Section 59 of the EAA provides, in subsection (2), that the executor or administrator of a deceased person may continue or bring or maintain an action for all loss or damage to the person or property of the deceased in the same manner and with the same rights as the

deceased would, if living, be entitled to. However, section 59(5) provides that the executor or administrator may also be awarded reasonable expenses of the funeral, in addition to the remedies to which the deceased would, if living, be entitled.

When I consider the provisions of sections 15 and 96.3, together with the provisions of the EAA, specifically section 59(5), I am persuaded to conclude that the estate of a deceased worker has the right to initiate a review where the sole issue before the Board is the payment of funeral expenses.

Issue #2 — Did the worker's death arise out of and in the course of her employment?

In the course of my review of this issue, I have considered the statements obtained by the occupational safety officers (OSOs), the results of the Royal Canadian Mounted Police ("RCMP") investigation, the British Columbia Coroner's Service Judgment of Inquiry dated January 12, 2004, all other file information and the parties' submissions.

The worker was 20 years old on May 20, 2003 and had started work as a tree planter on April 19, 2003. The applicant advised that his daughter was studying art in Calgary. She and a friend had intended to make some money tree planting so they could go traveling later in the summer. Between April 19, 2003 and May 20, 2003 the worker had been living at a camp supplied by the employer for a fee. The camp was approximately one-half hour from the nearest town.

The applicant takes issue with conclusions regarding the worker's activities on May 19 and 20, 2003. For the purposes of this review, I accept the applicant's description of the worker's activities on those days. Specifically, I accept that the worker left camp at 11:00 a.m. on the morning of May 20, 2003, that she attended to personal errands in town throughout the day and stopped at a nearby pub for dinner and drinks before returning to the camp between ten and eleven that night. The worker then joined two co-workers who were listening to music and socializing, including drinking, in a vehicle supplied by the employer.

The employer designated a driver for the supplied vehicles. RM was the designated driver for the accident vehicle. The keys were, however, always in the vehicle which was made available in the case of emergencies. At approximately 11:00 p.m. a co-worker, TW drove the vehicle away from camp. The vehicle was subsequently driven into a nearby lake. The RCMP investigated this incident and laid several criminal charges against TW. The employer advises that TW was convicted of impaired driving causing death and was sentenced to four years in prison and banned from driving for 10 years.

The Board officer denied the claim, noting that the worker was not in the course of her employment at the time of her death. The officer concluded that Board policy did not extend coverage in all camp situations and noted that the worker was not required to stay in the camp.

Submissions

The applicant argues that the worker's death must be found to have arisen out of and in the course of her employment because:

- the camp was part of the planter's worksite,
- the worker was a passenger in a vehicle provided by the employer, and
- the accident occurred following a common practice of drinking and listening to music in the provided vehicles during recreational time.

It is the applicant's position that a number of the criteria in policy item #14.00, *Arising Out of and in the Course of Employment*, of the *Rehabilitation Services and Claims Manual* (the "RSCM"), Vol. II have been satisfied. The applicant also submits that the road leading to the camp may fit within the definition of a captive road as considered in section 18.11, *Captive Road Doctrine*, of the RSCM and that this road posed a special hazard as contemplated by policy item #18.12, *Special Hazards of Access Route*.

The applicant also refers to policy items #19.00, *Use of Facilities Provided by the Employer*, and #19.10, *Bunkhouses*. He submits that no one suggested to the worker that she live anywhere other than the employer's camp, that the travel time to the remote camp location would have been an unreasonable burden, and, as a novice tree planter, it would have been financially unreasonable for the worker to pay to reside elsewhere.

The employer's submissions also focus on the criteria outlined in policy item #14.00 and conclude that the driver removed himself from the employment relationship with his actions of assault, driving while under the influence and removal of the vehicle without permission. Therefore, the employer submits it should not be held responsible for TW's actions as if he were an employee. In addition, the employer argues that the incident arose solely out of the worker's activities during her personal time.

Policy #14.00 Analysis

First, it appears from my review of the statements taken by the OSOs that although RM, the designated driver of the vehicle, was punched by the driver, there is no suggestion that RM was attempting to remove the vehicle keys and that this prompted the alleged assault. Second, I agree with the applicant that any finding that the driver had removed himself from the course of employment would not be determinative of the issue of whether the worker was in the course of her employment at the time the incident occurred.

The issue of whether an incident in a camp setting arose out of and in the course of the worker's employment is complex. These terms are defined in policy #14.10 in the context of the presumption in section 5(4). "Out of employment" is defined as being concerned with the cause of injury and "in the course of the employment" the time and place. As outlined in policy #14.00 a number of factors may be considered when analyzing whether an injury arose out of and in the course of employment.

The fact that the worker was not actively involved in work or on the employer's premises when the incident occurred does not necessarily result in the denial of the claim. A number of the policies found in Chapter 3, Compensation for Personal Injury, do provide for compensation in cases where a worker is injured in such situations, e.g. traveling employees who are injured on their own time in a hotel room or employees who are injured while participating in competition outside of work hours and off the employer's premises. It is necessary to consider all of the circumstances in these cases. Policy #14.00 lists a number of criteria to consider but also acknowledges that the list is not exhaustive.

My review suggests to me that few of the listed eight criteria confirm an employment relationship in these circumstances. Clearly, the fact that the vehicle was provided by the employer and the worker was, as a result, receiving some consideration while using the vehicle weigh in favour of a work relationship. I agree with the applicant that the chain of events that resulted in the worker's death began on the employer's premises, but I do not find that this conclusion weighs for or against a finding of a work relationship. I also acknowledge the applicant's position that the employer, by inactivity contributed to the circumstances that led to his daughter's death. However, I am of the view that this issue, the circumstances of the incident, and the policy #14.00 criteria are more properly analyzed by considering policy items #19.00 and #19.10.

Analysis of Policy Items #19.00 and #19.10

Policy #19.10 specifically relates to the situation where a worker is injured in the course of using some facility supplied or provision made by the employer. Even where the worker was not actively involved in work this policy clarifies that compensation may be payable as the injury may be found to have resulted from the employment relationship. It is necessary to consider all of the circumstances in these cases. I find policy item #19.10, *Bunkhouses*, relevant and applicable.

The applicant has provided submissions with respect to these policies. He suggests that the employer "appeared to condone the practice of its employees to gather in the vehicles provided by the employer to socialize, listen to music and drink alcohol." He argues that given the situation, a claim that has, to a large extent, arisen from this practice cannot be denied.

From my review of the available information, including the interviews of the employees and employer representatives, I would agree with the applicant's observation that the employer allowed the workers to sit in the vehicles, socialize, including drinking alcohol and play music and use the heater which required the vehicles to be running. I would liken this to the employer providing a recreational facility.

Although the employer did not provide bunkhouses to all employees, there were cabins available as well as areas where the employees could pitch tents or park their vehicles. Policy item #19.10 provides that if a worker is required to use premises supplied by the employer those premises are considered part of the employment where there is no reasonable alternative accommodation or their use is encouraged or contemplated by the employer.

The information provided by the employees and employer suggests that, while many of the workers did live at the camp, it was not required and there were some employees who lived off site. Specifically, I note that RM, in his statement of May 22, 2003, confirms that there were other planters who stayed in town and met the crew at various junctions.

However, as the applicant points out, in many situations, and particularly with this worker, it was not feasible, from a financial standpoint or otherwise to find alternate accommodation. Policy item #19.10 discusses this situation in paragraph #2 which reads as follows:

> Where a camp is isolated or for other reasons the worker has no reasonable choice about staying in accommodation provided by the employer, injuries resulting from the use of facilities provided by the employer on the camp site will normally be held to have arisen out of and in the course of the employment. This applies not only to residential but to recreational facilities. This principle is illustrated by the facts of a Board decision where a claim was allowed from a man working for a mining company in a remote area of British Columbia and living in a bunkhouse provided by the company at a townsite approximately half a mile from the mine. Some time after the end of his shift the worker was going for a recreational walk, and was injured in a fall while descending the steps of the bunkhouse.

The policy outlined in paragraph #5 must also be considered. It reads as follows:

> Even where the bunkhouse is not isolated and there is other available accommodation, there may be coverage where the bunkhouse accommodation is provided free of charge and the worker would have to pay for other accommodation. In practice, most persons would stay in the bunkhouse in such a situation and only those who had existing homes nearby would likely exercise the option to live elsewhere. The freedom of choice would be more theoretical than real and this may be a factor which indicates that coverage should extend to residing in the bunkhouse. On the other hand, while in the case of an isolated camp, coverage may extend to injuries arising from both residential and recreational facilities, the same will not necessarily be the case when the bunkhouse is located close to the town and alternative facilities. Economic factors may make a worker's freedom to choose the worker's own residence largely theoretical, but this does not extend to the choice of recreation. In the Kelsey Bay case described above, the claim was for an injury occurring in the course of a recreational activity.

In the circumstances of this claim the camp was not isolated and was not provided free of charge. However, I agree with the applicant that the worker had, at the time the incident occurred, more of a theoretical than real choice about whether to stay at camp or live in the nearby town, one-half hour away. The worker had only arrived to work as a tree planter in the past three weeks. Her home was a significant distance away and she was not an experienced planter. The applicant suggests that the worker earned very little in the first week. While I note that the worker's earnings in the one month prior to the incident totaled $1,173.38 (as outlined in the employer's letter to the Board June 6, 2003), I have no reason to query the applicant's evidence that in the first week of planting the worker's earnings were minimal. Therefore, I conclude that, for this worker, coverage would extend to residing at the camp, even though this camp was not isolated or provided free of charge. I also agree with the applicant that, by living in camp, the worker's immediate availability conveyed some benefit to the employer.

However, this portion of the policy suggests that in such a case, where the bunkhouse is not isolated, injuries resulting from residential and recreational facilities may be treated differently. I find most important the policy's suggestion that, although economic factors may make

a worker's freedom to choose the worker's residence largely theoretical, such cannot be said for the choice of recreation. In the circumstances of this claim I liken the use of the vehicles to socialize as recreational activity.

A Panel of the Appeal Division, in Decision #96-0277, considered the case of a worker who injured his left ankle when he fell on ice in a camp parking lot. The worker, prior to the incident, had gone to town to socialize in a bar. The Panel found that the worker's participation in this recreational activity was part of his personal and social life. The Panel went further and concluded that this was not a situation in which the scope of coverage would extend to the use of recreational activities due to the remoteness of the location and lack of reasonable alternatives.

The Panel also considered the example provided in paragraph #4 of policy item #19.10 and noted that in that example "the fact that the employee was injured on the employer's premises was considered less significant than the fact that the employee had a choice of recreation." In that example, the worker resided in the employer's bunkhouse close to a town where there were recreational facilities and living accommodation available to him. The worker's claim for an injury when he fell down the steps of a building on his employer's camp complex which was used for holding film shows was denied.

As outlined in Decision #96-0277, these two examples distinguish between situations where the bunkhouse is in an extremely remote setting, in which case the recreational activity may be included in the scope of the employment relationship and situations where the worker has the freedom to choose his or her recreation. In that case the recreational activity is treated as outside the employment relationship, even though it may result from the use of the employer's premises, such as was the case in the example in paragraph #4.

However, the Panel noted that the worker's fall appeared to be due to additional hazards to which the worker was exposed on the employer's premises. The Panel went further and found that there was a link between the conditions under which the claimant was compelled to live and the nature of the injury and that those conditions were at least to some extent within the employer's control. The Panel concluded that the fall in the parking lot was more closely connected to the worker's employment related residence in the bunkhouse than to his choice of pursuit of a personal recreational activity and concluded that the worker's fall arose out of and in the course of his employment.

There, the camp conditions of freezing rain, poor lighting, and a lack of sand or salt on the parking lot, and the worker's requirement to walk across the parking lot to reach the bunkhouse resulted in his injury. When I analyze the facts of this case, I am lead to conclude that the worker's death, as a result of this tragic accident, is more closely connected to her "choice of pursuit of a personal recreational activity" than connected to her employment-related residence in the camp. While in the slip case the worker was compelled to walk across an icy parking lot; here, there was no similar requirement for the worker to be in the vehicle. I do not equate the employer's provision of a vehicle and condoning of drinking when sitting in the vehicle with the engine running to the failure to keep the parking lot free of ice. In my view, the analysis of recreational activities in policy #19.10 supports that conclusion. In this case, reasonable recreational alternatives were available; the camp was close to town, the worker had her own vehicle in the camp, and there were heated cabins where the employees could socialize.

I have also considered the decisions provided by the applicant. The British Columbia Court of Appeal decision in *Hagen v. Thompson Valley Insurance Agency Ltd.* decided an employer's liability, applying common law rules because the operation was not captured under the Act. Here, I must apply Board policies rather than the common law. The facts considered by the Appeal Division in its Decisions 92-0355 and 92-1543 distinguish those decisions from the facts of this claim. I think it is helpful to elaborate further on each decision.

In Decision 92-0355, the worker was being driven home when he was accidentally shot by the driver who stopped the vehicle to hunt. The workers were paid while traveling to and from a remote job site and the Appeal Division accepted they were workers at the time of that commute. The issue being considered was whether the driver's hunting activity took him out of the course of his employment and the Appeal Division found that it did. The determination of the workers being in the course of their employment did not turn on their use of a benefit provided by the employer.

The facts of Decision 92-1543 involved a worker who was on his way out of a remote logging camp for personal reasons. The Appeal Division found that the logging road was not a captive road as discussed in policy #18.11. The worker's vehicle collided with a logging truck, that was owned by the company the worker worked with, traveling to the same camp where the worker worked. The Panel noted that the worker was there because of his employment and logging trucks were directly connected to his employment. Therefore, the Panel concluded that the truck was a special hazard that went beyond the ordinary hazards of highway or off-road travel and it was directly connected to the industrial environment. In these circumstances the Panel found that because the worker was required to travel on the logging road due to his employment and suffered an injury due to a "special hazard" he was in the course of his employment. Here, the road being traveled was not a "captive road," it was a public road. Also, I do not conclude that the absence of lighting and distinct markings for the entrance to the camp were "special hazards" as suggested by the applicant. Rather, such conditions are consistent with normal off-road travel.

Based on my analysis of the criteria in policy #14.00 and other Board policies I conclude that the motor vehicle accident resulting in the worker's death did not arise out of and in the course of her employment. Therefore, I must deny the applicant's request.

Finally, it is my impression that one of the applicant's objectives is to increase safety standards at tree planters' camps in general, and, specifically this employer's camps. The applicant has also suggested that a coroner's inquest should be held. My jurisdiction is limited to reviewing the decision made and reaching a decision that it be confirmed or varied. The Board has the discretion to investigate worksites and my decision cannot determine whether such an investigation should be undertaken. Similarly, I have no ability to direct the coroner's service in any way.

Conclusion

As a result of this review, I confirm the Board's decision of April 15, 2004.

Decision of the Review Division

Number: **21018**
Date: **December 1, 2004**
Review Officer: **Sam Isaacs**
Subject: **Exceptional Circumstances Under Section 33.4**

The worker requests a review of the decision of the Workers' Compensation Board (the "Board") dated July 15, 2004. The worker has not provided any submission beyond that contained in his request for review. The employer was given notice of the review and is participating. The employer has not provided any submission to this review.

Section 96(6) of the *Workers Compensation Act* (the "Act") gives a review officer authority to conduct this review.

Issue

This is a review of the Board's decision regarding the worker's long-term wage rate.

Background

The Board accepted this worker's claim for an injury that occurred on May 21, 2004. As the injury resulted in temporary disability, the worker was paid temporary disability benefits. The wage rate for the initial payment period of 10 weeks was calculated with reference to the worker's earnings at the time of injury, which was listed as "$16.57 per hour," plus 4% holiday pay. In the decision under review, the Board officer determined the worker's wage rate for the long term with reference to his earnings in the 12-month period immediately preceding the date of injury.

The worker, in his request for review, writes that he had been working for this company for approximately one year, but started at a rate of $10 per hour, until he "had shown [his] ability to work." He further wrote that a review of the hours that he worked in the previous year, multiplied by his wage rate at the time of his injury, of "$16.50 per hour," would give a more accurate figure on which to base his compensation rate.

Facts and Evidence

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

- The Employer's Report of Injury documented the work incident of May 21, 2004. The worker was reported to be working as a band saw operator, earning $16.57 per hour. The worker's earnings in the three months prior to injury were reported as $8,000.68. His earnings in the one year prior to injury were reported as $28,732.29. The worker was listed as working permanent full-time, and had started work there on May 15, 2003.

- A log entry dated June 3, 2004 documented the acceptance of the worker's claim. The initial wage rate was based on the worker's hourly rate of pay, which was "annualized" to give an equivalent one-year figure of $35,942.70.

- A log entry dated July 15, 2004 documented the calculation of the worker's long-term wage rate based on the earnings in the 12-month period prior to injury, of $28,732.29.

- In order to obtain additional information, I spoke to the worker on October 13 and 14, 2004. I also spoke to the employer, C., on October 21, 2004. The worker advised that he started working for the employer at $10 per hour doing general work duties, and working as a sander/grinder man. Over the course of the year he received various wage increases, going to $11 per hour after approximately one week, $12 per hour as of June 8, 2003, $13 per hour as of July 20, 2003, $14 per hour as of October 25, 2003, $15 per hour as of January 30, 2004, $16 per hour as of April 11, 2004 and $16.50 per hour as of May 13, 2004. The worker explained that during the course of the year his job responsibilities also changed, as he transferred over to become a band saw operator. He worked as a band saw operator as of September 2003, and was working in this position when he was hurt on May 21, 2004. He explained that even after commencing to work as a band saw operator he was given wage increases because of his work ethic, and the job that he was doing. In addition to operating the band saw he did other tasks, such as crane mechanics.

- The employer advised that they generally hire younger workers at a lower starting rate. In this case, the worker was older, and because they wanted the worker to stay with them, they moved him up in salary. The employer advised that the worker moved up to become their band saw operator, taking over from a previous individual who had left. The previous individual was not a full-time band saw operator. As a result, the employer was not able to advise what a full-time band saw operator earned in the 12-month period prior to the injury. However, in further discussion, the employer advised that if they had a full-time band saw operator similar to the worker, earnings in the 12-month period prior to the injury would have been based on an hourly rate of $16.50 per hour for a 40-hour workweek, with 50 weeks of available work. The company shuts down for two weeks at Christmas time. Any overtime that might have been available would have been infrequent in nature. As a result, the employer advised that the figure of $33,000 would represent what a similar worker would have earned in the 12-month period immediately preceding the date of injury.

Law and Policy

The Act

The law that applies to this review is found in section 33.1 and section 33.4 of the Act. Section 33.1 sets out two general rules for determining a worker's average earnings, for the initial period and for the long term. These general rules are subject to several exceptions. Section 33.4 provides an exception to the general rule for determining a worker's long-term wage rate where exceptional circumstances exist, such that the application of section 33.1(2) would be inequitable.

Policy

The policy relating to this review is found in the *Rehabilitation Services and Claims Manual* ("RSCM") Vol. II. Specific policy items include:

- Policy item #66.00, *General Rule For Determining Long-Term Average Earnings*, provides direction on applying the general rule for determining a worker's wage rate for the long term.

- Policy item #67.60, *Exceptional Circumstances*, provides direction on determining a worker's wage rate with reference to the exception to the general rule found under section 33.4, for exceptional circumstances. Various criteria are identified to determine if a worker's circumstances are exceptional.

Reasons and Decision

In the decision under review the Board officer determined the worker's long-term wage rate with reference to the general rule under section 33.1(2), and used the worker's earnings in the 12-month period immediately preceding the date of injury. The worker submits that using the 12-month earnings does not take into account that his wage rate had increased to $16.50 per hour, at the time of injury.

Both the employer and the worker agree that the worker was initially hired in a different job, at a lower rate of pay, than the job that he was doing at the time that he was injured. During the course of his employment with this employer, the worker's wage rate increased from $10 per hour to $16.50 per hour, and his job changed from a sander/grinder man and general duties, to that of a band saw operator with additional duties relating to crane mechanics and other electrical work. The employer has confirmed that the worker's progression was unusual for them, but the worker was a good worker, and they wanted him to stay with them.

Section 33.1(2) requires the Board to use the worker's earnings in the 12-month period immediately preceding the date of injury, unless an exception to the general rule applies. The worker has been employed by this employer for over 12 months. The only potential applicable exception, in this case, would be with reference to section 33.4. Section 33.4 requires two conditions to be met — that exceptional circumstances exist, and be of a type such that the application of the general rule would be inequitable. In such cases, the Board determines the average earnings of the worker based on the amount that the Board considers to best reflect the worker's loss of earnings. In this case, the worker has argued, in essence, that an inequity has resulted, as his earnings from the earlier part of the year do not reflect his earnings at the time of injury. However, section 33.4 also requires that an exceptional circumstance exists.

Policy item #67.60 provides guidance on determining when a worker's circumstances are exceptional. Three criteria are listed, of which only the first might have application in this case. This criterion applies where a worker had a history of regular full-time employment, "and the worker's earnings in the 12-month period immediately preceding the date of injury do not reflect the worker's historical earnings because of a significant atypical and/or irregular disruption in the pattern of employment during that period of time."

Under review decision #7512, a review officer found that section 33.4 should apply in a case where a worker had been working on a casual basis with the employer, for a lengthy period of time. During the 12-month period immediately preceding the date of injury, that worker's employment changed, to become full-time. As a result, the application of the general rule would have had inequitable consequences for the worker, as the worker's long-term wage rate was lower because of her significant period of casual employment with her employer during the relevant 12-month period. This resulted in a lower wage rate than the rate that would have been used had she worked for a different employer as a casual worker before commencing her full-time employment, or had not worked at all prior to becoming a full-time regular worker with her employer.

In the facts under review decision #7512 the worker's categorization of employment, as defined within the legislative options and rules, changed during the relevant time period, from casual to full-time.

In the review before me, I must determine whether this worker's circumstances meet the requirements of policy item #67.60. There are certain gross similarities to the circumstances under review decision #7512. While this worker's employment categorization has not changed, his job with the same employer has changed, as has his hourly wage rate. As a result, the worker's hourly rate of pay increased by 65% over the course of the year. The worker also commenced a different job, which related to the increase in pay. The employer has advised that a similar worker would have earned approximately $33,000 in the 12-month period prior to injury, which reflects a difference of almost 15%, compared to the figure used by the Board. This difference, on a percentage basis, exceeds the example cited in policy item #67.60 for a worker who had missed more than six consecutive weeks in the 12-month period immediately preceding the date of injury.

In deciding this review I am required to apply the Board's policies. I am not bound by the interpretations or applications of policy as set out in other review decisions. Each review must be determined on its own merits. I note however, that notwithstanding the similarities between review decision #7512 and this case, there are material differences that require a different approach in this case. The inequity under review decision #7512 was found to have occurred as a result of the categorization of the worker, and the types of exceptions to the general rule allowed for under the Act. During the earnings period under review, the worker's employment changed from casual (section 33.5) to a regular worker employed less than 12 months (section 33.3), such that the combination resulted in the worker also being considered under the general rule found in section 33.1(2). This exceptional circumstance was found to have resulted in an inequity.

In the case before me, the worker's employment categorization has not changed. As a result, there is no inequity based on the legislative model. Any potential for an inequitable result would first require exceptional circumstances to exist, and result from the application of the general rule, noting the worker's change in hourly rate of pay and job assignment.

It is not uncommon for workers to experience changes in their hourly rate of pay over the course of a year. It is also not uncommon for workers to receive promotions, or otherwise change jobs with their employer at various points in time. However, neither of these factors is identified as an exceptional circumstance or significant criterion under policy item #67.60.

Furthermore, policy item #67.60, by stating that the "following criteria *shall* be applied . . ." [emphasis added] restricts the discretion of the Board officer to consider and apply other criteria.

The criteria used in policy item #67.60 resulted from legislative amendments to the Act that took effect on June 30, 2002. These amendments resulted from the core review of the Act. The core reviewer, in recommending a substantially different legislative model for determining a worker's average earnings, recommended an exception to the general rule where extenuating circumstances would produce an inequitable result. He cited two examples where the general rule for determining the long-term wage rate might constitute such an extenuating circumstance. These related to cases of a young worker, or a student with part-time or seasonal employment, where the average earnings at the time of injury did not equitably represent the worker's lost earning capacity. The core reviewer further wrote: "I wish to emphasize that the WCB's utilization of this 'catch-all' discretionary authority is intended to be the true exception, and not the rule." The Board's *Policy Framework* public consultation paper reflected this intent by stating that policy item #67.60 would only be used in "rare situations."

I appreciate the worker's concern regarding his perceived disadvantage through the Board's inclusion, in determining his average earnings, earnings from the earlier part of the year where he was being paid less, and for a different job with this employer. However, in deciding this matter, I am bound by the published policies of the Board. Section 33.4 gives the Board the authority to determine the exceptional circumstances that would be inequitable. Policy item #67.60, approved by the Board of Directors, is deliberately narrow, and follows from the recommendations of the core reviewer, and after public consultation.

Policy item #67.60 does not include, as an exceptional circumstance, the more common experiences of wage increases or changes in jobs while with the same employer. The general criterion considers, as an exceptional circumstance, a "significant atypical and/or irregular disruption in the pattern of employment . . ." during the time period under consideration. I do not conclude that wage increases or promotions are either atypical, or disruptions in the pattern of employment, within the meaning and intent of policy item #67.60. To so conclude would give a broader meaning to policy item #67.60 than written, and contrary to the intent that this policy would only be used in rare situations.

As I do not find that an exceptional circumstance exists, the first requirement of section 33.4 is not met. Section 33.4 is therefore not applicable in this instance. The worker's long-term wage rate must therefore be determined under the general rule of section 33.3(2). As a result, I deny the worker's request.

Conclusion

As a result of this review, I confirm the Board's decision of July 15, 2004.

Decision of the Review Division

Number: **21260**
Date: **October 19, 2004**
Review Officer: **Nick Attewell**
Subject: **Whether Refusal to Make a Decision is a Reviewable Decision**

The employer requests a review of a letter of the Workers' Compensation Board (the "Board") dated August 10, 2004.

Issue

The issue is the whether the Board's letter declining to alter a prior decision refusing the employer relief of costs is a reviewable decision.

Background

The worker injured her neck and shoulder on October 9, 1996, from lifting a mattress in the course of her employment as a housekeeper in a hospital. A claim was accepted and temporary disability benefits paid from October 11, 1996, to September 7, 1997. On July 4, 1997, a decision was made denying relief of costs. It stated

> Based on my review of the claim, there is no evidence at this time, of a pre-existing disability, disease or condition enhancing the employee's recovery from the injuries sustained. Section 39(1)(e) has, therefore, not been applied on this claim, at this time. In addition, there is no evidence that the employer is entitled to any other form of relief of costs.

On June 7, 2004, a consultant wrote the Board to ask as follows:

1. Has section 39(1)(e) relief been considered? If so, and if the decision was made prior to the conclusion of the claim, please provide a final decision with respect to all evidence received on file since the first decision.

2. Has section 42 relief (including Policy #115.30 exclusions) been considered? If so, and if the decision was made prior to the conclusion of the claim, please provide a final decision with respect to all evidence received on file since the first decision.

The letter that is the subject of this review responded to the June 7, 2004, request. This letter referred to the July 4, 1997, decision and summarized the contents of the letter regarding section 39(1)(e). With regard to section 42, the letter stated that the July 4, 1997, letter did

consider whether policy #115.30 applied. Finally, the letter stated that "there has been no new evidence or new information or any evidence of error that would alter any decision under this claim."

Reasons and Decision

The letter that is the subject of this review in effect declined to make a new decision on relief of costs under either section 39(1)(e) or section 42 that was requested by the employer. The main issue before me is whether such a refusal to make a new decision is itself a reviewable decision. This requires consideration of the sections of the Act that authorize the Review Division to conduct reviews.

What decisions may be reviewed?

Section 96.2(1) of the Act states that the following Board decisions in a specific case may be reviewed:

> (a) a decision respecting a compensation or rehabilitation matter;
> (b) a decision respecting an assessment or classification matter, a monetary penalty or a payment under section 47 (2), 54 (8) or 73 (1) by an employer to the Board of compensation paid to a worker;
> (c) a Board order, a refusal to make a Board order, a variation of a Board order, or a cancellation of a Board order respecting an occupational health or safety matter.

A decision granting or refusing relief of costs is normally a reviewable decision under this section, likely under paragraph (b).[1] However, neither paragraph (a) nor (b) refer to refusals to make decisions. This is in contrast to paragraph (c) in the prevention context, which specifically grants a right to request a review of a "refusal to make an order" as distinct from an "order." It would seem reasonable to infer from these differences in wording that there is no right to request a review of a refusal to make a decision respecting a compensation or assessment matter.

A decision to reject this review might rest solely on the normal meaning and natural inferences to be drawn from the wording of section 96.2(2). However, the Workers' Compensation Appeal Tribunal ("WCAT") has in some recent decisions discussed below found that the Review Division erred in rejecting certain requests to review refusals to make decisions in situations similar to the present case. Since the rationale for these decisions is not totally clear, a broader discussion of the issues is necessary that goes beyond a simple reliance on the wording of section 96.2. In the balance of this decision, I consider whether the provisions of the Act warrant a conclusion that, notwithstanding the specific wording of section 96.2, the overall intent of the Act is best met by allowing reviews of refusals to make decisions in cases such as the present.

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[1] This arises from section 96.2(2)(e), which is discussed further below.

History of the Workers' Compensation Appeal System

The first Act in 1917 set up an inquiry system of decision making that vested the powers of the Board in a Commission, initially consisting of three members. The commissioners were responsible for the overall administration of the Board as well as making policy and the final decisions on individual matters. There were no explicit rights of review or appeal. This system continued until 1991, though from the 1950s certain rights of appeal were created.

The first Royal Commission on Workers' Compensation in 1942 considered a request to create a right of appeal, but recommended against it. The Commission believed that permitting appeals of WCB decisions would interfere with the ability of the system to provide "quick, summary, and final decisions."[2] The first statutory right of appeal was created following the second Royal Commission, which reported in 1952. This appeal was limited to medical issues on claims. A more general right of appeal to independent "boards of review" was created in 1974. Since this appeal was limited to decisions "with respect to a worker," there was no right of appeal on assessment and relief of costs decisions. The statute included a right for workers or employers to appeal board of review decisions to the commissioners of the Board and a discretion for the Board as whether to implement board of review decisions. In February 1986, the name of the board of review was changed to the Workers' Compensation Review Board.

In 1988 the minister of labour appointed Donald R. Munroe, QC, to chair an advisory committee to examine the structure of the WCB. The committee recommended a different form of governance. It proposed that the policy-making, administrative, and appellate functions previously held by the commissioners be assigned to different persons. The policy making functions would be assigned to a body of governors, the administrative functions to a president and chief executive officer, and the appellate functions to an Appeal Division.[3] These recommendations were implemented effective June 3, 1991, and continued until the recent changes to the appeal system that took effect on March 3, 2003.

As well as hearing appeals from the Review Board, the Appeal Division was authorized to hear appeals by employers from assessment notices, classification decisions, relief of costs decisions, and penalties for health and safety violations. This was limited to situations where there was an error of law, fact, or policy.

The development of the appeal system shows an intention to strike a balance between conflicting values. On the one hand, there is the need for the Board's governing body and administration to fairly, consistently, and efficiently develop the rules that govern the system and conduct the Board's operations. On the other hand, there is the desire of individual parties to obtain fair and independent reviews of their own issues. In recognition of the Board's operational and administrative needs, at no time have independent appeal bodies obtained final jurisdiction over all Board decisions or activities. With regard to the issues on this appeal, there was no independent right of appeal on assessment and relief of cost issues until 1991, and this right has continued up to now to be more restricted than appeals rights on claims

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[2] The Report of the Commissioner, Relating to the Workmen's Compensation Board, Gordon McG. Sloan, (1942) p. 190.

[3] The Munroe Report can be found at page 231 of Volume 9 of the *Workers' Compensation Reporter.*

issues raised by workers and employers. It appears that, in balancing the conflicting values, the legislation gives more weight to the Board's operational needs on assessment and relief of costs issues than for claims issues.

Restrictions on Assessment and Relief of Cost Reviews in the Current Appeal System[4]

Section 96.2(2) of the Act specifically excludes certain types of assessment decisions from the jurisdiction of the Review Division. The general intent behind these exclusions is to prevent reviews on systemic matters that might affect large numbers of employers but to allow employers to raise issues that are of individual concern.

Of particular relevance to this review is section 96.2(2)(e) excludes the following in the context of relief of costs:

> The allocation of income, compensation payments, outlays, expenses, assets, liabilities, surpluses or deficits to or from the account of a class or subclass, or to or from a reserve of the accident fund, except an allocation as it relates to a specific employer or an independent operator respecting:
>
> (i) the account of a class or subclass described in section 10 (8), or
> (ii) the reserve described in section 39(1)(b), (d) or (e). (96.2(2)(e))

Employers can request reviews of relief of costs decisions made under the sections listed in paragraphs (i) and (ii). However, they cannot request a review of any decision under a section that is not listed in those paragraphs if that decision concerns whether claim costs should be assigned to another class or subclass or to a reserve. For example, as in this case, employers sometimes request relief of costs under section 42 of the Act. Such requests would not fall within the exceptions in paragraphs (i) and (ii).

The Board's policy on experience rating provides for costs to be deducted from an employer's account in certain situations that would not be covered by paragraphs (i) and (ii) of section 96.2(2)(e). Policy #115.30 of the *Rehabilitation Services and Claims Manual* lists these situations. Section 96.2(2)(f) provides that no review may be requested of "the determination of an assessment rate for a class or subclass, except the modification to the assessment rate determined for an employer on the basis of the employer's own experience." The exception for experience rating permits requests for review of decisions regarding situations listed by policy #115.30 (for example injuries occurring during Board-sponsored retraining programs). However, a decision on a general request for relief under section 42 that does not relate to one of these situations does not fall within the exception allowed by section 96.2(2)(f) and is therefore not reviewable.

If a decision to grant or refuse relief of costs under section 42 is not reviewable, a refusal to make a decision of that type must also not be reviewable.

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[4] The Act also excludes certain claims and prevention decisions from parts of the current appeal system. Notably, the Review Division has no jurisdiction over reopenings "on an application" (section 96.2(2)(g)) and WCAT has no jurisdiction over several matters, including decisions on vocational rehabilitation (section 239(2)).

What remedy exists when a decision cannot be reviewed or appealed?

Since the Act has excluded certain types of assessment and relief of costs decisions, it obviously envisages that persons who are dissatisfied with those decisions would have remedies other than requesting a review.

As noted earlier, the 1988 Munroe Report distinguished three main functions that the Board performs: the policy making, administrative, and appellate functions. Each has its own legitimate role and is assigned to different parts of the system. Where complaints or other matters cannot be dealt with by the appeal system, they must be dealt with by the policy making and administrative arms of the Board. In particular, a major role of the administrative arm of the Board, reporting to the president, is to make decisions on individual matters affecting persons external to the Board. This is not just a matter of making one decision on any issue. Within the legal limits established by the Act, the Board is constantly reexamining and varying initial decisions as new evidence comes to light or circumstances change. Many such changes result from complaints, inquiries, or submissions from the persons affected.

It would not be appropriate for the Review Division to take jurisdiction over a type of decision not covered by the words of section 96.2 on the basis that there was no other remedy for the complainant. This would contradict the overall arrangement of the Act whereby the policy making, administrative, and appellate functions are each assigned specific to different parts of the Board.

Should complaints regarding refusals to make decisions be reviewable?

Even if it is recognized that the policy making, administrative and appellate parts of the Board have their own roles, it might still be questioned why refusals to make new decisions regarding compensation and assessment matters should not be reviewable.

To answer this question, it will first be helpful to compare refusals to issue prevention orders, which the Act specifically states are reviewable, with refusals to make other kinds of decisions. Prevention orders can be distinguished in two significant ways:

1. Since a prevention order is typically intended to remedy an unsafe situation at a workplace, it is apparent that workers or other persons at the workplace will be directly and immediately affected by a failure to issue an order.

2. A refusal to issue a prevention order will usually result from a determination by a Board officer that no unsafe situation exists, or that an order is not required or authorized to remedy an unsafe situation. This determination involves a weighing of evidence, a determination of facts and the application of law and policy, and is similar to many other decisions over which rights of review exist.

The lack of these two factors in the case of refusals to make decisions on compensation and assessment matters means that less grounds exist for considering them reviewable.

In considering whether to agree to a request from an external party to make a new decision on a matter, both legal/policy and administrative factors may need to be considered.

Legal/policy factors may consist of provisions of the Act or policy indicating a responsibility to make a new decision. For example, certain sections of the Act give specific rights to persons to make applications to the Board. There may also be provisions of the Act or policy suggesting or requiring that no decision be made. Of note in this decision is section 96(5)(a) of the Act, which states that the Board cannot reconsider a prior non-prevention decision more than 75 days after the decision was made.

Administrative factors may be relevant as follows:

- *The criteria to be applied in deciding whether grounds exist for making a new decision.* Because of the costs involved in making decision, it is reasonable for the Board to set policies and criteria for when it will make new decisions, particularly when a prior decision has already been made on the same issue. For example, in policy C14-103.01, the Board requires that certain grounds be presented before the Board will consider reconsidering a prior claims decision.

- *Whether to take any action at all in response to a request for a new decision.* Just to consider whether grounds exist for making a new decision can involve significant administrative costs. This cost may be increased if, as is the case with the June 7, 2004, letter from the consultants in this case, the request for the new decision is a standard form letter that makes no specific submission regarding the facts of the particular case. The Board's file may or may not contain information that would support the request, but the Board will bear the burden of incurring the cost necessary to find out. The Board may legitimately expect a party to provide specific reasons in support of its request before agreeing to consider whether there are grounds for reaching a new decision.

- *The timing of a decision.* Even though the Board may be required to make decisions on a particular issue, it is reasonable for it to reduce to a minimum the number of these decisions that must be made. In the relief of costs context, for example, it may be possible to reduce costs by delaying the decision until the worker's disability ends.

It may be arguable that a refusal to make a decision is reviewable if it appears to contradict a requirement of the Act or policy that a new decision be made. Whether or not that position is taken, difficulties arise if a review is allowed to proceed where the Act or policy does not require a new decision or actually precludes a new decision from being made. Where there is no clear obligation to make a new decision, administrative factors will likely be significant factors in the refusal. If the Review Division accepts a review in such situations, it will be undermining the role of the administrative part of the Board in determining the best allocation of the Board's resources. If, for example, the Board declines to act in response to a request for a new decision that is unsupported by any grounds, the Review Division will by accepting a review either conduct the inquiry that the Board has refused to conduct or force the Board to do so. This will encourage parties to request new decisions from the Board, since they will know that, if the Board declines to act, the Review Division will do so.

Decisions Under Section 39(1)(e)

In light of the above general discussion, the questions remains whether refusals to make new decisions under section 39(1)(e) should be reviewable at all and, if they are reviewable, should this be limited to specific situations.

Section 39(1)(e) states that "for the purpose of creating and maintaining an adequate accident fund, the Board must every year 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 to . . . provide and maintain a reserve for payment of that portion of the disability enhanced by reason of a pre-existing disease, condition or disability . . . . "

This section only requires the Board to establish a reserve. It gives no specific right for an employer to have costs assigned to this reserve and would appear to leave the Board with a broad authority to determine criteria as to when and how it will make decisions. The Board has established policies and practices for this purpose. Policy #114.40B, *Enhancement of Disability by Reason of Pre-Existing Disease, Condition or Disability*, of the *Rehabilitation Services and Claims Manual*, Vol. II, sets out the criteria on which decisions are made. Policy #114.43, *Procedure Governing Applications under Section 39(1)(e)*, sets out the responsibility to make decisions as follows:

> The Board has the responsibility to initiate consideration with or without a specific request or application by an employer, and to decide upon the applicability of the subsection on a claim. If a decision is made to apply this subsection, the employer will be notified. If relief has been requested, the employer will be advised if it has been denied. If there is a disagreement with such a decision, the employer may request a review by the Review Division.

The policy does not specify when an initial decision should be made or discuss if and when second decisions might be made after the initial decision. The timing of initial decisions is covered by the Worker and Employer Services Division's Practice Directive #62, dated July 1, 2003, but the Practice Directive is also silent concerning requests for additional decisions.

Administrative factors are clearly significant for the Board in considering whether to make new decisions under section 39(1)(e). Even if a review of a claim file after the fact indicates that there may be reason for making a new decision, it is necessary to consider how the matter was initiated and the reasonableness of the Board's refusal to make a new decision. As was the case with the consultant's letter of June 7, 2004, requests for new relief of costs decisions are often form letters that provide no specific reasons relating to the claim that would warrant the Board considering the request. If reviews are allowed to proceed in these cases, the Board would not be able to refuse such requests in future without creating a reviewable decision. The result would be that the Board would be forced to consider the matter. This clearly undermines the ability of the administrative part of the Board to perform its role of efficiently allocating scarce resources.

The absence of a clear legislative or policy direction to make second decisions under section 39(1)(e) together with the significant administrative factors involved in making such decisions suggest that a refusal to make these decisions should not be reviewable.

Impact of the Limits on the Board's Authority to Reconsider Prior Decisions

A common reason for refusing a request for a new decision under section 39(1)(e) is that section 96(5)(a) precludes a new decision due to the lapse of more than 75 days since the original decision denying relief of costs. The August 10, 2004, letter under review did not specifically mention this reason, but might have done so.

This issue has been considered in several recent WCAT decisions. For example, in Decision #2004-00638, the Review Division rejected a request for review of a letter dated March 18, 2003, declining to make a new decision following a prior decision dated August 28, 2000, refusing relief of costs under section 39(1)(e). WCAT stated:

> A preliminary issue arises as to whether the August 28, 2000 decision by the case manager to deny relief of claim costs was of a conditional nature, which was intended to be "time-limited" in its application. Was it limited to the issue as to whether, in terms of the claim costs to the date of the decision, the worker's disability had been prolonged or enhanced by reason of a pre-existing disease, condition or disability? Such a decision would leave open for future consideration the question as to whether further periods of disability involved prolongation or enhancement on the basis of a pre-existing disease, condition or disability.
>
> Alternatively, did the August 28, 2000 decision provide a categorical denial as to the existence of any pre-existing disease, condition or disability? If so, there would be no basis for a later new decision under section 39(1)(e). If there were no pre-existing disease, condition or disability, the occurrence of further periods of disability would not give rise to a need for further consideration as to whether there had been a prolongation or enhancement by reason of a pre-existing disease, condition or disability. Any further consideration under this section would necessarily involve a reconsideration of the earlier decision, which would be subject to the 75-day time limit on the Board's reconsideration authority.

WCAT found that the August 28, 2000, decision was a categorical denial. As a result, it upheld the rejection of the review on the basis that making a new decision was barred under section 96(5)(a) and the March 18, 2003, letter was an "information letter" rather than a reviewable decision. It stated:

> By logical inference . . . the legislature did not intend to provide a right of review by the Review Division under section 96.2(b), with respect to the Board's failure to make a decision concerning an assessment matter. The practical impact of these provisions is to allow the Board discretion in assigning resources to various tasks and determining when and if decision letters are required.

In other cases, where the original decision was not a categorical denial of relief of costs, WCAT have taken different positions. In some cases (for example #2004-04020), WCAT have overturned the rejection of the request to review the refusal to make another decision under section 39(1)(e). This seems to be on the basis that, since the 75-day time limit does not prevent a new decision, reliance on the 75-day time limit is not an appropriate response; and that there is some kind of immediate duty to make a decision once an issue within the Board's authority is brought to its attention, regardless of how and when this occurs. However, in one case (#2004-01846) WCAT upheld the rejection of the review and suggested to the employer that it request the Board to adjudicate the period of disability not covered by the original decision. For the reasons stated in my decision, it is suggested that the approach taken in #2004-01846 is the correct one. Whether or not the Board should be making a new decision in these situations, and if so when, is a matter for the Board's administration, not the appeal system.

Decisions Under Section 42

Section 42 states that

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

It was pointed out above that decisions under this section other than in relation to experience rating are excluded from being reviewable. The Board's system of experience rating is set out in policies AP1-42-1 to AP1-42-3 of the *Assessment Manual*. Policy AP1-42-2 refers to policies in the *Rehabilitation Services and Claims Manual* providing for relief of costs and states that these relieved costs are excluded from consideration for experience rating purposes. In particular, policy #115.30 lists many of the situations where relieved costs are excluded.

Neither the assessment nor the claims policies generally state when decisions will be made regarding these situations. However, my understanding is that the practice is as stated in the decision sought to be reviewed, namely

> Determinations under Policy #115.30 are considered in the ordinary course of business and would have been considered and applied if the facts required such determination. The Board is not required by law or policy to provide decisions on each category in this or other policies. To provide a decision to workers or employers in the absence of evidence or in the absence of circumstances requiring such a decision would be extremely costly and inefficient. Consideration occurs at the appropriate time as per Policy and Practice and decision letters are provided when applicable.

Therefore, the Board does not make decisions simply because an employer has requested one, and where the employer provides no specific grounds for suggesting that relief should be provided. Rather, if one of the specific situations listed in policy #115.30 occurs, the Board will make a decision on its own initiative. If one of these situations has occurred, and the Board fails on its own initiative to make a decision, the Board will consider and make a decision on request that specifically refers to such an occurrence.

The reasons for not allowing requests for reviews of refusals to make new decisions are essentially the same as for section 39(1)(e) but even stronger. Every WCAT decision of which I am aware, including #2004-00638 referred to above, has found that a refusal to make a decision under section 42 is not reviewable.

Circumstances of this Case

I consider that the original July 4, 1997, decision denying relief of costs under section 39(1)(e) was not a "categorical denial." The language of the letter is ambiguous as to whether it is finding that there was no pre-existing condition as opposed to there was a pre-existing condition but it did not enhance the worker's disability. The use of the phrase "at this time" in the decision implies that the decision maker envisaged that further decisions might be made in future if the evidence or circumstances changed. While this conclusion indicates that the Board might make a new decision on the worker's disability occurring after the July 4, 1997, decision, I consider that this is not a sufficient basis for allowing the employer's review to proceed. The employer's remedy is to make a specific request to the Board's administration if it is able to provide supporting grounds, not to file a request for review.

I return to the basic position stated at the beginning of this decision that the natural inference from the wording of section 96.2 is that no right of review exists against a refusal to make a second decision on a compensation and assessment matter, including section 39(1)(e). Furthermore, I have concluded that the Act as a whole, notwithstanding the specific wording of section 96.2, shows no general intention to allow reviews of refusals to make this kind of decision. Even if I could find an intent that some refusals to make decisions under section 39(1)(e) could be reviewed, I consider that the generic nature of the employer's request for a decision requires that the review be rejected. The lack of a clear obligation to make a new decision and the significant administrative factors involved in deciding what response to make to such requests, indicate that the matter must be left to the Board's administration to deal with.

I would reject the request for review relating to the refusal to make a decision under section 42 for essentially the same reasons. Having regard to the applicable policy and the types of situations covered by this section, there are even less grounds for allowing the review to proceed than in relation to section 39(1)(e).

Conclusion

As a result, I have decided to reject the request for review of the Board's letter of August 10, 2004. This is on the primary ground that section 96.2(1) provides for employers, workers, or others to request reviews of refusals to make prevention orders, not requests by workers, their dependants or employers to review refusals to make compensation and assessment (including relief of costs) decisions. This conclusion is supported by the following additional reasons:

- The history of the appeal system, particularly concerning assessment and relief of costs matters, suggests a legislative intent to balance the needs of individuals to have a fair and independent review of decisions against the general need of the Board's administration to efficiently conduct the Board's operations.

- Section 96.2(2) specifically excludes certain assessment and relief of costs decisions from being reviewed, notably any that might be made under section 42 other than in relation to experience rating.

- The history and statutory exclusions suggest a legislative intent that parties who are dissatisfied with certain types of decision or refusals to make decisions must take any complaints to the administrative rather than the appellate part of the system.

- Refusals to make decisions should not be reviewable when there is no clear legal or policy obligation to make a decision at the particular time and administrative factors are significant in determining if and when a new decision should be made.

- The refusal to make new decisions in this case under sections 39(1)(e) and 42 was not reviewable as there was no clear legal/policy obligation to make a new decision and there were significant administrative factors involved in determining whether to make a new decision. These administrative factors arose particularly from the fact that the employer's request for a new decision was a form letter containing no specific supporting reasons as to the circumstances of the claim.

Decision of the Review Division

Number: **21536**
Date: **December 20, 2004**
Review Officer: **Ken Venables**
Subject: **Lung Cancer and Occupational Exposure**

The worker requests a review of the decision of the Workers' Compensation Board (the "Board") dated July 15, 2004. In support of this request for review, the worker's representative has provided written submissions. The employer was given notice of the review and is not participating.

Section 96(6) of the *Workers Compensation Act* (the "Act") gives a review officer authority to conduct this review.

Issue

The issue on this review is the Board's decision not to accept the worker's diagnosed lung cancer as having resulted from an occupational exposure.

Background

The worker has submitted a claim for an asbestos-related disease which he believes has resulted from his employment. Although the Board accepted that the worker likely had occupational exposure to asbestos, the case manager determined the evidence did not support that the worker's lung disease was related to this exposure. As a result, the worker's claim was denied.

The worker has requested a review of this decision. He is seeking to have his claim accepted and appropriate benefits paid.

Facts and Evidence

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

- The worker is currently 49 years old. According to his application, he has been employed in the asbestos abatement industry for approximately 18 years. The application also states that he smoked cigarettes at a rate of one package per day from age 18 to April 2004.

- Medical information on file indicates that the worker has been diagnosed with small cell cancer of the lung with metastatic disease to the liver and spine.

- A Board case manager provided information to a Board internal medicine consultant in a memo dated June 21, 2004. He indicated that the worker had worked in a machine shop between 1975 and 1983 and this had included work in the chrome plating and heat treating departments. The worker reported wearing protective clothing consisting of an asbestos suit with hood and gloves. The case manager concluded that the worker likely had exposure to asbestos while working in this capacity. In addition, the worker could have had inadvertent exposure to asbestos while working in the abatement industry although he did wear full protective equipment.

- The internal medicine consultant's opinion is dated July 14, 2004 and has been quoted at length in the decision letter which precipitated this request for review. Briefly, the consultant noted that CT scan results showed no evidence of pleural plaques or asbestosis. In the absence of such evidence, the consultant opined that there was nothing to support a connection between the worker's lung disease and any potential asbestos exposure. He further stated that the worker's condition was entirely explainable by his over 30 pack year history of cigarette smoking.

- The case manager denied the worker's claim based on the internal medicine consultant's opinion. Specifically, the claim was denied under section 6(3) based on a lack of evidence supporting the presence of an asbestos-related disease. The claim was also denied for primary cancer of the lung under Schedule B when related to prolonged exposure to a variety of other gasses and aerosols. The case manager concluded that the evidence did not support prolonged exposure to any of these other substances. Lastly, the claim was denied under section 6(1) based on a conclusion that the more likely cause of the lung disease was long-term exposure to cigarette smoke.

Medical Opinion

In order to assist with reviews of this nature, I have previously asked the Review Division medical advisor to conduct a review of recent literature and provide an opinion on current thinking with respect to lung cancer in asbestos-exposed workers. Of note, aside from a medical degree, Dr. P. also holds a graduate degree in Occupational Health and Epidemiology. His opinion was disclosed to the worker's representative on this claim and an opportunity provided for a response. Dr. P.'s opinion is dated November 17, 2004. As it is a part of the record, I will not record its entire contents here except for the most salient points.

- Dr. P.'s opinion is based on a review of the most recent epidemiological literature focusing on recent review articles and meta-analysis.

- There is general agreement that asbestos is carcinogenic. Many experts believe the relationship between lung cancer and exposure to asbestos is dose dependent and linear with no threshold. However, some experts (he refers specifically to Professor Weiss) have argued that the evidence has not been correctly interpreted with, for example, the possible existence of a threshold of exposure, below which there would be little risk of developing cancer.

- The multiplicative effects of cigarette smoking and exposure to asbestos is a theory that is "falling out of favour." Professor Liddell in fact, showed that the relative risk ("RR") of developing lung cancer is lower for smokers exposed to asbestos than for non-smokers.

- Bilateral pleural plaques as seen on x-rays or CT scans are still a reliable indicator of asbestos-induced fibrosis.

- Dr. P. has discussed in detail findings contained in the Helsinki report (1997) which is a meta-analysis with conclusions approved by an international panel of experts. The report confirms a linear relationship between exposure to asbestos fibers and development of lung cancer. It is possible to have significant exposure to asbestos and yet not have radiological evidence of pleural plaques or asbestosis. However, the RR in such cases is below 2.

- There is significant, elevated risk for lung cancer where there is radiological evidence of pleural plaques, asbestosis, or a significant fiber burden from biopsy.

- Cigarette smoking is the likely cause of lung cancer in smokers ". . . when sufficient (asbestos) exposure criteria are not met." A lower level of exposure could be accepted as causing lung cancer in a non-smoker.

Submission

The worker's representative has provided a submission in support of this review. He argues that the case manager should have conducted a further investigation based on his conclusion that the level of exposure to asbestos the worker may have had in the abatement industry was ". . . difficult to know." Because of this, the representative obtained from the worker, a more detailed history of his exposure to asbestos while in the course of his employment. This information purports to show that the worker's exposure, while working in asbestos abatement, was significant. In addition, the worker has commented on being exposed to "hazardous chemicals" while working at the machine shop, including trichlorethaline fumes, chromium fumes, cadmium and caustic soda fumes.

The worker's representative has also provided a letter from Dr. M., a respiratory specialist who has been treating the worker. Dated July 30, 2004, Dr. M. states that smokers have a 20 times greater chance of developing lung cancer and asbestos-exposed workers, a similar risk. The synergistic effects of both smoking and asbestos exposure produce a 400 times greater risk for developing lung cancer. Therefore, he concluded that the worker should be "partially compensated" by the Board for his disease.

In addition to the above, the representative argues that ". . . 30+ packs of cigarettes per year can hardly be categorized as significant heavy smoking." Further, the representative characterizes cigarette smoking as a disease which resulted in the worker being more susceptible to developing an asbestos-related disease.

The representative has also provided a submission in response to Dr. P.'s opinion. Based in part on information contained in the Helsinki Report, he argues that the worker in this case could still have asbestosis despite the absence of radiological evidence to confirm this. Further, he states that the worker's relative risk for developing asbestos-related lung cancer is, in fact, higher than 2.0 based on the likely significance of his exposure, both in terms of duration and dose. The representative is also of the opinion that the worker's age should be considered as more lung cancer victims are significantly older at the time of diagnosis.

Law and Policy

The Act

Section 6(3) of the Act describes the manner in which claims can be considered under Schedule B. If "at or immediately before the date of disablement," a worker is diagnosed with a disease listed in the first column of the schedule and is employed in an industry listed in the second column opposite to the disease, "the disease is deemed to be due to the nature of the employment unless the contrary is proved."

Section 4(a) of Schedule B lists carcinoma of the lung as an occupational disease when associated with asbestosis or bilateral diffuse pleural thickening or fibrosis. The presumption applies where there is exposure to airborne asbestos dust.

Section 4(e) of the schedule lists primary cancer of the lung as an occupational disease where there is prolonged exposure to:

(1) aerosols and gases containing arsenic, chromium, nickel or their compounds; or
(2) bis (chloromethyl) ether; or
(3) the dust or uranium, or radon gas and its decay products; or
(4) particulate polycyclic aromatic hydrocarbons.

Section 6(1) provides that where a worker develops an occupational disease that is due to the nature of his or her employment, and is thereby disabled from earning full wages at the work at which he or she was employed, compensation is payable as if the disease were a personal injury. Health care benefits may be paid in cases where the disease has not resulted in a disablement.

Policy

The policy relating to this review is found in *Rehabilitation Services and Claims Manual* Vol. I, policy item #26.22, *Non-Scheduled Recognition and Onus of Proof*. This allows the Board to consider claims where a worker suffers from an occupational disease not listed under Schedule B or suffers from an occupational disease listed in Schedule B but is not employed in the corresponding industry or process. The Board may also consider claims where the disease has not previously been recognized as an occupational disease. The decision as to whether the disease is due to the worker's employment "is determined on the merits and justice of the claim without the benefit of any presumption." This policy goes on to state:

> If the Board has no or insufficient positive evidence before it that tends to establish that the disease is due to the nature of the worker's employment, the Board's only possible decision is to deny the claim. A speculative possibility that a worker's employment may have caused the disease is not sufficient to establish a causal relationship.

Reasons and Decision

There is no dispute that the worker has been diagnosed with cancer of the lung. The issue before me is whether this has been caused, at least in part, by an occupational exposure. I have first considered the claim under section 6(3). With respect to section 4(a) of Schedule B, I find no evidence that the worker has asbestosis or bilateral diffuse pleural thickening or fibrosis. As a result, I find that the requirements for the Schedule B presumption to apply have not been met.

With respect to section 4(e) of the schedule, I note that the representative has made no reference to this in his arguments in favour of accepting the claim. The worker has briefly referenced this in listing a number of substances he was exposed to prior to 1983. However, only chromium is listed in the schedule and there is no evidence that the worker had significant or prolonged exposure to this substance. As a result, I find that the Schedule B presumption would also not apply in this instance.

I have also considered the claim under the section 6(1). As part of this process, I have reviewed previous decisions of the Workers' Compensation Appeal Division and of the Workers' Compensation Appeal Tribunal ("WCAT"). While these decisions are not binding in any way on the matter before me, they did contain useful medical and epidemiological information on the subject of lung cancer and asbestos exposure.

With regard to the level of asbestos exposure, I note that the Board has accepted that the worker was likely exposed, although to what degree the case manager considered difficult to ascertain. The worker's representative has criticized the Board for not conducting an investigation on this issue and has argued in favour of accepting a significant degree of exposure. I find, however, that an additional investigation would not likely yield any more detailed information with regard to this specific worker's level of exposure. As I do accept that the worker was likely exposed to asbestos in the course of his employment, this is sufficient to proceed with consideration of the claim on its merits.

The question becomes whether the evidence is sufficient to conclude that asbestos-exposed workers are at significant increased risk of developing lung cancer in the absence of asbestosis and in the presence of non-occupational risk factors. As part of this process, I will consider the epidemiological evidence with respect to the relationship between asbestos-exposed workers and the risk of developing lung cancer in the absence of asbestosis, bilateral diffuse pleural thickening, or fibrosis. In addition, it will also be necessary to assess the role played in the disease process by the worker's cigarette smoking.

Regarding the use of epidemiological evidence, I find the following quote from Appeal Division Decision #93-0163 to be on point:

> However, epidemiological evidence, like other generalized evidence, deals with categories of occurrences rather than particular individual occurrences. Epidemiology cannot determine which particular factor caused a particular person's disease, but only what factors are statistically associated with the occurrence of the disease in groups of people.

> Epidemiological studies cannot prove or disprove causation in an individual case. Proof of excess incidence of a certain cancer in a certain defined occupational group is not "proof" that the disease of the individual claimant, who belongs to that group, was work caused. Rather, such evidence is supportive of an increased likelihood in an individual case which can be weighed along with other evidence.

This quote is significant with respect to cancer claims because the causes of these diseases are not completely understood. Moreover, it is not possible to medically determine with any certainty what the cause of this particular worker's lung cancer is likely to have been. The purpose of reviewing epidemiological evidence, therefore, is to assess possible risks but not to prove causation in individual circumstances.

All of the available evidence, including that provided by the worker, indicates that he had at least a 30 pack year history of cigarette smoking. Although the representative has referred to 30 packs per year, I believe that he has misinterpreted the term 'pack year'. This is a common medical term used to denote the number of packages smoked per day over the course of a year. In other words, 30 pack years indicates a history of one pack per day, 365 days per year, for 30 years. Obviously, this is a significant exposure.

There is no doubt that cigarette smoking is itself a primary cause of lung cancer. The *Merck Manual of Diagnosis and Therapy*, 15th Edition, states as follows on page 705 with regard to lung cancer:

> Cigarette smoking accounts for > 90% of cases in men and about 70% in women, with a strong dose-response relationship and regression of incidence after quitting . . . . A small proportion of lung cancers (15% in men and 5% in women) is related to occupational agents, often overlapping with smoking . . .

The 1984 *Report of The Royal Commission on Matters of Health and Safety Arising from the Use of Asbestos in Ontario* states as follows:

> It is now a well-accepted fact that cigarette smoking plays a critical role in the incidence of lung cancer. Smoking has been a common habit among working populations including those individual cohorts of asbestos workers that have been subjected to epidemiological study. It therefore becomes important to consider the extent to which the incidence of lung cancer among asbestos workers is attributable to their smoking habits rather than to their asbestos exposure . . . Smokers were at 11 times greater risk of lung cancer than non-smokers. (p. 295)

There is no doubt that this worker was at significant increased risk for the development of lung cancer based on his history of cigarette smoking alone. However, the question remains as to whether the worker was at risk for development of this disease as a result of asbestos exposure, especially in light of the absence of evidence of asbestosis. In addition, the combined effect of cigarette smoking and asbestos exposure must also be considered.

As previously noted, Dr. M. has provided an opinion in support of accepting the worker's claim based on the increased risk for lung cancer for asbestos-exposed workers and the synergistic effects of asbestos exposure and cigarette smoking. He has not provided any references to specific studies on the subject or the source of the figures that he refers to. Additionally, he has not commented on the relationship between asbestos exposure and lung cancer in patients without evidence of asbestosis. Nevertheless, from my review of the literature, I would conclude that there is some support for Dr. M.'s opinion in this regard.

In the Appeal Division's Decision #99-1965, the panel relied on a medical opinion from Dr. H., a physician with a specialty in occupational medicine and occupational and environmental health and safety. She noted in her report of April 12, 1999 that recent studies had shown that even at low exposure levels, asbestos exposure can produce an increase in the relative risk ("RR") of cancer, even in the absence of asbestosis. In Decision #98-0856, the Appeal Division panel reviewed an opinion provided by Dr. M., an oncologist at the BC Cancer Agency. With regard to the RR for cigarette smokers exposed to asbestos, he stated as follows:

> Asbestos exposure is associated with bronchogenic carcinomas but asbestos exposure by itself in a nonsmoking individual has a rather small relative risk of about 1.5 as compared to a non-asbestos exposed nonsmoker. The relative risk associated with smoking depends on the amount smoked and in [the worker's] situation based on 50 pack year exposure the relative risk from cigarette smoking by itself would be about 15. Notably, the combined risks of asbestos exposure and smoking are more than additive; they are synergistic. Exposure to asbestos probably about doubles the risk of the smoking factor alone. The relative risk of a smoking asbestos worker such as [the worker] would probably be in the range of 25−30 compared to unity for a nonsmoking nonasbestos worker or a relative risk of about 1.5 for a nonsmoker that worked with asbestos. The most important risk factor is smoking but the addition of asbestos does enhance the probability of disease.

With respect to the argument that the combined effects of asbestos exposure and cigarette smoking are synergistic, there are certainly other studies that have concluded this to be the case. However, as noted in Dr. P.'s opinion based on his review of recent literature, the multiplicative argument is now falling out of favour. In addition, it is important to note that even if this connection exists, it does not prove causation in the case of an individual without evidence of asbestosis or pleural disease.

In addition to the aforementioned opinion of Dr. H., there are other studies which argue in favour of a conclusion that asbestos-exposed workers are at significantly increased risk of lung cancer even in the absence of asbestosis or pleural disease. On the other hand, Dr. P. has placed great emphasis on the results of the Helsinki study (1997) with respect to this issue. That study confirmed a significantly increased risk of lung cancer in individuals with confirmed asbestosis. In the absence of this condition, the report concluded that there was likely an increased risk but this was less than 2.0. An RR of 2.0 is generally thought to equal a 50% likelihood that a condition is related to a specific exposure. An RR of less than 2.0 would mean that the probability of a connection is less than 50%.

In addition to the above, WCAT Decision #2004-04988 includes references to articles by Weiss[5] and Cagle[6] which are on point. Weiss reviewed cohort studies up to 1997 which looked at risk based on incidence or mortality. His conclusions are based on the premise that asbestosis is a marker for asbestos-related lung cancer and is not necessarily a cause of the disease. He described as "well established" the conclusion that lung cancer among asbestos-exposed non-smoking workers was rare and that the combination of the two factors was generally believed to be more than additive. However, he also noted that smokers exposed to asbestos were at higher risk of developing radiographic evidence of asbestosis than were non-smokers.

Based on the studies reviewed in this report, Weiss concluded as follows:

> Nevertheless, the results suggest a close link between bronchial cancer and the preceding inflammatory reaction to asbestos. This link is consistent with the hypothesis that lung cancer risk is elevated only in humans exposed to asbestos when there is asbestosis. That the increased risk is limited to the radiologic evidence of asbestosis is supported by the available good epidemiological evidence summarized in this review.

Cagle discusses the primacy of tobacco use in determining the etiology of lung cancers and states that fully 90% of lung cancers are related to cigarette smoking. Since most asbestos-exposed workers with lung cancer are also smokers or ex-smokers, this will always be the primary cause of the cancer.

