

WORKERS' COMPENSATION REPORTER

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- *Creation of workplaces that are safe and secure from injury and disease*
 - *Successful rehabilitation and return to work of injured workers*
 - *Fair compensation for workers suffering injury or illness on the job*
 - *Sound financial management to ensure a viable WCB system*
 - *Protection of the public interest*
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- Blue — Decisions of the Panel of Administrators
- Green — Appeal Division Decisions
- Pink — Miscellaneous
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Decision of the Panel of Administrators

Number: 11/14/97-01

Date: November 14, 1997

Subject: Case Management

WHEREAS:

The Panel of Administrators is charged with approving the operating and capital budgets of the Workers' Compensation Board (the "Board") pursuant to Section 82(a)(iii) of the *Workers Compensation Act*, RSBC 1996, Chapter 492 and amendments thereto (the "Act");

AND WHEREAS:

Case Management has been identified as a key strategy in the Board Strategic Plan for transforming service to injured workers and is critical as a hub of service delivery for complex claims;

AND WHEREAS:

Case Management is supported by E-File;

AND WHEREAS:

On January 16, 1997 the Senior Executive Committee approved the first two phases of Case Management as a demonstration project;

AND WHEREAS:

The Board submitted a report entitled "*Case Management: A Developmental Overview and Preliminary Results*" dated October 20, 1997 discussing the development of the prototype and its preliminary results;

AND WHEREAS:

The Board submitted a report entitled "*Case Management: A Proposal for Further Development & Roll-Out*" dated November 12, 1997 summarizing the progress of the demonstration project and its potential impact on service delivery and including, among other things:

- Appendix A: Summary of Key Project Activities
- Appendix C: Claimant Satisfaction Survey Results
- Appendix D: Stakeholder Interview Results
- Appendix E: Staff Survey Results compiled by Bert Painter
- Summary Report of October 1997

THE PANEL OF ADMINISTRATORS RESOLVES THAT:

1. Approval is granted by the Panel to the Board to immediately expend funds for piloting the Case Management Prototype model in the full Prince George Area Office and in an additional Lower Mainland Service Delivery Location ("SDL") at a cost of up to \$3.32 million;
2. The Board will present to the Panel an evaluation of the expanded pilot of the Case Management Prototype model including:
 - a) Bert Painter to prepare a staff evaluation relating to the Case Management model;
 - b) an external evaluation of the integrity and appropriateness of the Case Management model piloted by the Board, cogency of results of the pilot, and the extent to which the model can sustain those results.

Decision of the Panel of Administrators

Number: 12/17/97-02

Date: December 17, 1997

Subject: The Assessment of Permanent Functional Impairment (“PFI”) by External Service Providers using ARCON Software

WHEREAS:

Pursuant to Section 82 of the *Workers Compensation Act*, RSBC 1996, Chapter 492 and amendments thereto (the “*Act*”), the Panel of Administrators (the “*Panel*”) must approve and superintend the policies and direction of the Workers’ Compensation Board (the “*Board*”) and must:

- 82(a)(ii) review and approve operating policies of the Board,
- 82(a)(iii) approve operating and capital budgets of the Board,
- 82(a)(v) approve major programs and expenditures;

AND WHEREAS:

The Board’s Strategic Plan contemplates improving claims processing via timely and accurate entitlement decisions and improving client satisfaction;

AND WHEREAS:

Board physicians conducting PFI examinations have been testing the use of ARCON software and testing tools;

AND WHEREAS:

The Board’s *Rehabilitation Services and Claims Manual* specifies that PFI examinations will be conducted by Board physicians;

AND WHEREAS:

It is proposed that a pilot project be conducted in which external service providers, using ARCON software under the supervision of a physician, would perform PFI examinations in the lower mainland area and that Board officers would adjudicate a worker's pension entitlement, using the results of such examinations;

THE PANEL OF ADMINISTRATORS RESOLVES THAT:

1. External service providers, who are under the supervision of a physician and participating in the External Preferred Provider Pilot being conducted by the Compensation Services Division of the Board in the lower mainland, are authorized, as an exception to the *Rehabilitation Services and Claims Manual*, to conduct PFI examinations with the use of ARCON software;
2. Board officers are authorized to adjudicate and render decisions regarding a worker's pension entitlement using the results of such examinations.
3. The pilot project will be monitored for maintenance of confidentiality and any subjective component which may bias outcomes. This will be carried out by the Administration of the Board and the Policy and Regulation Development Bureau who will make progress reports to the Panel at future meetings.

Decision of the Appeal Division

Number: 96-1627
Date: October 24, 1996
Panel: Maureen S. Nicholls
Subject: Reconsideration of an appeal division decision — error of law going to jurisdiction — application of Section 39(1)(e) — pre-existing condition as opposed to pre-existing disease or disability

The employer requests the reconsideration of Appeal Division Decision No. 92-0809 dated April 14, 1992. In that decision, the appeal commissioner confirmed the claims adjudicator's refusal to grant relief of costs to the employer under Section 39(1)(e) of the *Act*. The employer was seeking relief of costs in respect of benefits paid to one of its workers for a knee injury.

The employer finds fault with the appeal commissioner's handling of the evidence, invoking "an error of fact on the face of the record" as a reconsideration ground. In a submission dated August 2, 1995 addressed to the chief appeal commissioner, the employer explains:

. . . The appeal commissioner, in her decision of April 14, 1992 made reference to Dr. A's July 7, 1989 description of the injury as follows:

. . . fell about three and a half feet, landing on his right knee . . .

In her reasoning and conclusions, she stated the incident described under this claim is significant. [The worker] stepped down two and a half feet (earlier on she had cited [Dr. A] who had said three and half (feet) from his truck, twisting his right knee. This action could have caused the injury as described in the initial medical report from [Dr. B]. We submit that the appeal commissioner made an error of fact when she accepted the description of the events of July 4, 1989 as described by [Dr. A] in determining whether or not cost relief should be granted. [Dr. C], in Memo #51 dated September 14, 1994, states "it

is apparent that the patient did not fall three and half feet, which would have been a significant distance considering the patient's weight at the time of the injury. The history of fall three and a half feet was obtained by [Dr. A] (orthopedic surgeon), when he saw the patient three days later on July 7, 1989. This history would lead [Dr. A] to believe that the forces involved at the moment of injury were greater than they actually were. I also note that in [Dr. A's] letter of March 11, 1994 he again mentions the history of falling three and a half feet in Page 1, Paragraph 2 of that Report. A subsequent Appeal Division Panel utilizing [Dr. C's] opinion set out in Memo #51 (Appeal Division Decision No. 94-1371 dated November 23, 1994) stated at Page 15 **"as pointed out by [Dr. C], the history of the Worker falling three and half feet on July 4, 1989, as cited by [Dr. D] and [Dr. A], is without foundation."**

[emphasis in original]

The employer also submits that the appeal commissioner erred in rejecting medical evidence that the worker's pre-existing condition (obesity and degenerative changes) prolonged his recovery.

Appeal Division decisions are "final and conclusive" and can only be reconsidered on very limited grounds. These grounds are new evidence as set out in Section 96.1 of the *Act*, an "error of law going to jurisdiction" (including breaches of the rules of natural justice), clerical mistakes or omissions, and fraud. A patently unreasonable interpretation (or application) of the *Act* amounts to an "error of law going to jurisdiction." The phrase "patently unreasonable" indicates the degree of magnitude of the error that would justify setting aside a decision. A decision may not be set aside simply because there is another preferable interpretation of the relevant statutory provision nor even because its interpretation of the *Act* is flawed. For it to be set aside, the decision must involve an interpretation that is not viable, in light of the legislative text. I note that the phrase "patently unreasonable" may also be used with reference to a finding of fact. A "patently unreasonable" finding of fact (such as a finding that is not supported by *any* evidence) would also amount to "an error of law going to jurisdiction."

I appreciate the employer's unease about the appeal commissioner's handling of the evidence. It is not clear from the decision whether (or to what extent) the appeal commissioner accepted Dr. A's description of how the worker injured his knee. More specifically, it is not clear whether she accepted his description that the worker "fell about 3 1/2 feet, landing on his right knee" or whether, as stated in the concluding part of the decision, she found the worker to have "stepped down two and one-half feet from his truck, twisting his right knee." More clarity in that regard would have

been advisable since, as the appeal commissioner herself pointed out, one of the policy questions relevant to the application of Section 39(1)(e) is: how severe was the incident initiating the claim? The confusion in the decision as to the nature of the incident behind the claim could be seen as undermining the appeal commissioner's conclusion that the incident was significant. It could be seen, therefore, as undermining her conclusion that relief of costs is not warranted. That said, I do not consider that the appeal commissioner's handling of the evidence would justify setting aside her decision. It is not so unreasonable as to defy explanation. If one interprets the decision as based on the finding appearing in its concluding part, there is a medical memo on file (memo #13 dated December 11, 1990) that is consistent with that finding. Now whether it could be said that the worker stepping down 2 1/2 feet from his truck and twisting his knee constituted a severe incident is a question that comes close to being evidentiary. The weighing of evidence is generally not a reviewable matter.

While I am not persuaded that the appeal commissioner's handling of the evidence warrants a reconsideration of her decision, I have nevertheless come to the conclusion that the decision should be set aside. I find the appeal commissioner's interpretation and application of Section 39(1)(e) to be patently unreasonable. How so? The appeal commissioner stated at the end of her decision:

There are no indications of a *previously reduced capacity to work* and/or no indications of *prior ongoing medical treatment* for obesity.

The criteria for relief under Section 39(1)(e) of the *Workers Compensation Act* have not been met on this claim and no relief of costs will be given (emphasis added).

The appeal commissioner apparently considered evidence of a previously reduced capacity to work and/or evidence of prior medical attention crucial to determining whether an employer should be relieved from the costs of a claim under Section 39(1)(e). But was such evidence crucial to this case? subsection 39(1)(e) states:

- (e) provide and maintain a reserve for payment of that portion of the disability enhanced by reason of a pre-existing disease, condition or disability.

It is obvious from the wording of the provision that relief may be granted where there is a pre-existing condition — not only where there is a pre-existing disability or a pre-existing disease. There may be a pre-existing condition, even though there is no evidence of a previously reduced capacity to work and/or evidence of prior medical treatment. The Governors' published policies recognize this. Under the existing policies, evidence of a previously reduced work capacity and/or prior medical

treatment is intended to help determine whether there is a pre-existing disability. Policy item #44.10 in the *Manual* concerns proportionate entitlement under Section 5(5) of the *Act*; it specifically refers to “a previously reduced capacity to work and/or . . . prior ongoing medical treatment . . .” as relevant to establishing whether there is a *pre-existing disability*. Subsection 5(5) applies only where a disability resulting from a work injury is superimposed on a pre-existing disability and increases that disability. The application of Section 5(5) may result in a reduction in the amount of compensation paid to a worker. Subsection 39(1)(e) provides relief to an employer where a disability is enhanced because of a pre-existing disease, condition or disability. The application of Section 39(1)(e) cannot affect a worker’s entitlement. It can assist employers though. It can assist them in a broader range of situations than where a worker suffers from a pre-existing disability.

In light of the fact that the employer’s argument was with reference to a pre-existing condition, I conclude that the appeal commissioner’s application of Section 39(1)(e) has no support in the legislation or the relevant policies. The appeal commissioner asked herself the wrong question and applied the wrong test when she noted the absence of a previously reduced capacity to work or prior medical treatment. Where it is argued that relief should be granted because of a pre-existing condition, it is patently unreasonable in applying Section 39(1)(e) to highlight considerations that matter only to a determination of whether a worker suffered from a pre-existing disability.

I grant the employer’s request for a reconsideration of Appeal Division Decision No. 92-0809.

Editor’s Note: This decision has been edited for publication and for the purposes of complying with the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165.

Decision of the Appeal Division

Number: 96-1628
Date: October 24, 1996
Panel: Maureen S. Nicholls
Subject: Reconsideration of an appeal division decision — role of credibility considerations in analyzing the causes of a worker's disability

The worker requests the reconsideration of Appeal Division Decision No. 95-0276 dated March 15, 1995. In that decision, the appeal commissioner denied the worker's appeal stating:

From [the worker's] own evidence to the appeal division, I find that he was not experiencing any neck and shoulder symptoms at work on August 30, 1993. . . . Even if I were to accept that the incident as described by the worker did occur, in view of the worker's own evidence as to the onset of his pain, I find, as did the Review Board, that at best [the worker] is speculating as to the cause of his shoulder and back symptoms. I find that there is insufficient evidence to conclude that his shoulder and back symptoms arose out of and in the course of his employment.

The worker is represented. In submissions dated June 23, 1995 addressed to the chief appeal commissioner, the representative contends that the appeal commissioner disposed of the worker's claim by assessing solely his credibility. According to him, this is improper. The representative contends further that, in focusing on credibility, the appeal commissioner failed to exercise her investigative powers and this amounts to an error of law.

The employer opposes the reconsideration request.

Appeal Division decisions are final and conclusive and may only be reconsidered if there is new evidence within the meaning of Section 96.1 of the *Act* or if they are tainted by an "error of law going to jurisdiction", clerical mistakes or omissions or fraud. The grounds for reconsidering Appeal Division decisions are, therefore, strict. The reconsideration process cannot be used simply to continue arguments or strengthen an unsuccessful case.

Having regard to the representative's submissions, the question arises, therefore, as to whether Appeal Division Decision No. 95-0276 is tainted by an "error of law going to jurisdiction." In order to answer this question and address the representative's concerns, I must decide whether the decision turned on findings against the worker's credibility and, if so, to what extent credibility was relevant to considering the issue on appeal. To base a decision on irrelevant considerations or/and to ignore relevant considerations may amount to an "error of law going to jurisdiction" and may, therefore, vitiate the decision.

The impugned decision is about the causes of the shoulder and back problems which the worker reported to his employer on August 31, 1993. Compensation is generally payable where a disability results from employment. The specific formula used in the *Act* to express that notion is set out in Section 5(1); the formula is that compensation is payable where "a personal injury arises out of and in the course of the employment." Sometimes, it is alleged that a specific incident (or specific incidents) caused the injury. Other times, it is alleged that the nature of the work in general caused the injury. Where it is alleged that a specific incident caused the injury, the decision-maker may find that the incident did not occur. Alternatively, the decision-maker may find that the incident occurred but that it did not cause the injury. A finding that a particular incident did not occur would not be appealable to a Medical Review Panel as it is a factual finding. A finding that a particular incident occurred but did not cause the injury would be appealable to a Medical Review Panel as it is a medical finding. Where it is alleged that the nature of the work in general caused the injury, the inquiry will tend to be broader in scope. A finding that the nature of the work in general did not cause the injury would be appealable to a Medical Review Panel.

Policy item #14.20 of the *Rehabilitation Services and Claims Manual* discusses the significance of establishing whether a specific incident occurred. The policy cautions:

It is not a bar to compensation when an injury occurs over a period of time rather than resulting from a specific incident. To be compensable, however, the evidence must warrant a conclusion that there was something in the employment that had causative significance in producing the injury. A speculative possibility that this might be so is not enough.

This does not mean that the presence or absence of a specific incident is never relevant in the decision of a claim for compensation. *What it does mean is that the absence of a specific incident is not of itself ground for denying a claim.* The existence of a specific incident may still be relevant in that:

1. There are some disabilities that are classified as resulting from an “injury” if they arise out of a specific incident, but are classified as resulting from a “disease” if they occur over time. (2)
2. *The etiology of a disabling condition is always relevant, and the presence or absence of a specific incident may have some evidentiary value in establishing whether it was caused by any feature of the employment.* (emphasis added)

To what extent does the above policy suggest that a decision-maker faced with a question of causality must always engage in a narrow *and* broad inquiry? That is, does the policy imply that a decision-maker, who is faced with the specific question of whether a particular incident caused an injury, must also examine the broader question of whether the nature of the work in general may have caused it? It is perhaps possible to interpret policy item #14.20 as putting such an onus on the decision-maker. Another interpretation though is that the occurrence of a specific incident is *not* a necessary condition for accepting a claim. From this perspective, where a worker specifically alleges that a particular incident caused his injury and the decision-maker determines that the incident did not occur or could not have caused the injury, the claim could be denied with respect to the specific allegation that a particular incident caused the injury. But it would still be open to the worker to request a determination as to whether his day-to-day work activities might have caused the injury. The claim could be valid on that basis. In sum, policy item #14.20 could be interpreted to mean that decision-makers must inquire into whether an injury was caused by the regular work activities, even where it is alleged that a particular incident caused the injury. Or, the policy could be interpreted to mean that the absence of a specific incident (or the lack of a causal relationship between such an incident and the injury) does not close the door to a further adjudication of the compensability of the claim.

