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- Blue — *Governors' Decisions*
- Green — *Appeal Division Decisions*
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Decision of the Appeal Division

Number: 6
Date: May 14, 1992
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Expert Evidence

Introduction

Sections 10 and 11 of the *Evidence Act* set out the procedures to be followed where it is desired to admit expert evidence in a proceeding, including any quasi-judicial or administrative hearing or inquiry. Those sections are to be amended by Section 10(b) of the *Justice Reform Statutes Amendment Act, 1989*. The amendment will add to Section 10 of the *Evidence Act* the following provision as Section 10(1.1):

This section and section 11 do not apply where a tribunal, commission, board or other similar body enacts or makes its own rules for the introduction of expert evidence and the testimony of experts, and where there is a conflict between any such rules and this section or section 11, those rules apply.

Pursuant to this provision, the following rules have been made for the introduction of expert evidence and the testimony of experts in connection with oral hearings before the Appeal Division. These rules concern the provision of opinion evidence by any person whom the panel finds to be an expert. For example, this could include a physician, rehabilitation consultant, occupational therapist, engineer, accountant, physiotherapist, or occupational hygienist. These rules are intended to ensure that no party is taken by surprise by expert evidence submitted at a hearing. They are also intended to ensure that the procedures followed by the Appeal Division are informal in nature to facilitate workers and employers acting on their own behalf. These rules do not apply to the provision of evidence by witnesses, who simply report what they saw or heard without giving an "expert" opinion.

These rules govern the provision of expert evidence where an oral hearing will be held by the Appeal Division. The principles upon which these rules are based are also generally applicable to the provision of expert opinion evidence where no oral hearing is being held. Rules 1 to 5 set out below are applicable to a matter being

considered on the basis of written evidence and submissions. In such cases, however, the existing procedures of the Appeal Division which govern the time frame for the provision of written evidence and submissions, and for notice to other parties, continue to apply.

Rules

1. Opinion evidence will generally only be accepted from a person the panel recognizes as being qualified by education, training or experience as an expert.
2. Objections to a person's qualifications as an expert will not generally cause a panel to exclude evidence. Such argument will be considered by the panel relative to the weight to be given to the evidence received.
3. The evidence of an expert is admissible in the form of a written report by the expert, without the necessity of the expert attending an oral hearing before the Appeal Division. An expert's oral evidence will be admissible in a hearing, however, even if a written report has not been provided by them. It is expected that advance notice will be given to the Appeal Division of any expert who will be attending the oral hearing.
4. The qualifications of the expert should be stated in or with their report. The assertion of qualifications in that manner will generally be considered as sufficient evidence of such qualifications. A job title will generally be accepted as evidence of the person's qualifications to hold the position.
5. Parties to an appeal or other matter before the Appeal Division are responsible for securing file disclosure through the established procedures, and will generally be considered to have notice of all information disclosed from the W.C.B. file.
6. Where an oral hearing is granted, it is expected that written reports will be provided to the Appeal Division as soon as practicable after receipt by the party obtaining them. This is for the purpose of the panel disclosing same to any other parties who have given notice of their intention to participate in the appeal process. The object is to provide notice to other parties in sufficient time for any response to be presented at the hearing.

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7. Evidence tendered at an oral hearing will not be excluded from consideration due to lack of notice. Where the panel considers that a party would otherwise be prejudiced as not having had sufficient opportunity to respond to significant new expert evidence, the panel may:
 - (a) allow an extension of time after the oral hearing for submission of a response,
 - (b) postpone the oral hearing, or
 - (c) provide such other relief as the panel considers appropriate.
 8. The Appeal Division will not require an expert to attend an oral hearing unless, in the panel's assessment, the attendance is necessary to a fair hearing of the issues or a failure to do so would prejudice a party to the proceeding.
 9. The application of these rules may in any case be varied at the discretion of the Appeal Division and will generally be considered by the panel hearing the matter.

The above rules take effect on the date of proclamation of Section 10(b) of the *Justice Reform Statutes Amendment Act, 1989*.

Editors' note: Order in Council 585, approved and ordered April 15, 1992 reads as follows:

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that, effective June 1, 1992, section 19(b) of the Justice Reform Statutes Amendment Act, 1989, S.B.C. 1989, c. 30, is brought into force by this regulation.

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



REPORTER

Decision of the Appeal Division

Number: 7
Date: May 21, 1992
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Delegation by the Chief Appeal Commissioner

I hereby reappoint Paul Petrie, appeal commissioner, to serve as registrar of the Appeal Division on the same basis as set out in Appeal Division Decision Number 2, for a further one-year term commencing June 3, 1992.



Decision of the Appeal Division

Number: 92-0930
Date: May 4, 1992
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Section 96(2) — Vibration White Finger

Letters dated August 21, 1991 and November 8, 1991 have been received from the Office of the Ombudsman, requesting reconsideration of the February 20, 1991 decision by the prior commissioners. The commissioners had concluded that the worker was not entitled to a permanent partial disability pension for his vibration white finger disease.

(a) Section 17(2) of Bill 27

By letter of November 8, 1991, the general counsel for the ombudsman submits:

In view of the extent of activity generated in response to our submission [of May 25, 1990], we do not consider that the Commissioners' reported decision not to reconsider the matter should be determinative on this issue, and that consideration of [this] case can therefore be continued under section 17(2) of Bill 27.

Section 17(2) of Bill 27 provides:

s. 17(2) If an appeal or a rehearing under . . . section 91 or 96 of the former *Workers Compensation Act* has been commenced but has not been completed on the date that this *Act* comes into force, that appeal or rehearing shall be continued by the appeal division under and in conformity with the new *Workers Compensation Act* . . . , so far as it may be done consistently with that new *Act*.

The background to this matter is that the ombudsman officer wrote to the prior commissioners on May 25, 1990. In a preliminary response dated October 16, 1990, the Board's general counsel and secretary advised that the commissioners had decided to obtain input from the Board's Medical Services Department. This was followed by the commissioners' decision of February 20, 1991, which enclosed copies of the additional medical reports they had obtained.

In their decision of February 20, 1991, the prior commissioners stated that they were unable to accept the ombudsman's proposal. Nothing further was heard from the Office of the Ombudsman concerning this matter until the letter of August 21, 1991. There was nothing outstanding before the prior commissioners on this claim at the time the *Workers Compensation Amendment Act, 1989* came into force on June 3, 1991.

The two final paragraphs of the commissioners' February 20, 1991 decision were as follows:

[The worker] was not considered by the board of review panel to have sustained any long-term loss of earnings as a result of his V.W.F.D. The Commissioners do not consider that there is any basis to reconsider this decision.

In the result, the Commissioners are unable to accept your proposal. [The worker] will not be awarded a permanent partial disability pension for his Vibration White Finger Disease. In the Commissioners' opinion, their decision in this respect does not constitute a new *medical* decision within the meaning of Section 58 of the *Workers Compensation Act*.

The commissioners had clearly concluded their consideration of the matter. The paragraph quoted above cannot be interpreted as showing that a rehearing by the commissioners "has been commenced but has not been completed" within the meaning of Section 17(2) of Bill 27.

General counsel for the ombudsman suggests that the prior commissioners would have had:

an expectation that we would review and assess this material and *likely* make a further submission based on such consideration, following the pattern established in previous cases.

(emphasis added)

This argument is properly qualified with the term "likely." As this implies, at each stage of the proceeding it requires a further decision by the ombudsman as to whether he will pursue the investigation, taking it to a higher level, or accept the explanation provided by the Board and close the investigation. While an expectation of a further response from the ombudsman might well have been reasonably anticipated in this case, this was nevertheless conditional on the ombudsman making a decision to pursue the inquiry further. I have difficulty equating the fact that the ombudsman would likely decide to pursue the complaint further (which was conditional on his

proceeding in this manner), with a conclusion that there was a rehearing in progress before the prior commissioners.

I conclude, therefore, that there was no rehearing under way before the prior commissioners on the date the *Workers Compensation Amendment Act, 1989* came into force which can be continued by the Appeal Division under Section 17(2).

I have one serious reservation in reaching that conclusion. This concerns the fact that the commissioners obtained new medical reports, which they relied upon in reaching their further decision without disclosing these reports to the worker, the employer, or the ombudsman, prior to their decision. I appreciate that support for the argument by the general counsel for the ombudsman that a rehearing was in process may be found in this failure by the prior commissioners to disclose these reports.

The course of action taken by the prior commissioners in failing to disclose these reports may, as argued, have been based on an expectation that the ombudsman could respond further in the future. Notwithstanding the fact that the prior commissioners' February 21, 1991 letter was couched as a final decision, it may be viewed as part of an ongoing process of review with the Office of the Ombudsman. The difficulty with this approach, however, is that it requires assumptions concerning the prior commissioners' decision-making process which go beyond what is evident from the record. It requires an assumption that such a process of review was under way, in the face of a decision letter written in a form suggesting conclusion of the commissioners' consideration of the matter. This process would seem to be more accurately characterized as involving a rehearing and redetermination by the prior commissioners, which was itself subject to the possibility of a further reopening, rehearing and redetermination if the ombudsman pursued the matter further.