In assessing the possible role played by asbestos-exposure in incidents of lung cancer, Cagle points out that everyone in the general population is exposed to background levels of asbestos as has been shown in lung tissue studies and yet there is no increased risk of lung cancer on this basis alone. Further, the vast majority of asbestos-exposed workers, even most of those with significant exposure, will not develop lung cancer. Based on this, he argues that other factors must be present to link asbestos exposure to lung cancer. He concludes from the available epidemiological evidence, that the only proven marker for asbestos-related lung cancer is asbestosis. As evidence of this, he discusses a study of 234 lung cancer patients with pathological evidence of significant asbestos tissue burden. All but 10 also had evidence of asbestosis. Cagle concludes as follows:

> From the point of view of the pathologist, asbestosis is an unambiguous marker not only of a tissue burden of asbestos sufficient to cause a risk of lung cancer but also of individuals whose tissues are susceptible to the effects of that tissue burden. Asbestosis is the most consistent marker of asbestos-related lung cancer in the literature to date and has a basis in current molecular theories of disease similar to many other inflammatory or fibrotic diseases associated with an increased risk of lung cancer, including diseases caused by tobacco smoke. Tobacco smoke is sufficient by itself to cause the vast majority of lung cancers in workers with asbestos exposures. Asbestosis establishes the link between a

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[5] Weiss, W. Asbestosis: a marker for the increased risk of lung cancer among workers exposed to asbestos. *Chest*. 1999 Feb: 115(2); 536–549.

[6] Cagle, PT. Criteria for attributing lung cancer to asbestos exposure. *American Journal of Clinical Pathology*. 2002 Jan; 117(1): 9–15.

> lung cancer and asbestos exposure even when the patient also was a tobacco smoker. Since there is no other marker, for example, a molecular genetic marker, available to link a lung cancer to asbestos exposure, currently there is no basis in the absence of asbestosis for assuming that an individual lung cancer is caused by asbestos or asbestos and tobacco smoke combined rather than by tobacco smoke alone.

Based on the epidemiological evidence noted above, the facts of the claim and the opinions of the Review Division medical advisor and Board internal medicine consultant, I conclude the following:

- The worker has been diagnosed with carcinoma of the lung with no evidence of asbestosis, pleural thickening, or fibrosis.

- The worker was exposed to asbestos while in the course of his employment. The extent and duration of the exposure is not clear and further investigation would not likely produce additional accurate information.

- The worker's risk of developing lung cancer as a result of cigarette smoking is high and, in fact, is considerably higher than the risk for asbestos exposure alone. By far the most common cause of lung cancer in the vast majority of individuals is considered to be cigarette smoking.

- The issue of whether cigarette smoking and asbestos exposure are synergistic with respect to the development of lung cancer is controversial. It would appear that more recent studies have concluded that this is not the case. In addition, even if this is the case, it does not prove causation in an individual without evidence of asbestosis or pleural disease.

- There is general agreement that the presence of asbestosis and pleural plaques are a marker for asbestos exposure and that this is a risk factor for lung cancer. There is far less agreement on whether asbestos exposure without asbestosis or pleural plaques is a risk factor for the development of lung cancer.

- With respect to this last point, I acknowledge that there is a considerable body of opinion which states that individuals exposed to asbestos are at greater risk of developing lung cancer even in the absence of pleural disease or asbestosis. I am, however, persuaded by the opinions of Weiss and Cagle; the Board internal medicine consultant, who is familiar with the literature; and the Review Division medical advisor, who has done a recent literature review. I conclude from these opinions that, at best, there may be an increased risk of lung cancer in asbestos-exposed workers without asbestosis or pleural plaques but this risk has not been proven to be statistically significant.

- I find that the evidence is insufficient to conclude that the worker in this case developed lung cancer as a result of an occupational exposure. I find it more likely that this disease resulted from his significant history of cigarette smoking. As a result, I deny the applicant's request.

Conclusion

As a result of this review, I confirm the Board's decision of July 15, 2004.

Decision of the Review Division

Number: **22274**
Date: **November 19, 2004**
Chief Review Officer: **Joe Pinto**
Subject: **Extension of Time — Failure to Copy Authorized Representative**

The worker seeks an extension of the 90-day statutory time limit to request a review of a June 15, 2004 decision of the Workers' Compensation Board (the "Board").

The statutory time limit expired on September 21, 2004. This includes the eight-day grace period provided for mailing of decisions in subsection 221(2) of the *Workers Compensation Act* (the "Act"). The worker's request for review was received on September 27, 2004, six days beyond the statutory time limit to request a review.

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

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

Background

The Board decision letter of June 15, 2004 advised the worker with respect to his long-term disability entitlement and provided details as to the manner in which it was calculated.

The second to last paragraph of the decision letter of June 15, 2004 stated:

> If you disagree with this decision, you have the right to request a review by the Review Division. A request for review of this decision must be filed within 90 days from the date of this decision letter. Please see the enclosed appeal pamphlet for further information.

Submissions

The worker's legal counsel submits that:

- The worker's medical condition is such that he has difficulty with his memory and stress and is unable to efficiently manage his claim,

- Counsel has represented the worker with respect to all aspects of his claim since October 14, 2003, and which has included two prior requests for review before the Review Division in relation to other Board decisions,

- Any and all correspondence to the Board or the Review Division from the worker has been drafted by counsel, on whom the worker has relied totally for assistance,

- The worker was under the impression that counsel had been copied on all decisions rendered under his claim, and which had been the case, with the exception of the decision letter of June 15, 2004,

- Counsel discovered the existence of the decision letter of June 15, 2004 only after reviewing a decision of the Review Division, dated September 27, 2004, which had referenced the decision of June 15, 2004, and following which, counsel contacted the Board officer to confirm the existence of the June 15, 2004 decision,

- The Board officer confirmed that the decision letter of June 15, 2004 had been mailed only to the worker,

- Counsel was mailed a copy of the decision letter of June 15, 2004 at which time counsel promptly filed a request for review of that decision on the worker's behalf, and

- Since the signing by the worker of the authorization document on September 23, 2003, the worker had been of the view that all decisions on his claim would be copied to counsel and, accordingly, the worker did not think it to be necessary to contact counsel upon the worker receiving the decision letter of June 15, 2004.

Practices and Procedures

Item B2.4.2 of the Review Division's *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 the request for review within the 90-day time period. No consideration is given to the merits of the request for review. If the worker'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 otherwise result if the time limit were not extended. It is only when it is found that both special circumstances existed and an injustice would otherwise result that an extension of time will be granted.

Reasons and Decision

Special Circumstances

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

Decisions of the Board are, in many instances, communicated directly to the worker or employer in written letter form (although Board policy does not require written decisions in many non-contentious matters). In cases in which the worker or employer has previously engaged the services of legal counsel or a representative, Board policy states that the Board will cooperate with and notify the worker's or employer's counsel or representative of any Board decisions which have been made and which have been communicated to the worker or employer. In a majority of cases the representative is copied and in the same manner regardless of whether he or she represents the worker or employer.

In the matter before me, I must consider whether the late filing of a request for review of a Board decision may be attributed, in whole or in part, to the failure of the Board to provide a copy of the decision to the representative. If so, I must further decide whether this constitutes a special circumstance that precluded the filing of the review request within 90 days. In doing so, I must weigh and strike a balance between requirements for disclosure of Board decisions to representatives specified in Board policy and the need for finality and timeliness that is inherent in the legislation.

I am of the view that, in any case in which a proper signed authorization has previously been provided by the representative, it is entirely appropriate that the representative be sent a copy of the written decision of the Board at the time that it is sent to the worker or employer. The Board should continue its efforts to ensure that occurs without exception. However, I am also of the view that the failure to copy the representative does not, in itself, equate to the granting of an extension of time to file a request for review. The retention of a representative in a legal matter does not absolve an individual of their personal responsibility to comply with statutory requirements.

In some cases, however, the circumstances may be such that the failure to notify a properly authorized representative does constitute a special circumstance that precluded the filing of the application. Such circumstances will include some combination of the following:

- the authorization had been specific and clear. In particular, with respect to a matter involving a particular claim, the representative's written authorization specifically and clearly referenced the claim involved,

- there had been prior communication between the representative and the Board on the specific matter,

- the representative had initiated an inquiry in response to which the Board decision was generated,

- absent the receipt of a copy, the representative could not have known of the existence of the Board decision or could not have known at an earlier date,

- the worker or employer was, due to his or her individual circumstances, significantly reliant upon the representative,

- the length of time, upon discovering the existence of the Board decision, the representative took to file the request for review,

- any other relevant circumstances particular to the case.

In addition to finding that a special circumstance existed which precluded filing within 90 days, I am also, before allowing an extension, required to find that an injustice would result. The same criteria that I apply in making this latter determination in other applications will apply in this type of case as well.

There are a number of factors to consider when determining whether special circumstances existed. Two key factors are evidence of the worker's intention to request an appeal or review within the 90-day time limit, and the length of the delay.

A review of the claim file reveals that counsel had represented the worker on several prior matters with respect to his claim for the past year since October of 2003. This has included numerous communications between counsel and a Board officer in addition to the Review Division in relation to two prior requests for review. I also note that, due to the state of the worker's health, he has, of necessity, relied upon counsel to assist him in relation to his claim. I find it to be reasonable that counsel would have had no prior opportunity to learn of the existence of the decision letter of June 15, 2004 until her later review of the Review Division decision of September 20, 2004. I also accept that the worker would have had no reason to suspect that the decision letter of June 15, 2004 had not been copied to counsel as copies of all other Board decisions had been sent to her. I also note that counsel moved promptly to file a request for review as soon as she became aware of the existence of the decision letter of June 15, 2004. Lastly, and although the authorization document does not specifically refer to the worker's claim by file number, I note that it does reference counsel's authority in relation to all Board matters, "including any reviews before the Review Division."

As for an intention to file a request for review, I have concluded that, had counsel received a copy of the decision letter of June 15, 2004, she would have filed a timely request on behalf of the worker as had been done on two prior occasions. The delay in filing of six days is considered to be reasonable in the particular circumstances of this case.

In light of the above, I conclude special circumstances existed that precluded the worker from making an application on time.

Injustice

In addition to finding that there existed special circumstances, I must also find that an injustice would otherwise result if an extension were not granted. This involves having regard to the significance of the matter that is the subject of the request for review and the degree of prejudice to the worker that would result from a denial of the requested extension of time.

In this case, I have concluded that injustice would result if I were not to grant an extension. The issue in dispute on this request for review is the extent of the worker's entitlement to a disability award. This issue could have a significant financial impact on the employer who would be prejudiced by a denial of the requested extension of time.

Conclusion

I allow the application for extension of time to file the request for review which is accepted as of the date of this decision letter.

In granting this extension of time to request a review, I am not making a finding with respect to the worker's disagreement with the June 15, 2004 decision. I am simply finding that the worker has met the legal requirements for an extension of time and that the June 15, 2004 decision can now be reviewed by a review officer.

Decision of the Review Division

Number: **23106**
Date: **February 11, 2005**
Chief Review Officer: **Joe Pinto**
Subject: **Extension of Time — Acts or Omissions of Representatives**

The worker seeks an extension of the 90-day statutory time limit to request a review of a June 17, 2004 decision of the Workers' Compensation Board (the "Board").

The statutory time limit expired on September 23, 2004. This includes the eight-day grace period provided for mailing of decisions in subsection 221(2) of the *Workers Compensation Act* (the "Act"). The worker's request for review was received on October 18, 2004, 25 days beyond the statutory time limit to request a review.

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

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

Background

The Board decision letter of June 17, 2004 informed that his claim for a back injury was disallowed as the provisions of section 5(1) of the Act had not been met. The final paragraph of the letter stated:

> If you disagree with my decision, you have the right to request a review by the Review Division. A request for review of this decision must be filed within 90 days from the date of this decision. The attached pamphlet provides instructions.

Submissions

The worker's representative submits that:

- The worker requested the assistance of his union representative in pursuing a request for review and was left with the understanding that it would be looked after,

- The representative became busy with other matters and overlooked filing the appeal. When the worker called the union representative at the end of September 2004 it was discovered that the appeal had not been processed,

- At that time the union representative contacted the current representative to look after this appeal on behalf of the union, and

- The union is a small local and they do not have the staff to look after the daily operations and have indicated that they will retain the current representative to look after future Board appeals.

Practices and Procedures

Item B2.4.2 of the Review Division's *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 the request for review within the 90-day time period. No consideration is given to the merits of the request for review. If the worker's reasons do not amount to special circumstances which were significant enough to preclude a filing, 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 otherwise result if the time limit were not extended. It is only when it is found that both special circumstances existed and an injustice would otherwise result that an extension of time will be granted.

Reasons and Decision

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

Experience has shown that there are generally three categories of circumstances that parties bring forward in seeking extensions of time under section 96.2(4) — acts and omissions on the part of the Board, the personal circumstances of parties, and acts or omissions of representatives retained by parties to deal with their cases. The case before me falls into the third category.

In her decision on request for review #4090, now published on the WorkSafeBC web site, the previous chief review officer discussed the background to the approach being used in addressing requests for extension of time based upon the act or omission of a representative. She set out a number of factors to be considered in each case.

Those factors were generally considered in subsequent decisions. However, it was also noted that many requests during the first year of the Review Division's operations had been received immediately following a period when there were significant changes to the *Workers Compensation Act* and the workers' compensation appeal structure. Both the previous chief review officer and I recognized the challenges encountered by representatives in adjusting to the March 3, 2003 legislative changes. This warranted a certain amount of "transitional leniency" when considering requests for extensions of time applicable to this and other statutory deadlines.

This "transitional leniency" could not, however, continue over the longer term. As the months passed, it became more realistic to expect that the Review Division, and the parties and their representatives, would have had sufficient time to make the necessary adjustments. It was therefore decided that, where an extension of time was requested to request a review of a Board decision made on or after March 4, 2004, "transitional leniency" would no longer be a ground for determining whether "special circumstances" existed.

The decision that the worker is seeking to have reviewed was made on June 17, 2004. This is clearly beyond the "transitional leniency" period. This case therefore raises the issue as to what factors should be considered in deciding whether to grant an extension of time.

The former chief review officer's decision in request for review #4090 was issued in November 2003. We have now had considerable experience in the application of the factors set out in #4090. I have concluded that those factors, with some modifications to reflect our experience, continue to provide a useful mechanism for considering applications for extension of the 90-day time limit where the case involves an act or omission of a representative.

I will therefore continue to consider requests for extension of time based upon acts or omissions of representatives according to the following factors:

- whether there is evidence that the party intended to request a review within the 90-day time limit through instructing the representative to do so;

- whether there is evidence that the party gave instructions promptly (early in the 90-day period);

- whether the party followed up with the representative, or the Review Division, within the 90-day time limit to ensure that the representative acted in accordance with the party's instructions;

- whether the failure to comply was somehow the responsibility of the party, for example failure to provide the necessary information to file a request for review such as the date of the decision in dispute;

- whether the representative acted as quickly as possible to remedy the error as soon as it was identified;

- if the representative is no longer representing the party, whether the party acted as quickly as possible to remedy the error as soon as it was identified;

- whether the failure to comply was the result of a failure in the representative's normal business practices or something more;

- whether the failure to comply resulted from a choice on the part of the representative in dealing with the party's case; and

- any other relevant circumstances particular to the case.

While it is not expected that attribution of the acts or omissions of a party's representative will necessarily be made to the party, these factors indicate that there is clearly an onus on the party to instruct, follow up in a timely manner, and ensure that, as far as possible, the representative has initiated the review.

In this case, the worker's current representative states that the worker had requested the assistance of his union representative on July 6, 2004. This would have been well within the statutory limitation period. The worker therefore instructed his union representative in a timely manner.

However, there is no evidence that the worker followed up with the union representative after providing his initial instructions. Nor is there is evidence that the worker otherwise ensured that, as far as possible, the representative had initiated the review, by following up with the Board or the Review Division. The worker apparently left everything in the hands of his representative without involving himself further.

I note that the worker had had several previous claims with the Board and could reasonably be presumed to understand the importance of complying with statutory time limits. However, according to the worker's claim file, he at no time during the statutory time period expressed dissatisfaction to the Board with respect to the June 17, 2004 decision. The first indication of the worker's dissatisfaction was the receipt of the request for review nearly one month after the expiry of the statutory time limit.

The worker's current representative appears to attribute the failure to file a request for review to oversight on the part of the worker's union representative. The error was discovered at the end of September 2004, and I acknowledge that attempts were promptly made to remedy it. The application for the extension of time was made approximately two weeks later. However, I do not consider that this outweighs the reasons for not granting an extension of time.

In light of the above, I am unable to conclude special circumstances existed that precluded the worker from making an application on time. 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 application for extension of time to file the request for review.

Decision of the Review Division

Number: **24070**
Date: **April 11, 2005**
Review Officer: **Marla Cook**
Subject: **Retroactive Vocational Rehabilitation Benefits**

The worker requests a review of the decision of the Workers' Compensation Board (the "Board") dated August 31, 2004. In support of this request for review the worker provided a written submission. The employer is defunct, and the issue under review does not meet the basic criteria for deeming employers.

Section 96(6) of the *Workers Compensation Act* (the "Act") gives a review officer authority to conduct this review.

Issue

The issue on this review is the Board's decision that the worker is not entitled to retroactive vocational rehabilitation benefits from February 13, 2002.

Background

On January 19, 2001 this worker was hauling logs down a winding road and his trailer went over the bank and the truck went with it. The truck apparently rolled over twice and the worker was reported to have been thrown out of the cab landing on his face with his head downhill. There was no loss of consciousness. The worker was provided with wage loss benefits from January 20, 2001 until February 12, 2002. The worker's claim was initially accepted for injuries to the right shoulder, right knee, neck, and low back.

In a decision letter dated February 13, 2002 the case manager ("CM") advised the worker that temporary wage loss benefits would be terminated effective February 12, 2002. The CM also determined that there was no evidence that the worker sustained a permanent functional impairment ("PFI"), and so the file would not be referred to Vocational Rehabilitation Services ("VRS"). The worker appealed this decision. In a Review Board finding dated November 29, 2002 the panel confirmed the Board officer's decision.

In a subsequent Medical Review Panel ("MRP") certificate dated April 2, 2004, the panel confirmed that the worker suffered from "chronic irritation" of either the costal vertebral junctions or the facet joints located somewhere between 8 and 10 thoracic vertebrae. Also, the Panel found that the worker's condition was at a plateau, was permanent, and he continued to have symptoms that were disabling to the extent that he could not drive in his pre-injury employment as a logging truck driver. Limitations were confirmed for the thoracic spine by the MRP as limited ability to lift, push, pull, twist, and throw; and cannot drive for periods in excess of 45 minutes.

The worker was subsequently referred to VRS as a result of the MRP certificate. The vocational rehabilitation consultant ("VRC") met with the worker on May 28, 2004 at which time it was confirmed that the worker had found suitable alternate employment. The worker requested in a letter dated August 3, 2004, that retroactive vocational rehabilitation ("VR") benefits are paid for 2002 and 2003, and submitted efforts of his vocational activities for review by the VRC. In a decision letter dated August 31, 2004 the VRC concluded that the worker was not entitled to retroactive vocational rehabilitation allowances specifically in the form of wage top-up from February 13, 2002. The worker requests a review of this decision.

Worker's Submission

In the worker's request for review and written submission he requested VR benefits from February 13, 2002 to the date that his permanent partial disability was implemented. He submits that he never declared himself unable to work during the time that he received Employment Insurance medical assistance. He stated that he looked for work but did not find anything until two-thirds of the way through his Employment Insurance benefits, and that his efforts are supported by the fact that he found employment on his own. He argues that if the Board accepted his claim as per the MRP certificate, and identified that he had a permanent disability, he would have been provided with VRS at the end of his entitlement to wage loss benefits in February 2002. He feels that he has participated in vocational activities as per policy to the best of his ability. The worker's written submission provides similar details regarding the vocational activities he undertook during 2002 and 2003, which are already on the claim file.

Facts and Evidence

Having considered the Request for Review as well as the contents of the worker's claim file, the following are the facts and evidence I find relevant to the issue before me:

- An Initial Vocational Assessment ("IVA") is dated May 28, 2004. The report provided a summary of the file, the MRP certificate dated April 2, 2004, and the worker's vocational and educational profile. A summary of the worker's vocational activities since the conclusion of wage loss on February 12, 2002 was also provided.

- A memo dated June 25, 2004 confirmed the VR manager spoke with the worker regarding his request for retroactive vocational benefits. The worker was advised that they do not automatically flow from an appellate decision unless they have been directed, and generally commence from the date of the appellate findings, if they are payable at all. Further, that retroactive VR benefits would be considered on the basis of normal vocational rehabilitation policy, and the worker was advised to submit a formal written request for retroactive payment.

- A fax transmission dated August 3, 2004 from the worker requested retroactive VR benefits from February 2002. The worker provided 36 pages of his activities from February 2002 which included, job search efforts, copies of three different resumés, an Employment Insurance ("EI") "subsidy letter" provided to employers for on-the-job training, a copy of his driving abstract and Class 1 license, and his statement of benefits from EI and statement of wages paid the jobs he has worked at.

- A memo dated August 31, 2004 by the VRC included additional details regarding the worker's activities:
  - EI benefits period (15 weeks) until approximately mid June 2002;
  - Worked three months as a ranch hand at a farm at $12 an hour until mid September 2002;
  - Worked two months finishing metal trim at a meat plant for $11 an hour until mid November 2002;
  - Attended a work centre and various employment agencies to assist him with job search skills targets
- The VRC confirmed the receipt of the worker's fax detailing his efforts and noted he commenced his employment with his recent employer on March 10, 2003 as a laminator earning $10 an hour which increased to $12 an hour May 9, 2003 and $14 an hour on March 13, 2004. The VRC stated that there were other manufacturing and assembly plants in the Okanagan area that hire workers with similar restrictions and background, and provide rates of pay starting at $12, with increases up to $18 an hour. The VRC stated that his current salary closely equates his long-term wage rate and he also has the ability to exceed it.
- The VRC advised the worker that policy does allow for the payment of a short-term top-up. The VRC felt the worker had demonstrated the ability to recoup his long-term wage rate so there was no indication that VR assistance was warranted, and would only be prepared to assist the worker with moving costs if relocation was necessary.

Law and Policy

The Act

The law that applies is section 16(1), which provides that the Board may make expenditures it considers necessary or expedient to aid in getting injured workers back to work or to assist in lessening or removing a resulting handicap.

Policy

The policy relating to this review is found in the *Rehabilitation Services and Claims Manual* ("RSCM"), Vol. I:

- Policy item #85.30, *Principles of Vocational Rehabilitation*, sets out the seven guiding principles of quality rehabilitation.
- Policy item #102.26, *Rehabilitation Matters*, provides that rehabilitation is a discretionary matter for the Board, to which there is no legal right.

Reasons and Decision

The issue I must decide is whether the Board's decision regarding the worker's entitlement to retroactive vocational rehabilitation assistance is appropriate based on the accepted facts, evidence, and applicable Board law and policy.

The Medical Review Panel certificate dated April 2, 2004, made a finding that the worker's mid back problems were causally related to the compensable injury of January 19, 2001. The panel also determined that his back condition had reached medical plateau and resulted in limitations of the thoracic spine, which affected his ability to return to his pre-injury employment job as a logging truck driver. Although the worker was referred to VRS as the MRP found that he could not return to his regular job, they made no finding regarding the worker's entitlement to VRS or the payment of benefits in this regard.

The worker submits his back condition been accepted as compensable, and the decision that he was unable to return to his job been made at the time of medical plateau in February 2002. It would have been a natural progression for him to have received VRS. However, I do not agree. In keeping with policy item #102.26, VRS is a discretionary matter for the Board and is not a legal right. Therefore the provision of VRS would not have been an automatic consequence at the time of medical plateau. While it may have resulted in a referral, a worker's eligibility for VRS is ultimately determined by the VRC in accordance with Board law and policy.

Pursuant to section 16(1) of the Act, the Board has the right to exercise its discretion, in accordance with policy item #102.26. Notwithstanding, with respect to the payment of retroactive vocational rehabilitation, there is no specific policy on which to rely. To assist me in making a decision regarding the worker's entitlement to retroactive VRS, I have referred to the Workers' Compensation Appeal Tribunal ("WCAT"), decision dated July 28, 2003, #2003-10744-RB, deals with the issue of retroactive VRS. I have relied on this decision as it is clear, concise, and pragmatic in its evaluation. In addition, when considering the issue of retroactive VRS, the vice chair reviewed and considered the decisions made by other appellate bodies. The vice chair noted that some have determined that retroactive VR assistance cannot be provided, specifically where no prior VR activities have taken place. Others believed that the Board can exercise its' discretion to consider the payment of VR benefits, but that the worker must demonstrate participation and active vocational efforts towards returning to work. The rationale is that history cannot be rewritten as a result of an appellate decision.

The vice chair in the decision dated July 28, 2003, #2003-10744-RB concluded that, for the payment of retroactive VR benefits, workers must demonstrate active involvement and participation in rehabilitation efforts for the purposes of returning to work in accordance with policy item #85.30. This policy requires that a worker meet the principles and goals outlined in order to be eligible to receive VR benefits. Specifically, a worker must be motivated to take an active interest and initiative in their own rehabilitation, and show a commitment and determination to re-establish themselves. Vocational programs, services, and benefits are then offered and sustained in direct response to the worker's efforts to successfully rehabilitate themselves. The vice chair further explains the parameters needed in order to pay retroactive VRS under policy item #85.30:

> "I hold that a worker should be eligible for retroactive payment of rehabilitation assistance where there is evidence of meaningful and purposeful 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 contexts of each case. Factors to be considered include the extent of effort exerted by the worker in the context of available resources, the nature and effort extended, the duration of the effort, and whether the effort was undertaken in good faith."

This means that, when looking at a worker's efforts retrospectively, they should be considered within the context of available resources, be supported as credible, undertaken in good faith, are meaningful towards enhancing employability, and can be shown as sustained over the duration in question.

I have therefore reviewed the worker's efforts as provided in his fax transmission dated August 3, 2004, and as documented in the IVA, in accordance with policy item #85.30 and the WCAT finding. I note that the worker received EI medical benefits for a 15–17-week period. The VRC concluded that because the worker had received medical EI, he had in essence declared himself unable to work during his period. As a result, the worker would have been unavailable to participate in the vocational rehabilitation process. The worker submits that he was not eligible for regular EI and therefore took medical EI but did not completely utilize the full period and had commenced his job search prior to the end of the 17 weeks.

The VRC also referred to the fact that the worker was ultimately able to secure employment that paid close to his long-term wage loss rate, and was therefore not entitled to VRS in the form of top-up allowances, as Board policy did not provide for the payment of a short-term loss of earnings. While I agree that the Board does not provide benefits for short-term loss of earnings, only long-term loss of earnings under section 23 of the Act, I am not satisfied that the worker's vocational efforts, which resulted in him securing employment were appropriately considered.

Although the worker was not receiving the professional guidance of a Board VRC, during the period in question, the worker submitted evidence that he located community resources to assist in career redirection, resumé preparation, and job search. In addition, the evidence provided by the worker in his submission confirmed that he attempted various work. He was employed as a ranch labourer for three months (June–September 2002) at $12 per hour, but found it physically difficult having to move bales of hay, wrangle cows, hold horses for breeding, or jump on or off the wagon. Since the employer was not prepared to modify the duties he left. He then found a two-month employment contract (September–November 2002) finishing metal trim at a meat plant where he earned $11 an hour. He attempted to contact the company for work directly but none was available due to downsizing.

Despite this, the worker's evidence supports that he continued to look for employment and was eventually successful in securing work as a laminator in April 2003. The worker stated the work was light and started at $10 an hour. He is now earning $14 an hour. I am satisfied that the evidence submitted by the worker regarding his vocational efforts is credible, meaningful, sustained over the period in question, and was undertaken in good faith in an effort to enhance his employability. My rationale is based on the fact that after his EI he was successful in finding his first job, and when that did not work out, he found two subsequent positions. During

this time he also recruited available community resources to assist him in his efforts, relocated when he could not find work, which support that his efforts were undertaken in good faith and for the purposes of enhancing his employability.

I find that the evidence supports the intent of the vocational efforts, participation, and motivation referred to under policy item #85.30 and the WCAT decision dated July 28, 2003. Although Board policy does not provide for the payment of short-term loss of earnings, his job search efforts during the periods in which he was not employed, are sufficient to warrant the payment of retroactive job search benefits. As a result I allow the worker's request in part, and direct that the Board provide the worker with job search benefits for the dates or periods after February 12, 2002, in which he was not employed and searching for employment.

In the VRC's memo dated August 31, 2004, the VRC states that he was prepared to assist the worker with moving costs if relocation was necessary. The worker had referred in his submission to the fact that he had relocated during the period he looked for work. This relocation resulted in him securing employment, which the Board agrees is suitable and will replace his long-term wage rate. I therefore direct the VRC to obtain the necessary information to provide the worker with relocation costs in keeping with Board policy.

Conclusion

As a result of this review, I vary the Board's decision of August 31, 2004.

Decision of the Review Division

Number: **25354**
Date: **May 13, 2005**
Review Officer: **Warren Hoole**
Subject: **Payment of Interest — Authority of Review Division to Consider Charter Arguments**

The worker requests a review of the decision of the Workers' Compensation Board (the "Board") dated October 25, 2004. The worker's counsel provided written submissions in support of this request for review. The employer was given notice of the review; however, the employer is not participating.

Section 96(6) of the *Workers Compensation Act* (the "Act") gives a review officer authority to conduct this review.

Issues

There are two issues in this review:

1. The Board's decision to deny the worker wage loss benefits for the period of March 3, 2000 to August 3, 2000; and

2. The Board's decision not to pay interest on the worker's entitlement to retroactive wage loss benefits.

Background

The worker, now a 44-year-old longshoreman, applied to the Board on October 4, 2001, for compensation in relation to post traumatic stress disorder ("PTSD"), a condition that the worker attributed to a life-threatening incident at his work on March 1, 2000. The worker did not return to work on March 4, 2000 and subsequently remained off work for a lengthy period.

By decision letter dated October 16, 2001, the Board rejected the worker's claim for compensation on the basis that the worker's application was not filed until after the expiration of the one-year limitation period set out in section 55 of the Act.

The worker appealed the Board's October 16, 2001 decision. The Workers' Compensation Appeal Tribunal ("WCAT") accepted the worker's appeal in a decision dated April 6, 2004, and directed the Board to consider the worker's claim on its merits.

By decision letter dated October 25, 2004, the Board considered the worker's claim on its merits. The Board concluded that the worker's PTSD arose out of and in the course of the worker's employment on March 1, 2000. The Board accordingly accepted the worker's claim

and provided the worker with a retroactive lump sum payment for wage loss benefits (the "Retroactive Payment"). The Board noted that the first medical evidence indicating the worker was disabled from working was set out in an August 3, 2000 chart note of the worker's family physician. Accordingly, the Board concluded that the first day of the worker's entitlement to wage loss benefits was August 3, 2000.

In its decision letter of October 25, 2004, the Board also concluded that the worker was not entitled to interest in respect of the Retroactive Payment. The Board indicated that interest is generally not payable on retroactive benefits unless the payment of retroactive benefits was necessitated by a "blatant Board error." The Board was of the view that no such error had occurred in relation to the worker's claim and therefore that no interest was payable to the worker in respect of the Retroactive Payment.

The worker disagrees with the Board's October 25, 2004 decision in two respects. First, the worker says he is entitled to wage loss benefits beginning on March 4, 2000, the first day he missed from work as a result of the March 1, 2000 work incident that caused his PTSD. Second, the worker says that he is entitled to interest on the Retroactive Payment.

Facts and Evidence

The relevant facts and evidence are adequately set out in the WCAT decision of April 6, 2004 and in the decision letter under review.

Law and Policy

The Act

Subsection 5(1) of the Act directs that, where a worker sustains a personal injury arising out of and in the course of his or her employment, the Board must pay "compensation as provided by this Part."

Subsection 35(1) of the Act provides that the Board must make payments of compensation on a periodic basis and may make payments of compensation at the times and in the manner and form the Board considers advisable.

Although there have been various amendments to the Act throughout the currency of the worker's claim with the Board, the above subsections have remained unchanged in substance.

Other Relevant Legislation

Pursuant to section 182 of the *Administrative Tribunals Act*, [SBC 2004] c. 45, ("ATA") WCAT is expressly precluded from considering "constitutional questions":

> 44. (1) The tribunal does not have jurisdiction over constitutional questions.
>
> (2) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to the tribunal.

Section 44 of the ATA applies to the WCAT effective December 3, 2004 (B.C. Reg. 516/2004).

Section 1 of the ATA defines "constitutional questions" as meaning "any question that requires notice to be given under section 8 of the *Constitutional Question Act*."

Section 8 of the *Constitutional Question Act* states, in part:

> 8 (1) In this section:
>
> "**constitutional remedy**" means a remedy under section 24 (1) of the *Canadian Charter of Rights and Freedoms* other than a remedy consisting of the exclusion of evidence or consequential on such exclusion;
>
> "**law**" includes an enactment and an enactment within the meaning of the *Interpretation Act* (Canada).
>
> (2) If in a cause, matter or other proceeding
>
> (a) the constitutional validity or constitutional applicability of any law is challenged, or
>
> (b) an application is made for a constitutional remedy,
>
> the law must not be held to be invalid or inapplicable and the remedy must not be granted until after notice of the challenge or application has been served on the Attorney General of Canada and the Attorney General of British Columbia in accordance with this section.
>
> (3) If in a cause, matter or other proceeding the validity or applicability of a regulation is challenged on grounds other than the grounds referred to in subsection (2) (a), the regulation must not be held to be invalid or inapplicable until after notice of the challenge has been served on the Attorney General of British Columbia in accordance with this section.

Subsection 15(1) of the Charter states:

> 15. (1) Every individual is equal before and under the law and has the right to 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.

Policy

The following policies relating to this review are found in the *Rehabilitation Services and Claims Manual*, Volume I:

- Policy item #50.00, *Interest*, directs the Board as to when interest is payable, and how such interest will be calculated. There are two circumstances where the Board will pay interest. First, the Act requires the payment of interest in limited circumstances. Second, the Board

may exercise its general discretion to pay interest where an amount was not paid by the Board due to a "blatant error." A blatant error is "an obvious and overriding error."

The policy item applies whether the Board is statutorily required to pay interest, for example pursuant to paragraph 19(2)(c), or whether the Board is merely exercising its discretion to pay interest. In either case, the policy item directs that only simple interest be paid and that the interest be calculated at a rate equal to the prime lending rate of the banker to the government.

This policy item was brought into effect November 1, 2001, by a Resolution of the Panel of Administrators dated October 15, 2001.

- Policy item #95.31, *Payment of Wage-Loss without Medical Reports*, states that wage loss benefits will generally not be paid in the absence of medical evidence of disablement from working. However, the policy item notes:

> [if] there is acceptable evidence of disability, and that evidence is clearly documented, wage-loss benefits can be paid in the absence of medical reports although these will, in almost all cases, be the most acceptable evidence.

Practice Directive

Although not binding upon me, I note Practice Directive #28, *Interest on Retroactive Wage Loss and Permanent Disability Lump-Sum Benefits*. The Practice Directive provides further guidance as to what constitutes a "blatant Board error."

Reasons and Decision

Issue #1: Wage Loss Benefits from March 4 to August 3, 2000

The evidence shows that the worker ceased working on March 4, 2000, as a result of the mental stress he sustained out of and in the course of his employment on March 1, 2000. Indeed, in the decision letter under review, the Board stated:

> I find that the evidence weighs in support of your case that you stopped working as of March 4, 2000 as a result of the near miss incident on March 1, 2000.

Despite this finding, the Board concluded that it could not pay wage loss benefits in the absence of medical evidence establishing that the worker was disabled from working. Because the first medical evidence to this effect was dated August 3, 2000, the Board did not pay wage loss benefits to the worker until that date.

In my view, the Board was incorrect to conclude that medical evidence of disability is mandatory before wage loss benefits are payable. Policy item #95.31 clearly states that, although medical evidence is usually preferable, it is not mandatory in every case. I take this to mean that in unusual or extraordinary situations, contemporaneous medical evidence of disability is not

necessary for the payment of wage loss benefits. The worker's case is extraordinary because of his own confusion over his mental condition, his delay in applying for compensation, the delay in his PTSD diagnosis and the lengthy appellate process.

In the unusual circumstances of the worker's case, I am satisfied that contemporaneous medical evidence of disablement from working on March 4, 2000 is not mandatory for the payment of wage loss benefits. I find that there is sufficient alternative evidence on file to demonstrate that the worker was disabled from working on March 4, 2000, as a result of the March 1, 2000 incident.

It follows that the worker is entitled to wage loss benefits from March 4, 2000 to August 3, 2000. For the purposes of my discussion below, the benefits payable for this period of entitlement to wage loss benefits form part of the "Retroactive Payment."

Issue #2: Interest on the Retroactive Payment

The Act does not contain any specific direction to the Board as to the proper method for calculating interest. Indeed, the Act is largely silent as to the Board's obligation to pay interest at all. Exceptions to this silence are found in sections 19 and 258 of the Act; however, neither of these exceptions is relevant to the circumstances of the decision letter under review.

In addition to these limited statutory situations where interest is payable, the Board has a discretion to award interest.[7] This discretion may be implied from the Board's general authority to pay "compensation" under subsections 5(1) and 35(1) of the Act.

Effective November 1, 2001, the Board significantly amended its interest policy pursuant to a Resolution of the Panel of Administrators dated October 15, 2001. Prior to November 1, 2001, interest was generally payable on all retroactive lump sum payments. Interest was also calculated on a compound basis at the rate of the Board's return on its investments ("Former Interest Policy").

Following the November 1, 2001 amendment to the Board's interest policies, interest is now paid on lump sum payments only where the lump sum payment is the result of a "blatant Board error." Further, if interest is payable, such interest is payable on a simple basis at the prime lending rate of the provincial government's banker ("Current Interest Policy").

Evidently, the Former Interest Policy is more advantageous to the worker than the Current Interest Policy in relation to whether or not he is entitled to interest on the Retroactive Payment.

In this regard, the worker's legal counsel says that the Current Interest Policy is invalid on several grounds. As a result, counsel argues that the Former Interest Policy is properly applicable to the issue of interest payable on the Retroactive Payment.

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[7] See Appeal Division Decision #97-0857 (1997), 13 *Workers' Compensation Reporter* 443.

I will consider each of the worker's arguments below.

A. Does the Current Interest Policy Infringe Subsection 15(1) of the Charter?

Counsel says that the Current Interest Policy discriminates between disabled workers on the grounds that, where a worker's claim is denied because of "blatant Board error," that worker will receive interest following a successful appeal. However, where a worker's claim is denied because of non-blatant Board error, that worker will not receive interest following a successful appeal.

It is thus submitted that:

> The different treatment, the lesser compensation for one of the injured workers, is based not on the assessment of his/her disability, but rather on a matter totally unrelated to the worker and his injuries, on the basis of how bad the Board's decision making was in his case. The award of interest to one disabled worker where the Board has made a blatant error and the denial of interest where the Board's decision was simply wrong is discriminatory contrary to section 15 of the Charter.

I disagree with counsel's Charter submissions.

I find that counsel's submission is a "constitutional question" within the meaning of section 1 of the ATA because the question engages subsection 8(3) of the *Constitutional Question Act*.[8] In my view, effective December 3, 2004, the ATA has now removed jurisdiction from the Review Division to consider constitutional questions, including Charter issues. Prior to the ATA, the Review Division took the position that it was authorized to consider constitutional matters.[9]

In *Nova Scotia (Workers' Compensation Board)* v. *Martin*, [2003] 2 SCR 504, the Supreme Court of Canada recently set out the principles applicable to the issue of whether or not an administrative tribunal such as the Board has the jurisdiction to consider Charter matters. The key issue to determine is whether the enabling legislation of the administrative tribunal evidences an intent for the tribunal to consider Charter issues:

> The current, restated approach to the jurisdiction of administrative tribunals to subject legislative provisions to Charter scrutiny can be summarized as follows: (1) The first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law arising under the challenged provision. (2)(a) Explicit jurisdiction must be found in the terms of the statutory grant of authority. (b) Implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors will include the statutory mandate of the

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[8] I am of the view that the policy in question likely constitutes a "regulation" within the meaning of subsection 8(3) of the *Constitutional Question Act*. In this regard, see *Skyline Roofing Ltd.* v. *Alberta* (Workers' Compensation Board), 2001 ABQB 624.

[9] See Review Division Decision #499, dated January 12, 2004.

> tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations, including the tribunal's capacity to consider questions of law. Practical considerations, however, cannot override a clear implication from the statute itself. (3) If the tribunal is found to have jurisdiction to decide questions of law arising under a legislative provision, this power will be presumed to include jurisdiction to determine the constitutional validity of that provision under the Charter. (4) The party alleging that the tribunal lacks jurisdiction to apply the Charter may rebut the presumption by (a) pointing to an explicit withdrawal of authority to consider the Charter; or (b) convincing the court that an examination of the statutory scheme clearly leads to the conclusion that the legislature intended to exclude the Charter (or a category of questions that would include the Charter, such as constitutional questions generally) from the scope of the questions of law to be addressed by the tribunal. Such an implication should generally arise from the statute itself, rather than from external considerations.[10]

The search for legislative intent mandated by the Supreme Court of Canada has now been simplified by the express statement of the BC legislature, as found in sections 44 and 182 of the ATA. These provisions specifically deprive the WCAT of jurisdiction over constitutional questions. In my view, it follows that the Review Division is similarly deprived of jurisdiction.

I recognize that the ATA does not in fact refer to the Review Division. It might thus be said that the legislature's decision not to reference the Review Division indicates an intent for the Review Division to continue to consider Charter matters. On balance, however, I am satisfied that it would be absurd to interpret the legislature's silence as demonstrating an intent to empower an inferior administrative body (i.e., the Review Division) with greater constitutional jurisdiction than its supervisory administrative tribunal (i.e., the WCAT). I find that, with the enactment of the ATA, the legislature intended to deprive the Review Division of jurisdiction over "constitutional questions" within the meaning of the *Constitutional Question Act*, including Charter issues.

As a result, I conclude that I am without jurisdiction to consider the Charter submission of the worker's legal counsel.

If I am wrong on this jurisdictional point, I would still disagree with the worker's Charter argument on its merits.

Subsection 15(1) of the Charter does not simply invalidate all forms of discriminatory action. Rather, subsection 15(1) precludes discriminatory action on certain enumerated grounds. Common law jurisprudence has added additional "analogous grounds" to the list of enumerated grounds.

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[10] *Martin*, *supra*, at paragraph 48.

Therefore, not all discriminatory action will automatically infringe the Charter. Rather, discrimination must be based on an enumerated or analogous ground before subsection 15(1) of the Charter is engaged.

The basis of the discrimination alleged by the worker in this case is the different treatment of workers that are subject to a "blatant Board error" (and thus receive interest on retroactive lump sum payments) versus the treatment of workers not subject to a "blatant Board error" (and thus receive no such interest).

In my view, this basis for treating workers differently is not one of the enumerated or analogous grounds of discrimination prohibited pursuant to subsection 15(1) of the Charter and Charter jurisprudence. The worker's legal counsel has not cited any authority for his argument that this type of discrimination is contrary to subsection 15(1) and I am not aware of any such authority.

Therefore, I disagree that the Current Interest Policy infringes subsection 15(1) of the Charter. To the extent that the Current Interest Policy treats workers differently, the basis of this different treatment does not offend subsection 15(1) of the Charter.

Consequently, even if it were within my jurisdiction to consider the worker's Charter argument, this argument would not assist the worker.

B. Is the Board without statutory authority to promulgate policy with a retroactive effect?

In the alternative, the worker's counsel says that, as a matter of law, it is presumed that an administrative tribunal will not exercise its discretion, such as the discretion to pay interest, in a retroactive manner. Counsel points out that the Act does not expressly authorize the Board to make policy having a retroactive effect and that any effort by the Board to do so is beyond the Board's statutory authority. Counsel therefore submits that the Current Interest Policy, because it purports to apply retroactively, is *ultra vires* the Board and must be disregarded.

Again, I am without jurisdiction to address counsel's argument on this point.

Subsection 99(2) of the Act requires the Board, including the Review Division, to "[. . .] apply a policy of the board of directors that is applicable to that case." Policy item #50.00 is clearly applicable to the worker's circumstances. In my view, subsection 99(2) of the Act precludes me from declaring a policy of the Board *ultra vires*. Rather, the legislature has expressly directed Board decision makers, including review officers, to apply relevant policies in adjudicating matters under the Act.

The authority granted a review officer pursuant to subsection 96.4(8) of the Act does not include an authority to declare Board policy *ultra vires*. I note that the WCAT may engage in the consultative process set out in s. 251 of the Act if the chair of the WCAT is concerned that a policy of the Board is "so patently unreasonable" as to be inapplicable. This process would likely be available to remedy policies that are potentially *ultra vires* the Board.[11]

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[11] See *Switzer* v. *British Columbia Workers' Compenssation Board*, 2004 BCSC 1616.

Given the legislature's express requirement that Board policy be applied, the limited scope of a review officer's authority, and the availability of an alternative process to question Board policy, I am of the view that I have no jurisdiction to declare Board policy *ultra vires*.

It follows that, irrelevant of the merit or otherwise of counsel's argument, I have no authority to declare the current version of policy item #50.00 *ultra vires*. The worker's argument on this point must therefore fail.

C. Is the Current Interest Policy intended to apply retroactively?

The worker's counsel argues in the further alternative that, as a simple matter of interpretation, the Current Interest Policy does not apply where the original decision to deny benefits was made prior to November 1, 2001. Because the Board issued its original decision to deny benefits pursuant to section 55 of the Act on October 16, 2001, counsel says that interest entitlement is determined on the basis of the Former Interest Policy. Counsel cites WCAT-2004-03816-RB in support of this position.

However, I note several other appellate decisions that reach a conclusion contrary to WCAT-2004-03816-RB.[12] I prefer the appellate decisions contrary to WCAT-2004-03816-RB.

Further, I note that the Resolution of the Panel of Administrators dated October 15, 2001, is said to apply to "all decisions to award or charge interest" after November 1, 2001. It is not disputed that, in the case under review, the decision not to award interest was made on October 25, 2004, evidently well after November 1, 2001. I am therefore satisfied that, on the plain wording of the Resolution, the Current Interest Policy is applicable to the Board's decision not to award the worker interest on the Retroactive Award.

Thus, despite counsel's three arguments, I am persuaded that the Current Interest Policy governs whether the worker is entitled to interest on the Retroactive Payment.

As already discussed, interest is only payable pursuant to the Current Interest Policy where a retroactive payment is necessitated by a "blatant Board error." The worker's counsel has not argued that the Board's initial decision that the worker's claim was statute-barred amounted to a "blatant error." I see no such error from my review of the file.

Accordingly, in light of policy item #50.00 as it currently reads, the worker is not entitled to interest on the Retroactive Payment.

As a result, I allow in part the worker's request for review. The worker is entitled to wage loss benefits for the period of March 4, 2000 to August 3, 2000. The worker is not entitled to interest on the Retroactive Payment, of which wage loss benefits for March 4 to August 3, 2000, forms a part.

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[12] See Appeal Division Decision #2002-1488, dated June 14, 2002; and WCAT-2005-01178, dated March 8, 2005.

Conclusion

As a result of this review, I vary the Board's decision of October 25, 2004.

Decision of the Review Division

Number: **25638**
Date: **May 18, 2005**
Review Officer: **Kevin Molnar**
Subject: **Meaning of "Wilful" Under Policy Item D12-196-6**

On October 8, 2004 the Workers' Compensation Board (the "Board") issued an administrative penalty against the employer by way of Inspection Report #2004045630126. Notification of the administrative penalty was provided to the employer in a letter from the Board's Compliance Section dated October 12, 2004. The employer, through their representative, has provided submissions in support of their request for review.

The employer's submissions were disclosed to the Board's Compliance Section, which filed a response. That response was disclosed to the employer who provided a rebuttal submission.

The employer's workers were given notice of this review but they are not participating.

Section 96(6) of the *Workers Compensation Act* (the "Act") gives a review officer authority to conduct this review.

Issue

The issue on this review is the Board's decision to impose an administrative penalty against the employer for a violation of Part 3 of the Act.

Background

The employer is involved in the west coast tourism industry and has a number of holdings including sport-fishing operations. On May 26, 2003 a worker was injured when his foot was caught between two boats during a transfer at sea. On August 26, 2003 the Board issued Inspection Report 2003045630110 (IR 110) that found the employer in violation of the accident investigation and reporting provisions set out in sections 174(1) and 175(1) of the Act respectively. The Board found that the accident investigation did not include a worker representative and the report failed to include all of the information required pursuant to section 3.4 of the Occupational Health and Safety Regulation (the Regulation).

The Board notified the employer that a penalty was being considered and invited the employer to respond. After concluding their investigation, the Board issued an administrative penalty for the following reasons:

- The employer violated the Act and Regulation with knowing (wilful) and reckless disregard.
- The employer has previous violations of a similar nature.

- The employer's actions indicated a general lack of commitment to compliance.
- The employer failed to comply with a previous order within a reasonable time.
- The Board applied an administrative penalty in order to motivate the employer and other employers to comply with the Act and Regulation.
- The employer failed to exercise due diligence to prevent the violation to which the penalty relates.

In the October 12, 2004 notification letter to the employer, the Board explains how the penalty amount of $22,021.80 was established. A category "A" penalty was applied because the employer's actions were found to be knowing (wilful) or committed with reckless disregard. However, the Board reduced the basic penalty amount by 30% after applying the variation factors set out in policy D12-196-6.

The employer requests a review of the Board's decision to impose an administrative penalty. The employer contends that it has demonstrated their commitment to comply with the Act and a penalty should not be imposed. Alternatively, if a penalty is imposed, it should be reduced to a category "B" because the employer's actions were not wilful or made with reckless disregard.

Facts and Evidence

I do not intend to list in detail the extensive facts and evidence on file in this review. Rather, it will suffice to note that I have carefully considered the following documents in conducting this review:

- The 273-page "firm file" document dated January 24, 2005, and disclosed by the Board to the Review Division and the employer.
- The employer's December 22, 2004 submission to the Review Division.
- The Board's response submission dated February 4, 2005.
- The employer's rebuttal submission dated March 8, 2005.
- The Statement of Reasons for Administrative Penalty dated July 27, 2004.
- All previous inspection reports and warning letters issued by the Board.
- The employer's incident investigation report from the May 26, 2003 incident.

Where necessary, I will discuss specific findings of fact and other relevant evidentiary matters in the course of my reasons.

Law and Policy

The Act

The law that applies to this review is found in sections 174(1), 175(1), 175(2), and 196(1) of the Act and section 3.4 of the Regulation.

Section 174(1) states that an investigation required under this Division must be carried out by persons knowledgeable about the type of work involved and, if they are reasonably available, with the participation of the employer or a representative of the employer and a worker representative.

Section 175(1) states that as part of an investigation required by this Division, an employer must ensure that an incident investigation report is prepared in accordance with the regulations.

Section 175(2) states the employer must provide a copy of and incident investigation report to the joint committee, worker representative and the Board.

Section 196(1) states that the Board may, by order, impose an administrative penalty on an employer under this section.

The Regulation

Section 3.4 of the Regulation indicates that an employer must ensure that an incident investigation report required by Division 10 of Part 3 of the *Workers Compensation Act* contains seven specific criteria.

Policy

The policies relating to this review are found in the Board's *Prevention Manual*.

Policy item #D12-196-1, *Administrative Penalties – Criteria for Imposing*, provides that the main purpose of administrative penalties is to motivate the employer receiving the penalty and other employers to comply with the Act. The policy outlines that the Board will consider imposing an administrative penalty based on a number of factors including:

- where the violation results in a high risk of serious injury, illness or death;
- where the employer is found in violation of the same section of the Act or Regulation on more than one occasion;
- where the employer has failed to comply with a previous order within a reasonable time;
- where the employer knowingly or with reckless disregard violates one or more sections of Part 3 or the Regulation; and,
- where Board considers that the circumstances warrant an administrative penalty.

Policy item #D12-196-2, *Administrative Penalties – High Risk Violations*, sets out a list of violations that are assumed to be high risk in the absence of evidence showing the contrary. Whether a violation involves high risk of serious injury, illness or death is determined on the basis of the likelihood of an occurrence, the number of affected workers and the likelihood of any serious injury or illness.

Policy item #D12-196-6, *Administrative Penalties – Amount of Penalty*, outlines the criteria used when determining the amount of an administrative penalty. A Category "A" penalty applies where there is a high risk of, serious injury, illness or death, or non-compliance was wilful or with reckless disregard. Any other violations result in a category "B" penalty. With a multi-site employer, whether the violation represents a "program failure" determines the assessable payroll used to calculate the penalty. The policy allows for the basic penalty amount to be varied up or down based on nine "variation factors."

Reasons and Decision

It is an undisputed fact that the employer has violated sections 174(1) and 175(1) of the Act. On May 26, 2003 a worker was injured. The employer had an obligation to conduct an investigation and prepare an incident investigation report (the Report) as prescribed by legislation. The Board found that the employer failed to meet their obligation and cited the employer for that violation by way of inspection report IR110.

The employer did not request a review of IR110 and candidly acknowledges their reporting procedures have been deficient in the past. I have reviewed the Report submitted to the Board by the employer and agree with the Board officer that it does not meet the requirements specified in section 3.4 of the Regulation. What I must determine is whether it was appropriate for the Board to impose an administrative penalty as a result of this violation. If imposing a penalty was in order, I must also consider whether the amount of the penalty imposed is supported by Board policy and the facts of the case.

Is an administrative penalty appropriate?

Policy item #D12-196-1 provides guidance when determining whether an administrative penalty is warranted. The policy indicates that the main purpose of an administrative penalty is to motivate the employer receiving the penalty or other employers to comply with the Act. The policy provides that the Board will consider imposing an administrative penalty based on a number of different factors. Those factors include situations where the employer is found in violation of the same section of the Act or Regulation on more than one occasion or when the employer knowingly or with reckless disregard violates one or more sections of Part 3 or the Regulation.

In their submission, the employer argues that a penalty is not necessary to motivate compliance. According to the employer, they have been participating in a Joint Action Plan (the JAP) with the Board since 1999 in order to improve occupational health and safety in the workplace. The employer contends that they have worked diligently to meet the objectives of the JAP and have demonstrated their motivation to comply with the Act and Regulation. Further, the

employer argues that they have shown due diligence by taking all reasonable steps to comply with the investigation and reporting requirements of the Act. The evidence does not support the employer's contention.

The penalty sanction before me is a result of the May 26, 2003 accident and the subsequent order issued August 26 2003 citing the employer for a violation of sections 174(1) and 175(1) of the Act. In the preceding three years, the employer was cited on two occasions for violations of these same sections of the Act. The Board also issued a warning letter July 20, 2001 putting the employer on notice that further violations of a similar nature may result in an administrative penalty. Even after IR110 was issued, the employer was cited for a violation of a similar nature under section 175(2)(b) of the Act on November 11, 2003.

Although the employer appears to have taken steps to train staff regarding investigation and reporting procedures, those efforts largely appear to have occurred after August 2003. I note that the employer started to demonstrate a commitment to the JAP, assigned occupational health and safety issues to the chief operations officer and began working closely with the Board officer in 2004. All of these improvements occurred after significant intervention by the Board.

It is clear that the Board followed a pattern of escalating enforcement in order to motivate this employer to comply with the Act and Regulation. Compliance after being the subject of escalating enforcement or in response to an order issued by the Board does not demonstrate either due diligence or motivation to comply with the legislation. The stated purpose of an administrative penalty is to ensure that an employer, and other employers, comply with the Act. This includes motivating an employer to continue complying. Although the employer is to be commended for their recent improvements with regard to an occupational health and safety, I find that imposition of an administrative penalty is warranted. To do otherwise would send the message that compliance is only necessary when subject to Board scrutiny.

What category of administrative penalty is appropriate?

In both the October 8, 2004 decision and the October 12, 2004 notice of penalty, the Board informed the employer that a category "A" penalty applies in this case because their actions were knowing (wilful) or with reckless disregard. According to the employer, actions that are knowing, or made with reckless disregard occur when failure to fully comply is deliberate or with an omission that is made with heedless indifference to the consequences. The employer argues that finding their actions were wilful, or with reckless disregard is inconsistent with the evidence. The employer contends that a category "B" penalty would be more appropriate.

In the decision under review and in the July 27, 2004 Statement of Reasons for the administrative penalty, the Board characterizes the employer's actions as "knowing (wilful) or with reckless disregard" as justification for imposing a category "A" penalty. The Board repeatedly equates "knowing" with "wilful" in support of their use of the category "A" penalty. "Knowing" and "wilful" are not the same and treating them as synonymous is a misapplication of Board policy.

Policy item D12-196-1 provides guidance on what factors are considered when deciding whether to impose an administrative penalty. One factor considered is where an employer knowingly or with reckless disregard violates one or more sections of Part 3 or the Regulation. Knowing

and reckless disregard are separate concepts. The first refers to simply having knowledge of one's obligation under the legislation, while the later implies knowing that there may be an obligation, and refusing to inquire as to its existence or terms.

Knowledge sufficient for imposition of a penalty under policy D12-196-1 can be inferred where an employer has prior inspections or contact with the Board and is therefore aware of their obligation. Where an employer refuses to read the legislation or take other steps to find out their obligations, their actions could be characterized as having reckless disregard. In the latter situation, refusal to learn of an obligation is a conscious decision on the part of the employer to remain ignorant of that obligation. If an employer fails to comply with the Act when they are aware of their obligation, or they set out to consciously remain ignorant of that obligation, it may well be justification for imposing a penalty pursuant to policy D12-196-1.

Policy D12-196-1 provides guidance on when to impose a penalty, it does not provide guidance on the category or the amount of any penalty. The amount of an administrative penalty is established under the auspices of policy item D12-196-6. According to policy, a category "A" is applied where the violation could result in a high risk of serious injury, illness or death, or where non-compliance is wilful or with reckless disregard. Although the wording is similar to language used in policy D12-196-1, there is a difference. Policy D12-196-6 makes no mention of "knowing" and it should not be equated with "wilful" when determining the category of penalty to be imposed.

"Wilful," like reckless disregard, is a deliberate act made with intent by an employer despite knowledge of their obligation under the Act and Regulation. Under policy D12-196-6, wilful requires not just that the employer at some time in the past was told about a violation, but also that they were conscious of that knowledge when the later violation is committed. This may be hard to prove, but it is reasonable to have a high standard to preserve the integrity of category "A" and "B" penalties. It also allows for situations where, though the employer had prior knowledge, the later violation resulted from negligence or circumstances beyond the employer's control.

To suggest that a category "A" penalty ought to apply in situations where the employer simply knew of their obligation and a violation subsequently occurs diminishes the impact of a category "A" penalty. A category "A" penalty is used when the workplace hazard is high risk as set out in policy D12-196-2 or the precipitating actions are so egregious they can be considered wilful, or made with reckless disregard. For an employer that knows of their obligation, but is inattentive to that obligation, policy D12-196-6 provides for use of escalating category "B" penalties. In fact, since most penalties are either the result of escalating enforcement or a high risk violation, elevating penalties to a category "A" where the employer has prior knowledge of the Act would virtually render category "B" penalties redundant.

In this case, there is no suggestion that submitting a Report without all the criteria set out in section 3.4 of the Regulation presented a high risk of injury, illness, or death. Consequently, the evidence must suggest that the employer's actions were wilful, or made with reckless disregard in order to justify a category "A" penalty. It is clear that the employer knew of their obligation to conduct an accident investigation and submit a report to the Board. I also note that the Board officer made a significant effort to ensure the employer understood their obligation. However, I would not characterize the employer's actions as either "wilful" or with "reckless disregard."

The employer did conduct an investigation into the May 26, 2003 incident and filed a Report, albeit without all the necessary criteria set out in section 3.4 of the Regulation. This indicates that the employer was making an effort, although inadequate, to comply with the legislation. It is not indicative of an employer who knows of their obligation under the Act and deliberately sets out to avoid compliance. In the July 27, 2004 Statement of Reasons, the employer's actions are also characterized as being made with reckless disregard because the employer failed to read the Act and regulations and ignored the many orders previously written.

Not responding to escalating enforcement does justify imposition of a penalty; however, simply failing to read the Act or Regulation does not amount to reckless disregard. Although reckless disregard has the same meaning in both policy D12-196-1 and D12-196-6, there is no evidence to suggest that the employer deliberately refused to read the legislation or otherwise set out to avoid their obligation under the Act and Regulation. The evidence indicates this employer was inattentive toward the investigation and reporting requirements of the Act and their efforts to comply inadequate.

I find that a category "A" penalty does not apply in this case. A category "B" penalty as specified in policy #D196-6 will be imposed.

What amount of penalty is appropriate?

Policy D12-196-6 also provides guidance on how to establish the amount of an administrative penalty. The policy contains two tables from which the "basic amount" of a penalty can be determined based on whether the penalty is classified as category "A" or "B." Each table sets out certain payroll categories and specifies a formula for determining the penalty for each.

In this case, the category "B" penalty amount is based on the employer's 2003 payroll in Classification Unit 761028 of $1,385,486.00. The formula for this payroll is $6,800 + .32% of payroll over $1,000,000, which amounts to $1,233.56 for a total basic penalty amount of $8,033.56 ($6,800.00 + (.32% x $385,486.00) = $8,033.56). The policy provides that the "basic amount" of the penalty may be varied up to 30%, have regard to the circumstances, including the following factors:

(a) nature of the violation;
(b) nature of the hazard created by the violation;
(c) degree of actual risk created by the violation;
(d) whether the employer knew about the situation giving rise to each violation;
(e) the extent of the measures undertaken by the employer to comply;
(f) the extent to which the behaviour of the workplace parties has contributed to the violation;
(g) employer history;
(h) whether the financial impact of the penalty would be unduly harsh in view of the employer size;
(i) any other factors relevant to the particular workplace.

The power to vary the penalty amount recognizes that categories "A" and "B" each cover a broad range of situations. Based on this list of factors, there may be grounds for reducing or increasing the standard penalty amount. Like the Board officer, I find that there are grounds for varying the basic penalty amount.

Items (a), (b) and (c) are relevant to this situation because they deal with the nature of the violation and the degree of risk created by the violation. In this case, the nature of the violation is administrative and there is no immediate hazard to workers or actual risk created by the violation. I also recognize the considerable extent of the measures undertaken by the employer to comply and the positive comments from the Board officer regarding the employer's current commitment to health and safety in relation to items (e) and (i). All of these factors suggest a downward variation. However, I do not believe a full 30% downward variation is warranted.

Items (d) and (g) refer to the employer's knowledge of the situation giving rise to the violation and prior history. The evidence suggests that the employer did not pay adequate attention to their investigation and reporting obligations. It was only after substantial intervention by the Board that the employer has assigned sufficient management and training resources to ensure compliance. In addition, there is no indication the financial impact of the penalty referred to in (h) would be unduly harsh. These factors suggest no variation of the penalty is warranted. Taken together, I find that a downward variation of 15% would be appropriate. Accordingly, a category "B" penalty in the amount of $6,828.53 is imposed ($8,033.56 − 15% = $6,828.53).

As a result, the employer's request for review is allowed in part.

Conclusion

As a result of this review, I vary the Board's decision of October 8, 2004 and impose an administrative penalty in the amount of $6,828.53.

Decision of the Review Division

Number: **25707**
Date: **June 17, 2005**
Review Officer: **Jackie Christofferson**
Subject: **Board Authority on Receipt of Section 96.4(8) — Refer Back**

The worker requests a review of the decision of the Workers' Compensation Board (the "Board") dated October 18, 2004. In support of this Request for Review, the worker has provided written submissions. The employer is inactive and as a result, there is no respondent to this review.

Section 96(6) of the *Workers Compensation Act* (the "Act") gives a review officer authority to conduct this review.

Issue

This is a review of the Board's implementation of a Review Division decision of August 25, 2004 regarding the worker's long-term wage rate.

Background

The Board accepted a claim for injuries that occurred on November 21, 2002 to this now 62-year-old self-employed truck driver. The worker's claim was reopened on September 26, 2003. The worker requested a review of the Board's decision regarding his wage rate upon reopening of his claim. A decision of the Review Division dated August 25, 2004, found that further investigation was required to determine the worker's earnings in the 12 months prior to the injury.

In the decision letter under review, the Board officer outlined her implementation of the Review Division decision. The Board officer determined that based upon the information provided by the worker, the "office" expenses and "telephone and utility" expenses were properly added back to the worker's net income. Further, the worker's Business Loss Carried Forward was appropriately taken into account when the worker's net income was determined. The worker was invited to submit further evidence or documentation regarding these issues within 30 days. The worker did not provide further documentation.

The worker requested an oral hearing for the review. In a letter dated January 13, 2005, a preliminary decision was made not to hold an oral hearing in this matter. There may be compelling reasons to hold an oral hearing, such as when credibility is an important issue, or where an oral hearing is needed to determine the significant facts in dispute. Neither of these reasons applies to this review. For that reason, I confirm the preliminary decision not to hold an oral hearing in this case.

Facts and Evidence

The relevant facts and evidence with respect to this claim have been outlined in the Review Division decision of August 25, 2004. Therefore, I will only list the additional facts and evidence I found relevant to the issues before me when conducting this review:

- The Review Division decision of August 25, 2004, referred the decision of January 5, 2004 back to the Board for further investigation. The Board officer was to investigate the following:

    1. Whether office expenses and telephone and utilities expenses pertained to the worker's home office and therefore may be classified as possible add-backs to the worker's net income.