If a claim is made on the footing that a particular incident occurred, the worker’s credibility may be an important consideration in determining whether the specific allegation is substantiated. A worker’s credibility can be important in other ways too. A decision-maker requires evidence concerning the onset of a worker’s pain, whether it came on first at work, whether it came on suddenly or gradually, and what the worker was doing when he first felt pain. A worker’s credibility can, therefore, also be a factor relevant to determining the broader question of whether the day-to-day work activities may have caused his injury. But where this broader question is concerned, while credibility may still be a relevant factor, it generally cannot be determinative. In a broad sense then, I would agree with the representative that a claim cannot be determined “on the sole question of credibility.” To take some extreme examples, a claim could be found to have a valid basis despite misrepresentation by the worker.

Consider the following scenarios: a worker invents an incident in the belief that the occurrence of a such an incident is necessary to the acceptance of a claim; medical examinations establish, however, that his regular work activities caused his injury. Or, a worker alleges his pain came on suddenly at work whereas it really came on at home; medical evidence establishes that a delayed onset of pain is consistent with the occurrence of a work injury.

I note that it may be difficult for the affected parties to assess whether a decision is appealable to a Medical Review Panel, if the decision does not set out its factual findings and if it does not specify whether it concerns a specific incident as a possible cause of injury and/or about the nature of the work in general as a possible cause of injury.

Was the impugned Appeal Division decision about a specific incident as a cause of injury and/or the nature of the work in general as a cause of injury? In his Application for Compensation dated September 22 (presumably 1993), the worker described the cause of injury as follows:

I was pulling a log about 10 wide and 14 long. The log was about 22 feet long. The pick rule that I was pulling with broke and I fell backward. I hurt my neck and back.

(reproduced as written)

In a decision dated October 1, 1993, the claims adjudicator denied the claim, stating:

A number of contentious issues have been found in our claim for compensation. In addition to conflicting information obtained from [another individual] within a 2 day period, you were not certain from the onset as to whether or not your back complaints were due to work or due to going home taking a nap and upon waking finding your back sore at that time. You are unable to relate the incident to sudden onset of pain. You advised you were somewhat unsure but you figured it was because of the previous day when you were using a hook-a-roon. It did not appear to bother you the previous day. Also considering that you spent the last 1.2 hour shift pulling lumber and had no difficulty performing these duties.

For an injury to be compensable, it must be shown that the injury arose out of and in the course of employment. In other words not only must the injury occur while you were working, but in fact something in the employment situation must have causative significance in producing the injury. It is not necessary that a claimant prove that he suffered an injury arising out of and in the course of employment. Nevertheless, there still must remain certain fundamental facts and evidence that would lead to a conclusion favorably to a claims acceptance. Unfortunately, given the number of discrepancies and your lack of logical explanations for these discrepancies, I am not drawn to a conclusion that this injury arose out of and in the course of employment.

In the above decision, the claims adjudicator neither specifically accepted nor rejected the occurrence of the incident as described by the worker on his Application for Compensation. It is difficult to tell from the decision whether the claims adjudicator concluded that: the incident did not occur; the incident did occur but did not cause the worker's back and shoulder problems; his regular work activities did not cause them either. But since the worker's application alleged the occurrence of an incident at work on August 30, 1993, it is reasonable to infer that claims adjudicator's denial was with respect to that specific allegation. Admittedly, by saying "I am not drawn to the conclusion that this injury arose out of and in the course of employment", the claims adjudicator appeared to be disposing of all the issues germane to such a claim, including the possibility that the nature of the work might have caused the worker's problems. However, in memo #1, the claims adjudicator seemed to be addressing only the question of whether a specific incident caused the worker's problems.

In appealing the October 1, 1993 decision to the Review Board, the worker stated in Part 1 of the Review Board Appeal Forms that he thought the decision was wrong because "my injury arose out of and in the course of my employment."

In findings dated August 24, 1994, the Review Board panel defined the issue on appeal as follows:

The issue raised by this appeal is whether [the worker's] neck and back complaints requiring medical attention and resulting in three days of wage loss are causally related to a specific work incident on August 30, 1993, and arose out of and in the course of his employment.

While the panel's use of the phrase "arose out of and in the course of his employment" might suggest that it was embarking upon a broad type of inquiry, its analysis and conclusion suggest otherwise. The panel stated:

The panel is unable to find that [the worker] injured himself at work on August 30, 1993 or that he was experiencing any neck and shoulder symptoms at work on that date. We accept the evidence given to his supervisor the following day and to the Claims Adjudicator that it was not until he woke up after sleeping on the sofa that he experienced any symptoms. . . . We find that at best [the worker] is speculating as to the cause of his shoulder and back symptoms and we are unable to find that they arose out of and in the course of his employment, particularly in the manner which he has described.

The Review Board panel apparently rejected the worker's claim that his problems were caused by an incident at work. More specifically, the panel apparently rejected the worker's version of events as to the occurrence of an incident at work on August 30, 1993. I do not read the panel's findings as also pertaining to the question of whether the nature of the worker's regular work activities might have caused his injury. I recognize the ambiguity in the findings stemming from the panel's use of the phrase "we are unable to find that they arose out of and in the course of his employment . . ." But where there is ambiguity as to whether a decision or findings dispose of an issue, I believe it is prudent to interpret the decision or the findings narrowly so as not to deprive the affected parties of a full adjudication of the issue.

Did the impugned Appeal Division decision remove the ambiguity as to the nature of the issue(s) on the table? In submissions dated September 26, 1994 addressed to the appeal commissioner, the worker himself did not explicitly define the issue(s) he wished to appeal. Yet the tenor of his submissions makes it clear that he was disputing the Review Board findings regarding the veracity of his version of events. In submissions dated November 1, 1994, his representative reiterated that the worker had an accident at work on August 30, 1993 and the somewhat delayed onset of his symptoms does not imply that the accident did not occur.

The appeal commissioner defined the issue the same way the Review Board did. She defined it as "whether [the worker's] . . . complaints . . . are causally related to a specific work incident on August 30, 1993 and arose out of and in the course of his employment." The appeal commissioner's conclusion contains the same ambiguity as the Review Board findings and the claims adjudicator's decision. It is not entirely clear whether she intended to rule out a causal relationship between the nature of the worker's regular work activities and his complaints as well as rule out a causal relationship between a particular incident and these problems. In light of that ambiguity and for the reasons I discussed in relation to the Review Board findings, I believe it is prudent to interpret the Appeal Division decision narrowly — that is, to interpret it as only concerning allegations that a specific incident at work caused the

worker's shoulder and back problems. Although she did not state it explicitly, I am satisfied that the appeal commissioner's concluding paragraph indicates that she rejected the worker's evidence as to the occurrence of an incident at work on August 30, 1993 and this is the basis of her decision. In an *obiter* statement, the appeal commissioner briefly considered the possibility that such an incident might have caused the worker's problems; she questioned that possibility but only as an aside.

Given the scope of the impugned decision, I find its focus on credibility justifiable. The consistency between the worker's various stories regarding the alleged incident and the onset of his pain is a relevant consideration that has a meaningful connection to the matter before the appeal commissioner, namely, whether a specific incident caused particular problems. It cannot be said, therefore, that the appeal commissioner relied on an irrelevant consideration by focusing on the worker's credibility. But could it be said that she failed to take some other relevant considerations into account? If the decision were read as disposing of both the narrow issue of whether a specific incident caused particular problems *and* the broad issue of whether the worker's regular work activities might have caused these problems, an exclusive focus on credibility would be questionable. Since I read the impugned decision as intending to address only the question of whether a specific incident caused particular problems, I cannot fault it for its focus on credibility. It was and remains, therefore, open to the worker to seek a proper adjudication of the broad issue.

In sum, I find no "error of law going to jurisdiction" in the appeal commissioner's handling of the question before it, namely, whether a specific incident caused certain symptoms. When analyzing a decision on the causes of a worker's disability, it is helpful to bear in mind that such a decision may (but need not) involve three different questions: whether a specific incident occurred; if it did, whether it caused the worker's disability; and, if it did not, whether the regular work activities caused this disability. In varying degrees, credibility may be a relevant consideration for all three questions. It will be most pertinent to an inquiry into whether a specific incident occurred. Decision-makers who limit their scope of inquiry to that question should be careful in when they use the phrase "arising out of and in the course of the employment." An unqualified use of that phrase may generate the impression that their scope of inquiry is broader than was intended to be. That may well be the weakness of the impugned decision — a weakness that does not, however, vitiate it.

I deny the worker's request for reconsideration. Appeal Division Decision No. 95-0276 is final and conclusive. It must stand. It does not contain an "error of law going to jurisdiction."

Editor's Note: This decision has been edited for publication and for the purposes of complying with the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165.

Decision of the Appeal Division

Number: 96-1629
Date: October 24, 1996
Panel: Maureen S. Nicholls
Subject: Reconsideration of an appeal division decision — error of law going to jurisdiction — interpretation of regulation 34.16(2) of the *Health and Safety Regulation for Construction*

The employer seeks a reconsideration of Appeal Division Decision No. 95-0650 dated May 31, 1995. In that decision, a three-member panel (“the panel”) upheld the levy of a penalty on the employer for the violation of Industrial Health and Safety Regulation 34.04(1). The regulation requires that, during the erection of buildings and structures, workers be protected from injury through falling by means of barriers, guardrails, guard ropes, safety-belts, etc.

The submission dated June 13, 1995 in support of the reconsideration request basically reargues the point raised by the employer before the panel, the point being that the levy is supported neither by the facts nor the legislation. The employer specifically contends that Decision No. 95-0650 “is based on an error of fact and an error of law.”

By way of background, the employer had appealed the penalty levy imposed by the Prevention Division in accordance with Section 96(6) of the *Act* — that is, “on the grounds of error of law or fact or contravention of a published policy of the Governors.” The panel could find no error of law or fact or contravention of policy in the imposition of the penalty.

The fact that the employer is simply rearguing the point raised on appeal has no bearing on whether the reconsideration request has merit; the point raised could have been valid yet missed by the panel considering the appeal. For example, if the employer correctly identified an error of law but the panel overlooked it, it would be appropriate for this very same point to be reargued in support of the reconsideration request. That said, Appeal Division decisions are “final and conclusive” subject to new evidence within the meaning of Section 96.1 of the *Act*, clerical mistakes or omissions, fraud or “*errors of law going to jurisdiction.*” Therefore, a mere error of law would not be sufficient to set aside an Appeal Division decision. It would have to be an error that

could be characterized as “going to jurisdiction” such as a breach of the rules of natural justice, a patently unreasonable interpretation of relevant legislation or a patently unreasonable finding of fact.

The question arises, therefore, as to whether the impugned decision is tainted by an “error of law going to jurisdiction.” More specifically, as there is no allegation in the case before me that the decision contravened the rules of natural justice, the question arises as to whether it is based on patently unreasonable legal and/or factual findings.

The impugned decision concerns two separate companies: A (namely, the employer seeking the reconsideration of the decision [hereafter, “A” or “the employer”]) and B. Both companies are independently registered with the Board.

As related by the employer, the facts are as follows: B was under contract with the employer to deliver materials to various construction sites; the construction site where the violation of Industrial Health and Safety Regulation 34.04(1) occurred was neither owned nor controlled by the employer; the workers involved in the violation of the regulation were employed by B — *not* the employer.

There is no suggestion in the impugned decision that the panel disagreed with the above version of events. The panel did not make any contrary findings. That is, it did not find that the workers involved in the violation were really the employer’s workers or that the employer owned or was in charge of the worksite where the violation occurred. The panel appears to have based its conclusion regarding the appropriateness of the penalty on the facts as outlined by the employer. I see, therefore, little merit in the employer’s argument that the decision is tainted by an error of fact.

There is no apparent flaw in the decision’s evidentiary basis. But is there a flaw in its legal reasoning? The panel characterized both the employer and B as “subcontractors.” While it characterized the employer once as the “primary subcontractor”, it did *not* characterize it as the “principal contractor.” Rather, it found that the employer had contracted with the principal contractor. Having found the employer to be a “subcontractor” (or “primary subcontractor”), the panel appears to have relied on Regulation 34.16(2) in the *Health and Safety Regulation for Construction* to justify the penalty levy. The crux of the reasoning underlying the panel’s conclusion lies in the following statement:

From the evidence, we conclude [A] is a subcontractor that has contracted with the principal contractor to supply and deliver construction materials. [A] has the contractual responsibility for the safe delivery of these supplies and therefore retains responsibility for ensuring that [B] meets its

safety responsibilities in completing the deliveries to [A's] customers. As provided in Regulation 34.16(2), the principal contractor at the worksite retains some responsibility to ensure that the regulations are complied with, but this does not relieve *any* subcontractor from compliance with the regulations. We interpret "any subcontractor" to include both [A] and [B] in light of the definition of "subcontractor" in Regulation 34.16(1).

...

... We find that, as the primary subcontractor for the supply and delivery of construction materials, [A] has a responsibility to ensure that the subcontracted delivery portion of that contract by delivery services that are integral to their operations is carried out in accordance with the regulation requirements. This does not relieve the secondary subcontractor, [B], from their responsibility for compliance.

I note that the *Health and Safety Regulations for Construction* neither define nor, for that matter, use the category of "primary subcontractor." However, they do use and define the categories of "person", "owner", "principal contractor" and "subcontractor." The definitions set out in Section 34.16(1) are as follows:

"person" includes a firm, a partnership, a limited company, an association or any other legal entity.

"owner" includes a person who has an interest, legal or equitable, in the property on which and on whose behalf, or for whose direct benefit a construction project is undertaken.

"principal contractor" means a person contracting with an owner or his agent to undertake a construction project.

"subcontractor" means a person not contracting directly with an owner or his agent in respect of a construction project, but one who contracts with the principal contractor or with another subcontractor or his agent, but does not include a worker.

Regulation 34.16(2) on which the panel apparently relied to establish the employer's liability states:

(2) When a construction project involves the services of one or more subcontractors or their workers, the principal contractor, or if there is no principal contractor, the owner, shall ensure that all industrial health and

safety regulations are complied with in respect of the construction project, *but nothing in this regulation shall relieve any subcontractor or his workers from compliance with the industrial health and safety regulations.* [emphasis added].

Does regulation 34.16(2) provide the legal basis for finding a subcontractor such as this employer liable to pay a penalty for the violation of regulation 34.04(1)? Regulation 34.16(2) creates an obligation for principal contractors and owners, namely, the obligation to ensure that the Industrial Health and Safety Regulations are complied with. As far as subcontractors are concerned though, regulation 36.16(2) merely says that they may not shirk their responsibilities to comply just because the principal contractor (or the owner) is also responsible for compliance. However, for subcontractors, regulation 34.16(2) itself does not create the obligation to comply. To the extent that such an obligation exists, it stems from the other regulations. Of course, it is clear from the other regulations that, as an employer, a subcontractor has the responsibility to ensure compliance in respect of work done by him or his workers. What is less clear is whether a subcontractor (who is not a principal contractor) may sometimes be responsible for ensuring that other subcontractors and their workers comply with the regulations. While this question would seem relevant to this case inasmuch as the workers involved in the violation of regulation 34.04(1) were employed by another subcontractor, it is not a question I need to address in order to deal with the reconsideration request. In the impugned decision, the panel relied on regulation 34.16(2) — not some other regulation — to uphold the penalty levy. Therefore, the question I need to address is whether the levy of a penalty on this employer may be reasonably justified in terms of that particular regulation.

I find that the levy of a penalty on this employer cannot be justified in terms of regulation 34.16(2). Use of that regulation to uphold the penalty imposed on the employer is patently unreasonable. For a subcontractor, regulation 34.16(2) cannot be read as the source of an obligation to ensure that other subcontractors and their workers comply with the regulations.

Regulations are subordinate legislation. Just as much as a patently unreasonable interpretation (or application) of a provision in the governing legislation would amount to “an error of law going to jurisdiction”, so would a patently unreasonable interpretation (or application) of a regulation. As indicated earlier, one of the grounds for reconsidering Appeal Division decisions is “an error of law going to jurisdiction.” In the case before me, that ground has been met.

The employer’s request for the reconsideration of Appeal Division Decision No. 95-0650 is granted. I have decided to set aside the impugned decision on the grounds that

it rests on a patently unreasonable interpretation of a regulation and, therefore, involves “an error of law going to jurisdiction.”

The employer’s appeal will be considered afresh by a new panel of the Appeal Division.

Editor’s Note: This decision has been edited for publication and for the purposes of complying with the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165.

Decision of the Appeal Division

Number: 97-0050
Date: January 15, 1997
Panel: Anne-Marie Drosso
Subject: Reconsideration of an appeal division decision — error of law going to jurisdiction — application of Section 55 of the *Workers Compensation Act*

The worker seeks a reconsideration of Appeal Division Decision No. 96-0729 dated May 3, 1996 (the “impugned decision”). In that decision, the Appeal Division panel (“the panel”) found the worker’s claim to be barred by Section 55 of the *Act*.

The appeal officer has had no success in trying to contact the employer.