Having regard to the statement in the prior commissioners' decision that they did not consider that there was any basis to reconsider the Review Board decision, an alternative interpretation of their letter is that the commissioners never reopened the matter at all. On this interpretation, their February 20, 1991 letter only amounted to a negative determination on the preliminary issue as to whether grounds had been provided which warranted a reopening under Section 96(2) of the *Act*. Viewed in this way, it may be considered that the matter was never reopened by the prior commissioners so as to initiate a rehearing of the matter.

I have some concern with the failure by the prior commissioners to disclose the new medical reports obtained by them in advance of making their February 20, 1991 decision. It might be questioned whether this involved a breach of natural justice which would constitute an error of law. In light of my conclusions concerning the "new evidence" provided by the ombudsman, however, it is not necessary that I consider this aspect further.

(b) Section 17(5) of Bill 27

The ombudsman officer submits, as an alternative, that this case may be reconsidered by the Appeal Division because of new evidence within the meaning of Section 96.1 of the *Act*.

Section 17(5) of Bill 27 states:

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

Section 96.1 of the *Workers Compensation Act* provides:

Reconsideration by appeal division

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

(2) A worker, the worker's dependants, the worker's employer or the representative of any of them may apply to the chief appeal commissioner for reconsideration of a decision of the appeal division on the grounds that new evidence has arisen or has been discovered subsequent to the hearing of the matter decided by the Appeal Division.

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

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

he may direct that

- (c) the Appeal Division reconsider the matter, or
- (d) the applicant may make a new claim to the Board with respect to the matter.

The jurisdiction of the Appeal Division to reconsider the prior commissioners' decision under Section 96.1 is dependent upon all of the requirements of this provision being met.

The governors' policy concerning the "Assessment of Pensions for Raynaud's Phenomenon" is set out in #30.11 of the *Rehabilitation Services and Claims Manual* (the *Manual*). It contains a table, with criteria for classifying a worker's disability as being in Classes 1 through 5. The *Manual* does not identify the source of this table. It is clearly indicated in the prior commissioners' decision, however, that this table is based on the classification system developed by Dr. Gilles P. Laroche. A table, entitled "Classification of traumatic vasospastic disease" was included in Dr. Laroche's article "Traumatic vasospastic disease in chain-saw operators" published in the *C.M.A. Journal*, December 18, 1976, Volume 115, page 1217, at page 1220. The table in Dr. Laroche's article is the same as that contained in the governors' policy in all essential respects, apart from the fact that Dr. Laroche assigned specific ranges of percentage of disability to each class which are not found in the governors' policy.

The letters from the prior commissioners on this claim clearly indicate that the Board was utilizing the Laroche classification system. Their letter of October 16, 1990 stated, for example, that:

. . . it appears to the Commissioners that the dispute over the severity of [this worker's] V.W.F.D. does not result from any differences which might exist between the Laroche system and the Taylor-Pelmeur system or from Dr. G's conversion of Dr. L's findings under one system to the other.

In their subsequent letter of February 20, 1991, the commissioners noted:

Dr. L has therefore confirmed Dr. G's conversion of his 1983 findings from the Taylor-Pelmeur System to Class 1 of the Laroche system. Since Dr. L examines virtually all V.W.F.D. cases considered by the Board, [this worker] was treated in exactly the same way as any other worker with V.W.F.D.

The ombudsman submits that the commissioners have erred in their interpretation of the Laroche classification system. Significantly, the Office of the Ombudsman contacted Dr. Laroche directly to obtain clarification as to the proper interpretation of the classification system developed by him. By letter of August 1, 1991, an ombudsman officer wrote to Dr. Laroche to confirm the contents of their telephone discussions as to the proper interpretation of his classification system. Her letter was endorsed by Dr. Laroche on August 12, 1991, in confirmation of the following:

The table used by the B.C. Board appeared in your article in the *C.M.A. Journal*, December 18, 1976, Vol. 115 . . . Table II, on page 1220, states that traumatic vasospastic disease must exist “along with any two or more of the findings below” for a Class 2 classification. It was my understanding that “a finding” could include the conclusion, under the heading: “Symptoms”, that a patient’s symptoms were sufficiently severe to cause the abandonment of his or her job. Equally, a “finding” could include any of the five clinical observations or investigations listed under the heading: “Evidence of vascular damage”.

Accordingly, a patient could be classified as Class 2 even in the absence of “sclerodactyly” or “fingertip scars (healed ulcers)” if any other two or more “findings” were found to be present. For example, a patient who was forced to abandon his job because of the severity of symptoms and who also demonstrated severe changes in some fingers, demonstrated by U.V.D. or D.P., could also be classified as Class 2.

Dr. Laroche added the notation “correct” beside this last passage from the ombudsman officer’s letter.

The interpretation by the prior commissioners of this classification system was clearly at odds with Dr. Laroche’s intent and the policy stated in the *Rehabilitation Services and Claims Manual*. The prior commissioners stated in their decision as follows:

However in compensating for V.W.F.D., the Board does not pay a permanent partial disability pension to a worker who does not suffer a loss of earnings, unless that worker has sustained observable physical impairment as a result of V.W.F.D. This “observable physical impairment” consists at a minimum of “sclerodactyly” (tight and shiny skin) and “fingertip scars (healed ulcers)”. Without this physical impairment, no permanent partial disability pension would be paid (if no loss of earnings) whatever system of medical assessment was adopted.

Reading this passage in the context of the prior commissioners’ decision as a whole, it is apparent that the prior commissioners meant that a worker would not be classified higher than Class 1 unless at least two findings from the right-hand column of the Laroche table were present. In stating that there had to be “a minimum of ‘sclerodactyly’ (tight and shiny skin) and ‘fingertip scars (healed ulcers)’,” the commissioners were stating that two of the requirements from the right-hand column had to be met

before a Class 2 disability would be recognized. The effect of this is that the prior commissioners misinterpreted the Laroche classification system to impose three, rather than two requirements for a Class 2 classification.

It should be acknowledged that there was an ambiguity in the table which would appear to have led to this misinterpretation. Class 2 of the Laroche classification reads as follows:

Traumatic Vasospastic Disease	Symptoms	Evidence of Vascular Damage
Exists along with any <i>two or more of the findings</i> .	Severe, forbidding outside work or causing abandonment of job	<ul style="list-style-type: none"> – Sclerodactyly – Fingertip scars (healed ulcers) – Bone changes and vacuoles – Arterial occlusions visualized arteriographically – Severe changes in some fingers demonstrated by U.V.D. or D.P.

(emphasis added)

The prior commissioners interpreted the phrase “two or more of the findings” as meaning two or more findings from the column at the right. The proper interpretation of the governors’ policy, however, is that the symptoms set out in the middle column may constitute one finding. Thus, if the worker is suffering from the symptoms set out in the middle column, and one of the signs of evidence of vascular damage set out in the column at the right is present, the worker’s disability is properly classified as being in Class 2.

I note with concern the statement by the prior commissioners that this worker was treated in exactly the same way as any other worker with vibration white finger disease. This would seem to indicate that the misinterpretation of the Laroche classification system evident in the prior commissioners’ decision on this claim is indicative of a generalized error. It suggests that many workers may have been improperly classified as being in Class 1 of the Laroche system, when in fact they would more properly have been classified as being in Class 2. It is of interest to note that

Dr. Laroche indicated in his original table that Class 1 would not warrant a percentage disability award, but that the appropriate range for Class 2 would be from 5 to 15% of total disability.

The error of interpretation is not contained in the governors' policy set out in #30.11 of the *Rehabilitation Services and Claims Manual*. Rather, the error arose in the application of the phrase from this passage of the *Manual* in respect of Class 2: "Exists along with any two or more of the findings." The Board's *practice* was to interpret this as requiring that the criterion in the middle column (Symptoms) be satisfied together with *two* or more findings from the right-hand column, before a worker's disability would be recognized as being in Class 2. As noted above, the proper interpretation of the table is that the prerequisites for a Class 2 classification are that the criterion in the middle column and *one* or more of the findings in the right-hand column be met. Based on the information provided concerning the proper interpretation of the classification system, it is incorrect to state that both the physical findings of "sclerodactyly" and "fingertip scars (healed ulcers)" are essential to a Class 2 classification as is implicit in the prior commissioners' decision.

The ombudsman officer submits that this worker would be properly classified as being in Class 2, on the basis that the symptoms from the middle column exist and that one of the findings from the column at the right are present, namely, that there are *severe changes in some fingers demonstrated by U.V.D. (ultrasonic velocity detection) or D.P. (digital plethysmography)*. Under the Laroche classification system, a worker is placed in Class 1 if there are "*Normal findings or moderate changes demonstrated by U.V.D. or D.P.*"

A report dated November 27, 1986 from the Department of Health Care and Epidemiology, University of British Columbia, stated:

We can, however, based on our limited examination classify [this worker] as Laroche Class 2 based on symptoms and abnormal digital plethymography.

The new evidence provided by the ombudsman was disclosed to the worker's employer. By letter of December 19, 1991, the employer's health and safety coordinator noted:

. . . the information provided in [the Ombudsman Officer's] letter, dated August 21, 1991, referring to a possible misinterpretation of the Laroche System could, as new evidence, warrant further consideration by your division.