    2. The worker's submission that he had carried a previous business loss forward.

- In a memo dated October 14, 2004, the worker's long-term wage rate was referred back to the Long-Term Rate Setting Unit (the "LTRSU"). The worker was categorized as a labour contractor self-employed truck driver. The re-referral was based upon the Review Division decision of August 25, 2004 to further investigate two issues.

- In a memo dated October 15, 2004, the LTRSU noted that there was no evidence of previous years losses being carried forward either on the Tax Forms, the Statement of Business Expenses or the documents on file. The telephone and utilities expenses were already recorded in the Business Use of Home (the "BUH") portion on the Statement of Business Expenses.

- In a memo dated October 18, 2004, the LTRSU confirmed the following information:

    – With respect to the office expenses and telephone and utility expenses, in both 2001 and 2002, the worker declared the BUH expenses. In 2001, this included the business portion of the following home expenses: heat, electricity, insurance, maintenance, mortgage interest, and property taxes. In 2002, the BUH expenses included: heat, electricity, insurance, maintenance, mortgage interest, property taxes, and cable. Therefore, the utilities (heat, electricity), for the home use for business had already been reported and deducted in the BUH expenses.

    – As indicated in the Review Division decision, the BUH expense had been added back. Usually if a self-employed person is declaring telephone as part of the BUH expense, the telephone amount is added to the listed items in the BUH. Therefore, unless information is provided which states that the telephone and utilities entered on line 9220 of the Statement of Business Activities is not representative of the business expense but rather a personal expense relating to the home office, the expense for telephone and utilities would not be considered an add-back.

    – With respect to office expenses, as the worker had declared BUH expenses which included insurance, mortgage interest and property taxes, unless the worker provides documentation to the contrary, the office expenses are considered to be a business expense and not an add-back.

– Regarding the two-year loss carried forward, the May 31, 2004 letter from the worker advised that his company was working on a two-year loss carried forward. On both the 2001 and 2002 Statement of Business Activities, the worker declared carry forwards from the previous year for the BUH. While these BUH carry forwards reduced the worker's net income, the entire amount of the BUH is an add-back and therefore, the carry forward from previous years does not affect the net plus add-back figure used for the calculation of average earnings.

– The LTRSU was unable to locate any other entry in the 2001 or 2002 Statement of Business Activities which would indicate an extraordinary or unusual business adjustment representing previous year's business losses carried forward, the disposition/acquisition of capitol asset or other extraordinary item which would not be a normal business occurrence and therefore may distort the real income of the business.

– The LTRSU noted the following:

1. Review of average earnings calculation of December 17, 2003 LTRSU log.

   On reviewing the income tax information on file, errors were made in the calculation of the average earnings resulting in higher annual average earnings than would have resulted if the calculation had been done correctly. The worker was a 50% business partner; therefore, the worker's shared net income before adjustments on line 9369 is 50%. Since the entire amount of the BUH expenses is deducted from the worker's share of net income, the entire amount of the BUH is added back; however, only 50% of the net income (gross-expenses) was declared by the worker, only 50% of the meals had actually been deducted from the worker's portion so only 50% of the meals should have been added back.

   The 2002 Statement of Business Activities included other income from recapture of CCA and CEC in the amount of $2,000 in the gross income. As this would be extraordinary income and not a normal business occurrence, this amount should not have been included in the income. Noting that the worker is a 50% partner (therefore $1,000 should not have been included in the income), in 2002 the net income before add-backs should have been $63.24.

   As greater than 75 days had passed since the long-term wage rate decision was made there is no reconsideration of the average earnings based upon these errors.

2. Further information was required from the worker which indicated the following:

   (a) The office expenses and/or telephone and utilities declared as business expenses pertain to the worker's home office; and if so, the amount that represents the business expense and the personal expense; and

   (b) If the declared expenses (other than BUH) includes a carry forward of a business loss from previous years, and if so, confirmation of a carry forward amount would be required.

– In the decision letter under review, the Board officer advised that with respect to the following issues:

1. *Office Expenses; Telephone and Utilities Expenses*

   A review of the information provided showed that utilities (heat and electricity) for the home use for the worker's business had already been *reported and deducted* within the BUH expense. As noted in the Review decision, the BUH expense had already been added back.

   The LTRSU noted that generally, when a self-employed person declares a telephone as part of the BUH expense, the telephone amount is added to items listed within the BUH, to be deducted from income, similar to how the amount paid for cable to the BUH expenses for 2002. However, the worker did not include his telephone bill in his list of "business expenses" in his tax return.

   Unless information is provided by the worker which stated that the telephone and utilities expense (line 220 of the Statement of Business Activities) does not represent a business expense, but is actually a personal expense, the expense for telephone and utilities would not be considered an "add-back."

   With respect to office expenses, as the worker declared BUH expenses which included insurance, mortgage, interest and property taxes, unless the worker provided documentation to the contrary, the office expenses are considered to be a real business expense, and not an "add-back."

2. *Business Loss Carried Forward*

   The Board officer acknowledged the worker's submission that his company was working on a two-year loss carried forward. Upon review of the worker's business records to determine whether there was an "unusual expense" due to business loss carry forwards from previous years, which may result in additional expenses be added back to the income, none were found. In both the 2001 and 2002 Statement of Business Activities, the worker declared carry forwards from the previous year under the BUH expenses. While these BUH carry forwards do reduce net income, the entire amount of the BUH *is already* an add-back. Therefore, the business loss carried forward from previous years does not affect the add-back figure used in the calculation of the worker's average earnings.

   The Board was unable to locate any other entry in the 2001 or 2002 Statement of Business Activities (other than the BUH carry forward from the previous year) which would indicate any extraordinary or unusual business adjustment representing the previous year's businesses losses carried forward, the disposition/acquisition of capitol asset or other extraordinary item which would not qualify as a normal business occurrence, which would distort the real income of the business.

As a result, the worker was invited to submit further evidence or documentation to establish that:

1. The office expenses or telephone and utilities declared as business expenses pertain to the worker's home office, and

2. The declared expenses, other than the declared BUH, includes a carry forward of business loss from previous years and provide documentation confirming the amount carried forward for each year. The Board officer confirmed that there was no evidence which indicated that there were any add-backs that should have been added back when calculating the worker's long-term wage rate.

- The Automatic Wage Loss Payment System shows that the worker received initial wage loss benefits from November 22, 2002 to January 31, 2003 and long-term wage loss benefits after February 1, 2003.

Worker's Submissions

- In a letter dated September 29, 2004, the worker provided the following relevant written submissions:

- The worker does not want a "long-term wage rate"; rather, he wants "the money I feel I have coming to me to November 27, 2003."

- Although the Board is to base the worker's average earnings on the 12-month period prior to the date of injury, this was not done. The Board used the earnings of the company which was substantially less because of the huge losses brought forward from the previous two years.

- The Review Division decision of August 25, 2004, noted that "it does not appear that when the Board officer set the long-term wage rate that he received sufficient information from the worker to investigate whether the worker was working on a loss from the previous years that was brought forward." The worker confirms that this was shown on his income tax statement and the Board officer did not request additional information.

- With respect to policy item #68.62, the Board did not properly implement this policy. Rather, the Board calculated from the net income of the worker's "company business."

- The worker paid the Board deductions on $250 per day on the days he worked. This amount should be used to establish his earnings.

- When the Board stated that the worker's wage rate was based on $36,500 which was prorated to $35,780 or a net weekly rate of $494.64, this figure was correct and based on employee, not company, earnings.

- The Board later stated that the worker's income for this period was only $3,945.48, resulting in a net weekly wage rate of $75.67. This discrepancy is due to using the company's earnings instead of employee earnings.

The letter dated January 16, 2004, states the worker's claim to final entitlement was November 27, 2003. Therefore, from January 29 to November 27, 2003, a period of 43 weeks, at $494.64 per week the Board owes the worker a total of $21,269.52 minus payments of $75.67 for 43 weeks.

Law and Policy

The Act

The law that applies to this review is found in sections 33.1 and 96 of the Act.

Section 33.1 sets out two general rules for determining a worker's average earnings, for the initial period and for the long-term period. With respect to the worker's long-term wage rate, section 33.1(2) directs that a worker's long-term average earnings are based on the earnings in the 12-month period immediately preceding the date of injury. This general rule is subject to several exceptions.

Section 96(4) provides that the Board may reconsider a previous decision. Section 96(5) of the Act provides that the Board cannot reconsider a previous decision if more than 75 days have elapsed.

Policy

The policies relating to this review are found in the *Rehabilitation Services and Claims Manual*, Vol. II. Specific policy items are as follows:

Policy item #66.00, *General Rule for Determining Long-Term Average Earnings*, elaborates upon the general rule for determining long-term average earnings and provides guidance for the process of reviewing and adjusting a worker's wage rate after 10 cumulative weeks of benefits paid.

Policy item #68.62, *Labour Contractor without Coverage under Section 2(2) Long-Term Average Earnings*, states, in part, that operating costs or expenses will be deducted from the worker's gross business income to obtain business net income (the worker's average earnings).

Policy item #70.10, *Disability Occurring within Three Years of Injury*, discusses that when a claim is reopened for temporary total or temporary partial disability within three years of the date of injury, or the equivalent date in the case of occupational diseases, the wage rate set on the claim at the time of the injury is the rate to be used.

Policy item #103.01 section 96(4) provides that the Board may reconsider a previous decision. Section 96(5) of the Act provides that the Board cannot reconsider a previous decision if more than 75 days have elapsed.

Reasons and Decision

Preliminary Issue

In the decision under review, the LTRSU noted that errors were made in the original calculation of the worker's average earnings. The LTRSU decided that it was unable to reconsider the Board's decision as 75 days from the initial decision had expired. The issue before me is whether this conclusion was correct and whether I have jurisdiction to correct the error made in the Board's initial decision.

Section 96(4) states that the "board may, on its own initiative, reconsider a decision . . . that the Board . . . has made under this Part." This is subject to section 96(5), in particular, paragraph (a), which states that "the Board may not reconsider a decision . . . if . . . more than 75 days have elapsed since that decision . . . was made." The limits in section 96(5) are in turn subject to sections 96.4(8) and (9) relating to Review Division decisions, which state;

> (8) The review officer may make a decision
>
> (a) confirming, varying or cancelling the decision or order under review, or
>
> (b) referring the decision or order under review back to the Board, with or without directions.
>
> (9) Subject to sections 96.5 and 239, a decision by the review officer under subsection (8) is final and the Board must comply with that decision.

These sections allow a Board officer to change a Board decision following a Review Division decision even though more than 75 days has elapsed since the Board decision.

The initial decision on the worker's wage rate of January 5, 2004, was considered in the August 25, 2004, Review Division. The review officer referred the decision back to the Board under section 96.4(8)(b) on the following grounds:

> As a result, I return to the Board its decision of January 5, 2004 for further investigation as to whether "Office Expenses" and "Telephone and Utilities" expenses pertain to the worker's home office and therefore may be classified as possible add-backs to the worker's net-income. Further investigation is also required with reference to the worker's claim that he had carried a previous business loss forward. Depending on the results of this investigation, there may be additional items that may be added back to the worker's net income.

Clearly, the restrictions of section 96(5) did not prevent a Board officer from changing the January 5, 2004, decision to deal with the expenses issues specifically discussed in this paragraph. Nor, however, did the specific directions in that paragraph restrict the scope of the new decision that the Board had to make.

When the Review Division refers a decision back to the Board under section 96.4(8)(b), the effect is to cancel the original Board decision and require the Board to make a new decision to replace it. This means that the Board has all the authority in making the new decision that it had when making the original decision, and is not subject in any way to the restrictions in section 96(5). It is not limited to considering the specific reasons for which the review officer made the referral back. The review officer can, in making the referral back, choose to limit the scope of the Board's new decision by issuing "directions" provided for in section 96.4(8)(b). For example, in this case, the August 25, 2004, decision might have limited the scope of the Board's authority by giving a direction that further decisions on expenses were to be based on a specified gross or net income figure. Since the August 25, 2004, Review Division decision did not include such a direction, it was open to the Board in the decision now under review to rectify the errors in the Board's January 5, 2004, decision that came to light after the Review Division decision.

As a result, I have jurisdiction to rectify these errors as part of this review.

Issue #1 — Errors in the Calculation of the Worker's Average Earnings

As noted in the memo from LTRSU dated October 18, 2004, when the Board investigated the worker's claim to implement the directions of the Review Division, it noted that errors in the initial calculation of the worker's average earnings. This resulted in average earnings that were higher than what the worker had actually earned had the calculation been done correctly.

I am satisfied that the errors identified by the LTRUS, when rectified, would provide a correct calculation of the worker's average earnings. Therefore, as noted above, since I have jurisdiction to remedy these errors, I vary the Board's decision in order to allow the Board to recalculate the worker's average earnings to take into account these identified errors.

Issue #2 — Implementation of the Findings of the Review Division Decision of August 25, 2004

There is no dispute that this claim was reopened for wage loss benefits within three years from the date of the original injury. Therefore, policy item #70.10 applies with respect to setting the worker's wage rate upon reopening of his claim. This policy requires that the rate a worker was paid when his claim was reopened within three years from the date of his original injury is the long-term wage rate which was established at the outset of his claim. In this case however, the worker had not received wage loss benefits longer than 10 weeks; therefore, a long-term wage rate had not been previously established on his claim.

As noted by the Automatic Wage Loss Payment System, the worker received initial wage loss benefits from November 22, 2002 to January 29, 2003. These wage loss benefits were based upon the worker's income, as reported by the worker's accountant, of $36,500 or prorated as $35,780. When the worker's claim was reopened on September 26, 2003, as the worker was entitled to a full 10 weeks of wage loss benefits under the initial wage rate, the worker continued to receive initial wage loss benefits on January 30 and 31, 2003.

Policy item #70.10 directs that when a 10-week wage rate review has not been done on a claim, it will be done by the Board officer following the reopening at the earlier of when the total wage loss paid on the claim adds up to 10 weeks or the effective date of the permanent disability award. In this case, the Board officer was required to do a 10-week rate review to take effect February 1, 2003. As noted by the memo of December 12, 2003, the Board officer did so. As a result, the Board officer properly applied the provisions of policy item #70.10 with respect to setting the long-term wage rate on this claim once the worker received 10 weeks of initial wage loss benefits.

As noted by the memo of December 17, 2003, the LTRSU could not use the worker's earnings as reported by his accountant of $36,500, or prorated as $35,780. Instead, as required by Board law and policy, since the worker was a self-employed labour contractor who filed income tax with Statement of Business Activities, the Board was required to apply policy item #68.62.

Policy item #68.62 directs that a labour contractor's average gross earnings is determined by deducting operating costs or expenses from gross business income to determine the business net income. Additionally, Practice Directive #33A, Appendix A, outlines which add-backs are considered by the Board for self-employed persons.

Upon a review of the decision letter under review, I am satisfied that the Board officer properly followed the appropriate policy and Practice Directive when determining the worker's earnings from his self-employment activities.

Initially, the Review Division referred back the decision of January 5, 2004 for further investigation to determine if there were further add-backs pertaining to office expenses and telephone and utilities expenses. Specifically, whether these expenses pertain to the worker's home office and therefore may be classified as possible add-backs to the worker's net income. Further, the Board was to undertake an investigation as to whether the worker incurred an extraordinary or unusual business adjustment, such as previous years business losses carried forward, which were not normal business occurrences and therefore may distort real income.

The decision under review confirms that the Board officer reviewed the documentation previously provided by the worker and invited the worker to provide further information with respect to these issues within 30 days. A review of the file confirms that the worker failed to provide any additional documentation to substantiate additional add-backs regarding his office or telephone and utilities expenses nor did the worker provide any further information regarding his assertion that he was operating on a loss from previous years that was brought forward. As the worker failed to provide any additional information with respect to these issues, I am satisfied that the Board officer properly implemented the decision of Review Division dated August 25, 2004.

I acknowledge the worker's submission that he not receive a long-term wage rate and that the Board calculate his wage rate based upon the earnings information provided by his accountant which was used to calculate his initial wage rate. First, with regard to the worker's request that he not receive a long-term wage rate, the Board's legislation and policy direct that the Board must undertake a wage rate review at the 10-week period. Further, with respect to the worker's request that the earnings information as provided by his accountant be used to set his wage

rate upon reopening of his claim, I find that this information cannot be used as the worker is not an employee of the company; rather he is a self-employed labour contractor. Therefore, policy item #68.62 is applicable in establishing the worker's long-term wage rate upon reopening of his claim. The worker is requesting a method of calculating his long-term wage rate which is not permitted by the Act or policy.

Lastly, I acknowledge the worker's submission that he paid assessments to the Board based upon earnings of $250 per day. The Board is unable to consider this when determining the worker's earnings, as policy requires that the Board use the worker's actual earnings in the 12-month period preceding the injury.

As a result, I deny the worker's request with respect to this issue.

Conclusion

As a result of this review, I vary the Board's decision of October 18, 2004.

Decision of the Workers' Compensation Appeal Tribunal

Number: WCAT-2004-05728
Date: October 29, 2004
Panel: Herb Morton, Vice Chair
Subject: Reconsideration Grounds — Failure to Consider Argument Made by a Party

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Introduction

The worker requests that Workers' Compensation Appeal Tribunal (WCAT) Decision #2003-00361-RB, dated May 1, 2003, be set aside on the basis of a breach of natural justice. The worker submits that the WCAT panel erred, in making a decision concerning the cause of his right arm complaints in April 2001 (i.e. as to whether this should be adjudicated as a reopening of his compensable right arm injury of January 10, 2001 or as a new claim). The worker submits the WCAT panel erred by failing to take into account the evidence regarding his December 1993 left elbow epicondylitis claim, and reopening in 1994 (for a cortisone injection) and 1995 (for wage loss benefits). The worker's left elbow problems were adjudicated by the Board under a 1994 claim, which was not mentioned in the WCAT decision. Although the 1994 and 2001 claims involved opposite arms, the worker's argument was that the WCAT panel should apply the same approach as was applied in the appellate decisions under his 1994 claim. The worker describes the former appellate decisions as "my precedent."

The employer is not participating in this application, although invited to do so. The worker had provided written submissions.

Issue(s)

Did the WCAT panel's failure to refer in its decision to an argument raised by the appellant involve a breach of natural justice with respect to his right to be heard?

Jurisdiction

WCAT uses the broad heading of "reconsideration" to encompass situations both where an applicant seeks to have a decision reconsidered on the basis of new evidence, and where an applicant seeks to have a decision set aside on the basis of the common law ground of an error of law going to jurisdiction. WCAT's authority to reconsider on the basis of new evidence is defined by section 256 of the *Workers Compensation Act* (Act). WCAT also has authority to "reconsider" (i.e. to set aside or void one of its decisions) on the common law ground of an error of law going to jurisdiction, including a breach of natural justice. These grounds are described at items #15.20 to #15.24 of WCAT's *Manual of Rules, Practices and Procedures* (MRPP), accessible on WCAT's web site at http://www.wcat.bc.ca/publications/toc.htm. A tribunal's common law

authority to set aside one of its decisions on the basis of jurisdictional error was confirmed by the British Columbia Court of Appeal in the August 27, 2003 decision in *Powell Estate v. Workers' Compensation Board*, (2003) BCCA 470, [2003] BCJ No. 1985, (2003) 186 BCAC 83.

This matter has been assigned to me by the WCAT chair for consideration under a written delegation of authority.

Standard of Review

Section 255(1) of the Act provides that a WCAT decision is final and conclusive and is not open to question or review in any court. In keeping with the legislative intent that WCAT decisions be final, they may not be reconsidered except on the basis of new evidence as set out in section 256 of the Act or on the basis of the common law ground of an error of law going to jurisdiction. The question as to whether a decision involved an error of law going to jurisdiction generally requires application of the "patently unreasonable" standard of review. On a jurisdictional issue, however, with respect to whether the tribunal had authority to do the act, the decision must be correct. On a natural justice issue, the question to be addressed is whether the procedures followed by WCAT were fair (see WCAT Decision #2004-03571).

Analysis

WCAT is subject to a statutory requirement to provide written reasons for a decision. Section 253(3) of the Act provides:

> The appeal tribunal's final decision on an appeal must be made in writing with reasons.

The worker's application for reconsideration raises two related concerns. The first relates to the appellant's right to be heard. The second relates to the adequacy of the reasons provided for the panel for its decision. There is a connection between these two concerns, as to whether a failure to provide reasons with respect to an argument raised by an appellant amounts to a breach of natural justice with respect to the appellant's right to be heard.

These questions were addressed in two published decisions of the former Appeal Division. Published Appeal Division and WCAT decisions are accessible at http://www.worksafebc.com/publications/newsletters/wc_reporter/default.asp. Those decisions provide relevant background to the worker's application. In Appeal Division Decision #97-0083, *Reconsideration of an Appeal Division decision – natural justice – the right to be heard*, 14 *Workers' Compensation Reporter* 37, the panel considered a situation in which the panel did not address a central argument raised by the appellant, in the panel's reasons for its decision. The Appeal Division panel reasoned (at page 44):

> An Appeal Division panel need not acknowledge and address in its decision every point raised by an appellant or an affected party to an appeal. The failure to acknowledge and address every point raised will certainly not constitute a breach of the rules of natural justice. In the case before me though the panel did not simply omit to acknowledge and address every point raised by the employer.

> The panel's omissions were of a more serious nature. The employer had requested that the appeal proceed by way of an oral hearing and written submissions. The request for an oral hearing was denied. In the written submissions, the employer focused on a particular issue, namely, the occurrence of repeat violations of regulation 1.02. Evidently, the employer believed that the case turned on that issue — a belief that was arguably reinforced by the tenor of the letters and decisions from the variance and review section. Furthermore, the occurrence of repeat violations seemed central to the panel's conclusion, as this conclusion was worded. And yet the panel did not address the employer's arguments regarding the repeat violations — be it to dismiss them as irrelevant or reject them as unfounded. In the circumstances, I find this to have amounted to a breach of the principles of natural justice. Having denied the employer's oral hearing request, the panel had a particular obligation to satisfy the employer that his arguments, whether or not meritorious, had been properly considered. Indeed, the panel may well have fully considered these arguments. But, according to a well-established principle of administrative law, an appearance of injustice, such as an appearance of bias, may taint a decision. In this case, bias is not the issue. Rather, the issue is whether the employer appears to have been heard. Unfortunately, on its face, the impugned decision does not convey the impression that he was heard.

The Appeal Division decision was set aside as involving an error of law going to jurisdiction, due to the breach of natural justice.

Appeal Division Decision #2001-1794, *Whether Previous Appeal Division Decision Provided Adequate Reasons*, 17 *Workers' Compensation Reporter* 453, reviewed several administrative law texts concerning the requirement to provide reasons (at pages 458–460):

> *(25)* Reasons, defined narrowly, can be seen as that part of the decision that sets out the basis for the finding or conclusion. However, in administrative law, the term "reasons" is usually taken to mean the entire decision. As a matter of common law a decision is expected to have adequate reasons in this broader sense because it may be necessary to have an adequate discussion of the facts for a decision to comply with the requirements of natural justice and administrative fairness. The latter, broader definition of reasons is used in the following discussion about what constitutes good reasons,
>
> > Reasons should be just that, the explanation for the important decisions which the agency made. Good reasons do at least two things:
> >
> > 1. They explain how the agency reached the decision it did. To do this, as a minimum, the reasons should set out the facts, law and reasoning which formed the basis for the decision reached.

2. *They show that due regard was had to the balance of the evidence and arguments advanced by the parties. This serves to avoid claims that the agency failed to consider some relevant evidence or argument which should have been considered.*

[emphasis added]
Macauley & Sprague, *Practice before Administrative Tribunals*, (2001) page 22-74

(26) A British decision has pointed out that a decision might be "perfectly right" but it could be open to challenge if the person against whom it was made is not told why the decision was made. In a discussion of a statutory requirement for tribunals to provide reasons the court also stated that reasons must be proper, adequate, intelligible and they have to deal with the substantial points that have been raised in the case (*Re Poyser and Mills' Arbitration* [1964] 2 QB 467 at 477–78). A Canadian administrative law text is to the same effect,

> Where reasons are required by law, a decision-maker must give reasons that not only contain no misstatement of the law or other legal error, but are adequate. For example, they must be "sufficiently clear, precise and intelligible" to enable the individual to know why the tribunal decided as it did. That is, the reasons must set out the chain of reasoning and the findings of fact on which the decision is based in such a way as to serve the purposes for which the reasons requirement was imposed. Thus, courts have assessed the adequacy of the reasons by asking whether, for example, the losing party was able to understand why the case was lost and to assess whether there were grounds to challenge the decision, whether the reasons enabled the reviewing body to test the validity of the decision or to show curial deference, *and whether the reasons made it clear that the party's representations were considered*, and due weight was given to the important individual interests affected by the decision.
>
> [emphasis added]
> Brown & Evans, *Judicial Review of Administrative Action in Canada*, (1998) 12:5310

(27) Within this discussion of the broad nature of reasons and their importance lies the sub-issue of the "adequacy" or "sufficiency" or length of a decision or reasons. The subject has been considered at some length in the literature. The following quotes provide a good summary of the prevailing views,

> Whether reasons are regarded as adequate will be determined in light of all the circumstances. Neither the form nor the length of the reasons is determinative. Thus, reasons that have been characterized as "terse and perfunctory," brief, skimpy, short, "manifest[ing] some deficiencies" and even "lamentably sparse,"

> have nonetheless been held to be adequate in the circumstances. Moreover, written reasons need not be given simultaneously with an oral decision.
>
> Brown & Evans, supra, page 12-66

> Earlier in this chapter I referred to the "transcript" form of reasons in which every detail of the proceeding is carefully recorded in chronological order, every piece of evidence noted, every argument canvassed, and every comment, ruling, and conclusion of the decision-maker is dutifully set out. Frankly, if at all possible, I believe these types of decisions should be avoided. I recognize, however, that in proceedings where no form of record or tape recording, or transcript is kept these type of decisions may be necessary to serve as that record. Often, where an agency fails to maintain some sort of record of the proceedings, the reasons are the only way to ensure that important details of the proceeding are recorded. However, these types of reasons take a long time to write, are usually tedious to read, and sometimes end in obscuring the important with mountains of ancillary detail.
>
> Macauley & Sprague, supra, page 22-74

Appeal Division Decision #2001-1794 denied the employer's application for reconsideration. The panel reasoned at paragraph 41:

> It is clear from the file that the specific concerns of the employer's representative were before the Board and the medical advisor (see Memo 9, for example). The fact that the previous Appeal Division panel accepted the general statement in the June 30, 1999 as adequately dealing with these concerns — even though they were not specifically mentioned in the opinion — does not amount to an error of law going to jurisdiction or any error. "The absence of a reference to an item of evidence or an issue of fact does not mean that that bit of evidence or that issue was ignored. Far from it." (*Sangha v. Dhaliwal*, BCSC, Vancouver Registry No. B952733, February 11, 1998). The employer submits that the previous panel should be held to a very high standard of specificity but this is not supported by the authorities or the particular facts of this case. I accept that the employer disagrees with the previous panel's conclusion but that does not mean the decision and reasons were inadequate. In short, the previous panel's reasons were clear, precise, intelligible and they communicated how the panel made its decision.

I agree with the reasoning set out in the two Appeal Division decisions cited above. The difficulty presented by the present application concerns the need to balance two competing considerations, namely, the statement that a failure to acknowledge and address every point raised will not constitute a breach of the rules of natural justice, and the fact that a failure to provide reasons concerning a particular argument presented by a party may give rise to a concern that the tribunal failed to consider some relevant evidence or argument which should have been considered.

The issue for my consideration is not whether the WCAT panel provided "good" reasons, in the sense of providing a well-written decision. Rather, the issue is whether the reasons provided failed to meet the minimum standard of legal adequacy, in regard to the requirements of natural justice and procedural fairness regarding the appellant's right to be heard.

The March 7, 2001 decision of the entitlement officer on this claim set out the basis on which the worker's January 10, 2001 right elbow epicondylitis claim was accepted:

> As outlined by the worker, he was pulling a 220 volt cable which was woven through the ceiling joists in a house that was under contract to be demolished. He states that each time he was pulling on it, he was only getting about 6 to 7 inches through the wall and because of complaints from co-workers, that he was not pulling hard enough, he "reefed" on it and felt a sudden pain in his right elbow.

The WCAT panel gave detailed consideration to the expert opinion provided by the worker's attending physician, which supported the worker's request for reopening of his 2001 claim. The WCAT panel noted as follows, under the heading of "Background and Evidence":

> In support of his appeal, the worker submitted a January 16, 2002 letter from Dr. S. Lubin. Dr. Lubin said he had first seen the worker October 12, 2000 and again on November 7, 2000 for low back problems. At that time, there were no complaints with respect to the worker's elbow. He saw the worker January 10, 2001 for right arm symptoms and diagnosed a right lateral epicondylitis resulting from an injury at work. The worker was next seen March 5, 2001, at which time the pain in right elbow was quite severe. Dr. Lubin provided a steroid injection of Depomedrol. On May 1, 2001, the worker reported improvement with the injection and noted he had returned to part-time work, progressing to full-time work, one week prior to May 1, 2001. On May 1, the worker told his doctor that "one week ago" there was increased pain with using a hammer. Dr. Lubin diagnosed a recurrent right lateral epicondylitis and recommended the worker be seen by a Board doctor. On June 12, 2001, the worker attended Dr. Lubin who noted the epicondylitis had been improving and the worker was now fit for modified part-time work. Dr. Lubin noted the worker's comment that he had attained full recovery by June 22, 2001 and declined to comment as he had not seen the worker subsequent to June 12. Dr. Lubin said, on March 5, 2001, the worker had not fully recovered and should have remained off work. With respect to the April 2001 re-injury, the doctor said he was not aware of any such injury and was of the opinion the worker's right lateral epicondylitis was persistent from January to June 2001.

Under the subsequent heading of "Reasons and Findings," the WCAT panel noted:

> While Dr. Lubin may not be aware of the chainsaw fixing incident in April 2001, the worker has confirmed that something occurred during the month of April which can only be classed as a "new" injury since it was initiated by a single specific incident. A medical report dated May 1, 2001 from Dr. Lubin refers to a

problem arising when the worker was using a hammer "one week ago". That same report refers to the worker as having been working part-time and "went back to full-time last week".

. . . on review of the file and the worker's various letters and submissions the following fact pattern emerges:

- On January 10, 2001 the worker sustained a compensable right forearm injury accepted by the Board as a right lateral epicondylitis.

- In spite of some confusion and negative decisions, eventually the claim was accepted and wage loss benefits were paid to March 13, 2001.

- Following termination of wage loss benefits the worker returned to work as a shake-blocker.

- This work is different employment than his work at the time of his compensable injury.

  . . .

- While engaged in the shake-blocking activity, the worker re-injured his right forearm.

- This was a specific incident with a mechanism of injury similar to the mechanism of injury which initiated this claim.

It is evident that the WCAT panel considered the expert evidence provided by Dr. Lubin, which concerned the nature and cause of the worker's right arm problems under his claim 2001 and the request for reopening. In considering that evidence, the panel made specific factual findings. The panel concluded that in April 2001, the worker was engaged in different employment from that in which he was engaged at the time of his January 10, 2001 injury. As well, the panel found that the worker re-injured his right forearm, as a result of a specific incident in the shake-blocking activity.

The worker's complaint is that the panel failed to expressly acknowledge and respond to his arguments, concerning the fact that his appeal to have a reopening of his left arm complaints under his 1994 claim had been successful. From the worker's perspective, the course of his problems regarding his left arm problems was substantially similar, and the WCAT panel should have taken guidance from the prior Review Board and Appeal Division decisions which granted the worker's request for a reopening of his claim.

I agree that it would have been desirable for the WCAT panel to expressly acknowledge and respond to the worker's arguments on this basis. This was more than an incidental reference in the worker's submissions. To the extent this involved one of the worker's central arguments, the concern that the panel failed to expressly comment on the worker's submission has some force.

At the same time, however, I note that the WCAT decision provided detailed reasons as to the basis on which it was made. The panel dealt with the substance of the worker's request that his April 2001 right arm problems be addressed by reopening of his January 10, 2001 claim rather than as involving a new injury (even if it did not expressly comment concerning the decisions made regarding his left arm claim reopening). The fact that the worker was engaged in different employment, and the fact that there was a specific incident in which the worker re-injured his right arm, were clearly identified as significant factors in the WCAT decision.

I am satisfied that the reasons provided in the WCAT decision explained how the panel reached the decision it did. The reasons set out the facts, law, and reasoning which formed the basis for the decision reached. The reasons were sufficiently clear, precise, and intelligible to enable the worker to know why the panel decided as it did. It is clear that due regard was had to the expert evidence provided in support of the worker's appeal. While the reasons lack express reference to the argument presented by the worker concerning the precedent provided by the appellate decisions with respect to the adjudication of his left arm problems, it is not a legal requirement that every argument be canvassed and every ruling and conclusion of the decision-maker be dutifully set out. The failure to acknowledge and address every point raised will not constitute a breach of the rules of natural justice.

It would have been preferable for the WCAT panel to address the argument raised by the worker, even if only briefly for the purpose of explaining why the panel did not consider the argument relevant or persuasive. However, in the context of the panel's reasons as a whole, I consider that it may reasonably be inferred that such was the case. The panel identified key factors on which its decision was based, which would serve to distinguish the matter before it for decision regarding the cause of the worker's right arm complaints in April 2001, from the prior decision-making regarding the reopening of the worker's 1994 claim for his left arm complaints. While there are some apparent similarities between these two situations, there are also significant differences which are readily apparent from the reasons provided in the WCAT decision.

Upon consideration of the foregoing, I am not persuaded that the failure by the WCAT panel to expressly comment concerning the argument raised by the worker, regarding the precedent provided by the decisions concerning the reopening of his 1994 claim for his left arm problems, involved a breach of natural justice which requires the WCAT decision to be set aside. On balance, I consider that the circumstances presented by the worker's application are fundamentally more similar to those addressed in Appeal Division Decision #2001-1794, than those addressed in Appeal Division Decision #97-0083. The worker's application for reconsideration is, therefore, denied.

While not raised by the worker, I have also considered two further points regarding the WCAT decision as to whether these might involve an error of law going to jurisdiction. My comments regarding these two additional points may be regarded as *obiter* (comments which are not necessary to my decision). First of all, the statement provided by the WCAT panel under the "Jurisdiction" heading was incorrect. The panel stated:

> This appeal was filed with the Review Board. On March 3, 2003, the Appeal Division and the Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). As the Review Board panel started its consideration

> of this appeal before March 3, 2003, it is being completed as a Review Board appeal. (See the Workers Compensation Amendment Act (No. 2), 2002, Section 38.)

The statement in this paragraph that the worker's appeal was being completed as a Review Board appeal was inconsistent with the fact that the decision was issued as a WCAT decision (i.e. rather than as a Review Board finding under section 38(3) of the transitional provisions to the *Workers Compensation Amendment Act (No. 2), 2002*, which would then be appealable to WCAT under section 41(3)). Upon reviewing WCAT's records, I note that the worker's request that his appeal be expedited was denied by the former Review Board. In response to a telephone call from the worker on March 13, 2003, the worker was advised that his appeal would be assigned to a panel for consideration in approximately three weeks. It is evident, therefore, that this was not a case where a panel of the Review Board commenced deliberations on the basis of written submissions prior to the March 3, 2003 transition date. The assignment of the worker's appeal to a WCAT panel was made after March 3, 2003. Accordingly, the decision was correctly issued as a WCAT decision. There is no indication that the incorrect statement by the panel regarding its jurisdiction affected the consideration provided to the worker's appeal.

I have also noted the concluding comments by the WCAT panel concerning the further consideration which might be available from the Board. The panel commented:

> In the August 8, 2001 decision letter appealed, the Board officer considered both and determined firstly, no reopening would occur and, secondly, no new claim would be established. This determination likely was made without the decision-maker being aware of the complete circumstances. The worker has indicated his reluctance to have the person who held the salvage permit under which they were "shake-blocking" held responsible for the April 2001 injury. If the worker wishes to pursue that avenue he should file a new claim and request the Board investigate the April 2001 incident as a "new" injury.

I considered whether these comments failed to take into account the statutory constraints on the Board's reconsideration authority set out in section 96(5) of the Act. Section 96(5) provides that:

> . . . the Board may not reconsider a decision or order if
>
> (a) more than 75 days have elapsed since that decision or order was made,
>
> (b) a review has been requested in respect of that decision or order under section 96.2, or
>
> (c) an appeal has been filed in respect of that decision or order under section 240.

The specific decision rendered on August 8, 2001 by the client service manager regarding a new claim was as follows:

> On April 6 you re-injured your arm in the course of self-employment work activities, shake blocking. You indicated that you did not purchase personal optional protection coverage from the Workers' Compensation Board for this work, therefore, the Workers' Compensation Board would not cover any injury as a result of this activity.

There is no indication that the Board officer considered the possibility that the worker was working for another person, rather than being self-employed, while doing the shake blocking work. Accordingly, this possibility may be viewed as potentially raising a new issue for decision, which was not previously decided by the Board. Alternatively, if the facts regarding the worker's employment status in April 2001 were misrepresented to the Board, further consideration might be provided under section 96(7) of the Act and the policy at item #C14-104.01 of the *Rehabilitation Services and Claims Manual*, Volume I. Consequently, I do not consider that the concluding comments by the WCAT panel were indicative of jurisdictional error by the panel regarding the further consideration which might be available from the Board.

Conclusion

The worker's application for reconsideration, on the common law ground of an error of law going to jurisdiction, is denied. For the reasons set out above, I am not persuaded that the WCAT panel's failure to refer in its decision to an argument raised by the appellant involved a breach of natural justice with respect to his right to be heard. Accordingly, WCAT Decision #2003-00361-RB stands as final and conclusive.

Decision of the Workers' Compensation Appeal Tribunal

Number: WCAT-2004-06588
Date: December 13, 2004
Panel: Herb Morton, Vice Chair
Subject: WCAT's Jurisdiction — Section 16 Limitation Over Vocational Rehabilitation Does Not Affect Ability to Consider All Relevant Evidence in an Appeal

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Introduction

By letter dated December 19, 2003, the Workers' Compensation Appeal Tribunal (WCAT) vice chair/deputy registrar advised the worker that four Review Division decisions were not appealable to WCAT. He advised that these four decisions concerned vocational rehabilitation under section 16 of the *Workers Compensation Act* (Act), and that section 239(2)(b) provides that such decisions are not appealable to WCAT. These four decisions, all contained in a single Review Division document dated November 14, 2003, were as follows:

Review Decision Number	Date of Decision by the Board Officer	WCAT Appeal
4870	May 12, 2003	K
4872	June 5, 2003	L
7723	June 13, 2003	O
7638	September 2, 2003	P

These four decisions were addressed together at pages 8 to 12 of the November 14, 2003 Review Division decision. The Review Division denied the worker's requests in relation to these four decisions, and found that Vocational Rehabilitation Services has no further obligation to the worker. The review officer further noted that it was not open to her to address a loss of earnings issue in her review, as that issue had been addressed in the Workers' Compensation Review Board (Review Board) finding (which the worker appealed to the Appeal Division).

The worker requests reconsideration of the December 19, 2003 WCAT decision, on the basis of an error of law going to jurisdiction. The worker is represented by a workers' adviser, who has provided a written submission dated December 30, 2003. The employer is not participating in this application, although invited to do so.

In addressing this application, I take note of a recent WCAT decision regarding other appeals brought by the worker. Those appeals included an appeal of the December 23, 2002 Review Board finding (filed to the former Appeal Division), appeals of decisions by a vocational rehabilitation consultant (VRC) dated January 7, 2003 and January 9, 2002 (filed to the former Review Board), and appeals of several Review Division decisions (including the "M" and "N"

appeals which were also dealt with in the November 14, 2003 Review Division decision). WCAT Decision #2004-06493-RB dated December 7, 2004 concluded as follows:

> The worker's appeals are allowed, in part, as follows:
>
> I vary the Review Board's December 23, 2002 decision, to the extent that the worker is entitled to an additional award of 1% in recognition of his reduced grip strength. I confirm the pension wage rate has been accurately determined. Furthermore, I confirm that the worker will not have a loss of earnings in the long term as the recommended vocational rehabilitation plan will likely restore the worker's earning capacity in the long term.
>
> I confirm the vocational rehabilitation consultant's decision of January 7, 2003, in which the worker was advised he would not be provided with a financial contribution, equal to the cost of an accepted vocational rehabilitation plan, to enhance a viable business.
>
> I vary the vocational rehabilitation consultant's decision of January 9, 2003 decision, to the extent that the worker should be provided with the opportunity to utilize the funds which were allowed for his training as a service advisor to participate in a viable alternate plan. It is also open to the worker to request a contribution to a viable rehabilitation plan under category 2 in item #88.51 of the RSCM I.
>
> I confirm the review officer's August 29, 2003 decisions, in which she concluded no appealable issues arise from a vocational rehabilitation consultant's letter of April 4, 2003 and correspondence the worker received from a private training institution.
>
> With respect to the review officer's November 14, 2003 decision, I confirm that the Board correctly determined the reopening wage rate. I confirm the worker is not entitled to the purchase of anti-vibration gloves and herbal remedies as health care expenses.

This application has been assigned to me for consideration on the basis of a written delegation from the WCAT chair (paragraph 26 of WCAT Decision No. 6, *Delegation by the Chair*, June 1, 2004).

Issue(s)

Did the WCAT decision, to reject the worker's appeals as being outside WCAT's jurisdiction, involve an error of law going to jurisdiction?

Jurisdiction

Section 255(1) of the Act provides that a WCAT decision is final and conclusive and is not open to question or review in any court. In keeping with the legislative intent that WCAT decisions be final, they may not be reconsidered except on the basis of new evidence as set out in

section 256 of the Act, or on the basis of an error of law going to jurisdiction, including a breach of natural justice (which goes to the question as to whether a valid decision has been provided). A tribunal's common law authority to set aside one of its decisions on the basis of jurisdictional error was confirmed by the British Columbia Court of Appeal in the August 27, 2003 decision in *Powell Estate* v. *WCB (BC)*, (2003) BCCA 470, [2003] BCJ No. 1985, (2003) 186 BCAC 83.

Standard of Review

Section 255(1) of the Act provides that a WCAT decision is final and conclusive and is not open to question or review in any court. In keeping with the legislative intent that WCAT decisions be final, they may not be reconsidered except on the basis of new evidence as set out in section 256 of the Act or on the basis of the common law ground of an error of law going to jurisdiction. WCAT's approach to applying these common law grounds has been as follows. The question as to whether a decision involved an error of law going to jurisdiction generally requires application of the "patently unreasonable" standard of review. On a jurisdictional issue, however, with respect to whether the tribunal had authority to do the act, the decision must be correct. On a natural justice issue, the question to be addressed is whether the procedures followed by WCAT were fair (see WCAT Decision #2004-03571). This analysis is now subject to section 58 of the *Administrative Tribunals Act* (ATA).

Order in Council No. 1143 brought sections 174 to 176 and 179 to 188 of the ATA into force effective December 3, 2004. Section 182 of the ATA amends the Act by the addition of section 245.1, which concerns the application of the ATA to WCAT proceedings. This provides:

> Sections 1, 11, 13 to 15, 28 to 32, 35 (1) to (3), 37, 38, 42, 44, 48, 49, 52, 55 to 58, 60 (a) and (b) and 61 of the *Administrative Tribunals Act* apply to the appeal tribunal.

Section 58 concerns the standard of review if the tribunal's enabling Act has a privative clause. Section 58 provides:

> **58** (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
>
> (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
>
> (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

(3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith,

(b) is exercised for an improper purpose,

(c) is based entirely or predominantly on irrelevant factors, or

(d) fails to take statutory requirements into account.

WCAT's Manual of Rules, Practices and Procedures was replaced by a *Manual of Rules of Practice and Procedure* (MRPP) effective December 3, 2004 (Chair's Decision No. 7). Item #15.24 of the MRPP now provides:

> WCAT will apply the same standards of review to reconsiderations on common law grounds as will be applied by the court on judicial review (see item 15.32).

Item #15.32 of the MRPP further provides:

> **15.32 Standards of Review Act**
>
> The court will not interfere in a final WCAT decision unless threshold grounds are met. There are three possible standards of review [s. 58(2), ATA]:
>
> (a) patently unreasonable for a finding of fact or law or an exercise of discretion in respect of a matter over which WCAT has exclusive jurisdiction under the privative clause (see section 254, WCA);
>
> (b) whether WCAT acted fairly in all of the circumstances for questions about the application of common law rules of natural justice and procedural fairness; and
>
> (c) correctness for all other matters.
>
> A discretionary decision will be considered to be patently unreasonably if the discretion is exercised arbitrarily or in bad faith, is exercised for an improper purpose, is based entirely or predominantly on irrelevant factors, or fails to take statutory requirements into account [s. 58.3, ATA].

I have considered whether additional submissions should be invited concerning the application of the ATA and the amended items of the MRPP to this application. I consider, however, that this application concerns a jurisdictional issue. I find that under both the former common law test described above, and section 58, the standard of review on a jurisdictional issue is correctness. No deference is given to the WCAT decision on a jurisdictional issue. As the test to be applied is the same under both the common law and section 58 of the ATA, I find it unnecessary to invite additional submissions on this point. I further note that the guidance provided by item #15.24 is in the form of practice rather than a rule. Section 13 of the ATA provides that practice directives are not binding – section 12(3) provides that WCAT may

waive or modify one or more of its rules in exceptional circumstances. Accordingly, while it may assist in understanding the applicable standards of review to refer to the wording of section 58, as a re-statement of these standards, I consider that it remains open to WCAT to consider and apply relevant common law authority in determining whether there has been an error of law going to jurisdiction.

Background

By finding dated December 23, 2002, the Review Board denied the worker's appeal from the September 6, 2001 decision by a Board officer. The Review Board confirmed the assessment of the worker's permanent functional impairment at 1.5% of total disability. The Review Board further concluded that the Board's plan to train the worker as a service advisor was a good one, and that if it had been carried out the worker would not have suffered any loss of earnings. The worker appealed the Review Board finding to the Appeal Division. The worker's appeal was transferred to WCAT on March 3, 2003, as a result of the changes to the workers' compensation appeal structures contained in the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). That appeal was addressed in WCAT Decision #2004-06493-RB dated December 7, 2004, as described above.

Following the Review Board finding, Board officers issued several additional decisions. The four decisions which are at the root of this appeal were all issued by a VRC and concerned the following:

May 12, 2003	The VRC set out in detail (seven pages) the vocational rehabilitation assistance which was offered to the worker, conditional on his active cooperation in the vocational rehabilitation program.
June 5, 2003	The VRC addressed various concerns raised by the worker regarding his current vocational rehabilitation plan.
June 13, 2003	The VRC addressed the worker's request that his vocational rehabilitation assistance be changed to job search and training on the job.
September 2, 2003	The VRC rejected the worker's request for sponsorship of a training-on-the-job arrangement with a particular automotive firm, on the basis that the earnings from this job would be too low.

Analysis

A. Preliminary — Right to be Heard

A preliminary question arises as to whether the December 19, 2003 WCAT decision, which advised the worker that the four Review Division decisions are not appealable to WCAT, involved a breach of natural justice. WCAT Decision #2004-05889 commented:

> I do not consider, however, that every letter issued by a vice chair in the WCAT Registry constitutes a decision. The Registry may make a decision concerning a matter, which will be final and conclusive under section 255(1) of the Act.

> Alternatively, the Registry may elect to make a provisional determination regarding a matter. A higher standard of procedural fairness is required where a decision is being made. In the case of provisional determinations, however, notice to the party and an opportunity to make submissions are not required. The provisional determination itself constitutes such notice, and if the party is aggrieved by the determination he or she has the opportunity to make representations before the matter is finally determined. This latter approach permits greater efficiency in dealing with preliminary matters, while respecting the requirements of natural justice. Such preliminary or provisional determinations may serve to provide guidance to appellants, without denying the appellant the opportunity to make submissions regarding the issue if they do not agree with the initial response from the WCAT Registry.
>
> For example, the Registry may advise an appellant, on a preliminary or provisional basis, that the issue in his or her appeal is not within WCAT's jurisdiction. If the appellant disputes that advice, the matter can be formally determined after the parties have had the opportunity to provide submissions on the matter.

The vice chair/deputy registrar did not take the approach of issuing a provisional determination in this case. The decision to reject the worker's four appeals appears to have been made without prior notice to the worker, with an opportunity to comment.

Whether or not the WCAT decision was stated, on its face, to be provisional in nature, it seems to me that the registry could have proceeded to consider the worker's objections to the December 19, 2003 decision on the basis that it was provisional. The alternative is to consider that the December 19, 2003 decision is subject to being set aside based on a breach of natural justice.

I could return the December 19, 2003 decision to the registry, to be addressed anew with the benefit of the further submissions which have been provided. I note, however, that the issue addressed in the December 19, 2003 decision was jurisdictional in nature. On a jurisdictional issue, with respect to whether the tribunal has authority to do the act, the decision must be correct. The workers' adviser has provided submissions regarding the merits of the December 19, 2003 decision, to argue that it was wrongly decided. Accordingly, I consider it appropriate to proceed to consider the worker's objections to the December 19, 2003 decision. For this purpose, no deference will be afforded to the December 19, 2003 decision. A similar approach appears to have been the approach taken by the WCAT senior vice chair and registrar in WCAT Decision #2003-02542. To the extent the December 19, 2003 decision involved a lack of procedural fairness, that defect is cured by this further consideration.

While not necessary to my decision, I note that effective December 3, 2003, section 31 of the ATA provides that WCAT may, at any time, summarily dismiss all or part of an application if WCAT considers it is not within WCAT's jurisdiction. However, WCAT is required to give the applicant a prior opportunity to make submissions or otherwise be heard. WCAT must also provide a decision in writing, with reasons. Thus, the approach taken in the December 19, 2003 letter, of summarily rejecting the worker's appeal on the basis it was outside WCAT's jurisdiction, with no prior opportunity for the appellant to make submissions, is an approach which can no longer be followed.

I have proceeded to consider the worker's application for reconsideration.

B. WCAT's Jurisdiction Regarding Rehabilitation Decisions

The submissions provided by the workers' adviser express several concerns relating to the statutory limitation on WCAT's authority to hear an appeal respecting matters under section 16 of the Act.

It is important to note, at the outset, that VRCs play two roles in the workers' compensation system. To put it another way, a VRC has two hats. Wearing one hat, the VRC is a decision-maker, with authority to determine the nature and extent of a worker's eligibility for vocational rehabilitation assistance under section 16 of the Act. Such decisions are reviewable by the Review Division, and the decision of the Review Division is final. Pursuant to section 239(2)(b) of the Act, there is no right of appeal to WCAT from the Review Division decision respecting vocational rehabilitation assistance under section 16 of the Act.

For greater certainty, section 4(e) of the Workers Compensation Act Appeal Regulation, B.C. Reg. 321/02 (the Appeal Regulation), provides:

> **4** For the purposes of section 239 (2) (a) of the Act, the following are classes of decisions that may not be appealed to the appeal tribunal:
>
> (e) decisions respecting the conduct of a review if the review is in respect of any matter that is not appealable to the appeal tribunal under section 239 (2) (b) to (e) of the Act.

This regulation is based on the authority set out in section 239(2)(a) and section 224(2)(j) of the Act.

Wearing a second hat, the VRC is a source of expert evidence. The VRC provides advice to decision-makers in the Disability Awards Department on a range of issues relevant to whether the worker is eligible for a loss of earnings pension under section 23(3) of the Act. In this latter capacity, the VRC is not a decision-maker, and the VRC's advice does not concern the provision of vocational rehabilitation assistance under section 16 of the Act. A decision under section 23 is rendered by a Board officer in the Disability Awards Department, not by a VRC. In this latter capacity, the input of the VRC may be treated as analogous to the input provided by physicians employed by the Board. Both are sources of expert evidence, but the authority to make a decision is vested in a decision-maker who is not obliged to accept this expert evidence. The decision-maker has an obligation to consider all the relevant evidence, but may also consider evidence from other sources in making the decision.

There are obvious inter-relationships between the two areas of decision-making. For example, if the VRC refuses to provide vocational rehabilitation assistance, the worker's future employability may be adversely impacted. However, the two areas of decision-making are separate, in terms of WCAT's jurisdiction under section 239 of the Act. WCAT has no jurisdiction respecting matters referred to in section 16 of the Act (regarding the provision of vocational rehabilitation assistance), but does have jurisdiction to consider a worker's pension eligibility (including eligibility for a loss of earnings pension award). I am, in this regard, only referring to WCAT's

authority to consider appeals from decisions of the Review Division. This limitation on WCAT's authority does not limit WCAT's authority in addressing appeals which were initially filed to the former Review Board or Appeal Division under the transitional provisions set out in Part 2 of Bill 63.

In the background set out above, I have not recorded all the details contained in the VRC's four decision letters. Upon close reading of those four decision letters, however, I find no decision regarding any matter other than vocational rehabilitation assistance under section 16 of the Act.

The workers' adviser argues that to not allow the WCAT panel to consider the K, L, O, and P appeals would effectively dismiss the worker's right for all evidence to be considered in dealing with related matters as a whole. This submission fails to take into account the distinction between the role of the VRC as a source of expert evidence, and the role of the VRC as a decision-maker under section 16 of the Act. There is no limitation on WCAT's authority to receive evidence from the VRC, notwithstanding the fact that decisions under section 16 are not appealable to WCAT.

The workers' adviser further submits that section 239(2)(b) of the Act is patently unreasonable. He submits:

> Section 251(1) of the Act authorizes that WCAT may refuse to apply Section 239(2)(b) as it does in this case limit its jurisdiction to deal with "related matters".

I find this argument is in error. Section 251 establishes a process for addressing issues concerning the lawfulness of policy under the Act, not for challenging the lawfulness of a provision in the Act. Under section 251(1), a WCAT panel 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. This test must be applied in light of the provisions of the Act. Section 251 does not provide authority for challenging the lawfulness of the Act itself. WCAT is a creature of statute, and only has the authority conferred on it by legislation (as well as certain common law authority). Effective December 3, 2004, section 44(1) and (2) of the ATA have removed WCAT's authority to address constitutional issues (regarding the scope of provincial authority, and Charter issues).

Upon consideration of the foregoing, I find that WCAT has no authority to address the worker's appeals from the four Review Division decisions relating to the decisions rendered by the VRC.

In addressing this application, I considered whether additional submissions should be invited in light of WCAT Decision #2004-06493-RB dated December 7, 2004. I consider, however, that while it may be convenient to refer to that decision, this is not necessary to my decision. The issues in this application were not rendered moot by that decision. Accordingly, I considered it appropriate to proceed with this decision.

While not necessary to my decision, I have noted that some of the arguments raised by the workers' adviser relate to matters addressed in the recent WCAT decision. The workers' adviser submitted that while the four decisions were made by the VRC, they were provided as a

result of the December 23, 2002 Review Board finding which pre-dated the March 3, 2003 legislative changes. He submitted that the VRC erred in interpreting the December 23, 2002 Review Board finding as having stated there would be no loss of earnings. I note, however, that the worker's appeal from the Review Board finding has been decided by WCAT Decision #2004-06493. The WCAT decision confirmed "that the worker will not have a loss of earnings in the long term as the recommended vocational rehabilitation plan will likely restore the worker's earning capacity in the long term." There is no basis for me to consider this argument.

The workers' adviser similarly makes arguments regarding the worker's wage rate. I note that the December 7, 2004 WCAT decision dealt with the worker's wage rate, and this was not an issue addressed in the four decisions issued by the VRC which are the subject of this application.

The workers' adviser also submits that section 239(2)(b) of the Act may exclude section 16 matters, but does not deny WCAT the right to deal with loss of earnings or wage rate issues. Again, I note that the loss of earnings and wage rate issues have been addressed in the December 7, 2004 WCAT decision.

Conclusion

The worker's application for reconsideration of the December 19, 2003 decision is denied. The four Review Division decisions concerned vocational rehabilitation under section 16 of the Act. Pursuant to section 239(2)(b), these decisions are not appealable to WCAT. The December 19, 2003 decision is upheld as being jurisdictionally correct. To the extent the December 19, 2003 decision involved a breach of natural justice with respect to the worker's right to be heard, that breach is remedied by this further decision.

Decision of the Workers' Compensation Appeal Tribunal

Number: WCAT-2005-01710
Date: April 7, 2005
Panel: Jill Callan, Chair
Subject: Section 251 Referral to the Chair — Recurrence of Disability

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1. Introduction

This determination under section 251(3) of the *Workers Compensation Act* (Act) is made in the context of the worker's appeal, in which he seeks a reassessment of his permanent partial disability pension. The worker's appeal raises the question of whether item #1.03(b)(4) of the *Rehabilitation Services and Claims Manual*, Volume I (RSCM I) and Volume II (RSCM II) is so patently unreasonable that it is not capable of being supported by the Act.

Pursuant to the *Workers Compensation Amendment Act, 2002* (Bill 49), several of the entitlement provisions of the Act, including those related to permanent disability pensions, were amended effective June 30, 2002. Section 35.1 of the Act is a transitional provision that establishes whether the entitlement of workers to various benefits arises out of the former or current sections of the Act. Under section 35.1(8), if on or after June 30, 2002 a worker has "a recurrence of a disability that results from an injury that occurred before [June 30, 2002]," the current sections of the Act apply. Item #1.03(b)(4) states that, for the purposes of section 35.1(8), a reopening of a claim for "any permanent changes in the nature and degree of the worker's permanent disability" constitutes a "recurrence." In this determination, I will refer to that element of item #1.03(b)(4) as the "impugned policy."

The vice chair of the Workers' Compensation Appeal Tribunal (WCAT) assigned to hear the worker's appeal considered that item #1.03(b)(4) is so patently unreasonable that it should not be applied in the adjudication of the worker's appeal. As a result, on June 25, 2004, the vice chair referred the issue to me for determination in accordance with section 251(2) of the Act. Under section 251(3) of the Act, I must decide whether the impugned policy "should be applied" in adjudicating the worker's appeal. In accordance with section 251(1), this requires me to determine whether the impugned policy is "so patently unreasonable that it is not capable of being supported by the Act and its regulations." In this case, there is no relevant regulation.

If the impugned policy is applied (and recurrence is considered to include a permanent change in the nature and degree of a worker's permanent disability), under section 35.1(8) the vice chair must consider the worker's entitlement to an increased pension based on the current Act. If I find the policy to be patently unreasonable and, therefore, inapplicable and the Board of Directors agrees, the vice chair will determine the worker's entitlement to benefits based on the Act as it read prior to the Bill 49 amendments. The worker argues that his entitlement to an increased pension should be determined by applying the former provisions of the Act.

Item #1.03(b)(4) came into effect as of June 17, 2003 as a result of the renumbering of the former item #1.00(4) of RSCM I and II as item #1.03(b)(4) of RSCM I and II. Although the vice chair's referral memorandum refers to item #1.00(4) of RSCM II, I will refer to the policy under consideration as item #1.03(b)(4) of RSCM I and II throughout this determination (except when I am referring to the earlier versions of the policy or quoting from documents that refer to the policy as item #1.00(4)).

In this determination, where there is potential for confusion, I will refer to sections or provisions of the Act as they existed prior to the amendments that flowed from Bill 49 as "former sections" or "former provisions" and the sections or provisions of the amended Act as "current sections" or "current provisions." If I do not indicate whether a section or provision is a current or a former one, it should be assumed I am referring to a current section or provision.

2. Parties

The worker is represented by his trade union. As there is no employer of record, pursuant to section 248(1) of the Act, an employers' adviser of the Employers' Advisers Office has been deemed to be the employer and is participating in the appeal.

Section 246(2)(i) enables WCAT to "request any person or representative group to participate in an appeal if the tribunal considers that this participation will assist the tribunal to fully consider the merits of the appeal." As I view the question raised by the vice chair to be of considerable importance to the workers' compensation system, I directed that the following representative groups be invited to participate in this determination:

- B.C. Federation of Labour
- Business Council of B.C.
- Coalition of B.C. Businesses
- Employers' Forum to the WCB
- Workers' Compensation Advocacy Group
- Workers' Advisers Office

As the Employers' Advisers Office was already participating in this application as a deemed party, it was not invited to participate under section 246(2)(i). The Workers' Compensation Advocacy Group and the Workers' Advisers Office have provided submissions related to the matter before me.

WCAT will send copies of this determination to the parties, the chair of the Board of Directors of the Workers' Compensation Board (Board), the president of the Board, and the Board's vice president, Policy and Research. In addition, WCAT will send copies of this determination to the representative groups, with the worker's identifying information deleted.

3. Issue(s)

The issue in this determination is whether, for the purposes of the current section 35.1(8) of the Act, the element of item #1.03(b)(4) of RSCM I and II that characterizes a reopening of a claim for "any permanent changes in the nature and degree of a worker's permanent disability" as a "recurrence" is so patently unreasonable that it is not capable of being supported by the Act.

4. Policy-making Authority

Although the impugned policy was originally enacted by the Panel of Administrators, it became a policy of the Board of Directors as of February 11, 2003. The relevant governance history and the applicable decision of the Board of Directors are summarized below.

In 1991, a new governance structure for the Board came into effect and the policy-making authority was vested in the governors of the Board. In 1995, a Panel of Administrators was appointed to perform the functions of the governors of the Board and, accordingly, the policy-making authority was vested in the Panel of Administrators.

Bill 49 amended the governance structure of the Board effective January 2, 2003, establishing the Board of Directors under section 81 of the Act. Under the current section 82(1)(a) of the Act, the Board of Directors has the authority to "set and revise as necessary the policies of the board of directors, including policies respecting compensation."

In Board of Directors' Decision No. 2003/02/11-04, *Policies of the Board of Directors*, February 11, 2003, published at 19 *Workers' Compensation Reporter* 1[13], a policy, resolution, and bylaw relating to the policies of the Board of Directors was enacted, which stated in part:

> **1.0 Policies of the Directors**
>
> 1.1 As of February 11, 2003, the policies of the directors consist of the following:
>
> . . .
>
> (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;
>
> . . .
>
> (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.

Pursuant to Decision No. 2003/02/11-04, the impugned policy, having formed part of the RSCM I and II prior to February 11, 2003, became a policy of the Board of Directors.

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[13] Policy resolutions are available at http://www.worksafebc.com/publications/newsletters/wc_reporter/default.asp.

5. The Act and Policies

There is no definition of "recurrence" in the Act. However, the term "recurrence" is used in several current sections of the Act as well as in the Board of Directors' policies under the Bill 49 transitional provisions and those regarding reopenings of claims under the current section 96(2). Each of these is reproduced below.

(a) Section 32

Section 32 of the Act was not amended by Bill 49 or by *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). It was previously numbered section 30 but essentially has not changed since July 1, 1974 (later in this determination, I will refer to decisions made in the 1970s regarding section 30). Section 32 provides:

> **Recurrence of disability**
>
> 32(1) For the purpose of determining the amount of compensation payable where there is a *recurrence* of temporary total disability or temporary partial disability after a lapse of 3 years following the occurrence of the injury, the Board may calculate the compensation as if the *recurrence* were the happening of the injury if it considers that by doing so the compensation payable would more nearly represent the percentage of actual loss of earnings suffered by the worker by reason of the *recurrence* of the injury.
>
> (2) Where a worker has been awarded compensation for permanent partial disability for the original injury and compensation for *recurrence* of temporary total disability under subsection (1) is calculated by reference to the average earnings of the worker at the date of the *recurrence*, the compensation must be without deduction of the compensation payable for the permanent partial disability; but the total compensation payable must not exceed the maximum payable under this Part at the date of the *recurrence*.
>
> (3) Where more than 3 years after an injury a permanent disability or *an increased degree of permanent disability occurs*, the compensation payable for the permanent disability or increased degree of permanent disability may be calculated by reference to the average earnings of the worker at the date of the occurrence of the permanent disability or increased degree of permanent disability.
>
> [emphasis added]

(b) Section 96(2)

The current section 96(2) of the Act was enacted effective March 3, 2003 as a result of Bill 63. It provides:

> 96(2) Despite subsection (1), at any time, on its own initiative, or on application, the Board may reopen a matter that has been previously decided by the Board or an officer or employee of the Board under this Part if, since the decision was made in that matter,

(a) there has been *a significant change in a worker's medical condition* that the Board has previously decided was compensable, or

(b) there has been *a recurrence* of a worker's injury.

[emphasis added]

(c) Section 35.1

As stated earlier, Bill 49 resulted in changes to the benefit scheme under the Act that were effective as of June 30, 2002. The current section 35.1 specifies whether the current or former provisions of the Act apply to entitlement to various benefits. Section 35.1(8) is the statutory foundation for item #1.03(b)(4). It provides, in part:

Transitional

35.1 (1) In this section, "transition date" means the date that this section comes into force.

(2) Subject to subsection (7), this Act, as amended by the *Workers Compensation Amendment Act, 2002*, applies to an injury that occurs on or after the transition date.

(3) Subject to subsections (4) to (8), this Act, as it read immediately before the transition date, applies to an injury that occurred before the transition date.

(4) Subject to subsections (5) to (8), if a worker's permanent disability first occurs on or after the transition date, as a result of an injury that occurred before the transition date, this Act, as amended by the *Workers Compensation Amendment Act, 2002*, applies to the permanent disability.

. . .