In Decision No. 20 [12 *WCR* 361] dated November 29, 1996, the chief appeal commissioner delegated to me the power to direct the reconsideration of Appeal Division decisions and the power to set them aside.

Grounds For Reconsidering or Setting Aside Appeal Division Decisions

The statutory ground for reconsidering an Appeal Division decision is new evidence within the meaning of Section 96.1 of the *Act*.

The common law grounds for setting aside an Appeal Division decision as articulated in Decision No. 93-0740, 10 *Worker’s Compensation Reporter* 127 include an “error of law going to jurisdiction.”

The worker’s advisor argues that the impugned decision contains “an error of law.” A mere error of law is not a sufficient ground to set aside an Appeal Division decision. The error must amount to an “error of law going to jurisdiction.” What constitutes an “error of law going to jurisdiction”? A breach of the rules of natural justice is generally characterized as “an error of law going to jurisdiction.” A wrong interpretation or application of a “jurisdictional” provision (such as a provision that

defines the scope of a tribunal's powers or a provision that relates to access to a tribunal) is an "error of law going to jurisdiction"; a tribunal must be right when its interprets or applies a "jurisdictional" provision. A wrong interpretation or application of any other type of provision does not constitute, however, an "error of law going to jurisdiction." Where a tribunal is protected by a privative clause, decisions on points of law within the tribunal's expertise may not be reconsidered, unless they involve a patently unreasonable interpretation or application of a statutory provision. An interpretation that has some logical basis and is at all viable, in light of the wording of the legislation, may not be set aside. In other words, the "error of law" test for setting aside an Appeal Division decision is very strict. As explained in Decision No. 93-0740, a strict test is in keeping with the statutory scheme contemplated by the *Act*.

For the impugned decision to be set aside, it must be shown, therefore, either that it involves a wrong interpretation or application of a jurisdictional provision or some analogous error or that it involves a patently unreasonable interpretation or application of a provision within the tribunal's expertise.

The Claims Background

The facts culminating in the current proceedings are as follows:

- In an application form dated 11/2/93, the worker claimed compensation for neurological damage caused by exposure to lacquers at work. He stated that he had last worked on April 31, 1990.
- In a letter dated February 10, 1993, the claims adjudicator requested the worker to explain his delay in filing an application. The adjudicator advised the worker that, where an application is filed more than one year after the date of injury, the Board may pay compensation, in accordance with Section 55 of the *Act*, if it is satisfied that there existed special circumstances which precluded the filing of the application within the one year timeframe.
- In a letter dated February 16, 1993 addressed to the claims adjudicator, the worker's union representative argued that, since the worker's condition was not initially diagnosed by his doctors as related to his work, his claim should be covered by the policy that deems the injury to have occurred when the industrial disease was first diagnosed (policy 25.30 of the *Rehabilitation Services and Claims Manual* at the time the representative wrote the letter). The representative appended to his letter a 1990 Medical Review Panel certificate

concerning another worker who had suffered from similar problems and who was found by a Medical Review Panel to have a neurological disability caused by his exposure to lacquer.

- In a letter dated February 26, 1993 addressed to the worker, the claims adjudicator noted that the medical reports did not indicate an industrial disease.
- In a letter dated March 22, 1993, the claims adjudicator rejected the claim, stating in part:

... The medical report indicates a diagnosis as follows: chronic dysthymic disorder and passive dependant personality disorder.

As previously advised, I have not received any medical reports which indicate an industrial disease, for which to consider this claim.

As previously noted, in order to have a claim for Workers' Compensation benefits, one must sustain a personal injury under Section 5, or an industrial disease under Section 6. As there has been no medical diagnosis of an industrial disease or personal injury, I am unable to accept your claim as a Workers' Compensation Board responsibility. This includes that there will be no wage loss benefits payable, nor will any medical expenses incurred be accepted as a Workers' Compensation Board responsibility.

- The worker tried to appeal the claims adjudicator's decision to a Medical Review Panel.
- In a letter dated June 11, 1993, the medical appeals officer rejected the worker's application for a Medical Review Panel examination on the basis that the claims adjudicator's decision was not a medical decision but rather was a decision pertaining to the application of law and policy.
- The worker appealed both the claims adjudicator's and the medical appeal officer's decisions to the Review Board. He appended to his Notice of Appeal the 1990 Medical Review Panel certificate concerning his co-worker.
- In findings dated September 1, 1995, the Review Board panel characterized the issues on appeal as: whether the claim was statute-barred, whether the worker

sustained an injury or suffered from an industrial disease as a result of his employment, and whether he was entitled to be examined by a Medical Review Panel. The Review Board panel found that: the claim was statute-barred, the worker did not sustain an injury or an industrial disease as a result of his employment, and the medical appeals officer correctly determined that the adjudicator's February 26, 1993 decision was not a medical decision and, therefore, could not be appealed to a Medical Review Panel.

On whether the claim was statute-barred, the Review Board panel stated in part:

. . . Section 55 of the *Act* requires that an application for compensation must be made within one year of the injury's occurrence and, for an industrial disease an application must be filed within one year of the date of disability. There is evidence that [the worker's] disability began to manifest itself by at least 1987, at which time he started to undergo treatment and hospitalizations for depression. Certainly, by 1990 his condition was disabling. His application for compensation benefits was not filed however, until February 1993.

.

The worker and his representative have submitted at the oral hearing that special circumstances did exist which precluded compliance with time limits in as much as [the worker's] marriage had failed, he was depressed, and the characteristics of his work exposure were not well understood. We do not accept that the breakup of his marriage precluded the worker from filing a claim in a timely fashion. Nor do we accept that the effects of exposure to organic solvents etc. were so unfamiliar that [the worker's] attending physicians would not have appreciated the implications of the exposure, had they been aware of them at the onset of the worker's symptoms. Certainly, exposure to organic solvents was sufficiently implicated as a cause of industrial diseases that it qualified as a scheduled industrial disease by at least June 4, 1986.

The one circumstance by which [the worker] may have been precluded is the nature of his psychological and mental deterioration. Between 1987 and 1990, he was hospitalized for significant periods of time during which he progressively deteriorated. According to [Dr. A], he is now unable to function at all. We accept that for significant periods between 1987 and 1993

[the worker's] condition likely interfered with his memory, concentration and cognition so as to impede his ability to file a claim. We cannot find, however, that he was precluded from filing within the required time limits. [The worker] told the panel that he associated his symptoms with work from as early as 1984, although he did not know precisely what about the work was causing the problem. Other workers were concerned about the ventilation and he indicated that some workers started to book off sick. He periodically recorded his symptoms in the sick book and took ASA. [The worker's] symptoms did not become manifestly disabling over night, rather, they were progressive. Even in the period between 1987 and 1990, there were times when [the worker] was well enough to work. Given that he attributed his complaints to his work since as far back as 1984, we would expect that he would have filed a claim long before 1993. Accordingly, we find that he was not precluded from filing a claim; and find that his claim is statute barred.

On whether the worker sustained an injury or suffered from an industrial disease as a result of his employment, the Review Board panel stated in part:

... The diagnoses listed on the medical reports submitted to the Board include depression, chronic dysthymic disorder, passive/dependant personality disorder, alcoholism in remission stress, and functioning capacity fair to subnormal. These are the conditions from which he was and is disabled. None of these conditions are accepted industrial diseases.

.....

... On the evidence before us, we find that the worker was likely exposed to organic solvents at work. We make no findings as to the period or extent of this exposure, nor do we make any findings regarding exposures to other toxic substances with which [the worker] worked and may have been exposed ...

... We note that to date [the worker] has undergone no testing to determine his neurological status and therefore there is no evidence that he has neurological damage which might be attributable to chronic organic solvent exposure, (or indeed to exposure to any toxic chemical). There is insufficient evidence upon which to conclude that the worker has sustained either an

injury or an industrial disease as a consequence of a possible exposure to organic solvents or other toxic chemicals in his employment.

On whether the worker was entitled to a Medical Review Panel examination, the Review Board panel stated:

. . . As indicated in the June 11, 1993 decision letter under appeal, Section 58(3) of the *Act* requires that medical findings of the Review Board or medical decisions by the Board are appealable to Medical Review Panels. The statements that a claim is out of time or that the worker has not been diagnosed as having an industrial disease are not medical decisions. The statement that the worker has *not been diagnosed* as having an industrial disease is a statement of fact; whereas the statement that the worker *does not have* an industrial disease would be a medical finding or decision. Both statements in the decision letter relate solely to questions of law and policy. Industrial diseases, for instance, are those diseases which have been so designated by the Board. We find that the Medical Appeals Officer correctly determined that no medical dispute was identified in the decision letter of February 26, 1993. Accordingly, we confirm this decision.

- The worker appealed the Review Board finding to the Appeal Division. In support of the appeal, the worker's advisor made several arguments as regards both the question of whether the claim was statute-barred and the question of whether the worker sustained an injury or suffered from an industrial disease as a result of his employment. As regards the first question, the advisor referred to Appeal Division decisions which had adopted a liberal interpretation of the phrase "special instances which precluded the filing of an application" that appears in Section 55 of the *Act*. He urged the panel to interpret the phrase in that light, considering that the worker had been uncertain whether his workplace exposure was the source of his problems, had been hospitalized for depression, had applied for compensation when he found out about the acceptance of his co-worker's claim and was provided with a medical opinion linking his symptoms to his work only in May 1993. As regards the second question, the worker's advisor argued that the worker's condition should be accepted as an industrial disease within the meaning of Schedule B of the *Act*.
- The panel rejected the advisor's arguments. The panel's reasoning was in part as follows:

It is difficult to consider the Section 55 issue without also considering the issue of causation. If [the worker's] symptoms of significant depression and memory loss are a consequence of his exposure to chemicals at work, and [the worker] and his doctors failed to recognize the connection between his symptoms and his work prior to 1993, then he has a good argument that there existed special circumstances which precluded him from filing an application within the prescribed period in Section 55. However, if those symptoms are not related to his work, [the worker] and his doctor realized earlier there was a connection between his work and his symptoms, then [the worker's] arguments under Section 55 are much weaker.

.....

Based on [Dr. B's] opinion, I find it unlikely that [the worker's] significant depression, passive-dependant personality disorder, and memory loss were related to his exposure to chemicals, solvents and/or lacquers at work. Therefore, I am unable to find those symptoms constituted "special circumstances." Since [the worker] stopped work in 1990 and did not apply for compensation until 1993, I find his claim is barred by Section 55(2) of the *Act* and there were no special circumstances which precluded him from filing within that one year period. Therefore, I deny [the worker's] appeal under Section 55 of the *Act*.

Merits

As I have found [the worker's] claim is barred by Section 55 of the *Act*, it is not necessary to consider the merits of his appeal. However, as noted above in considering the Section 55 issue, based on [Dr. B's] opinion I found it was most likely that [the worker's] significant symptoms were not related to his exposure to chemicals and solvents at work. Even if [the worker's] claim was not barred by Section 55, Section 6(3) and Schedule B 1(g) would not assist him on the issue of causation, as that part of Schedule B requires a diagnosis of poisoning by organic solvents. [Dr. C] did not diagnose poisoning, but other symptoms. Therefore, the merits of [the worker's] claim would have been adjudicated under Section 6(1) of the *Act* without the assistance of Section 6(3) and Schedule B.

Is Appeal Division Decision No. 96-0729 Tainted By An “Error of Law Going to Jurisdiction”?

The worker’s advisor impugns the panel’s application of Section 55 of the *Act*. More specifically, the advisor takes issue with the panel’s statement that, because it could not find the worker’s significant depression, passive-dependant personality disorder and memory loss to be related to the worker’s exposure to chemicals, solvents and/or lacquers at work, it was unable to find the symptoms constituted “special circumstances” within the meaning of that Section. The advisor submits that the causation of these symptoms is irrelevant to a determination of whether special circumstances had precluded the worker from filing an application on time. In the advisor’s words, “[t]here is no reference in Section 55(3) of the *Workers Compensation Act* to the different and separate issue of causation.” The worker relies on several published Appeal Division decisions in support of his position.

The advisor’s argument concerns the interpretation of Section 55 of the *Act*. Section 55 was amended effective August 26, 1994 by Bill 13, *The Workers Compensation Amendment Act*. The question arises, therefore, as to whether the old or the new Section 55 applies to this worker’s claim. The worker applied for compensation in 1993. The claims adjudicator rendered her decision in 1993. The Review Board panel issued its findings in 1995. The panel issued its decision in 1996. Neither the Review Board panel nor the panel mentioned the amendment to Section 55. While both referred to Section 55, neither cited the text of the provision on which they relied.

Prior to the 1994 amendment, Section 55 read as follows:

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

(2) Unless an application is filed, or an adjudication made, within one year after the date of injury, death or disablement from industrial disease, no compensation is payable, except as provided in subsection (3).

(3) Where the Board is satisfied that there existed special circumstances which precluded the filing of an application within one year after the date referred to in subsection (2), and

- (a) where an application is filed within 3 years after that date, it may pay the compensation provided by this Part; or
- (b) where the application is filed after 3 years after that date, it may pay the compensation provided by this Part but not in respect of a period prior to the date the application is received by the Board.

(4) This section applies to an injury or death occurring on or after January 1, 1974 and to an industrial disease in respect of which exposure to the cause of the industrial disease in the Province did not terminate prior to that date.

Following the 1994 amendment, Section 55 provides:

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

(2) Unless an application is filed, or an adjudication made, within one year after the date of injury, death or disablement from occupational disease, no compensation is payable, except as provided in subsection (3), (3.1), (3.2) and (3.3).

(3) If the Board is satisfied that there existed special circumstances which precluded the filing of an application within one year after the date referred to in subsection (2), the Board may pay the compensation provided by this Part if the application is filed within 3 years after that date.

(3.1) The Board may pay the compensation provided by this Part for the period commencing on the date the Board received the application for compensation if

(a) the Board is satisfied that special circumstances existed which precluded the filing of an application within one year after the date referred to in subsection (2), and

(b) the application is filed more than 3 years after the date referred to in subsection (2).

(3.2) The Board may pay the compensation provided by this Part if

(a) the application arises from death or disablement due to an occupational disease,

(b) sufficient medical or scientific evidence was not available on the date referred to in subsection (2) for the Board to recognize the disease as an occupational disease and this evidence became available on a later date, and

(c) the application is filed within 3 years after the date sufficient medical or scientific evidence as determined by the Board became available to the Board.

(3.3) The Board may apply subsection (3.2) to an application in respect of a death or disablement from an occupational disease that the Board previously considered since July 1, 1974 under the equivalent to this section.

(4) This section applies to an injury or death occurring on or after January 1, 1974 and to an occupational disease in respect of which exposure to the cause of the occupational disease in the Province did not terminate prior to that date.

Clearly, the 1994 legislative amendments to Section 55 have had important consequences as to the Board's discretion to pay compensation for late applications, in the case of occupational diseases. Prior to 1994, if an application was filed after 1 year from the date of death or disablement from what was then termed an "industrial disease", the Board could pay compensation as long as it was satisfied that special circumstances had precluded the filing of the application within one year of the date of death or disablement. More specifically, it could pay full compensation, if the application was filed within three years of that date. But it could only pay compensation in respect of the period starting when the application was received at the Board, if the application was filed later than three years from the date of death or disablement.

In sum, under the old Section 55, the Board's discretion to pay any compensation in the case of late applications for death or disablement from an "industrial disease" depended strictly on its being satisfied that special circumstances had precluded the filing of the application within one year of the death or disablement from the disease. The amount of compensation it could pay depended on whether the application was filed within three years after that date or later than that. The interpretation of the

phrase “there existed special circumstances which precluded the filing of an application within 1 year . . . ” was, therefore, central to the consideration of any late application for compensation for death or disablement from an “industrial disease.”

The 1994 amendments to Section 55 have introduced a more complex system — a system designed to take into account the fact that late applications for what is now termed an “occupational disease” may be attributable to insufficient medical or scientific evidence linking a particular disease to a particular process, trade, occupation or industry. The intent behind the amendments was to permit the Board to pay compensation where advances in scientific and medical knowledge establish new linkages between a disease and a particular process, trade, occupation or industry. The new Section 55 leads one to distinguish between three possible scenarios. Under the first scenario, a disease has been given some broad recognition by the Board as an occupational disease; for example, it is listed in Schedule B or, alternatively, it has been designated as an occupational disease by a regulation. A worker dies or becomes disabled from that disease. The application for compensation is filed after one year of the date of death or disablement from the disease. In such circumstances, the new Section 55 seems to operate like the old Section 55. How? It seems to make the Board's discretion to pay compensation depend on whether the Board is satisfied that special circumstances precluded the filing of the application within one year; and it seems to make the amount of compensation payable depend on whether the application was filed within three years of the date of death or disablement from the disease or later than three years from that date.