Having carefully considered the foregoing, I have concluded that the evidence provided by the Office of the Ombudsman from Dr. Laroche (with respect to the proper interpretation to be given to the classification system developed by him and incorporated into the policy stated in the *Rehabilitation Services and Claims Manual*), constitutes new evidence which meets the requirements of Section 96.1 of the *Act*. It is substantial and material to the decision, and either did not exist at the time of the commissioners' hearing or did exist at that time but was not discovered and could not through the exercise of due diligence have been discovered. I would rely, in this regard, on the reasoning expressed in the *Workers' Compensation Reporter*, Vol. 7(3): p. 145, Appeal Division Decision No. 91-0724.

I find that the requirements of Section 96.1(3)(a) and (b) are met. I have, therefore, the discretion to:

direct that

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

The Appeal Division will, pursuant to Section 96.1(3)(c), reconsider the question as to whether the worker is entitled to a permanent partial disability pension.

In my notice letter to the employer, I advised that if they were participating in this process they would be granted a further opportunity to make submissions prior to any decision being made on the merits of the claim. The employer has stated that they would welcome the opportunity to participate in any forthcoming process. The worker and employer will, therefore, be given the opportunity to provide submissions as to whether the worker is entitled to a permanent partial disability pension, prior to a decision being rendered.

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



Decision of the Appeal Division

Number: 92-0857, 92-0858
Date: April 21, 1992
Panel: Connie Munro, Derrick Spooner, Walter N. Peain
Subject: Section 96(4) Referral

This matter comes before the Appeal Division both as a referral from the president and chief executive officer and by way of a worker's appeal from the Review Board findings. As the appeal and the referral involved different issues, these were separately considered by the panel as follows.

(a) Appeal by the Worker: Amount of his Pension Award

An appeal from the August 12, 1991 Review Board finding was filed by the worker's representative. The appeal disputes the Review Board finding that only 70% of the worker's hearing loss was a responsibility of the B.C. Board. The argument is that the worker, upon leaving the military in 1968, had no evidence of hearing loss. The submission acknowledges that the discount of 14%, referring to the time that the worker was employed in Alberta for three years, is correct but expresses the opinion that it is a relatively insignificant number so that the worker ought to have been granted a 100% hearing loss award. The issue is also raised that the worker had a serious injury under another claim which is recorded as a neck injury but involved a severe blow to the head. It is requested that the 1979 file be reviewed to determine if the worker's hearing problems are a result of that trauma.

Dealing first with the latter issue, the panel has reviewed the 1979 claim in detail. It arose as a result of a motor vehicle accident August 2, 1979. Given that the vehicle in which the worker was a passenger rolled over in a ditch before striking a telephone pole it is reasonable to presume that some trauma to the head was involved. There is, however, no evidence of head injury, per se, nor is there any indication on the file that complaints of hearing problems followed the accident. Moreover, the audiometric test results were interpreted by the registered audiologist at the W.C.B. as suggesting a hearing loss due to occupational noise exposure, that is, non-traumatic hearing loss. Although the degree of loss did, in the opinion of the audiologist, appear excessive in view of the worker's age and history of noise exposure, the Board accepted that the entire loss was a result of the non-traumatic exposure. No evidence has been provided or is on file that would lead to a different conclusion.

With respect to the calculation of the percentage of the worker's loss that is attributable to employment in British Columbia, there is no discernable error in the conclusions of the adjudicator and the Review Board. Although the worker may not have had a noticeable hearing loss upon leaving the Armed Forces, it is apparent from the 1968 audiograms performed by the Canadian Forces Medical Service that the results between the right and left ear were not the same, even at that time.

The submission on behalf of the worker suggests that the non-B.C. exposure ought to be ignored or that the time he was in the Armed Forces in British Columbia ought to be accepted as a W.C.B. responsibility. Members of the Armed Forces are not covered by the *Workers Compensation Act* so that any such exposure would not be compensable. The governors' policy #30.22 provides that if the B.C. responsibility is 90% or greater that the Board will assume total liability. In this case, however, the worker has not met that threshold as his B.C. exposure accounts for only 70% of the hearing loss.

The panel finds, therefore, that the amount of the worker's functional award has been correctly calculated. The worker's appeal is denied.

(b) Referral by the President: Commencement Date of the Worker's Pension Award

In a letter to the worker dated September 12, 1991, Kenneth M. Dye stated:

The question is whether the Review Board finding regarding the commencement of your award is in contravention of the published policy of the Governors. I refer you to paragraph 4 of #30.28 of the *Rehabilitation Services and Claims Manual* (Copy enclosed). Under this paragraph, your award cannot commence prior to the date your application for compensation was received by the Board, namely March 20th, 1990.

While this last sentence correctly reflects paragraph 4 of the governors' policy, it should be noted that paragraph 3 in the governors' policy authorizes the payment of hearing loss pensions "in respect of a loss of earnings or impairment of earning capacity" from the date the worker first suffered same.

Mr. Dye's letter had earlier stated that the Review Board findings of August 12, 1991:

... confirmed the decision as to the amount of the pension awarded to you for your hearing loss but directed the Board to review the commencement date of your award in light of Dr. C's report of July 8, 1987.

The Review Board stated, on page 4 of its “Findings and Reasons,” that:

In regards to the commencement date of the worker’s loss of hearing pension award, we would refer the file back to the Board’s Disability Awards Department to re-assess the award, taking into consideration Dr. C’s audiologic assessment report of July 8, 1987. *If the degree of hearing loss recorded on that report entitles the worker to a loss of hearing pension award his award should commence on the date of this report which is the first evidence of industrial hearing impairment.* The worker’s loss of hearing pension award will then be assessed in accordance with Board policy as contained in Section 30.28 of the *Rehabilitation Services and Claims Manual*.

(emphasis added)

In referring to the governors’ policy, the Review Board findings stated:

The Board’s policy regarding the commencement of awards for hearing loss claims of non-traumatic origin is contained in Section 30.28 of the *Rehabilitation Services and Claims Manual*. It states:

. . . payments shall be calculated to commence as of the date upon which the worker first became disabled from earning full wages at work at which he was employed.

That is not, however, a statement of policy with respect to all non-traumatic hearing loss claims. The aforementioned quote from paragraph 2 of *Rehabilitation Services and Claims Manual* (the *Manual*) #30.28 is prefaced by the words:

Where compensation is being awarded under Section 6, then, subject to Section 55, periodical (payments shall. . .)

The governors’ policy quoted by the Review Board was from paragraph 2 of #30.28, which is only concerned with applications under Section 6 of the *Workers Compensation Act*. The governors’ policy set out in #30.20 of the *Manual* provides:

(b) If the hearing loss has developed gradually over time as a result of exposure to industrial noise, it is treated as an industrial disease. However, *the provisions of Section 6 do not apply unless the claimant ceased to be exposed to causes of hearing loss prior to September 1, 1975. In all other cases, Section 7 of the Act applies.*

(emphasis added)

The worker's exposure to industrial noise in British Columbia continued to the date of his application to the Board in 1990. The policy cited by the Review Board dealing with applications under Section 6 of the *Act* is, therefore, not applicable.

In the governors' Decision No. 1 in the *Workers' Compensation Reporter*, Vol. 7(1): p. 7, "Appeal Division Administration, Practice and Procedure," the governors created the following policy under #6.0:

The Appeal Division may exercise its discretion pursuant to Section 91(2) to direct the Review Board to reconsider in any case where it considers it appropriate and will generally do so where it finds an error of law or contravention of published policy of the Governors in a referral from the President under Section 96(4).

An error has been identified in the reasoning expressed by the Review Board, inasmuch as they relied upon a passage from the governors' policy which was not applicable to this claim. There has, therefore, not been consideration of the worker's claim by the Review Board based upon the appropriate policy of the governors. The panel has concluded that, in light of the governors' policy quoted above concerning the Appeal Division's use of its discretion under Section 91(2) in referrals, the matter should be returned to the Review Board for reconsideration on this issue. In light of this action, the panel has refrained from addressing the conclusion of the Review Board with respect to the commencement date of the worker's pension.

The panel would note that, in reviewing this matter, they considered whether there was any ambiguity in the Review Board finding which would allow it to be interpreted in accordance with the policy of the governors. Where a Review Board finding is capable of more than one interpretation, the view of the findings consistent with the governors' policy ought to be adopted. As well, it would appear from the direction in the Review Board finding that the worker be "assessed in accordance with Board policy as contained in Section 30.28 of the *Rehabilitation Services and Claims Manual*" that there was no intent to contravene the policy of the governors. The panel considered, therefore, whether the Review Board intended, in accordance with paragraph 3 of the governors' policy #30.28, that there be a further assessment as to the worker's "loss of earnings or impairment of earning capacity," and that any resulting award be retroactive.

Having regard to its overall content and effect, this did not appear to be a possible interpretation of the Review Board finding. The Review Board had confirmed the level of the worker's pension award at 1.05% of total. The only issue on which the further assessment was to be undertaken concerned the commencement date of this award. There did not appear to be anything in the Review Board finding to support the

conclusion that it intended the worker be assessed for any “loss of earnings or impairment of earning capacity.” The panel concluded, therefore, that the Review Board finding could not be upheld on this basis.