(8) If a worker has, on or after the transition date, a *recurrence* of a disability that results from an injury that occurred before the transition date, the Board must determine compensation for the *recurrence* based on this Act, as amended by the *Workers Compensation Amendment Act, 2002*.

[emphasis added]

In this case, the worker's claim relates to an occupational disease. Although section 35.1(8) refers to an "injury," in light of sections 6(1) and (2) of the Act, I interpret "injury" to include an occupational disease. Section 6(1) of the Act provides compensation is payable for an occupational disease "as if the disease were a personal injury arising out of and in the course of that employment" and section 6(2) provides "[t]he date of disablement must be treated as the occurrence of the injury."

(d) Item #1.03(b)(4)

Item #1.03(b)(4) (previously item #1.00(4)) has the following history:

- Item #1.00(4) was among the many policies that the Panel of Administrators brought into effect through Resolution of the Panel of Administrators' Decision No. 2002/06/18-02, *Policies in Regard to the Workers Compensation Amendment Act, 2002*, June 11, 2002, published at 18 *Workers' Compensation Reporter* 363. From June 30, 2002 to October 15, 2002, item #1.00(4) read as follows:

> *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*.
>
> [emphasis added]

The worker, the vice chair who has referred this matter to me, and all participants who have made submissions, other than the employers' adviser, take the view that characterizing a deterioration as different from a recurrence reflects the appropriate interpretation of section 35.1(8).

- By Resolution of the Panel of Administrators' Decision No. 2002/10/16-08, *Recurrence of Disability*, October 16, 2002, the Panel of Administrators amended item #1.00(4) effective October 16, 2002. The resolution states, in part:

> WHEREAS:
>
> Pursuant to section 82 of the *Workers Compensation Act*, RSBC 1996, Chapter 492 and amendments thereto ("*Act*"), the Panel of Administrators ("Panel") must approve and superintend the policies and direction of the Workers' Compensation Board ("Board"), including policies respecting compensation, assessment, rehabilitation and occupational safety and health, and must review and approve the operating policies of the Board;
>
> AND WHEREAS:
>
> Effective June 30, 2002, the *Act* was amended by the *Workers Compensation Amendment Act*, 2002, resulting in changes to compensation benefits for injured workers;
>
> AND WHEREAS:
>
> Section 35.1(8) of the *Act* provides a transitional provision to address situations where a worker suffers a *recurrence* of a disability;

AND WHEREAS:

> The Board's policy regarding the transition rules is provided in policy item #1.00 of the *Rehabilitation Services & Claims Manual*, Volume II, ("*RS&CM II*");

AND WHEREAS:

> Policy item #1.00 distinguishes a *recurrence of a disability* from a *deterioration of a permanent disability* with no further explanation;

AND WHEREAS:

> Clarification is required with respect to whether compensation for the *recurrence* of a disability includes a *deterioration of a permanent disability* is to be determined under the current provisions of the *Act*;

. . .

THE PANEL OF ADMINISTRATORS RESOLVES THAT:

1. *Policy item #1.00 of the RS&CM II is amended to remove the distinction between a deterioration of a permanent disability and a recurrence of a disability, and to clarify the application of section 35.1(8) of the Act.*

. . .

5. The amendments to policy items #1.00, #70.10, and #70.20 of the *RS&CM II*, as attached, are approved.

6. The amended policies are effective October 16, 2002, and will apply to all adjudication decisions made on or after that date.

[emphasis added]

As a result of the resolution, effective October 16, 2002, item #1.00(4) was amended to read as follows:

> 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*.
>
> 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.*

[emphasis added]

This is the version of item #1.00(4) that has been applied by the Board and the Review Division in adjudicating the worker's claim.

- By Resolution of the Board of Directors, Decision No. 2003/06/17-03, *Amendments to Chapter 1, Volumes I and II, Rehabilitation Services and Claims Manual*, 19 *Workers' Compensation Reporter* 15, item #1.00(4) was renumbered as item #1.03(b)(4) of RSCM I and RSCM II. It continued to otherwise be identical to the version that came into effect on October 16, 2002.

(e) Policy on Reopenings

The Board of Directors' policy on reopenings is contained in item C14-102.01 (*RE: Changing Previous Decisions – Reopenings*) of the RSCM II. It provides, in part:

(c) Grounds for reopening

A decision may be reopened if, since it was made:

- there has been a significant change in a worker's medical condition that the Board has previously decided was compensable; or
- there has been a recurrence of a worker's injury.

. . .

A "significant change" would be a physical or psychological change that would, on its face, warrant consideration of a change in compensation or rehabilitation benefits or services. *In relation to permanent disability benefits, a "significant change" would be a permanent change outside the range of fluctuation in condition that would normally be associated with the nature and degree of the worker's permanent disability.*

A claim may be reopened for repeats of temporary disability, irrespective of whether a permanent disability award has been provided in respect of the compensable injury or disease. *A claim may also be reopened for any permanent changes in the nature or degree of a worker's permanent disability.*

(d) Recurrence of injury

A recurrence of an injury may result where the original injury, which had either resolved or stabilized, occurs again without any intervening new injury. A recurrence of an injury may result in a claim being reopened for:

- an additional period of temporary disability benefits where no permanent disability award was previously provided in respect of the compensable injury;

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

- *an additional permanent disability award being provided due to a change in the nature and degree of the worker's permanent disability resulting from the original work injury.*

An example of a recurrence of an injury is where a worker has a compensable injury for which temporary disability benefits are paid. The injury resolves and the claim is closed, but later becomes disabling again without any intervening new injury. In these situations it is considered that the original injury has recurred. The result is that the worker may be entitled to an additional period of temporary and/or consideration for permanent disability compensation under the original claim.

[emphasis added]

6. The History of the Worker's Claim

The worker was born in 1930 and retired from work as an ironworker in 1989. In February 2001, he submitted a claim to the Board for asbestos-related pleural disease. The Board accepted his claim and, by decision dated May 9, 2001, awarded him a functional pension based on impairment of 20% of total disability effective September 29, 2000.

In a decision dated February 28, 2003, a disability awards officer stated that the worker's claim had been referred to the Disability Awards Department to determine if he was entitled to an increase in his permanent partial disability pension. The disability awards officer noted the Act had been amended effective June 30, 2002 pursuant to Bill 49. Although the former section 23(1) of the Act provided that permanent partial disability pensions assessed on a functional basis were payable for life, the current section 23.1 operates to generally end those pensions at age 65 or the date the worker would have retired (if the latter date is beyond age 65). As the worker had retired, the disability awards officer concluded that, as a result of the operation of the current section 23.1 of the Act, the worker could not be granted an increase in his permanent partial disability pension. The disability awards officer also informed the worker that his existing pension would continue and be payable for life.

Although not expressly stated in the February 28, 2003 decision, the rationale for the disability awards officer's conclusion that the current provisions of the Act would be applicable to any increase in the worker's pension was based on the application of the impugned policy. In other words, the disability awards officer characterized any permanent deterioration in the worker's permanent disability as a "recurrence" under section 35.1(8).

In Review Decision #3773, dated October 21, 2003[14], a review officer confirmed the February 28, 2003 decision. The worker's appeal of that decision is now before the vice chair, who has referred this matter to me. The worker takes the position that, as his pensionable condition has deteriorated, his pension should be reassessed and an increased pension paid under the former provisions of the Act. The worker argues that the impugned policy is patently unreasonable under the Act.

7. The Vice Chair's June 25, 2004 Referral

In order to determine whether the impugned policy can be supported by the Act, namely the current section 35.1(8), it is necessary to examine the phrase "recurrence of a disability" found in that section and determine whether it is patently unreasonable to interpret it as including a reopening of a claim for "permanent changes in the nature and degree of a worker's permanent disability." Accordingly, the vice chair's referral memorandum is largely focused on that question.

The vice chair noted the worker's representative had relied on a dictionary definition of "recurrence" in support of her position. In reviewing the dictionary definitions of "recurrence," the vice chair's referral memorandum stated:

> [In her submissions, the worker's representative noted "recurrence"] is defined by the Merriam-Webster dictionary as "to occur again after an interval." [She submits the] worker's disability did not recur, but rather it worsened or deteriorated, an entirely different process.
>
> I add that the *Oxford Concise Dictionary* defines "recur" as to "present itself again; occur again, be repeated." That dictionary defines "recurrent" as "occurring again or often or periodically." Notably, *Dorland's Illustrated Medical Dictionary*, 26th ed. defines "recurrence" as "the return of symptoms after a remission."

The vice chair agreed with the worker's representative's view that the interpretation of "recurrence" in the current section 35.1(8) that was the basis for the impugned policy could not be supported when the use of "recurrence" in sections 32 and 96(2) was taken into account.

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[14] Review Division decisions are available at http://www.worksafebc.com/claims/review_and_appeals/review_division/review_search/advanced_search.asp.

The vice chair concluded by stating:

> [W]here there is an ongoing permanent partial disability and there is a deterioration of that disability in the absence of a further period of temporary disability, I do not think that the permanent disability has recurred.

8. Standard of Patent Unreasonableness

Section 250(2) of the Act provides:

> The appeal tribunal must make its decision based on the merits and justice of the case, but in so doing the appeal tribunal must apply a policy of the board of directors that is applicable in that case.

Section 251(1) 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.

Pursuant to section 251(2), if, in the course of deciding an appeal, a vice chair considers that a policy should not be applied, the issue must be referred to me, in my capacity as chair of WCAT, for a determination as to whether the policy should be applied.

I have previously made a determination under section 251 in WCAT Decision #2003-01800-ad[15], dated July 30, 2003. In discussing the standard of patent unreasonableness set out in section 251(1), I stated:

> 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.

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[15] WCAT decisions are available at http://www.wcat.bc.ca/research/appeal-search.htm.

For instance, in *Canada (AG)* 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.

Recent commentary on the standard of patent unreasonableness has been provided by the Supreme Court of Canada in *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92* [2004] 7 WWR 411. Mr. Justice LeBel stated (at pages 424 to 425):

> 40 . . . Patent unreasonableness is an inadequate standard that provides too little guidance to reviewing courts, and has proven difficult to distinguish in practice from reasonableness *simpliciter*. This difficulty persists despite the many permutations it has gone through (*CUPE, Local 79*, at paras. 78–83). With respect, adding yet another definition of patent unreasonableness would not make its application any easier nor its conceptual validity more obvious.

> 41 It is illuminating in this respect to consider the definition of patent unreasonableness by Dickson J. (as he then was) in *CUPE, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2. SCR 227 (SCC), at p. 237, which is the seminal judgment of our Court in the development of a modern law of judicial review. Rather than contemplating the metaphysical obviousness of the defect, he explained that a decision will only be patently unreasonable if it "cannot be rationally supported by the relevant legislation". This is consistent with what Iacobucci J. observed in *Ryan v. Law Society (New Brunswick)*, [2003] 1 SCR 247, 2003 SCC 20 (SCC), in discussing what the reasonableness standard of review entails at para. 49: "the reasonableness standard requires a reviewing court to stay close to the reasons given by the tribunal and 'look to see' whether any of those reasons adequately support the decision". The "rationally supported by the relevant legislation" standard is one that not only signals that great deference is merited where discretion has been exercised, but also makes clear that a reviewing court cannot let an irrational decision stand. As I observed in *CUPE, Local 79, supra*, at para. 79, this approach should apply to judicial review on any reasonableness standard.

The employers' adviser contends that the patently unreasonable standard requires me to grant a significant degree of deference to the Board of Directors.

The Workers' Compensation Advocacy Group has submitted that "the standard of review under section 251 is not as strict as that which a court must apply in judicial review proceedings where it is faced with a privative clause." They provide the following arguments in support of their contention that, when the chair of WCAT is determining whether a policy of the Board of Directors is patently unreasonable, he or she should apply a less stringent test:

- Unlike the courts, WCAT is integral to the workers' compensation system and not outside of it.

- "WCAT has far greater expertise in interpreting and applying the provisions of the Act than the WCB's Board of Directors, whose policies are under review when section 251 is invoked." As this is the opposite of the situation on judicial review where the tribunal whose decision is being reviewed is generally considered to have greater expertise than the court, the chair should be less deferential to the Board of Directors on issues of policy than the courts would be.

- There is a difference between the consequences of a court finding a policy to be patently unreasonable and those that flow from a similar finding by WCAT. In the former situation, the Board must discontinue its application of the policy whereas, if WCAT finds a policy to be patently unreasonable, the consequence is merely that the Board of Directors must review the policy and determine whether WCAT may refuse to apply it. In this way, the power of the chair to determine that a policy is patently unreasonable is tempered by the fact that the chair's determination is not binding on the Board.

The section 251 process and the standard of patent unreasonableness largely arises out of the recommendations made by Alan Winter in the *Core Services Review of the Workers' Compensation Board* (March 2002), which I will call the Core Review (see discussion from pages 92 to 96

of the report). The significant difference between the core reviewer's recommendations and what ultimately became section 251 is that the core reviewer contemplated that the Board of Directors would refer the matter to the British Columbia Court of Appeal if it disagreed with the WCAT chair's conclusion that a policy was patently unreasonable. The core reviewer discussed the standard of patent unreasonableness at pages 94 to 96 and provided the following description of the standard (at page 94):

> *The "patently unreasonable" standard* — The focus under this approach is whether the applicable policy involves an interpretation of the *Act* which could not be rationally supported. This standard would tolerate a possible interpretation of the *Act*, no matter how strained that interpretation might be, if otherwise lawful under the *Act*.

He also noted the panel minority in Appeal Division Decision #99-0734 and the three-member panel chaired by the chief appeal commissioner in Appeal Division Decision #2001-2111 (18 *Workers' Compensation Reporter* 33)[16] had determined that the standard of patent unreasonableness should be applied when the Appeal Division was considering the lawfulness of policies. In determining that the appropriate standard would be the patently unreasonable standard, the core reviewer considered the following:

> (i) The power to create and approve published policies will, under the *Act*, expressly reside with the Board of Directors — not the Appeal Tribunal. The patently unreasonable standard recognizes the precedence to be given to this responsibility of the Board of Directors.
>
> (ii) Many provisions in the *Act* confer a broad measure of discretion, leaving room for a broad range of options for consideration by the Board of Directors in adopting policy. It is not appropriate for the Appeal Tribunal to call a published policy unlawful on the basis that some other option (than that accepted by the Board of Directors) might better fulfill the objectives of the *Act*.
>
> (iii) Policy-making generally involves a consideration of a broad range of factors, such as the legal interpretation given to the applicable provisions of the *Act*; an evaluation of the impact which various permissible options may have on the workers' compensation system; the application of values on the part of the policy-makers in selecting the preferred policy; the consideration of the views of the interested stakeholders; and a balancing of the benefits and costs of the various options. The Board of Directors' balancing of these often competing interests should not be second-guessed by the Appeal Tribunal.

I have reviewed the debates of the legislature regarding Bill 63[17]. However, I have not identified any statements that assist me in analyzing the standard of review under section 251.

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[16] Published decisions are available at http://www.worksafebc.com/publications/newsletters/wc_reporter/default.asp.

[17] British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly (Hansard).*

I find that the comments and analysis of the core reviewer are of assistance in interpreting the standard of review set out in section 251 and that they support the conclusion that it is a high standard requiring significant deference to the Board of Directors. In my view, the core reviewer took into account the appropriate principles in arriving at his recommendation of the patently unreasonable standard. I find his definition of the meaning of patently unreasonable to be consistent with the Supreme Court of Canada jurisprudence.

I do not accept the contention that the WCAT chair is to apply a less stringent standard than that applied by the courts on judicial review. In my view, if the legislature had intended that the WCAT chair would apply a less stringent standard, it would not have used the term contained in the core reviewer's analysis, which has been the subject of such extensive judicial commentary. I find the application of the patently unreasonable standard requires the determination of whether the policy in question can be rationally supported by the Act and regulations.

In considering the application of the standard of patent unreasonableness to the matter before me, I must accept that statutory provisions are often capable of more than one interpretation and that there may be a variety of viable policy options through which a statutory provision may be implemented. It is clear from the use of the patent unreasonableness standard in section 251 that the legislature did not intend that the section 251 process be invoked where a policy of the Board of Directors fails to reflect the most correct interpretation of the relevant statutory provisions but is not patently unreasonable. The first version of item #1.00(4) made a distinction between a permanent deterioration of a permanent condition and a recurrence and the impugned policy does not. However, the fact that there were two significantly different approaches to the application of section 35.1(8) does not, in and of itself, lead to the conclusion that one version is patently unreasonable. It is certainly possible that both versions could be characterized as viable.

9. Analysis

The question of whether the current section 35.1(8) of the Act supports the impugned policy requires consideration of whether it is patently unreasonable to interpret "recurrence" as including "any permanent changes in the nature and degree of a worker's permanent disability."

While the first version of item #1.00(4) recognized that a "recurrence is to be distinguished from a deterioration" in which a permanent disability worsens, the impugned policy (which resulted from the October 2002 amendment) characterized "any permanent changes in the nature and degree of a worker's permanent disability" as a "recurrence." The resolution that resulted in the October 2002 amendment does not include a rationale for characterizing a deterioration as a recurrence. The matter before me turns on the question of whether "recurrence" can be interpreted to include a permanent deterioration of a permanent condition.

(a) The Positions of the Parties

The thrust of the submissions provided by the worker's representative, the Workers' Compensation Advocacy Group, and the Workers' Advisers Office is that it is patently unreasonable to interpret "recurrence" in section 35.1(8) as applicable to a deterioration in a worker's permanent condition. Their submissions are based on the plain meaning of "recurrence" and the use of "recurrence" in sections 32 and 96(2) of the Act.

The employers' adviser states, in part:

> We submit that the wording under policy item [1.03(b)(4)] can be viewed as being consistent with the legislative intention to transfer new events on old claims into the amended Act as a transitional objective. Furthermore, we submit that policy [1.03(b)(4)] is also consistent with the government's intention to ensure that workers who were injured prior to June 30, 2002 will receive benefits under the provisions of the Act as it read at the time of injury. Although, the current policy now ensures that all recurrences of a disability (temporary and permanent conditions) are adjudicated under the current provision, there would be no reduction in benefits that were awarded prior to the transition date.

(b) Relevant Principles of Statutory Interpretation

Statutory interpretation in Canada is governed by the "modern principle." This principle was formulated in 1974 by Professor Elmer Driedger in the first edition of the *Construction of Statutes*[18] as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

In 1998, the Supreme Court of Canada in *Re Rizzo and Rizzo Shoes Ltd.*[19], declared the modern principle as the preferred approach to statutory interpretation. In 2002, in *R. v. Jarvis*,[20] the court restated the modern principle in this way (at paragraph 77):

> The approach to statutory interpretation can be easily stated: one is to seek the intent of Parliament by reading the words of the provision in context and according to their grammatical and ordinary sense, harmoniously with the scheme and the object of the statute.

The Supreme Court of Canada has repeatedly cited and applied the modern principle in a wide variety of cases.[21] Most recently, Bastarache J., writing for the dissent in *Marche v. Halifax Insurance Co.*[22], said this about the "ordinary meaning" analysis:

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[18] Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974) at p. 67.

[19] [1998] 1 SCR 27, at 41, per Iacobucci J.

[20] [2002] 3 SCR 757, 2002 SCC 73, per Iacobucci J. and Major J.

[21] See *Stubart Investments Ltd. v. The Queen*, [1984] 1 SCR 536, at p. 578, per Estey J. (taxation); *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114, at p. 1134, per Dickson C.J. (administrative); *R v. Sharpe*, [2001] 1 SCR 45, 2001 SCC 2, at para. 33, per McLachlin C.J. (criminal); *R. v. Ulybel Enterprises Ltd.*, [2001] 2 SCR 867, 2001 SCC 56, at para. 28, per Iacobucci J. (admiralty); *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 84, 2002 SCC 3, at para. 27, per Iacobucci J. (immigration); *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 SCR 559, 2002 SCC 42, at para. 26, per Iacobucci J. (radiocommunication); *Marche v. Halifax Insurance Co.*, 2005 SCC 6, per dissent by Bastarache J.

[22] 2005 SCC 6, at para 59. The majority of the court in this case did not disagree with the dissent on its expression of the basic statutory interpretation framework, although Bastarache J. did disagree with the majority on the emphasis it placed on certain interpretative factors.

> The interpretation begins with the ordinary meaning. But what does this first stage involve? Professor Sullivan, at p. 21, explains:
>
> > The expression "ordinary meaning" is much used in statutory interpretation, but not in any consistent way. Sometimes it is identified with dictionary meaning, sometimes with literal meaning and sometimes with the meaning that results after the words to be interpreted are read in total context. Most often, however, it refers to the reader's first impression meaning, the understanding that spontaneously emerges when words are read in their immediate context . . .
>
> Hence, as expressed by Gonthier J. in *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 SCR 724, at p. 735, the ordinary meaning is "*the natural meaning which appears when the provision is simply read through*".
>
> [emphasis added]

Regarding the contextual analysis, Bastarache J. stated[23]:

> I will examine this second factor of the modern approach in three steps. First, I will scrutinize the immediate context of the impugned words: the provision in which the words appear and any closely related provisions. Second, I will follow with an inquiry into the broader context of the section, i.e., the Act as a whole to determine the intention of the legislator. Finally, I will review the external context, that is the historical settings in which [the section] was enacted (see Sullivan, at pp. 260−62)

The types of external contextual factors to consider vary from case to case, but often include information about the legislative evolution and history of the provision and Act such as previous versions of the provision, legislative debates about its enactment, and government commissioned reports related to the proposed amendments.

In British Columbia, the modern principle is buttressed by section 8 of the *Interpretation Act*, RSBC 1996, c. 238 which provides:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

I will now apply these statutory interpretation principles to section 35.1(8) of the Act. I will start by considering the objects of the Act and section 35.1. I will then turn to the ordinary meaning of "recurrence" and the question of whether it has a special meaning within the workers' compensation context. Finally I will consider the use of "recurrence" in sections 32 and 96(2) of the Act to assist in determining its meaning in section 35.1(8).

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[23] *Marche*, supra, at para 66.

(c) The Object of the Act

The object of the Act is to provide "no fault" compensation to workers who sustain injuries arising out of and in the course of their employment or develop occupational diseases due to the nature of their employment. The Act establishes that the accident fund is funded through employer assessments. It also establishes the Board's important role in the prevention of workplace injuries and occupational diseases.

I have reviewed the debates of the legislature regarding Bills 49 and 63 and the Core Review and have not found any references to the transitional provisions in section 35.1 or any excerpts relevant to the specific question before me. However, it is useful to consider some of the general comments of the minister of Skills Development and Labour regarding Bill 49. During the May 16, 2002 second reading of the Bill (*Hansard*, Volume 8, No. 3), the minister raised concerns about the financial impact on the Board of the continuation of the benefit scheme then in place and outlined the following goals of Bill 49 (at page 3547):

> The goals of this bill are to restore the system to financial sustainability by bringing costs under control, to make the system more responsive and to maintain benefits for injured workers, which are among the highest and best in Canada, while ensuring fairness for workers and employers.

Thus, one of the purposes of the legislature in enacting Bill 49 was to reduce the costs of workers' compensation benefits in order to support the ongoing sustainability of the Board's accident fund. Generally speaking, the cost of benefits awarded under the current Act after June 30, 2002 is less than under the former Act. Therefore, to the extent that the transitional provisions, such as section 35.1(8), result in benefits being awarded under the current provisions, the object of reducing global compensation costs is met.

At page 3548, the minister stated:

> Let me emphasize again that *this bill does not reduce any benefits already awarded to injured workers*. I just want to say that again for people to understand, because there could be people who are fearful that these changes relative to the benefit they're receiving today will be changed. That is not correct. I will say it again. This bill does not reduce any benefits already awarded to injured workers. *The new method of calculating benefits applies only to those benefits awarded after this legislation comes into force.*
>
> [emphasis added]

Section 35.1(2) provides that the current Act applies to all injuries that occur on or after June 30, 2002. Taken on its own, it could be argued that the minister's statement supports the conclusion that the legislature intended that Bill 49 would also apply to any benefits awarded by the Board under pre-June 30, 2002 claims after June 30, 2002. However, if this were the case, it seems that section 35.1(2) would have stated that the current Act applies to all benefits awarded after June 30, 2002. In addition this argument is not consistent with the ordinary meaning of section 35.1(4). It provides that, if a worker who was injured prior to June 30, 2002 is awarded a permanent disability pension after that date, the factor that determines whether

the former or current provisions apply is whether the "permanent disability first occurs on or after [June 30, 2002]." If so, subject to sections 35.1(5) to (8), the current provisions will apply to the pension.

If the object of section 35.1 were to ensure that all benefits awarded after June 30, 2002 were payable under the current Act, this would help support the goal of reducing the global cost of compensation benefits. However, in my view, the object of section 35.1 is to distinguish between those benefits which are to be adjudicated under the former and the current sections of the Act.

(d) The Ordinary Meaning of Recurrence and its Meaning in the Workers' Compensation Context

The submissions in support of the position that the impugned policy is patently unreasonable rely heavily on the dictionary definitions of "recur." I have therefore reviewed the discussion starting at page 26 of *Construction of Statutes* regarding the pitfalls of relying on dictionary definitions to interpret statutes. Although the authors note that judges frequently rely on dictionary definitions, they also identify a variety of problems associated with doing so. For instance, the meanings of words may vary from dictionary to dictionary and even minor differences may become significant when a statute is being interpreted. In addition, they note that there is no official or standard dictionary in Canada. They also comment that words have different meanings depending on the context but the meanings provided in dictionaries tend not to be contextual.

Although I am mindful of the potential pitfalls, in this determination I find that it is appropriate to consider the dictionary definitions of "recur" that were included in the vice chair's referral memorandum because they are sufficiently clear, consistent, and unambiguous. I find it compelling that the plain meaning of "recur" is "to occur again." In my view, this is a fundamentally different concept from a permanent change in a permanent condition. Such a permanent change can be characterized as a deterioration (as it was in the first version of item #1.00(4)). In the *Concise Oxford English Dictionary* (10th ed. revised), "deteriorate" is defined as "become progressively worse." Therefore, I find that a deterioration is not synonymous with a recurrence. In fact, I find that "deterioration" and "recurrence" refer to fundamentally different processes.

In concluding that I may rely upon the dictionary definition of "recurrence," I have considered whether there is a basis on which to conclude that it has a different meaning in the workers' compensation system that would render its common use inapplicable. I recognize that there are other terms that have a different meaning in the workers' compensation context than are attributed to them in normal circumstances. For instance, in the *Concise Oxford Dictionary* (10th ed. revised), the word "permanent," which is used in section 23 (as well as other sections of the Act), is defined to mean "lasting or remaining unchanged indefinitely, or intended to be so; not temporary." However, item #34.54 of the RSCM II provides that a condition is permanent if it is not likely to change over a 12-month period. Accordingly, the word "permanent" is illustrative of the concept that the manner in which a term is used in the workers' compensation system may differ from common parlance.

I have reviewed the history of the use of "recurrence" to determine whether there is support for such a specialized definition for this term in the workers' compensation context. Prior to the 1991 changes in the governance structure of the Board, the commissioners of the Board were charged with the policy-making function. They issued a series of decisions entitled "The Recurrence of Disability" regarding section 32 of the Act (formerly section 30). Section 32 deals with the amount of compensation payable in certain circumstances where further benefits are payable three or more years after the injury. Sections 32(1) and (2) deal with recurrences of temporary partial or total disability after the lapse of three years and section 32(3) deals with situations in which a permanent disability or an increased degree of permanent disability occurs more than three years after the injury.

In Decision No. 81, dated December 12, 1974 (1 *Workers' Compensation Reporter* 308), the former commissioners used the word "recurrence" in connection with a recurrence of temporary partial or total disability and, significantly, in connection with "an increase in residual permanent disability" under the then section 30(3). This decision taken alone might support the argument that the meaning of the word "recurrence" in the workers' compensation system differs from the common meaning and includes a deterioration of a permanent disability. One could then argue that, in enacting section 35.1(8), the legislature was aware of this meaning of recurrence and intended it to be applicable. In those circumstances a policy, such as the impugned policy, that characterizes "any permanent changes in the nature and degree of a worker's permanent disability" as a "recurrence" could be supported by the Act.

However, subsequently, in Item No. 249, dated July 15, 1977 (3 *Workers' Compensation Reporter* 137), the commissioners used "recurrence" in connection with other aspects of the then section 30 but used the term "occurrence" of disability in connection with section 30(3) (now 32(3)). In Decision No. 406, dated January 16, 1986 (6 *Workers' Compensation Reporter* 57), the commissioners continued to use the word "occur" in connection with an increased degree of permanent disability by entitling the policy related to section 32(3) as "Permanent Disability Occurring or Increasing More Than Three Years After Injury." This use of "occur" rather than "recur" has been maintained in item #70.20 of RSCM I and II.

Accordingly, although the former commissioners, in their decisions entitled "The Recurrence of Disability," outlined policies under section 32(3) for compensation for an "increased degree of permanent disability" more than three years after the injury, they did not specifically use the term "recurrence" in that regard after July 15, 1977. I am not of the view that, prior to the enactment of section 35.1(8), a "recurrence" in the context of the workers' compensation system, was generally applied to a permanent deterioration of a permanent disability.

In light of the ordinary meaning of "recurrence," I conclude section 35.1(8) cannot be rationally interpreted to mean that there is a "recurrence" when a permanent disability for which a pension was granted under the former Act permanently gets worse or deteriorates after June 30, 2002. In other words, I find the impugned policy to be patently unreasonable under the Act.

(e) Sections 32 and 96(2)

My determination that the impugned policy cannot be rationally supported by section 35.1(8) is strengthened when I consider the wording of the current sections 32 and 96(2) of the Act. In considering these provisions, the following principles of statutory interpretation enunciated in *Construction of Statutes* are relevant:

- The presumption of consistent expression, which is discussed at pages 162 to 163 as follows:

> It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to avoid stylistic variation. Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended. Given this practice, it then makes sense to infer that where a different form of expression is used, a different meaning is intended.

- The presumption against tautology, which is discussed at pages 158 to 159 as follows:

> It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose. In *Hill v. William Hill (Park Lane) Ltd*., [[1949] AC 530, at 546 (HL)], Viscount Simons wrote:
>
> > [Al]though a Parliamentary enactment (like parliamentary eloquence) is capable of saying the same thing twice over without adding anything to what has already been said once, this repetition in the case of an Act of Parliament is not to be assumed. *When the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before*. The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which would not be there if the words were left out.
> >
> > [emphasis added]

As stated earlier, section 32 provides for the manner in which a worker's compensation is calculated when a claim is reopened more than three years after the injury. While sections 32(1) and 32(2) use the term "recurrence" in the context of further periods of temporary partial or temporary total disability, the term "recurrence" does not appear in section 32(3), which deals with the occurrence of a permanent disability or an increased degree of permanent disability. Section 32(3) characterizes "an increased degree of permanent disability" as something that "occurs." It does not refer to it as something that "recurs." It is clear to me that a deterioration in a permanent disability is "an increased degree of permanent disability." The application of the presumption of consistent expression leads to the conclusion that the legislature would have used the word "recurs" rather than "occurs" to refer to "an increased degree of permanent disability" in section 32(3) if it had intended such an increase to be characterized as a recurrence.

Since the title of section 32 is *Recurrence of disability*, I have considered whether that alone is sufficient to support the conclusion that "an increased degree of permanent disability" under section 32(3) can be said to be a recurrence. Section 11(1) of the British Columbia *Interpretation Act* provides:

> 11(1) In an enactment, a head note to a provision or a reference after the end of a section or other division
>
> (a) is not part of the enactment, and
>
> (b) must be considered to have been added editorially for convenience of reference only.

The question that arises is whether the title of section 32 is a "head note" for the purposes of section 11. The B.C. Court of Appeal considered the meaning of this section in *Peters v. Chilliwack (District)* (1987), 43 DLR (4th) 523. In light of that judgment, I find section 11(1) of the *Interpretation Act* applies to the title of section 32. Accordingly, I find the title "Recurrence of disability" cannot support the conclusion that an "increased degree of permanent disability" in section 32(3) constitutes a recurrence. However, as two of the three subsections of section 32 address recurrence of temporary disability, I note the title of the section properly applies to most of the provision.

Therefore, based on my analysis of the presumption of consistent expression, I conclude that the term "recurrence" in the current section 35.1(8) cannot be rationally interpreted to include "any permanent changes in the nature and degree of a worker's permanent disability." It is consistent with the use of "recurrence" and "occurs" in section 32 to characterize a "permanent change in the nature and degree of a worker's permanent disability" as something that "occurs" rather than as a "recurrence."

The wording of section 96(2) is problematic as it refers to the "recurrence of a worker's injury" rather than "a recurrence of a disability" (the phrase used in section 35.1(8)) thus signaling that the legislature intended that a distinction would be drawn between two different types of recurrence. (I also note that sections 32(1) and (2) refer to the recurrence of disability but section 32(1) introduces the concept of calculating "the compensation as if the recurrence were the happening of the injury.") I find the existence of these two different concepts (that is, recurrence of disability and recurrence of injury) to be troublesome and difficult to interpret. However, I do not find the question before me turns on resolving this distinction. Therefore, I find it unnecessary to do so for the purposes of this determination.

The application of the presumption against tautology leads to the conclusion that the legislature clearly intended that there be a difference between "a significant change in a worker's medical condition that the Board has previously decided was compensable" (the phrase that appears in section 96(2)(a)) and "a recurrence of a worker's injury" (the phrase that appears in section 96(2)(b)).

I note item C14-102.01 (*RE: Changing Previous Decisions – Reopenings*) appears to some extent to treat sections 96(2)(a) and (b) as if they have overlapping meanings. The policy discusses a reopening of a claim for a permanent change in a permanent disability under both sections. This seems to ignore the presumption that the legislature would not have intended section 96(2)(b) to have the same meaning as section 96(2)(a). In order for section 96(2)(a) to be meaningful, it must be interpreted as referring to something other than a recurrence.

In my view, the better interpretation of section 96(2) is that a reopening for a permanent deterioration in a permanent disability falls into the category of "a significant change in a worker's medical condition" rather than "a recurrence of a worker's injury." However, I would not find strong support for my conclusion that the impugned policy is patently unreasonable on the basis of a review of section 96(2) alone, given the interpretive challenges I have identified, and in the absence of my analysis regarding the dictionary definition of "recur" and section 32 and the ordinary meaning of "recur."

(f) Summary

In summary, I agree with the position of the employers' adviser that the standard of patent unreasonableness is a very high standard that demands significant deference to the Board of Directors. However, I find the impugned policy cannot be rationally supported by section 35.1(8) of the Act. I find that the impugned policy is so seriously flawed that it cannot be allowed to stand. My conclusion is based largely on my analysis of the ordinary meaning of "recur" and the application of the presumption of consistent expression. While my analysis of section 96(2) supports my conclusion, I acknowledge the interpretive difficulties related to that section. For the purposes of section 35.1(8) of the Act, I find it patently unreasonable to characterize a reopening of a claim for "any permanent changes in the nature and degree of a worker's permanent disability" as a "recurrence."

In making this determination, I have been mindful of the Supreme Court of Canada's judgment in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748, in which the court commented:

> The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.
>
> (para. 47 (QL))

In this case, it may be debatable as to whether the defect is obvious or required further searching. It could be considered obvious in the sense that the use of "recurrence" in the impugned element of the policy is not consistent with common parlance. However, consideration of whether the policy is patently unreasonable also required consideration of the use of the word "recurrence" in the workers' compensation context and the interpretation of section 35.1(8) in the general context of the Act. Therefore, a degree of searching and testing was required in order to confirm that the use of "recurrence" in the impugned policy is not rational. The more recent judgment of the Supreme Court of Canada in *Voice Construction* (cited earlier) indicates

a growing dissatisfaction with any test requiring an analysis of the "metaphysical obviousness of the defect." This judgment suggests that the Supreme Court of Canada is moving away from the notion that the defect must be immediately apparent. In addition, it is arguable that any analysis of the current Act requires "significant searching" or "testing" due to the complex interplay between provisions.

On this basis, I conclude the essence of the question before me is whether the impugned policy can be rationally supported by section 35.1(8) the Act. I find that it cannot be supported. I find the impugned policy should not be applied in the adjudication of the worker's entitlement, if any, to an increased permanent partial disability pension. In other words, I find that such entitlement should be adjudicated under the former provisions of the Act.

(g) Item C14-102.01

My determination may draw certain elements of item C14-102.01 (*RE: Changing Previous Decisions – Reopenings*) of the RSCM II into question. That policy is not before me in this determination and I make no determination in that regard. However, I note that it appears that the element of that policy that characterizes a reopening for an increased permanent disability award due to a deterioration of a permanent disability as a reopening for a "recurrence of injury" can be supported by section 96(2)(a) regarding "a significant change in a worker's medical condition that the Board has previously decided was compensable" without any need to characterize such a deterioration as a "recurrence" under section 96(2)(b). In fact, the policy provides that under section 96(2)(a), "[a] claim may also be reopened for any permanent changes in the nature or degree of a worker's permanent disability."

10. The Operation of Section 251

Section 251 prescribes a series of steps that must be taken as a result of my determination that the impugned policy should not be applied. Those steps include the following:

- In accordance with section 251(5), WCAT will suspend any other appeal proceedings that can be affected by the impugned policy.

- In accordance with section 251(5), I will send notice of this determination and my reasons to the Board of Directors in care of the chair of the Board of Directors. I will enclose with the notice a list of the parties to the appeal that has led to this referral and the parties to the appeals that WCAT has suspended under section 251(5).

- In accordance with section 251(6), within 90 days of receipt of notice of this determination, the Board of Directors must review the policy and determine whether WCAT may refuse to apply the policy. The date for receipt of the notice is a matter to be determined by the Board of Directors. However, I note that WCAT's task of identifying the appeals that are to be suspended under section 251(5) may be logistically demanding. In fact, it may require a review of each appeal involving a post-June 30, 2002 reopening of a claim for a permanent deterioration of a permanent disability for which a pension had been awarded under the former provisions. Accordingly, there may be a delay between the date of this determination and the date I give formal notice of this determination to the Board of Directors.

- In accordance with section 251(7), the Board of Directors must allow the parties to this appeal and the parties to all appeals suspended by WCAT to make written submissions.

- In accordance with section 251(8), WCAT will be bound by the Board of Directors' determination.

11. Conclusion

For the purposes of the current section 35.1(8) of the Act, I find the characterization in item #1.03(b)(4) of RSCM I and II (formerly item #1.00(4)) of a reopening of a claim for "any permanent changes in the nature and degree of a worker's permanent disability" as a "recurrence" to be patently unreasonable under the Act. In accordance with section 251(5) of the Act, I will send notice of this determination and my reasons to the Board of Directors of the Board. In addition, I will provide the Board of Directors with a list of the parties to the appeals that WCAT suspends under section 251(5).

Decision of the Workers' Compensation Appeal Tribunal

Number: WCAT-2005-01772
Date: April 11, 2005
Panel: Jill Callan, Chair; Steven Adamson, Vice Chair; Michelle Gelfand, Vice Chair
Subject: Review Division and WCAT Jurisdiction — Refusal to Make a Decision

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Introduction

The employer, which is represented by a consultant, appeals a June 13, 2003 Review Division decision (Review Decision #1786). In that decision, the review officer declined to conduct a review of a March 26, 2003 letter of a case manager of the Workers' Compensation Board (Board). That letter pertained to relief of costs for experience rating purposes under section 39(1)(e) of the *Workers Compensation Act* (Act) and under item #115.30 (*Experience Rating*) of the *Rehabilitation Services and Claims Manual*, Volume I (RSCM I).

In the March 26, 2003 letter, the case manager declined to issue a further decision regarding relief of costs under section 39(1)(e) of the Act because the Board had previously issued a decision dated August 23, 1999. He noted that the Board makes decisions regarding the other items enumerated in item #115.30 "in the ordinary course of business." He also stated:

> The Board takes the position that it is not required by law or policy to provide decisions on each category in [item #115.30]. Consideration occurs at the appropriate time as per policy and practice and decision letters are provided, when applicable.

In the June 13, 2003 decision under appeal, the review officer declined to conduct a review because, in his view, the March 26, 2003 letter had merely communicated the Board's position that there was no requirement for it to make a further decision.

This appeal is being considered by a three-member panel appointed under section 238(5)(a) of the Act. As the panel has not been appointed under section 238(6), this decision does not constitute a binding decision under section 250(3).

The employer has not requested an oral hearing of this appeal. As the issues on this appeal relate only to law and policy, we find that the appeal can be fully considered without an oral hearing.

Jurisdiction

Under section 239(1) of the Act, a final decision made by a review officer in a review under section 96.2, including a decision declining to conduct a review under that section, may be appealed to the Workers' Compensation Appeal Tribunal (WCAT).

Under section 250(1), WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the Board's Board of Directors that is applicable in the case. Section 254 of the Act gives WCAT exclusive jurisdiction to inquire into, hear, and determine all those matters and questions of fact, law, and discretion arising or required to be determined in an appeal before it.

Issue(s)

The following issues arise on this appeal:

- Whether the Review Division correctly refused to conduct a review of the Board's March 26, 2003 letter;

- Whether WCAT has the general authority to order the Board to issue decisions on relief of costs; and

- Whether to apply section 246(3) of the Act to compel the Board to issue a further decision on relief of costs in this case.

Claim Background

The worker is a registered nurse. On February 10, 1999, she experienced right shoulder symptoms while moving a patient. The Board accepted her claim for a right trapezius strain and paid wage loss benefits to her for 391 days.

A Board medical advisor reviewed the claim and made a note dated June 8, 1999 in the claim log. The medical advisor concluded that the diagnosis was a "soft tissue strain to the right shoulder, largely the trapezius muscle of the neck and posterior shoulder but also indicating the rotator cuff." The medical advisor noted there were pre-existing changes of spondylosis on the CT scan but questioned their significance in respect of the compensable injury. The medical advisor also noted "a history of pre-existing problems in the right shoulder" and noted the worker had seen Dr. McPherson for an orthopaedic consultation in the early 1990s.

By decision dated August 23, 1999, the case manager informed the employer:

> There is no evidence of a pre-existing condition, disease or disability that has enhanced the worker's disability under this claim. Therefore, relief of costs under Section 39(1)(e) of the *Worker's Compensation Act* does not apply.
>
> My review of this claim does not disclose any circumstance that would allow me to grant you relief of costs under any other Section of the *Worker's Compensation Act*. This means that the relief of costs will not be granted.
>
> [reproduced as written]

She noted that her decision could be appealed to the Appeal Division of the Board and that an appeals pamphlet was enclosed.

The employer did not initiate an appeal of the August 23, 1999 decision.

Wage loss benefits under the claim were terminated effective March 22, 2000.

By letter dated February 26, 2003, the employer's representative informed the Board that he was conducting a review of workers' compensation claims on behalf of the employer. He stated it was unclear as to "whether decisions pertaining to the application of Sections 39 and 42 of the . . . Act have been established on this claim." He asked whether the relief of costs provisions were applicable. He also requested that, if a decision had previously been issued under the claim, the Board consider the question of relief of costs in light of medical evidence received by the Board since the date of that decision.

The employer's representative's letter led to the case manager's March 26, 2003 letter, which the employer sought to have reviewed by the Review Division.

Law and Policy (Relief of Costs)

Pursuant to section 42 of the Act, the Board has created an experience rating system for employer assessments. As a result, the amount of claims costs charged to an employer in a given year may have an impact on the employer's assessment rate. The following explanation of the operation of the experience rating system is set out in item #115.30 of RSCM I:

> The plan compares the ratio between an employer's claim costs and assessable payroll with the ratio between the total claim costs and assessable payroll of the employer's class. Subject to maximums, merits are assigned for favourable ratios and demerits for unfavourable ratios. The merit or demerit takes the form of a percentage increase or decrease in the usual assessment rate. Details of ER [the experience rating system] can be found in the *Assessment Policy Manual* (Policy No. 30:50:41).

Item #115.30 provides that generally all claims coded to an employer that are accepted by the Board are taken into account for experience rating purposes. However, the policy also sets out a list of items that the Board will deduct from the employer's claims costs for the purposes of experience rating. The list includes:

- costs recovered through a third party action;
- costs paid out prior to the disallow of a claim or the reversal of a decision to accept a claim;
- costs transferred to the class of another employer under section 10(8) of the Act;
- costs assigned to the funds created under sections 39(1)(d) and (e);
- costs for certain occupational disease claims which do not manifest into a disability without an average exposure of two or more years or a latency period of two or more years;

- costs after 13 weeks where section 5(3) of the Act is applicable;

- costs from accidents caused by personal illness;

- costs for injuries during a retraining program sponsored by the Board's Vocational Rehabilitation Department; and

- costs for the situations covered by items #115.31 and #115.32.

Section 39(1) of the Act sets out the requirement that the Board create and maintain an adequate accident fund. That section provides that the Board must assess, levy on, and collect from employers and independent operators sufficient funds to meet various requirements. The requirement under section 39(1)(e) is to "provide and maintain a reserve for payment of that portion of the disability enhanced by reason of a pre-existing disease, condition or disability."

The Board of Directors' policies regarding section 39(1)(e) include:

- Items #114.40 to #114.43 of RSCM I; and

- Decision of the Panel of Administrators #98/04/23-03, Section 39(1)(e), 14 *Workers' Compensation Reporter* 107[24].

Resolution of the Board of Directors 2005/01/18-01 (*Re: Relief of Costs for a Pre-Existing Disease, Condition or Disability*)[25] has resulted in significant changes to the policies of the Board of Directors relevant to relief of costs under section 39(1)(e). The revised policies are applicable to "all decisions on and after March 1, 2005." As the decision that the employer sought to have reviewed by the Review Division was issued before that date, the new policies do not appear to be applicable to this appeal. In any event, this appeal does not turn on whether the new or old policies apply.

Bill 63, Review Division, and WCAT Decisions

Pursuant to the *Workers Compensation Amendment Act (No.2), 2002* (Bill 63), the Act underwent significant amendments that were effective March 3, 2003. Those amendments included the introduction of a new review and appeal system and changes to the provisions related to matters such as reopenings of claims and the reconsideration of prior decisions. In this decision, we refer to sections of the Act as it was prior to March 3, 2003 as "former" sections. Otherwise, all references to the Act should be read as references to the current Act.

Under the former section 96(2), the Board had the broad power to "at any time at its discretion reopen, rehear and redetermine any matter." Accordingly, the Board had broad authority to reconsider its prior decisions. There were some situations in which the Board revisited a

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[24] Decisions published in *Workers' Compensation Reporter* are available at http://www.worksafebc.com/publications/newsletters/wc_reporter/default.asp.

[25] Available at http://www.worksafebc.com/regulation_and_policy/policy_decision/board_decisions/default.asp.

decision regarding relief of costs under section 39(1)(e) on one or more occasions (see, for instance, Appeal Division Decision #2001-0635, 17 *Workers' Compensation Reporter* 359, in which the panel set out the history of a claim for which the Board issued a series of decisions regarding relief of costs under section 39(1)(e)).

As a result of Bill 63, the Board's authority to reconsider its decisions has been significantly restricted. In section 1 of the Act, "reconsider" is defined to mean, "to make a new decision in a matter previously decided where the new decision confirms, varies or cancels the previous decision or order." While section 96(4) provides that "the Board may, on its own initiative, reconsider a decision" that it has previously made, section 96(5) limits the Board's reconsideration power by stating that it may not reconsider a decision if "more than 75 days have elapsed since that decision . . . was made."

Since March 3, 2003, WCAT panels have decided many appeals involving the following fact pattern:

- The Board issued a decision denying relief of costs under section 39(1)(e).
- Although the decision informed the employer of its appeal rights, the employer did not appeal the decision.
- Following the expiration of the time limit for initiating an appeal, a consultant made a general inquiry with the Board regarding whether a relief of costs decision had been previously issued and requested a further decision.
- In responses issued after March 3, 2003, the Board provided a copy of the earlier relief of costs decision and declined to make a further decision on the basis that, as more than 75 days had passed since the original decision was issued, sections 96(4) and (5) precluded the Board from reconsidering its previous decision. In addition, these decisions expressly or impliedly refused to address the other relief of costs items enumerated under item #115.30 of RSCM I.
- The consultant sought a review of the new letter by the Review Division.
- The Review Division declined to conduct a review on the basis that the letter was informational only in that it merely informed the employer of the existence of the previous decision and the fact that the decision could not be reconsidered because more than 75 days had passed.
- The employer appealed the Review Division decision to WCAT.

In WCAT Decision #2004-00638, dated February 5, 2004 (20 *Workers' Compensation Reporter* 59), a three-member panel considered an appeal to which the scenario set out above was applicable. In discussing the effect of the original decision that had denied relief of costs under the claim (at pages 63 and 64 of the published version of the decision), the panel considered whether the original relief of costs decision was "of a conditional nature, which was intended to be 'time-limited' in its application." In other words, the panel considered whether the decision was limited to considering the claims costs to the date of the decision, in which case the "decision would leave open for future consideration the question as to whether further periods

of disability involved prolongation or enhancement on the basis of a pre-existing disease, condition or disability." The panel concluded that the original relief of costs decision in that case constituted "a categorical denial as to the existence of any pre-existing disease, condition or disability." Therefore, the panel concluded that there was no basis on which a further relief of costs decision could be made because more than 75 days had passed and the Board's reconsideration authority was subject to the 75-day limit set out in section 96(5).

At pages 66 to 68 of the published version of the decision, the panel considered the fact that the Board had refused to provide a specific response to the employer's request for relief of costs under the items other than section 39(1)(e) listed in item #115.30 of RSCM I. The panel noted that section 96.2(1)(c) of the Act specifically creates a right of review for a refusal to make a Board order. In contrast, sections 96.2(1)(a) and (b) "do not expressly grant a right to request review of a failure or refusal by the Board to make a decision concerning a compensation, rehabilitation or assessment matter" or the other matters listed under section 96.2(1)(c). The panel concluded:

> The legislature has provided a right of review concerning "a Board decision", "in a specific case", "respecting an assessment or classification matter". All three elements must be present. By logical inference, as set out above, the legislature did not intend to provide a right of review by the Review Division under section 96.2[(1)](b), with respect to the Board's failure to make a decision concerning an assessment matter. The practical impact of these provisions is to allow the Board discretion in assigning resources to various tasks and determining when and if decision letters are required.

The framework developed in WCAT Decision #2004-00638 has been applied in subsequent WCAT decisions. In some decisions the panel has concluded that the Review Division erred in not determining that another section 39(1)(e) decision should be issued in a case in which the original 39(1)(e) decision amounted to a conditional or time-limited decision (see for example WCAT Decision #2004-04020, dated July 28, 2004[26]). However, in other decisions, such as WCAT Decision #2004-01846, dated April 14, 2004, the panel has confirmed the Review Division decision but noted it is open to the employer to ask the Board to further consider relief of costs in relation to the time period subsequent to the original relief of costs decision. This has been the approach in recent WCAT decisions, where the original decision was considered conditional or time limited in its application.

If the analysis in WCAT Decision #2004-00638 were applied to the August 23, 1999 decision that was issued under the claim before us, we might consider the decision on relief of costs under section 39(1)(e) to be a conditional decision which leaves it open to the Board to make a further decision. While the employer's representative has advanced numerous arguments about the application of sections 96(4) and (5) of the Act, the situation before us is not one in which the Board declined to make a further decision due to the operation of those sections — it is a situation in which the Board has simply declined to make a further decision.

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[26] WCAT decisions are available at http://www.wcat.bc.ca/research/appeal-search.htm).

In Review Decision #21260, dated October 19, 2004[27], a review officer considered a scenario in which the Board refused to make further decisions under section 39(1)(e) and the other items enumerated in item #115.30. The review officer summarized his reasons for declining to conduct a review as follows:

> As a result, I have decided to reject the request for review of the Board's letter of August 10, 2004. This is on the primary ground that section 96.2(1) provides for employers, workers or others to request reviews of refusals to make prevention orders, not requests by workers, their dependants or employers to review refusals to make compensation and assessment (including relief of costs) decisions. This conclusion is supported by the following additional reasons:
>
> - The history of the appeal system, particularly concerning assessment and relief of costs matters, suggests a legislative intent to balance the needs of individuals to have a fair and independent review of decisions against the general need of the Board's administration to efficiently conduct the Board's operations.
>
> - Section 96.2(2) specifically excludes certain assessment and relief of costs decisions from being reviewed, notably any that might be made under section 42 other than in relation to experience rating.
>
> - The history and statutory exclusions suggest a legislative intent that parties who are dissatisfied with certain types of decision or refusals to make decisions must take any complaints to the administrative rather than the appellate part of the system.
>
> - Refusals to make decisions should not be reviewable when there is no clear legal or policy obligation to make a decision at the particular time and administrative factors are significant in determining if and when a new decision should be made.
>
> - The refusal to make new decisions in this case under sections 39(1)(e) and 42 was not reviewable as there was no clear legal/policy obligation to make a new decision and there were significant administrative factors involved in determining whether to make a new decision. These administrative factors arose particularly from the fact that the employer's request for a new decision was a form letter containing no specific supporting reasons as to the circumstances of the claim.

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[27] Review Division decisions are available at http://www.worksafebc.com/claims/review_and_appeals/review_division/review_search/advanced_search.asp.

Employer's Submissions

The employer's representative provided a submission dated June 23, 2004 in which he addressed the merits of the employer's request for relief of costs. He noted that the Board continued to pay the worker temporary disability benefits for a further seven months after the August 23, 1999 decision regarding relief of costs under section 39(1)(e) was issued. He also pointed out that a June 8, 1999 log entry by a Board medical advisor referred to the worker's history of pre-existing right shoulder problems in the early 1990s. He submitted that the worker's disability was enhanced as a result of these pre-existing shoulder problems. He also contended that there is a problem with the August 23, 1999 decision because it did not contain reasons. In this regard, he referred to WCAT Decision #2003-01234-ad.

On December 3, 2004, a WCAT appeals coordinator informed the employer's representative that the chair had appointed a three-member panel pursuant to section 238(5) of the Act to consider the appeal. She noted that copies of WCAT Decision #2004-00638 and Review Decision #21260 were enclosed. She then stated:

> As the panel understands it, your position is that WCAT ought to compel the Board to issue a further decision on relief of costs under section 39(1)(e) and a decision dealing with the other items listed in policy #115.30. The panel takes the view that WCAT's authority to consider appeals and vary Review Division decisions must come from the Act. In other words, the panel is not of the view that WCAT has the inherent jurisdiction to cause the Board to make a further decision.
>
> Section 246(3) of the Act provides:
>
> > If, in an appeal, the appeal tribunal considers there to be a matter that should have been determined but that was not determined by the Board, the appeal tribunal may refer that matter back to the Board for determination and suspend the appeal proceedings until the Board provides the appeal tribunal with that determination.
>
> The panel notes that, in order to refer a matter back to the Board for a determination pursuant to section 246(3), it must be determined that the matter "should have been determined but . . . was not determined by the Board". As the provision states that WCAT "*may* refer that matter back to the Board for determination" [emphasis added], the WCAT panel has the discretion to determine whether it ought to refer a matter back to the Board for determination.
>
> As the remedy you are seeking on behalf of the employer is a determination by WCAT that the Board ought to make a further decision, the panel considering the appeal has determined that it is necessary to consider:
>
> - whether the Board should have made a further determination on relief of costs; and

- what criteria and circumstances should WCAT take into account when considering whether to refer a decision regarding relief of costs under section 39(1)(e) or the other items listed in policy #115.30 back to the Board for further consideration.

Accordingly, the panel is requesting your submissions on these questions.

The employer's representative responded in letters of December 10, 2004 and January 4, 2005. The specific submissions set out in those letters are referred to below under the appropriate headings.

In his December 10, 2004 submission, the employer's representative expressed the general concern that WCAT is granting Review Decision #21260 "the force of a guiding principle; one which WCAT appears to want to use as the underpinning for assessing its' [*sic*] responsibilities on other claims." Accordingly, it seems appropriate to point out that neither WCAT Decision #2004-00638 nor Review Decision #21260 has the force of a precedent decision or a policy. However, as both decisions address issues potentially relevant to the issues arising on this appeal, it seems appropriate to consider both of those decisions in the course of our deliberations.

Analysis

Did the Review Division Have Jurisdiction Over the Review?

Typically, the narrow question that is before WCAT when the Review Division declines to conduct a review is whether the Review Division had jurisdiction over the issue raised by the review and ought to have proceeded with the review.

In this case, as the Board has declined to make a decision at all, the analyses in WCAT Decision #2004-00638 and in Review Decision #21260 are relevant. Section 96.2(1)(c) grants the Review Division jurisdiction over "a refusal to make a Board order." However, there is no parallel language under sections 96.2(1)(a) or (b) for situations where the Board declines to issue a decision regarding a compensation or assessment matter.

The presumption of consistent expression is discussed in *Sullivan and Driedger on the Construction of Statutes*[28] (*Construction of Statutes*). At pages 162 to 163, the authors state:

> It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to avoid stylistic variation. Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended. Given this practice, it then makes sense to infer that where a different form of expression is used, a different meaning is intended.

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[28] Sullivan, Ruth, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: The Butterworth Group of Companies, 2002).

It is arguable that, in some circumstances, a letter communicating a determination that a further decision will not be issued will constitute a decision. However, when the presumption of consistent expression is applied, the fact that the legislature specifically provided under section 96.2(1)(c) that a refusal to make a Board order is reviewable, but did not specifically state under sections 96.2(1)(a) and (b) that a refusal to make a decision is reviewable, leads us to conclude that a refusal to make a decision is not reviewable. In making this determination, we have taken into account the fact that there are distinctions to be drawn between an order and a decision. However, we conclude that, had the legislature intended that a refusal to make a decision would be reviewable, it would have specifically said so.

For the above reasons, we adopt the analysis in WCAT Decision #2004-00638 and conclude that a refusal to make a decision is not reviewable by the Review Division. Accordingly, we confirm the review officer's decision that the Review Division did not have jurisdiction to conduct the review.

Does WCAT Have the General Authority to Compel the Board to Make a Decision?

The employer's representative contends that WCAT has the power and authority to compel the Board to provide a further relief of costs decision. It appears to be the employer's position that WCAT can and should do so even if the Review Division lacks jurisdiction over the review. The employer's representative advances a series of arguments in support of this position.

The employer's representative submits the employer's position is supported by section 250(2) of the Act, which states:

> The appeal tribunal must make its decision based on the merits and justice of the case, but in so doing the appeal tribunal must apply a policy of the board of directors that is applicable in that case.

The employer's representative argues that, as WCAT must consider "the merits and justice of the case," WCAT must consider evidence that supports granting relief of costs and must compel the Board to make a decision. He also notes section 251 of the Act sets out a role for the WCAT chair in determining whether policies of the Board of Directors of the Board are patently unreasonable under the Act. It appears from these arguments that the employer's representative takes the view that WCAT has the inherent jurisdiction to supervise the Board. However, in our view, section 250(2) has no application unless WCAT already has the statutory authority to make the decision being sought. The process outlined in section 251 is limited to the question of whether a policy is patently unreasonable and does not confer any general supervisory authority on the chair. In any case, when the WCAT chair makes a determination under section 251(3), the final determination is made by the Board of Directors under section 251(6).

Superior courts, such as the Supreme Court of British Columbia, have the inherent jurisdiction to review the legality of actions of administrative bodies. Accordingly, they generally have supervisory jurisdiction to review all administrative decisions. In contrast, the jurisdiction of administrative tribunals, such as WCAT, is limited to the jurisdiction expressly granted to them by statute. WCAT's jurisdiction to hear appeals from the Review Division arises out of and is limited by section 239 of the Act. The jurisdiction of the Review Division arises out of and is limited by section 96.2(1) of the Act. We do not interpret sections 250(2) and 251 as

granting WCAT supervisory jurisdiction over the Board. If the legislature had intended WCAT to have the general authority to compel the Board to make decisions, the limited discretionary authority in section 246(3) would have been unnecessary.

Accordingly, we find that WCAT does not have the general authority to compel the Board to make a further decision.

Should this Matter Be Referred Back to the Board Under Section 246(3)?

We agree with the submissions advanced on behalf of the employer to the extent that we find under section 246(3) that WCAT has the statutory authority to compel the Board to make decisions in some circumstances. We interpret section 246(3) as having two elements:

- the matter must be one "that *should* have been determined but that was not determined by the Board" [emphasis added]; and

- since the section states "the appeal tribunal *may* refer the matter back to the Board for a determination" [emphasis added], WCAT is not required to refer matters back to the Board for a determination, but merely has the discretion to do so. In this regard, we rely on the fact that the Legislature used the word "may" rather than the more mandatory terms "shall" or "will" in section 246(3).

Section 246(3) allows WCAT to refer a matter back to the Board where WCAT considers "there to be a matter that should have been determined but was not determined by the Board." In interpreting this provision, we have considered the meaning of the word "should." The *Concise Oxford English Dictionary* (10th ed. revised), sets out a variety of definitions of the word "should." The most applicable definition in this case is "used to indicate obligation, duty, or correctness." In the *Construction of Statutes*, the authors provide the following discussion regarding "should" at page 65:

> Some courts have held that "should" imposes a legal obligation. However, this holding is hard to accept because it is inconsistent with the ordinary meaning of "should". In ordinary usage, "should" indicates a preferred course of action but it does not make that preference binding. The holding also ignores the well established convention of using "shall" to impose legally binding obligations or requirements.

The employer's representative submits that, as section 96(1) grants the Board "exclusive jurisdiction to inquire into, hear and determine all matters" including "the existence and degree of disability by reason of an injury," the Board is required to make a further decision on relief of costs. However, we interpret section 96(1) as a provision that confers jurisdiction rather than a mandatory provision requiring the Board to adjudicate certain matters. Accordingly, while we find section 96(1) authorizes the Board to make decisions on a range of matters, it does not require the Board to do so in any specific case. Therefore, this is not necessarily a situation in which the Board "should" have determined a matter in the sense of being legally obliged to do so.

The employer's representative submits that the original August 23, 1999 decision was "unreasoned." The employer appears to be arguing that this is a further reason for concluding both that the Board should have issued a decision when asked to do so in February 2003 and that we should now compel the Board to issue a reasoned decision based on all available evidence.

We are not persuaded that the analysis regarding unreasoned decisions set out in decisions such as WCAT Decision #2003-01234-ad applies to the circumstances of this appeal. In contrast to the current provisions of the Act, the former sections 96(6) and 96(6.1) of the Act required an employer to establish an error of fact or law or a contravention of published policy in order to successfully appeal a decision regarding relief of costs. It is in this context that WCAT Decision #2003-01234-ad concluded it was an error of law not to provide reasons. Even if we accepted that the August 23, 1999 decision did not include adequate reasons, we would not find that the Board "should" provide a further decision as a result.

The employer's representative contends that the request for a further decision amounts to an application for reopening under section 96(2) of the Act and that the Board therefore "should" make the requested decision under that provision. Sections 96(2) and (3) Act provide:

> (2) Despite subsection (1), at any time, on its own initiative, or on application, the Board may reopen a matter that has been previously decided by the Board or an officer or employee of the Board under this Part if, since the decision was made in that matter,
>
> (a) there has been a significant change in a worker's medical condition that the Board has previously decided was compensable, or
>
> (b) there has been a recurrence of a worker's injury.
>
> (3) If the Board determines that the circumstances in subsection (2) justify a change in *a previous decision respecting compensation or rehabilitation*, the Board may make a new decision that varies the previous decision or order.
>
> [emphasis added]

The effect of a decision to relieve costs under section 39(1)(e) of the Act or under item #115.30 of RSCM I is to reduce the claims costs that will be taken into account in determining the employer's experience rating under the assessment policies established under section 42 of the Act. While we acknowledge that decisions on relief of costs are made by Board officers who are also involved in the adjudication of workers' benefits under claims, we do not find that, in and of itself, is enough to lead us to characterize such decisions as compensation decisions. Given that decisions regarding relief of costs have no effect on the entitlement of workers to benefits and that they potentially affect the experience rating of employers, we find them to be assessment decisions rather than decisions "respecting compensation or rehabilitation." Accordingly, we do not find that section 96(2) authorizes the Board to reopen a claim for a further relief of costs decision.

We now turn to the question of whether there is any other basis in law or policy on which to conclude that the Board should have made a further decision under section 39(1)(e) or made a determination related to the other items enumerated in item #115.30.

In Appeal Division Decision #95-0062, *Section 39(1)(e) Policies* (11 *Workers' Compensation Reporter* 295), a chief appeal commissioner considered the language of section 39(1)(e) and commented (at pages 296 and 297):

> [Section 39(1)(e)] clearly requires the Board to accumulate a reserve for the broad purpose of relieving employers of the costs of claims of workers suffering enhanced disabilities. The provision is silent, however, on how the reserve is to be administered.
>
> To require the Board to accumulate a reserve for a broad purpose is a different matter from requiring it to accomplish the purpose in specific ways. Subsection 39(1)(e) states the broad purpose for which the reserve is intended but provides no guidance as to the implementation of that purpose. It provides no guidance as to how the provision is to be applied to individual cases. It would appear that the provision calls for policies regarding the manner in which it is to be applied to individual cases. Subsection 39(1)(e) may be interpreted, therefore, as leaving implicitly a substantial amount of discretion for policy making as regards its potential application to individual cases. The history behind the provision reinforces that interpretation.

Item #114.40 of RSCM I contemplates that relief of costs decisions most frequently relate to permanent disability pensions. However, the policy also provides that relief of costs under section 39(1)(e) will apply to temporary disability benefits but will not be invoked until the worker has been disabled for at least 13 weeks.