Under the second possible scenario, a worker dies or becomes disabled as a result of a disease. Sufficient medical or scientific evidence as determined by the Board becomes available for it to recognize the disease as an occupational disease by adding it, let us say, to Schedule B or, alternatively, by designating it as an occupational disease in a regulation. Under those circumstances, the Board's discretion to pay compensation apparently depends on whether the application was filed within three years of the date sufficient medical or scientific evidence as determined by it became available for it to recognize the disease as an occupational disease. If the application was filed within three years of that date, it would appear that the Board may pay full compensation. subsection 55(3.2) is silent on whether or to what extent the Board may pay compensation, if the application was filed later than three years after that date. Reading the section as a whole, it is arguable that, if the application was filed later than three years after that date, the Board may pay compensation as of the date of application once it is satisfied that special circumstances had precluded the filing of the application within one year of the date of disablement.

Under the third possible scenario, a worker dies or becomes disabled as a result of a disease. An application for compensation is filed. There has been no broad recognition

of that disease as an occupational disease — that is, the disease is not listed in Schedule B, has not been designated as an occupational disease by regulation, etc. It remains open though to the Board to recognize the disease as an occupational disease in an individual case. If the Board recognizes the disease as an occupational disease in the individual case, it would appear that the new Section 55 allows the Board to pay compensation, regardless of when the application was filed. In other words, unless an occupational disease has been given some broad recognition, it would appear that there is no requirement that an application for compensation be filed within a certain time frame.

I note that Section 55(3.3) allows the Board to apply the new Section 55 provisions “to an application in respect of a death or disablement from an occupational disease that the Board previously considered since July 1, 1974 under the equivalent of this section.”

To recapitulate, under the new Section 55, the question of whether an application was filed within one year of the date of death or disablement from occupational disease or whether special circumstances precluded the filing of the application within that time frame is not relevant to every claim for compensation for death or disablement from occupational disease. In some circumstances, it may not be relevant. In view of Section 55(3.3), the panel had a responsibility to consider the applicability of the new Section 55 provisions to the claim before it.

As indicated earlier, in the impugned decision, the panel made no mention of the 1994 amendments to Section 55. But can it be inferred from its discussion that it considered whether the 1994 amendments were at all relevant to the claim before it? The argument could be made that, by virtue of Section 55(3.3) the amended Section 55 applies to this worker's claim, even though he stopped work in 1990, applied for compensation in 1993 and was first denied compensation in 1993 — all of which took place before the section was amended. The apparent reasoning in the impugned decision would not support the inference that the panel considered the new Section 55. If anything, the reasoning in the decision would lead to the opposite conclusion — namely, that the new section was not considered. Why? The panel found that the worker did not suffer from an occupational disease listed in Schedule B. Since it ruled out disablement by an occupational disease listed in Schedule B, if it had been considering the new Section 55, it would have been logical for it to discuss the possible implications of the 1994 amendments regarding the timeframe for filing an application for compensation for a disease that may be recognized as an occupational disease in an individual case. It did not discuss these implications. Furthermore, on page two of its decision, the panel stated “if those symptoms are not related to his work, or [the worker] and his doctor realized earlier there was a connection between his work and his symptoms, then [the worker's] arguments under Section 55 are much weaker.”

This statement too would suggest that the new Section 55 was not considered since the new Section 55 is clearly framed with reference to the state of the Board's knowledge — not the state of the worker's or his doctor's knowledge. Really, there is no hint in the decision that the Board's discretion to pay compensation may depend on when the disease was or becomes recognized by the Board as an occupational disease. On the face of the decision, the only reasonable conclusion is that the amendments to Section 55 were not considered.

The failure to consider a relevant statutory provision which in a broad sense relates to access to a tribunal constitutes in my opinion an "error of law going to jurisdiction" and, therefore, justifies setting aside the impugned decision. Assuming, however, that I am wrong in inferring that the panel failed to consider the amended Section 55 or, alternatively, that I am wrong in concluding that such a failure constitutes "an error of law going to jurisdiction", one question remains to be answered: is the panel's application of the phrase "special circumstances which precluded the filing of an application . . ." flawed (be it in the context of the old or the new Section 55) and, if so, is it so flawed as to invalidate the decision? I agree with the worker's advisor that the panel's application of that phrase is flawed. Particularly problematic is the impression conveyed by the panel that the worker's symptoms (such as his depression and memory loss) could only constitute "special circumstances" within the meaning of that phrase, if they were related to exposure to chemicals, solvents and/or lacquers at work. Nothing in the wording of the old or the new Section 55 (or in the wording of the governors published policies concerning these sections) would indicate that the special circumstances which precluded the filing of an application on time must be related to work. The policies in fact stress that, in determining whether special circumstances existed, the concern should be solely with the claimant's reasons for not submitting the application within the one year period and not with whether the claim is otherwise a valid one (see policy item #93.22 in the *Rehabilitation Services and Claims Manual*). The policies clearly separate the issue of what caused the worker's disability from the issue of whether special circumstances precluded the timely filing of an application for compensation. Now it may well be that, in this worker's case, the panel blended the two issues because some of the circumstances which the worker identified as "special circumstances" to explain his delay in applying for compensation were also adduced as evidence of his disablement from work. But it is clear from the Review Board findings that other circumstances had been equally presented as "special circumstances", for instance, the worker's marriage failure.

Although perhaps it was unintentional, in applying the phrase "special circumstances", the panel ostensibly added a requirement that is not in the legislation — namely, a requirement that the "special circumstances" be related to work. I find that this requirement is not viable, in light of the legislation. The panel's application of the legislation may be said, therefore, to have been patently unreasonable.

I have decided to set aside Appeal Division Decision No. 96-0729 on the grounds that it is tainted by an “error of law going to jurisdiction.”

The worker’s appeal will be considered afresh by a new panel.

Editor’s Note: This decision has been edited for publication and for the purposes of complying with the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165.

Decision of the Appeal Division

Number: 97-0083
Date: January 22, 1997
Panel: Anne-Marie Drosso
Subject: Reconsideration of an Appeal Division decision — natural justice — the right to be heard

The employer seeks the reconsideration of Appeal Division Decision No. 93-1486 [unpublished]. In that decision, an Appeal Division panel (“the panel”) upheld the levy of a \$2,000.00 additional assessment (“the penalty”) on the employer.

In a letter dated June 22, 1993, the regional manager, occupational safety and health division, advised the employer that a penalty was appropriate because of its “continued violation of Industrial First Aid Regulation 1.02.” Subsequent to a hearing, an officer from the variance and sanction review section advised the worker that a \$2,000.00 penalty was warranted. The panel agreed with the officer’s decision.

The employer argues that the Appeal Division decision is based on some factual errors and is tainted by a breach of the rules of natural justice. The employer has requested an oral hearing to present these arguments more fully.

In Decision No. 20 [12 WCR 361] dated November 29, 1996, the chief appeal commissioner delegated to me the power to direct the reconsideration of Appeal Division decisions and the power to set them aside.

Having reviewed the file, I am satisfied that the employer’s objections to Decision No. 93-1486 can be fully dealt with on the basis of written submissions.

Grounds For Reconsidering or Setting Aside Appeal Division Decisions

The chief appeal commissioner has the power to direct that the Appeal Division reconsider some of its decisions, if there is new evidence within the meaning of Section 96.1 of the *Workers Compensation Act* (the “Act”). Appeal Division Decision No.

93-0166 and No. 93-0182, 9 *Worker's Compensation Reporter* 358, concluded that Appeal Division decisions involving assessments, monetary penalties or a classification fall outside the scope of Section 96.1. Therefore, according to that decision's interpretation of the legislation, a decision such as Appeal Division Decision No. 93-1486 could not be reconsidered on the basis of new evidence.

Appeal Division Decision No. 93-0740 10 *Worker's Compensation Reporter* 127 concluded that Appeal Division decisions may be set aside, if they involve an "error of law going to jurisdiction", including a breach of the rules of natural justice. This common law ground for setting aside a decision applies to all Appeal Division decisions.

Background to the Reconsideration Request

In order to put the employer's reconsideration request in proper context, it is important to outline its background, namely:

- In a memo dated May 4, 1993, the occupational safety and health field officer recommended a sanction against the employer, stating:

I inspected the worksite of [the employer] at [a school] on April 27, 1993 and issued Inspection Report number [X].

There was no certified Industrial First Aid Attendant at this worksite ("A" hazard classification, less than 20 minutes travel time to hospital, 18 workers) in violation of Industrial First Aid Regulation 1.02 (Table 2).

A review of this employer's record was conducted to determine prior knowledge.

Similar violations were cited on previous Inspection Reports [A] and [B].

A Warning Letter for similar violations was processed under Sanction Recommendation [C].

- In a letter dated May 25, 1993, an officer from the variance and review section advised the employer that a penalty action would be commenced under Section 70(1) of the *Act* on the basis of the field officer's report.

- In a letter dated June 22, 1993 addressed to the employer, the regional manager of the field services department stated:

. . . I have reviewed the order written on IR [X], resulting in this penalty recommendation, and I am convinced that the order was valid. A review of the firm file confirms that this same order has been written on at least 3 previous occasions since 1989 and a Warning Letter, SR [D] WL was issued in 1990 because of prior repeated violations of Industrial First Aid Regulation 1.02. This Warning Letter advised that further violations may result in a penalty. Workers Compensation Board Policy requires that a penalty must be considered where persuasive means have failed to achieve compliance with the Regulations. In our opinion we have reached the stage where a penalty consideration is appropriate in dealing with your firm's continued violation of I.F.A. Regulation 1.02.

[Reproduced as written]

- At the sanction review meeting held on July 23, 1993, the employer disputed the facts outlined in some of the inspection reports that had preceded inspection report number [X] (the "earlier inspection reports").
- In a letter dated August 9, 1993 addressed to the employer, an officer from the variance and sanction review section concluded that the violations outlined in the May 25, 1993 letter had occurred and a \$2,000.00 penalty assessment was warranted.
- The employer appealed the August 9, 1993 decision to the Appeal Division. In a Notice of Appeal dated August 13, 1993, the employer specified that the appeal was based on the grounds of error of fact. The employer requested an oral hearing (which was not granted) and a three-member panel (which was granted). In written submissions to the Appeal Division, the employer presented arguments concerning the factual basis of the earlier inspection reports. For example, he argued that inspection report number [Y] was based on the faulty premise that there was no survival first aid attendant on the site whereas two of his workers had in fact SFA certificates. He explained that he did not fight the order at the time of the inspection partly because he did not know that the orders were cumulative and, as such, could lead to a fine.

- The impugned Appeal Division decision was issued on October 26, 1993. In the decision, the panel focused exclusively on inspection report number [X], found no error of fact in that report, and concluded:

Policy 1.4.1 of the *Occupational Safety Health Policy and Procedure Manual*, "Application of Sanctions" states:

- 2) In situations where there are recorded observations of previous non-compliance with regulations or orders, officers shall recommend the application of sanctions. Such a recommendation should be considered when the officer is satisfied that persuasive means have failed to gain a meaningful commitment to comply, from the employer. The amount assessed will reflect the degree of hazard occasioned by the non-compliance and/or consideration of the motivational impact required; ...

The employer has previously been cited on three occasions, plus one warning letter for violations of the same Regulation. We are not convinced that the employer made reasonable efforts at ensuring compliance with Industrial First Aid Regulation 1.02.

This panel finds there have been *repeat violations* of Industrial First Aid Regulation 1.02 and, therefore, the Type I penalty of \$2,000.00 is warranted in the circumstances. (emphasis added)

- After the Appeal Division decision was rendered, the employer's discussions with the prevention division resulted in that division rescinding at least one or possibly two of the orders cited in the earlier inspection reports. The prevention division accepted the employer's contention that two workers had the required SFA certificates in the [relevant] site and rescinded order #2 of Inspection Report [Y] dated May 6, 1990. There is also a memo on file dated July 12, 1996 from the prevention manager to the appeal officer regarding the rescission of another order pertaining to the violation of Industrial First Aid Regulation 1.02. The memo states "evidence now on this firm file suggests a second order pertaining to the same reg. violation will be rescinded." There is no further documentation on file, however, regarding this rescission.

The Employer's Submissions

The employer and his representative argue that Appeal Division Decision No. 93-1486 contains factual errors namely, errors pertaining to the earlier orders. They also argue that the decision contravened the principles of natural justice. The employer's repeated complaint is that he was not properly heard. In addition to pointing out that some of the earlier orders have now been rescinded by the prevention division, the employer has submitted to the Appeal Division a letter from the administrator of [a health care centre]. The letter is intended to attest to the fact that, when construction was under way for [another health care centre], the employer had arranged that the staff in the outpatient department would attend to any calls from workers for medical assistance. The employer submits this letter as evidence warranting the rescission of yet another one of the earlier orders (order #1 on Inspection Report [B]).

The employer apparently thinks that it is the *cumulative effect* of the series of orders concerning repeat violations of Regulation 1.02 that led to the penalty levy and, if it is now shown that some of the violations did *not* occur, then the penalty levy was unfounded.

Analysis

The employer's submissions implicitly raise the question of whether a penalty may be levied only in the case of repeat violations of a regulation. While repeat violations would certainly constitute a sufficient reason to levy a penalty, a single violation could also be a sufficient reason. An emphasis on repeat violations would be in keeping with the governors' published policies, inasmuch as policy item #1.4.1 of the *Occupational Safety and Health Manual* refers to repeated non-compliance with Board orders. But a penalty levy based on a single violation would also be consistent with the policies. For example, policy item #1.0.0 specifically contemplates that a penalty may be levied where "violation of the regulations are discovered in the first instance", recognizing though that "[n]ormally penalty assessments are only imposed when an employer has failed to comply with the order of an inspection." Hence, in the context of the policies as a whole, the reference in policy item #1.4.1 to repeated non-compliance with Board orders could be seen as directed to the question of whether, in light of a series of orders, an employer knew of the required safety practices quite apart from the question of whether some violations actually occurred.

In sum, upholding a penalty levy on the basis of a single violation would offend neither the *Act* nor the policies. In terms of its end result then, the impugned Appeal Division decision has some plausibility, regardless of its basis.

That said, it is important to determine the basis on which the Appeal Division panel upheld the penalty. It is important for several reasons. First, to assess the validity of the employer's complaint that he was not heard, one must establish whether or to what extent the panel responded to his arguments. If the panel found the penalty levy warranted on the basis of repeat violations, it would matter whether these violations actually occurred and, therefore, the employer's allegations of factual errors in the earlier orders would be very relevant to its decision. Furthermore, if the panel decided that there were repeat violations, it is questionable whether the prevention division had the authority to rescind any of the earlier orders. The prevention division cannot interfere with an Appeal Division panel's findings of fact. Finally, if the panel decided that there were repeat violations, the evidence contained in the letter from the administrator of the [health care centre] may be material to its decision. But this raises the question of whether this evidence may be at all considered, in view of the interpretation of Section 96.1 found in Decision No. 93-0166 and No. 93-0182.

On the other hand, if the panel found the penalty levy warranted simply on the basis of the violation noted in inspection report number [X], it would not matter whether the factual basis of the earlier reports was sound. It would not matter whether some prior violations had in fact occurred. From this perspective, the rescission by the prevention division of orders contained in the earlier inspection reports would be irrelevant to the substance of the panel's decision. So would the new evidence contained in the letter from the administrator of the [health care centre] since it concerns one of the earlier orders.

It is not entirely clear from Decision No. 93-1486 whether the panel considered the penalty justified because it found that First Aid Regulation 1.02 had been repeatedly violated or because it found that one violation occurred. While the panel focused on the April 27, 1993 inspection report (inspection report number [X]) from which one could infer that it was sanctioning the penalty on the basis of that one violation, it concluded "This panel finds there have been *repeat* violations of Industrial First Aid Regulation 1.02 and, therefore, the Type I penalty of \$2,000.00 is warranted in the circumstances (emphasis added)." Could this concluding statement be interpreted as intended to convey only the notion that the employer was aware of the regulation and its requirement? That would be a very strained interpretation of the statement, considering its contents, namely, "[t]his panel finds there have been repeat violations" Really, the occurrence of repeat violations seemed central to the panel's conclusion.

Disregarding the panel's concluding comments and assuming that the panel upheld the penalty on the basis of one violation, does the employer have cause to think he was not properly heard? It is clear from the employer's submissions that he has assumed all along that it was the cumulative effect of the alleged violations that lead to the penalty. That is clear from his submissions in support of the reconsideration request but was also clear in his submissions in support of the appeal. The employer stated in those submissions "The fine is a result of 4 instances" (see, the employer's September 21, 1993 letter to the appeal officer). The assumption that it was the cumulative effect of the alleged violations that lead to the penalty might be seen as warranted, in light of the substance of the letters and decisions from the variance and review section. Furthermore, since the employer was operating on this assumption and framed his arguments accordingly, it could be argued that the panel should have clarified that the penalty was warranted on the basis of only the most recent violation — if that was indeed the basis for the decision. The panel did not provide such clarification, leaving, therefore, the employer to think that his submissions were ignored.