The panel has some concerns as to the appropriateness of the referral in this case. The statutory amendments made by Bill 27 (the *Workers Compensation Amendment Act, 1989*) restricted the Board’s power to initiate “own motion” appeals of Review Board findings to the grounds of error of law or contravention of a published policy of the governors.

The legislative changes contained in Bill 27 were based in large measure on the October 31, 1988 report of the *Advisory Committee on the Structures of the Workers’ Compensation System of British Columbia*, chaired by Donald R. Munroe, Q.C. The Committee stated in its report as follows:

It is Section 96(2) of the *Workers Compensation Act* which has generated some of the more outspoken criticism of the present structure . . .

The lack of broad-based confidence in “own motion” appeals could easily be finessed by not permitting them to occur; by saying that an appeal against a finding of the Review Board can only be initiated by the worker or the employer. However, that would assume that *serious issues of law or policy* are always fully argued at the Review Board level; that claims issues always arise between separate parties who are as likely as not to utilize existing appeal mechanisms.

Those assumptions do not stand up under scrutiny. It is common for one of the parties not to appear at hearings of the Review Board. In the result, *important issues* can go unargued . . .

We do not think that “own motion” appeals from findings of the Review Board are inherently bad. Rather, it is a question of control and structure . . .

With respect to the grounds for an “own motion” appeal, it is fair to observe that *the interests of the system (as well as of the immediate parties) may be at stake where questions of law or policy arise*, but that there is no real systemic interest in questions of fact. Thus, there is no clear justification for “own motion” appeals based on alleged factual errors, while justification does exist for “own motion” appeals based on law or policy . . .

(emphasis added)

It was thus apparent from the context in which the legislative changes were made that the intent was to restrict such referrals to important issues of law or policy of general significance beyond the particular claim. Objections to a decision which only concern the particular claim can be pursued by the worker or the employer by way of an appeal.

In other words, the intent behind the statutory amendments was to change the system whereby the Board set itself up to scrutinize Review Board findings for possible error, with the Board acting much like an appellant with a stake in the outcome of each decision. The decision by the legislature to restrict the grounds for referrals was indicative of an intent that, in the absence of an appeal from one of the parties, the Board would generally accept and implement Review Board findings. As an exception to this, the legislature granted to the president the power to initiate referrals of Review Board findings on important issues of law or policy of significance to the workers' compensation system.

While the referral on this claim was found by the panel to be technically valid, it may be questioned whether it warranted the use of the "own motion" referral power of the president. Respect for the spirit and intent of Section 96(4) requires consideration not only as to whether there has been a technical breach of policy, but whether the Review Board finding gives rise to a need for guidance to the Board and to the Review Board from the Appeal Division. If so, the intent of Section 96(4) is that the Appeal Division exercise its interpretive authority with respect to the *Workers Compensation Act* and the policy of the governors to provide guidance to the system. It is for this reason that virtually all decisions of the Appeal Division on referrals under Section 96(4) have been published in the *Workers' Compensation Reporter*.

It is quite apparent from the Review Board finding on this particular claim that their error was inadvertent, in referring to an inappropriate passage of the governors' policy. There was no indication that the Review Board intended to depart from the governors' policy or to contravene the *Act*. The quantum involved was not significant, as it involved the possible backdating of a pension award of 1.05% of total. (The pension award was made effective March 20, 1990, and the Review Board requested a reassessment of the worker's hearing loss with reference to a medical report dated July 8, 1987). Finally, and most significantly, there is no documentation on the claim file to show that the reassessment requested by the Review Board would have led to any change in the commencement date of the worker's pension award in any event. If the reassessment did not support an earlier date for the commencement of the worker's pension award, the entire referral process would have been undertaken as an academic or moot exercise. The panel is convinced that this would not be in keeping with the legislative intention behind the enactment of Section 96(4).

We do not question the authority or jurisdiction of the president and chief executive officer to make a referral under Section 96(4) on the grounds of error of law or contravention of a published policy of the governors in a case such as this. Rather, the foregoing discussion is intended to serve as a reminder of the problems experienced with the approach formerly taken to the referral of Review Board findings, and to provide guidance as to the proper interpretation of Section 96(4). The purpose or intent of Section 96(4) is to ensure that important issues of law and policy are addressed for the benefit of the system as a whole, rather than for the Board to act as an appellant seeking to correct minor errors which only affect the individual claim.

In conclusion, the worker's appeal with respect to the level of his pension award is denied. With respect to the referral by the president under Section 96(4) as to the commencement date of the worker's pension award, the Panel has found that the Review Board erred in utilizing a policy of the governors' which did not apply to the circumstances of this claim (paragraph 2 of #30.28). The matter is remitted to the Review Board for reconsideration on this issue. The matter will not be further considered by the Appeal Division, unless a new appeal or referral arises in connection with the further finding which is to be made by the Review Board.

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



Decision of the Appeal Division

Number: 92-0817
Date: April 15, 1992
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Section 96(2) Application — M.R.P. Certificate

This is an application pursuant to Section 96(2) on behalf of the worker with respect to the former commissioners' decision of June 5, 1987. The allegation by the worker's representative is that the commissioners' decision contains an error of law. This application is based on the January 6, 1992 resolution by the Board of Governors which provided:

RESOLVED THAT the Appeal Division of the Workers' Compensation Board of British Columbia shall exercise the authority of the Workers' Compensation Board of British Columbia under Section 96(2) of the *Workers Compensation Act* to reopen, rehear and redetermine any decision made by the former Commissioners prior to June 3, 1991, where the Chief Appeal Commissioner finds that the decision was based upon an error of law or involved or involves an issue under the *Canadian Charter of Rights and Freedoms*; . . .

The worker appealed to a medical review panel a 1985 decision denying him a permanent disability pension for compensable left knee problems. The medical review panel found that the worker was suffering from a disability which they described as "functional." The medical review panel certificate went on to say that the panel could not detect any physical abnormalities with regard to the knee but that the worker's disability

consists of a hypersensitivity to light touch over the left infra patella tendon, unrelated to any other detectable abnormality. This prevents him from climbing or kneeling and leads to an apprehension about height because of fear of losing his balance. This relates to a feeling of insecurity with respect to his left knee.

The panel also certified that the worker had no pre-existing problems with his knee and that the eventual outcome of his disability was unpredictable.

The Board initially interpreted the certificate to mean that the worker had a psychological disability, however, he was denied a permanent partial disability award on the basis of an examination by a Board psychologist who felt that the worker was not psychologically disabled. That decision was appealed to a Review Board who contacted the original medical review panel. The chair of the medical review panel, Dr. S, wrote to the Review Board on November 3, 1986 stating:

. . . the term functional was used to describe a hypersensitivity to light touch over the left infrapatellar tendon, which prevented him from climbing, kneeling and caused an apprehension about working on heights because of the fear of losing his balance.

Dr. S also stated:

Such syndromes are known to occur following injury and they may not be associated with any psychological disability.

The Panel report did not mean to imply that his complaint was psychologically based, but merely that it interfered with function.

After reviewing the letter from Dr. S the Review Board found that the worker was in fact suffering from a real disability and that the Board should determine whether it was temporary or permanent, and if permanent, assess an appropriate pension.

The Review Board finding was referred to the commissioners on the basis of two criteria:

- 1) that the findings conflicted with the decision of the medical review panel on the same claim; and
- 2) that the findings amount to an original decision rather than a conclusion on the appeal.

Before proceeding further, I would comment that there is no apparent substance to the allegation that the Review Board decision constituted an original decision. Decision No. 403 in the *Workers' Compensation Reporter*, Vol. 6: p. 50, in which the criteria for referral are set out, indicates that the term *original decision* used in Decision No. 403 has the same meaning as in Decision No. 280 (*Workers' Compensation Reporter*, Vol. 4: p. 43). Decision 280 states:

There are occasions when a Board officer has made a decision on fundamental issues placed before him by the claim, such as whether the claimant is a worker under the *Act* or whether the

injury arose out of and in the course of employment, but no decision has been made on some other issue which may still be part of the same claim. In those cases, where it is clear that the issue considered by the Board of Review, although not specifically referred to by the original decision-maker, is one which should properly have been considered on the occasion of the original decision, and as long as no new claim and no new original documentation is required, a Board of Review decision on that issue will not be objectionable as being “original.”

The allegation that the Review Board decision in this case was an “original decision” cannot be sustained.

I turn then to the allegation that the Review Board decision contravened the terms of the medical review panel certificate. The commissioners agreed with the claims adjudicator that the Review Board decision should not be implemented because:

The Commissioners consider that the Board is precluded from accepting your continuing complaints as being the result of your 1979 injury, in light of the binding effect of the Medical Review Panel’s decision.

The Review Board had taken the unusual step of going back to the medical review panel for clarification of their certificate as indicated in the letter from Dr. S referred to earlier. The findings of the Review Board only repeated the explanation by Dr. S clarifying the medical review panel certificate.

The June 5, 1987 commissioners’ decision stated:

Section 61(1) of the *Workers Compensation Act* provides the Medical Review Panel Chairman with the legal authority to certify on behalf of the Panel. The Commissioners accept the 3 November 1986 letter from Dr. S as clarifying the Panel’s Certificate of 23 September 1984.