There is nothing in the policies that indicates that further decisions under section 39(1)(e) will be issued when temporary disability benefits continue past the point at which the Board makes the relief of costs decision. However, the fact that it is open to the Board to make a further decision was recognized in various decisions of the Appeal Division and in WCAT Decision #2004-00638.

If there were a statutory provision or a policy requiring the Board to render a further decision in the circumstances of this case, it would be clear that the first aspect of section 246(3) had been met and the question would be whether we ought to exercise our discretion to refer this matter back to the Board for a further section 39(1)(e) decision. In this case, we find there is no requirement under the Act or applicable policies for the Board to render a further relief of costs decision. However, as stated above, the use of the word "should" in section 246(3) rather than a more mandatory term appears to mean that WCAT may require the Board to make a determination even if there is no legal obligation to do so.

We conclude that this is not a case in which the Board "should" have rendered a further decision, even within the more expansive meaning of "should" discussed above. In reaching this conclusion, we have considered the following factors:

- **Finality**

  If WCAT required the Board to make a further determination under section 39(1)(e) after such a lengthy delay, it seems that increased finality, which was one of the legislature's goals in enacting Bill 63, would be thwarted. At the second reading of Bill 63 in the

legislature on October 22, 2002, the minister of Skills Development and Labour commented on the purposes of the statutory amendments as follows (*Hansard*, 3rd Session, 37th Parliament (2002), at page 3935):

> **Hon. G. Bruce:** With this bill we aim to make the appeal process more responsive to injured workers and employers alike. In developing the new system, the ministry took into consideration the recommendations of the 1999 royal commission report on workers compensation and the 2001-02 WCB core services review conducted by Mr. Allan Winter. The changes that we are introducing will accomplish three main goals: first, limit the amount of time that it takes to reach a decision; second, improve the quality and consistency of decision-making; and *third, end the cyclical nature of the current process*.
>
> [emphasis added]

- **Unfairness to Current Employers**

  If relief of costs were now granted on the claim, it would affect the assessments of current employers rather than assessments of employers that were paying assessments in 1999 and 2000. There would, admittedly, be virtually no impact if relief of costs were granted after the fact on one claim. However, it could be unfair to current employers if every employer that had previously received relief of cost decisions prior to the termination of temporary disability benefits successfully requested relief of costs years after the period of disability.

- **The Appeal Structure**

  Given the Review Division's consistent position that it does not have jurisdiction over appeals of this nature, if WCAT were to compel the Board to make a decision in cases such as this one, the Review Division would simply become a conduit through which appeals on this issue would come to WCAT. There are some appeals and applications that are made directly to WCAT. However, it seems unlikely that the legislature intended that WCAT could compel the Board to make decisions on matters arising out of appeals of Review Division decisions when the Review Division does not have jurisdiction over those matters. Similarly, it is unlikely that the legislature intended that the Review Division's statutory authority to review relief of costs decisions would be bypassed, which would be the result if WCAT referred these decisions back to the Board. Although we recognize that many section 246(3) referrals will, in effect, result in a direct appeal to WCAT of the newly issued decision, the new decision generally raises an issue similar to the one already under appeal. In the case before us, the issue under appeal is jurisdictional, whereas the new decision requested by the employer would relate to the merits of granting relief of costs, which is an entirely different issue.

- **Delegation of Administrative Control**

  The Board has finite resources and the administration of the Board must set priorities for utilizing those resources. To the extent that multiple decisions are being made under section 39(1)(e), other matters are delayed or cannot be dealt with by the Board. Section 82 of the Act sets out the powers and duties of the Board of Directors of the Board. Section 82(1)(b)

requires the Board of Directors to "set and supervise the direction of the Board." WCAT has not been granted a similar power or duty under the Act. Accordingly, WCAT should not play a role in dictating the manner in which the Board allocates its adjudicative resources.

- **Availability of Alternative Remedy**

  The employer's representative raises the concern that, when significant new evidence is discovered after the relief of costs decision is issued, the employer is without a remedy. However, pursuant to the transitional provisions in Part 2 of Bill 63, the employer may apply to WCAT for an extension of time to appeal the August 23, 1999 decision. Item #5.31 of WCAT's *Manual of Rules of Practice and Procedure*, which deals with the "special circumstances" requirement of section 243(3), provides that the following factor "may be considered in deciding whether special circumstances precluded the filing of an appeal on time":

  > (d) whether the applicant has obtained significant evidence which, at the time the decision was issued, either did not exist or existed but was not discovered and could not through the exercise of reasonable diligence have been discovered (see *WCAT Decision #2004-00433*); and, . . .

In light of all of these factors, we conclude that this is not a situation in which the Board "should" have made a further determination regarding the employer's eligibility for section 39(1)(e) relief of costs under the worker's claim. In reaching this conclusion, we note that the general factors set out above could, in the appropriate circumstances, be outweighed by the specific factors associated with an individual case and lead to a different conclusion regarding whether the Board "should" have made a determination. Factors such as the diligence of the employer in pursuing the original decision, and the reasonableness of the delay in requesting the subsequent decision, could lead to a different outcome. In this case, however, we find the lack of diligence on the employer's part in pursuing the original decision and the lengthy delay in requesting the subsequent decision support the conclusion that the general reasons for not referring this matter back to the Board apply.

In this case, we have not concluded that this matter should have been determined by the Board. As a result, we do not find it necessary to consider the second aspect of section 246(3) regarding the circumstances in which it would be appropriate for WCAT to exercise its discretion to refer a matter back to the Board.

We recognize that situations arise where a pre-existing condition that was not enhancing or prolonging the disability at the time when a decision under section 39(1)(e) was made may subsequently be viewed as prolonging or enhancing the disability under the claim if temporary wage loss benefits continue for a protracted period. In our view, the March 1, 2005 version of item #114.40 will enable the Board to address many of these situations by delaying the decision on relief of costs under section 39(1)(e). The revised version of the policy provides:

> 5. *Timing of Cost Relief Decisions*
>
> Where an employer is eligible for cost relief consideration on a claim, the decision is made at the earliest of:

a) there being sufficient evidence to make a determination on whether the compensable disability was enhanced by reason of a pre-existing disease, condition or disability; or

b) the conclusion of temporary disability compensation; or

c) after six months of wage loss has been paid.

Cost relief decisions may be deferred beyond six months of wage loss payment when the impact of the pre-existing disease, condition or disability on the compensable disability is not yet clear, or major diagnostic procedures have been scheduled that would clarify the existence, and/or extent of any pre-existing disease, condition or disability.

Finally, as the employer's representative did not provide specific arguments regarding other cost relief items set out in item #115.30, we have not found it necessary to address those items.

Conclusion

The appeal is denied and the June 13, 2003 Review Division decision is confirmed. We find the review officer correctly declined to conduct a review. In addition, we find that WCAT does not have the general authority to order the Board to issue a decision. Finally, we find that this is not an appropriate case in which to compel the Board, under section 246(3), to make a further determination on relief of costs.

Decision of the Workers' Compensation Appeal Tribunal

Number: WCAT-2005-01826
Date: April 13, 2005
Panel: Elaine Murray, Vice Chair
Subject: When Disability First Occurs — Section 35.1(4)

Introduction

In an April 27, 2004 decision, the Workers' Compensation Board (Board) granted the worker a permanent partial disability (PPD) award of 8.60% of total for right knee and hip impairment stemming from injuries that he sustained on March 7, 1974. The effective date of this award is June 2, 2003 and the termination date is September 19, 2008 (the worker's 70th birthday).

The worker requested a review of the April 27, 2004 decision by the Board's Review Division. He took issue with the effective and termination dates of his PPD award. By decision dated October 14, 2004, a review officer confirmed the Board's decision.

The worker now appeals the Review Division decision to the Workers' Compensation Appeal Tribunal (WCAT). He asks that his PPD award be effective as of the date of his injury and continue for life. The worker did not request an oral hearing. I am satisfied that an oral hearing is not required in this appeal, since there are no serious factual disputes or issues of credibility. The employer is no longer registered with the Board.

Issue(s)

Did the Board correctly determine the effective and termination dates of the worker's PPD award?

Jurisdiction

This appeal was filed with WCAT under section 239(1) of the *Workers Compensation Act* (Act).

Under section 250 of the Act, WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the Board's Board of Directors that is applicable in the case. Section 254 of the Act gives WCAT exclusive jurisdiction to inquire into, hear, and determine all those matters and questions of fact, law, and discretion arising or required to be determined in an appeal before it.

Background and Evidence

On March 7, 1974, the then 35-year-old worker fell 65 feet to the ground, while in the course of his duties as a lineman. He sustained a number of injuries, which included a grossly comminuted oblique fracture of the right femur about 11 to 14 centimetres from the lesser trochanter, and an undisplaced fracture of the right fibula. He underwent closed reduction surgery for the femur fracture. During recovery, the worker developed swelling and stiffness of his right knee.

An October 7, 1974 x-ray showed that the right femur had not yet completely healed. Two months later, the worker's orthopaedic surgeon, Dr. Lee, reported that the fracture was clinically solid, and the worker had no shortening of his right leg. The worker continued, however, to complain of right knee pain and right leg weakness. Dr. Lee noted in all of his reports to the Board that he did not anticipate that the worker would be left with any permanent disability.

On January 31, 1975, Dr. Lee reported that the worker's right femur was getting stronger. On examination, he had slight limitation of right knee movement with some clicking sounds.

Dr. Lee approved the worker returning to light duties on March 10, 1975. The worker then progressed to his full duties shortly thereafter.

On March 20, 2001, the worker fell 16 to 18 feet and fractured his left hip and wrist. The Board accepted that claim, paid the worker temporary disability benefits until June 9, 2002, and granted him a PPD award.

The Board heard nothing further from the worker concerning his 1974 claim until his wife told a Board officer on June 11, 2003 that her husband had been having problems with his right knee "over the past six weeks."

A June 2, 2003 x-ray of the worker's right knee showed an old united fracture of the femur, with very slight narrowing of the medial joint within the knee. No other abnormalities were noted. A left knee x-ray taken on June 9, 2003 for comparison purposes did not show any abnormalities.

On July 2, 2003, the worker told a Board officer that his right knee had bothered him off and on over the years, but had recently begun to swell for no apparent reason. He said that he sought treatment from his current family physician, Dr. Morry, who requested the June 2003 x-rays.

The Board asked Dr. Morry for any records relating to the worker's right knee complaints since 1974. Dr. Morry had treated the worker for a number of years; however, his clinical notes and records reveal that the worker only complained about his right knee on and after June 2, 2003.

In a July 3, 2003 letter to his employer, the worker asked to continue his employment beyond his 65th birthday. The employer agreed. It informed the Board that workers have the option of continuing their employment until they turn 70 provided that they pass an annual medical examination.

An October 17, 2003 right knee x-ray showed "quite marked narrowing" of the medial joint compartment consistent with medial meniscus degeneration. There was also early spurring on the medial aspect of the joint and very minimal narrowing of the patellofemoral joint space. In

addition, the radiologist noted periosteal new bone about the proximal tibial shaft, which was more obvious than in June 2003. He thought that it probably resulted from the previous injury.

On October 17, 2003, Dr. Morry diagnosed the worker as having degenerative post-traumatic right knee arthritis, which he attributed to the worker's 1974 right femur fracture.

An October 30, 2003 bone scan revealed mild increased uptake at the right femur just proximal to the midshaft, which the radiologist thought was in keeping with the worker's previous trauma. The radiologist also noted increased uptake in the worker's right knee, which he thought likely represented osteoarthritis and possibly synovitis.

In a November 18, 2003 claim log entry, Dr. H, a Board medical advisor, offered his opinion that the worker's right knee degenerative changes were probably related to his 1974 injury, and would result in him having a permanent functional impairment (PFI).

In a January 8, 2004 memo (amended on January 12, 2004) to the Board's Disability Awards Department, the Board officer explained that the effective date of any PPD award would be June 2, 2003, since that was when medical evidence first demonstrated a significant change in the worker's condition.

The worker attended an evaluation on March 4, 2004 (the report reads 2003 in error) with Dr. W, a disability awards medical advisor, to assess any PFI arising from his 1974 injury. In addition, Dr. W was asked to determine if there had been any increase in the worker's PFI stemming from his 2001 claim injury, for which he had been granted a 10.27% of total award for permanent impairment of his left hip and wrist (effective June 2002).

The worker told Dr. W that he had recovered well from his 1974 injuries, and that his problems really began with his 2001 injury. With respect to his right knee, he said that it clicks and hyperextends.

On examination, the worker had reduced right knee flexion (equivalent to 4.29% of total) and right hip flexion (equivalent to 0.57% of total) for a total of 4.86%. Dr. W did not observe any significant increase in the worker's PFI on his 2001 claim.

The disability awards officer (DAO) accepted Dr. W's PFI assessment. Given that the worker now had two disabilities in the same part of his body (right hip and knee), the DAO decided that a downward adjustment, known as devaluation, was required. Devaluation reduced the worker's award to 4.82% of total. Furthermore, the DAO considered that the combined effect of two separate disabilities (left hip and right hip/knee) was greater than the separate effect of each, and decided to apply an enhancement factor to the overall impairment of 4.82%, which increased the worker's award to 7.23% of total. Finally, the DAO added a further 1.37% for age adaptability to bring the worker's PFI to 8.60% of total.

The DAO then rendered the April 27, 2004 decision, in which he granted the worker a PPD award of 8.60% of total, effective June 2, 2003. He also accepted that the worker would continue to work until age 70, which would be the termination date of his PPD award. This meant that the worker would receive a lump sum retirement benefit at age 70.

The worker was not satisfied with the effective and termination dates of his PPD award and requested a review of the DAO's decision by the Board's Review Division.

The review officer found no basis to disturb the effective and termination dates of the worker's PPD award.

In support of this appeal, the worker contends that he had problems with his right knee from the outset of his injury. He contends that the permanent nature of his injury would have been discovered sooner if a PFI evaluation had been done much earlier. He also states that he had right knee discomfort since 1974, but was able to rely on his left side to compensate. Following his 2001 injury, however, he could no longer rely on his left side, which he believes increased his right-sided problems.

Reasons and Findings

Effective Date

The *Workers Compensation Amendment Act, 2002* (Bill 49) resulted in significant changes to the law and policy concerning permanent disability awards. Subsection 35.1(4) of the transitional provisions of Bill 49 provide that if a worker's permanent disability "first occurs" on or after the transition date (June 30, 2002), as a result of an injury that occurred before the transition date, the Act, as amended by Bill 49, applies to the permanent disability, subject to subsections (5) to (8).

Policy item #1.03 of the *Rehabilitation Services Claims Manual,* Volume I (RSCM I) and Volume II (RSCM II) provides rules for determining whether the former provisions (pre-Bill 49 and RSCM I) or the current provisions (post-Bill 49 and RSCM II) apply to permanent disability awards. The policy (see item #1.03(b)(3)) provides that if an injury occurred before June 30, 2002, but "the first indication that it is permanently disabling" occurs after June 30, 2002, the current provisions apply, as follows:

> Under this 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 (i) and (ii) above. The determination of when permanent disability first occurs will be based on available medical evidence.
>
> An example of when this 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.

In this case, the determination of which law and policy is applicable assists in the determination of the effective date of the worker's PPD award. Policy item #41.10 of the RSCM I provides the general rule that a pension commences when a worker's temporary disability ceases and

his condition stabilizes or is "first considered to be permanent." This is consistent with policy item #1.03(b)(3). I note that policy item #42.10 in the RSCM II is identical to RSCM I policy item #41.10, except for references to the percentage of wage loss benefits payable.

The question then is when did the worker's permanent right knee and hip disability first occur? Policy item #1.03(b)(3) provides that in answering that question the Board must rely on the "available medical evidence" to ascertain the first indication of permanent disability.

The worker submits that his right knee and hip conditions were first permanently disabling on the date of injury. With respect, I do not agree. His injuries first resulted in temporary total disability. It was uncertain on March 7, 1974 whether he would be left with any permanent impairment. The medical evidence establishes that he had significant injuries; however, it also shows that they healed well. At no time did Dr. Lee anticipate that the worker's injuries would lead to a permanent disability. X-rays taken in 1974 did not reveal any of the degenerative changes noted in June 2003.

No doubt these degenerative changes did not suddenly develop on June 2, 2003; however, there is no medical evidence prior to June 2, 2003 that reveals when those changes first commenced. Moreover, there is no medical evidence prior to June 2, 2003 that suggests that any degenerative changes impaired the worker's function. The available evidence suggests that the worker did not experience any significant right knee symptoms, which impaired him in any significant way, until approximately June 2, 2003.

I do not accept the worker's submission that an earlier PFI examination would have revealed impairment. This is speculation on his part, and I must rely on the available medical evidence to determine the first indication of permanent disability. I find that June 2, 2003 is the first indication of the worker having a permanent disability, and agree that it should be the effective date of the worker's PPD award. I deny the worker's appeal on this issue.

Termination Date

Given my finding concerning the first occurrence of permanent disability, the Act, as amended by Bill 49, and RSCM II, apply to the worker's PPD award. Bill 49 resulted in significant changes to the duration of PPD awards.

Section 23.1 of the amended Act permits the Board to pay benefits beyond age 65 if the Board is satisfied that the worker would have continued to work beyond that age. Benefits will be paid to the date that the Board determines the worker would retire.

RSCM II policy item #41.00 provides that independent verifiable evidence (not just the worker's statements regarding his intention to work past 65 and to what date) is required to pay benefits beyond age 65 and to establish the date of retirement.

In this case, the employer provided independent verifiable evidence that the worker could work and was working beyond age 65. In addition, the employer confirmed that the worker could continue to work until age 70. The worker has not provided any evidence that establishes he intended to work beyond age 70.

In my view, the evidence supports that the worker would have continued to work until age 70, with employment being available to him until that time. Accordingly, I find that his 70th birthday was correctly set as the termination date of his PPD award, in accordance with section 23.1 of the amended Act and RSCM II policy item #41.00. I deny the worker's appeal on this issue.

Although the worker only questioned the effective and termination dates of his PPD award, I have also reviewed the other aspects of that award, which include the percentage of impairment, the devaluation and enhancement factors, the age adaptability factor, the wage rate, and the lump sum retirement benefit, and find no error in the DAO's calculations.

Conclusion

I confirm the October 14, 2004 Review Division decision.

No expenses were requested and none are awarded.

Decision of the Workers' Compensation Appeal Tribunal

Number: WCAT-2005-01943
Date: April 18, 2005
Panel: James Sheppard, Vice Chair
Subject: WCAT's Jurisdiction — Permanent Disability Award Under Schedule D for Hearing Loss

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Introduction

A November 6, 2003 decision of the Workers' Compensation Board (Board) granted the worker under section 7 of the *Workers Compensation Act* (Act) a 1.7% total disability pension. The worker was granted a pension of 1.7% for occupational noise-induced hearing loss that affects both his ears. The worker was paid this pension award in a lump sum and a retirement benefit equal to 5% of his disability award.

The worker requested a review of the November 6, 2003 decision by the Board's Review Division. A review officer in Review Division Decision #13087 dated June 25, 2004 confirmed the November 6, 2003 decision.

The worker has appealed the June 25, 2004 Review Division decision to the Workers' Compensation Appeal Tribunal (WCAT).

Issue(s)

1. Does section 239(2)(c) of the Act preclude me from considering the worker's appeal of the review officer's June 25, 2004 decision concerning the worker's 1.7% occupational noise-induced hearing loss pension award?

2. If I have the jurisdiction to address the worker's 1.7% pension award was the percentage awarded to the worker properly determined? Is the worker entitled to a greater pension award?

3. Do I have the jurisdiction to consider whether there has been a further deterioration of the worker's occupational noise-induced hearing loss that affects both ears based upon an October 29, 2004 audiology report submitted to WCAT by the worker?

Jurisdiction

On appeal WCAT can confirm, vary, or cancel an appealed decision (section 253(1) of the Act). WCAT may inquire into, hear, and determine all those matters and questions of fact, law, and discretion arising or required to be determined in an appeal (sections 250 and 254 of the Act). WCAT must make its decision based on merits and justice of the case, but in so doing, must apply policy of the Board's Board of Directors that is applicable in the case.

Procedural Matters

The worker's representative has requested on the notice of appeal a read and review. She was provided with an update of disclosure by the Board of the worker's 2003 electronic claim file up to November 12, 2004.

An audiology report dated October 29, 2004 was faxed to and received by WCAT on November 24, 2004. A copy of this report was faxed to the worker's representative by WCAT.

The worker's representative, in a December 7, 2004 letter, indicated that we should proceed on the basis of the information contained on the claim file.

After reviewing this matter I instructed the WCAT appeal coordination officer to invite submissions from the worker's representative on issues #1 and #3 as noted above. The worker's representative provided a March 30, 2005 written submission.

I agree with the worker's representative that this appeal can be addressed by read and review and without the need for an oral hearing.

Reasons and Decision

Issue 1: Jurisdiction Under Section 239(2)(c) of the Act

Section 239(2)(c) of the Act states that a decision respecting the application of section 23(1) of rating schedules compiled under section 23(2) of the Act where the specified percentage of impairment has no range or has a range that does not exceed 5% may not be appealed to WCAT.

The worker's representative, in her March 30, 2005 written submission, states after her review of the Act and Board policy she conceded that the panel does not have jurisdiction over the appeal as the specified percentages of impairment outlined in Schedule D did not provide a range greater than 5%.

After examining the wording of section 239(2)(c) of the Act the question arises as to whether Schedule D is a rating schedule that has been compiled under section 23(2) of the Act.

Section 7(1) of the Act states:

> Where a worker suffers loss of hearing of non-traumatic origin, but arising out of and in the course of employment under this Part, this is a greater loss than the minimum set out in Schedule D, the worker is entitled to compensation under this Part.

Section 7(3) of the Act states:

> Where the loss of hearing does not amount to total deafness, and there is no loss of earnings resulting from the loss of hearing, compensation must be calculated as for a lesser percentage of total disability, and, unless otherwise ordered by the Board, must be based on the percentages set out in Schedule D.

Section 23(2) of the Act states:

> The Board may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations which may be used as a guide in determining the compensation payable in permanent disability cases.

Schedule B of the Act lists "neurosensory hearing loss" as an occupational disease. Item #31.00 of the *Rehabilitation Services and Claims Manual,* Volume I and II (RSCM I and RSCM II) both indicated that where hearing loss has developed gradually over time as a result of exposure to occupational noise, it is treated as an occupational disease. However, the provisions of section 6 do not apply unless the worker ceased to be exposed to causes of hearing loss prior to September 1, 1975. In all other cases Section 7 of the Act applies. The facts in this case indicate that section 7 of the Act would apply and not section 6.

Item #31.40 of the RSCM I and II both state that workers who develop non-traumatic noise-induced hearing loss are assessed for a permanent disability award under section 23 of the Act. Schedule D appears in item #31.40 of both the RSCM I and RSCM II with reference to the provisions of section 7(3) of the Act. Schedule D also appears in the permanent disability evaluation schedule (PDES) published as Appendix 4 in both the RSCM I and RSCM II. Item #39.10 of the RSCM I and II both state that section 23(1) awards may be made with reference to the PDES. The PDES is referred to as a rating schedule of percentage of disability for specific injuries or mutilations. There is a reference in the header for Schedule D to section 7 as it appears in the PDES in both the RSCM I and RSCM II.

The part of Schedule D which relates to hearing loss of 68 decibels (dBA) or more in the ear least affected was brought into force on September 1, 1975 (Decision No. 137 in Volume 2 of the *Workers' Compensation Reporter* series (WCR) at page 143). The remainder of Schedule D was brought into force on December 1, 1975 (Decision No. 164 2 *Workers' Compensation Reporter* 230). I also note that section 7(3.1) of the Act gives the Board the authority to make regulations to amend Schedule D in respect of the ranges of hearing loss, the percentage of disability and the methods or frequencies to be used to measure hearing loss.

The word "compiled" as it appears in section 23(2) of the Act is not defined by the Act. The word "compiled" is not defined by the *Interpretation Act* (RSBC 1996, chapter 238). The *Concise Oxford Dictionary* (Tenth Edition) defines the word "compiled" to mean produce (a collection) by assembling material from other sources.

I read the provisions of section 7 of the Act and the establishment through legislation of Schedule D in 1975 as an indication that Schedule D is not a rating schedule that was compiled under the Board's authority set out in section 23(2). Although Schedule D appears in the PDES there is reference in the header to section 7 which provides for the application of Schedule D to occupational noise-induced hearing loss claims.

I find that section 239(2)(c) of the Act does not preclude me from hearing the worker's appeal of the June 25, 2004 Review Division decision concerning the worker's 1.7% occupational noise-induced hearing loss pension. The schedule (Schedule D) used to determine the worker's hearing loss pension entitlement was not a rating schedule compiled under section 23(2) of the Act.

Issue 2: Occupational Noise-Induced Hearing Loss Pension Award

I agree with the review officer that the law as it read on and after June 30, 2002 applies in this case. Item #31.80 (*Commencement of Permanent Disability Periodic Payments Under Sections 6 and 7*) states that where compensation is being awarded under section 7 but not in respect of any loss of earnings or impairment of earning capacity, then, subject to section 55, permanent disability awards shall be calculated to commence as of the earlier of either the date of application or the date of first medical evidence that is sufficiently valid and reliable for the Board to establish a compensable degree of hearing loss under Schedule D of the Act. Where the date of application is used as the commencement date, subsequent testing must support a compensable degree of hearing loss as of the date of application.

The Board made the effective date (disablement date) of the worker's pension May 14, 2003 which is the date of the worker's signed Hearing Loss and Employment Questionnaire. The worker subsequently underwent testing on September 29, 2003. The September 29, 2003 audiogram recorded a right ear 31.67 dBA pure tone average hearing loss and a left ear 33.3 dBA pure tone average hearing loss. The Board's occupational audiologist, in her September 29, 2003 claim log entry recommended taking the September 29, 2003 audiogram as an indication of the extent of the worker's occupational noise-induced hearing loss within British Columbia. She did indicate that any future deterioration in hearing would have a low probability of resulting from continuing occupational noise exposure. It would have a high probability of being due to a combination of presbycusis and middle ear pathology.

The Board calculated the worker's pension award with reference to Schedule D. The review officer applied Schedule D and found no information or evidence whatsoever to support a position that the worker was entitled to a greater than 1.7% of total disability award. I agree with the review officer's decision based upon the reasons he has given in his June 25, 2004 decision and my review of the evidence as outlined above.

Issue 3: Further Deterioration in the Worker's Hearing Loss

As previously mentioned, WCAT received a further audiogram taken on October 29, 2004. The issue is whether I have the authority to determine in this appeal whether the worker has suffered a further deterioration in his hearing loss in both ears because of his exposure to occupational noise.

The worker's representative, in her March 30, 2005 written submission, states that I do not have the jurisdiction to address this issue in this appeal. I would agree that I do not have the authority to determine this issue in this appeal. This is an issue the worker will have to address with the Board.

Conclusion

The worker's appeal is denied. I confirm the June 25, 2004 Review Division decision.

I find that section 239(2)(c) of the Act does not preclude me from considering the worker's appeal of the June 25, 2004 Review Division decision. I find that Schedule D is not a rating schedule compiled under section 23(2) of the Act.

I find that the Board properly determined the worker's pension entitlement for his occupational noise-induced hearing loss at 1.7% of total disability.

I find that I do not have the authority in this appeal to address the issue of whether the worker has suffered a further deterioration in hearing loss in both ears as a result of his exposure to occupational noise. The worker will have to address this issue with the Board.

No expenses have been requested and none are ordered.

Decision of the Workers' Compensation Appeal Tribunal

Number: WCAT-2005-02034
Date: April 22, 2005
Panel: Marguerite Mousseau, Vice Chair
Subject: WCAT's Jurisdiction — Permanent Disability Award for Additional Factors

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Introduction

The worker seeks an increase of his permanent functional impairment award for the partial amputation of his right index finger. In Review Reference #14493, dated July 28, 2004, a review officer confirmed the decision of the Workers' Compensation Board (Board) awarding the worker a pension based on 1.6% of a totally disabled person. The worker appeals that decision to the Workers' Compensation Appeal Tribunal (WCAT).

The worker was represented by legal counsel when he initiated this appeal but counsel has indicated, by letter dated February 11, 2005, that he no longer represents the worker. The worker was self-employed at the time of the injury. Accordingly, there is no participating employer.

The worker requested that his appeal proceed by way of "read and review." After considering the issues and the evidence and submissions on file, I agree that the worker's appeal may be fairly adjudicated without an oral hearing.

Issue(s)

The issue on this appeal is whether the permanent partial disability award of 1.6% reflects the impairment of earning capacity due to the worker's injury.

Preliminary Matter — Jurisdiction

The date of injury is July 11, 2003. As such, the worker's entitlement to a permanent disability award is based on the provisions of the *Workers Compensation Act* (Act) as amended by the *Workers Compensation Amendment Act, 2002* (Bill 49).

Additional amendments to the Act, which deal with the appeal structure, appeal rights, the application of policy and other procedural matters which are contained in the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63) are also relevant to the appeal and to the question of the jurisdiction of WCAT on this appeal. Applicable published policy is found in the *Rehabilitation Services and Claims Manual*, Volume II (RSCM II).

Section 239(1) of the Act, provides that a final decision made by a review officer under section 96.2 of the Act may be appealed to WCAT. Section 239(2), however, establishes some restrictions on these appeal rights.

Section 239(2)(c) states that there is no appeal to WCAT of "a decision respecting the application under section 23(1) of rating schedules compiled under section 23(2) where the specified percentage of impairment has no range or has a range that does not exceed 5%."

Accordingly, the first question is whether WCAT has the jurisdiction to hear the worker's appeal.

The worker's permanent disability assessment occurred on January 6, 2004. His award was based on the application of the Permanent Disability Evaluation Schedule (PDES), which is a rating schedule compiled under section 23(2) of the Act. It is published at Appendix 4 of the RSCM II. Chart 2 of the PDES applies to an amputation involving a single finger. It provides that an amputation at the distal interphalangeal joint (DIP), which is the first finger joint, results in a permanent functional impairment of 1.6%.

Since the decision to grant an award of 1.6% is a decision respecting the application of a schedule under section 23(2) of the Act and the specified percentage may be interpreted as either having no range or a range that does not exceed 5%, this decision may not be appealed to WCAT.

The worker, however, is not appealing the decision that he is entitled to the amount of 1.6% under the PDES. Rather, he is appealing a number of issues that might be described as incidental to the decision awarding him 1.6%.

In his notice of appeal to WCAT the worker said that he wanted to have a "PFI assessment granted." Subsequently, his representative said that the worker relied on his submission to the Review Division and his position remained the same as in that submission.

In that submission, dated April 28, 2004, the worker requested findings that:

- the Board underestimated the degree of impaired earning capacity,
- the Board be directed to refer the file to a disability awards medical advisor for a thorough permanent functional impairment examination,
- the worker be assessed for loss of range of motion, grip testing and sensory testing, and
- a value of 0.25% for cold intolerance be added to the revised pension award subsequent to the permanent functional impairment examination.

Whether these matters may be appealed to WCAT is a question of interpretation of section 239(2)(c), specifically, what is "a *decision respecting* the application under section 23(1) of rating schedules compiled under section 23(2)." On the one hand, this phrase may be interpreted as referring to all aspects of the decision made by the review officer. The effect of this interpretation is that no aspect of the review officer's decision could be appealed where the award was based on the application of the schedule under section 23(2) and the "specified percentage of impairment has no range or has a range that does not exceed 5%." In the present case, this interpretation would result in the worker having no right of appeal to WCAT.

Another interpretation of section 239(2)(c) is to interpret "a *decision respecting* the application under section 23(1) of rating schedules compiled under section 23(2)" more narrowly. According to this interpretation "decision" is taken to refer only to the decision regarding the application of the schedule. The effect of this interpretation is that all aspects of the review officer's decision may be appealed except the decision as to the scheduled percentage of impairment caused by the injury.

Section 23 of the Act establishes entitlement to compensation for a permanent partial disability. There is no definition of permanent (partial or total) disability provided in the Act although the worker's entitlement to compensation is based on the effects of his or her permanent partial disability.

Section 23(1) requires the Board to make certain payments "if a permanent partial disability results from a worker's injury." The compensation payable must be based on an estimate of "the impairment of earning capacity from the nature and degree of the injury."

Section 23(2) permits the Board to "compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations which may be used as a guide in determining the compensation payable in permanent disability cases." The Board has established a schedule, which, as noted above, is published as Appendix 4 of the RSCM II.

Section 23(3) provides an alternative method of calculating a worker's entitlement to compensation for a permanent partial disability. This method is used if the worker has a permanent partial disability and the Board decides that "the combined effect of the worker's occupation at the time of the injury and the worker's disability resulting from the injury is so exceptional that an amount determined under subsection (1) does not adequately compensate the worker."

It is evident from these subsections that the compensation or award for permanent partial disability is based on a number of factors but always takes into account a determination or decision as to the "extent of the impairment of earning capacity . . ." Where the injury or affected body part is identified in the PDES, the decision regarding the extent of impairment is based on that schedule.

Returning to section 239(2)(c), the terminology used and the process described in subsections 23(1)(2) and (3) indicate that the better interpretation of the phrase "a decision respecting the application . . . of rating schedules" is that it refers to the narrow decision regarding the percentage of impairment that is due to an injury as per the schedule in Appendix 4. This is only one of the decisions made when deciding a worker's entitlement to compensation for permanent partial disability.

Consistent with this interpretation, I note that, if the term "decision" is construed broadly to refer to the permanent disability award decision, there would be no appeal from a review officer's decision made under section 23(3) of the Act — if the impairment of earning capacity was based on the application of the PDES (and there is no range or the range exceeds less than 5%). Permanent disability awards made under section 23(3) are frequently referred to as loss-of-earnings awards. I consider it unlikely that the legislature intended to limit a worker's appeal rights with respect to loss of earnings pensions in the absence of specific language to that effect.

I am drawn to the narrow interpretation of the term "decision" as a result of the statutory provisions and the nature of the rights involved. I have also, however, referred to the Debates of the Legislative Assembly (*Hansard*) regarding the enactment of subsection 239(2)(c), and I view that statements regarding the purpose of subsection 239(2)(c) also support that interpretation.

At the House in Committee of the Whole session on October 28 and 29, 2002, the following exchange took place between Joy MacPhail and the Honourable Graham Bruce, Minister of Skills Development and Labour:

> **J. MacPhail**: This is the second division of the whole appeal process. It's entitled "Appeal Rights." I have two areas of concern. The first is under sections 239(2)(b) and (c) . . . These decisions were appealable . . . Why was the change made to make this not appealable now?
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> Hon. G. Bruce: . . . In regards to (2)(c), this isn't in the aspect of whether there is to be an amount that is awarded. This speaks to where that amount — and there's some debate within 5 percent one way or the other — is not appealable. Basically, it's trying to focus people on those things — and the board and the tribunal — in bringing through a timely decision rather than having these things extended through appeal after appeal.
>
> [1040]
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> **J. MacPhail**: So just to be clear on the second point, which says. . . . Yes, 239(2)(c) says that there will be no appeal "where the specified percentage of impairment has no range or has a range that does not exceed 5 percent."
>
> My understanding, then, from the briefing that we received, is that if the decision for compensation is 23 percent and you want to appeal it. . . . If the range for compensation was 21 to 25 percent, that's not appealable, *but you can appeal the level of compensation awarded*.
>
> **Hon. G. Bruce**: The member is correct in that definition.[29]
>
> [emphasis added]

These comments indicate that the competing values underlying this amendment are the preservation of adequate appeal rights on the one hand and efficiency and timeliness of decision making on the other.

The comments directed specifically to an explanation of the section indicate that the legislature intended to restrict the right of appeal with respect to one aspect of the permanent disability award only: the scheduled percentage of impairment. The larger question of the worker's entitlement to compensation, that is, the amount of the permanent disability award is appealable.

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[29] British Columbia, Debates of the Legislative Assembly (Hansard), volume 9,10 (29 October 2002) at 4126. The Hansard index is accessible at http://www.leg.bc.ca/hansard/hansindx/37th3rd/index.htm.

Accordingly, with respect to this appeal, the worker may not appeal the decision that the scheduled portion of his award is 1.6%. He may however appeal other aspects of the permanent disability award.

Admittedly, this interpretation leads to the result that section 239(2)(c) has little effect in terms of altering the practice that was in place prior to the enactment of this provision. This would also appear to run counter to the stated legislative intent of improving efficiency and timeliness of decision-making by restricting certain rights of appeal. In my view though, this interpretation of section 239(2)(c) accurately reflects the language of the section in the context of the related provisions and the specific intent of the section as recorded in *Hansard*.

WCAT Jurisdiction Respecting Impairment of Earning Capacity

Returning to subsection 23(2), it authorizes the compilation of "a rating schedule of percentages of impairment of earning capacity for specified injuries . . . which may be used as a guide in determining the compensation payable" for the purpose of subsection 23(1) — which requires the Board to "estimate the impairment of earning capacity from the nature and degree of the injury."

Section 23(2) describes the schedule as a "guide" to determining the percentage of impairment. Similarly, item #39.10 of the RSCM II describes the PDES as a set of guide rules and states that the Board officer in Disability Awards is free to apply other variables in arriving at a final award under section 23(1). In addition, the introduction to Appendix 4 explains that the PDES does not determine the final amount of the section 23(1) award.

Accordingly, the percentage of impairment of earning capacity determined by applying the schedule under section 23(2) may be only one of several elements used in order to arrive at an "estimate of impairment of earning capacity" under section 23(1).

As a result, I consider that WCAT has the jurisdiction to address the review officer's estimate of impairment of earning capacity under section 23(1) although it does not have the jurisdiction to review the decision as to the percentage of impairment under section 23(2) (where the scheduled impairment has no range or the range does not exceed 5%).

WCAT Jurisdiction Respecting Additional Factors

As previously noted, item #39.10 of the RSCM II describes the PDES as a set of guide rules and states that the Board officer in Disability Awards is free to apply other variables in arriving at a final award. The "other variables" must relate to physical or psychological impairment. Similarly, the introduction to Appendix 4 explains that the PDES does not determine the final amount of the section 23(1) award. It states that the Board is free to take other factors into account and that the PDES provides a guideline or starting point for the measurement rather than a fixed result.

The *Additional Factors Outline*[30] provides guidelines for consideration of additional factors that are not formally contained in the PDES. It states that policies #39.10 and #39.50 should be referenced "to determine if the additional factor is scheduled or unscheduled."

The section of the *Additional Factors Outline* that deals with amputations states that the values in hand charts 2 to 5 "have 'built in' enhancement factors." With regard to those charts "Amputation value includes loss of sensation at the amputation site and any resulting loss of pinch/grip strength."

In this case, chart 2, which is the chart applicable for amputation involving one finger only, is used to determine the percentage of impairment. Since the award of 1.6% includes an award for loss of sensation and loss of pinch/grip strength, WCAT does not have jurisdiction to address the issue of additional factors. They are included in the scheduled amount which is not appealable to WCAT under section 239(2)(c). However, in cases where the scheduled award does not include a value for additional factors, WCAT likely has the jurisdiction to address the worker's entitlement to compensation for additional factors.

Summary

Section 239(2)(c) prohibits an appeal of the narrow decision respecting the application of the schedule under section 23(2) where the scheduled percentage has no range or the range does not exceed 5%. This is only one aspect of a permanent partial disability award under section 23(1) of the Act. WCAT has the jurisdiction to address chronic pain, other variables where they have not been included in the scheduled percentage, and the estimated impairment of earning capacity.

Evidence, Reasons, and Decision

The worker was self-employed as a local hauling truck driver. On June 11, 2003 he caught his right index finger between the fan belt and a pulley on his truck resulting in an amputation of the tip of the finger.

Dr. Pugash, plastic surgeon, saw the worker on June 13, 2003. He described the injury as a transverse amputation through the mid-portion of the distal phalanx and noted that no nail structures appeared to be present. He recommended that he perform a revision amputation. Dr. Pugash performed this surgery the same day. He shortened the digital nerves at that time.

Dr. Pugash submitted several more reports to the Board over the next two months. His report of August 6, 2003 states that the injury is well healed; the worker still has tenderness and some sensitivity at the tip but he is able to return to work on August 18, 2003.

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[30] *Additional Factors Outline* accessible at http://www.worksafebc.com/regulation_and_policy/practice_directives/default.asp.

A Board officer contacted the worker after receiving this report. The worker said that he did not have a job to return to. His wage loss benefits were brought to conclusion as of August 18, 2003 and his file was referred to a Board medical advisor for review. In a memo dated August 25, 2003, the Board medical advisor recommended that the worker be assessed for permanent functional impairment.

The permanent functional impairment assessment was conducted by a disability awards officer (DAO). The DAO noted that, although the operative report did not specify the exact level of amputation, the subsequent progress report stated that the amputation was at the distal interphalangeal joint. The DAO considered that no further medical examination was required to determine the worker's permanent partial disability.

Policy item #39.01 of the RSCM II provides that a DAO may decide a worker's entitlement under section 23(1) in the absence of an examination of the worker by a Disability Awards medical advisor if there is sufficient medical evidence on file to do so. Taking into account the nature of the injury and the subsequent procedures and medical reports which did not reveal complications, I consider that it was appropriate for the DAO to decide the worker's permanent disability award without a further medical assessment. The worker's appeal on this aspect is denied.

The DAO noted that the scheduled values for finger amputations include any resulting weakness of hand grip or pinch grip. He also found that any remaining sensitivity was not disproportionate to the objective impairment. The DAO is correct in stating that the scheduled value of 1.6% includes the effects of the other variables. Accordingly, there is no basis for referring the worker to Disability Awards to have these assessed. There is no medical foundation for a referral to Disability Awards with respect to cold intolerance.

Conclusion

I find that the permanent disability award of 1.6% reflects the impairment of earning capacity due to the worker's injury. I confirm the decision of the review officer dated July 28, 2004.

Decision of the Workers' Compensation Appeal Tribunal

Number: WCAT-2005-02770
Date: May 30, 2005
Panel: Randy Lane, Vice Chair
Subject: Permanent Disability Awards — Long-term Wage Rate Under Current Provisions

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Introduction

The worker suffered an October 30, 2002 back injury. His claim was accepted by the Workers' Compensation Board (Board). He was paid temporary disability wage loss benefits for the period February 2, 2003 until August 17, 2003, save for several days worked in February 2003.

By decision of February 21, 2003 the worker was advised that initially his disability benefits would be calculated using his earnings of $310.00 per day.

By decision of June 2, 2003 the worker was advised of the reasons for the Board calculating his long-term wage rate at 10 weeks using his net business income of $24,998.40 in the one year prior to his injury. That annual figure produced a monthly net average earnings figure of $1,530.87. The worker's request for an extension of time in which to appeal the June 2, 2003 decision was denied by the Board's Review Division.

By decision of April 22, 2004 the worker was awarded a permanent partial disability award of 15% of total disability. The award was calculated using the monthly net average earnings figure of $1,530.87.

In her October 27, 2004 decision (Review Division #17860) a review officer with the Board's Review Division confirmed the April 22, 2004 decision. The review officer determined that she lacked jurisdiction to address submissions regarding the wage rate used to calculate the pension benefits. She agreed with the award of 15% of total disability. Her decision may be viewed on the Internet at the Board's web site at www.worksafebc.com.

The worker appealed the October 27, 2004 decision to the Workers' Compensation Appeal Tribunal (WCAT). With the assistance of Mr. Field, a lawyer, the worker provided a November 16, 2004 notice of appeal and a January 31, 2005 submission.

The notice of appeal asks that the appeal be considered by way of "Read and review." By letter of January 10, 2005 the worker was advised that the appeal would proceed by way of written submissions. That decision does not bind me if I consider that an oral hearing is necessary. I consider a fair and thorough decision may be reached on this appeal without holding an oral hearing.

Issue(s)

At issue is whether the pension decision contained a reviewable decision concerning the worker's wage rate used for pension calculation purposes, and, if so, what the rate should be.

Jurisdiction

WCAT has exclusive jurisdiction to inquire into, hear, and determine all those matters and questions of fact, law, and discretion arising or required to be determined in an appeal before it (section 254 of the *Workers Compensation Act (*Act)). It is not bound by legal precedent (section 250(1) of the Act). WCAT must make its decision on the merits and justice of the case, but, in so doing, it must apply a policy of the Board of Directors of the Board that is applicable in the case.

This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

Background and Evidence

Given the narrow issue on appeal, I do not consider that a detailed recitation of the history of the claim is required. I will use this section of my decision to document Mr. Field's arguments.

Mr. Field submits that the determination of the loss of earnings resulting from a permanent partial impairment of a worker's earning capacity requires a consideration of factors that may not be relevant to the simpler exercise of determining average earnings for the purpose of determining temporary disability wage loss benefits payable pursuant to sections 29 or 30 of the Act. He notes that section 29 provides for a payment that is "a periodic payment that equals 90% of the worker's average net earnings." There is no reference to "earning capacity" in section 29. Similarly, sections 33.1, 33.8, and 33.9 refer to the determination of "average earnings." Those sections do not refer to the determination of "earning capacity."

Mr. Field submits that a disability awards officer must use his or her discretion afresh to "estimate the loss of average net earnings resulting from the impairment [subsection 23(1) of the Act]." There is no directive in subsection 23 (1) or in the rest of the Act that eliminates the need to exercise that discretion fully and fairly. When the Board estimates the long-term impact of an injury which is found to have resulted in a permanent impairment, the loss of average net earnings should not be a mechanical exercise. He contends that the decision in *Testa v. Workers' Compensation Board*, (1989) 36 BCLR (2d) 129, (1989) 58 DLR (4th) 676 (BCCA), as well as the discussion in WCAT Decision 2004-06007 (which may be viewed on the Internet at WCAT's web site at http://www.wcat.bc.ca), supports this interpretation of how the Board must exercise its discretion in these matters.

Mr. Field argues that different considerations must be taken into account when determining earnings for calculating temporary total disability benefits payable after 10 weeks disability and earnings for calculating payment of a pension which is to compensate a worker for the impact of an injury upon his earning capacity for the rest of his life.

Reasons and Findings

I consider that the only issue raised on this appeal concerns the wage rate. While the review officer considered the percentage of disability and whether the worker should be given an additional award for subjective symptoms, the notice of appeal and the submission to WCAT concern the wage rate. While the submission to WCAT is accompanied by a copy of the submission to the Review Division (which raises issues other than the wage rate), I consider that the copy of the Review Division submission was provided for its discussion of the wage rate issue.

Mr. Field notes that prior to December 3, 2004, WCAT's *Manual of Rules, Practices and Procedures* provided at item 2.23(f) that the effective date and average earnings of any pension award were compensation issues on which a review officer's decision was appealable to WCAT. He observes that the *Manual of Rules of Practice and Procedure*[31] was amended as of December 3, 2004 to provide at item 2.23(f) that "the effective date and average earnings calculation of any permanent disability award assessed under the WCA as it read before it was amended by the *Workers Compensation Amendment Act, 2002* (Bill 49)" were compensation issues on which a review officer's decision was appealable to WCAT. He submits that as the worker's appeal was filed in November 2004, the appeal should be considered with regard to the WCAT *Manual of Rules, Practices and Procedures* in effect at the time.

I consider that the issue is not resolved with regard to the version of the manual that was in effect at the time of the appeal. While it may have created expectations in appellants, the *Manual of Rules, Practices and Procedures* was not binding on WCAT. As well, the *Manual of Rules, Practices and Procedures* could not require WCAT to do something that was not open to it to do as a matter of law and policy. The current *Manual of Rules of Practice and Procedure* does contain rules which may be waived or modified only in exceptional circumstances, but there is no rule applicable to the case before me.

I am aware that a number of Review Division decisions have determined that the effect of the amendments to the Act associated with the coming into force of the *Workers Compensation Amendment Act, 2002* (Amendment Act) as of June 30, 2002 was that the Disability Awards Department did not set a wage rate, but rather was obliged to calculate pension entitlement by using the long-term wage rate previously set on the claim. The effect is that the Disability Awards Department does not render a wage rate decision subject to review.

The leading Review Division case appears to be Review Reference #15971, dated September 9, 2004. The review officer determined that the wage rate ". . . that must be used for PPD awards is the worker's long term wage rate." She provided the following analysis:

> The DAO [disability awards officer] had no authority to make a new decision regarding the long term wage rate to be used in the calculation of the worker's PPD [permanent partial disability] award due to the recent changes in legislation. Effective June 30, 2002, the *Workers Compensation Act* was amended

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[31] The name of the manual was changed slightly as of December 3, 2004.

by the *Workers Compensation Amendment Act, 2002*. The amendments changed the law in relation to compensation benefits for injured workers. The law and policy as they were immediately before being changed is referred to as the former provisions and the law and policy after the changes is referred to as the current provisions.

Under the former provisions, if there were valid reasons, the DAO or Claims Adjudicator Disability Awards had discretion to change the wage rate established by the Case Manager and use a different long term wage rate for PPD purposes. Rehabilitation Services and Claims Manual, Vol. 1, policy item #68.00, *Permanent Disability Pensions*, states as follows:

> Permanent disability pensions are normally based on the earnings rate established at the point when long term earnings are reviewed for wage loss purposes. This, in most cases, means the rate resulting from the eight week rate review; however, a different rate can be used if there are valid reasons for this. If there has been no review of long term earnings for wage loss purposes, a review will be carried out by the Disability Awards Officer or Adjudicator in Disability Awards in the same manner as a Claims Adjudicator would carry out an eight week review.

This discretion was presumably based on the broad discretion set out in section 33(1) of the former *Act*. This section allowed the initial decision-maker to utilize a method of calculating the worker's average earnings which appears "best to represent the actual loss of earnings suffered by the worker by reason of the injury".

Under the current provisions, sections 33.1 – 33.9 provide that the Board must determine an initial wage rate for the first ten weeks of disability (or until permanent disability occurs, whichever is shorter) and a long term wage rate to apply thereafter. There is no authority for two long term wage rates to be determined under the new provisions, depending upon whether the worker is temporarily or permanently disabled. There is therefore no discretion given to the DAOs or Adjudicators in Disability Awards to change the long term wage rate already established on the claim file.

In his 2002 Core Services Review of the Workers' Compensation Board, Mr. Alan Winter recommended amendments to section 33(1) of the former *Act*. I find that his discussion on this issue supports my interpretation of the changes in legislation. Specifically, the notion that the long term wage rate can not be varied once it has been established. With respect to this issue he stated on page 142 of his report:

> After the worker has received temporary wage loss benefits for a period of 10 weeks from the date of injury, I have recommended that the WCB must conduct a rate review to determine the worker's average earnings. This determination of average earnings would then be used by the WCB to calculate any further

> entitlement to temporary wage loss or permanent disability benefits the worker may have under the Act from the start of the 11th week (from the date of injury) on. (By way of clarification, a second determination of the worker's average earnings would no longer be conducted when the worker is assessed for a permanent disability award, as is currently the case.)
>
> . . . As the DAO has no discretion to vary the long term wage rate already established, the DAO used the wage rate to calculate the worker's pension. In the decision before me, I find that the DAO has not made a new decision regarding the worker's wage rate. As a result, I have no jurisdiction to review this issue.

That decision has been cited by several Review Division decisions.

In considering the matter before me, I note that while the Act as it existed before June 30, 2002 did not expressly provide for different wage rates to be used at various points on a claim, the policy associated with that version of the Act (found in the *Rehabilitation Services and Claims Manual*, Volume I (RSCM I)) provided for three possible wage rate decisions:

(1) A "short term wage rate" (item #66.00 *Wage Loss Rates on New Claims*),

(2) A "long term wage rate" made at eight weeks (item #67.20 *8-week Wage Rate Review*), and

(3) A "pension wage rate" made at the time that a pension is awarded (item #68.00 *Permanent Disability Pensions*).

As noted by the review officer in Review Division #15971, the authority for those various policies was presumably section 33 of the Act.

The Amendment Act introduced a number of changes to the Act that expressly set out provisions dealing with calculating net average earnings. Subsection 33.1(1) of the Act establishes a general rule for determining average earnings for the shorter of (a) the initial payment period (defined in section 1 of the Act as the first 10 weeks of compensation payable for temporary disability) or (b) the period starting on the date of the worker's injury and ending on the date the worker's injury results in a permanent disability. Section 33.8 (*Determination of net average earnings – initial period of injury*) provides at subsection 33.8(2) that the formula in section 33.8 applies to the determination of average net earnings for a worker for whichever of the following periods is shorter for the worker: (a) the initial payment period or (b) the period starting on the date of the worker's injury and ending on the date the worker's injury results in a permanent disability.

Subsection 33.1(2) establishes a general rule that provides that if a worker's disability continues after the end of the periods referred to in subsection 33.1(1), the Board must "determine the amount of average earnings of the worker based on the worker's gross earnings, as determined by the Board, for the 12 month period immediately preceding the date of injury." Section 33.9 (*Determination of net average earnings – long term injury*) provides at subsection 33.9(2) that the formula in section 33.9 ". . . applies to the determination of average net earnings for a worker starting after the end of the period referred to in section 33.8 (2) (a) and (b) that is shorter for the worker."

I consider it significant that section 33.9 does not refer to an end-date. By that, I mean that that section does not set out a formula for calculating average net earnings that only applies until a worker is determined to have a permanent disability. In fact, that section sets out a formula that is expressed to be applicable *after the period* that ends on the date the worker's injury results in a permanent disability.

I further consider it significant that the Act does not set out a third calculation point for determining average net earnings. It sets out formulae for the initial period of injury and for a long-term injury. The absence of such a third calculation point suggests that there are only two calculation points applicable to the calculation of compensation benefits on a worker's claim. (There are exceptions to the general rules set out in subsections 33.1(1) and 33.1(2), but those exceptions do not involve a third calculation point.)

The definition of "average net earnings" found in section 1 of the Act also supports the existence of only two calculation points. Section 1 the Act provides that average net earnings ". . . means, with respect to a worker, the average net earnings of the worker as determined by the Board under sections 33.8 and 33.9." I consider that that definition of "average net earnings" indicates that there is no third calculation point for determining average net earnings in connection with awards for permanent partial disability under section 23 of the Act. In that regard, subsection 23(1) provides that if a permanent partial disability results from a worker's injury, the Board must perform two calculations:

> (a) estimate impairment of earning capacity from the nature of degree of the injury, and
>
> (b) pay the worker compensation that is a periodic payment that equals 90% of the Board's estimate of the loss of average net earnings resulting from the impairment.

I do not consider that the reference to impairment of earning capacity in subsection 23(1) permits the Board to conduct a further calculation of a worker's earnings. As established by subsection 23(2), the reference to impairment of earning capacity in subsection 23(1) concerns the percentage of impairment rather than the earnings used to calculate benefits payable under subsection 23 (1).

The Board's policy buttresses a finding that there is no third calculation point. Item #65.00 of the RSCM II sets out the policy regarding the general rule for determining short-term average earnings. Item #66.00 describes the general rule for determining long-term average earnings. The provision in item #66.00 that "Long-term earnings data is normally obtained where there is an indication that a permanent partial disability pension may be payable" suggests that, at the time a long-term wage rate is determined, the Board should be considering the implications of a rate decision on any pension entitlement.

There is no policy which establishes a separate general rule for determining average earnings in connection with permanent disabilities or a policy which distinguishes between long-term wage rates and pension wage rates. In fact, item #71.00, dealing with average net earnings, reinforces that there are only two calculation points:

> Under sections 33.8 and 33.9 of the *Act*, the Board calculates a worker's average net earnings at two stages in the claim process as described below.

Item #71.10 describes the calculation of short-term average net earnings and item #71.20 describes the calculation of long-term average net earnings. It is very significant that there is no current equivalent to RSCM I item #68.00 which expressly provided that a different wage rate could be used to calculate pension entitlement:

> Permanent disability pensions are normally based on the earnings rate established at the point when long-term earnings are reviewed for wage-loss purposes. This, in most cases, means the rate resulting from the 8-week rate review; however, a different rate can be used if there are valid reasons for this. . . .

The absence of an equivalent to the RSCM I item #68.00 in the RSCM II strongly points to there being no separate wage rate determination for pension entitlement. That point is further reinforced by item #36.00 of RSCM II which observes that the calculation of long-term average net earnings is made with reference to chapter 9 of the RSCM II which is entitled "Average Earnings" and which contains policy items #64.00 to #71.40:

> Permanent disability awards are calculated on the basis of a worker's long term "average net earnings". The computation of long term average net earnings is dealt with in Chapter 9.

Item #39.00 of RSCM II also indicates that there is no separate calculation of a wage rate when a pension is assessed:

> Once the percentage of disability is determined, it is applied to the worker's long term average net earnings, and the permanent partial disability award is 90% of the amount so determined.

The excerpt from the *Core Services Review of the Workers' Compensation Board* reproduced in Review Division #15971 reinforces that there is no determination of a worker's wage rate when a worker is issued a pension decision after a wage rate review has been conducted at 10 weeks.

I observe that where a worker's temporary disability which precedes his or her permanent disability is less than 10 weeks, the Board will not have been required to provide the worker with a separate wage rate decision in connection with temporary disability wage loss benefits payable after 10 weeks. In such a case, the pension decision may be the first decision in which the worker is advised of a long-term wage rate determined under subsection 33.1(2). In such a case, the pension decision would contain an appealable decision regarding the worker's long-term wage rate.

After reviewing the matter, I find that the Act and policy do not envision the rendering of a separate wage rate decision in connection with a pension award in a case where there has already been a decision rendered under subsection 33.1(2) as to the worker's long-term wage rate. As there is no separate wage rate decision rendered in such cases, an appeal from the pension decision does not contain a wage rate decision subject to review. As the worker in this case was provided with a long-term wage rate decision in the June 3, 2003 decision letter, I do

not consider that the pension decision of April 22, 2004 contained an appealable decision with respect to the worker's wage rate. I do not consider that this is a question of the Board inappropriately fettering its discretion with respect to the setting of wage rates such that the decision in the *Testa* case would be applicable. The Board had no discretion to exercise in the case before me. The disability awards officer was required, as a matter of law and policy, to use the wage rate set in the June 2, 2003 decision.

Conclusion

The worker's appeal is denied. I confirm the review officer's October 27, 2004 decision, as I find that the pension decision did not contain a reviewable decision concerning the worker's wage rate used for pension calculation purposes.

Decision of the Workers' Compensation Appeal Tribunal

Number: WCAT-2005-03420
Date: June 29, 2005
Panel: Susan L. Polsky Shamash, Vice Chair
Subject: WCAT Jurisdiction — Review Division Extension of Time Decisions

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Introduction

The worker appeals a June 2, 2004 decision of a review officer (Review Decision #9599) declining to grant the worker an extension of time to review an October 3, 2001 decision written by a case manager in the Disability Awards department of the Workers' Compensation Board (Board). The review officer concluded that special circumstances did not exist which precluded the worker from bringing his request for review within the 90-day time limit.

The worker, who is self-employed, is represented by a lawyer. Although the worker's representative requested an oral hearing before a three-person precedent panel established under section 238(6) of the *Workers Compensation Act* (Act), this appeal has been conducted by a one person non-precedent panel based on a review of the claim file and written submissions from the worker's representative.

Because the issue is entirely one of legal interpretation, I have concluded that it can be fully and fairly determined without an oral hearing. Although the issue raised on this appeal may be of special interest or significance to the workers' compensation system as a whole, this is the first time that the Workers' Compensation Appeal Tribunal (WCAT) has been asked to address it. It is therefore not an appropriate matter for a precedent panel at this time.

Issue(s)

Does WCAT have the authority to consider an appeal from a decision of a review officer declining to extend the time to review a decision of the Board?

Jurisdiction

Section 239(1) of the Act provides that a final decision made by a review officer in a review under section 96.2 may be appealed to WCAT. Section 239(2) limits this right by stating that there are certain decisions of a review officer that may not be appealed. These include decisions in a prescribed class respecting the conduct of a review (section 239(2)(a)). Section 224 enables the lieutenant governor in council to make regulations prescribing the classes of decisions that may not be appealed for purposes of section 239(2)(a). Section 41 of the *Interpretation Act* states that such regulations have the force of law.

Section 4(b) of the Workers Compensation Act Appeal Regulation (Regulation) provides that decisions made under section 96.2(3) may not be appealed to WCAT. Section 96.2(3) provides a 90-day time limit to request a review from the Review Division. Section 96.2(4) states that the chief review officer may extend the time to file a request for review where he is satisfied that special circumstances existed which precluded the filing within the 90-day time limit and an injustice would otherwise result. Section 96.6 enables the chief review officer to delegate his powers and duties to a review officer.

Procedure

As this statutory framework appears to lead to the inexorable conclusion that WCAT does not have the jurisdiction to consider this appeal, I wrote to the worker's representative on June 15, 2005 quoting the applicable legislative provisions. I indicated that I was considering dismissing this appeal pursuant to section 31(1)(a) of the *Administrative Tribunals Act (*ATA) on the grounds that it is not within WCAT's jurisdiction.

The worker's representative responded in a June 24, 2005 submission.

Analysis

The worker's representative made several arguments in support of me finding that WCAT has jurisdiction to consider this appeal. I will deal with each in turn.

The representative stated that the worker's disability arose over five years prior to the passage of the *Workers Compensation Amendment Act, (No. 2), 2002* (Bill 63) which created the current appeal system, including WCAT, and placed limits on WCAT's jurisdiction. It is the representative's position that the worker's statutory entitlement arose and was vested as of the date of his injury.

The worker's representative provided no legal foundation for this argument.

The Transitional Provisions of Bill 63 provide a schema for continuing appeals that were pending before the former Workers' Compensation Review Board (Review Board), Appeal Division, and Medical Review Panel on the transition date, March 3, 2003 (sections 36, 38, and 39). They also provide a schema where unexercised rights of appeals still existed and the time limit for appeal had not yet expired by the transition date (sections 40 and 41). Finally, section 44 of the Transitional Provisions enables the lieutenant governor in council to make regulations respecting any matters not sufficiently provide for that were necessary for the orderly transition of appeals.

Section 2(1) of the Transitional Review and Appeal Regulation provides that where, on transition date, a person had not yet exercised their statutory right to appeal a decision to the Review Board and the time limit to appeal had expired, the person could apply to the chief review officer under section 96.2(4) of the Act to extend the time to request a review.

I find that these legislative provisions clearly establish that the worker did not have a vested right to consideration of this appeal under the former appeal provisions.

The representative's second argument is that there is no published WCAT or Board policy with respect to the statutory provisions to which I referred in my June 15, 2005 letter.

WCAT's practices and procedures with respect to its jurisdiction is set out in items #2.20 to 2.44, in particular, item #2.41 of our *Manual of Rules of Practice and Procedure*. I find that there is published policy with respect to WCAT's jurisdiction. I also find that the lack of published Board policy is not relevant since the Board does not make policy with respect to WCAT's jurisdiction.

The representative's third argument is that no typically disabled worker can be expected to understand this complex and convoluted material.

I agree that the amendments to the Act and the changes to the appeal system occasioned by Bill 63 have caused confusion. Bill 63 created substantial changes to an appeal structure that has remained unchanged since 1991 and that has been substantially similar since 1974. However, the fact that the new system may be complex and the change may be confusing does not give a worker a right of appeal in the face of clear legislative language.

The representative's fourth argument is that WCAT is an independent appeal tribunal and, as such, has a clear obligation to ensure that every reasonable effort is made to ensure the worker's appeal rights are protected. There is no prejudice to the employer or the Board for allowing this appeal to proceed. Further, WCAT should err on the side of procedural fairness.

While I have some sympathy for the worker's situation, he had appeal rights that were statutorily protected. But, those appeal rights included a time limit and he did not bring his appeal within the statutory time limit. He therefore had to request an extension of time for review which was denied by the chief review officer. WCAT's obligation in this circumstance is to comply with our statutory mandate. WCAT is a creature of statute with no inherent jurisdiction.

The representative's final argument is that this decision impacts upon the worker's permanent disability award entitlements which are appealable and the concept of congruency applies.

The worker's representative provided no legal foundation for this argument.

There is no question but that permanent disability award decisions are appealable to WCAT (subject to the limitations in section 239(2)(c)). However, decisions of the chief review officer denying extensions of time to request a review of permanent disability award decisions are not appealable. Any possible lack of congruency is created by the legislation.

The balance of the representative's submission addresses the merits of the worker's appeal. It is not relevant to my consideration of WCAT's jurisdiction to consider this appeal.

Given the statutory scheme outlined above, which I consider to be very clear and unequivocal, I find that WCAT does not have jurisdiction to consider an appeal from a decision of the chief review officer or his delegate to deny an extension of time to request a review. I therefore dismiss this appeal.

Conclusion

Pursuant to section 31(1)(a) of the ATA, I dismiss the worker's appeal on the ground that it is not within WCAT's jurisdiction.

Decision of the Workers' Compensation Appeal Tribunal

Number: WCAT-2005-03622-RB
Date: July 8, 2005
Panel: Herb Morton, Vice Chair; William J. Duncan, Vice Chair; Susan L. Polsky Shamash, Vice Chair
Subject: Precedent Panel — Payment of Interest on Retroactive Benefits

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1. Introduction

The worker has appealed a decision dated May 17, 2002 by a client services manager of the Workers' Compensation Board (Board). In a prior decision dated December 4, 2001 by a case manager, the worker was paid 170 days of retroactive wage loss benefits, in implementation of a Workers' Compensation Review Board (Review Board) finding dated September 19, 2001. The December 4, 2001 decision did not grant interest to the worker on his retroactive wage loss benefits. The manager's May 17, 2002 decision expressly denied the worker's request for payment of interest. It applied an amended policy (effective November 1, 2001) which made "blatant Board error" a prerequisite for awarding interest.