To characterize the impugned decision as a decision to uphold the penalty because of repeat violations of Industrial First Aid Regulation 1.02 would be consistent with the panel's concluding comments. But if this were the basis for its decision, one cannot but query why the panel failed to address the employer's submissions on point, considering that the employer had specifically challenged the evidentiary basis of some of the earlier orders.

Part of the concept of natural justice is the principle that a person has a right to be heard before a tribunal makes a determination that affects his rights or interests. The right to be heard includes the right to present evidence as well as to submit arguments when all the evidence has been received. It follows that the decision-maker must hear that evidence and those arguments — that is, he must familiarize himself with the evidence and arguments presented. There is a presumption in law in favour of the regularity of the acts of public officials. That presumption applies to decision-makers in administrative tribunals. That presumption is, however, rebuttable. There is no general requirement at common law for members of administrative tribunals, nor for judges for that matter, to give reasons for their decisions. Generally speaking, therefore, the absence of reasons in support of a decision is not a breach of the principles of natural justice. However, inferences adverse to a tribunal may be drawn from the tribunal's failure to give reasons. Moreover, the courts have held that, regardless of whether there is a duty to give reasons, any reasons given must be adequate. To be adequate — that is, of value to the affected parties — the reasons should explain how the tribunal reached its conclusions, both on fact and on law or policy.

In sum, natural justice requires providing those individuals who may be affected by a decision with the opportunity to present their point of view. Providing them with that

opportunity is not sufficient. They must also be genuinely heard. While the *Act* does not require the Appeal Division to give reasons for its decisions, the governors' published policies do. The governors' policy as outlined in Decision No. 1, 7 *Workers' Compensation Reporter* 7 at 10, requires that Appeal Division decisions "be written in plain language explaining the conclusion reached and the reasons for that conclusion." There is support in the case law for the proposition that, where reasons are given, the reasons ought to indicate the logical basis for the decision.

An Appeal Division panel need not acknowledge and address in its decision every point raised by an appellant or an affected party to an appeal. The failure to acknowledge and address every point raised will certainly not constitute a breach of the rules of natural justice. In the case before me though the panel did not simply omit to acknowledge and address every point raised by the employer. The panel's omissions were of a more serious nature. The employer had requested that the appeal proceed by way of an oral hearing and written submissions. The request for an oral hearing was denied. In the written submissions, the employer focused on a particular issue, namely, the occurrence of repeat violations of regulation 1.02. Evidently, the employer believed that the case turned on that issue — a belief that was arguably reinforced by the tenor of the letters and decisions from the variance and review section. Furthermore, the occurrence of repeat violations seemed central to the panel's conclusion, as this conclusion was worded. And yet the panel did not address the employer's arguments regarding the repeat violations — be it to dismiss them as irrelevant or reject them as unfounded. In the circumstances, I find this to have amounted to a breach of the principles of natural justice. Having denied the employer's oral hearing request, the panel had a particular obligation to satisfy the employer that his arguments, whether or not meritorious, had been properly considered. Indeed, the panel may well have fully considered these arguments. But, according to a well-established principle of administrative law, an appearance of injustice, such as an appearance of bias, may taint a decision. In this case, bias is not the issue. Rather, the issue is whether the employer appears to have been heard. Unfortunately, on its face, the impugned decision does not convey the impression that he was heard.

I have decided, therefore, to set aside the decision on the grounds that it involves a breach of the rules of natural justice and, therefore, involves an "error of law going to jurisdiction." Appeal Division Decision No. 93-1486 is consequently of no force or effect.

I find that the appropriate remedy in this case is to refer the file back to the variance and review section for it to determine whether there are grounds to reconsider its earlier decision to levy a \$2,000.00 penalty assessment on the employer. Since Appeal Division Decision No. 93-1486 is of no force and effect, the section is free to make that determination, in light of its rescission (or rescissions) of the earlier orders.

Should the employer find it necessary at some later stage to pursue an appeal of a new decision by the variance and review section concerning the penalty, the office of the deputy chief appeal commissioner will contact the employer regarding the processing of the appeal.

Appeal Division Decision No. 93-1486 is set aside as null and void.

Editor's Note: This decision has been edited for publication and for the purposes of complying with the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165.

Decision of the Appeal Division

Number: 97-0233
Date: February 20, 1997
Panel: Anne-Marie Drosso
Subject: Reconsideration of an appeal division decision — sick leave payments as assessable payroll

The employer seeks to have Appeal Division Decision No. 96-1295 dated August 21, 1996 set aside. In this decision, an appeal commissioner concluded that the decision of a Board controller to include, as assessable payroll, a worker's salary for periods of time during which the worker is off sick did not involve an error of law or fact or contravene the governors' published policies.

In Decision No. 20 [12 WCR 361], the chief appeal commissioner delegated to me the power to direct the reconsideration of Appeal Division decisions and the power to set them aside.

Appeal division decisions may be reconsidered on the basis of new evidence within the meaning of Section 96.1 of the *Workers Compensation Act* ("the Act"). The employer's representative does not invoke new evidence as a ground for reconsideration.

Appeal division decisions may be set aside, if they are tainted by an "error of law going to jurisdiction." Appeal division Decision No. 93-0740 discusses that common law ground for setting aside Appeal Division decisions.

An "error of law going to jurisdiction" includes a breach of natural justice, a patently unreasonable interpretation of the statute or a patently unreasonable finding of fact. In a letter dated August 26, 1996, the employer's representative contends that:

The Commissioner's decision is patently unreasonable, is contrary to policy, is contrary to the principles of natural justice and essentially creates policy without the jurisdiction to do so. . . .

To begin with, I should like to address the representative's contention that the decision is contrary to the principles of natural justice. I see no merit to that contention. The principles of natural justice concern the fairness of the procedures leading to the making of a decision such as whether the party affected by the decision knew of the issue that would be dealt with, was given the opportunity to present his case, etc. I see no unfairness in the procedures that led to the making of Decision No. 96-1295. The representative himself has not pointed to any particular breach. Rather, he seems to be alleging that the decision is contrary to the principles of natural justice in some general sense. The principles of natural justice do not, however, concern the substance of a decision. The substance of a decision must be measured against the enabling legislation, the applicable policy and the available evidence.

As I see it, the employer's objections to Decision No. 96-1295 raise the following questions:

- a) Is the decision consistent with the *Act*? Or does it constitute at least a viable application of the relevant statutory terms?
- b) Is the decision consistent with the relevant policies? If it is inconsistent with the policies, would such inconsistency amount to an "error of law going to jurisdiction"? This question is particularly important where a statutory provision is broad enough to tolerate a range of policies. What if a particular decision could be reconciled with the broad terms of the provision but not with the specific policy formulated under those terms?

Appeal Division Decision No. 96-1295 with Reference to the Act

Subsection 39(1) of the *Act* states:

39.(1) For the purpose of creating and maintaining an adequate accident fund, the Board shall every year assess and levy on and collect from independent operators and employers in each class, by assessment rated on the payroll, or by assessment rated on a unit of production, or in a manner the Board considers proper, sufficient funds, according to an estimate to be made by the Board, but the established practice of assessment and levy shall be varied only with the approval of the Lieutenant Governor in Council, to

- (a) meet all amounts payable from the accident fund during the year;

- (b) provide a reserve in aid of industries or classes which may become depleted or extinguished;
- (c) provide in each year capitalized reserves sufficient to meet the periodical payments of compensation accruing in future years in respect of all injuries which occur during the year;
- (d) provide a reserve to be used to meet the loss arising from a disaster or other circumstance which the Board considers would unfairly burden the employers in a class; and
- (e) provide and maintain a reserve for payment of that portion of the disability enhanced by reason of a pre-existing disease, condition or disability.

In the impugned decision, the appeal commissioner specifically referred to that provision, stating:

While I would not necessarily agree with the proposition that *any* payment to an employee by an employer is assessable, I do note Section 39(1) gives the Board substantial discretion to levy assessments on “payroll” or “in a manner the Board considers proper.” Indeed, the section specifically refers to “payroll”, not to “salary” or “wages.” “Payroll” is defined in the *Gage Canadian Dictionary* as:

1 an employer’s list of persons to be paid, together with the amount that each person is to receive. **2** the total amount to be distributed among those persons.

The representative criticizes the appeal commissioner’s interpretation of Section 39(1) as follows:

The Commissioner attempts to rely on Section 39 being broad enough to cover sick leave payments (notwithstanding the more specific policy). He ignores, however, the obvious implication of the complete wording of the Section. The Section also states that reference can be made to a “unit of production” or “in a manner the Board considers proper.” A unit of production means the employee would have to be working and not on sick leave. It also could not be considered “proper” to collect WCB premiums for someone who is not working and who cannot suffer a work injury.

It is evident, as the commissioner stated, that Section 39(1) gives the Board a very broad discretion. It can base assessments “on the payroll”, “the unit of production”, or “in a manner it considers proper.” The fact that the commissioner did not specifically refer to the phrase “on the unit of production” cannot be taken to mean that “he ignored the implications of the complete wording of the provision”, as suggested by the representative. The implication of the provision’s wording is that it affords the Board flexibility in devising a system of assessment. That was the commissioner’s point. The point is well taken. I note that the *Act* does not define “payroll” or “the unit of production.” Nor does it define terms such as “wages” or “earnings” which means that the Board has in effect a substantial amount of flexibility in devising an assessment system. By allowing for the possibility that assessments be based on the payroll or on a unit of production, the legislation offers the Board a range of choices, including basing the assessment on the number of employees and their regular remuneration or on the number of plants, factories, etc. As pointed out by the appeal commissioner, the term “payroll” refers to a list of employees receiving regular pay or to the total amount of payments made to such employees. The term “unit of production” which the appeal commissioner did not specifically discuss must be construed, therefore, as referring to something other than the employees receiving regular pay or their remuneration for if it were interpreted in that fashion, it would be redundant. That is, the term “unit of production” must be given a separate meaning from the term “payroll.” It would be reasonable to interpret it, therefore, as referring to factories, plants, etc. as opposed to interpret it as referring to the employees, as the representative does. In sum then, Section 39(1)(e) allows the Board to devise an assessment system with respect to a number of variables. And, in the final analysis, the Board has the discretion to devise a system “in a manner . . . it considers proper.” Therefore, the *Act* does not preclude including, for the purpose of assessing an employer, a worker’s salary for periods of time during which the worker is off sick.

Appeal Division Decision No.96-1295 With Reference to the Governors’ Policies

Both the appeal commissioner and the representative referred to policy item #40:10:10 of the *Assessment Policy Manual*. The appeal commissioner suggested that the terms of the policy were so general as to be capable of supporting the decision to include a worker’s wages for periods of time during which he is off sick. The appeal commissioner specifically relied on the following statement in the policy:

The category Wages and Salaries includes the *gross* earnings of all workers except those individuals subject to Personal Optional Protection (see Section 20:50:00) or covered under one of the other categories of Assessable Payroll. These earnings include wages, salaries, commissions,

holiday pay, bonuses, etc., as well as any other means or manner by which a worker is paid for services.

The commissioner recognized that there is some ambiguity in the wording of the above policy or at least some lack of clarity. He noted:

The wording of policy no. 40:10:10 is not entirely clear — it could be argued that it gives examples of various kinds of earned income, such as holiday pay and bonuses, so that “etc.” is restricted to earned income. However, I find the policy does not clearly displace the general power given by the *Act*, such that the assessment department is contravening the published policy of the Board in assessing sick leave payments. I also observe that, notwithstanding judicial comment in wrongful dismissal cases, it is not clear that sick leave could not be considered part of salary or wages in the context of workers’ compensation. The sick leave is paid pursuant to a collective agreement, by which the services of the worker are retained over the long term in consideration of various payments; even if it is never claimed, the right to sick leave is a pecuniary benefit which is bargained for between the parties.

The representative takes strong exception to the appeal commissioner’s comments regarding policy item #40:10:10. As I see it, the representative’s position is that, when it refers to earnings such a wages and salaries, the policy is referring to payments for services and sick leave payments are *not* payments for services.

Policy item #40:10:10 does indeed state “as well as any other means or manner by which a worker is paid for services.” But I agree with the appeal commissioner that it is not clear from that phrase whether the policy’s intent is to exclude sick leave payments. It could be argued that such payments are in the long run part of a worker’s remuneration for use of his services on a continuing basis. To view sick pay benefits in that light would not be unreasonable. Of course, I am aware that this approach generates some incongruous results to the extent that the sick leave benefits received by a worker though a private insurance carrier are apparently not subject to any assessments. But that does not mean that sick leave benefits may not be characterized, in a broad sense, as payment for services. In a way, they are analogous to payments received during vacation or during temporary work interruptions such as coffee breaks (if and when workers are remunerated during these work interruptions) — all payments which are deemed to be payments for services. I note that, if a worker were to spend his coffee break outside the work premises, there would be no possibility of a work injury. I realize that the representative considers vacation pay to be distinguishable from sick leave pay. He would agree that the former constitutes a payment for services because he views it as a deferred payment. He does not consider,

however, that the wages received by a worker when he is sick are “deferred” wages. In a letter to the appeal commissioner written prior to the decision being made, the representative had stated:

. . . The nature of the two payments are not the same. Salary paid during the period of vacation is payment for services, although the services were not provided during the actual vacation period. Instead, some of the salary earned for earlier services is deferred and paid during the vacation period. Sick leave is not, however, deferred salary. The employer is obliged by the collective agreement to pay the benefit to the employee **if he qualifies under the terms of the sick leave plan** — i.e. disabled from working and not entitled to workers’ compensation. If the employee is not sick there is not payment. Additionally, the worker has already paid assessments on the full salary paid earlier while the worker was, in fact, providing services to the employer.

(Reproduced as written)

While there may be some basis for distinguishing between these payments on the basis that vacation pay is planned while sick leave payments are not, it is debatable whether such a distinction would warrant treating the payments differently for assessment purposes.

Both the commissioner and the representative referred to policy item #66.11 of the *Rehabilitation Services and Claims Manual* (the “Manual”). According to the commissioner, the substance of this policy may be reconciled with the practice of levying assessment on sick leave benefits. According to the representative, the substance of this policy and the assessment practice are difficult to reconcile. Policy item #66.11 of the *Manual* concerns the computation of a worker’s long-term earnings for the purpose of determining his compensation rate. I would say that this policy has, therefore, no obvious implications for assessment questions. The basis on which an employer is assessed need not be *directly* related to the amount of compensation payable to a worker. For example, a worker might start some new employment at the maximum wage rate after earning over an extended period of time earnings at a much lower rate. His new employer would be assessed on the basis of the maximum wage rate. But the worker’s long-term earnings would be based on his past earnings, if those were deemed to reflect his real earnings position. I see, therefore, little merit in basing an argument concerning whether an employer was properly assessed on principles underlying a compensation policy.

In sum, I do not find that the commissioner clearly misapplied the governors' policies when he concluded that the decision to assess the employer on the salaries of employees who are off sick falls within the scope of these policies.

I find no reason to set aside Appeal Division Decision No. 96-1295. It is not inconsistent with the *Act* nor with the governors' published policies. It is not tainted by a breach of natural justice. It is final and conclusive in accordance with Section 96.1 of the *Act*.

The employer's request for reconsideration is denied.

Editor's Note: This decision has been edited for publication and for the purposes of complying with the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165.

Decision of the Appeal Division

Number: 97-0510
Date: April 22, 1997
Panel: Anne-Marie Drosso
Subject: Reconsideration of an appeal division decision — Section 33(1) of the *Workers Compensation Act* — computation of a worker's wage rate for pension purposes

The worker objects to Appeal Division Decision No. 94-1470 [unpublished] dated December 9, 1994. In that decision, an Appeal Division panel concluded that it had been appropriate for the Board to calculate the worker's wage rate for pension purposes with reference to his earnings during the three years preceding his compensable injury. The worker argues that it was wrong in law for the Board to calculate his wage rate with reference to his earnings during the three years preceding his injury. He submits that the wage rate should reflect his earnings at the time of his injury.

The employer was invited to participate in the proceedings initiated by the worker but has not responded to that invitation.

In Decision No. 20 [12 WCR 361] dated November 29, 1996, the chief appeal commissioner delegated to me the power to direct the reconsideration of Appeal Division decisions and the power to set them aside. The statutory ground for reconsidering an Appeal Division decision is new evidence in accordance with the requirements set out in Section 96.1 of the *Workers Compensation Act* (the "Act").

The common law grounds for setting aside an Appeal Division decision, as articulated in Decision No. 93-0740 10 *Worker's Compensation Reporter* 127, include an "error of law going to jurisdiction."

The worker has not raised arguments inviting a consideration of Section 96.1. The question arises, therefore, as to whether the common law grounds for reconsideration are met — more specifically, whether the decision involves an "error of law going to jurisdiction." The worker suggests that the Board misapplied the *Act* when it

calculated his wage rate for pension purposes with reference to his earnings during the three years preceding his injury; therefore, the Appeal Division was wrong to uphold that wage rate.