The commissioners purportedly accepted the legally binding effect of the medical review panel certificate, as clarified by the medical review panel chairman. The question to be determined, therefore, is whether their determination of the worker’s compensation entitlement, in implementation of the medical review panel certificate, was so patently unreasonable as to amount to a failure to implement the medical review panel decision or otherwise constituted an error of law.

The medical review panel clearly stated in its certificate that the worker had a disability. The panel's response to Issue #6, as to whether there were two or more causes of this disability, was "not applicable." The effect of these findings was to establish that the worker had a disability, and that this disability was solely due to the compensable injury.

Entitlement to compensation will normally be established by a finding that a worker has a disability as a result of a compensable injury. In this case, however, the commissioners appear to have focused on two separate statements by the panel in coming to the conclusion the worker had no compensation entitlement. These were the statements that:

Clause 5 of the Certificate:

All physical aspects of his injury have resolved, but he remains abnormally apprehensive.

November 3, 1986 Letter of clarification:

Such syndromes are known to occur following injury and they may not be associated with any psychological disability. The Panel report did not mean to imply that his complaint was psychologically based, but merely that it interfered with function.

The commissioners evidently took these two phrases, namely, that all physical aspects of the injury had resolved, and that there was no psychological disability, and concluded that this left no room for a finding of compensation entitlement. In so doing, however, the former commissioners appear to have lost sight of the fact that the worker was suffering from a disability as a result of his compensable injury.

It would seem that the commissioners were presuming that in order to be compensable the worker's disability had to be one which could be clearly characterized as either physical or psychological in nature. In the context of the panel's decision, however, it is evident that the worker's disability was one which could not be easily categorized. This does not negate the fact that this "syndrome," as it was described by the medical review panel, resulted in an impairment of function, constituted a disability, and was due to the compensable injury. The worker is entitled to compensation for his disability. The conclusion that he has a disability is binding on the Board.

In concluding that the worker had no compensation entitlement, the commissioners failed to implement the finding by the medical review panel that the worker was suffering from a disability as a result of his compensable injury. Their decision

represented a patently unreasonable interpretation of the medical review panel certificate. It was, therefore, contrary to Section 65 of the *Workers Compensation Act*, which provides that a medical review panel certificate is conclusive as to the matters certified and is binding on the Board.

I have concluded that the June 5, 1987 decision of the former commissioners, to overturn the December 4, 1986 Review Board finding, was unlawful. I have, therefore, proceeded to “reopen, rehear and redetermine” the matters addressed in that decision pursuant to Section 96(2) of the *Act*.

Having reviewed the entire matter, I am in agreement with the December 4, 1986 Review Board finding.

A decision dated June 12, 1989 was made by the Claims Division in implementation of the December 4, 1986 Review Board finding. This was to fulfill the requirement that the Review Board finding be given effect up to the date of the former commissioners’ decision pursuant to Section 92. This decision was appealed to the Review Board, which allowed the worker’s appeal in a finding dated February 20, 1990. This Review Board finding was in turn implemented by the claims adjudicator on June 7, 1990. The worker appealed that decision to the Review Board, which denied his appeal in a finding dated February 28, 1992 (mailed on March 2, 1992).

A Notice of Appeal dated April 7, 1992 has been received from the worker, together with a letter of the same date from his representative with reasons for the delay in appealing. An extension of the 30-day time limit for appealing the Review Board finding to the Appeal Division is granted. Once that appeal is considered by the Appeal Division, this decision can be given full force and effect by the appropriate permanent partial disability award being paid subsequent to the June 5, 1987 commissioners’ decision.

In the result, the commissioners’ June 5, 1987 decision overturning the findings of the Review Board dated December 4, 1986 is declared unlawful. The findings of the Review Board are to be given full force and effect as if the commissioners’ decision had not occurred.

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



Decision of the Appeal Division

Number: 92-0872
Date: April 27, 1992
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Section 96(2) Application — M.R.P. Certificate (#2)

This is a request for a review pursuant to Section 96(2) of the *Workers Compensation Act* (the *Act*) of two commissioners' decisions dated March 12, 1990 and July 10, 1990. The request is contained in several items of correspondence received from the worker's counsel, the last of which is dated January 15, 1992. A supportive letter dated April 8, 1992, was also received from the pre-injury employer and the counsel for the worker responded in a letter dated April 15, 1992.

The Appeal Division has the authority to hear this application as a consequence of the following resolution of the Board of Governors approved January 6, 1992:

RESOLVED THAT the Appeal Division of the Workers' Compensation Board of British Columbia shall exercise the authority of the Workers' Compensation Board of British Columbia under Section 96(2) of the *Workers Compensation Act* to reopen, rehear and redetermine any decision made by the former Commissioners prior to June 3, 1991, where the Chief Appeal Commissioner finds that the decision was based upon error of law or involves an issue under the *Canadian Charter of Rights and Freedoms*; . . .

Section 96(2) of the *Act* provides:

. . . the Board may at any time at its discretion reopen, rehear and redetermine any matter, except the decision of the Appeal Division, which has been dealt with by it or by an officer of the Board.

It is submitted by counsel that the commissioners' refusal to establish a new medical review panel of psychiatrists to determine the cause of the applicant's chronic pain syndrome constitutes a patently unreasonable refusal to exercise the Board's jurisdiction pursuant to Section 58(5) of the *Act*. Counsel argues that a patently unreasonable exercise of discretion constitutes an error of law. He also argues that the

commissioners' refusal to submit to a medical review panel the issue of causation of the worker's chronic pain syndrome contravenes Section 99 of the *Act* which directs the Board to make its decision according to the merits and justice of the case.

In their March 12, 1990 decision the commissioners reviewed the psychiatric report prepared by Dr. M in concluding that a sufficient basis had not been provided for establishing a second medical review panel composed of psychiatrists. In 1987 the worker had been examined by a panel of orthopedic surgeons. The medical review panel certificate dated April 22, 1987 stated that the worker's disability was due to degenerative disease and chronic pain syndrome, both of which were unrelated to his 1981 or 1983 injuries.

The commissioners' July 10, 1990 decision denied the request for a reconsideration of the March 1990 decision. They reviewed the reports of Doctors H and G and advised that there was no significant new evidence which would warrant establishing a second medical review panel.

Counsel contends that there is an ambiguity in the medical review panel certificate in that the panel does not address the cause of the worker's chronic pain syndrome. He contends that Dr. M's opinion is the only evidence regarding the crucial issue of the claim, namely the cause of the worker's chronic pain syndrome.

I have reviewed all of the material contained in this worker's file and am not satisfied that the actions of the commissioners constitute an error of law. I disagree with counsel's characterization of the medical review panel certificate as ambiguous. The medical review panel was not asked nor was it incumbent upon them to specifically address the causation of the worker's chronic pain syndrome. The question which they deal with specifically is the causative significance of the worker's compensable injuries to his current disability. The medical review panel certificate is explicit that "the compensable injuries of 9th of March, 1981 or 16th of June, 1982 are not of causative significance with regard to his present disability."

Undoubtedly the Board has a wide power to decide when to appoint a medical review panel of its own motion under Section 58(5). However, this case bears some similarity to the circumstances in *Kooner v. Workers' Compensation Board* (1991) 54 B.C.L.R. (2d) 83. The significant difference is that the panel of medical specialists in the *Kooner* case (who were not psychiatrists) found in the worker's favour as opposed to the present case where the medical review panel found no causative relationship between the compensable work accident and the chronic pain syndrome. In the *Kooner* case, the court was critical of the attempts by the W.C.B. to establish a new medical review panel of psychiatrists. Mr. Justice Taylor, speaking for the B.C. Court of Appeal said:

The panel's certificate must, in my view, be accepted as "conclusive" and "binding on the board" in the sense that the board is required to act on it unless and until some significant new circumstance comes to light.

No such new circumstance is apparent in the case before me. The report of Dr. M is simply another view on matters considered by the medical review panel. It is not surprising that unsuccessful appellants may wish to continue the debate, however, the purpose of the medical review panel procedure is to provide finality to medical disputes.

My role in assessing the decisions of the commissioners in this case is not to determine whether their actions were right or wrong on the basis of what my response may have been to a similar fact situation. To find the decision unlawful requires a finding that the commissioners' refusal to exercise their discretion was patently unreasonable. No "significant new circumstance" has come to light pointing up an error in the certificate. The commissioners' discretion was exercised within the bounds of their lawful authority.

I have concluded that the failure to convene a new medical review panel was not a patently unreasonable act on the part of the previous commissioners and the current application must be dismissed.

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



Decision of the Appeal Division

Number: 92-0943
Date: May 5, 1992
Panel: Patrick L. Byrne, Lorna Pawluk, A. Grant McRitchie
Subject: O.S.H. Penalty — Definition of Employer

This is an appeal of the January 8, 1991 decision of the director of the Field Services Department, Occupational Safety and Health Division (O.S.H.) to impose a penalty assessment of \$5,500.00. The director concluded that C Management Ltd. had violated Industrial Health and Safety Regulations 38.22(1), 46.74(e), 34.16(2), 8.04, 8.24(1), 8.18, 8.20 and 42.05 on March 29, 1990 and that the circumstances warranted a type 3 penalty assessment.