While the worker has appealed both the December 4, 2001 and May 17, 2002 decisions, only his appeal of the May 17, 2002 decision has been assigned to this "precedent panel." The May 17, 2002 decision concerned the denial of interest, which is the subject of this appeal. The worker's appeals from the December 4, 2001 decision, and from Review Decision #11209 concerning his pension award, will be considered by other WCAT panels.

The worker submits that he is entitled to interest, as the September 19, 2001 Review Board finding to allow his appeal was issued prior to the November 1, 2001 policy change regarding interest. He argues that this policy change does not apply in his case as the policy was not intended to apply retroactively. He submits that if the policy change was intended to apply retroactively, then the policy is unlawful as the Panel of Administrators did not have the legal authority to amend the policy retroactively. Additionally, by letter dated May 20, 2004, the worker's previous union representative submitted that the case manager had made a decision to pay interest when the worker spoke to the case manager by telephone on October 22, 2001.

In his notice of appeal, the worker requested an oral hearing. Following a preliminary review by the Workers' Compensation Appeal Tribunal (WCAT) Registry, the worker was advised that his appeal would be heard on a "read and review" basis. The employer is not participating in this appeal, although invited to do so. The worker's union representative has provided a written submission. We find that the issues of law and policy raised by the worker's appeal can be properly considered on the basis of written submissions without an oral hearing. There is no significant issue of credibility requiring an oral hearing.

All references in this decision to statutory sections are to the *Workers Compensation Act* (Act) unless otherwise specified.

2. Issue(s)

A "precedent panel" has been appointed to consider the worker's eligibility for interest on his retroactive benefits. This requires consideration as to the meaning of the November 1, 2001 effective date contained in the October 15, 2001 policy resolution concerning interest. This involves both the intent of the policy, and the authority of the policy-makers under section 82.

3. Precedent Panel

This "precedent panel" was appointed by the WCAT chair under section 238(6), and is composed of three vice chairs. One member was appointed as the presiding member under section 236(a). Under section 238(9), the decision of the majority is WCAT's decision, but if there is no majority the decision of the presiding member is WCAT's decision.

As this was the first appointment of a WCAT panel under section 238(6), we consider it useful to begin by addressing the effect of this section.

Where the chair determines that the matters in an appeal are of special interest or significance to the workers' compensation system, the chair may appoint a panel under section 238(6). Item #8.20 of WCAT's *Manual of Rules of Practice and Procedure* uses the term "precedent panel" to describe a panel appointed under section 238(6). A precedent panel may consist of three to seven members. A precedent panel may also include "extraordinary members" (see section 231 and section 232(2)(c)). Not all three-member panels are precedent panels — under section 238(5), a three-member panel may also be appointed which is not a precedent panel.

Section 250(3) provides that WCAT is bound by a decision of a precedent panel unless:

> (a) the specific circumstances of the matter under appeal are clearly distinguishable from the circumstances addressed in the panel's decision, or
>
> (b) subsequent to the panel's decision, a policy of the board of directors relied upon in the panel's decision was repealed, replaced or revised.

Under section 250(2), WCAT must apply a policy of the Board of Directors that is applicable in that case. If a "precedent panel" addresses an interpretive issue regarding a policy, that interpretation is binding on future WCAT panels subject to one of the exceptions set out in section 250(3) being met. Section 250(3) represents an exception to the more general wording of section 250(1), which states that WCAT is not bound by legal precedent.

The provision of statutory authority for "precedent panels" was one of the novel features of the March 3, 2003 restructuring of the workers' compensation appeal bodies under the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). A recommendation for such authority was contained in the March 11, 2002 *Core Services Review of the Workers' Compensation Board* (the Winter Report), accessible on the internet at http://www.labour.gov.bc.ca/wcbreform/WinterReport-Complete.pdf. The core reviewer reasoned (at page 54):

> (d) The use of "Super Panels"
>
> I have no doubt that the Appeal Tribunal will be called upon to adjudicate matters of policy or law which are of significant importance to the workers' compensation system as a whole. In such circumstances, the Chair of the Appeal Tribunal should have the discretion to appoint a "Super Panel" to determine the issue. Such "Super Panels" would consist of more than 3 persons, and should generally have the Chair as the presiding person of the Super Panel (although the Chair would have the authority to assign another Vice-Chair to preside as Chair of the Panel).

> The Chair of the Appeal Tribunal would also have the authority to conduct an "open" hearing (either by written submissions or an oral hearing) into the issues before the "Super Panel." Such an "open" hearing would provide invited stakeholders with the opportunity to present submissions to the Super Panel.
>
> Finally, it is my view that decisions rendered by the Super Panel must generally be followed by subsequent Panels of the Appeal Tribunal. The rationale for establishing a Super Panel is to provide leadership and direction for other decision-makers with respect to adjudicative issues of importance to the workers' compensation system. Accordingly, subsequent Panels of the Appeal Tribunal should not have the discretion to reach a different conclusion on the same issue which had previously been determined by a Super Panel, unless the circumstances of the subsequent appeal before the Appeal Tribunal Panel clearly distinguish its case from that determined by the Super Panel.

The terms "super panel" or "precedent panel" are not contained in the Act. These terms describe the legal effect of a decision made by a panel which has been appointed under section 238(6).

A precedent panel decision is binding in relation to future decision-making by WCAT. However, it will normally not provide a basis for reconsideration of a prior WCAT decision given the high level of deference to be accorded to a WCAT decision. The fact that prior decisions have reached differing conclusions on an interpretive issue does not mean they were "patently unreasonable." Differing interpretations may be possible or viable under the Act (see Appeal Division Decision #00-1596, *Reconsideration of an Appeal Division Decision – Consistency and "Hallmarks of Quality Decisions"*, 16 *Workers' Compensation Reporter* 349, and WCAT Decision #2004-04221). A decision which is a possible or viable interpretation (i.e. not patently unreasonable) is not subject to reconsideration simply because it took a different approach.

4. Participation

Section 246(2)(i) gives WCAT authority to request any person or representative group to participate in an appeal if WCAT considers that this participation will assist it in fully considering the merits of the appeal. As a precedent panel decision has significance beyond the particular case, and is binding on future WCAT panels subject to section 250(3), broader participation was invited. By letter of November 30, 2004, the following groups were notified of the appointment of a "precedent panel" and invited to participate in this appeal:

> B.C. Federation of Labour
> Business Council of B.C.
> Coalition of B.C. Businesses
> Employer's Forum to the WCB
> Employers' Advisers
> Workers' Advisers
> Workers' Compensation Advocacy Group

Submissions were received from the employers' adviser (January 19, 2005) and workers' adviser (January 21, 2005). They both replied to the submission of the other on March 11, 2005. These submissions were disclosed to the worker, and his union representative provided a submission dated May 2, 2005.

5. Jurisdiction

The worker's appeal was filed to the former Review Board. As this appeal had not been considered by a Review Board panel prior to March 3, 2003, it is being decided as a WCAT appeal (under section 38(1) of the transitional provisions contained in Part 2 of Bill 63).

WCAT may consider all questions of fact, law, and discretion arising in an appeal, but is not bound by legal precedent (sections 250(1) and 254). WCAT must make its decision based on the merits and justice of the case, but in so doing must apply a published policy of the Board of Directors that is applicable (section 250(2)). Section 42 of Bill 63's transitional provisions states:

> As may be necessary for the purposes of applying sections 250 (2) and 251 of the Act, as enacted by the amending Act, in proceedings under sections 38 (1) and 39 (2) of the amending Act, published policies of the governors are to be treated as policies of the board of directors.

Accordingly, in connection with the requirement of section 250(2) that WCAT "must apply a policy of the board of directors that is applicable in that case," we will apply the former policies of the Board of Governors (whose authority under section 82 was being exercised by a Panel of Administrators under section 83.1 during the time frame relevant to this appeal).

6. Background and Evidence

The worker suffered a back injury at work on August 15, 1985. In March 1999, he underwent surgery for an L5-S1 discectomy. This was initially not accepted under his claim. His appeal to the Review Board was allowed. By finding dated September 19, 2001, the Review Board found that the worker's L5-S1 disc herniation was causally related to his 1985 work injury "and therefore the surgery of March 31, 1999 along with all associated medical aid and time loss resulting therefrom should be accepted as a Board responsibility." As the Review Board finding did not mention interest, we read that finding as leaving this issue to be adjudicated by a Board officer (rather than implicitly granting or denying interest).

By decision dated December 4, 2001 (in implementation of the Review Board finding), the case manager reopened the worker's claim for 170 days of wage loss benefits from March 27, 1999 to August 29, 1999, and from September 1, 1999 to November 23, 1999. The worker was also referred for a permanent functional impairment assessment. The December 4, 2001 decision did not include any express reference to interest.

One of the questions raised in this appeal concerns whether a decision concerning interest was made under the former policy. Accordingly, we have reviewed in detail the information on file concerning the consideration given to the worker's claim for interest. The case manager

partially completed a form 25B3 entitled "INTEREST CALCULATIONS FOR RETROACTIVE WAGE-LOSS PAYMENTS, Compensation Services Division." This included the following information:

Payment Periods	**Amount**
March 27, 1999 to June 30, 1999	$ 7,545.93
July 1, 1999 to August 29, 1999	$ 4,660.72
Sept. 1, 1999 to November 23, 1999	$ 6,658.18
TOTAL	$18,864.83

An entry on the form indicated that the "date payment made" was December 3, 2001. A space on the form for the "Interest Decision Date" was left blank. This term was defined on the bottom of the printed form as follows:

> * The "Interest Decision Date" is the date on which the Claims Adjudicator, Disability Awards Officer, or other Board officer, or Appeals Commissioner, makes the decision to pay interest which is to be calculated. It is NOT the date of a Review Board decision. In accordance with Item #50.00 of the Claims Manual, Actuarial will calculate interest on the above amounts to the end of the calendar month preceding the Interest Decision Date.

A copy of the form, completed except for the Interest Decision Date, was retained on the claim file.

In a telephone memo dated February 4, 2002, a compensation services manager noted:

> I spoke with [the worker] and explained the change in policy regarding interest. He does not agree with the change and intends to appeal. I advised him that he can appeal the December 4, 2001, implementation letter as it did not award interest. He was advised to requwest [*sic*] a letter, I told him if someone wants to make a written submission we would provide a written response but I believe he should be able to appeal the implementation letter.

By letter dated February 4, 2002, the worker wrote to his union representative, noting:

> As to our discussion in early December, 2001, I requested a letter from WCB with regards as to why they didn't pay interest on my appeal . . . I was told by [name], WCB manager that they don't pay interest on claims settled after November 2,2001 [*sic*]. I stated that I would like a letter regarding that discussion to give to my Worker Advocate. His reply was if my advocate wanted a letter, he would have to request it.

On May 2, 2002, the worker's union representative wrote to the area office manager, enclosing a copy of the worker's letter and requesting that the worker be paid interest. He submitted:

> It appears that your refusal to pay interest to [the worker] is based upon the November 1, 2001 policy change regarding interest. That policy was enacted after the award in this case and thus the previous policy should be applied. The November 01, 2001 policy ought not to be applied retroactively to disentitle [the worker] from the monies he was entitled to at the time of the award.

The client services manager replied with a decision dated May 17, 2002. He noted that a manager's review had been requested of the decision that the worker was not entitled to interest on his retroactive wage loss benefits. The manager cited the current policy at item #50.00 of the *Rehabilitation Services and Claims Manual* (RSCM), which included the requirement for a "blatant Board error." He further cited Practice Directive #28, *Interest on Retroactive Wage Loss and Permanent Disability Lump-Sum Benefits*. This provided, in part:

> The amendments to the policies apply to interest decision dates on or after November 1, 2001. The "interest decision date" is the date that a Board officer decides that interest is payable.

The manager's May 17, 2002 decision expressly denied the worker's request for payment of interest.

7. Policy Resolution of October 15, 2001

Resolution of the Panel of Administrators Number 2001/10/15-03, *Calculation of Interest*, dated October 15, 2001, is published at 17 *Workers' Compensation Reporter* 465. The background recitations to this policy amendment noted that under prior policy:

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

Paragraph 2 of the October 15, 2001 policy resolution provided:

> Policy item #50.00 is also amended to provide new criteria for determining when it is appropriate for the Board to pay interest in situations other than those expressly provided for in the Act. The amended policy will provide for interest on retroactive wage-loss and pension lump-sum payments where it is determined that a blatant Board error necessitated the payment. For an error to be "blatant" it must be an obvious and overriding error.

Paragraph 6 of the policy resolution concerned the effective date of the policy changes:

> The amended policies are effective November 1, 2001, and will apply to all decisions to award or charge interest on or after that date. When calculating the amount of interest payable, the new method for determining the applicable rate of interest will apply retrospectively and will be used for the entire entitlement period and will not be limited to entitlement for time periods after November 1, 2001.

8. Prior Appellate Decisions

The effect of the wording of the October 15, 2001 policy resolution with respect to its effective date has been addressed in prior Appeal Division and WCAT decisions. Three notable decisions illustrate the different manner in which the policy has been interpreted.

(a) Interpretation #1

Appeal Division Decision #2002-1488 dated June 14, 2002 is accessible at http://www.worksafebc.com/claims/review_and_appeals/search_appeal_decisions/default.asp. The Appeal Division decision concerned a March 7, 2001 decision in which the worker had been granted a loss of earnings pension retroactive to 1991, without interest. The denial of interest was under the former policy. The worker appealed to the Review Board, which issued a finding dated November 6, 2001. In its finding to deny the worker's appeal, the Review Board also applied the former policy concerning interest. However, the Appeal Division panel found that as its decision was being made after November 1, 2001, the new policy on interest should be applied. The Appeal Division panel reasoned in part (at paragraphs 23–25):

> The submission that the new policy does not apply is not persuasive. We consider there is no doubt that the formula for calculating interest applies to any decision on or after November 1, 2001 to pay interest regardless of who the decision-maker is and at what stage in the appeal proceedings the decision-maker is situated. The language of the policy seems sufficiently broad to ensure that the new formula applies to those decisions.
>
> The submission that the new policy does not apply could be based on an argument that the reference in the resolution to all decisions to award or charge interest means that it is only the formula for calculation of interest which applies to all decisions after November 1, 2001 and that whether interest is payable is determined according to the policy in effect when the initial decision as to interest eligibility is made. This would mean that eligibility for interest is determined by the old policy in cases when the initial decision pre-dated November 1, 2001. Such an interpretation would mean that two policies would apply to interest until an initial decision on a claim concerning interest was made on or after November 1, 2001. That would mean that all the interest decisions in the appellate system would have to be completely processed before only one policy would be applicable to interest issues. That strikes us as an unwieldy set of circumstances. We appreciate that it would be open to the Panel of Administrators to create such a situation as it would likely not be contrary to the *Act*. Yet we would want persuasive evidence in their resolution that that was their intention before we would interpret the resolution in that manner.
>
> In interpreting policy it is appropriate to keep in mind the purpose of the policy revision as revealed by the resolution. Among other matters, the policy was revised to move away from paying interest using a compound rate of interest and to use different, more stringent criteria for establishing eligibility for interest. The policy revision seeks to limit costs associated with the payment of

> interest. We consider that such a purpose is achieved if the policy revision is interpreted in a simple straightforward manner, that is, the new rules for eligibility to interest and the calculation of interest are applicable as of November 1, 2001. The retention post-November 1, 2001 of part of the old policy applicable to eligibility for interest would be inconsistent with the purpose of the policy revisions. As well, it would mean that the application of policy to interest issues would be needlessly complex.

In that case, the initial decision to deny interest was made on March 7, 2001. The Appeal Division panel rejected the argument that eligibility for interest is determined by the policy in effect at the time of the initial decision concerning interest. It interpreted the phrase "all decisions" as including appellate decisions.

(b) Interpretation #2

WCAT Decision #2004-03816 dated July 19, 2004 concerned a claim on which the worker had appealed to the Review Board concerning decisions dated July 16, 1998 and March 27, 2001 (which denied her claim). The Review Board held an oral hearing on October 26, 2001. On March 28, 2002, the Review Board issued its finding allowing the worker's appeal. Implementation decisions dated August 22, 2002 and September 12, 2002 were issued, which awarded retroactive benefits to the worker without interest. The worker appealed these decisions to the Review Board, and the appeals were transferred to WCAT on March 3, 2003. The WCAT panel found the worker was entitled to interest, notwithstanding that her appeal regarding the acceptance of her claim was not decided by the Review Board until after the policy change concerning interest, and the first decision to address interest was made after November 1, 2001. The WCAT panel reasoned in part, in connection with the reasoning in Appeal Division Decision #2002-1488:

> The panel concluded that this wording was broad enough to bear an interpretation that the policy change applied to all decisions, appellate or not, made after November 1, 2001. I accept that such is the case. That is, the above statement does allow for such an interpretation. However, it also is broad enough to allow for the contrary interpretation. That is, it may be read that the policy applies only to new <u>initial</u> decisions made after November 1, 2001 which are later overturned at the appellate level and therefore would attract consideration for interest payment on the retroactive payment of benefits. This second interpretation seems more likely to be the intent of the governors when one considers that the method of determining the applicable rate of interest was specifically identified as applying retrospectively. On a plain reading of the paragraph quoted above, I cannot find that the retrospective application can apply to anything other than the applicable rate of interest. Any other reading of the paragraph is necessarily tortured.
>
> I therefore conclude that the governors specifically turned their minds to the retrospectivity of the policy and chose to explicitly make it applicable only to the method of calculation of interest.

> The panel in *Decision #2004-1488* [*sic*] said that one of the purposes of the changed policy was to establish more stringent criteria for eligibility and that phased implementation of the policy would be inconsistent with that desire. Again with respect, I cannot agree with my colleagues reasoning in this regard. It seems to me that if the governors had sought to change the policy because it was an incorrect application of the law, they would have been required to, and indeed eager to, make the policy retroactive in order to avoid further applications of an unlawful policy. There is no suggestion here that the pre-November 1, 2001 policy was unlawful. Rather, the panel in 2002 simply concluded that the governors wanted to establish a more restrictive policy for, presumably, economic reasons. There is, however, no suggestion that there was an urgent or dire economic circumstance that the Board faced in November 1, 2001 that required retroactivity of the policy change. Rather, the governors were taking an orderly and, in their view timely, step to continue the operations of the Board on a sound financial footing. There is simply no evidence that the financial impact of a change of policy item #50.00 was such that it required retrospective application to all cases.
>
> [underlining in original]

The WCAT panel found the October 15, 2001 policy change only affected claims where the initial adjudication regarding entitlement to benefits was conducted subsequent to November 1, 2001.

(c) Interpretation #3

A third interpretation of the October 15, 2001 policy resolution was provided in Appeal Division Decision #2002-1383 dated June 4, 2002. In that case, the panel found that as the Board officer's decision to deny interest was made prior to November 1, 2001, the former policy (in effect at the time the decision to deny interest was made) should be applied in the appeal. The Appeal Division panel reasoned:

> Although the decision not to award interest was made by the Board on December 17, 1999, if I decide that an award of interest should be paid now, this would be a decision to award interest made after November 1, 2001. Decision #36 of the Governors [now the Panel of Administrators] 9 WCR, No. 2 147 addresses the retroactivity of policy changes. It states that a policy change may occur as a result of a reconsideration and rethinking of existing lawful policy. The presumption in these cases is that the changed policy will not apply retroactively before the date on which the new policy was approved. It is not clear to me that the Panel's resolution is referring to Board decisions made on or after November 1, 2001 or any decision, including a decision upon appeal, made after November 1, 2001. In light of this uncertainty, I find that the prior policy item #50 applies in this case and not the amended policy.

Appeal Division Decision #2002-1383 is also accessible on the Board's web site (cited above). A similar interpretation was provided in WCAT Decision #2004-05710 dated October 28, 2004. While these decisions have not been followed in other cases, and were not part of the package of materials on which submissions were invited, we consider it appropriate to include this third approach in our consideration for completeness.

9. Submissions

The workers' adviser and employers' adviser have provided detailed submissions. These submissions include the following key points.

The workers' adviser submits that the Board is a creature of statute, and only has those powers conferred on it by its enabling statute. The Act does not contain any express provision giving the Board the authority to pass retroactive policy. She submits the Board has no jurisdiction to pass policy with retroactive effect, unless the policy is conferring a benefit or is in some other way permissive or beneficial. She submits, therefore, that any retroactive aspect of the November 1, 2001 amendments to policy in RSCM item #50.00 is unlawful, and should be referred to the WCAT chair under section 251 of the Act. Alternatively, the workers' adviser submits that the approach set out in WCAT Decision #2004-03816 (*Interpretation #2*) is the correct interpretation to be given to the policy change, as it limits the retroactive application of the policy.

The employers' adviser submits the plain meaning of the October 15, 2001 policy resolution was that, on or after November 1, 2001, all decisions as to whether interest should be paid on retroactive benefits shall be made in accordance with the new policy. She submits that WCAT Decision #2004-03816 (*Interpretation #2*) has interpreted "all decisions" as meaning all "initial" decisions, suggesting that the policy in effect at the time of the original decision to deny a particular benefit should govern, and that it is only the calculation of interest which was intended to have retrospective application. She submits that in order to give effect to this interpretation, two words must be read into the paragraph. First, the word "initial" must be read in after the word "all." Second, it requires that a qualifying word such as "however" be read in after the beginning of the second sentence dealing with the calculation of interest. She submits this differs from the intention of the Panel of Administrators, and that if the intention had been to have only those initial decisions regarding the payment of interest to be affected by the new policy, that wording as to the application date would have been included. The employers' adviser further argues that the presumption against retroactivity in Decision No. 36 is rebutted, primarily by the wording of the policy resolution itself.

The worker's union representative expresses agreement with the submission by the workers' adviser. In the alternative, she submits that the case manager had already made the decision to pay interest on the worker's retroactive entitlement before the November 1, 2001 policy change.

10. Reasons and Findings

(a) Effective Date Wording

We will consider, first of all, the meaning or effect of the wording used in the October 15, 2001 policy resolution regarding its effective date. For this purpose, we will focus our attention on the wording of the resolution within the context of other policy resolutions. In this part of our decision, we seek to identify the intent of the policy-makers. We defer consideration, until later in our decision, as to whether there are legal principles (concerning retroactivity or retrospectivity) requiring a different approach.

(i) Literal reading

On a literal reading, there would not appear to be any difference in meaning between the phrase "all decisions," and the phrase "all decisions, including appeal decisions." For example, if one referred to "all residents of British Columbia," and "all British Columbia residents, including Vancouver Island residents," the meaning would be the same. The use of the word "all" would encompass both mainland and island residents. As well, the use of the word "including" normally serves to identify specific subgroups for the sake of clarity. It is evident that Appeal Division Decision #2002-1488 (*Interpretation #1*) found that the phrase "all decisions" has just such an effect, namely, of including initial adjudicative decisions and appeal decisions (so as to include situations where the initial interest decision was made under the former policy). Upon examining the wording of the October 15, 2001 resolution alone, this would appear to be the literal effect of the wording regarding its effective date.

(ii) Other Policy Resolutions – Effective Date Wording

Rather than focussing solely on the wording of the October 15, 2001 resolution, we consider it useful to examine the wording of the October 15, 2001 resolution in the context of other policies, and other "effective date" wordings used by the policy-makers, to assist in considering the effect of the October 15, 2001 resolution. A range of different wordings has been utilized by the policy-makers regarding the effective date of policy changes. While multiple examples exist in relation to the various categories shown below, we will show only one example in each category (except for the category which specifically refers to appellate decisions).

Many policy resolutions simply state that the resolution is effective on a specified date:

- September 11, 1998 Re: Hand-Arm Vibration Syndrome (HAVS)
  The amended policies are effective September 11, 1998.

Other policy resolutions state that the policy change applies to all decisions made on or after a specified date:

- October 26, 2004 Re: Policy Item #31.20 — Hearing Loss
  This resolution is effective December 1, 2004, and applies to all decisions made on or after that date.

Other policy resolutions state the policy change applies to all adjudicative decisions after a specified date:

- October 16, 2002 Re: Recurrence of Disability
  The amended policies are effective October 16, 2002, and will apply to all adjudication decisions made on or after that date.

Other policy resolutions use different terminology, but also appear to be referring to all adjudicative decisions after a specified date:

- November 19, 2002 Re: Chronic Pain
  This resolution applies to new claims received and all active claims that are currently awaiting an initial adjudication.

Other resolutions state that the policy change applies to all adjudicative and appellate decisions made on or after the specified date:

- March 16, 2000 Re: Loss of Earnings Pensions Past Age 65
  The amended policy item #40.20 is effective on April 1, 2000, and will apply to all pensions adjudicated by a Board officer or *appeal body* on or after that date.

- January 24, 2004 Re: The Status of Treatment Injuries
  Amendments to policy items #22.00, #22.10, #22.11, #22.15 and #22.21 of the *RS&CM*, Volume II, attached as Appendix A, are approved and apply to all decisions, *including appellate decisions*, made on or after February 1, 2004, regardless of the date of the original work injury or the further injury.

- May 18, 2004 Re: Statutory Presumption and Diseases with Long Latency Periods
  Amendments to policy item #26.21 of the *RS&CM*, Volumes I and II, attached as an Appendix, are approved and apply to all decisions, *including appellate decisions*, made on or after June 1, 2004.
  This resolution is effective June 1, 2004 and applies to all decisions, *including appellate decisions*, made on or after that date.

- May 18, 2004 Re: Adjudication of Hernia Claims
  This resolution is effective June 1, 2004 and applies to all decisions, *including appellate decisions*, made on or after that date.

- June 22, 2004 Re: Referral to Disability Awards
  This resolution is effective July 2, 2004, and applies to all decisions, *including appellate decisions*, made on or after that date.

[emphasis added]

Other policy resolutions state that the policy change only applies to applications for compensation received by the Board after a specified date:

- December 17, 1999 Re: Schedule B Item 12 Bursitis and Item 13 Tendinitis, tenosynovitis
  The above amendments to Schedule B and to Sections 27.10, 27.11, 27.12, 27.20, and Appendix 2 of the *Rehabilitation Services and Claims Manual* shall be effective 30 days after publication of the above Regulation in the British Columbia Gazette. The amendments to Schedule B and to the above policies shall apply only to those claims where the initial application for compensation has been received by the Board on or after the effective date of such amendments.

Other policy resolutions have used particular wording to establish a specific prospective effective date:

> • July 12, 1999 Re: Compensation Benefits and Incarceration
> The amendments are effective on the date this resolution is approved. Workers incarcerated as of that date who have had their benefits cancelled will be reassessed under this policy. The policy will have effect prospectively with respect to future ongoing entitlement. There will be no retroactive effect.

Other policy resolutions are stated to be effective from some past date:

> • April 28, 2000 Re: Bladder Cancer in Aluminum Smelter Workers
> The amended Section 30.10 is effective on April 28, 2000. This policy will apply to all claims adjudicated on or after March 13, 1989 (the date the original bladder cancer policy was approved).

(iii) Policy on Retroactivity

As indicated in Decision of the Governors Number 28, *Approval of Retroactive Implementation of Changes in WCB Policy Necessitated by Appeal Division Decision No. 91-0850 and Appeal Division Decision No. 92-1210*, October 26, 1992, 8 *Workers' Compensation Reporter* 691, the Board of Governors proceeded to adopt a general policy regarding retroactivity. Decision of the Governors No. 36, *Retroactivity of Policy Changes*, March 1, 1993, 9 *Workers' Compensation Reporter* 147, was primarily concerned with the following question:

> How then shall the Board decide whether, or to what extent, a policy change necessitated by a finding by the courts, the Appeal Division or another administrative tribunal that Board policy under the *Workers Compensation Act*, the *Criminal Injury Compensation Act*, the *Workplace Act* or other statute is unlawful applies to cases decided before the change?

Decision No. 36 established several guidelines to be applied where a policy is found to be unlawful. As the October 15, 2001 policy change concerning interest did not follow a finding that the prior interest policy was unlawful, those guidelines are not applicable to the issue before us. However, Decision No. 36 also briefly addressed two other situations. It specified:

> The policy change may occur as a result of a reconsideration and rethinking of existing lawful policy. The presumption in these cases is that the changed policy will not apply retroactively before the date on which the new policy was approved.

Decision No. 36 further noted:

> The policy change may occur as a result of an amendment to the *Workers Compensation Act*, the *Criminal Injury Compensation Act*, the *Workplace Act* or some other statute. The presumption in these cases, unless expressly or necessarily implied from the language, purpose or circumstances of the statute, is that the changed policy will not apply retroactively before the date on which the statute came into force.

Decision No. 36 was adopted as a policy of the Board of Directors by Resolution of the Board of Directors Number 2003/02/11-04, *Policies of the Board of Directors*, 19 *Workers' Compensation Reporter* 1 (accessible at http://www.worksafebc.com/publications/newsletters/wc_reporter/default.asp). Paragraph 1.1 included the following as policy of the Board of Directors:

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

Decision No. 36 was published in Volume 9 of the *Workers' Compensation Reporter*, and was not part of the collection of decisions published in Volumes 1 to 6 of the *Workers' Compensation Reporter* which have recently been retired.

As the October 15, 2001 resolution involved a reconsideration and rethinking of existing lawful policy, the policy presumption contained in Decision No. 36 is that the changed policy will not apply retroactively before the date on which the new policy was approved.

(iv) Interpreting Application Statement in the October 15, 2001 Resolution

Upon consideration of the foregoing, certain questions or concerns arise regarding the interpretation of the effective date of the October 15, 2001 policy resolution.

Appeal Division Decision #2002-1488 (*Interpretation #1*) found that the new policy applied to a case in which the initial decision to deny interest had been made under the former policy. One of the key reasons provided for that conclusion was that the policy-makers would likely not have intended to have two policies apply to interest, with the new policy only applying to initial interest decisions made on or after November 1, 2001. The panel expressed concern that this would mean that all the interest decisions in the appellate system would have to be completely processed before only one policy would be applicable to interest issues. The Appeal Division panel found that this would produce "an unwieldy set of circumstances," which was likely not the intent of the policy-makers. We consider, however, that this inference is not supported by a review of the various wordings used to specify effective dates. Given the number of resolutions in which just such distinctions are clearly made by the wording of the effective dates, we consider that this reason has little force. As well, Decision No. 36 establishes or recognizes a presumption that a changed policy will not apply retroactively before the date on which the new policy was approved.

In several instances, the policy-makers have utilized wording to specify that a policy is to apply to cases which are under appeal, notwithstanding the fact that the initial adjudication decision was rendered under a prior policy. The summary of effective date wordings set out above includes five examples of policies which were expressly stated to also apply to appellate decisions. The first of these examples occurred prior to the October 15, 2001 policy resolution (i.e. the March 16, 2000 policy regarding *Loss of Earnings Pensions Past Age 65*). Accordingly, a question arises as to the significance, if any, regarding the lack of reference to appellate decisions in the October 15, 2001 resolution regarding its effective date.

The policy-makers could not use the phrase "all decisions, excluding appeal decisions," as decisions rendered under the new policy would be subject to appeal. A question arises as to whether the phrase "all decisions" has any difference in meaning from the phrase "all decisions,

including appellate decisions." Is the phrase "all decisions" intended to mean all new adjudicative decisions, but not including appeal decisions regarding decisions made under the former policy? If, for example, the policy-makers' operating assumption is that appeal bodies will apply the policy that was in effect at the time of the original decision, then the addition of the phrase "including appellate decisions" would be necessary and meaningful, where they wished to rebut such a common law presumption. Otherwise, there would be no distinction between the phrases "all decisions" and "all decisions, including appellate decisions."

The reasoning in Appeal Division Decision #2002-1488 (*Interpretation #1*) was a reasonable interpretation of the literal wording of the October 15, 2001 policy when read in isolation. As noted above, however, that interpretation has the effect of making meaningless the distinction in various policy resolutions between those policy changes which apply to "all decisions," and those which apply to "all decisions, including appellate decisions." Taking into account the presumption set out in Decision No. 36 (that a changed policy will not apply retroactively before the date on which the new policy was approved), and giving meaning to the distinction in various policy resolutions between those which apply to "all decisions," and those which apply to "all decisions, including appellate decisions," we consider that the intent of the wording in the October 15, 2001 resolution regarding its effective date was that it would only apply to initial decisions concerning interest on or after November 1, 2001 (and not to appeals of interest decisions made prior to November 1, 2001 under the former policy).

With respect to WCAT Decision #2004-03816 (*Interpretation #2*), we consider that it is inconsistent with the plain wording of the October 15, 2001 policy resolution regarding its effective date. The policy specified that it applied effective November 1, 2001, "and will apply to all decisions to award or charge interest on or after that date." The WCAT panel interpreted this wording to mean the policy only applies to claims where the initial adjudication regarding entitlement to benefits was conducted subsequent to November 1, 2001. Thus, it found the former interest policy applied even where a worker's entitlement to benefits was not established until after November 1, 2001. We consider that if the policy-makers had intended such a restriction to apply, it would have been more clearly stated in the wording of the resolution. We consider our interpretation to be consistent with the further wording of the resolution which stipulates that "when calculating the amount of interest payable, the new method for determining the applicable rate of interest will apply retrospectively and will be used for the entire entitlement period and will not be limited to entitlement for time periods after November 1, 2001." We consider that the issue of eligibility for interest, and the method of calculating the interest, are separate questions.

It is apparent from the reasoning in WCAT Decision #2004-03816, that the panel was concerned with the retroactive effect of the policy. The panel may have found that a strained interpretation of the policy was required, so as to not to contravene common law presumptions against retroactivity or retrospectivity. The question as to whether the panel's interpretation was correct requires consideration of these common law principles, which we will address later in our decision.

In sum, as a matter of interpretation of the October 15, 2001 policy resolution regarding its effective date, we agree (subject to further consideration of the common law as set out below), with the interpretation provided in Appeal Division Decision #2002-1383 dated June 4, 2002 (*Interpretation #3*).

(b) Policy-making Authority and the Common Law

(i) Policy-making Authority

At the time of the October 15, 2001 policy resolution, section 82 of the Act established the authority of the Board of Governors as the policy-making body under the Act. Section 82 provided that:

> The governors must approve and superintend the policies and direction of the board, including policies respecting compensation, assessment, rehabilitation and occupational safety and health. . . .

The analysis in the first part of our decision is based primarily on the "effective date" wording in the October 15, 2001 and other policy resolutions. It is, however, also necessary to take into account certain common law principles of statutory interpretation.

Under section 99(1) and 250(1), the Board and WCAT are not bound by legal precedent. This means that the policy-makers and decision-makers have considerable scope and flexibility in addressing matters under the Act. However, this does not mean that the Board and WCAT operate in a legal vacuum. The policy-makers or appeal bodies are entitled to interpret provisions in the Act differently than a court might. Such decisions must, however, take into account the general legal framework within which the Board and WCAT have been established. This framework is implicit to administrative tribunals being part of a society governed by the rule of law. We cannot determine the correct interpretation of the effective date of the October 15, 2001 policy resolution on the basis of its wording alone. Before reaching a final decision, it is necessary to take into account the common law regarding retroactivity and retrospectivity (in order to consider whether this requires the policy resolution be interpreted differently so as to better accord with the common law, or whether the policy should be referred to the WCAT chair under section 251(1) and (2) of the Act as being so patently unreasonable that it is not capable of being supported by the Act and its regulations).

(ii) Retroactivity and Retrospectivity

Policy in Decision No. 36 recognized a presumption that a changed policy will not apply retroactively before the date on which the new policy was approved. It did not, however, identify any restriction regarding the retrospective application of new policy.

In *Benner v. Canada (Secretary of State)*, [1997] 1 SCR 358, (1997) 143 DLR (4th) 577, Mr. Justice Iacobucci (of the Supreme Court of Canada) reasoned:

> 39 The terms, "retroactivity" and "retrospectivity", while frequently used in relation to statutory construction, can be confusing. E. A. Driedger, in "Statutes: Retroactive Retrospective Reflections" (1978), 56 Can. Bar Rev. 264, at pp. 268−69, has offered these concise definitions which I find helpful:
>
> > A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect

> of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event.
>
> [emphasis in original]

In the text *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: The Butterworth Group of Companies, 2002), Professor Ruth Sullivan adopts the following terminology and distinctions (pages 548–549):

- *retroactive application*: legislation which changes past effects of a past situation, that is, changes the legal character of the past transaction;

- *retrospective application*: legislation which changes the future effects of a past situation; and

- *prospective application*: legislation which changes the future effects of an ongoing situation (immediate application), or which changes the future effects of a future situation (future application).

Retroactive application occurs when the effect of applying law to particular facts is to deem the law to be different from what it actually was when the facts occurred: *Gustavson Drilling (1964) Ltd. v. MNR*, [1977] 1 SCR 271, (1975) 66 DLR (3d) 449 (*Gustavson Drilling*). Although legislatures are permitted to create law with retroactive application, doing so is a serious violation of the rule of law because people are entitled to govern their affairs according to the law. To do so, they must have advance knowledge of what the law is. It is arbitrary and unfair to change the law retroactively. There is therefore a strong presumption that legislation is not intended to be retroactive unless such construction is expressly, or by necessary implication, required by the language of the statute.

According to Mr. Justice Dickson, writing for the court in *Gustavson Drilling*, legislation that changes the future effects of past or ongoing situations is not retroactive because there is no attempt to reach into the past and alter the law as of an earlier date. Mr. Justice Dickson found that such legislation is prospective and should receive an immediate effect.

Sullivan and Driedger conclude that a statutory provision should be given immediate effect unless to do so would change the past or interfere with vested rights (page 557). Sullivan and Driedger classify this as retrospective application of legislation. They point out that if there was a presumption against the retrospective application of legislation, it would be much weaker than the one against retroactive application and would probably be easy to rebut, particularly in circumstances involving long-term relationships (page 559).

(iii) Application of Common Law Principles to October 15, 2001 Resolution

The workers' adviser submits the policy-makers have no authority under the Act to approve retroactive policy changes (subject to the caveat that the presumption against retroactivity does not arise when the retroactive change is beneficial). She cites the Alberta Court of Queen's Bench decision in *Skyline Roofing Ltd. v. Alberta (Workers' Compensation Board)*, [2001] 10 WWR 651, (2001) 34 Admin. LR (3d) 289, July 23, 2001, in which the court reasoned:

> 62 Because statutorily-authorized policies can have the force of law, there is a general presumption that such policies cannot be made to apply retroactively. Citizens are entitled to know what the law is as of the date they are making decisions about their conduct. Even the legislature rarely enacts regulations with retroactive effect, because of this constitutional principle. Accordingly, the power to make retroactive policies will not be inferred unless the statute requires it: Western Decalta Petroleum Ltd. v. Alberta (Public Utilities Board) (1978) 6 Alta. LR (2d) 1, 86 DLR (3d) 600 (CA); Gustavson Drilling (1964) Ltd. v. Minister of National Revenue, [1977] 1 SCR 271; and NWTTA v. Northwest Territories (Commissioner) (1997), 153 DLR (4th) 80. The statute need not expressly permit retroactivity if the context implies it: Paton v. The Queen, [1968] SCR 341 at 358.

In the first part of our decision, we concluded that the new policy was not intended to apply to cases in which a decision concerning interest had been made under the former policy. This means, for example, that if an employer appealed a decision made under the former policy to award interest to a worker, an appellate body could not use the amended policy as a basis for finding the worker was not entitled to interest. Similarly, if a worker had been incorrectly denied interest under the former policy, it would be open to the worker to pursue an appeal in reliance on the former policy. Accordingly, we consider that the policy change was not retroactive in nature. Rather, it was retrospective in nature, dealing with initial decisions concerning interest made on or after November 1, 2001.

Having regard to the court decisions and texts cited above, we do not consider that the common law limits the policy-makers from giving the October 15, 2001 policy resolution immediate effect, in relation to claims for interest which had not been adjudicated by November 1, 2001. We do not consider that this amounts to a retroactive policy. Accordingly, for the purposes of our decision, it is not necessary that we address the question as to whether the Board of Directors has authority to approve policy with retroactive effect.

(c) Application of Policy to Worker's Circumstances

(i) Was an Interest Decision Made Prior to the Policy Change?

The worker submits that the case manager had made a decision to pay interest when the worker spoke to the case manager by telephone on October 22, 2001.

It is necessary to consider whether a decision had been made concerning the worker's request for interest under the former policy prior to the November 1, 2001 policy amendment. Pursuant to the interpretation set out above, if a decision had been provided to the worker concerning

his claim to interest prior to the policy change, his appeal must be decided on the basis of the former policy. If, however, the initial decision concerning interest was not made until after the policy amendment, the amended policy applies to the adjudication of the worker's request for interest and the consideration of his appeal.

The circumstances of the worker's claim were not such as to involve any statutory entitlement to interest. His eligibility for interest was based solely on a policy. The worker's entitlement to compensation was established by the September 19, 2001 Review Board finding. However, under section 92(2) of the Act as it existed at that time, where a Review Board finding was appealed under section 91, or reopened or reheard under section 96, payment of retroactive compensation had to be deferred until the Appeal Division rendered its decision or redetermination. In accordance with this statutory framework, policy at RSCM item #105.30 required payment of retroactive compensation be deferred until the expiry of the 30-day time frame for an appeal or referral of the Review Board finding to the Appeal Division. The October 15, 2001 policy resolution was issued during this 30-day period. The first decision communicated to the worker concerning the benefits payable in implementation of the Review Board finding was dated December 4, 2001.

In response to an inquiry regarding implementation of the Review Board finding, the Board officer might reasonably have explained that implementation would be deferred for 30 days under section 92, but that interest would be payable on any retroactive benefits. It was routine under the former policy to award interest, where a denial of benefits was reversed on appeal. Although not explained in the claim file records, we infer from the fact that the Board officer largely completed the form for initiating payment of interest that it was initially contemplated that interest would be payable. Although not documented in any decision or other file memoranda, it would appear that the planned payment of interest was halted upon a realization that the policy had changed.

The worker may reasonably have hoped or expected to be awarded interest on his retroactive entitlement, based on the former interest policy, but this prospect had not yet been realized. To the extent the Board officer may have had occasion to contemplate implementation of the Review Board finding, the Board officer would similarly have anticipated granting interest to the worker. In any telephone discussion with the worker regarding the deferred implementation of the Review Board finding, it is likely that this expectation that interest would be granted would have been communicated. Accordingly, we have no reason to doubt the worker's claim that he was told he would receive interest, when the worker spoke to the case manager by telephone on October 22, 2001. However, no written decision was provided to the worker concerning his request for interest.

The policy concerning interest had changed by the time the Board officer was ready to proceed with the calculation of the worker's entitlement to retroactive benefits in implementation of the Review Board finding. The worker's entitlement to interest had not been established prior to November 1, 2001. While he had an expectation of payment of interest, the new policy imposed a new result in respect of a past event. We consider that the application of the new interest policy in this context is properly characterized as retrospective, rather than retroactive in effect.

Having regard to the partially completed form to award interest, we infer that the Board officer may well have intended to award interest (possibly unaware of the policy change). It may be the case that some internal "quality control" process identified the possible error, with the

result that interest was not awarded when the officer's decision was issued. We do not consider that any anticipatory comments, concerning the expectation that interest would be payable under the former policy, or any draft decision to award interest based on a possible lack of awareness of the new policy, mean that the worker is thereby entitled to a decision under the former interest policy.

We are not persuaded that any decision had been made regarding the worker's eligibility to interest prior to November 1, 2001. While there might well have been a verbal explanation to the worker regarding the expectation that interest would be awarded on his retroactive benefits, in accordance with the policy which existed at the time, we do not consider that this amounted to a decision. We are not persuaded that the worker's claim to interest had moved beyond an expectation, so as to become a vested right to receive interest under the terms of the former policy. While not necessary to our decision, we note that our reasoning is consistent with that recently expressed in WCAT Decision #2005-02379 dated May 10, 2005.

Under sections 99(2) and 250(2) of the Act, the Board and WCAT must apply a policy of the Board of Directors that is applicable in a case. As we find that the worker's request for interest was not adjudicated prior to November 1, 2001, we find that the November 1, 2001 policy is the one which applies in the worker's case. We do not consider the amended policy, and its retrospective application in the circumstances of the worker's case, to be patently unreasonable. We do not consider that grounds are established for referring the policy to the chair under section 250(1), as being "so patently unreasonable that it is not capable of being supported by the Act and its regulations."

(ii) Was there a Blatant Board Error?

Under the November 1, 2001 policy, interest is payable if it is determined that there was a blatant Board error that necessitated the retroactive payment. The policy states:

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

The September 19, 2001 Review Board finding allowed the worker's appeal from the July 13, 1999 decision by the case manager. The case manager denied the worker's request for a reopening of his 1985 claim, in relation to his surgery in March 1999 for an L5-S1 discectomy. The July 13, 1999 decision of the case manager included a review of the worker's prior back claims (memo #12) and a medical opinion by a Board medical advisor (memo #14). The September 19, 2001 Review Board finding reasoned in part:

> Based on Dr. [F's] opinion of July 22, 1999 (and clarification of August 23, 2001) that the disc injury in 1985 may remain stable and not cause any pain or may cause a disc herniation later in life, either on the same side as the initial pain or on the opposite side, the evidence is more than sufficient on balance to find that in all likelihood had it not been for the August 15, 1985 compensable low back injury the worker would not have required the L5-S1 discectomy on March 31, 1999.

While the July 13, 1999 decision was reversed on appeal, this involved a different judgment with respect to the weighing of the evidence with the benefit of new evidence from the neurosurgeon who performed the worker's surgery. We find no basis for considering that the July 13, 1999 decision by the case manager involved a blatant error. Accordingly, the worker is not entitled to interest.

(d) Summary

We find that the correct interpretation of the October 15, 2001 policy resolution is that it applies to initial adjudicative decisions concerning interest on or after November 1, 2001, but not to appeals where the initial adjudicative decision concerning interest was made prior to November 1, 2001. This approach gives meaning to the distinction drawn in various policy resolutions between those which apply to "all decisions," and those which apply to "all decisions, including appellate decisions." As the policy change in this case applied to "all decisions," it applied to all adjudicative decisions (but not to appeals from decisions rendered under the prior policy). This interpretation is supported by the wording of other policy resolutions which specify that particular policy changes also apply to appellate decisions, by the policy presumption contained in Decision No. 36 that a changed policy will not apply retroactively before the date on which the new policy was approved, and by common law principles of statutory interpretation as discussed above. We agree, therefore, with the interpretation provided in Appeal Division Decision #2002-1383 and WCAT Decision #2004-05710 (*Interpretation #3*).

We find that the policy-makers had authority under section 82 of the Act to create new policy, and to stipulate that it would have immediate application to matters that had not yet been decided. To the extent this adversely impacted the worker's eligibility to claim interest under the former policy, we find the policy was retrospective, rather than retroactive, in its effect. No decision had been rendered to award interest to the worker, notwithstanding any expectation on the part of both the worker and the case manager that such a decision would be forthcoming. We accept that the policy-makers have the legal authority to make new policy which applies immediately to the initial adjudication of a particular subject matter, even where this has the effect of defeating a hope or expectation that a matter would be adjudicated a particular way under the former policy. In the absence of a specific adjudication concerning the worker's claim to interest prior to November 1, 2001, we do not consider that the worker had acquired a right to consideration under the former policy.

In the present case, the worker's eligibility for compensation was determined prior to the October 15, 2001 policy resolution, but the initial decision on interest was not made until after the new policy was effective. The application of the new policy in these circumstances was retrospective, rather than retroactive, and does not offend the presumption against retroactivity. For the purposes of our decision, we did not need to consider whether the Board of Directors has authority to approve policy which is truly retroactive.

We consider that the worker's eligibility was properly addressed under the new policy, which applied to the initial adjudication after November 1, 2001 of his claim to interest. We find that both as a matter of interpretation of the policy resolution, and upon consideration of the common law, that the policy was correctly interpreted and applied in this case. As no blatant Board error was identified, the worker is not eligible for interest under the new interest policy. The worker's appeal is denied.

11. Conclusion

The May 17, 2002 decision by the client services manager is confirmed. The December 4, 2001 decision by the case manager was correct in denying the worker's request for interest on his retroactive wage loss benefits, in implementation of the September 19, 2001 Review Board finding. The Board officers correctly interpreted the October 15, 2001 policy resolution concerning interest as applying to initial decisions concerning interest on or after November 1, 2001.

Decision of the Workers' Compensation Appeal Tribunal

Number: WCAT-2005-04320
Date: August 17, 2005
Panel: Marguerite Mousseau, Vice Chair
Subject: WCAT's Jurisdiction — Interest on Retroactive Vocational Rehabilitation Benefits and Legal Costs

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Introduction

On October 8, 2004 the Review Division issued a decision respecting the worker's entitlement to vocational rehabilitation assistance. In this decision, Review Division Decision #17297, dated October 8, 2004, the review officer varied the Workers' Compensation Board's (Board) decision of May 3, 2004. The review officer granted the worker retroactive vocational rehabilitation benefits and directed that the worker be assigned a new vocational rehabilitation consultant (VRC). The review officer denied the worker's representative's request for the payment of legal fees and costs.

The worker's representative submitted a notice of appeal to the Workers' Compensation Appeal Tribunal (WCAT) with respect to Review Division Decision #17297. In the notice of appeal, the representative stated that the only issue on the appeal was the worker's entitlement to costs, including the reimbursement of legal fees.

In a subsequent submission dated January 19, 2005 the representative stated that he intended to raise two issues with WCAT: the issue of costs, as noted in the notice of appeal, and the issue of the worker's entitlement to interest on the retroactive rehabilitation assistance awarded by the Review Division.

The worker's representative requested an oral hearing which was denied on a preliminary basis by a WCAT deputy registrar. Item 8.90 of the *Manual of Rules of Practice and Procedure* (MRPP) provides that WCAT will normally conduct an appeal on a read and review basis where the issues are largely medical, legal, or policy-based, and credibility is not an issue. I have reviewed the issues and have concluded that this appeal may be determined without an oral hearing.

Issue(s)

Does WCAT have jurisdiction to address an appeal respecting legal costs associated with the adjudication of a worker's entitlement to vocational rehabilitation benefits?

Does WCAT have the jurisdiction to address a request for "costs for all unnecessary appeal proceedings until now?"

Does WCAT have the jurisdiction to address a worker's entitlement to interest with respect to a decision on vocational rehabilitation benefits?

If WCAT had jurisdiction to award costs, is the worker entitled to costs?

If WCAT has jurisdiction to address entitlement to interest in this case, is the worker entitled to interest?

Applicable Law

In this case, the worker's injury occurred before June 30, 2002. As a result, the worker's entitlement to compensation is adjudicated under the provisions of the *Workers Compensation Act* (Act) that preceded changes contained in the *Workers Compensation Amendment Act, 2002* (Bill 49). The worker's appeal rights, however, are governed by the Act as amended by the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63), which came into force on March 3, 2003 and which established the Review Division and WCAT. WCAT panels are bound by published policies of the Board's Board of Directors pursuant to Bill 63.

The following sections of the Act are relevant to this appeal:

> 239 (1) Subject to subsection (2), a final decision made by a review officer in a review under section 96.2, including a decision declining to conduct a review under that section, may be appealed to the appeal tribunal.
>
> (2) The following decisions made by a review officer may not be appealed to the appeal tribunal:
>
> (b) a decision respecting matters referred to in section 16;
>
> 243 (1) A notice of appeal respecting a decision referred to in section 239 must be filed within 30 days after the decision being appealed was made.

Section 16 of the Act provides authority to the Board to make expenditures in order to "aid in getting injured workers back to work or to assist in lessening or removing a resulting handicap." This section provides the statutory basis for vocational rehabilitation assistance.

Section 224(2)(k.3) of the Act and sections 6 and 7 of the Workers Compensation Act Appeal Regulation (Regulation) are also relevant. They provide:

> 224(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows:
>
> (k.3) prescribing the circumstances under which the appeal tribunal may order the Board to reimburse the expenses incurred by a party to an appeal under Part 4;

6 The appeal tribunal may award costs related to an appeal under Part 4 of the Act to a party only if the appeal tribunal determines that

(a) another party caused costs to be incurred without reasonable cause, or caused costs to be wasted through delay, neglect or some other fault,

(b) the conduct of another party has been vexatious, frivolous or abusive, or

(c) there are exceptional circumstances that make it unjust to deprive the successful party of costs.

7 (1) Subject to subsection (2), the appeal tribunal may order the Board to reimburse a party to an appeal under Part 4 of the Act for any of the following kinds of expenses incurred by that party:

(a) the expenses associated with attending an oral hearing or otherwise participating in a proceeding, if the party is required by the appeal tribunal to travel to the hearing or other proceeding;

(b) the expenses associated with obtaining or producing evidence submitted to the appeal tribunal;

(c) the expenses associated with attending an examination required under section 249 (8) of the Act.

(2) The appeal tribunal may not order the Board to reimburse a party's expenses arising from a person representing the party or the attendance of a representative of the party at a hearing or other proceeding related to the appeal.

Interest on Retroactive Vocational Rehabilitation Assistance

On the question of interest on the retroactive vocational rehabilitation assistance awarded by the review officer, the representative states that the worker sought this remedy at the Review Division but the review officer failed to address it. He states that there has been no adjudication regarding the issue of interest payable on those benefits and requests that WCAT address the issue.

There are two issues which the representative has not addressed with respect to this matter. The first is the basis on which WCAT would have jurisdiction to address the awarding of interest in relation to a matter over which WCAT has no jurisdiction. The second is the statutory or policy basis for awarding interest on retroactive vocational rehabilitation benefits.

Turning to the first issue, under section 239(2)(c) of the Act, Review Division decisions with respect to vocational rehabilitation assistance may not be appealed to WCAT. Since WCAT has no jurisdiction over the merits of the Review Division decision, it would seem to follow that WCAT has no jurisdiction over a matter, such as interest, which is incidental to the matter over which WCAT has no jurisdiction.

If I am wrong on that, however, I would find no statutory or policy basis for awarding interest on retroactive vocational rehabilitation benefits. This issue was canvassed at some length in Appeal Division Decision #2001-0972 (17 *Workers' Compensation Reporter* 4, page 547). In that case, the panel determined that there was no statutory entitlement to interest on retroactive benefits except in the limited situations expressly addressed in the Act. The panel concluded that the governing body of the Board has the authority to establish policies regarding the payment of interest with respect to other benefits and situations (not provided for in the Act). The policy at item #50.00, however, provided for the payment of interest only with respect to the wage loss and pension benefits. The policy did not provide for the payment of interest on rehabilitation benefits. Accordingly, in the absence of circumstances which would allow for deviation from the policy, the worker was not entitled to interest on vocational rehabilitation. I agree with the reasoning in that decision.

Since that decision was issued, item #50.00 has been amended. However, the policy still does not provide for the payment of interest on vocational rehabilitation benefits. In addition, the amendments enacted on March 3, 2003 provide that WCAT must apply an applicable policy. Pursuant to section 251(1) of the Act WCAT may refuse to apply a policy of the Board of Directors only if the policy is patently unreasonable. Section 251(2) established the procedure that the WCAT panel must follow in that event. The representative has made no argument that the policy at item #50.00 is patently unreasonable.

In conclusion, even if WCAT has the jurisdiction to address the question of interest on a vocational rehabilitation matter, which I believe it does not, there is no authority under the Act or the policies to grant interest on an award of retroactive vocational rehabilitation assistance.

Legal Costs/Expenses

On the question of costs, the representative submits that the VRC assigned to assist the worker repeatedly disregarded appellate decisions and frustrated any reasonable attempt to provide appropriate or adequate rehabilitative services to the worker. The VRC's conduct was "flagrant and abusive, and should expose the Board to appropriate sanctions." He states that the worker is seeking legal costs or fees "with respect to his having to unnecessarily appeal illegal (or at least, patently unreasonable) decisions."

The representative goes on to make an argument that the review officer had the jurisdiction to award legal fees and costs pursuant to section 100 of the Act and item #100.70 of the *Rehabilitation Services and Claims Manual*, Volume ll. He submits that the review officer's failure to do so is a "failure of jurisdiction."

The representative then goes on to say that "[The worker] is not seeking legal fees and costs for this specific appeal; he is seeking his legal fees and costs for having to undertake several unnecessary appeals when faced with repeated illegal (or at least, patently unreasonable) decisions by a Board Officer." He notes that section 6(c) of the Regulation provides that WCAT may award costs where there are exceptional circumstances and he submits there are exceptional circumstances "which make it unjust to deprive [the worker] of his costs for all unnecessary appeal proceedings until now." The representative referred to several WCAT decisions in which panels had considered the jurisdiction of WCAT to consider legal fees

under section 100 of the Act and under section 6(c) of the Regulation. He submits that the "strongest ground for the granting of legal fees and costs arises from the Board's flagrant abuse of its powers and consequentially of this worker's rights, not once but several times."

The gist of the representative's argument with respect to legal costs appears to be that the Board should be ordered to pay the worker's legal costs as a penalty for improper dealings with the worker. The representative has cited no statutory provision or policy enabling WCAT to make such an award.

As previously noted, section 239 of the Act establishes the classes of decisions that may be appealed to WCAT. Only certain final decisions of a review officer may be appealed to WCAT. In this regard, I note that the representative initiated the appeal with regard to legal costs by submitting a notice of appeal of Review Division Decision #17297. In his submission, however, he states that the appeal with respect to legal costs is far broader and apparently does not even include the decision respecting costs made in Review Division Decision #17297.

WCAT has no jurisdiction beyond that established by statute. This includes the jurisdiction established under section 239 of the Act and several other sections which have no relevance to this appeal. The full extent of WCAT's jurisdiction as established by the Act is set out under item 2.00 of the MRPP. Furthermore, under section 253(1) of the Act, WCAT is empowered to "confirm, vary or cancel the appealed decision or order." There is no general authority to make orders or give directions outside of the context of a decision which is properly before WCAT. Section 6 of the Regulation must be read within the context of the Act under which the Regulation was promulgated. Given the clear limitations on the authority of WCAT to make orders or give directions, I do not consider that section 6 of the Regulation may be read so as to extend that power and enable WCAT to make an order for costs or expenses unrelated to an appeal that is before the WCAT panel.

There is no authority to address issues of legal costs related to decisions and appeals that have not been directly addressed in the decisions that form the basis of an appeal. In this case, that is the Board decision of May 3, 2004 and Review Division Decision #17297. These decisions both deal with vocational rehabilitation assistance. Under section 239(2)(c) of the Act, Review Division decisions with respect to vocational rehabilitation assistance may not be appealed to WCAT.

In Decision #2004-06308, a WCAT panel addressed the analogous issue of legal costs in relation to a pension commutation decision. In that case the worker's representative appealed a Review Division decision denying legal costs. The substantive decision before the Review Division had been the commutation of the worker's pension.

The panel in Decision #2004-06308 reasoned as follows:

> Section 239(2)(a) further provides:
>
> (2) The following decisions made by a review officer may not be appealed to the appeal tribunal:
>
> (a) a decision in a prescribed class of decisions respecting the conduct of a review;

Section 224(2)(j) of the Act provides that the Lieutenant Governor in Council may make regulations as follows:

(j) prescribing any decisions or orders under this Act or the regulations that may be appealed to the appeal tribunal under Part 4, prescribing who may appeal those decisions or orders and prescribing classes of decisions for purposes of section 239(2)(a); . . .

Section 4(e) of the Appeal Regulation provides:

4 For the purposes of section 239(2)(a) of the Act, the following are classes of decisions that may not be appealed to the appeal tribunal:

(e) decisions respecting the conduct of a review if the review is in respect of any matter that is not appealable to the appeal tribunal under section 239(2)(b) to (e) of the Act.

I am inclined to the view that the decision on the worker's request for legal fees, in connection with his request for review of the decision to deny his commutation request, was a decision respecting the conduct of the review. I note, in this regard, that under section 7 of the Appeal Regulation, WCAT's authority to order the Board to pay expenses (such as the reimbursement of medical-legal reports) is limited to situations where the evidence was submitted to WCAT. If the subject matter of the appeal cannot be appealed to WCAT, there would be no opportunity to submit the evidence to WCAT. As well, section 7(2) of the Appeal Regulation provides that WCAT cannot order the Board to pay legal expenses, and the policy of the Board of Governors also provides that legal expenses will not be paid by the Board. To the extent the phrase "conduct of a review" is ambiguous, I interpret this as extending to consideration of issues relating to the costs and expenses associated with the review. Alternatively, the decision regarding the worker's request for legal fees may simply be viewed as part of the decision regarding the commutation request, which is not appealable to WCAT.

On the basis of this reasoning, an appeal cannot be brought to WCAT regarding a request for reimbursement of legal fees or other expenses, if the subject matter addressed in the Review Division decision is not appealable to WCAT under section 239(2)(b) to (e) of the Act. I find that as the Review Division decision concerning the worker's commutation request was not appealable to WCAT, it is not within WCAT's jurisdiction to hear the worker's appeal on the issue of legal fees alone.

I agree with the panel's reasoning in Decision #2004-06308 and find that, for the same reasons, WCAT does not have jurisdiction to hear an appeal on the sole issue of legal costs in the present case.

Conclusion

It is questionable whether WCAT has the jurisdiction to address an appeal regarding interest with respect to an award of retroactive vocational rehabilitation assistance. If WCAT has jurisdiction to address this question, I find that neither the Act nor the policies provide for the payment of interest on such an award.

WCAT does not have jurisdiction to address a request for legal fees and costs related to appeal proceedings outside of its jurisdiction to address an appeal of a final decision of a review officer under section 239 of the Act. WCAT does not have the jurisdiction to hear an appeal on the sole issue of legal costs with respect to a final decision of a review officer on vocational rehabilitation expenses.

I confirm the implied decision in Review Division Decision #17297 denying interest on retroactive vocational rehabilitation assistance benefits.

Decision of the Workers' Compensation Appeal Tribunal

Number: WCAT-2005-04416-ad
Date: August 23, 2005
Panel: Herb Morton, Vice Chair
Subject: Section 11 Determination

Introduction

The plaintiff suffered an injury to his left knee while at work on September 22, 1990. His application for workers' compensation benefits was accepted by the Workers' Compensation Board (Board). He underwent surgery on October 19, 2000 for a total left knee replacement. This surgery, which was accepted under his workers' compensation claim, was performed by the defendant, Dr. James C. Rose. The plaintiff has brought a legal action against Dr. Rose, alleging negligence in relation to the surgery. Dr. Rose was registered with the Board as an employer, but had not purchased Personal Optional Protection coverage from the Board.

This application was initiated by plaintiff's counsel on December 3, 2001 to the former Appeal Division of the Board. No examination for discovery has been conducted. Mr. Paterson has provided written submissions on behalf of the plaintiff dated December 16, 2004, April 14, 2005 and June 7, 2005. Mr. McJannet has provided written submissions on behalf of the defendant dated February 18, 2005 and May 3, 2005. Counsel have also provided letters dealing with preliminary or procedural matters. Although invited to do so, the plaintiff's employer is not participating in this application. The legal action was initially scheduled for trial on March 21, 2005, but this was rescheduled to April 3, 2006.

Issue(s)

The plaintiff's legal action alleges negligence in the provision of medical treatment for his work injury. At issue are the status of the plaintiff and his surgeon at the time of surgery, some ten years after the plaintiff's original work injury to his left knee. Related questions involve the effect of the January 20, 2004 policy amendments concerning the status of treatment injuries, and whether any significance attaches to the fact the defendant had not purchased Personal Optional Protection coverage from the Board.

Jurisdiction

This application for a determination under section 11 of the *Workers Compensation Act* (Act) was filed with the Appeal Division before March 3, 2003. Effective March 3, 2003, section 11 of the Act was repealed, and the Workers' Compensation Review Board (Review Board) and Appeal Division were replaced by the Workers' Compensation Appeal Tribunal (WCAT). These changes were contained in *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63).

WCAT has jurisdiction to provide a certificate to the court under section 257 of the amended Act. However, as this application was pending before the Appeal Division on March 3, 2003, it must be completed as a proceeding before WCAT pursuant to section 39(1)(c) and 39(2) of the transitional provisions contained in Part 2 of Bill 63. Accordingly, WCAT will consider this application under the former section 11. In doing so, WCAT must apply the policies of the Board of Directors pursuant to sections 250(2) and 251 of the amended Act. Section 42 of the transitional provisions further provides:

> As may be necessary for the purposes of applying sections 250(2) and 251 of the Act, as enacted by the amending Act, in proceedings under sections 38 (1) and 39 (2) of the amending Act, published policies of the governors are to be treated as policies of the board of directors.

Section 11 of the Act obliged the Board to make determinations and provide a certificate to the court regarding certain matters relevant to a legal action. Pursuant to section 255 of the Act, a WCAT decision is final and conclusive and is not open to question or review in any court. The court determines the effect of the certificate on the legal action.