A patently unreasonable application (or interpretation) of the *Act* would amount to an “error of law going to jurisdiction.” The phrase “patently unreasonable” indicates the degree of magnitude of the error before a decision may be set aside. An application (or interpretation) of a statutory provision is not patently unreasonable simply because there are other possible applications (or interpretations). It is “patently unreasonable”, if it is not viable, in light of the legislative text and intent.

The test for setting aside Appeal Division decision is strict because these decisions are protected by a privative clause. According to Section 96.1 of the *Act*, they are “final and conclusive.” To set aside a decision on the basis that there is a preferable application of a statutory provision than the decision’s own application of the provision would undermine the finality of Appeal Division decisions as entrenched in the legislation. So would setting aside a decision on the basis that, although viable, its application of a statutory provision is wrong. In other words, I am not at liberty to set aside a decision simply because I disagree with the panel’s conclusion or because the conclusion is wrong. If, in light of the *Act*, the conclusion is viable, the decision must be respected.

As stated in policy item #64 of the *Rehabilitation Services and Claims Manual* (“the *Manual*”), compensation is normally based on a worker’s “average earnings.” Section 33(1) of the *Act* states:

33. (1) The average earnings and earning capacity of a worker shall be determined with reference to the average earnings and earning capacity at the time of the injury, and may be calculated on the daily, weekly or monthly wages or other regular remuneration which the worker was receiving at the time of the injury, or on the average yearly earnings of the worker for one or more years prior to the injury, or on the probable yearly earning capacity of the worker at the time of the injury, as may appear to the board best to represent the actual loss of earnings suffered by the worker by reason of the injury, but not so as in any case to exceed the maximum wage rate, except that where, owing to the shortness of time during which the worker was in the employment of his employer, or in any employment, or the casual nature of his employment, or the terms of it, it is inequitable to compute average earnings in the manner described in this subsection, regard may be had to the average daily, weekly or monthly amount which, as shown by the records of the board, was being earned during the one or more years or other period previous to the injury by a person in the same or similar grade or class of employment.

Wage loss payments at the outset of a claim are usually based on the worker's rate of pay at the date of injury up to the maximum wage rate permitted by the *Act*. Compensation at that rate will normally continue until the end of the worker's temporary disability or the 8-week rate review whichever comes first. This review involves a determination of what earnings rate best represents the long-term earnings loss suffered by a worker as a result of his compensable injury. Permanent disability pensions are normally based on the earnings rate resulting from the 8-week rate review.

In discussing the concept of long-term earnings, the *Manual* provides various guidelines, including:

- “The Adjudicator must use the figure which best represents the worker's actual loss of earnings by reason of the injury. This will not necessarily be the figure which gives the worker the highest compensation rate. . . . [item #66.10].”
- “. . . Normally, earnings in the one year period prior to the injury are obtained and used to reflect the worker's long-term wage loss and the pension rate. In some instances, however, the three-month figure prior to the injury may be used. Its use, however, is generally limited to those situations where there is a relatively fixed change in the worker's earning pattern which is deemed likely to continue into the future. In some instances, the Claims Adjudicator may decide to select the three year earnings figure prior to the injury. These situations are normally limited to cases where there are extenuating circumstances in the one year period prior to the injury and therefore the use of that one year period would be incompatible with the worker's normal historical earnings pattern. This is sometimes occasioned by economic downturns which produce anomalies or irregularities in the earnings pattern of the worker in the year prior to the injury to the extent that they differ from the normal work history. In some exceptional circumstances, the Claims Adjudicator may decide to use the earnings in the five year period prior to the injury. This, however, is of very limited application and would only apply to those exceptional circumstances where even the use of the three year period would produce an inappropriate reflection of the worker's normal employment history. An example of this type of situation would be the case of a worker who for many years had been steadily employed with one company, which because of a downturn in the economy has either gone out of business or laid off some staff. Recognizing that many such long-term employees may have difficulty re-establishing themselves on a permanent basis in the labour force, but in recognition of the expectation that such workers will attempt to reinstate their earnings status on a similar basis to that in the past, the use of the average of earnings over the five years prior to the injury is felt to be appropriate at least

for pension purposes. Its use for wage-loss purposes following the 8-week rate change will, however, depend on the circumstances of the case which would examine the worker's employability potential during the period of recovery from the injury. . . .

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The Claims Adjudicator will also consider the probability of the worker continuing in the injury occupation. For this purpose, the Adjudicator will contact the employer to enquire whether the worker could reasonably have been expected to continue in the job. . . . (policy item #67.20)."

Both the *Act* and the policies make it clear then that there is a range of viable options for determining a worker's average earnings and earning capacity. The determination must, however, reflect what " may appear to the Board best to represent the actual loss of earnings suffered by the worker by reason of the injury." In other words, the decision-makers must turn their minds to the various possible options and select the option which captures, in their opinion, the worker's actual loss of earnings. subsection 33(1) of the *Act* confers upon the decision-makers, therefore, an element of discretion. Of course, that discretion is not unfettered. As indicated above, it has to be exercised within the parameters of the provision. That is, it must be used for the purpose of determining a worker's actual loss of earnings by reason of the compensable injury. Some of the fundamental principles concerning the making of discretionary decisions are: the decisions should be based on evidence relevant to the power to be exercised; relevant evidence should be considered and weighed. But the weighing of the evidence is not generally a reviewable matter.

In the impugned decision, the Appeal Division panel turned its mind to all of the arguments presented by the worker and his adviser regarding the determination of the wage rate. The panel specifically mentioned the employer's letter of March 8, 1989 in which the employer outlined the terms of its agreement with the worker. The panel considered whether the worker's actual loss of earnings should have been calculated with reference to the rate of pay provided for in that agreement (namely, the worker's rate of pay at the time of his injury). The panel concluded for reasons set out in the decision that the worker's actual loss of earnings should not be calculated with reference to this rate. Moreover, the panel considered the alternative argument that the worker's loss of earnings should be calculated with reference to the class average of full-time carpenters. The panel rejected this argument for reasons also set out in the decision. Finally, the panel considered whether, as argued by the worker, his earnings during the three years preceding the injury were in fact higher than the sum calculated by the Board and was not persuaded that this was the case. Again, the panel gave reasons for why it was not persuaded by this last argument.

In sum, the panel's decision as regards the calculation of the worker's actual loss of earnings was reasonable in the sense that it was arrived at after a careful review of different possible ways of calculating that loss. The decision is, therefore, consistent with Section 33(1) and the applicable policies. The panel held the view that the worker's earnings during the three years preceding the injury reflected most closely his earning capacity at the time of the injury. There is nothing patently unreasonable about this conclusion or how it was reached. Neither can I find that, in exercising its discretion under Section 33(1), the panel ignored the express purpose of the provision nor can I find that it handled the evidence improperly. The panel cannot be faulted for ignoring important evidence or arguments. It cannot be faulted for rejecting evidence and arguments without giving an explanation. The decision cannot be said, therefore, to involve an "error of law going to jurisdiction." There is no basis for setting aside the decision or some of its findings.

The worker's request that the Appeal Division finding in Decision No. 94-1470 concerning the calculation of his wage rate be set aside cannot be granted. Appeal Division Decision No. 94-1470 must stand. It is "final and conclusive" in accordance with the *Act*. Therefore, the wage rate upheld in that decision cannot be redetermined by the Appeal Division nor by some other division of the Board.

Editor's Note: This decision has been edited for publication and for the purposes of complying with the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165.

Decision of the Appeal Division

Number: 97-0743
Date: May 30, 1997
Panel: Anne-Marie Drosso
Subject: Reconsideration of an appeal division decision — interpretation of policy — item #70.20.2(a) of the *Rehabilitation Services and Claims Manual*

The worker contends that the Appeal Division Decision No. 91-0459 dated September 19, 1991 is tainted by “an error of law going to jurisdiction.”

The worker is represented by counsel whose arguments are contained in a letter dated June 28, 1996 addressed to the prior chief appeal commissioner.

In Decision No. 20 [12 WCR 361] dated November 29, 1996, the chief appeal commissioner delegated to me the power to direct the reconsideration of Appeal Division decisions and the power to set them aside. The statutory ground for reconsidering an Appeal Division decision is new evidence in accordance with Section 96.1 of the *Workers Compensation Act* (the *Act*). The common law grounds for setting aside an Appeal Division decision are set out in Decision No. 93-0740, 10 *Workers' Compensation Reporter* 127. Those grounds include “an error of law going to jurisdiction.”

The employer was invited to respond to the arguments submitted on behalf of the worker but has chosen not to provide submissions.

The Circumstances That Led to the Current Proceedings

In 1953, the worker, then 23 years of age, fell at work and injured his right hip and his right wrist. He received a permanent partial disability award for the injury to his hip.

In 1975, the worker underwent total hip replacement; his pension was reduced subsequent to that surgery.

In 1983, the worker saw his attending physician, complaining of pain in his hip and was off work for a few days. However, he did not receive wage loss benefits. By letter dated April 12, 1983, the claims officer advised him that his pension compensated him for this short term fluctuation in his condition.

In 1985, the worker's attending physician reported to the Board that the worker was having pain in his thigh and knee, raising the possibility that these symptoms were related to the 1953 compensable injury. In memo #36 dated August 22, 1986, the claims medical advisor stated that the worker's pension was sufficient to compensate him for these symptoms.

A physician's progress report dated February 10, 1988 indicates that the worker was off work on February 8 and 10 due to pain in his right hip. The worker's physician requested that a Board physician see the worker to check on his ongoing intermittent hip pain. The worker took early retirement effective March 1, 1988. A March 7, 1988 report from the worker's orthopaedic surgeon states that he would be booked electively for a revision of his total hip replacement. An April 15, 1988 letter from the Board medical advisor to the orthopaedic surgeon authorized the revision. The surgery was performed on April 28, 1988.

By letter dated April 11, 1988, the claims adjudicator advised the worker that he was entitled to medical aid for his 1988 hip revision but he was not entitled to wage loss benefits. The adjudicator stated:

I have been advised by your former employer . . . that you retired at the end of February, as there was an early retirement package offered and that you took advantage of it. As this is a reopening over three years from the date of injury, it is Board policy that current loss has to be considered with respect to wage loss being paid. As there is no actual or potential for loss, this claim is reopened for medical aid only.

The worker appealed the above decision to the Review Board. In support of the appeal, his counsel argued that the worker retired because he was disabled from work. More specifically, counsel submitted that the claims adjudicator erred: in finding that the worker took early retirement for reasons other than disability, in failing to reassess the worker's permanent partial disability, and in denying the worker wage loss benefits for the period following his surgery. Counsel also submitted that the worker was entitled to a one hundred percent loss of earnings pension commencing from the date of his retirement onward.

In findings dated July 18th, 1989, the majority of the Review Board panel characterized the issue on appeal as whether the worker was entitled to wage loss benefits as a result of the surgery accepted by the Board, as well as whether the worker's retirement in February, 1988 was caused by his compensable hip injury and whether the worker had a loss of earnings due to total disability. The majority of the Review Board panel denied the appeal on the following basis:

There is no objective medical evidence before us that the worker was unable due to his hip condition to maintain his pre-injury kind of employment at any relevant time prior to and at the time of retirement and following the recovery period from the surgery.

.....

We conclude the worker has not established his case for retirement due to the hip condition making it too difficult to continue the pre-injury employment. We accept that the worker himself decided to retire due to his hip pain but we do not find sufficient objective evidence for support of that decision.

We are not satisfied the condition for which the surgery was performed produced a potential for loss of income by removing the worker as a viable entity in the labor force. The worker had opportunity to establish that he wanted to work following his retirement, both before his retirement and following the surgery. There is no objective evidence that he sought work in that period. When he did work for [A] in early 1989 it was at the initiative of [A]. We conclude from the worker's inactivity to seek employment that he had fully retired in March 1988.

.....

Any issue on a permanent partial disability assessment or pension is not properly before us because there is no valid appeal on that matter. . . .

In a dissent, the minority found that the worker was entitled to wage loss benefits after his surgery because he suffered a disability as a result of the surgery which "produce[d] a potential loss of income by removing [him] as a viable entity in the work force." The minority specified that the worker was entitled to wage loss benefits at the rate originally set on the claim.

The worker appealed the July 18, 1989 Review Board findings to the former commissioners of the Board. In submissions dated March 8, 1990, his counsel argued several points, including that the worker was totally disabled from working in

February 1988. Counsel requested, amongst other, full wage loss payments from the time it was determined the surgery was required until the point where the worker's condition stabilized following that surgery as well as a one hundred percent loss of earnings pension commencing from the date of his retirement onward.

In accordance with Bill 27, the *Workers Compensation Amendment Act, 1989* which came into force on June 3, 1991, a panel of the Appeal Division considered the appeal. The panel allowed the appeal, finding the worker to be entitled to wage loss benefits in accordance with policy item #70.20.2(a) of the *Rehabilitation Services and Claims Manual* ("the *Manual*"). The panel explained:

In [the worker's] case, he advised the claims adjudicator in Memo 39 and the Review Board, at its hearing, that he was unable to work due to his disability and that this was the reason he took early retirement. Corroborative evidence was obtained from his co-workers. No medical evidence was obtained to confirm or deny [the worker's] statement about his own condition. Rather, the adjudicator relied on the evidence of the employer's accountant, (who had not discussed with [the worker] his reasons for accepting the retirement package), that the reason he retired was because an early retirement package had been offered to him. There was no analysis of why the accountant's evidence was preferred to that of [the worker] on this matter. The accountant . . . has subsequently written in a letter dated April 14, 1989, that she does not feel that she is in a position to fairly state [the worker's] actual reasons for retiring.

The panel finds that the Board policy 70.20.2(a) applies to the facts of this case. The medical evidence supplied in support of the appeal is supportive of [the worker's] statement to the Board and Review Board. The evidence also supports that [the worker's] condition in February of 1988 had deteriorated to the point that he could not walk for any prolonged period of time or climb box cars. In light of these new medical reports, we find the fact that he continued on with his employer, performing what duties he could with increasing pain and with the help of co-workers, is more evidence of his stoic nature than an accurate reflection of his ability to perform the duties of his job. The weight of evidence indicates that [the worker] took early retirement because of increased difficulties doing his job due to his injury. Accordingly, his claim should be reopened pursuant to the policy contained in 70.20.2(a) of the *Manual*.

At the end of its decision, the panel recommended that the worker be examined by the Board's disability awards medical advisor for an assessment of "the extent of his

current disability” and went on to say that, if his disability was found to have deteriorated since 1976, then a determination should be made as to when the deterioration began and his pension should be reassessed on that basis.

A Board decision letter dated April 21, 1992 advised the worker that, as a result of Appeal Division Decision No. 91-0459, he was entitled to wage loss benefits in connection with the hip replacement surgery performed in April 1988. The claims adjudicator specified that the wage loss benefits would commence on March 7, 1988, since the worker’s physician indicated on that day that the worker would require the surgery. The claims adjudicator also specified that the Appeal Division decision indicated that his claim should be re-opened pursuant to the policy contained in item #70.20.2(a) of the *Manual*; therefore, pursuant to this policy, the re-opening wage rate would be based on the wage rate set in 1953, plus applicable Consumer Price Index adjustments.

A Board decision letter dated December 15, 1995 dealt with a number of issues pertaining to the worker’s claim, including the Appeal Division’s recommendation regarding the assessment of the worker’s permanent disability. The worker was granted an increase in his total functional award part of which was for his right hip disability. The other components of the increase were an award for the worker’s right wrist problems, a bilateral enhancement factor in view of his non-compensable left ankle impairment and an age adaptability factor. In the decision letter, the claims adjudicator, disability awards department, found that the worker did have increasing symptoms related to his hip for approximately 2 years prior to March 1988 and the symptoms were related to the loosening of the prosthesis. He noted that the worker underwent revision surgery and was paid wage loss benefits from March 1988 to September 11, 1990. He stated that September 12, 1990 was, therefore, an appropriate effective date for the increase in the award relating to his right hip. He advised the worker that, in calculating his award, the Board used the maximum wage rate payable at the time of reopening of his claim in 1988, namely, in March 1988. He also advised the worker that his pension would be based on his loss of earnings since the evidence on file showed him to be incapable of returning to the work he was doing at the time of the reopening of the claim. The disability officer further specified that, given the extent of the worker’s functional impairment, and taking all other factors into consideration, “it is not considered that [the worker] is competitive in today’s labour market.”

The worker appealed the December 15, 1995 decision letter to the Review Board. His counsel argued that the wage rate, the quantum of the wrist pension and its effective date, the quantum of the increase to the hip pension and its effective date and the added enhancement factor were all incorrect. With respect to the wage rate, counsel argued that there was an arithmetical mistake in the Board’s calculations and there ought to be some CPI adjustments.