C Management Ltd. (referred to herein as "CM") appeals on an error of fact. The issues are whether there were violations of Regulation 42.05 and whether CM is the employer responsible for all the cited violations.

CM is a labour contractor. On March 29, 1990 a work site was inspected by a W.C.B. occupational safety officer. He observed workers drilling below inadequately scaled sections of an excavation rock face. He issued a 24-hour Board Officer Closure Order and cited CM for violations of Regulations 38.22(1), 46.74(e), 34.16(2), 8.04, 8.24(1), 8.18 and 8.20 on Inspection Report No. 90764144. The officer also reported that workers were dry drilling without any dust control. He cited CM for violations of Regulations 42.05, 8.18 and 8.20 on Inspection Report No. 90764147. The officer concluded that CM was the employer of the workers involved with the infractions. He recommended that CM receive a penalty assessment and on May 8, 1990 they were sent a show-cause letter proposing a penalty of \$5,500.00.

CM provided various written submissions and on January 8, 1991 the director imposed the penalty assessment.

CM filed a Notice of Appeal.

CM argued that they were not the true employer and that there was no violation of Regulation 42.05. They did not provide arguments with respect to the reported violations of Regulations 38.22(1), 46.74(e), 34.16(2), 8.04, 8.24(1), 8.18 and 8.20.

Was C Management Ltd. the employer responsible for the health and safety of workers?

CM argued that they were not the true employer and that P Drilling and Blasting Ltd. (P) and M Engineering and Construction Ltd. (M) were the true employers.

CM registered with the Board on July 7, 1989. They provided information on the Employer's Registration Form that workers were first employed on July 10, 1989 and the description of their business was one of "excavation site cleanup." The firm indicated they only provided labour. On July 17, 1989 the Board Assessment Department wrote to the firm advising that they would be placed in industrial classification 072612. CM was determined by the Board to be a labour contractor based on the information provided by the firm upon registration.

Section 20:30:20 of the *Assessment Policy Manual*, "Administering Registration Requirements," states:

3. Labour Contractors

Registration for labour contractors is not mandatory but is *allowed*. Those labour contractors who do not elect to be registered, and any help they employ to assist them, are considered workers of the prime contractor or firm for which they are contracting, and that firm is responsible for assessments and injury reporting.

If a firm is a labour contractor and does not elect to register, the partners or proprietors, the proprietors spouse and any member of the partner's (family unit partnership only) or proprietor's family under the age of 19 years are covered through the prime contractor. If the firm is registered, and therefore considered an independent firm, these individuals are not covered unless Personal Optional Protection is in effect.

In this particular case CM voluntarily registered with the Board. They are, therefore, considered an independent firm. CM's effective date for injury reporting and assessment was July 17, 1989, the date their registration was accepted by the Board.

This panel is urged to find that P and M rather than CM are the true employers responsible for the health and safety of workers. In support of this argument is the decision of the Industrial Relations Council, I.R.C. No. C128/90. That case involved a determination of "employer" for the purposes of the *Industrial Relations Act* which

found P and M to be the employer rather than CM. The Council applied seven criteria extracted from the Ontario Labour Relations Board case law in order to determine which company was the employer for labour relations purposes. The criteria include direction and control over employees; remuneration; discipline; hiring and firing authority; party perceived by employees to be the employer; and the intention of the parties. Critical to its conclusion was the requirement that “the broker must be an active and *bona fide* participant in the arrangement, not a mere shadow.” (p. 13) The actual arrangement did not comply with the parties’ commercial arrangement; thus the participation of CM was not one of an employer under the *Industrial Relations Act*. CM relies on that decision to maintain that it is not the employer under the *Workers Compensation Act* and that the penalties ought not to have been levied against it.

We do not agree: the conclusion of the Industrial Relations Council has no impact on CM’s obligations under the *Workers Compensation Act*. The two pieces of legislation contain different definitions of “employer.” Section 1(1) of the *Industrial Relations Act* defines employer as “a person who employs one or more employees and includes an employers’ organization.” Section 1 of the *Workers Compensation Act* defines it this way:

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

The lack of specific requirements in each piece of legislation means that development and refinement of these terms has been left to the respective statutory tribunals to define in accordance with the specific cases. The purposes of the two pieces of legislation are different. Section 27(1) of the *Industrial Relations Act* requires the Industrial Relations Council to interpret the legislation in such a way as to encourage “expeditious resolution of labour disputes.” By contrast, the purpose of the *Workers Compensation Act*, although not specifically set out in the *Act*, was defined by the Honourable Mr. Justice Charles W. Tysoe in his 1966 Commission of Inquiry into the *Workmen’s Compensation Act* as:

. . . the prime purpose of the *Act* is . . . to promote and encourage measures for the prevention of injury to workmen in the course of their work and, should any be so unfortunate as to become disabled as a result of such injury, means for their rehabilitation and return to useful employment as soon as possible.

Under these circumstances, the decision of the Industrial Relations Council has no bearing on the authority of the Board to find that CM is the true employer and to impose penalty assessments for violations of regulations.

Since CM registered with the Board as an employer and paid assessments (on the workers' wages) they are for the purposes of the *Workers Compensation Act*, the employer of the workers.

Section 71(1) of the *Workers Compensation Act* provides in part:

The board may make regulations whether of general or special application and which may apply to employers, workers and all other persons working in or contributing to the production of an industry within the scope of this Part, for the prevention of injuries and industrial diseases in employment, and places of employment . . .

Section 73 of the *Workers Compensation Act* provides:

- (1) Where the board considers that
 - (a) sufficient precautions are not taken by an employer for the prevention of injuries and industrial disease;
 - (b) the place of employment or working conditions are unsafe; or
 - (c) the employer has not complied with regulations, orders or directions made under section 71,

the board may assess and levy on the employer an additional assessment determined by the board and may collect the additional assessment in the same way as an assessment is collected. The powers conferred by this subsection may be exercised as often as the board considers necessary. The board, if satisfied the default was excusable, may relieve the employer in whole or in part from liability.

Therefore, since CM is the employer of the workers who were involved with the reported violations of regulations promulgated under Section 71(1) of the *Act*, penalty assessments under Section 73 of the *Act* may be applied to CM, if it is found that the violations occurred.

Were there violations of the regulations?

Industrial Health and Safety Regulation 42.05 provides:

Every rock drill shall be equipped with a water jet, spray, or other device of a type acceptable to the Board to suppress drilling dust effectively. . . .

The employer argued that the violations pertaining to dry drilling did not occur. Their November 12, 1990 submission provides arguments with respect to reported violations of Regulations 42.05 on November 24, 1989, December 11, 1989 and March 29, 1990. The employer relies on information provided by P to dispute the orders. The O.S.H. Division applied the penalty in part for the reported violation of Regulation 42.05 on March 29, 1990. They relied on the other reported violations as evidence of the employer's history of non-compliance with this regulation.

The officer's evidence was that he observed the dry drilling in each case and that P's representative, although present on the worksite, did not take part in all the inspections. In determining whether there were violations of Regulation 42.05 the panel weighed the officer's direct evidence that he observed the violations against the employer's indirect evidence of comments provided by P's representative. The panel prefers the direct evidence of the officer. The employer did not provide any direct evidence from their employees on site during the inspections. The panel also notes that the employer first raised an objection to the orders following the show-cause letter of May 8, 1990. By that time there had already been three orders issued which were not challenged by the employer either to the officer or the O.S.H. Division. It may have been that the employer objected to the orders and chose not to challenge them prior to the show-cause letter for their own reasons. However, a lack of any challenge or appeal of the earlier orders weighs against the employer in this case. On the balance of probabilities, the panel finds that there were violations of Regulation 42.05.

The employer did not provide any evidence or argument with respect to the reported violations of Regulations 8.18 and 8.20 pertaining to worker training and supervision. While the employer initially objected to the orders at the divisional level they do not appear to have pursued that objection on appeal.

The employer did not provide any arguments or evidence concerning the reported violation of the regulations concerning work below an unscaled rock face, the more serious of the reported violations. The officer characterized this violation as one which, ". . . exposed workers to conditions which were immediately dangerous to their life and health."

The governors' policy 1.4.3 ("Penalty Assessments in High Risk Work Situations") contained in the *O.S.H. Policy and Procedure Manual* provides:

The work practices listed below have a high risk of death, serious injury or industrial disease. . . .

4. Permitting workers to be exposed to situations or conditions which are immediately dangerous to life or health.

The recommended schedule of sanctions in the governors' policy 1.4.1 contained in the *O.S.H. Policy and Procedure Manual* provides for a penalty assessment of \$5,500.00 for such a violation.

The employer did not provide any evidence or argument with respect to the application of this policy. The panel reviewed the file and finds that the application of the policy was appropriate in the circumstances.

Conclusion

CM was the employer responsible for compliance with the regulations. There were violations of the regulations pertaining to dust control and scaling of the rock face above workers and worker training and supervision. There was no error of fact, error of law or contravention of a published policy of the governors. The penalty assessment was properly imposed.

THE APPEAL IS DENIED.