Preliminary

Many preliminary and procedural matters have been raised by plaintiff's counsel. My findings regarding the main such points are set out below. Other questions and requests were raised which are not specifically addressed in these reasons. Although those submissions were considered, I do not consider it necessary to expressly address every such point in my reasons. In the text *Administrative Law in Canada*, Third Ed. (Ontario: Butterworths, 2001), Sara Blake states at page 86:

> To be of any value to parties, reasons should explain how the tribunal reached its conclusions, both on fact and on law or policy. The essential findings of fact on which the decision is based should be stated and explanations should be given for rejecting important items of evidence pertaining to the central facts in issue, including an explanation of findings of credibility. If an application is dismissed by reason of insufficient evidence, the material deficiencies in the evidence should be identified. . . . If a statute requires that certain factors be considered before a decision is made, those factors should be discussed in the reasons. A significant departure from precedent should be explained. *However, reasons need not be given on every minor point raised during the proceeding nor must reference be made to every item of evidence.*
>
> [emphasis added]

These reasons focus primarily on the central issues in this application. To the extent additional questions or requests raised by counsel are not expressly addressed in these reasons, it may be inferred that I did not consider it necessary to grant the request or pursue the line of inquiry identified by counsel, in making my decision.

(a) Method of Hearing

Plaintiff's counsel requested an oral hearing. By preliminary determination dated November 3, 2004, I denied this request for the following reasons:

> I consider that the issues raised in this application primarily concern questions of law and policy, which are better addressed by way of written submissions. I also note that plaintiff's counsel has expressed the wish to engage in a far-ranging examination of Dr. Rose. It is open to him to pursue such inquiries by way of an examination for discovery. It does not appear that there is any issue of credibility arising in this application.

Upon further review, I find that the issues raised in this application can be properly considered on the basis of written evidence and submissions without an oral hearing, for the reasons previously expressed.

(b) Panel Assignment

By submission of December 16, 2004, Mr. Paterson requested a different panel assignment on the basis of a reasonable apprehension of bias. By memo of December 20, 2004, I advised that if he had any specific concerns he should identify these for consideration, bearing in mind the comments of the BC Court of Appeal in *Lorna Adams* v. *Workers' Compensation Board*, [1989] 42 BCLR (2d) 228 (see WCAT Decision #2004-03794). This objection does not appear to have been pursued in counsel's subsequent submissions (apart from general arguments that WCAT is not "independent" of the Board). I consider it appropriate, in any event, to proceed with consideration of this application.

Mr. Paterson further requested that a "precedent panel" be appointed under section 238(6) of the Act (see also item #8.20 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP)). This request was considered by the WCAT chair, who confirmed her November 2, 2004 assignment of this application to this one-member panel under section 238(4) of the Act.

(c) Charter

A Charter argument was raised by plaintiff's counsel. No notice was provided to the provincial or federal attorneys general. Effective December 3, 2004, WCAT's authority to address Charter issues was removed by section 44 of the *Administrative Tribunals Act* (ATA). Section 44 of the ATA provides:

> (1) The tribunal does not have jurisdiction over constitutional questions.
>
> (2) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.

Given the lack of notice to the attorneys general and section 44 of the ATA, I find no basis for addressing the application of the Charter in my decision.

(d) Interest Groups

Plaintiff's counsel requested that a number of interest groups be invited to participate in this application. WCAT has authority to invite such participation under section 246(2)(i) of the Act (see also MRPP item #4.37). Both parties in this application were represented by legal counsel, who provided full submissions. I did not consider it necessary to invite additional persons to participate. This application involved a lengthy submissions process, in which the trial date has already been postponed. In this context, I did not consider it appropriate to extend the process for obtaining submissions by inviting other groups to participate.

Status of the Plaintiff

The plaintiff suffered a left knee injury while working as a millwright on September 22, 1990. At that time, the plaintiff was employed by International Forest Products Ltd., a company registered with the Board under account number 62251. The worker submitted a claim for workers' compensation benefits, which was accepted by the Board. A decision letter on the claim file dated November 14, 2000 summarized the history of the worker's claim as follows:

> . . . you sustained a left knee injury on September 22, 1990. At that time, the claim was accepted for a left knee contusion and bucket handle tear of the left medial meniscus. You had surgery on January 18, 1991, and after recovering from the surgery you returned to work.
>
> In 1998 you developed increased left knee pain and discomfort. You were referred to the WCB Visiting Specialist's [*sic*] Clinic and saw Dr. Vaisler, Orthopaedic Surgeon. Dr. Vaisler obtained diagnostic tests and these tests showed that you had developed tricompartmental osteoarthritis. On March 26, 1999 he performed an arthroscopic debridement and the osteoarthritis was accepted under this claim. It is my understanding that in May 1999 you returned back to work.
>
> On March 2, 2000, Dr. Rose, Orthopaedic Surgeon, examined you and recommended that if you were not able to work because of left knee pain he would consider a total left knee replacement. On March 6, 2000 you stopped work because of left knee pain and discomfort, and wage loss benefits were re opened. . . .
>
> On October 19, 2000, Dr. Rose performed a total left knee replacement.

By decision letter dated November 22, 2000, the worker was advised that his surgery and subsequent disability and time loss from work had been accepted by the Board. In total, the worker has received 1,213 days of wage loss benefits, and 299 days of rehabilitation benefits under his WCB claim.

The worker's statement of claim, filed in the legal action on May 1, 2002, alleges that the Defendant "was negligent in the preparation and/or performance of the 19 October 2000 left knee replacement surgery and/or the Plaintiff's post-operative care." In October, 2000, section 10(1) of the Act provided as follows:

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

Section 11 of the Act provided:

> Where an action based on a disability caused by occupational disease, personal injury or death is brought, the board must, on request by the court or by any party to the action, determine any matter that is relevant to the action and within its competence under this Act and, without limiting the generality of the foregoing, may determine whether
>
> (a) a person was, *at the time the cause of action arose*, a worker within the meaning of this Part;
>
> (b) injury, disability or death of a worker arose out of, and in the course of, the worker's employment;
>
> (c) an employer or the employer's servant or agent was, at the time the cause of action arose, employed by another employer; and
>
> (d) an employer was, at the time the cause of action arose, engaged in an industry within the meaning of this Part,
>
> and must certify its determination to the court.
>
> [emphasis added]

The first issue to be addressed in this application is whether the plaintiff was, at the time the cause of action arose, a worker within the meaning of Part 1 of the Act. As the plaintiff's cause of action relates to the performance of surgery, this refers to the time the worker underwent surgery in October, 2000 rather than to the time he initially injured his knee at work on September 22, 1990.

Decision No. 152, *Re Injuries Arising Out of Treatment and Other Appointments*, November 6, 1975, 2 *Workers' Compensation Reporter* 186, established the compensability of treatment injuries. However, that decision concluded by commenting (at page 190):

> Where a subsequent injury within the scope of this directive is accepted as compensable, it is not accepted on the ground that the injury is one arising out of and in the course of employment. It is accepted on the ground that the

> subsequent injury is a compensable consequence of the original injury. Thus the provisions of Section 10 might not apply to any tort claim arising out of the subsequent injury.

Applications for certificates under section 11 of the former Act concerning treatment injuries gave rise to two lines of analysis. In the first line of cases, it was held that such treatment injuries arose out of and in the course of a worker's employment: Appeal Division Decisions #92-1899 (November 27, 1992), #93-1399 (October 6, 1993), #00-1587 (October 10, 2000), #2002-0003 (January 2, 2002), and #2002-0607 (March 7, 2002). Most notably, Appeal Division Decision #93-1399 (10 *Workers' Compensation Reporter* 603) was the subject of an application for judicial review. Ultimately, by decision dated January 20, 2000, in *Kovach* v. *BC (WCB)*, (2000) 184 DLR (4th) 415, [2000] 1 SCR 55, the Supreme Court of Canada found as follows:

> We are all of the view, substantially for the reasons of Donald J. A. in the British Columbia Court of Appeal, to allow the appeal, set aside the judgment of the Court of Appeal, and restore the s. 11 certificate order of the Workers' Compensation Board, with costs to the appellant Dr. Singh here and in the courts below.

Accordingly, the petition for judicial review of Appeal Division Decision #93-1399 was dismissed. The judgment of the British Columbia Court of Appeal, with Mr. Justice Donald's dissenting reasons, is found at [1999] 1 WWR 498, (1998) 52 BCLR (3d) 98.

A second line of cases applied a different interpretation of the former policies. This new approach was set out in Appeal Division Decisions #2002-1445 (June 11, 2002), #2003-0120 (January 20, 2003), and #2002-3030 (December 2, 2002), and WCAT Decision #2003-02257 (August 28, 2003). Appeal Division Decision #2002-1445 found, in paragraph 61, that while the prior approach had been upheld as viable on judicial review, this conclusion rested on the strength of the Board's privative clause rather than constituting agreement by Court with the Appeal Division decision in *Kovach*. Appeal Division Decision #2002-3030 reasoned (at paragraphs 89–94):

> The historical approach, whereby a treatment injury is recognized as an injury arising out of and in the course of employment for the purposes of section 10, is a long established practice which forms part of this larger scheme of compensation for workers and the rights of potential litigants. As a result, it is a concern that a different interpretation of the *Act* which potentially affects the entitlement of a worker or the immunity provisions may have unintended consequences.
>
> This concern was articulated by the panel in Decision #2002-0607, supra, which decided that any new interpretation of section 10 of the *Act* should be implemented by statutory amendment or policy revision. I consider this a very sound argument given the interrelationships involved and the complexity of the system. The value of consistency in decision making in this area also cannot be overestimated.
>
> On the other hand, it is difficult to arrive at a conclusion that an alleged injury caused by surgery is an injury arising in the course of employment on the basis of any rational analysis that is consistent with principles of compensation law. There is a good deal of similarity between Mr. Justice Tysoe's definition of the

phrase "arising out of and in the course of employment" and that of Professor Larson. Both indicate that the fundamental relationship which must be established is one of work causation (to paraphrase Justice Tysoe) or work connection, in the words of Professor Larson. When used as the threshold test for determining entitlement to compensation it is necessary to establish both aspects of the test to some minimal degree. It is conceivable that this phrase could support an alternative interpretation for the purposes of section 10 of the *Act*. But, in the absence of any foundation for an alternate interpretation in compensation law, the *Act* itself, or the policies, such an approach would fly in the face of the most basic rules of statutory interpretation.

In addition, there is substantial authority for the payment of compensation in relation to treatment injuries as compensable consequences and this goes some distance towards addressing the policy considerations raised by Mr. Justice Donald. Given these factors, it is difficult to find any sound basis in the legislation or policies for concluding that an injury allegedly caused by surgery arises in the course of employment. Even if one accepts that something occurred in the course of surgery which could be viewed as an "accident", thereby bringing into play the statutory presumption under section 5(4) of the *Act*, I would find that the presumption was rebutted by the fact of the worker being on a surgical table at the time the accident occurred.

If it is the intent of the legislature and/or the Board that these injuries have the status of injuries arising out of and in the course of employment, clear policy direction, or more likely, statutory amendment may be necessary. In the absence of such direction, I find that the alleged injury arose out of the employment in that there remained a sufficient work connection to establish this aspect of the test; I find, however, that it did not arise in the course of employment.

In summary, I find that the plaintiff was a worker under Part 1 of the *Act* at the time of surgery but any alleged injuries caused by the surgery did not arise out of and in the course of employment.

[emphasis added]

In WCAT Decision #2003-02257, a three-member panel followed this second line of analysis. Both lines of analysis noted the lack of clear guidance in policy regarding the status of treatment injuries, and the fact that this issue might be one on which legislative or policy guidance would be helpful.

The status of treatment injuries was identified as a policy issue for the Board of Directors. A discussion paper concerning this issue was posted on the Board's web site for public comment by stakeholders (currently accessible as an archived policy discussion paper at: http://www.worksafebc.com/regulation_and_policy/archived_information/policy_discussion_papers/default.asp). That paper succinctly outlined the background to this policy issue as follows (with footnotes placed within the text):

3.3 How This Issue Arose

As early as 1980, the WCB, when requested to determine the status of parties to a legal action, routinely characterized treatment injuries as arising out of and in the course of the worker's employment. [Footnote 4: The case *Smith* v. *Vancouver General Hospital* (1981), 31 BCLR 358 indicates that as early as 1980, the WCB provided certificates to court under section 11 of the *Act* describing treatment injuries as arising out of and in the course of employment. The Appeal Division panel in *Kovach* also noted that the WCB routinely made such determinations.] The Supreme Court of Canada upheld this approach in January 2000 in *Kovach* v. *British Columbia (Workers' Compensation Board*) ("*Kovach*"). [Footnote 5: [2000] 1 SCR 55; 2000 SCC 3.]

In *Kovach*, a worker, who was injured during surgery for a work injury, attempted to sue her treating surgeon for negligence. The former Appeal Division was requested to determine the status of the parties under the *Act* so that the court could then decide whether the statutory bar prevented the worker from suing the surgeon.

The Appeal Division panel in *Kovach* found that the treatment injury arose out of and in the course of the worker's employment. [Footnote 6: Appeal Division Decision No. 93-1399.] As the panel also found that the surgeon was a worker under the *Act*, the ultimate result was that section 10(1) of the *Act* barred the worker from suing the surgeon for negligence.

The Supreme Court of Canada found that the decision of the Appeal Division panel was not patently unreasonable. This means that the Court found that the *Act* supported the Appeal Division panel's decision on the treatment injury in question. It does not mean, however, that the Court necessarily endorsed the approach in *Kovach* as the only interpretation of the *Act*. As a result, subsequent Appeal Division panels found that the Court's decision did not preclude them from adopting alternative approaches to the issues raised in *Kovach*, as long as they were consistent with the *Act*.

In the years following the Court's decision in *Kovach*, two lines of cases emerged from the Appeal Division. One line of cases followed the reasoning in *Kovach*, with the result that a worker could not sue a treatment provider who was either a worker or an employer for treatment injuries.

The second line of cases adopted a different approach, finding that a treatment injury is a compensable consequence of a work injury, but does not arise out of and in the course of employment. The implication of this second line of cases is that the statutory bar to legal action does not apply, leaving the worker with the choice of either suing the treatment provider for negligence or receiving workers' compensation benefits, or possibly pursuing both of these options at once.

A WCAT decision was recently released on this issue. [Footnote 7: WCAT Decision 2003-02257 was issued on August 28, 2003.] The case involved an injured worker who sustained a further injury while travelling to an

appointment with a pain management specialist. The worker was injured when the taxi he had just entered was struck from behind by a second taxi. The worker's subsequent injury was compensable. However, the WCAT adopted the second line of reasoning described above, finding that the injury did not arise out of and in the course of employment. As a result, the worker was free to sue the second taxi driver, who was a worker under the *Act*, and the taxi company, which was an employer. As the WCAT is generally not bound by precedent, it is uncertain whether future WCAT panels will also follow this line of reasoning.

As a result of the inconsistent decisions that have emerged from the Appeal Division and the uncertainty about how future WCAT panels will view this issue, the status of treatment injuries is unclear. In particular, it is uncertain whether a worker may elect to sue a treatment provider for negligence, or whether section 10(1) of the *Act* bars legal action against a treatment provider who is either a worker or an employer.

The discussion paper identified three options and invited feedback on these options, or any additional comments, by December 12, 2003.

By resolution dated January 20, 2004, the Board of Directors approved policy amendments regarding the status of treatment injuries (Resolution No. 2004/01/20-01, *Re: The Status of Treatment Injuries*, 20 *Workers' Compensation Reporter* 1, also accessible at: http://www.worksafebc.com/regulation_and_policy/policy_decision/board_decisions/2004/default.asp). The resolution stated in part:

THE BOARD OF DIRECTORS RESOLVES THAT:

1. Amendments to policy items #22.00, #22.10, #22.11, #22.15 and #22.21 of the *RS&CM*, Volume II, attached as Appendix A, are approved and apply to all decisions, including appellate decisions, made on or after February 1, 2004, regardless of the date of the original work injury or the further injury.

2. Policy item #74.11 is deleted and amendments to policy item #111.10 of the *RS&CM*, Volume II, attached as Appendix B, are approved effective February 1, 2004.

3. Decision No. 152 of the *Workers' Compensation Reporter*, Volume 2 is retired effective February 1, 2004.

4. This resolution is effective February 1, 2004.

Policy item #22.00 of Volume II of the *Rehabilitation Services and Claims Manual* (RSCM II) was amended as follows:

Not all consequences of work injuries are compensable. A claim will not be reopened merely because a later injury would not have occurred but for the original injury. Looking at the matter broadly and from a "common sense" point

> of view, it should be considered whether the ~~previous~~ *work* injury was a significant cause of the later injury. *If the work injury was a significant cause of the further injury, then the further injury is sufficiently connected to the work injury so that it forms an inseparable part of the work injury. The further injury is therefore considered to arise out of and in the course of employment and is compensable.*
>
> [reproduced as written]

The new policy had the effect of adopting the approach applied in the *Kovach* decision. Under section 82 of the Act, the Board of Directors has authority to provide policy direction for the workers' compensation system. Even if the *Kovach* line of analysis represents a strained interpretation of the Act, it has been found by the courts to be legally viable (not patently unreasonable). Section 251(1) of the Act provides that WCAT 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. In view of the court decisions in the *Kovach* case, it is clear that the policy direction provided by the Board of Directors is viable under the Act.

By submission dated April 14, 2005, plaintiff's counsel argues at paragraph 27 that:

> . . . there is no evidence that the "board of directors" solicited representations from surgical patients or from disabled workers, such as the Plaintiff. The failure to give notice to the Plaintiff was a breach of the common law rules of natural justice and renders the decision void, certainly of no force and effect in relation to the Plaintiff.

For the purposes of my decision, I do not consider it necessary to determine whether the Board of Directors had a legal obligation to consult with stakeholders prior to approving policy amendments. Even if such a duty existed, an opportunity for public comment by stakeholders was provided by the Policy and Regulation Development Bureau. I adopt, in any event, the reasoning expressed in the June 2004 WCAT Decisions #2004-03362, 03429, 03430, 03431, and 03445 (flagged as noteworthy on WCAT's internet site at: http://www.wcat.bc.ca/research/noteworthy_decisions.htm):

> In considering which option to choose, and in ultimately formulating *Resolution 2003/02/11-06*, which adopted option 4, the board of directors needed to weigh the advantages and disadvantages of at least five different options. Those advantages and disadvantages included considering the impact of the options on other employers in the classification system, the problem of cross subsidization of industries, the need to treat employers fairly, the Board's interest in maintaining effective operating systems, and the need to try to adhere to current published Board policy (or at least the spirit of it). Therefore I am satisfied that *the Resolution 2003/02/11-06, including its aspect relating to the interim effective date of January 1, 2002 for the new lower assessment rate for resort timeshare employers, was the exercise of a quasi-legislative function (or a policy-making function) by the board of directors. The needs of employers who fell into the new resort timeshare classification were considered by the Board, and those employers were undoubtedly affected by the Resolution. But I find that they did not*

have, as individual firms, legal procedural rights requiring the board of directors to engage in a process of direct consultation with each employer or a designated representative of each employer.

With that in mind, I have found no breach of natural justice or unfairness in the way the Board developed *Resolution 2003/02/11-06*. In the context of its policy-making function, the Board's process for developing the Resolution was reasonable.

[emphasis added]

The January 20, 2004 policy resolution concerning the status of treatment injuries gave rise to a further interpretive issue regarding the wording of its effective date. On the one hand, the resolution stated that it would "apply to all decisions, including appellate decisions, made on or after February 1, 2004, regardless of the date of the original work injury or the further injury." This broad wording would by itself provide clear and unambiguous direction that the policy was not intended to be limited in any fashion, with reference to the date of the original work injury or the further injury. On the other hand, the policy resolution only approved amendments to RSCM II. No amendments to the *Rehabilitation Services and Claims Manual*, Volume I (RSCM I) were approved by the Board of Directors under section 82 of the Act. The scope of Volume II of the RSCM is explained in Chapter 1 of the RSCM II:

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 and surviving dependants. 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. In terms of benefits for the surviving dependants of a deceased worker, the policies in Volume II apply where the worker's death occurred on or after June 30, 2002.

Due to the fact that Volume I covers a finite group of injured workers and surviving dependants, 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 and deaths 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.

This wording was approved by the Board of Directors on June 17, 2003 (Resolution 20030617-03, *Re: Amendments to Chapter 1, Volumes I and II, Rehabilitation Services & Claims Manual*), as a clarification of the policies previously approved effective June 30, 2002 and October 16, 2002.

The effect of the application statement in the January 20, 2004 resolution has been considered in three WCAT decisions. WCAT Decision #2004-01325 dated March 16, 2004 concerned a worker who suffered a work injury in January 2000. She brought a legal action for alleged negligence with respect to the prescribing of a medication in July 2001. The WCAT panel reasoned:

> Any injury suffered by the plaintiff in July 2001 would not be subject to the policies in RSCM 2 revised by the recent resolution. Those revised policies would be applicable to injuries that occurred on or after June 30, 2002, but any July 2001 injury took place almost a year earlier. RSCM 1 would apply to any July 2001 injury.
>
> The resolution did not revise polices in RSCM 1. The versions of #22.00, #22.10, #22.11, #22.15 and #22.21 in that manual continue to be applicable to injuries that occurred before June 30, 2002. Notably, while those polices indicate that an injury arising out of treatment is compensable they do not indicate that the injury arises out of and in the course of employment. Thus the analysis in the recent Appeal Division and WCAT decisions continues to be applicable to the case before me.

Another case concerned an appeal by a worker regarding whether the prednisone administered to him in July 1989 activated his diabetes. WCAT Decision #2004-02097 dated April 26, 2004 found the worker's diabetes was a compensable consequence of his compensable left wrist injury in 1988. The panel commented in that decision:

> I note that the policies dealing with treatment injuries have been amended recently but I do not consider that those amendments apply to this appeal. On this point I agree with the analysis contained in WCAT Decision #2004-01325-AD which is accessible on the WCAT web site.

However, a different interpretation was applied in a third WCAT decision. WCAT Decision #2004-02972 dated June 3, 2004 concerned a worker who suffered an injury to his tooth on December 27, 1998, while eating food provided by his employer at its "bunkhouse" at a remote mining camp. In an application for a certificate under section 11 of the Act, the WCAT panel found that the worker's initial tooth injury was a compensable work injury. The panel further determined that the worker's dental treatment in 1999 involved a compensable consequence of his work injury. With respect to the applicability of the new policy amendments, the WCAT panel noted:

> The policies concerning "compensable consequences of work injuries" are set out at item #22.00 and following in RSCM I and RSCM II. A note to item #22.00 in RSCM I, now provides as follows:
>
> > For all decisions, including appellate decisions, on or after February 1, 2004 refer to policy item #22.00 of Volume II of this

> *Manual* regardless of the date of the original work injury or the further injury.
>
> This note is repeated for items #22.10, #22.11, #22.15, and #22.21. *The note itself does not qualify as policy. The amendments to policy to which the note refers are policy.*
>
> [emphasis added]

With respect to the interpretation of the policy amendments, the WCAT panel concluded:

> I consider that I am required to apply the policies as amended effective February 1, 2004 and quoted at some length immediately above. The matter of which volume applies is a matter dictated by the policies themselves. I do not consider the fact that the amended policies appear in RSCM II to be of determinative significance. The resolution is clear that the amendments were intended to apply to all decisions including those of this body made after February 1, 2004.

By submission dated April 14, 2005, plaintiff's counsel objects both to the application of the reasoning in WCAT Decision #2004-02972, and to the application of the new policy, to this case (at paragraphs 25–26):

> . . . the Plaintiff was *not* asked to vote upon, nor consent to, the revised RSCM #22.00. Nor were disabled workers, in general, as alleged "stakeholders", consulted or allowed voting privileges. Furthermore, that policy does not apply because it came into effect almost 3.5 years *after* the cause of injury arose and almost 3 years after the Writ was filed.
>
> . . . the *Workers Compensation Act*, even the amended version, does *not* require nor authorize the retroactive or retrospective application of the statute nor of WCB policies; #22.00 does *not* state that it applies to medical treatment or surgery, conducted in 2000. And the Plaintiff was not a "party" to WCAT-2004-02972-AD. Furthermore, the *Act* explicitly provides that there is no system of legal precedent. Finally, the said "Appeal Tribunal" erred, in law, in general, and in *not* providing procedural due process notice to the Plaintiff, whose claim was already pending, on the Defendant's application, before the WCAT. WCAT knew, or ought to have known, that the Plaintiff's rights would be affected, prejudicially, by any adverse ruling in said case and notice should have been provided so that the Plaintiff could participate, as an intervenor or interested party, in WCAT-2004-02972-AD.
>
> [emphasis in original]

None of the WCAT decisions cited above were by precedent panels appointed under section 238(6) of the Act. Accordingly, there is no WCAT precedent panel decision binding on my consideration pursuant to section 250(3) of the Act. The applicable provisions are subsections 250(1) and (2), which provide:

> **250** (1) The appeal tribunal may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent.

(2) The appeal tribunal must make its decision based on the merits and justice of the case, but in so doing the appeal tribunal must apply a policy of the board of directors that is applicable in that case.

As the various Appeal Division and WCAT decisions are publicly accessible, and the parties have had the opportunity to comment on them, I find no breach of procedural fairness in relation to the fact the plaintiff was not invited to participate in relation to the making of WCAT Decision #2004-02972 dated June 3, 2004. In any event, there are competing interpretations expressed in the three prior WCAT decisions.

As stated in WCAT Decision #2004-02972 , the notes inserted in RSCM I referring readers to RSCM II do not constitute policy. In Board of Directors' Resolution No. 2003/02/11-04, *Policies of the Board of Directors*, February 11, 2003, published at 19 *Workers' Compensation Reporter* 1 (accessible at: http://www.worksafebc.com/publications/newsletters/wc_reporter/default.asp), the Board of Directors established the published policies of the Board of Directors effective February 11, 2003. The bylaw states, in part:

1.0 Policies of the Directors

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

(d) The *Rehabilitation Services & 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;

The comments included in the RSCM I and II regarding the "effective dates" of policy amendments, provided at the end of each item appearing in the new manual format, are not part of the policies approved by the Board of Directors. This explanatory material is inserted by the Board. Such notes may be viewed as flags regarding the existence of policy resolutions containing policy amendments, or as practice direction from the Board's administration concerning its interpretation of the effective dates provided in policy resolutions. In either case, such notes do not have the status of policy.

Thus, WCAT Decision #2004-01325 gave meaning to the aspect of the Board of Directors' policy resolution which approved policy changes only to RSCM II. However, WCAT Decision #2004-02972 took the plain wording of the policy regarding its effective date as determinative, rather than attaching significance to which volume of the RSCM contained the amendment. I consider that there is validity to both approaches. It is unfortunate that the policy resolution which was intended to provide clarity for the workers' compensation system regarding the status of treatment injuries itself contained an ambiguity regarding its effective date.

As a question of legal interpretation of the literal wording of the application statement, I would not disagree with the analysis set out in WCAT Decision #2004-01325. It is evident that the panel, in considering the effect of the policy amendment, sought to give meaning to each part of the wording of the policy. The fact that the policy amendment was limited to RSCM II was read as a limitation on the more general wording of the policy regarding its effective date. This approach was supported by the policy concerning the scope of the RSCM II. If it was intended that the policies in the RSCM II would also apply to cases in which the injury occurred prior to June 30, 2002, this would seem inconsistent with the policy concerning the scope of the RSCM II.

Section 8 of the *Interpretation Act*, RSBC 1996, c. 238 provides:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

The principles governing statutory interpretation may also be applied in relation to the interpretation of policy, subject to the provisions of the Act. It is evident that the status of treatment injuries was addressed as a policy issue by the Board of Directors for the purpose of providing clarity for the workers' compensation system, in connection with the two lines of analysis (i.e. as represented by the *Kovach* decision, and the different approach which was first expressed in Appeal Division Decision #2002-1445 dated June 11, 2002). The approach set out in *Kovach* was one which was followed by the Appeal Division in decisions between 1992 and 2002. A similar approach had apparently been previously applied by the former commissioners. The new approach, expressed in decisions between June 2002 to August 2003, was implicitly rejected by the Board of Directors in their provision of policy direction for the workers' compensation system. By policy amendment, the Board of Directors confirmed the longstanding approach illustrated by the *Kovach* decision.

Even if the Board of Directors' resolution is subject to the limitation identified in WCAT Decision #2004-01325, this would make the new policies effective from June 30, 2002. The prior policies of the Board of Governors (and Panel of Administrators) were interpreted as having similar effect during the preceding decade. The new approach articulated in June 2002 was not adopted by the policy-makers when the question as to the status of treatment injuries came to them for direction.

The Appeal Division and WCAT decisions issued prior to the policy amendments concerning the status of treatment injuries were provided in the context of ambiguous policies. Both interpretations were legally viable. Even if I treat the February 1, 2004 policy amendments as not binding on my consideration, the fact remains that the policy makers have resolved the ambiguity in the policies in a direction which restored the approach set out in *Kovach*. The alternative analysis expressed in Appeal Division Decision #2002-1445 has not been adopted by the policy-makers. Given the knowledge that this alternative approach was rejected in its infancy, it seems to me that the interests of consistency in decision-making favour an application of the same interpretation of the former policies as was expressed in *Kovach*. Viewing the matter broadly, and from a purposive perspective, I consider that I should apply the same interpretation to the former policies as was applied in Appeal Division decisions up to June 2002 (and which was expressly adopted as policy of the Board of Directors from at least June 30, 2002).

Accordingly, I consider that my decision should be the same whether I apply the *Kovach* approach in making my decision under the former policies, or apply the new policies as was done in WCAT Decision #2004-02972. This has the benefit of giving effect to the apparent intent of the policy-makers that the new policy would apply to all decisions, including appellate decisions, made on or after February 1, 2004, regardless of the date of the original work injury or the further injury.

It is not evident to me as to why the policy changes were limited to RSCM II. It may be that it was perceived that this would be sufficient, as this reached back almost to the date the first Appeal Division decision took a different approach. Alternatively, it may be that it was not recognized that there would still be cases awaiting consideration involving treatment injuries prior to June 30, 2002. It may also be that there was an intention to try to restrict policy changes to RSCM II, to minimize the complexity created by amendments to RSCM I. Whatever the reason, this created an ambiguity which could have been avoided by making the policy change to RSCM I and II, or by some other means to avoid the logical inference created by the related policy concerning the scope of RSCM II. That said, I am inclined to consider that if the policy-makers had intended to limit the new policy to cases in which either the work injury, or treatment injury, occurred on or after June 30, 2002, they would likely have said so directly in the application statement rather than leaving this to be inferred from amending RSCM II alone.

Assuming that the new policy was intended to be applied on a fully "retroactive" basis, the question may be posed as to whether the Board of Directors has authority to approve retroactive policies. I find, however, that this situation is analogous to the one addressed by the Alberta Court of Queen's Bench decision in *Skyline Roofing Ltd. v. Alberta (Workers' Compensation Board)*, [2001] 10 WWR 651, (2001) 34 Admin. LR (3d) 289, July 23, 2001. In the context of both the common law and statutory provisions in Alberta, the court reasoned:

> 67 Based on the general presumption against the retroactivity of subordinate legislation, and based on the distinction that the statute appears to draw between various types of decision-making mechanisms, I am not satisfied that s. 149.2 authorizes the Board to pass policies retroactively. Parties such as the Applicant are entitled to know the law in force at the time that they make decisions about their business. Generally, they should be entitled to assume that the effect of decisions made by them will not be reversed retroactively by legislation, unless that is expressly authorized by the statute. This is particularly so with respect to the Board's assessment policies. While the assessments are not a true tax, they are a compulsory statutory levy, and assessment policies should not be applied retroactively. It is unlikely that the Lieutenant Governor in Council has a general power to make retroactive regulations under s. 147, and it is unlikely that it was intended that for Board to have a wider power. I am accordingly not satisfied that the Board has any general authority to make retroactive policies. The question is therefore whether the Board or the Appeals Commission did in fact apply the policy retroactively, or whether there is any specific power to enact the labour pooling policy retroactively.
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> [reproduced as written]

Following a review of the background materials, the court found as follows:

> 70 This memorandum and the accompanying resolution make it clear that the Board did not regard the "pooling of labour" policy as it was defined in 1997 to be a new policy. The added provisions were intended merely to clarify a policy that the Board believed had been in force since 1982. The added provisions were merely to clarify some uncertainty that had arisen about the application of the policy. This decision about the scope of an existing policy is clearly one that is

> within the core jurisdiction of the Board, and it would be entitled to significant curial deference. The underlying assumption that the policy had been in place since 1981 can be rationally supported by the material before the Board, and is not patently unreasonable.

I find that the January 20, 2004 policy amendments by the Board of Directors regarding the status of treatment injuries were of similar effect, in clarifying an uncertainty that had arisen about the application of the former policy. The Board of Directors in effect confirmed the longstanding approach illustrated by the *Kovach* decision, as the approach to be applied in future decision-making effective February 1, 2004. The Alberta Court of Queen's Bench concluded that policy amendments aimed at clarifying and confirming the effect of a prior policy as it had been previously understood, did not offend the presumption against retroactivity. I find that the January 20, 2004 policy amendments were within the authority of the Board of Directors.

In making my decision, I have taken into account section 42 of the transitional provisions contained in Part 2 of Bill 63. As this application to the Appeal Division for a certificate under the former section 11 is being completed by WCAT under section 39 of the transitional provisions, section 42 provides that as may be necessary for the purposes of applying sections 250(2) and 251 of the Act, as enacted by the amending Act, in proceedings under sections 38(1) and 39(2) of the amending Act, published policies of the Governors are to be treated as policies of the Board of Directors. I do not consider that this transitional provision has the effect of making the February 1, 2004 policy amendments inapplicable. While for the most part the policies to be applied in this determination are the policies which were in effect at the time the cause of action arose (see WCAT Decision No. 2005-02939), I find that it was open to the Board of Directors to clarify the policies on a retroactive basis.

For the reasons set out above, I find that the plaintiff was a worker within the meaning of Part 1 of the Act, and any further injury suffered by the plaintiff as a result of negligence in his medical treatment and surgery for his left knee in or around October, 2000, arose out of and in the course of his employment. My decision is the same whether I treat the February 1, 2004 policy amendments as applicable, or whether I make my decision under the former policies. In the latter case, I consider it appropriate to take into account the fact that the alternate analysis expressed in Appeal Division Decision #2002-1445 and following, was ultimately not adopted by the policy makers. In the interest of consistency, I follow the interpretation applied in various Appeal Division decisions prior to June 2002, which has been expressly adopted as policy from at least June 30, 2002.

Status of the Defendant

The defendant, Dr. James C. Rose, has provided an affidavit sworn on February 16, 2005. He is an orthopaedic surgeon, licensed to practice in British Columbia. He provided treatment to the plaintiff between December 9, 1999 and February 21, 2001. Dr. Rose's office was at the Gateway Medical Building. He saw the plaintiff at his office at Gateway Medical Building, except on October 19, 2000 when he performed the total knee replacement surgery on the plaintiff. This surgery was performed at the Abbotsford MSA Hospital. Dr. Rose had one employee (not his spouse), who was his medical office assistant. Dr. Rose was registered with the Board as a private medical practice under registration number 575168 and paid assessments to the Board.

By memos of July 7, 2004 and October 15, 2004 (incorrectly dated as 2003), the Assessment Department confirmed Dr. Rose's registration as an employer effective September 23, 1996, under account #575168. The policy manager, Assessment Department, advised this was an active account to the date of his July 7, 2004 memo. I accept this evidence as correct. I find that Dr. Rose's affidavit, and the Assessment Department memos, provide sufficient evidence to establish that Dr. Rose was an employer at the time the cause of action arose.

Dr. Rose did not purchase Personal Optional Protection coverage for himself. If Dr. Rose had suffered an injury at work, he would not have been eligible to claim workers' compensation benefits.

Prior to January 1, 1994, the practice of medicine was not a compulsory industry listed in Schedule A to Part 1 of the Act. Effective January 1, 1994, pursuant to Bill 63, the *Workers Compensation Amendment Act, 1993*, section 2(1) of the Act was amended to apply "to all employers, as employers, and all workers in British Columbia except employers or workers exempted by order of the Board."

Section 2(2) further provided that the Board may direct that Part 1 of the Act applied on the terms specified in the Board's direction:

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

Section 10(9) of the Act provided:

> For the purpose of this section, "worker" includes an employer admitted under section 2(2).

Section 1 of the Act included within the definition of the term "worker":

> an independent operator admitted by the board under section 2(2).

Pursuant to sections 1 and 10(9) of the Act, an independent operator or an employer who registered with the Board and obtained Personal Optional Protection coverage under section 2(2) was considered a worker within the meaning of Part 1 of the Act.

Governors' policy at No. 20:30:20 of the *Assessment Policy Manual* provided:

> Where an independent firm is an employer, registration with the Board is *mandatory*. Partners or proprietors are not automatically covered unless Personal Optional Protection is in effect.
>
> [emphasis in original]

Governors' policy at 20:50:10 of the *Assessment Policy Manual* further provided:

> Personal Optional Protection coverage allows those individuals not automatically covered under the Act to obtain compensation coverage if desired. The following individuals must apply for Personal Optional Protection to be covered for compensation:
>
> 1. A proprietor of a business where it is not a limited company. . . .
>
> 2. Partners of a business where it is not a limited company.

Under the policies at No. 20:30:20 and No. 20:50:10, a proprietor or partner was not eligible for workers' compensation coverage for any injury or disease he might suffer as a result of his work activities unless he had Personal Optional Protection coverage. While Dr. Rose was registered with the Board as an employer, he did not elect to purchase Personal Optional Protection coverage. Thus, his status under the Act was only that of an employer, rather than that of a worker.

Two lines of analysis have developed in regard to such situations. Appeal Division Decision #93-0670, *Medical Malpractice Action (No. 1)*, 9 *Workers' Compensation Reporter* 731 (*Cesari*) concerned a doctor who had voluntarily registered with the Workers' Compensation Board as an employer, but did not obtain Personal Optional Protection. An action was brought for medical malpractice in relation to surgery performed on August 12, 1988. The panel reasoned in that decision (at pp. 732–733):

> The practice of medicine, on its own, is not a compulsory industry within Part 1 of the *Act*. It is included only on application. When an unincorporated private doctor's office is brought within Part 1 of the *Act* on application, no assessments are paid on the doctor's wages. That would be done only if the doctor took out Personal Optional Protection.
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> The employment activities of the office staff of a doctor's office would not include attending at operations at the hospital. The office staff would be concerned with the management of the office, the booking of appointments, accounting matters, etc. Those workers would be covered for compensation benefits for any injuries arising out of and in the course of that employment and their employer would be protected under Section 10(1) from any legal action based on those employment activities. Those activities define the employment relationship and "employment" for the purposes of Part 1 of the *Act* for the doctor's office.
>
> Here, none of the workers of Dr. Ellis's medical office were engaged in attending to Mr. Cesari at the hospital. Dr. Ellis was not attending there as a worker, as he was not a worker under Part 1 of the *Act*. Assessments were not paid on his earnings for attending to Mr. Cesari. He would not have been covered for compensation benefits if he had been injured while attending to Mr. Cesari. I cannot see how this comes within the employment relationship or "employment" within Part 1 of the *Act*. Dr. Ellis declined to bring his activities into "employment" under Part 1 of the *Act* by not taking out Personal Optional Protection.

> As he did not take out Personal Optional Protection to cover himself while engaged in those activities, I find that Dr. Ellis was not in the course of employment within the scope of Part 1 of the *Act* while attending to Mr. Cesari at the hospital.

Plaintiff's counsel similarly argues (paragraph 37, April 14, 2005) that the defendant's assessments paid only for the risks incurred by employing his medical office assistant "(and himself) — in an office, for office work — not for the risks incurred by operating on any patients."

That reasoning was followed in Appeal Division Decision #98-0728 dated May 12, 1998. However, this approach not followed in Appeal Division Decision #2001-2240 dated November 9, 2001, *Section 11 Determination (Craig Sidney Parker v. Ravinderjit Singh Kandola and Yellow Cab Company Ltd.)*, 18 *Workers' Compensation Reporter* 71. The *Kandola* decision concerned a taxi owner, who registered with the Board as an employer for his workers, but did not have Personal Optional Protection at the time of a motor vehicle accident. Kandola was driving the cab at the time of the accident. In *Kandola*, the panel critiqued the reasoning in *Cesari*, reasoning in part (at paragraphs 41–43):

> On its face, the definition of "employment" in Section 1 does not distinguish "employment" for workers or employers. For compensation purposes, the published policy is that coverage extends beyond the "work" for which the person is being paid. Item #14.00, RSCM, provides:
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> > Confusion often occurs between the term "work" and the term "employment". Whereas the statutory requirement is that the injury arise out of and in the course of employment, it is often urged that a claim should be disallowed because the injury is not work related or did not occur in the course of productive activity. There are, however, activities within the employment relationship which would not normally be considered as work or in any way productive. For example, there is the worker's drawing of pay. An injury in the course of such activity is compensable in the same way as an injury in the course of productive work.
>
> The *Cesari* decision would not apply the broad definition of "employment" articulated in the policy to employers seeking protection from suit. To the contrary, the person who is at the centre of the business activity, perhaps the only one whose effort generates the revenue and makes possible the jobs of the support staff, is not acting in the course of employment when doing the productive work at the core of the business plan.
>
> The fact that the employer fully funds the assessments on its workers' earnings is not mentioned in the *Cesari* decision, even though payment of assessments could be seen as the cost to employers for protection from suit.

The Appeal Division panel concluded that Kandola's action or conduct (in driving the taxi), alleged to have caused the breach of duty, arose out of and in the course of employment within the scope of this Part. He was an employer, meeting his obligations as an employer by paying

assessments on his workers' earnings to the Board. His not having Personal Optional Protection did not affect his status as an employer.

Similar issues were recently addressed in WCAT Decision #2005-01937 dated April 18, 2005 (*Siefred*). That decision was disclosed to the parties for comment on April 19, 2005. In *Seifred*, the panel considered the status of a dump truck driver, who registered with the Board and paid assessments for his casual employees. He did not have personal optional protection coverage, and did not have any employees on the date of the accident. The panel reasoned:

> The approach in Kandola requires a determination of whether the employer was conducting business activities as opposed to personal or other non-business activities when the impugned conduct occurred, whereas the approach in Cesari requires consideration of whether the employer was engaged in conduct related to the activities of the workers upon which assessments have been paid.
>
> On the whole, I find the reasoning of the panel in Kandola more persuasive than that in Cesari. I do not consider that the failure to purchase POP [Personal Optional Protection] is a significant factor when considering questions related to status as an employer. The consequence of failing to purchase POP is that an employer is not entitled to compensation if injured while working. I have found no policy, however, to support a conclusion that the failure to purchase POP has an impact on a party's status as employer.
>
> I also find that the facts in this case reveal some of the practical difficulties associated with the application of the reasoning in the Cesari case. In that case, the panel said that the registration of any firm concerns the employment activities of its workers and therefore the scope of employment activities for the surgeon *qua* employer was confined to the activities he performed in his role as an employer. Accordingly, the surgeon was only protected under section 10 for activities related to the management of his office staff. Since the conduct that formed the basis of the legal action against him was his conduct as a surgeon he was not protected from legal action.
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> That analysis seems appropriate and reasonable in relation to those facts because of the clear separation between the surgeon's role in relation to the office staff and his activities as a surgeon. It seems reasonable to treat his activities in relation to his office staff as employment activities and his activities in surgery as a realm of activity unrelated to his functions as an employer of office staff. On the other hand, there would be no reason to have office staff other than to support his activities as a surgeon and his activities as a surgeon financed the operation of the office and paid the wages of his staff. So, if the surgical practice is viewed as a whole with very different but interdependent parts, it is more difficult to carve out those activities which would attract the benefit of the bar as an employer's employment activities and those that would not.
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> The line of reasoning in Cesari becomes even more problematic when applied to a case where the employer performs the same work as his employees. On what basis does one delineate those activities which are his employment activities as

> an employer? Would the employer only have the benefit of the bar when completing paperwork? Or, perhaps he would have coverage while negotiating a bank loan or purchasing new equipment. If it extended to purchasing new equipment would that be limited to situations where his employees would be using the equipment? Would he have coverage if he purchased equipment that only he would be using? Would he have coverage when taking equipment in for servicing? Would it make a difference if it was equipment used only by him?
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> No principles have been articulated to assist in characterizing a particular activity for this purpose. There are numerous policies to assist in defining the parameters of employment activities for workers but these are not relevant to determining the employment activities of an employer. In the absence of any principles or guidelines, I do not consider it viable to embark on a task of carving out a set of duties or tasks that constitute an employer's employment activities for the purpose of obtaining the benefit of the bar.
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> In view of all of the above, I consider that the term "employment activities" in section 10(1) is intended to include an employer's activities in relation to his business as a whole as distinct from his personal activities. Since the defendant was driving a dump truck used by his business when the accident occurred and he was on his way to have the dump truck serviced, I find that his conduct at the time of the accident arose out of and in the course of his employment.

Although dealing with somewhat different aspects of this issue, various court decisions have upheld tribunal decisions which found that an employer's action or conduct could not be divided into different roles, or overturned tribunal decisions which recognized such distinctions.

(a) *Pasiechnyk v. Saskatchewan* (WCB), [1997] 2 SCR 890, (1997) 149 DLR (4th) 577, [1997] 8 WWR 517.

This case arose out of a crane collapse at a construction site, killing two workers and injuring four others. A legal action was brought alleging, among other things, negligence by the government of Saskatchewan for breach of its duties under the *Occupational Health and Safety Act*. With respect to the status of the provincial government, the Saskatchewan Workers' Compensation Board considered two questions: is the defendant an employer within the meaning of the Act; and, if so, does the claim arise out of acts or defaults of the employer or the employer's employees while engaged in, about or in connection with the industry or employment in which the employer or worker of such employer causing the injury is engaged. The Board found that both questions should be answered in the affirmative, and concluded that the legal action was barred. The Board gave three reasons for rejecting the "dual capacity" theory advanced by the respondents: first, it did not recognize that the government, Procrane and SaskPower were corporations and could therefore only act through their employees. Thus, they were really being sued in their capacity as employers. Second, the statute bars "all" rights of action in which workers are injured in the course of employment, with no exception for actions based solely on non-employment grounds. Third, this doctrine would allow injured workers to bring actions against their employers on some other ground of liability, thereby defeating the intention of workers' compensation legislation.

Upon judicial review, the Saskatchewan Court of Appeal allowed an appeal on the basis of the "dual capacity" theory, which divided the role of the government in accordance with its public and private duties [1995] 7 WWR 1. The Court of Appeal held that the government was only protected from claims in liability in its capacity as employer and not as regulator. The Court of Appeal found that the Board erred in failing to find that the government was acting in its capacity as regulator at the time of the accident.

The majority of the Supreme Court of Canada allowed an appeal by the Saskatchewan government, finding that the Board's decision (that the legal action was barred) was not patently unreasonable.

(b) *Queen Elizabeth II Health Sciences Centre v. Nova Scotia (WCAT)*, (2001) 200 DLR (4th) 504

A worker was injured in a workplace accident for which he received workers' compensation benefits. His injury required treatment by a number of doctors at the Queen Elizabeth II Health Sciences Centre as well as by other medical personnel. The worker thought that they had treated him negligently and wished to sue. Under the Nova Scotia *Workers Compensation Act* and Regulations, the operation of hospitals was included in the workers' compensation scheme, but the following industries were expressly excluded from the operation of the Act: "educational institutions, surgical medical, veterinary work and dental surgery." The Nova Scotia WCAT panel found that the term "surgical medical" referred to the provision of medical treatment by medical professionals to patients generally, and not solely to "surgery." It found the worker's legal action was not barred.

Section 256(1) of the Nova Scotia *Workers Compensation Act*, provided for a right of appeal to the Nova Scotia Court of Appeal on any question as to WCAT's jurisdiction or on any question of law. On appeal, the Court of Appeal reversed the WCAT decision, reasoning as follows:

> 38 In the present case, WCAT's decision is that an employer may be subject to the Act in general terms and, at the same time, not subject to the Act on a case by case basis for the purposes of the bar of civil actions. Whether the employer is subject to the Act in particular cases will depend, in the Tribunal's view, on the nature of the activities of the employer's servant and agents which give rise to a cause of action. As the Tribunal put it, ". . . the term "surgical medical" . . . applies to the activities [i.e. of the medical professionals] which gave rise to the applicant's cause of action" and thereby ". . . carve[s] out an aspect of the operation of hospitals that is not covered by the Act . . . on the facts of this case."
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> 39 In my respectful view, this is an interpretation of the relevant legislation that is not reasonably attributable to the words. Three reasons compel this conclusion. First, WCAT's interpretation makes the Act unworkable. Second, it unreasonably confuses the questions of whether an employee is a worker within the meaning of the Act with the question of whether an employer is subject to the Act. Third, it is fundamentally at odds with a core principle — the historic trade-off — of the workers' compensation scheme. I will address each of these points in turn.

40 The bar to a civil action established by s. 28(1)(b) applies to workers' actions against employers who are "subject to this Part". However, whether an employer is "subject to this Part" is not defined by the legislation uniquely for the purposes of the bar of civil actions; it is defined in the same way for all of the many purposes under the Act for which this is a relevant consideration. The question of whether an employer is subject to the Act is fundamental, not only to the bar of actions, but to the operation of the Act in general. It is a determination made on the basis of a single set of provisions, that relates not only to whether a particular civil action is barred, but to a host of other determinations under the Act.

41 Whether or not an employer is subject to the Act relates to whether an employer has a duty to report an accident (s. 86(1) and s. 2(n) of the Act) as well as to the many other duties of such employers set out in ss. 88, 90 to 92, 97 and 98. It determines whether an employer is liable to contribute to the accident fund (s. 115) and has the duties associated therewith (see, e.g. s. 129).

42 It follows that the question of whether an employer is "subject to this Part" cannot depend, as WCAT concluded that it does, on a case by case analysis of the actions of an employer's servants or agents on a particular occasion which gave rise to a cause of action. It is not possible for the many other provisions in the Act whose operation depends on whether an employer is subject to the Act, to have any sensible operation if, as WCAT decided, an employer may, at the same time, be both subject and not subject to the Act. In other words, WCAT's interpretation is patently unreasonable viewed in the context of the Act as a whole.

43 This interpretation is also unreasonable when the relevant provisions are examined in isolation from the rest of the Act. The Regulations deal with included and excluded "employers . . . engaged in, about or in connection with the . . . industries" set out in Appendix A and section 2 thereof. The structure of s. 3 of the Act and of ss. 2 and 3 of the Regulations makes it clear, in my view, that an employer is either included or excluded and cannot be both. These provisions define included and excluded employers for all purposes under the Act. This requires a characterization of the employer as one or the other for all purposes. WCAT, instead, attempted to fit the employer into both categories by examining the particular activity giving rise to the particular cause of action and "carving out" an aspect of the employer's activity on a case by case basis. With respect, this approach, as well as its result, appear to me to be unreasonable.

44 Again with respect, WCAT unreasonably confused the question of whether a servant or agent is covered by the Act with the question of whether an employer is subject to the Act. The provisions deal with both issues. But the inclusion or exclusion of an employer does not depend on whether its servants or agents, whose activities gave rise to a particular cause of action, are workers (and therefore covered) within the meaning of the Act. The statute clearly distinguishes between workers (who are covered by the Act) and the broader class of servants and agents (who may not be). An employer may have servants and agents who are not workers covered by the Act but that does not mean that their employer is not subject to the Act.

> 45 WCAT confused these two issues. It noted that, in Nova Scotia, medical professionals have never been included in the workers' compensation scheme (With this no issue is taken on appeal). WCAT then reasoned that if the hospital has servants or agents who are medical professionals and, therefore, who are not workers under the Act, there must be an "aspect of the operation of hospitals" that is not covered by the Act. This is an unreasonable interpretation. The fact that certain servants and agents of an employer may not be workers subject to the Act because they are engaged in surgical medical activities does not affect the classification of the employer as being subject to the Act if it is covered precisely by the legislation's list of inclusions. It is hard to imagine how a hospital could be more precisely included than by the words "operation of hospitals" used in the governing provision.
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> [reproduced as written]

(c) *Fry v. Kelly* [1994] NJ 373, (1994) 127 Nfld. & PEIR 260

Both the *Kandola* decision, and WCAT Decision #2005-01937, cited the decision of the Newfoundland Supreme Court — Trial Division, in *Fry v. Kelly*. Fry's business involved the delivery of mail under contract with Canada Post. He had one employee, and applied to the Workers' Compensation Commission of Newfoundland and Labrador for coverage for this employee. His operation as an employer was assessed on a payroll that included only the income of this employee. Fry did not apply for personal coverage as he might have. Fry was involved in a motor vehicle accident. The Commission ruled that Fry was not immune from suit, for reasons similar to those expressed in *Cesari*.

The Newfoundland *Workers Compensation Act* provided for an appeal to the Court from a decision of the Commission involving any question of law or of mixed fact and law (section 38(1)). On appeal, the Court reversed the Commission's decision, reasoning:

> 21 In this case the Commission was unwilling to apply Section 12 in respect of torts committed by an employer in the course of his business. Does Section 12 support this view. [*sic*] Section 12(1) provided:
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> > . . . . neither the workman, his personal representative, his dependents nor the employer of the workman has any right of action in respect of the accident against an employer in any industry within the scope of this Part or against any workman of that employer unless the accident occurred otherwise than in the conduct of the operations usual in or incidental to the industry carried on by the employer;
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> 22 The plain language of the Section prohibits action against an employer unless the accident occurred outside the normal course of his business. In this case the accident occurred within the normal course of his business.
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> 23 I do not consider this interpretation to lead to an absurd result. Immunity is granted as part of an overall no-fault insurance scheme funded by employers to cover accidents occurring in the course of business. (Lee v. Spence; and see

> Reference re Sections 32 and 34 of The Workers' Compensation Act (Nfld) (1987) 67 Nfld. & PEIR 67 (Nfld. CA)). The Decision would carve out an exception to this statutory scheme for unincorporated employers.
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> Conclusion
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> 24 Accordingly I will grant the requested Order reversing the Decision and substituting therefore an Order that the Respondents "are precluded from bringing the within action against the Appellant by virtue of Section 12(1) of the Act.

(d) *Lindsay v. Saskatchewan (Workers' Compensation Board)* [1998] 4 WWR 436

The plaintiff received workers' compensation benefits for an injury to his lungs due to a mining accident. One doctor recommended a biopsy and this was performed by a second doctor. The plaintiff suffered further injury when the physician, while performing a biopsy of the plaintiff's lungs, accidentally severed one or more nerves.

The Saskatchewan Board ruled that the plaintiff's claim for medical malpractice was barred. The plaintiff brought an application to quash the Board's decision. With respect to the status of the doctors, the Saskatchewan Court of Queen's Bench reasoned:

> 19 The remaining question is whether the doctors are employers. Reference must again be made to Dr. Patel's MWW Agreement, and Dr. Ofiesh's CVT Agreement. The Compensation Board pointed out at paragraphs 7 and 8 of its decision that both these management companies pay assessments to the Board on behalf of their members. I think that each of these agreements can be fairly interpreted to mean that each doctor is the employer of the staff in the doctor's office, and that the company in each case is simply an agent of each doctor. While the agents pay the Compensation Board assessments in respect of the staff of each office, the doctors must reimburse the agents for such payments. In my view, both doctors, as well as the management companies with which they are associated, are engaged in the medical services industry.
>
> 20 At paragraph 6 of Pasiechnyk, Sopinka J. stated:
>
> > . . . if the question of law at issue is within the tribunal's jurisdiction it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review.
>
> In deciding that the doctors are employers and thus barring the plaintiff's action against them, I cannot find that the Compensation Board erred in a patently unreasonable manner, especially when the Compensation Board is competent to answer a question and in doing so may make errors without being subject to judicial review. As pointed out in Canada (Director of Investigation and

> Research) v. Southam Inc., *[1997] 1 SCR 748* at 778–9, there are many things that are clearly wrong but not patently unreasonable. However, I consider the Compensation Board's decision to be correct.
>
> [emphasis in original]

An appeal from this decision was denied by the Supreme Court of Canada on January 20, 2000 [2001] 1 SCR 59, (2000) 184 DLR (4th) 431.

Upon consideration of the foregoing, I agree with the reasoning expressed in *Kandola* and in WCAT Decision #2005-01937. The fact that Dr. Rose did not purchase Personal Optional Protection coverage, so as to be eligible for workers' compensation benefits for any work injury or occupational disease he might suffer, is not a relevant consideration. Dr. Rose's actions or conduct were incidental to being engaged in an industry within the meaning of Part 1 of the Act. There is no basis for considering that Dr. Rose's action or conduct, in relation to the plaintiff's medical treatment and surgery, did not arise out of and in the course of employment. I find that at the time the cause of action arose, Dr. Rose was an employer engaged in an industry within the meaning of Part 1 of the Act, and his action or conduct, which caused the alleged breach of duty of care, arose out of and in the course of employment.

Conclusion

I find that at the time of the plaintiff's medical treatment and surgery on or about October 19, 2000:

(a) the plaintiff, John Welch, was a worker within the meaning of Part 1 of the Act;

(b) the injuries suffered by the plaintiff, John Welch, arose out of and in the course of his employment within the scope of Part 1 of the Act;

(c) the defendant, Dr. James C. Rose, was an employer engaged in an industry within the meaning of Part 1 of the Act; and,

(d) any action or conduct of the defendant, Dr. James C. Rose, which caused the alleged breach of duty of care, arose out of and in the course of employment within the scope of Part 1 of the Act.

NO. S011323
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, AS AMENDED

BETWEEN:

JOHN WELCH

PLAINTIFF

AND:

DR. JAMES C. ROSE

DEFENDANT

CERTIFICATE

UPON APPLICATION of the Plaintiff, JOHN WELCH, 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 Board;

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, on or about October 19, 2000:

1. The Plaintiff, JOHN WELCH, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

2. The injuries suffered by the Plaintiff, JOHN WELCH, arose out of and in the course of his employment within the scope of Part 1 of the *Workers Compensation Act*.

3. The Defendant, DR. JAMES C. ROSE, was an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.

4. Any action or conduct of the Defendant, DR. JAMES C. ROSE, which caused the alleged breach of duty of care, arose out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.

CERTIFIED this day of August, 2005.

NO. S011323
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, AS AMENDED

BETWEEN:

JOHN WELCH

PLAINTIFF

AND:

DR. JAMES C. ROSE

DEFENDANT

SECTION 11 CERTIFICATE

WORKERS' COMPENSATION APPEAL TRIBUNAL

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031084-A

Decision of the Workers' Compensation Appeal Tribunal

Number: WCAT-2005-04492-RB
Date: August 26, 2005
Panel: Jill Callan, Chair
Subject: Section 251 Referral to the Chair — Entitlement to Dependents' Benefits

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1. Introduction

The worker passed away in December 2001 as a result of a tragic accident at work. He had previously been in a common law relationship and had had two sons with his common law spouse. At the time of his death, the worker was not living with the children's mother and their two sons. The quantum of the pensions awarded to the worker's two sons is the subject of an appeal that is before a panel of the Workers' Compensation Appeal Tribunal (WCAT).

The statutory provisions related to survivors' benefits are contained in section 17 of the *Workers Compensation Act* (Act). That section was amended effective June 30, 2002 pursuant to the *Skills Development and Labour Statutes Amendment Act, 2003* (Bill 37). Subject to limited exceptions, section 35.2 of the Act provides that the Act as amended by Bill 37 only applies to the death of a worker that occurred on or after June 30, 2002. Accordingly, the former provisions of the Act are applicable in this case and the relevant policies are contained in the *Rehabilitation Services and Claims Manual*, Volume I (RSCM I).

This determination under section 251(3) of the Act is made in the context of the appeal initiated by the children's mother. She seeks increased benefits for them. The quantum of the children's benefits was established under item #55.40 (*Spouse Separated from Deceased Worker*) of RSCM I, which provides that the benefits are to be calculated in accordance with section 17(9) of the Act.

The vice chair of WCAT assigned to hear the appeal considers that elements of items #55.40 and #59.22 (*No Surviving Spouse or Common-Law Wife/Husband*) of RSCM I are so patently unreasonable that they should not be applied in the adjudication of the appeal. As a result, the vice chair has referred these policies to me for a determination in accordance with section 251(2) of the Act. Under section 251(3) of the Act, I must decide whether the policies in question "should be applied" in adjudicating the appeal. In accordance with section 251(1), this requires me to determine whether the impugned policies are "so patently unreasonable that [they are] not capable of being supported by the Act and its regulations." In this case, there is no relevant regulation.

According to the vice chair's referral memorandum, the application of the impugned policies results in the quantum of benefits paid to the children being less than the amount that the children would receive if the benefits were calculated under the former section 17(3)(f), which she contends would involve the correct application of section 17 of the Act.

The policies that are the subject of this determination are significantly different from the policies related to section 17 of the current Act that are in the *Rehabilitation Services and Claims Manual*, Volume II (RSCM II). Throughout this determination all policy references will be to those contained in RSCM I unless otherwise specified. In addition, unless otherwise specified, references to section 17 of the Act are to section 17 as it existed prior to the Bill 37 amendments.

2. Participants

As the children's mother was unrepresented, pursuant to section 246(2)(i) of the Act, I invited the Workers' Advisers Office (WAO) to participate in this determination in order to assist me in fully considering this matter. In a submission dated March 9, 2005, the WAO submits that the impugned elements of the two policies are patently unreasonable under the Act.

Although invited to do so, the employer is not participating in the appeal. In order to assist me in fully considering this matter, pursuant to section 246(2)(i) of the Act, I invited the Employers' Advisers Office (EAO) to participate in this determination. In a submission dated November 19, 2004, the EAO takes the position that the impugned elements of the two policies are not patently unreasonable under the Act.

3. Issue(s)

The issue in this determination is whether, for the purposes of the former section 17 of the Act, the impugned elements of items #55.40 and #59.22 are so patently unreasonable that they are not capable of being supported by the Act.

4. Background

This determination involves circumstances in which the deceased worker is survived by dependent children but not by a spouse or common law spouse.

Following the worker's death, the children's mother applied for benefits as a common law spouse of the worker. By decision dated March 13, 2002, the case manager acknowledged that the worker and the children's mother had been in a common law relationship in the past. However, he concluded that, at the time of the worker's death, the children's mother and the worker did not support a common household in which they both lived. He informed the children's mother that he was denying her benefits as a common law spouse of the worker. The case manager's decision was upheld in WCAT Decision #2004-04372-RB, dated August 20, 2004[32].

By a second decision dated March 13, 2002, the case manager informed the children's mother that, in light of the fact that the worker had been providing financial support for their two sons and that there was a reasonable expectation of continued support, the Board had granted an award of $335 per month to each child pursuant to section 17(9) of the Act. The pension

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[32] WCAT decisions are available at http://www.wcat.bc.ca/research/appeal-search.htm.

calculation sheets for the two pensions characterize them as "Special Monthly Pensions" that were calculated manually. The vice chair notes that the quantum of the benefits was based on the federal guidelines for child support under a court order.

On behalf of the children, their mother appealed the March 13, 2002 decision to the Workers' Compensation Review Board (Review Board). Pursuant to the *Workers Compensation Amendment Act (No.2), 2002* (Bill 63), on March 3, 2003, the Review Board and the Appeal Division of the Workers' Compensation Board (Board) were replaced by WCAT. Section 38(1) of the transitional provisions contained in Part 2 of Bill 63 provides that all appeal proceedings pending before the Review Board on March 3, 2003 are continued and must be completed as proceedings pending before WCAT (except that no time frame applies to the WCAT decision). As a result, the appeal is being completed as a WCAT matter.

The appeal of the second March 13, 2002 decision has led to the referral that is the subject of this determination.

5. Policy-making Authority

Items #55.40 and #59.22 of RSCM I have existed in essentially their present form since the *Rehabilitation Services and Claims Manual* was first published in 1984. At that time, the policy-making authority under the Act was vested in the former commissioners of the Board.

In 1991, a new governance structure for the Board came into effect and the policy-making authority was held by the governors of the Board. In 1995, a Panel of Administrators was appointed to perform the functions of the governors and, accordingly, the policy-making authority was vested in the Panel of Administrators.

The *Workers Compensation Amendment Act, 2002* (Bill 49) amended the governance structure of the Board effective January 2, 2003, establishing the Board of Directors under section 81 of the Act. Under the current section 82(1)(a) of the Act, the Board of Directors has the authority to "set and revise as necessary the policies of the board of directors, including policies respecting compensation."

Sections 250(2) and 251(1) of the current Act were among the new provisions that flowed from Bill 63 being brought into force. They provide:

> 250(2) The appeal tribunal must make its decision based on the merits and justice of the case, but in so doing the appeal tribunal must apply a policy of the board of directors that is applicable in that case.
>
> 251(1) 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 Bill 63's transitional provisions states:

> As may be necessary for the purposes of applying sections 250 (2) and 251 of the Act, as enacted by [Bill 63], in proceedings under sections 38 (1) and 39 (2) of [Bill 63], published policies of the governors are to be treated as policies of the board of directors.

The appeal before the vice chair is a proceeding under section 38(1) of Bill 63. Accordingly, in connection with the requirement in section 250(2) that WCAT "must apply a policy of the board of directors that is applicable in that case," subject to section 251(1), the vice chair is required to apply the former policies of the governors (whose authority under section 82 was being exercised by the Panel of Administrators during the time frame relevant to the appeal) in deciding the appeal before her. Those policies included items #55.40 and #59.22 of RSCM I.