In findings dated February 20, 1996, the Review Board panel disagreed with the claims adjudicator's decision to base the worker's pension on the maximum wage rate at the date of reopening of the claim — that is the March 1988 maximum wage rate. The panel found that the wage rate for the worker's pension should be set using the worker's 1953 wage rate plus applicable Consumer Price Index adjustments. The panel's rationale for changing the basis on which the wage rate was calculated was as follows:

The Appeal Division decision was that [the worker's] claim should be reopened for temporary benefits under policy #70.20 2. (a) in the *Manual*. That section requires that, in [the worker's] situation, his wage rate for temporary benefits be based upon his date of injury wage rate (July 1953) plus all Consumer Price Index adjustments. Policy #70.20 3. for permanent disabilities would require that the wage rate for pension purposes be set as per Section 70.20 2. (a) for temporary wage-loss benefits. Therefore we find that his wage rate for pension purposes should be set using his July 1953 wage rate plus all applicable Consumer Price Index adjustments and applied to the current effective dates of his awards.

In a letter dated March 19, 1996, the claims adjudicator, disability awards department, advised the worker that his pension had been revised downwards as a result of the Review Board findings. The reduction in the wage rate resulted in a reduction in the worker's pension from \$1,732.91 per month to \$723.00 per month.

In a letter dated March 6, 1996, counsel informed the registrar of the Appeal Division that the worker had instructed him to appeal the February 20, 1996 Review Board findings. Counsel stated that the main issue in this appeal is the wage rate but, in order to succeed on that issue, Appeal Division Decision No. 91-0459 must be reconsidered first. Therefore, counsel requested a reconsideration of that decision.

In a letter dated April 2, 1996, the appeal commissioner/manager of the Appeal Division advised counsel that, in the circumstances of this case, it would be appropriate for the worker's appeal to be withdrawn pending a decision regarding the reconsideration request. The appeal of the Review Board findings could be re-established after that decision was issued.

In sum, the worker initiated the current proceedings on the premise that Appeal Division Decision No. 91-0459 stands in the way of an appeal of the February 20, 1996 Review Board finding concerning the wage rate used to calculate his pension.

Relevant Statutory Provisions and Policies

The recurrence of a compensable disability will entitle a worker to medical aid and, depending on the circumstances, may entitle him to wage loss benefits, rehabilitation assistance and/or permanent benefits.

Section 32 of the *Act* contains the statutory provisions relevant to a determination of the amount of compensation payable to a worker who suffers a recurrence of a compensable disability. The section states:

RECURRENCE OF DISABILITY

32. (1) For the purpose of determining the amount of compensation payable where there is a recurrence of temporary total disability or temporary partial disability after a lapse of 3 years following the occurrence of the injury, the board may calculate the compensation as if the recurrence were the happening of the injury if it considers that by doing so the compensation payable would more nearly represent the percentage of actual loss of earnings suffered by the worker by reason of the recurrence of the injury.

(2) Where a worker has been awarded compensation for permanent partial disability for the original injury and compensation for recurrence of temporary total disability under subsection (1) is calculated by reference to the average earnings of the worker at the date of the recurrence, the compensation shall be without deduction of the compensation payable for the permanent partial disability; but the total compensation payable shall not exceed the maximum payable under this Part at the date of the recurrence.

(3) Where more than 3 years after an injury a permanent disability or an increased degree of permanent disability occurs, the compensation payable for the permanent disability or increased degree of permanent disability may be calculated by reference to the average earnings of the worker at the date of the occurrence of the permanent disability or increased degree of permanent disability.

Section 32 authorizes the Board, in certain circumstances, to establish a new wage rate based on a worker's current or most recent level of earnings. The intent of the section is to enable the Board to estimate as accurately as possible the economic impact on a worker of a recurrence of a temporary disability or of a new (or increased level of)

permanent disability. I note that there are no specific provisions in Section 32 regarding situations in which a worker is unemployed when a temporary disability recurs or when a permanent disability (or an increased level of permanent disability) occur

Policy item #70.20 of the *Manual* outlines the circumstances under which it is appropriate to establish a new wage rate for a claim. The policy was developed in 1986 and has remained virtually unchanged since. According to the policy, one consideration is whether the worker was employed when the temporary disability recurred or when the permanent disability occurred or increased. If he was unemployed, it becomes important to distinguish between unemployment “due to the effects of the compensable injury” and unemployment for purely personal reasons.

Because policy item #70.20 sets out different guidelines for different possible situations and because the arguments regarding the validity of Appeal Division Decision No. 91-0459 ultimately involve the question of which guideline applies to this worker's case, I find it important to quote the policy almost in its entirety before reviewing the decision. Policy item #70.20 states:

#70.20 Reopenings Over Three Years

Section 32 of the Workers Compensation Act gives the Board a discretion to determine compensation benefits on a reopening of a claim more than three years after an injury by reference to the worker's current earnings. The guidelines set out below apply effective October 27, 1986. They apply in situations where there is a recurrence of temporary disability or an occurrence of or increase in a permanent disability over three years after an injury or disablement from occupational disease.

- 1. Temporary Disability Occurring After Three Years Where the Claimant Is Employed**
 - (a) Worker's Current Earnings Exceed the Rate Originally Set On the Claim**

Where the worker's earnings at the time of the occurrence of disability **exceed** the earnings rate originally set on the claim (or the 8-week review rate, if applicable) plus Consumer Price Index adjustments, Section 32(1) is normally applied so as to treat the recurrence of disability as the happening of the injury. Wage-loss compensation is based on the worker's earnings immediately prior to the recurrence and, where there is an existing permanent partial

disability pension granted in respect of the original injury, Section 32(2) applies. Therefore, the pension is not deducted from the wage-loss benefits except to the extent that the combined total exceeds the maximum wage rate in effect at the time of the recurrence. (21) An 8-week rate review will be carried out if the disability following the reopening of the claim continues for that period. Any Consumer Price Index increases occurring in the six months following the recurrence will, by virtue of Section 25(2), not be applicable to the wage-loss payments being made. (22)

(b) **Worker Is Employed at the Same Rate as Originally Set On the Claim**

Where the worker is employed at the **same rate** as originally set on the claim (or 8-week review rate, if applicable), the previous rate will be used plus applicable Consumer Price Index adjustments. The discretion contained in Section 32(1) will not be exercised.

(c) **Worker Is Employed at a Lower Rate than Originally Set On the Claim**

Where the worker is employed at a **lower rate** than the rate originally set on the claim (or 8-week review rate, if applicable) plus applicable Consumer Price Index increases, a determination will be made as to the reason for the lower figure.

(i) **Reduced Earnings Due to Effects of the Injury or Disease Accepted On the Claim**

If it is determined that the reduced earnings level is due to the effects of the injury or disease accepted on the claim, the rate originally set on the claim (or 8-week review rate, if applicable) plus applicable Consumer Price Index adjustments will be used on the reopening. Care must be exercised in making this determination to ensure that consistency is maintained with prior decisions reached on the claim. If, for example, a prior decision has been reached that a pension or higher pension which the claimant asked for should not be awarded because the claimant was

capable of undertaking certain occupations, it will not now be possible to conclude that the claimant's not being employed in those occupations is due to the effects of the injury.

(ii) **Reduced Earnings Due to Personal Choice**

If it is determined that the lower earnings level is due to a matter of personal choice on the part of the claimant, such as, for example, a voluntary change in lifestyle, the reduced earnings figure will be used on reopening. Section 32 will be applied and the rules set out in (a) above will apply in relation to the reduced figure. If it is concluded that this voluntary or elective change in earnings status is indicative of the future, no 8-week rate change on the basis of prior earnings will be carried out should the disability following reopening extend to that point.

(iii) **Reduced Earnings Due to Employment Situation**

If it is determined that the reduced earnings at the time of the reopening are due to employment difficulties occasioned by economic circumstances, Section 32 applies and the recurrence of disability is treated as the happening of the injury. Where there is an existing permanent partial disability pension granted in respect of the original injury, Section 32(2) applies and the pension is not deducted from the wage-loss benefits except to the extent that the combined total exceeds the maximum wage rate in effect at the time of the recurrence. The current rate of earnings will be used for the first eight weeks at which point a review is carried out. Since the 8-week review permits a consideration of the one year's, three or five years earnings prior to the injury, it will have the effect of adjusting for the long term any temporary aberrations in earnings capacity caused by

economic fluctuations. Any Consumer Price Index increases occurring in the six months following the recurrence will, by virtue of Section 25(2), not be applicable to the wage-loss payments being made.

2. Temporary Disability Recurring After Three Years Where the Claimant Is Unemployed

Where the worker is unemployed at the time of the reopening, a determination will be made of the reasons for this.

(a) Where Unemployed Status Is Due to the Effects of the Injury or Disease

If it is determined that the unemployed status prior to the recurrence is due to the effects of the injury or disease accepted on the claim, the rate originally set on the claim (or the 8-week review rate, if applicable) plus applicable Consumer Price Index adjustments will be used. The discretion in Section 32 will not be exercised. As in 1(c)(i) above, care must be exercised to ensure that the determination is consistent with prior decisions on the claim.

(b) Where Unemployed Status Is Not Due to Effects of the Injury or Disease

If it is determined that the workers unemployed status prior to the recurrence is not due to the effects of the injury or disease accepted on the claim, no wage-loss benefits are payable unless the disability following reopening will produce a potential for loss of income by removing the worker as a viable entity in the labour force. In the latter case, benefits will be paid on the basis of the wage rate originally set on the claim (or the 8-week review rate, if applicable) plus applicable Consumer Price Index adjustments. In determining whether there is a “potential loss”, the following are among the questions that might be considered.

- (i) Was the claimant’s unemployment a matter of personal choice?

- (ii) Does the claimant's lifestyle render it unlikely that he or she will, in practice, obtain employment? For example, if the claimant has moved to a remote area where there are virtually no employment opportunities, this would indicate that there was no potential loss.
- (iii) Are there any other health conditions or personal problems that limit the possibility of employment?
- (iv) Was the worker being paid unemployment insurance benefits? Since the payment of such benefits requires a confirmation that the worker is fit for work, this would be an indicator that there was a potential loss.
- (v) Has the worker been making an active, ongoing, job search? Has the worker registered with the Canada Employment and Immigration Commission?
- (vi) Has the worker maintained union status, remained available for dispatch to jobs, been dispatched to jobs or declined offers of dispatch?
- (vii) Was the worker listed as seeking employment by the Ministry of Social Services?

3. Permanent Disability Occurring or Increasing More Than Three Years After Injury

The rules set out above in relation to wage-loss benefits are, in general, equally applicable to permanent disability pensions. These rules have the effect that in one situation no wage-loss benefits are paid, notably when the worker is unemployed otherwise than through the effects of the injury and it is determined that there is no potential loss of earnings. A pension assessed on a physical impairment basis under Section 23(1) of the *Workers Compensation Act* should, however, be paid in that situation and (subject to any appropriate wage rate review being carried out) calculated on the basis of the wage rate originally set on the claim plus applicable Consumer Price Index adjustments. Pensions are distinguishable from wage-loss benefits since they are concerned with the long

term as opposed to the current situation. A permanent disability award is payable under Section 23(1) for significant impairments even though the worker has returned to work with no loss of earnings and may not have a loss of earnings in the future. The section directs that the pension is payable for life and appears to rest on an assumption that over the many years ahead some loss will on average be experienced. It follows that, just because a person is unemployed and does not now foreseeably have an actual loss of earnings, it does not mean that the person should not receive an award under Section 23(1). However, the situation is different for projected loss of earnings awards under Section 23(3). Since that assessment aims to predict the worker's actual loss of earnings over the future, no award can be made when the worker is unemployed for reasons unrelated to the injury and it is determined that there will not be a potential loss of earnings.

4. Prior Occasion When Section 32 Was Applied

Where, on a previous reopening of the claim, Section 32 or its predecessor has been used to base compensation on the current earnings, any rate resulting from the application of that section is ignored for the purposes of a later reopening.

5. Where, according to the guidelines set out above, compensation would normally be based on the worker's pre-injury earnings, but it is found impossible or impractical to obtain those earnings, Section 32(1) or (3) may be applied, unless this will result in a rate of compensation significantly less than that to which the pre-injury earnings would probably have entitled the worker. In the latter case, a reasonable estimate should be made of the worker's probable pre-injury earnings.

For the distinction between a "recurrence of . . . disability" within the meaning of Section 32 and a new injury, reference should be made to #107.10.

Counsel's Position

Counsel's chief argument against Appeal Division Decision No. 91-0459 concerns its finding that policy item #70.20.2(a) applies to this workers case. This section applies

where, at the time of the recurrence of a temporary disability, the worker is unemployed due to the effects of the injury. It provides that the wage rate originally set on the claim (or the 8-week review rate) plus applicable Consumer Price Index adjustments will be used in reopening the claim. According to counsel, at the time of the recurrence of his disability, the worker was employed. Counsel places the recurrence of the worker's temporary disability in February 1988 when he was still employed. If that is correct, policy item #70.20.2(a) would not apply and, therefore, the wage rate initially set on the claim would not be the appropriate wage rate.

Counsel's alternative arguments are that even if, strictly speaking, policy item #70.20.2(a) covers this worker's situation — that is, even if the worker was unemployed when his disability recurred — the policy is only a guideline and there would be good reasons to depart from it in this particular case. Counsel cites in this connection the B.C. court of appeal ruling in *Testa* (1989), 58 DLR (4th) 76. The court of appeal found the Board to have been patently unreasonable in rigidly applying a policy without regard to the particular facts of the case. Counsel also refers to Section 99 of the *Act* which states in part that “[the Board's] decision shall be given according to the merits and justice of the case.” Counsel submits that, by calculating the worker's wage loss benefits with reference to his February 1988 earnings, the Board would ensure that the compensation payable to him would reflect his actual loss of earnings as required by Section 32(1) and Section 99 of the *Act*.

Counsel suggests that policy item #70.20 may be inconsistent with the *Act* but does not elaborate much on this point.

Finally, counsel requests that the worker be reimbursed for the legal fees and costs which he incurred since March 1993 which apparently exceed \$15,000.00.

Analysis

It is important to note at the outset that the issue considered by the panel in the impugned Appeal Division decision was the worker's entitlement in 1988 to wage loss benefits in respect of his 1953 compensable hip injury. It is also important to note that, by finding that the worker's claim “should be reopened pursuant to the policy contained in 70.20.2(a) of the *Manual*”, the panel implicitly made a finding concerning the wage rate to be used in calculating these benefits since policy item #70.20.2(a) provides that the rate originally set on the claim (of the 8-week review rate, if applicable) should be used.

The issue of what rate should be used for wage loss benefits is distinct from the issue of what rate should be used for pension purposes. Admittedly, policy item #70.20

provides that, in general, the same guidelines apply to the calculation of both rates. However, the facts of a case may be such that, applying these guidelines would result in different rates. Consider a situation in which a worker suffered a compensable injury in January 1960 as a result of which he developed a permanent partial disability for which he was awarded a pension. In December 1970, there was evidence of deterioration in his permanent disability, although he continued to work. In March 1971, he stopped working. In August 1971, he underwent surgery related to his 1960 compensable injury. Were the Board to accept the evidence of deterioration in his permanent disability, the worker would be entitled to an increase in his pension effective December 1970. Because the worker was employed in December 1970, the increase in pension would be based on his December 1970 earnings, if those earnings exceeded the rate originally set on the claim. However, the wage loss benefits would be based on the rate originally set on the claim, if the Board were to find that the worker was entitled to wage loss benefits in connection with the 1971 surgery and that prior to the surgery he was neither permanently nor temporarily disabled from work by reason of the compensable injury but that his unemployed status was due to the effects of his 1960 injury.

In light of the above, I find the Review Board findings of July 20, 1996 questionable in one regard. The panel's reasoning would appear to suggest that Appeal Division Decision No. 91-0459 requires that the wage rate for the worker's pension be based on his 1953 wage rate since, by relying on policy item #70.20.2(a), the decision implicitly found the 1953 rate to be the wage rate upon which the worker's wage loss benefits should be based. But, as indicated earlier, the wage rate to be used for pension purposes should not be equated automatically with the wage rate used for the calculation of wage loss benefits. Whether the wage rates are the same would depend in part on when the worker's permanent disability deteriorated. The Appeal Division decision did not resolve that issue nor did it intend to resolve it.

That said, counsel has impugned the validity of Appeal Division Decision No. 91-0459 and has instituted proceedings to set that decision aside. I must, therefore, turn my attention to whether his objections to the decision justify setting it aside, independently of whether the decision necessarily carries implications relevant to a determination of the worker's wage rate for pension purposes.

In order to assess the validity of Appeal Division Decision No. 91-0459, policy item #70.20.2(a) must be examined closely. The policy appears to contemplate a situation in which a worker stops working "due to the effects of the injury" without being, however, temporarily disabled from work by reason of the compensable injury at that time; the temporary disability occurs only at some later stage. The policy must be understood, therefore, as drawing a distinction between being unemployed "due to the effects of the injury" and being temporarily disabled from work as a result of the

injury; otherwise the fact situation which it sets out would correspond to the fact situation which is set out in item #70.20.1, namely, a situation in which a worker becomes temporarily disabled while still employed.