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

In the Court of Appeal for British Columbia

Between: James David Hamilton
And: The Workers' Compensation Board of British Columbia and
K.G. Robertson
And: Her Majesty The Queen In Right of The Province of
British Columbia, The Attorney General and Robert Owens
And: Robert Owens

Reasons for Judgment of The Honourable Mr. Justice Hollinrake (Lambert and Gibbs, JJ.A. concurring) (March 3, 1992)

This is an appeal from a judgment in which the plaintiff/respondent was awarded damages of \$68,200 against all the defendants/appellants with the exception of the Attorney General as well as solicitor-client costs. Included in the award of \$68,200 was punitive damages of \$7,500. This appeal is against the trial judge's finding that certain chattels owned by the plaintiff were wrongfully seized and sold by the defendant Owens, then a deputy sheriff, as well as against the awards of punitive damages and solicitor client costs. All this arises from the failure of Forward Sawmills Limited ("Forward") to pay assessments made by the Workers' Compensation Board (the "Board").

The facts in some detail are set out in the judgment and I quote extensively from the judgment.

The Plaintiff, James David Hamilton (the Plaintiff), is a logging contractor and the owner of certain logging equipment that was seized and sold by the Deputy Sheriff of Campbell River, B.C.

The Defendant, Robert Owens (the Sheriff), was at all material times a Deputy Sheriff with the Ministry of the Attorney General.

The Defendant, K.G. Robertson (Robertson), was at all material times the assistant supervisor of the collection section, Assessment Department of the Defendant Workers' Compensation Board (W.C.B.).

The Plaintiff seeks damages for conversion and/or negligence in the seizure of the logging equipment that he owned personally.

All the Defendants allege lawful seizure and rely upon s. 52(2) of the *Workers' Compensation Act*, R.S.B.C. 1979, c. 437 (the *Act*) as amended.

FACTS

1. The Plaintiff now aged 62 years, is a logging contractor and has been involved in the industry since he was 14 years of age.
2. In 1978 he acquired certain timber rights in a Crown grant at Forward Bay, an isolated location about 200 miles up the coast from the Lower Mainland of British Columbia.
3. In March of 1978 the Plaintiff incorporated a company, Forward Sawmills Limited (Forward).
4. The Plaintiff was the sole shareholder, director and president of Forward.
5. The property used by Forward in its logging operations included a mountain logger skidder serial no. ML200-73166 (the "first skidder"), a mountain logger skidder serial no. ML200-73181 (the "second skidder") and one D8 caterpillar dozer (the "cat"). These pieces of equipment were purchased [by the plaintiff Hamilton] and used by Forward in its logging operations at Forward Harbour during the period in respect of which Workers' Compensation Board assessments were made but which remain unpaid.
6. Forward was registered as an employer with the W.C.B.
7. Amounts were due by Forward to the W.C.B. for assessments levied under the *Act*.
8. As a result of the depressed state of the logging industry, the plaintiff found it necessary, in July 1980, to close down his operation at Forward Harbour. He was unable to pay his assessments to the W.C.B.



9. Section 45 of the *Act* provides for the collection of assessments and permits the W.C.B. to file a certificate in the registry which becomes enforceable as a judgment of the Court against the person named in the certificate for outstanding assessments, inclusive of penalties.

10. On October 7th, 1980, a certificate naming Forward as a judgment debtor was filed in the Nanaimo Registry in the sum of \$2,575.19. On January 12th, 1981, a second certificate naming Forward as a judgment debtor was filed in the amount of \$3,230.12 in the Nanaimo Registry. On March 25th, 1982, a third certificate naming Forward as a judgment debtor in the sum of \$671.17 was filed in the Nanaimo Registry.

10(a) W.C.B. caused writs of seizure and sale to be issued and forwarded to the sheriff. The writs commanded the sheriff to seize and sell the assets of Forward to satisfy the certificates.

11. The Defendant Robertson on behalf of the Board, forwarded the writs to the sheriff with a memorandum which stated:

Assets, one cat and one skidder located in Forward Harbour out of Campbell River, Lynn Logging (Lynn Crawford's) TEL 286-6110 has cat in storage with his equipment and can detail the location of the skidder. Sheriff should contact him before seizure and he will cooperate. He expects to hear from sheriff re this matter.

12. On July 21st, 1982, Owens learned the equipment described in the writs was owned, *not by Forward, but by the Plaintiff* personally. The equipment was subject to a chattel mortgage in favour of Island Finance in Nanaimo.

13. On July 26th, 1982, Owens seized the cat and the first skidder.

14. Notwithstanding the fact the sheriff Owens knew the Plaintiff (and not Forward) owned the cat and the first skidder, he believed that he had the power and authority under s. 52(2) of the *Act* to seize that equipment.

* * *

15. Rather than seize the cat and the first skidder, the Plaintiff requested the sheriff to seize logs of Forward to satisfy the outstanding writs.

16. On December 7th, 1982, the Defendant Robertson met with the Defendant Owens at which time Robertson indicated that the policy of the W.C.B. was that 52(2) of the *Act* did not authorize the Board to seize and sell the equipment of a principal of an employer. The Defendant Robertson wrote a letter to the Defendant Owens which stated, inter alia:

It was indicated by the writer to the sheriff's office that our policy has been that section 52 of the Act grants the Board a lien against property owned by a director, principal or shareholder of the company, where used in the business, however, did not permit the Board the right to seize equipment on the strength of this section of our Act.

In view of the amount outstanding in the circumstances I would request that you endeavour to obtain an order for sale of the equipment belonging to the principal of the subject company on the basis of section 52(2) of the *Act*.

Regardless of the outcome of such an action I think it is a worthwhile exercise to test the strength of this particular section of the *Act*.

17. In January or February 1983 the Plaintiff learned that the cat and the first skidder (seized under the writs of seizure and sale) had been removed from Forward Harbour. In addition the *second* skidder, which was not covered under any writ, had been removed by a Mr. Lloyd.

18. The Plaintiff made a complaint both to the Defendant Owens and to the R.C.M.P. that the second skidder had been stolen. At this time the Plaintiff refused to sell the second skidder to Mr. Lloyd.

19. On February 17th, 1983, Owens purported to sell the *second* skidder to Mr. Lloyd for the sum of \$3,500. plus \$210. social services tax.



20. After advertising for sale, the Defendant Owens accepted the bid of Mr. Lloyd for the purchase of the cat and the first skidder for the sum of \$6,000.

The seizure and sale of the second skidder referred to in paragraph 17, 18 and 19 above quoted is not in issue on this appeal.

It is agreed that the certificates referred to in paragraph 10 of the facts quoted above were properly issued and that liens under s. 52 of the *Workers' Compensation Act* (the "Act") were lawfully in existence at all material times.

Section 52 of the Act reads:

Priority as to amounts due board

52.(1) Notwithstanding anything contained in any other Act, the amount due by an employer to the board, or where an assignment has been made under subsection (4), its assignee, on an assessment made under this Act, or in respect of an amount which the employer is required to pay to the board under this Act, or on a judgment for it, constitutes a lien in favour of the board, or its assignee payable in priority over all liens, charges or mortgages of every person, whenever created or to be created, with respect to the property or proceeds of property, real, personal or mixed, used in or in connection with or produced in or by the industry with respect to which the employer was assessed or the amount became payable, excepting liens for wages due to workers by their employer, and the lien for the amount due the board or its assignee continued to be valid and in force with respect to each assessment until the expiration of 5 years from the end of the calendar year for which the assessment was levied.

(1.1) The exception in subsection (1) does not apply in respect of a lien for wages that is, by section 15(3) of the Employment Standards Act, postponed to a mortgage or debenture.

(2) Where the employer is a corporation, the word "property" in subsection (1) includes the property of any director, manager or other principal of the corporation where the property is used in, or in connection with, the industry with respect to which the employer was assessed or the amount became payable, or was so used within the period in respect of which assessments are unpaid.

(3) Without limiting subsection (1), the board may enforce its lien by proceedings under the Court Order Enforcement Act.

(4) The board may assign its lien rights to a person, contractor or subcontractor who has fully discharged his liability for the amount of an assessment under section 51 by payment of it.

The defendants rely on s. 52(2) to support their position that this seizure and sale was a lawful one even though the chattels were owned by the plaintiff and not by the Board's judgment debtor Forward.

In paragraph 16 of the above quoted facts the reference to the defendant Robertson writing a letter to the defendant Owens is in error. What is quoted in paragraph 16 above is an internal memorandum from Robertson to Massing, an in-house solicitor for the Board.

There are further facts which are relevant to the issues of punitive damages and solicitor-client costs and I will refer to those facts when I deal with these two issues.

I turn now to the issue of the lawfulness of the seizure and sale of the cat and the first skidder.

On this issue the trial judge said this in part:

There is no dispute that the cat and the first skidder were, at the time of seizure and sale, owned by the plaintiff and not by Forward. There is no dispute the Board had a valid judgment against the corporation Forward. It was obtained pursuant to section 45 which provides:

Collection of assessments by suit or summarily

45.(1) If an assessment or part of it is not paid in accordance with the terms of the assessment and levy, the board has a right of action against the defaulting employer in respect of the amount unpaid, together with costs of the action.