Pursuant to the Board of Directors' Decision No. 2003/02/11-04 (Policies of the Board of Directors), dated February 11, 2003, published at 19 *Workers' Compensation Reporter* 1[33], items #55.40 and #59.22 of RSCM I became policies of the directors as of February 11, 2003.

6. The Act

In deciding that the children were entitled to benefits under the former section 17, the Board determined that they were dependent children of the deceased worker. The former section 1 of the Act defines "dependant" as:

> "dependant" means a member of the family of a worker who was wholly or partly dependent on the worker's earnings at the time of the worker's death, or who but for the incapacity due to the accident would have been so dependent, and, except in section 17 (3) (a) to (h), (9) and (13), includes a spouse, parent or child who satisfies the Board that he or she had a reasonable expectation of pecuniary benefit from the continuation of the life of the deceased worker;

The former section 17 (1) defines "child" as:

> (a) a child under the age of 18 years, including a child of the deceased worker yet unborn;
>
> (b) an invalid child of any age; and
>
> (c) a child under the age of 21 years who is regularly attending an academic, technical or vocational place of education,

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[33] Policy resolutions and decisions are accessible at http://www.worksafebc.com/publications/newsletters/wc_reporter/default.asp.

It also states:

> and "children" has a similar meaning;

For the purposes of this determination, the relevant provisions in the former section 17 are section 17(3)(f)(ii), section 17(9), and section 17(17), which provide, in part:

> 17(3) Where compensation is payable as the result of the death of a worker or of injury resulting in such death, compensation must be paid to the dependants of the deceased worker as follows:
>
> . . .
>
> (f) where there is no surviving spouse or common law spouse eligible for monthly payments under this section, and
>
> . . .
>
> (ii) the dependants are 2 children, a monthly payment of a sum that, when combined with federal benefits payable to or for those children, would equal 50% of the monthly rate of compensation under this Part that would have been payable if the deceased worker had, at the date of death, sustained a permanent total disability; or
>
> . . .
>
> subject, in all cases, to the minimum set out in paragraph (g);
>
> (9) Where compensation is payable as the result of the death of a worker, or of injury resulting in death, and where at the date of death the worker and dependent spouse were living separate and apart, and
>
> (a) there was in force at the date of death a court order or separation agreement providing periodic payments for support of the dependent spouse, or children living with that spouse, no compensation under subsection (3) is payable to the spouse or children living with the spouse; but
>
> (i) where the payments under the order or agreement were being substantially met by the worker, monthly payments must be made in respect of that spouse and children equal to the periodic payments due under the order or agreement; or
>
> (ii) where the payments under the order or agreement were not being substantially met by the worker, monthly payments must be made up to the level of support that the board believes the spouse and those children would have been likely to receive from the worker if the death had not occurred; or
>
> (b) there was no court order or separation agreement in force at the date of death providing periodic payments for support of the dependent spouse, or children living with that spouse, and

(i) the worker and dependent spouse were living separate and apart for a period of less than 3 months preceding the date of death of the worker, compensation is payable as provided in subsection (3); or

(ii) the worker and dependent spouse were separated with the intention of living separate and apart for a period of 3 months or longer preceding the death of the worker, monthly payments must be made up to the level of support which the board believes the spouse and those children would have been likely to receive from the worker if the death had not occurred.

(17) Where a situation arises that is not expressly covered by this section, or where some special additional facts are present that would, in the board's opinion, make the strict application of this section inappropriate, the board must make rules and give decisions it considers fair, using this section as a guideline.

7. The Policies

(a) RSCM I

In this case, the Board appears to have established the children's benefits under item #55.40 (*Spouse Separated from Deceased Worker*), which largely deals with the question of whether a spouse who is separated from a worker at the time of the worker's death is entitled to benefits. Much of the policy is focussed on the various fact patterns that might emerge when a worker is separated from his or her spouse. The aspect of the policy that is germane to this determination states, in part:

> . . . Section 17(9) also applies where there is no spouse eligible to claim benefits, but a claim is made by children of the deceased who were living separate and apart from the worker.
>
> To be eligible to claim under Section 17(9), a spouse or child must first be found by the Board to have been an actual dependant of the deceased as discussed in #54.00. It is not sufficient that the claimant, though not actually dependent, had a reasonable expectation of pecuniary benefit from the continuation of the life of the deceased.
>
> In no case can the compensation payable under Section 17(9) exceed the amount that would have been payable if there had been no separation.

Accordingly, item #55.40 provides that the benefits payable to the children in this case are to be determined under section 17(9). It appears the case manager set the quantum of the children's benefits under section 17(9)(b)(ii) by considering the amount the "children would have been likely to receive from the worker if the death had not occurred." The vice chair and the WAO contend that the children are entitled to the greater quantum of benefits that would be payable under the formula set out in section 17(3)(f).

Item #59.22 is referenced in item #59.21 (*Surviving Widow, Widower, Common-Law Wife or Common-Law Husband*), which provides, in part:

> Where there is a widow or widower and a child or children, and the widow or widower subsequently dies, the allowances to the children shall, if the children are in other respects eligible, continue and shall be calculated in like manner as if the worker had died leaving no dependent spouse. The rules described in #59.22 will apply to determine the children's entitlement.
>
> [footnote deleted]

Item #59.22 (*No Surviving Spouse or Common-Law Wife/Husband*) provides, in part:

> Where there is no surviving spouse or common-law wife or common-law husband eligible for monthly payments under this section, and
>
> . . .
>
> B. the dependants are two children, a monthly payment is made of a sum that, when combined with Federal benefits payable to or for those children, would equal 50% of the monthly rate of compensation under this Part that would have been payable if the deceased worker had, at the date of death, sustained a permanent total disability; or
>
> . . .
>
> The computation formula is similar to the one used for computing widows' or widowers' pensions described in #55.21–#55.22. Only the percentages taken of the projected permanent total disability pension are different. "Federal benefits" has the meaning set out in #55.24 and the minimum average earnings referred to in #55.26 is applicable.
>
> [footnote deleted]

(b) RSCM II

Prior to Bill 37 being brought into force, the Board of Directors approved a set of revised policies regarding the current section 17, which are set out in Chapter 8 of RSCM II. Item #55.40 of the RSCM II, which was the same as item #55.40 of RSCM I, has been replaced by item C8-56.20 (*Calculation of Compensation – Spouse Separated from Deceased Worker*). The impugned statement in item #55.40 of RSCM I does not appear in the revised policy. In fact, there is nothing in the policy that indicates that section 17(9) is applicable to a situation in which a worker did not have a spouse eligible for benefits under section 17 but had dependent children living separate and apart from him or her.

Items #58.21 and #58.22 of RSCM II, which were the same as items #59.21 and #59.22 of RSCM I, have been replaced with item C8-56.40 (*Calculation of Compensation – Children*). In the section entitled "Explanatory Notes" the following statement appears:

> This policy describes how compensation as a result of a worker's death is calculated for dependent children.

The policy provides, in part:

> **2. Calculation of Compensation — No Surviving Spouse or Common-Law Wife/Husband**
>
> Where there is no surviving spouse or, common-law wife or common-law husband eligible for monthly payments under section 17 of the *Act*, benefits for any dependent children are calculated as described below.
>
> . . .
>
> **2.2 Two Dependent Children**
>
> The monthly payment for two dependent children is calculated as the difference between:
>
> (a) 50% of the monthly rate of compensation that would have been payable if the deceased worker had, at the date of death, sustained a permanent total disability; and
>
> (b) 50% of the federal benefits payable to or for those children.

Therefore, it appears that had this policy been applicable in this case, the quantum of the children's benefits would have been established under section 17(3)(f)(ii) of the Act.

8. The Vice Chair's Referral Memo

In reference to item #55.40, the vice chair's concern is restricted to the following statement:

> Section 17(9) also applies where there is no spouse eligible to claim benefits, but a claim is made by children of the deceased who were living separate and apart from the worker.

She contends that it is patently unreasonable to enact such a policy under section 17(9) because that section is limited to circumstances in which there is a dependent spouse who is living separate and apart from the worker and, in this case, the children's mother was not a dependent spouse at the time of the worker's death. She states section 17(9) cannot support a policy regarding a situation in which there is no dependent spouse. In her view, when there is no dependent spouse, the benefits for the dependent children of the deceased worker are to be paid under section 17(3)(f)(ii).

The vice chair states that item #59.22, when read in conjunction with item #59.21, seems to indicate that benefits under section 17(3)(f) will only be paid to children who are orphans. She contends that this is patently unreasonable because section 17(3)(f) applies "where there is no surviving spouse or common law spouse eligible for monthly payments under this section." In her view, in addition to applying to circumstances in which a worker's spouse has pre-deceased the worker or subsequently passed away, the section is applicable to situations like the case before her. That is, it applies in a situation where the children's mother is no longer the

common law spouse of the worker and therefore ineligible to receive benefits. She believes that item #59.22 is patently unreasonable because it narrows the scope of section 17(3)(f) by limiting its application to situations in which the children are orphans.

The vice chair does not suggest that item #59.22 can be interpreted as applicable in a situation, such as the case before her, in which the children's mother has survived the worker but is ineligible to claim benefits under section 17, nor does the vice chair address any ambiguity in the policy. Her referral is based on the assumption that item #59.22 only applies when both parents of the children have passed away.

9. The Positions of the Participants

By letters dated October 6, 2004, WCAT forwarded the vice chair's memorandum to the WAO and EAO and invited their submissions.

The EAO provided a submission dated November 19, 2004. They note my discussion of the standard of patent unreasonableness in WCAT Decision #2003-01800-AD, dated July 30, 2003, and submit that I must grant a significant degree of deference to the Board of Directors. The EAO contends that, given that section 17(3)(f) contains the words "no surviving spouse or common law spouse," it is not patently unreasonable to interpret it as limited to situations in which both parents of the dependent children are deceased.

Regarding the application of section 17(9), the EAO states:

> The situation of the children living with a parent in a household separate and apart from the deceased worker at the time of death is most akin to the situations described in subsection 17(9), which deals with divorced or separated spouses. The nature of the children's dependence on the deceased worker and their entitlement to support by the deceased worker are similar in both cases. Children in both situations continue to have the support of the surviving parent and, in law, would generally only be entitled to support payments from the worker if the worker had been alive. Therefore, we submit that it is reasonable and fair for the Board to compensate children in both situations in the same manner, as per Policy #55.40.

The EAO also considers the possibility that the situation of the children in this case falls under section 17(17), which allows the Board to do what is fair in situations that are not expressly covered by section 17 or where the strict application of the section would be inappropriate.

The WAO has provided a submission dated March 9, 2005. They contend that the vice chair was correct in characterizing items #55.40 and #59.22 as patently unreasonable.

The WAO submits that there is no support in section 17(9) for the impugned statement in #55.40 to the effect that section 17(9) applies to a claim made by children of a deceased worker who were not living with him or her where there is no spouse eligible to claim benefits. They contend that section 17(9) only applies where there is a dependent spouse who is eligible to receive benefits.

The WAO notes that section 17(3)(f) is applicable to circumstances in which a child or children are orphans. However, they submit it is also applicable to situations such as the one before the vice chair in which there is a former common law spouse, who is the mother of the children and is not entitled to benefits as a dependant under section 17. They argue that the phrase "eligible for monthly benefits" would not have been necessary if the legislature had intended that section 17(3)(f) simply be applicable to orphans. They state:

> When read together Policy Items #55.40 and #59.22 fail to give effect to the rational scheme of benefits set out in Section 17 of the *Act*. We submit that this scheme was intended to ensure that children who do not have any surviving parents or one surviving parent who is "not eligible for benefits" will receive a greater benefit amount than children who have a surviving dependant [*sic*] parent entitled to monthly benefits.

The WAO also contends that, even if section 17(3)(f) is capable of being interpreted as a provision related solely to orphans, that interpretation would offend the common law principle that remedial legislation is to be interpreted broadly. In this regard, I note that section 8 of the British Columbia *Interpretation Act*, provides:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

10. Analysis

(a) The Standard of Patent Unreasonableness

As pointed out by the EAO, I discussed the standard of patent unreasonableness in WCAT Decision #2003-01800-AD, dated July 30, 2003, which was also a determination under section 251(3). I noted the standard of patent unreasonableness requires a significant degree of deference. I also quoted from Supreme Court of Canada judgments, which characterize patent unreasonableness as akin to being "clearly irrational" and "so flawed that no amount of curial deference can justify letting [the decision] stand." More recently, in WCAT Decision #2005-01710, dated April 7, 2005 (see pages 12 to 17), I provided an overview of additional judgments of the Supreme Court of Canada related to this standard and the reasons given by Alan Winter in the *Core Services Review of the Workers' Compensation Board* (March 2002) (Core Review) for his recommendation of the standard of patent unreasonableness for the purposes of section 251. In that determination, I concluded that the impugned policy was patently unreasonable as it was not capable of being rationally supported by the Act.

Effective December 3, 2004, under section 245.1 of the Act, section 58 of the *Administrative Tribunals Act* (ATA) became applicable to WCAT. Section 58(2) of the ATA provides that the standard of patent unreasonableness applies when a court is considering a judicial review application on a finding of fact or law or an exercise of discretion by WCAT. Section 58(3) of the ATA provides:

> For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith,
(b) is exercised for an improper purpose,
(c) is based entirely or predominantly on irrelevant factors, or
(d) fails to take statutory requirements into account.

I consider section 58(3) of the ATA to be a codification of the common law principles applicable to the question of whether a discretionary authority has been exercised in a patently unreasonable manner. In my view, the Board of Directors' policy-making authority generally involves making findings of law in interpreting the Act and exercising the discretion to set policies granted by section 82(1) of the Act. In this case, the matter under consideration largely relates to the policy-makers' findings of law in interpreting section 17 of the Act. Accordingly, I do not find section 58(3) of the ATA assists me in establishing whether the impugned policies are patently unreasonable.

(b) Are the Impugned Policies Patently Unreasonable?

History of the Impugned Policies

My attempts to research the background and history of the impugned policies have not been fruitful. I have not found a discussion of them in the decisions of the former commissioners contained in Volumes 1 to 6 of the *Workers' Compensation Reporter* or in the body of decisions produced by the former Appeal Division of the Board.

General Framework of the Former Section 17

In order to determine whether the impugned policies are patently unreasonable, it is useful to review the statutory framework set out in the former section 17 of the Act. There are elements of this provision which make it difficult to interpret. For instance, while the principles of statutory interpretation would normally dictate the consistent use of a term with a specific meaning, it appears that in section 17 different terms have the same meaning.

For instance, in sections 17(3)(a), (b), (c), and (d), the terms "widow or widower" are used. However, section 17(3)(f) uses the term "surviving spouse" which appears to have the same meaning as "widow or widower." In addition, section 17(11) uses the terms "common law wife" and "common law husband" whereas section 17(3)(f) uses the term "common law spouse."

A useful overview of the framework of section 17 and its history up to 1996 is found in *Compensation and the Death of a Worker*, dated December 23, 1996, which is a Royal Commission briefing paper that was prepared by the Board's former Policy and Regulation Development Bureau.[34] That briefing paper points out that there had been few substantial changes to section 17 since 1974, when it was significantly redrafted. I note amendments in 1985 and 1993 and those that arose out of Bill 37 have not altered the specific aspects of the former section 17 that are germane to the matter before me. I will analyze those elements of section 17 below.

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[34] Paper available at http://www.worksafebc.com/regulation_and_policy/archived_information/royal_commission_briefing_papers/assets/pdf/death.pdf.

In terms of general principles, the briefing paper points out that the compensation scheme looks at the question of what the dependant has "lost from the death of the worker," subject to minimum benefits and it notes "the extra payments for children may reflect more of a concern over the survivors' need than their actual loss" (see page 8). Section 17(9) is discussed at page 12 of the paper but only as it relates to dependent spouses living separate from the deceased. There is no discussion of dependent children living separate from the deceased where there is no dependent spouse or common law spouse.

Section 17(3)(f) and its predecessor section have been referenced in royal commission reports and the more recent Core Review as relating to orphans. In the *Concise Oxford Dictionary* (tenth edition, revised), "orphan" is defined as "a child whose parents are dead." In his 1966 royal commission report[35], Mr. Justice Tysoe referred to section 18(2)(c) as relating to "orphan children" (see section 6 of the report entitled "Payments for Children of Deceased Workmen"). Section 18(2)(c) set out the benefits payable "[w]here the dependents [*sic*] are children, there being no dependent widow or dependent invalid widower." While section 18(2)(c) did not contain the words "eligible for monthly payments under this section," it respectively modified the words "widow" and "widower" with the words "dependent" and "dependent invalid."

In its 1999 report[36], the Royal Commission stated (at page 8 of Chapter 2 of Volume II entitled "Current Calculation of Benefits for Surviving Spouses and Children"), "[b]enefits for orphaned dependant [*sic*] children are addressed in Section 17(3)(f)." The Royal Commission's statement in this regard was quoted at page 237 of the Core Review.

While the reports I have reviewed refer to section 17(3)(f) as the section applicable to orphans, that does not mean that it should be interpreted as only applicable to situations in which the children have no surviving parent. The focus on orphans is easily explained by the public policy concern that orphans be adequately supported.

Is the Impugned Element of Item #59.22 Patently Unreasonable Under the Act?

The vice chair states that item #59.22 restricts the application of section 17(3)(f) of the Act to orphans and that this is patently unreasonable. As stated earlier, she did not consider whether it is possible to interpret the policy more broadly.

In her referral memorandum, the vice chair acknowledges that the children's mother was no longer his common law spouse at the time of his death. However, she does not appear to have addressed her mind to the fact that the first phrase in item #59.22 is "[w]here there is no surviving spouse or common-law wife or common-law husband."

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[35] British Columbia, *Commission of Inquiry, Workmen's Compensation Act: Report of the Commissioner, the Honourable Mr. Justice Charles W. Tysoe* (Victoria: A. Sutton, Printer to the Queen, 1966).

[36] British Columbia, Royal Commission on Workers Compensation in British Columbia, *For the Common Good: Final Report of the Royal Commission on Workers' Compensation in British Columbia* (Victoria: Crown Publications Inc., 1999) (Chair: Gurmail S. Gill).

The vice chair assumes the application of item #59.22 is restricted to orphans. Her narrow interpretation of the policy may have been driven by the following factors:

- Item #59.22 is, in fact, applicable to orphans.

- There is nothing on the claim file to indicate that the case manager considered item #59.22 to be applicable.

- There is a clear statement in item #55.40 that it is applicable when there is no spouse eligible to claim benefits and the deceased worker had children living separate and apart from him or her at the time of death. Accordingly, the vice chair may have thought that she needed to interpret item #59.22 narrowly because the question before her was covered by item #55.40.

- The vice chair may have erroneously concluded that only one policy could be applicable to the appeal before her.

The vice chair did not consider whether item #59.22 was ambiguous or whether it can be interpreted as applicable to dependent children other than orphans. She did not consider the following:

- Item #59.22 indicates it is applicable "[w]here there is no surviving spouse or common-law wife or common-law husband eligible for monthly payments under this section." While it is not specifically stated in the policy, it appears that "this section" means section 17 of the Act. In this case, the children's mother was not the common law wife of the worker at the time of his death. Furthermore, the words I have quoted are essentially the words that the vice chair and WAO say should be interpreted as meaning that the policy is applicable to children who have a surviving parent provided that parent is not entitled to section 17 benefits.

- The Board of Directors has established a similar policy in item C8-56.40 of RSCM II and that policy would have been applicable to the appeal before the vice chair if the worker had passed away on or after June 30, 2002.

It is reasonable and appropriate to interpret item #59.22 in a much broader fashion than that set out in the vice chair's referral memorandum. In my view, it should be interpreted in a manner that is consistent with section 17(3)(f). I interpret section 17(3)(f) to be applicable to dependent children other than orphans. I view it as applicable when "there is no surviving spouse or common law spouse eligible for monthly payments under [section 17]." This would include situations where there is a surviving spouse or common law spouse who is not eligible for monthly benefits under section 17 and where the children have a surviving parent who is neither a surviving spouse nor a common law spouse.

In light of the vice chair's referral, I have considered whether I am required to determine whether item #59.22 is patently unreasonable if it is assumed that the policy is only applicable to orphans. However, I find it is unnecessary to engage in this exercise because section 251(3) states that I "must determine whether the policy should be applied." Subject to the comments I will make later in this determination regarding situations in which two policies are applicable, I have determined that item #59.22 should be applied to the appeal before the vice chair because it is consistent with section 17(3)(f) and not patently unreasonable.

I find item #59.22 of RSCM I is not patently unreasonable under the Act.

Is the Impugned Element of Item #54.40 Patently Unreasonable Under the Act?

The impugned element of item #54.40 provides that section 17(9) is applicable to the situation before the vice chair. Accordingly, the first question is whether it is supported by section 17(9). Section 17(9) starts with three conditions that must be met in order for that section to be applicable:

- compensation must be payable "as the result of the death of a worker, or of injury resulting in death";

- the worker must have a dependent spouse at the date of death; and

- at the date of death, the worker and the dependent spouse must have been "living separate and apart."

There is nothing in section 17(9) that indicates it is applicable when only the first condition is present. In order to find that the impugned element of item #55.40 is supported by section 17(9), I would have to be satisfied that section 17(9) is applicable even when the worker did not have a dependent spouse at the date of death. However, in my view, section 17(9) is only applicable if, at the time of a worker's death, there is a "dependent spouse" who was living separate and apart from the worker. In this case, the children's mother is not a dependent spouse for the purposes of section 17. I find the impugned element of item #55.40 is not supported by a rational interpretation of section 17(9).

The next question is whether there is a rationale for finding item #55.40 to be viable under the Act. Section 17(17) of the Act grants the Board an overriding discretion to make rules regarding, among other things, situations not expressly covered by section 17, provided that the rules are considered to be fair and section 17 is used as a guideline. Accordingly, I have considered the EAO's argument that the impugned policy is not patently unreasonable because it is supported by section 17(17) of the Act.

In order to accept this argument, I would have to be satisfied that section 17(9) is not purported to be the foundation for the impugned element of #55.40. I would therefore have to interpret item #55.40 as not providing that section 17(9) is applicable but as setting out by reference that the method of determining the quantum of benefits set out in section 17(9)(b)(ii) will be applied to circumstances such as those arising in the appeal. Under that method, the monthly payments to the children would be made "up to the level of support which the Board believes . . . those children would have been likely to receive from the worker if the death had not occurred." However, the impugned element of item #55.40 starts with the statement, "[s]ection 17(9) also applies." It does not set out that, although 17(9) is not applicable, the method set out in section 17(9)(b)(ii) will be used to determine the quantum of benefits. I find section 17(9) is the foundation of the impugned element of item #55.40.

If I had concluded that item #55.40 could be interpreted as merely incorporating the method in section 17(9)(b)(ii) by reference rather than stating section 17(9) is applicable, I would have

further difficulty in concluding that the policy-makers developed the impugned policy under section 17(17). Item #63.40 (*Special or Novel Cases*) of RSCM I provides:

> Section 17(17) provides that where a situation arises that is not expressly covered by the provisions discussed in this chapter or where some special additional facts are present that would, in the Board's opinion, make the strict application of those provisions inappropriate, the Board can make rules and give decisions it considers fair, using those provisions as a guideline.
>
> This provision is applicable to deaths occurring on or after July 1, 1974.

Given that this is the stated approach to using section 17(17), and in light of the fact that there is no mention of section 17(17) in item #55.40, I do not find that section 17(17) is the statutory authority for the impugned element of item #55.40. Moreover, I note the situation in the case before the vice chair is covered by item #59.22.

I find the impugned element of item #55.40 is patently unreasonable under the Act and should not be applied in the adjudication of the appeal.

11. The Operation of Section 251

Section 251 prescribes a series of steps that must be taken as a result of my determination that the impugned element of item #55.40 should not be applied. Those steps include the following:

- In accordance with section 251(5), WCAT will suspend any other appeal proceedings that can be affected by the impugned policy.

- In accordance with section 251(5), I will send notice of this determination and my reasons to the Board of Directors in care of the chair of the Board of Directors. I will enclose with the notice a list of the parties to the appeal that has led to this referral and the parties to any appeals that WCAT has suspended under section 251(5).

- In accordance with section 251(6), within 90 days of receipt of notice of this determination, the Board of Directors must review the policy and determine whether WCAT may refuse to apply the policy. The date for receipt of the notice is a matter to be determined by the Board of Directors. However, I note there may be a delay between the date of this determination and the date I give formal notice of this determination to the Board of Directors because of the time it will take to develop the list of appeals that are to be suspended under section 251(5).

- In accordance with section 251(7), the Board of Directors must allow the parties to this appeal and the parties to all appeals suspended by WCAT to make written submissions.

- In accordance with section 251(8), WCAT will be bound by the Board of Directors' determination.

12. The Applicable Policy

Section 250(2) of the Act states that "a policy of the board of directors that is applicable" must be applied. I take this to mean that WCAT must go through the appropriate analysis to determine if the policy is applicable. If a policy that is potentially applicable to an appeal is not, in fact, applicable, it is not necessary to invoke the 251 process. If more than one policy appears to be applicable, WCAT must identify the applicable policy.

I have determined that item #59.22 is capable of a much broader interpretation than the vice chair ascribes to it in the referral memorandum. In fact, I have determined that it can be interpreted as applicable to the appeal before the vice chair. Accordingly, items #55.40 and #59.22 are both potentially applicable to the situation before the vice chair.

In Decision No. 86 of the governors (*Subject: Bylaw No. 4 – Published Policy of the Governors*) dated November 16, 1994 (10 *Workers' Compensation Reporter* 781), the governors addressed, among other things, the question of which policy would apply in the event that two conflicting policies were applicable to a matter under adjudication. In section 2, they determined:

> **2.0 Section 2 — Application of Published Policy of the Governors**
>
> 2.1 In the event of a conflict between the *Act* or Regulations and the published policies of the governors, the *Act* and Regulations are paramount.
>
> 2.2 In the event of a conflict between published policy in a Manual identified in Section 1.1 (a), (b), or (c) of this Bylaw, and published policy in *Workers' Compensation Reporter* Decisions No. 1–423 identified in Section 1.1(d), published policy in the Manual is paramount.
>
> 2.3 In the event of any other conflict between published policies of the governors:
>
> (a) *if the policies were approved by the governors on the same date, the policy most consistent with the* Act *or Regulations is paramount.*
>
> (b) if the policies were approved by the governors on different dates, the most recently approved policy is paramount.
>
> [emphasis added]

In Decision No. 1 of the Panel of Administrators (*Subject: Discharge of Governor Policy-Making Function*) dated July 17, 1995 (11 *Workers' Compensation Reporter* 465), the Panel of Administrators adopted Decision No. 86 of the governors.

In the "Policy-making Authority" section of this determination, I referred to the Board of Directors' Decision No. 2003/02/11-04 (*Policies of the Board of Directors*). The bylaw approved by the Board of Directors in that decision also anticipates that there may be situations in which more than one policy may be applicable. It provides:

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.

[emphasis added]

In this case, items #55.40 and 59.22 were both included in the first version of the *Rehabilitation Services and Claims Manual*, which was published in 1984. Accordingly, if the Board of Directors determines that item #55.40 must be applied, in resolving the conflict between the two policies, the vice chair is required to consider the policy most consistent with the Act to be paramount.

When a WCAT vice chair invokes the section 251 process, the 180-day time frame for deciding the appeal set out in section 253(4)(a) (which is applicable to appeals initiated under the new appeal system) is suspended and the decision is delayed. By their very nature, section 251 referrals generally require substantial thought and consideration by the WCAT chair and, in the event the chair finds the impugned policy to be patently unreasonable, they raise significant issues for determination by the Board of Directors. I have concluded that item #59.22 can be interpreted as consistent with section 17(3)(f) and as applicable to the appeal before the vice chair. However, it was legitimate for the vice chair to have made the referral to me as item #55.40 was applied by the Board in establishing the amount of the children's benefits and that policy is patently unreasonable under the Act. Given the vice chair's referral of item #55.40, I was obligated under the Act to make this determination. I note there may be other situations in which the impugned element of item #55.40 has been applied by the Board.

13. Conclusion

In summary:

- I find the impugned element of item #55.40 is so patently unreasonable that it is not capable of being supported by the Act; and

- I find the impugned element of item #59.22 of RSCM I is not patently unreasonable under the Act.

In accordance with section 251(5) of the Act, I will send notice of this determination and my reasons to the Board of Directors of the Board. In addition, I will provide the Board of Directors with a list of the parties to the appeals that WCAT suspends under section 251(5).

Decision of the Workers' Compensation Appeal Tribunal

Number: WCAT-2005-04706
Date: September 7, 2005
Panel: Michelle Gelfand, Vice Chair
Subject: Extension of Time to Appeal — Appeal Filed Within 30 Days of Receipt of Decision

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Introduction

The worker applies for an extension of the 30-day statutory time period to appeal a May 14, 2004 decision of a review officer (Review Decision #4935). The issue on that review was whether the worker's right hand complaints were compensable.

The chair of the Workers' Compensation Appeal Tribunal (WCAT) is authorized under section 243(3) of the *Workers Compensation Act* (Act) to extend the time to appeal. That authority has been delegated to all members of WCAT.

The worker is receiving advice on this application from a worker's advisor. The employer is not participating, although invited to do so.

I have considered this application based on a review of the claim file and a written submission received on behalf of the worker.

Issue(s)

The issue is whether the worker should be granted an extension of time to appeal the review officer's decision of May 14, 2004.

Background and Analysis

This appeal was initiated on June 23, 2004. Taking into account the statutory 30-day appeal period, and the eight-day period for mailing, this appeal was filed two days late.

Section 243(3) of the Act sets out three requirements for a successful application for extension of time. The chair (or delegate) must conclude that:

- Special circumstances precluded the filing of the appeal on time;
- An injustice would result if the extension were not granted;
- The discretion to grant the extension should be exercised.

The worker explains her short delay in appealing on the basis that she received the review officer's decision on May 26, 2004, and that the envelope in which she received it was post-marked May 20, 2004. She further explains that she was suffering from depression at the time and dealing with various personal issues. As well, she believed that she had to provide her full submission on the appeal within the appeal period.

Section 243(1) of the Act states that, in the case of appeals from review officers' decisions, the notice of appeal must be filed within 30 days "after the decision being appealed was made." A further eight days is added to the appeal period, in accordance with section 221(2) which states that a document sent by mail is "deemed to have been received on the 8th day after it was mailed." According to section 221(4), that presumption of service is rebutted if a party who acts in good faith does not receive the copy until a later date due to "absence, accident, illness or other cause beyond the party's control."

In this case, I accept the worker's evidence regarding the date of mailing and her receipt date of the decision. Therefore, although the worker did not appeal within 30 days after the decision was made, she did appeal in less than 30 days of her receipt of the decision. I find that the late mailing of the decision constitutes special circumstances which precluded the initiation of the appeal within the statutory time period. It would be unfair for a party who receives the decision late, through no fault of their own, to be deprived of the full 30-day statutory appeal period in which to consider their options, seek advice, etc. before initiating an appeal.

As the issue is one of significance to the worker, I find that an injustice would result if the appeal were not allowed to proceed. I find it appropriate to exercise my discretion to grant the extension.

Conclusion

I allow the worker's application for an extension of time to appeal the decision of May 24, 2004. The appeal will be referred to the Registry for further processing.

Decision of the Workers' Compensation Appeal Tribunal

Number: WCAT-2005-04824
Date: September 14, 2005
Panel: Teresa White, Vice Chair; Steven Adamson, Vice Chair; Beatrice K. Anderson, Vice Chair
Subject: Three-member Non-precedent Panel — Work-required Motion

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Introduction

The worker appeals an April 14, 2004 decision of the Review Division of the Workers' Compensation Board (Board) to the Workers' Compensation Appeal Tribunal (WCAT). The Review Division denied the worker's request for review of a March 17, 2003 decision of the Board that the worker's lumbar strain was not a personal injury arising out of and in the course of his employment.

The Board's decision was based on the conclusion that the worker was not performing his work duties at the time of his injury, as he was involved in the natural body motion of "simply bending forward" to place his lunch in a fridge, and there was nothing of causative significance in his work as a psychiatric nurse that resulted in the injury.

The worker is represented by legal counsel. The employer is participating, and is represented by a consultant.

This appeal is proceeding by way of a read and review of the evidence and submissions on file. We consider this an appropriate method of resolving the issues, which turn primarily on the application of law and policy to facts that are not significantly in dispute. Counsel for the worker submitted that if the need for the worker to take a lunch to work, or the fact that he took things out of the same refrigerator to feed residents was "in dispute," an oral hearing was required. Neither of these points is significantly in dispute. We accept that the worker brought a meal to work, and that the same fridge was used to store items used for patients.

Section 238(5) of the *Workers Compensation Act* (Act) provides the authority to appoint a three-person panel where the chair determines that a matter under appeal requires it. This three-member panel was appointed by the chair, although this decision does not constitute a precedent decision under section 250(3) of the Act.

Jurisdiction

This appeal is brought pursuant to section 239(1) of the Act.

Subject to statutory limitations, WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (section 250(1) of the Act). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the Board's

Board of Directors that is applicable in the case. WCAT has exclusive jurisdiction to inquire into, hear, and determine all those matters and questions of fact, law, and discretion arising or required to be determined in an appeal before it (section 254 of the Act).

This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

The law and policy applicable to this appeal is found in the *Rehabilitation Services and Claims Manua*l, Volume II (RSCM II).

Issue(s)

The issue is whether the worker suffered a personal injury arising out of and in the course of his employment.

Background and Evidence

The worker has been employed by the employer as a psychiatric nurse since 1971. On February 4, 2003 the worker, then 52 years old, made application for compensation stating that he felt a sharp pain in his lower back when he bent over to put his meal in the fridge. This incident occurred before the worker's normal shift start time, but after he had arrived at the workplace and while he was preparing to begin his shift. According to submissions from counsel for the worker, this occurred just before the daily meeting of the nurses from the day and afternoon shifts.

The Board's entitlement officer spoke to the worker on March 12, 2003. The claim log memo in the worker's electronic file notes that the worker said he was putting his lunch in the refrigerator (fridge), which he described as a normal house-style fridge. There was no water on the floor and he did not slip on anything. He simply bent over and was putting his lunch into the fridge.

The entitlement officer recorded in the claim log that the claim did not meet the requirements of section 5(1) of the Act. The worker was performing a "normal body motion that he could have been performing in his home or in his social life."

The worker does not have any previous workers' compensation back claims. The worker's evidence, which we accept, is that he works on a unit with approximately 25 to 27 residents with dementia. Some of them can be unpredictable and aggressive, and they require physical assistance with standing or transferring into bed.

The worker saw a physician the same day. The physician's first report states that the worker leaned forward to put food in the fridge, and had sudden low back pain. The report states that the worker had no major back pain in the past. He had no pain to his legs, no numbness and sphincter control was "OK."

On February 12, 2003 the worker's regular family physician, Dr. Dugdale, reported that the worker continued to be disabled from work due to pain in his back. The worker was reported to be unable to stand or sit for prolonged periods. Reflexes were normal and the worker could straight leg raise to 60 degrees. Dr. Dugdale estimated that the worker would be off work for 7 to 13 days.

By February 19, 2003 Dr. Dugdale was reporting that the worker should be able to start back to work on February 23, 2003, with no heavy lifting. An x-ray was reported as normal, and the worker had increased range of motion (ROM) and decreased pain and no root signs.

The return-to-work was not successful. Dr. Dugdale reported on February 26, 2003 that the worker had been unable to do heavy lifting. By the end of the shift he had decreased ROM and tenderness of the paravertebral musculature of the spine. The worker needed physiotherapy. Dr. Dugdale estimated that he would return to work in 7 to 13 days. The worker ultimately did return to work but required an extended period of time off, and a graduated return-to-work.

An x-ray of July 2, 2003 showed no pathology.

The worker had a private MRI done, also on July 2, 2003. It identified a generalized disc bulge at L4-5 with no focal disc or nerve root changes. There was also no evidence of spinal stenosis. At L5-S1 there was a generalized disc bulge with subtle left posterolateral/proximal foraminal focal disc herniation and annular tear resulting in a very subtle posterior displacement of the proximal left S1 nerve root prior to its entrance into the lateral recess. The foraminal portion of the left L5 nerve root also contacted the disc material but there was no significant displacement at that level.

The worker was referred to a neurosurgeon, Dr. Chan. In a December 2, 2003 report, Dr. Chan said that from a clinical standpoint the worker's L5 and S1 nerve roots were functioning well, and surgery was not indicated. Dr. Chan said that the small protruded disc contained 60% mucopolysaccharide, which was water content. As long as the worker had no further injury it would continue to dry up, and this would correspond to continued clinical improvement.

The worker has been examined by an occupational health physician a number of times in respect of his return-to-work. He has returned to work, but has restrictions on lifting, pushing, pulling and rolling, bending, twisting, and awkward postures.

Counsel for the worker made a number of submissions. We have reviewed and considered all of them, and specifically note the following.

The Board should have applied the presumption found in section 5(4) of the Act, because it is undisputed that the worker had an "accident" as defined in section 1 of the Act. The Board did not consider policy items #14.10 and #14.20 which provide guidance in the interpretation of section 5(4). The worker's injury was caused by the "accident" of bending down, which falls into the definition of a "fortuitous event occasioned by a physical or natural cause."

The Board failed to properly apply section 5(1) and policy item #14.00, which addresses "arising out of and in the course of employment," and policy item #19.00, which addresses use of facilities provided by the employer.

Counsel submitted that bending down to put food in the fridge was a movement requirement by the worker's employment because the same fridge was used to store food that the workers used to care for and feed patients. In addition, the worker needed to bring a meal to work because the cafeteria at the workplace was not open during afternoon shifts, and the worksite was relatively isolated.

Counsel submitted that it was reasonable to conclude from the physician's reports on file that the worker's employment had primary causative significance in the onset of his lumbar strain and non-surgical subtle L5-S1 disc herniation and annular tear found on the July 2, 2003 MRI.

Counsel pointed to policy item #14.00 in the RSCM II, which states that there are activities, such as the worker's "drawing of pay" which although not normally considered productive activities, may lead to a compensable injury. She also pointed to policy item #19.00 which states that where a worker is injured using some facility supplied by the employer, the use of the facility may be part of the employment relationship. She also noted policy item #19.20, which discusses injuries occurring in parking lots, for reasons which are unclear.

Counsel submitted that we should issue a decision "akin" to WCAT #2003-00357-RB, and in particular following the reasoning set out in paragraphs 19, 20, 21, and 26 of that decision. She suggested that the fact that the worker was required to "bend down to take food in and out of the lower refrigerator section to care for and feed patients" should be incorporated into the language of that decision, which should be used as a template. Counsel submits, essentially, that the fact that the worker used the fridge as part of his work duties means that the action of placing his own lunch in the fridge is similarly work connected.

Counsel also submitted that the worker's job requirements include heavy lifting, because many of the residents on the ward have dementia and require assistance to stand and roll into bed. Counsel submitted that the worker's case fell within the numerous compensable back injuries accepted under policy item #15.20, and cited WCAT #2003-01390-RB, #2003-02475-RB, #2004-00121, #2004-01807, and #2004-02418-RB.

The employer's representative submitted that the worker was performing a normal body movement. It was a personal act, and the employer had concerns about whether the worker's complaints had any connection to his employment.

Reasons and Findings

This appeal illustrates the difficulties that arise when the Board is asked to adjudicate a claim involving what is termed an injury following a "motion at work."

Policy item #15.00 requires the adjudicator to distinguish between injuries resulting from employment and injuries resulting from purely natural causes. Policy item #15.10 discusses how to adjudicate claims where a worker has a pre-existing deteriorating condition that is on the verge of becoming a manifest disability. If the worker would not have escaped the disability regardless of the work activity, the disability is considered to have been caused by the deteriorating condition. Where no pre-existing condition exists, policy item #15.20 applies.

Policy item #15.20 of the RSCM II is titled *Injuries Following Motions at Work*. It is the policy referred to when a worker alleges an injury caused by a "motion" of the human body, such as turning the head, or bending over to pick something up. A "motion at work" is distinct from an event such as a fall or an incident where a worker is struck by something.

The intent of policy item #15.20 is to assist in the adjudication of claims that arise where there is no obvious accident, incident or event either at or immediately before the appearance of the injury. These claims are distinguished by a seemingly innocuous activity that the body usually performs without injury, which is followed by a constellation of symptoms. Policy item #15.20 specifically states that it does not apply where there is a deteriorating condition as contemplated by policy item #15.10.

Is there a deteriorating condition in this case to bring it within policy item #15.10?

Dr. Chan's opinion could be interpreted as linking the worker's clinical symptoms to the worker's subtle disc herniation and annular tear. If indeed that is the source of the worker's symptoms, and the evidence established that bending over caused the disc herniation, then policy item #15.10 would apply, on the basis that if such an inconsequential motion caused a disc herniation, the only reasonable conclusion must be that the worker had a pre-existing deteriorating condition. The deteriorating condition was such that it could have become manifest at any time, removing any employment significance.

We do not consider the evidence in this case a sufficient basis upon which to conclude that the worker had a pre-existing deteriorating condition. During our consideration of this appeal, we asked the worker's attending physician if the worker had any history of back complaints. His response was that there was no such history, and there is none evident on the medical records and reports on file. Consequently, we have considered this appeal in the context of policy item #15.20 of the RSCM II.

This appeal is the classic incarnation of this type of claim. That is the situation where a worker bends over to pick something up, or as in this case, to put something in a fridge, and experiences a relatively sudden onset of back pain. Understandably, the worker believes that the act of bending over caused an injury to his back. Given the sudden onset of pain, and the subsequent complaints, plus the discovery of positive findings on the MRI, the worker's physician also suggests that the "bending over" caused the worker's back condition.

These types of claims are challenging to adjudicate, because of the difficulty determining whether the "motion" was one arising out of and in the course of a worker's employment, or simply a "natural body motion" with no connection to the employment, and also whether the bodily motion actually caused an injury. The starting point in any analysis of whether a worker is entitled to workers' compensation benefits for a personal injury is always section 5 of the Act.

Section 5 requires that a personal injury arise out of and in the course of employment. Section 5(4) states that in cases where the injury is caused by accident, where the accident arose out of the employment, unless the contrary is shown, it must be presumed that it occurred in the course of the employment; and where the accident occurred in the course of the employment, unless the contrary is shown, it must be presumed that it arose out of the employment.

Policy item #14.00, *Arising Out Of and In The Course of Employment*, outlines eight indicators, which are not determinative, but provides guidance on whether an injury should be classified as one arising out of and in the course of employment. These include:

(a) whether the injury occurred on the premises of the employer;
(b) whether it occurred in the process of doing something for the benefit of the employer;
(c) whether it occurred in the course of action taken in response to instructions from the employer;
(d) whether it occurred in the course of using equipment or materials supplied by the employer;
(e) whether it occurred in the course of receiving payment or other consideration from the employer;
(f) whether the risk to which the employee was exposed was the same as the risk to which the employee is exposed in the normal course of production;
(g) whether the injury occurred during a time period for which the employee was being paid; and,
(h) whether the injury was caused by some activity of the employer or of a fellow employee.

Policy item #15.20 provides:

#15.20 Injuries Following Motions at Work

This heading refers to cases where an injury has followed a motion at work, but there was no deteriorating condition to bring the case within policy item #15.10.

If a job requires a particular motion, and that motion results in injury, that is an indication that the injury arises out of the employment and is compensable. An example of this principle is a Board decision where the worker's injury resulted from bending down and, for this worker, bending down was a required movement of the job. Another Board decision illustrates the point as follows:

> "An automobile mechanic working under a car is bending himself in unusual ways when he turns his head to look at something. Through some unusual movement of the neck muscles, he suffers a muscle strain. The employment activity may well have had causative significance and the injury is therefore compensable."

The same applies where a job requires a series of different motions, and an injury results from the series.

On the other hand, there may be situations where an injury resulted from some motion of the human body that was not required as part of the job. This would be an indication that the injury would not be compensable. Suppose, for example, that on walking along a road on an industrial site in the course of employment, a worker's head turns sideways as a matter of curiosity to see what someone is doing. Because of some peculiar movement in the neck muscles, a

muscle strain occurs. That would not be an injury "arising out of" the employment, and therefore not compensable. Again, suppose a worker is using the toilet at work and, in doing so, suffers an injury resulting only from the bowel movement. That would not be compensable.

The injury may result not from any particular motion at any particular time and place, but rather from repetition of the same kind of motion over time, perhaps several weeks, perhaps several years. If the motion is one that the worker undertakes in the course of employment, or predominantly in the course of employment, this would be an indication that the resulting injury would be compensable. But if the motion is of a kind that is undertaken at home and in the worker's social life as well as at work, this would be an indication that the resulting injury was not compensable. This point is illustrated in another Board decision:

> "If the injury is one that resulted from the natural condition of the worker together with the general activities of life, it would not be compensable simply because work was one of those activities. To be an injury arising out of the employment, there must be something in the employment that had a particular significance in producing the injury. For example, if a worker has an injury to his knee and medical evidence indicates that this is caused by the use of stairs, it would not be compensable simply because the worker uses stairs at work as well as at home and elsewhere."

It may often, in practice, be difficult to distinguish between work-required and non-work-required motions. Moreover, a work-required motion will often be a motion which the worker commonly engages in at home. This would suggest that the illustrations set out above are contradictory. However, the point is that it is not enough to consider only whether the motion is one which is undertaken at home, or only whether the motion was required by the worker's job. Illustrations are not intended to be substitutes for the exercise of judgment.

On the one hand, it is said that it should be sufficient to show only that the injury "came on while the worker was at work." The difficulty with this argument is that it renders meaningless the first half of the test contained in section 5(1). If causation is to be measured solely by the fact of employment, why did the Legislature include a requirement that the injury must also "arise out of" the employment? Clearly something more is required.

On the other hand, it has been suggested the Board should disallow any claim for compensation where the motion which caused, or apparently caused, the injury is one which occurs constantly in the course of daily living. This argument would inevitably lead to absurd conclusions. Very little physical activity or body movement in a worker's employment differs significantly from that at home. The result is that virtually every body motion or activity could be said to be "normal" or "natural", capable of occurring off the job and therefore non-compensable. Clearly something less restrictive is required.

> Claims of the kind under discussion here must be adjudicated with great care. Nevertheless, the necessity for the exercise of judgment will result occasionally in what may appear to be inconsistency or the application of slightly different criteria. This is inevitable in any situation where it is virtually impossible to draw a line. It is not advisable nor just to state that claims for injuries without accident can only be accepted where there was some demonstrable act on the part of the worker which was so directly connected with work that the relationship is indisputable. In particular, the present inability of medical science to accurately pin-point the etiology of a great variety of spinal problems, many of which have been shown to arise from the most trivial of incidents, leads to a conclusion that, in appropriate circumstances, such incidents should be seen as causative and if they occur while at work, the resulting injury must be compensable. On the other hand, the simple act of walking up stairs or turning one's head to speak to a co-worker or of looking down at one's hands while performing a certain job, fall so clearly into the realm of "natural" or "normal" bodily functions that the only connection between them and the employment is the coincidental fact that the worker was on the job at the time.
>
> Simply by adding a few more facts to these situations or others it might well be possible, in individual cases, to find that a work relationship existed. For example, (and these examples are not to be taken out of context without consideration of the discussion above), if the worker were forced into an awkward position in order to properly perform the job and either while in that position or when arising from it suffered a sudden and severe onset of pain and discomfort, and the evidence shows no previous difficulty, it might well be that the only reasonable conclusion is that the apparently minor incident was causative. Similarly, if a worker bends to pick up an object, and that motion is required by the job (e.g. a piece of debris while on clean-up, a piece of mail while working in the mail room, an item of equipment or machinery in a plant) and, unrelated to the lifting of the object, suffers an onset of disabling pain, that apparently insignificant motion might also establish some work relationship. In either of these cases, the motion although natural was performed as a matter of the worker's duties and may in that sense gain "work" status.

The Act requires a decision-maker to consider whether the section 5(4) presumption applies. Was there an "accident" arising out of the employment, or occurring in the course of employment? If either is true, then section 5(4) of the Act provides a worker with a benefit of a presumption that the accident occurred in the course of employment, or arose out of the employment as the case may be.

Counsel in this appeal submitted that bending over to get the lunch out of the fridge was an "accident." The review officer did not accept that submission. We agree.

What is an "accident" as such is intended by section 5(4) of the Act? "Accident" is defined in section 1 of the Act as, "includes a wilful and intentional act, not being the act of the worker, and also includes a fortuitous event occasioned by a physical or natural cause."

In our view, the term "accident" requires something more than simply bending over, even if a worker reports the sudden onset of back pain on bending. Neither the onset of pain nor the bending itself is an "accident." The act of bending over was an "act of the worker," and we do not consider it a "fortuitous event." *Black's Law Dictionary, Abridged Fifth Edition*, defines "fortuitous event" as an "event happening by chance, or an accident," "that which happens by a cause which cannot be resisted," and "an unforeseen occurrence, not caused by either of the parties, nor such as they could prevent." In our view, the act of bending over to pick something up is not a fortuitous event such that the presumption in section 5(4) applies. It was a deliberate act of the worker. It was just the type of act that policy item #15.20 is an attempt to address.

We have considered whether the internal bodily occurrence that led to the "sharp pain" could be characterized as the accident. Although the broadest possible interpretation of "accident" could include the onset of sudden sharp pain, we do not consider that the definition of "accident" in the Act is meant to include both the cause and the effect. The "sharp pain" suggests a possible "personal injury" but in cases such as this, the alleged cause of the worker's back pain was nothing more than the natural body motion of bending over, which most of us do many times a day. We do not see how bending over could be called an "accident," any more than reaching for a cup of coffee, or turning one's head is an "accident."

The presumption in section 5(4) does not apply.

Thus, compensability must flow from section 5(1), on the basis that there was a personal injury arising out of and in the course of employment.

Policy item #15.20 can be construed to mean that an injury caused by an insignificant natural body motion is compensable if the motion is work-required. Conversely, it can also be understood to mean that injuries resulting from insignificant motions are not compensable because the injuries did not arise out of the employment.

We have no doubt that bending over from the waist is a normal or natural body motion. Section 5 of the Act requires that a personal injury incurred by such a motion must arise out of the employment. When the motion is normal for the body, the causative role of the employment is often minimal. That is why policy item #15.20 requires these types of claims to be adjudicated with caution.

The former commissioners of the Board addressed the "motions at work" issue in Decision #286 (reported at (1978), 4 *Workers' Compensation Reporter* 60). That decision was stated to be a "policy directive" respecting injuries sustained while doing a motion required by a job which is otherwise a normal body motion.

The policy stated in Decision #286 was based on an earlier decision of the commissioners. Decision #145 ((1975), 2 *Workers' Compensation Reporter* 171) addressed a fact situation where a worker suffered a low back injury while bending down.

Both Decisions #145 and #286 have been "retired" and no longer have the status of published policy. However, it was from the principles discussed in these decisions that the policy was derived, and they can provide some interpretive guidance.

The commissioners in Decision #145 stated:

> A person does not normally suffer a disability simply as a result of bending down. For this reason, a claim for disability resulting from the simple act of bending down should not be accepted without further enquiry. But neither is there any rule requiring such a claim to be denied.

The commissioners then classified the more common situations. Under heading No. 4, *Work-Required Motion*, they stated:

> This heading refers to cases where an injury has resulted from a motion that is required as part of the employment . . . If a job requires a particular motion, and that motion results in injury, the injury arises out of the employment and is compensable.

Under heading No. 6, *Motion Not Required By the Employment*, the commissioners stated:

> This heading refers to situations where an injury resulted from some motion of the human body that was not required as part of the job. Such an injury would not be compensable unless the employment relationship had causative significance in some other way. Suppose, for example, that a worker is walking along a road in an industrial site in the course of his employment, when he turns his head sideways as a matter of curiosity to see what someone is doing. Because of some peculiar movement in the neck muscles, he suffers a muscle strain. That would not be an injury "arising out of" the employment, and therefore not compensable.

In Decision #286, the commissioners stated the following at pp. 66–67:

> We do not consider it advisable nor just to state that claims for injuries without accident can only be accepted where there was some demonstrable act on the part of the claimant which was so directly connected with his work that the relationship is indisputable. In particular, the present inability of medical science to accurately pin-point the etiology of a great variety of spinal problems, many of which have been shown to arise from the most trivial of incidents, forces us to conclude that, in appropriate circumstances, such incidents should be seen as causative and if they occur while the worker is at his job, the resulting injury must be compensable.

Although 30 years have passed since these decisions were written, medical science seems no closer to supplying the answer to the origin of many spinal or other physical problems. If the causes of these problems were clear, there would be less controversy adjudicating claims.

Policy item #15.20 says that if a worker is required by the employment to bend down and bending down causes an injury, then the injury is compensable despite the fact that it is a natural body motion. Conversely, the policy also says that walking up the stairs or turning one's head to speak to a co-worker or glancing at one's hands while performing a job are not compensable because they are only natural body motions, even though they may also be work-required.

Policy item #15.20 can support decisions either way, on similar facts. This cannot have been the intention of the policy-makers, who were attempting to provide guidance in adjudication of these types of claims, with the overall goal of consistency in adjudication. For that reason, we have carefully analyzed policy item #15.20 with a view to developing an interpretation that could help lead to consistent results.

We do not consider that everything done while at work, is, by definition, a work-required motion. Whether or not a particular motion is "work required" requires careful analysis using well-established principles of workers' compensation law and policy.

As policy item #15.20 acknowledges, there is "very little physical activity or body movement in the worker's employment that differs significantly from that at home." As human beings, we stand, walk, bend, reach, and lift. We have little doubt that the worker in this case uses a fridge at home, and in using it, bends down to put things in it. He likely also bends down to pick things up off his kitchen floor. These are obvious examples. They do not assist in arriving at a consistent approach to the analysis of policy item #15.20. Workers may lift a heavy item at work, or at home. An injury sustained doing so at work would likely be compensable. An injury sustained at home would clearly not be.

Therefore, both the connection of the motion to work and the significance of the motion in causing the injury are necessary considerations in order to found a claim for compensation.

The difficulty in adjudicating these types of claims is illustrated by the different approaches taken by previous appellate decision-makers, and perhaps to some extent the inconsistency in results. Many of these approaches are summarized in WCAT #2004-01807. Some of them include:

- If a worker is performing a work-related motion at the time of onset of discomfort, the mere fact that the motion was work-required would satisfy the requirement for "causative significance" set out in policy item #15.00.

- Where an expert medical opinion is that it is unlikely that the natural body motion caused the injury and the motion is only "coincidentally" required by the employment, the claim should be denied. (Review Decision #2576, November 17, 2003)

- No matter how trivial the motion, if it has "work status," the claim must be accepted.

- The decision-maker must look at whether there is something in the work-required motion that had causative significance.

- A motion must be "awkward" in order to satisfy policy item #15.20.

In our view, there are essentially three broad questions that arise when adjudicating a claim arising from a "natural" or "normal" body motion. We consider it necessary to consider all three questions in order to promote consistency in adjudication in accordance with the Act, and the policies having an impact on these claims.

These questions are:

1. Did the motion alleged to have caused personal injury take place in the course of employment?

2. Did the motion have enough work connection?

3. Did the motion have causative significance in producing a personal injury?

We have analyzed these three questions generally, and in the context of this appeal, as follows, keeping in mind the law and published policy, as well as some general principles of workers' compensation law.

Did the Motion Alleged to Have Caused the Personal Injury Take Place in the Course of Employment?

The answer to this question is not specific to the "motions at work" issue. Nor is the question answered in the affirmative simply because the worker was at work when the symptoms occurred. It involves the application of the policies which address the "course of employment." For example, a worker may have deviated from the course of employment by going to his car to pick up a personal item, or have been engaged in some other personal act, such as horseplay. Conversely, a worker injured in the immediate approach to the worksite, even though still on a highway, may be in the course of employment because the injury is a "spill-over" from the employer's premises.

Policy item #14.00 of the RSCM II states there are activities within the employment relationship which would not normally be considered as work or in any way productive. However, an injury in the course of some of these activities is compensable in the same way as an injury in the course of productive work. The policy item then goes on to list some indicators specific to the question of whether the worker was in the course of employment.

Under item #21.00 of the RSCM II, titled *Personal Acts*, it is recognized that sometimes it is difficult to separate work activities from personal activities. In mapping out the area where workers are compensated, policy item #21.00 notes that an incidental intrusion of personal activity into the process of work will not result in the denial of an otherwise acceptable claim. For this reason a worker who is blowing his or her nose, using a toilet, or having a coffee break when the injury occurs will not necessarily have the claim denied. Where the common practice of an employer or an industry permits some latitude to employees to attend to matters of personal comfort or convenience in the course of their employment, compensation for injuries occurring at those moments are not denied simply on the grounds that the worker was not in the course of production at the crucial moment.

Policy item #21.10 in the RSCM II deals specifically with lunch, coffee and other breaks. It states that a worker is considered to be acting in the course of employment not only when doing the work he or she is employed to do, but also while engaged in other incidental activities. Policy item #21.10 goes on to list examples of trips out to parking lots being covered or not depending on the circumstances. The policy states there will be trips for personal reasons unrelated to work, which cannot be said to be simply incidental to that work and in these cases no coverage will be extended.

In this case, the worker was already at work, on the employer's premises, and using the employer's fridge. Although technically he had not started his shift, he was in the process of immediate preparations for beginning work. We have concluded that he was in the course of his employment, despite the fact that he had not actually begun receiving pay from the employer.

This situation is similar to that which would arise if the worker had been injured when the locker supplied by his employer fell on him while he was changing into his uniform. The worker would likely be found to be "in the course of" his employment. The locker was a hazard of the employment and changing into the uniform a requirement of the employment. Similarly, a factory worker burned by the malfunctioning of a shower provided by the employer for use after a shift in a dirty environment would also likely be in the course of her employment. We recognize that these examples are of "accidents." However, they illustrate situations where a worker may be in the course of employment even though the workday has not begun.

On the other hand, had the worker been injured by the hatchback of his car falling on his head while taking his lunch out of the back of his car, it is unlikely he would have been in the course of his employment.

In this case, the worker had already entered the workplace and was in the process of more immediate preparations for work. We conclude that the worker was in the course of his employment.

Did the Motion Have Enough Work Connection?

Once it is established that the motion took place in the course of employment, the inquiry turns to whether there is a personal injury arising out of the employment. This is the second half of the test in section 5 of the Act.

This involves consideration of whether the motion was directly required by or incidental to the employment. It could also be characterized as whether performance of the motion exposed the worker to a risk of the employment, as opposed to the risks arising from the natural, everyday motions of the human body, to which we are all constantly exposed, and which it could be said take on more significance as our bodies age, regardless of our work activities.

Policy item #15.20 gives some examples of motions that do not have sufficient work connection. The "simple act of walking up stairs" or "turning one's head to speak to a co-worker," or of "looking down at one's hands while performing a certain job," are given as examples of motions that fall "so clearly into the realm of "natural" or "normal" bodily functions that the only connection to employment is the coincidence that the worker happened to be in the course of employment at the time. To this list, we would add such things as getting up from a chair, scratching one's back, and drinking from a cup of coffee. Activities such as getting up from a chair are so much a part of normal human life that unless there is some related hazard particular to the employment, we do not consider that sufficient work connection exists.

However, motions that are specifically required by a worker's employment, such as bending over to pick up a box, however light in weight, in order to move it, are sufficiently work-connected. There must be some direct connection between the employment and the motion.

In this context, one may ask whether the Act and policy require that the motion need be awkward, or unusual in some way. We do not consider that the Act or policy necessarily require an awkward or unusual motion in order to find a sufficient connection between the motion and the employment.

Policy item #15.20 makes a number of statements relating to this question, summarized as follows:

- A motion may be so directly connected with work that the relationship is indisputable.

- Very little physical activity or body movement in a worker's employment differs significantly from that at home. The result is that virtually every body motion or activity could be said to be "normal" or "natural," capable of occurring off the job and therefore non-compensable.

- A worker is "forced into" an awkward position in order to properly perform the job. While in that position or when arising from it the worker has sudden and severe onset of pain and discomfort. The evidence shows no previous difficulty. It "might well be" that the only reasonable conclusion is that the apparently minor incident was causative.

- If a worker bends to pick up an object, and that motion is required by the job and, unrelated to the lifting of the object, suffers an onset of disabling pain, that apparently insignificant motion might also establish some work relationship.

- The simple acts of walking up stairs or turning one's head to speak to a co-worker or of looking down at one's hands while performing a certain job, fall "so clearly" into the realm of "natural" or "normal" bodily functions that the only connection between them and the employment is coincidental.

If there is an "awkward" or "unusual" motion, is this enough of a connection? A motion that is awkward or unusual may be so simply because of the way an individual happened to move, but totally unrelated to the employment. It could also be so because the employment itself required an awkward or unusual motion. Where the motion is required by the employment to be awkward or unusual, it may expose the worker to an employment hazard. Where it is simply an unfortunate movement brought about by happenstance, and not attributable to a hazard of the employment, it is not employment-related.

Although whether a motion was awkward or unusual may have some bearing in answering the second question, it is not definitive. The intrinsic connection to the employment must still be there. For example, an awkward twist of the head to talk to a co-worker or an inopportune shoulder motion while scratching one's back may not be employment-related, but a similarly awkward posture required to look into a poorly placed cupboard at work could be. This determination will always require the application of common sense and judgement.

Although, as has been noted by many previous decision-makers, policy item #15.20 is somewhat confusing, the direction provided by policy item #15.20 can be simply stated. The motion must be one that is sufficiently connected to the employment, in the sense that it was required by the employment, and exposed the worker to a hazard of the employment itself.

This is contrasted with the physical, commonplace, everyday activities of life, that continue throughout the day, even while we are working, and cannot be said to directly expose us to a hazard born of the employment itself.

Applying this analysis to the worker's case, we conclude that the motion of bending over to put his meal in the fridge was not sufficiently connected to the employment.

The motion of bending over is a commonplace, day-to-day activity of life. The worker was not lifting anything required to be lifted by his employment. He simply bent over, which is a natural body motion, performed many times a day and in this case, done in order to complete a personal act. Even if the worker was compelled by circumstances to bring a lunch to work, placing it in the fridge did not expose the worker to a hazard (in the broadest sense), of the employment. Moreover, if, as submitted by counsel, the worker had occasion during his shift to take things in and out of the fridge as part of his duties in caring for the patients, he was not doing that activity at the relevant time. There is insufficient employment connection.

It is thus not necessary to progress to the third question in this particular case. However, for completeness, we set out below our analysis of the third question.

Did the Motion Have Causative Significance in Producing a Personal Injury?

Once it has been established that the worker was in the course of employment, and the motion had enough employment connection, the final question is whether the motion actually caused an injury. This is the medical question inherent in all claims. Law and policy requires that there be an injury, and that the work-required motion have caused it.

There is usually a report from the physician who examined the worker after the incident claimed to have caused injury. If this report does not provide sufficient information to resolve the matter, an opinion from the worker's physician or another medical expert may be sought to determine whether it is likely that the motion caused an injury.

This is the question that leads to analysis of the nature of the motion, and the medical significance of the motion in causing injury. The generally accepted standard in workers' compensation is causative significance. The decision-maker must consider whether the evidence, and in particular evidence relating to medical causation, supports a conclusion that the motion had causative significance in causing an injury. It must be kept in mind that pain itself is not necessarily evidence of an injury. There should be some medical evidence of an actual injury.

There are also a number of other criteria that should be considered in deciding whether the motion had causative significance. Inquiry should be directed to whether it makes biological sense that an injury could result from the particular motion. This is not a requirement for medical certainty. It means that, taking all of the circumstances into account, it is biologically likely that the motion could cause an injury.

Temporality is also an important criterion. The injury must follow the motion, in some demonstrable way. A close temporal relationship may support a causal relationship.

An individual worker may have risk factors that increase the likelihood of an injury occurring with a particular motion. Inquiry should be directed to pre-existing conditions, and the likelihood that the motion caused an aggravation.

It is here that the decision-maker may again ask whether the motion was awkward, or unusual and as such as likely to have caused an injury. This is distinct from the situation where the motion simply brought a pre-existing condition to the worker's attention, and from the situation contemplated by policy item #15.10.

Bending forward is not generally a motion that, by itself, has the kind of significance required to establish medical causation to the standard required. It is in every sense a natural body motion, an action that the human bones, muscles, and other tissues were designed to do without injury.

That is not to say that bending forward can never cause a compensable injury. Consideration must be given to such things as whether the motion was awkward, whether the "bent-over" position was sustained, whether the worker was required to lift or carry something while bent over, and other factors that could increase the biomechanical risk of the activity. In this case, the worker was simply placing his lunch in the fridge.

There is insufficient evidence of any biomechanical risk factor to support a conclusion that the bending over movement had causative significance.

Even if we had found sufficient work connection between the motion in this case and the worker's employment, we would have denied this appeal on the basis that the evidence does not support a conclusion that the bending over motion had causative significance in producing a personal injury. The worker's reach was not awkward, and there was no additional circumstance to distinguish this particular action and somehow connect the employment as a psychiatric nurse to the injury, other than the fact he was at the work premises, preparing for work at the time of the onset of symptoms. This alone is not sufficient to establish a claim for compensation.

Conclusion

The worker's appeal is denied and the Review Division decision of April 14, 2004 confirmed.

The worker's attending physician, who provided copies of his chart notes and a transcription of same, is entitled to payment in accordance with policy and practice. No other expenses were claimed and none are awarded.