(2) Where default is made in the payment of an assessment, or part of it, the board may issue its certificate stating that the assessment was made, the amount remaining unpaid on account of it and the

person by whom it was payable, and that certificate, or a copy of it certified by the secretary under the seal of the board to be a true copy, may be filed with any district registrar of the Supreme Court, or with the registrar of any County Court, and when so filed becomes an order of that court and may be enforced as a judgment of the court against that person for the amount mentioned in the certificate.

The judgment obtained by the Board against Forward could be satisfied by execution against “all goods, chattels and effects” of Forward, pursuant to section 49 of the *Court Order Enforcement Act*, R.S.B.C. 1979, c.75 which provides:

Except as exempted by sections 64 to 72 or otherwise provided by this Act, all goods, chattels and effects of a judgment debtor are liable to seizure and sale under a writ of execution against goods and chattels.

There is no dispute that the cat and the first skidder (owned by the plaintiff) were used by Forward in the logging operation during the period in respect of which the assessments remain unpaid.

There is no dispute over the fact that the Plaintiff was at all material times a director and the principal of Forward.

By virtue of section 52(2), *supra*, the Board is therefore entitled to a *lien* on the cat and the first skidder owned by the Plaintiff.

Section 52(3) *supra*, expressly provides that enforcement of the lien by execution proceedings under the *Court Order Enforcement Act* shall be without any limitation on the expanded definition of “property” available for execution.

The Defendants contend that the lien rights created under section 52(2) entitle the Board to execute against the property of a principal if it is used in, or in connection with the industry with respect to which the employer was assessed.

It is submitted by the Defendants the writ of seizure and sale can be used to enforce the W.C.B. lien against all property of Forward, whether or not the property is used in the industry, AND,

in addition, the W.C.B. may enforce its lien by using the writ of seizure and sale against the judgment debtor Forward, against such of the Plaintiff's personal property as was used in the industry for which assessments were made.

The Plaintiff does not take issue over the Board's right to a statutory lien over his goods that were used in the industry. He does take issue over the Board's actions enforcing its judgment against Forward by seizing and selling the Plaintiff's personal goods.

I emphasize here that it was common ground before the trial judge and before us that these chattels were properly the subject of a lien under s. 52 of the Act. What is in issue is the right of the Board under s. 52 of the Act to seize and sell these chattels that did not belong to the Board's judgment debtor Forward. As I understand the position of the parties it is conceded that these chattels could have been seized and sold by execution proceedings in court. This seizure and sale was done summarily, and if it is to be lawful, it must be so by the provisions of s. 52 of the Act.

The Board submits that the enforcement of the lien provisions in the Act should be interpreted liberally. It says that to hold the seizure and sale unlawful is to defeat the substance and intent of s. 52 of the Act. At worst, says the Board, what happened here was a procedural misstep which should not defeat the substance and intent of s. 52. Having said that, the Board does not concede any misstep be it procedural or of substance.

In his reasons the trial judge reviewed the history of s. 52 and the authorities the Board referred to in support of its proposition that the Board may enforce its assessment as a judgment pursuant to s. 45 of the Act, and by reason of s. 52 the chattels of the plaintiff in this case were available to it in that execution process. The judge referred to the following decisions:

Workmen's Compensation Board v. Werner (1959, 29 W.W.R. 47 (B.C.C.A.);
Re Clemenshaw; Workmen's Compensation Board v. Canadian Credit Men's Trust Association Ltd. (1962), 40 W.W.R. 199 (B.C.C.A.);
Bank of Montreal v. Workmen's Compensation Board (1967), 60 D.L.R. (2d) 680 (B.C.C.A.);
Re Inland Equipment Company Ltd. and Workmen's Compensation Board (1967), 65 D.L.R. (2d) (B.C.S.C.);

and concluded that:

On the authority of *Clemenshaw*, supra, I reject the submission of the Defendants that sections 45 and 52 permitted seizure of the Plaintiff's caterpillar and first skidder in order to satisfy its judgment against Forward.

Counsel for the Board points out that the four cases the trial judge referred to in reaching his conclusion that ss. 45 and 52 of the Act do not permit the seizure of the plaintiff's cat and first skidder all preceded the 1972 and 1974 amendments to the Act: see:

Workmen's Compensation, 1968 Amendment Act, S.B.C. 1972, c. 64, s. 25;
Workmen's Compensation Amendment Act, 1974, S.B.C. 1974, c. 101, s. 26.

Prior to these amendments there were no provisions similar to what is now s. 52(2) and (3) which extend the meaning of the word "property" in s. 52(1) and permit enforcement of the Board's lien under the *Court Order Enforcement Act*. The Board says that in holding that the summary judgment process in s. 45 of the Act had nothing to do with the enforcement of the s. 52 lien the trial judge failed to give effect to s. 52(1) and (3) of the Act.

In my opinion, the propositions put to us by counsel for the Board while attractive cannot succeed when one analyzes the statutory provisions the Board relies on.

I turn now to that analysis.

S. 52(1) of the Act constitutes the Board's lien over property "used in or in connection with . . . the industry with respect to which the employer was assessed". S. 52(2) defines the word "property" in s. 52(1) as including property of a principal of the company where that property is used in connection with the industry with respect to which the employer is assessed.

It is clear from s. 51(1) and (2) that this property of the plaintiff was properly the subject matter of a lien under s. 52. That is not contested.

The enforcement section is s. 52(3) which permits the Board to "enforce its lien by proceedings under the *Court Order Enforcement Act*."

Before turning to the *Court Order Enforcement Act* I must turn to s. 45 of the Act which refers to "collection of assessments by suit or summarily". S. 45(2) says that where there is default in payment of an assessment the Board may issue a certificate stating that an assessment was made, is unpaid and "the person by whom it was

payable". S. 45(2) goes on to say that this certificate may be filed in the Supreme Court and "may be enforced as a judgment of the court *against that person* for the amount mentioned in the certificate." (Emphasis mine.) This means in this case a judgment in *personam* against Forward and Forward only, and it is against Forward and Forward only that the judgment may be enforced. In my opinion, if the Board is to succeed in its submissions before us there must be some statutory provision that renders the property of the plaintiff in this case the property of Forward for the purposes of execution. S. 52(2) tells us that the property in s. 52(1) which is the subject matter of the lien includes the plaintiff's cat and skidder. There is nothing in s. 52 which renders the property referred to in s. 52(1) the property of Forward against whom the assessment is made and against whom the judgment is on the filing of the certificate under s. 45(2).

I turn now to s. 49 of the *Court Order Enforcement Act*. That section says:

Effect of writ of execution against goods

49. Except as exempted by sections 64 to 72 or otherwise provided by this Act, all goods, chattels and effects of a judgment debtor are liable to seizure and sale under a writ of execution against goods and chattels.

And so the goods which are liable to seizure and sale under s. 52(3) of the Act are those of Forward, the judgment debtor under s. 45(2) of the Act. I repeat, in my opinion, the provisions of s. 52(1) and (2) do not go so far as to give to Forward property rights in the plaintiff's chattels. Those chattels are the property of Hamilton. What s. 52 of the Act does is to make Hamilton's property the subject matter of the Board's lien. As the chattels in this case do not become the property of Forward they are not liable to seizure and sale under s. 49 of the *Court Order Enforcement Act*. In my opinion, if the intention of the legislature was otherwise clear words would have to be used to state that the "property" referred to in s. 52(2) would be deemed to be the property of the employer/ judgment debtor for the purpose of the *Court Order Enforcement Act*.

In short, the strongest argument that can be made in favour of the Board's position is that subsection 52(3), which provides that the Board may enforce its lien by proceedings under the *Court Order Enforcement Act*, should operate so as to permit the enforcement of the lien not only against the judgment debtor's property but also against any other property covered by the lien. Such an interpretation would require making substantial changes in s. 49 of the *Court Order Enforcement Act*. I do not regard the wording of s-s. 52(3) as carrying with it the requirement that s. 49 of the *Court Order Enforcement Act* is to be regarded as having been given such changes as might be necessary to allow it to be used directly to enforce a lien against someone who has not first become a judgment debtor or a deemed judgment debtor.

To conclude on this issue, it is my opinion, the effect of the provisions of ss. 45 and 52 of the *Act* and s. 49 of the *Court Order Enforcement Act* do not permit execution against the chattels of the plaintiff, the reason being that nothing in those statutory provisions renders the property of the plaintiff the property of Forward for the purpose of execution under the *Court Order Enforcement Act*.

I agree with the conclusion of the trial judge that the seizure of the plaintiff's cat and first skidder was unlawful and the defendant Robertson and the Board must answer in damages to the plaintiff.

[The balance of the judgment considered the liability of the defendants Her Majesty the Queen in Right of the Province of British Columbia and Sheriff Owens, whether punitive damages should have been awarded by the trial judge against all defendants and whether Mr. Hamilton should have been awarded costs on a solicitor-client basis. The Court upheld the decision of the trial judge that Her Majesty the Queen in Right of the Province of British Columbia and Sheriff Owens were liable in damages to Mr. Hamilton, but the Court found that no punitive damages were payable by any of the defendants and that costs should not have been awarded on a solicitor-client basis.]

Editors' note: These reasons for judgment have been transcribed unedited to the end of the portion of the judgment set out above.