What circumstances would warrant finding that a worker is “unemployed due to the effects of the injury” but not temporarily disabled from work by reason of the injury? The policy does not directly answer that question. One can only speculate as to the circumstances that might warrant making that finding. A reasonable inference is that the policy was formulated to cover situations in which the Board recognizes that the compensable injury was a factor in a worker’s unemployment but there may have been also an element of personal choice and economic conditions may have been a factor too.

Viewed together, policy items #70.20.1 and #70.20.2 contemplate a range of possible situations. At one end of the spectrum is the situation where a worker suffers a recurrence of temporary disability while he is employed at earnings higher than the rate originally set on the claim. The policy provides that, in that situation, the worker will be given the benefit of the higher earnings rate. This is consistent with the discretion conferred by Section 32 since the intent of the section is to enable the Board to estimate as closely as possible the actual loss of earnings suffered by the worker by reason of the recurrence. At the other end of the spectrum is the situation where a worker suffers a recurrence of temporary disability after he has removed himself from the workforce for purely personal reasons and where there is no potential for his re-employment, regardless of the recurrence. The policy provides that, in that situation, no wage loss benefits are payable. This is also consistent with Section 32 since it could be said that the worker suffers no loss of earnings by reason of the recurrence.

Intermediate situations would include a situation where a worker removes himself from the workforce for personal reasons while intending to resume employment after a certain lapse of time. For example, a worker decides to take one year off work to pursue personal interests fully intending to rejoin the labour force at the end of that year. At the end of the year, without any particular employment prospects, he suffers a recurrence. Under the policy, wage loss benefits on the basis of the rate originally set on the claim may be paid to the worker. Although it could be said that the worker suffered no actual loss of earnings by reason of the recurrence since he was unemployed at that time, the policy recognizes that the recurrence may have produced “a potential for loss of income by removing the worker as a viable entity in the labour force.” The policy contemplates the payment of wage loss benefits on that basis. To specify, as the policy does, that the wage rate to be used is the rate originally set in the claim does not offend Section 32, unless the worker had firm employment prospects at a higher rate, in which case it could be argued that this higher rate should be used to measure the worker’s actual loss of earnings.

Another intermediate situation covered by the policy is the situation in which a worker who is unemployed “due to the effects of the injury” suffers a temporary disabling recurrence of the injury, namely, the situation described in item #70.20.2(a). To specify, as the policy does, that the wage rate to be used in reopening the claim is the rate originally set on the claim does not offend Section 32, as long as one is satisfied that the worker was not temporarily or, for that matter, permanently disabled by reason of the compensable injury when he stopped working. To apply policy item #70.20.2(a) where a worker’s unemployment was strictly due to a disability resulting from the compensable injury would offend Section 32 of the *Act*, irrespective of whether the disability is temporary or permanent. Section 32 confers upon the Board a discretion to use the level of earnings at the time of the recurrence of the temporary disability or the occurrence (or increase in the level) of the permanent disability whereas policy item #70.20.2(a) rules out the exercise of that discretion.

The logic underlying policy item #70.20.2(a) is easiest to understand where a worker’s unemployed status preceded the recurrence of his temporary disability by a long lapse of time. It is understandable that, in such a situation, the policy would rule out the exercise of the discretion in Section 32 since using the earnings at the time of the recurrence would result in no wage loss benefits to a worker who has been unemployed for some time. This would be an unfair result, if the worker’s unemployment may be said to be “due to the effects of the injury.” But what about situations in which the recurrence of the temporary disability happened very soon after the worker stopped working? Where the transition between being unemployed “due to the effects of the injury” and being temporarily disabled from work by reason of the compensable injury was very rapid, it may be difficult to rule out the possibility that the two conditions overlapped. Hence, one may question whether policy item #70.20.2(a) was intended to apply to this type of situation. I note that this worker’s case involved a relatively short lapse of time between the time the worker stopped working and the recurrence of a temporary disability associated with surgery. The worker retired effective March 1, 1988; on March 7, 1988, the orthopaedic surgeon recommended the surgery for his compensable hip problem; the surgery was performed on April 28, 1988.

Without providing much analysis of the policy contained in item #70.20.2(a), the panel found the policy to be applicable to the worker’s case. The panel characterized the issue before it as whether the worker was entitled to wage loss benefits as a result of the hip replacement surgery performed in April 1988. The crux of the panel’s reasoning in the decision was that the worker should not be denied wage loss benefits for the April 1988 surgery simply because he took early retirement effective March 1, 1988. According to the panel, whether or not the worker was entitled to wage loss benefits would depend on why he took early retirement. The panel concluded that he “took early retirement because of increased difficulty doing his job due to his injury.” The panel found,

therefore, that the worker's unemployed status in April 1988 was due to the effects of the injury — a finding that would seem to invite the application of policy item #70.20.2(a). However, as indicated earlier, for policy item #70.20.2(a) to apply, one must also find that the worker was not temporarily disabled from work by reason of the injury at the time he retired. Did the panel make that finding?

The panel made no express finding as to whether or not the worker was temporarily disabled at the time he retired. The panel's reliance on policy item #70.20.2(a) suggests that it implicitly found the worker not to have been temporarily disabled at that time. While it would have been preferable for the panel to state that finding expressly, its failure to do so is to some extent understandable. In arguing the appeal, counsel stated that the worker was entitled to a 100 percent loss of earnings pension commencing from the date of his retirement award. That request would imply that counsel viewed the worker's condition as permanent at the date of retirement. Moreover, the evidence reviewed by the panel did not particularly suggest that the worker was suffering from a temporary disability at the time he retired. This, together with the nature of counsel's arguments in support of the appeal, may explain why the panel proceeded on the footing that the worker was not temporarily disabled from work when he retired, without stating that finding expressly.

The application of policy item #70.20.2(a) also assumes though that the worker was not permanently disabled from carrying on with his job when he retired. That is, it assumes that the worker could have continued working — albeit with difficulties. The panel did not expressly find that the worker could have continued working at the time he retired. For several reasons, I find this more problematic than the panel omitting to make an express finding as to whether the worker was temporarily disabled from work when he retired. As noted earlier, in arguing the appeal, counsel had specifically raised the issue of whether the worker was "totally disabled from working in February 1988." One would have expected, therefore, the panel to make explicit findings in that regard. Furthermore, some of the panel's statements could be interpreted as suggesting that the panel implicitly accepted that the worker could not have continued working when he retired. The panel stated in the decision "in [the worker's] case, he advised the claims adjudicator in Memo 39 and the Review Board, at its hearing, that he was unable to work due to his disability and that this was the reason he took early retirement. Corroborative evidence was obtained from his co-workers. . . . The medical evidence supplied in support of the appeal is supportive of [the worker's] statement to the Board and Review Board" In its concluding statement, the panel, however, merely referred to the worker's "increased difficulties doing his job due to his injury." While this statement may be reconciled with the application of policy item #70.20.2(a) to the worker's case, the earlier statements would tend to make one question whether the policy was truly applicable to the case. Finally, the panel recommended that disability awards determine whether the worker's permanent disability had deteriorated and, if

it had deteriorated, that it determine when the deterioration began. In making that recommendation, the panel seemed to give disability awards full scope to determine those issues. Yet, the application of policy item #70.20.2(a) to the worker's case narrowed in effect the range of possible findings disability awards could make. Although it could find that the worker's permanent disability had deteriorated prior to March 1, 1988, it could not find that it had deteriorated to such an extent that, by March 1, 1988, the disability precluded the worker from carrying on in his job. Inasmuch as the panel's application of policy item #70.20.2(a) had those implications for the assessment of the worker's permanent disability, it was incumbent upon the panel to provide clear findings regarding the worker's ability to continue working when he retired.

The fact that a decision is problematic, flawed or incomplete in some respects is not by itself a sufficient reason to set it aside. In accordance with Section 96.1 of the *Act*, Appeal Division decisions are "final and conclusive" subject to Medical Review Panel certificates and new evidence within the meaning of the provision. Taking into account the privative clause in Section 96.1, published Appeal Division Decision No. 93-0740 concluded that a decision must contain an "error of law going to jurisdiction" before it may be set aside. A patently unreasonable interpretation (or application) of a statutory provision would amount to an "error of law going to jurisdiction." A patently unreasonable finding of fact would amount to an "error of law going to jurisdiction." The blind application of a policy without regard to the actual facts of a case, such as in *Testa*, may amount to an "error of law going to jurisdiction." Furthermore, in *Administrative Law in Canada* (Toronto, 1992), Sara Blake states at p. 179:

To assist a court in review, a tribunal should expressly state its findings of primary facts that are necessary to the decision, together with the evidence upon which those findings are based. Otherwise, a court may assume that the tribunal failed to make a finding of an essential fact and, for that reason, quash its decision.

I have concluded that, in the circumstances of this case, the panel's failure to provide a clear finding as to whether the worker could have continued working when he retired is sufficient reason to set aside its decision. In reaching that conclusion, I have taken the following factors into account, namely: the application of policy item #70.20.2(a) turns on whether the worker could have continued working when he retired; the application of the policy would have required the panel to find that the worker could have continued working yet the panel seemed to accept evidence that he could not have continued working; therefore, the finding upon which the application of the policy turns cannot be readily read into the panel's decision; the panel failed to respond to a key argument in counsel's submissions by failing to provide a clear finding as to whether the worker could have continued working when he retired. In effect then, the

panel denied the worker a consideration to which he would be entitled under the *Act* in certain circumstances yet it did not expressly rule out those circumstances and it cannot be readily inferred from its decision that it implicitly ruled them out. From the reasons I have just given, it should be very clear that I am not setting aside the panel's decision on the basis that there is insufficient evidence to support the panel's conclusion or that the panel weighed the evidence improperly or that policy item #70.20.2(a) is inapplicable to this worker's case.

Counsel's request that the worker's legal fees and costs be reimbursed ought to be dealt with in the context of an appeal. However, I am prepared to consider counsel's request, as it concerns the legal fees and costs associated with the proceedings initiated to have Appeal Division Decision No. 91-0459 set aside. In published Appeal Division Decision No. 93-1687, 10 *Worker's Compensation Reporter* 211 at 220, an Appeal Division panel stated that it is reasonable and lawful for the governors' policies to refuse in general to make legal costs awards, whether to be paid by the Board or by a party to a contested compensation claim. I agree with that statement. On the footing that such awards may be made in unusual or extraordinary circumstances, I would also agree with the statement that:

. . . payment of costs by the Board . . . would not include cases in which Board officers merely erred or failed to exercise good judgment. It would require flagrant abuse by a Board officer of a worker's, or claimant's, or employer's rights under the *Act* or governors' policy, which was clear on the face of the file. Even that would give rise only to consideration of the payment of legal expenses, as other factors might also be relevant.

Flagrant abuse would not arise from a mere failure to investigate a matter fully, as it is virtually always a judgment call as to when adequate information has been obtained. Neither would it arise from a mere error in interpreting and applying governors' policies or the *Act*, as both are open to various interpretations and contain consideration discretion, so there is considerable scope for differences of opinion on matters of interpretation and application.

It is not possible to specify the types of situations which would justify payment of legal fees by the Board. It would require flagrant abuse as noted above, and then consideration of other relevant factors, such as the availability of free legal advice from other sources. We emphasize that entitlement to the payment of legal fees will arise only in very unusual cases.

The situation before me does not involve any abuse on the part of the Appeal Division panel. The fact that I set aside its decision does not in the least indicate that the panel misused its position. I see, therefore, no grounds for payment by the Board of the legal costs and fees incurred by the worker in connection with the proceedings he initiated to have Appeal Division Decision No. 91-0459 set aside.

The worker's request that Appeal Division Decision No. 91-0459 be set aside is granted. The issue under appeal in that decision will be considered afresh by a panel of the Appeal Division.

Editor's Note: This decision has been edited for publication and for the purposes of complying with the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165.

Decision of the Appeal Division

Number: 97-0835/97-0841
Date: June 23, 1997
Panel: Maureen S. Nicholls
Subject: Reconsideration of an Appeal Division decision —
reconsideration of an earlier reconsideration decision — when
natural justice at issue

The worker has made a second reconsideration request arising from Appeal Division Decision No. 93-0783 ([unpublished] May 28, 1993). In that decision the Appeal Division panel (hereafter, the "Original Panel") denied the worker's claim, concluding the worker did not suffer an injury arising out of and in the course of his employment.

The controversy arises from the fact that the appeal before the Original Panel was from a Review Board finding which concluded the worker's claim was barred by Section 55 of the *Workers Compensation Act*. The Original Panel concluded instead that the worker's claim was filed in a timely manner. The Original Panel, in the same decision, went on to consider the merits of the claim and ultimately denied the appeal on that basis. The worker requested reconsideration of the Original Panel's decision, alleging among other things a breach of the rules of natural justice stemming from the absence of express notice to the worker that the Original Panel would consider the merits of the claim.

Appeal Division Decision No. 94-1150 ([unpublished] September 28, 1994, hereafter, the "Reconsideration Panel") denied the reconsideration application, concluding, among other things, that the Original Panel did not breach the rules of natural justice.

The worker initially sought judicial review of Appeal Division Decision No. 94-1150 but indicated through counsel that he wished the petition for judicial review to be treated as a further reconsideration request. The worker, therefore, now seeks reconsideration of the Reconsideration Panel's decision, and that portion of the Original Panel's decision which denied the claim on the merits. The claim file and the petition for judicial review, together with further written submissions from counsel for the worker and the employer, have been considered in this most recent reconsideration process.

I note the Original Panel's decision regarding the timeliness of the worker's application has not been pursued as an issue by either party in this current reconsideration proceeding.

Background

The circumstances of this case have been fully articulated in the two earlier Appeal Division decisions. Therefore, I propose only to briefly outline the facts relevant to this most current reconsideration application.

The worker filed his form 6 application for compensation one year and four days after the date of his alleged back injury. Section 55(2) establishes a one year time limit. The claims adjudicator, by letter dated November 14, 1991, denied the claim based on timeliness only. The worker appealed to the Review Board.

The Review Board panel, in its February 11, 1993 findings denying the appeal, articulated the issue before it as follows:

Issue

Section 55(2) requires an Application for Benefits to be filed, or an adjustment made, within one year after the date of injury. If this requirement is not satisfied then, but for Section 55(3), no compensation is payable. Section 55(3) provides that where the Board is satisfied that there existed special circumstances which precluded the worker from filing an application within the one year period the Board may pay compensation despite the late filing. The issue is whether an application was filed within one year within the meaning of Section 55(2) or whether an adjudication was made within the meaning of Section 55(2) or, in the alternative, if there existed special circumstances which precluded [the worker] from filing an application within the one year.

As indicated above, the Review Board resolved that issue against the worker, concluding there were no special circumstances which precluded the worker from filing his application within the statutory time limit.

The Review Board finding was appealed to the Appeal Division. The Original Panel overturned the Review Board finding to the extent that the Original Panel concluded the claim was not statute barred by Section 55. As stated above, that conclusion is not at issue in this current reconsideration application. Despite that issue being the only one addressed by the Review Board and in submissions to the Original Panel, the Original Panel stated as follows, at page 2:

Having determined that the claim is not statute barred by Section 55 does not end the matter. The issue remains as to whether the worker has a claim which ought to be accepted as an injury arising out of and in the course of employment.

The Original Panel then considered the merits of the worker's claim and denied the worker's appeal, concluding the worker did not suffer an injury arising out of and in the course of his employment. The Original Panel stated its conclusion in this regard as follows, at page 3:

This panel does not see the incident that occurred on October 15, 1990, as having caused any additional injury to the worker. The worker had a history of back problems prior to the October 15, 1990, incident and those problems continued thereafter. We are not satisfied that any different treatment was required as a result of the work accident. We, therefore, conclude that the worker did not suffer an injury arising out of and in the course of employment.

The worker's appeal is denied.

It is to be noted that the Notice of Appeal originally filed with the Appeal Division, and submissions received from the parties in relation to that appeal, all related to the time limit issue only. No correspondence was received by the worker or employer from the Appeal Division suggesting that the Original Panel may go on to consider the merits of the claim in the event the time limit issue was resolved in the worker's favour.

Shortly after the Original Panel's decision of May 28, 1993, the worker sought reconsideration of that decision on the grounds that, among other things, the Appeal Division decision involved a breach of the rules of natural justice because the worker's representative was never advised that the merits of the claim would be considered by the Appeal Division.

The Reconsideration Panel found no breach of natural justice by the Original Panel.

The Reconsideration Panel noted that if the claims adjudicator concluded the claim was timely, it would have been open to the adjudicator to immediately make a finding on the merits without further submissions or evidence. Further, the Reconsideration Panel stated it was open to the Review Board to consider and determine the merits of the claim in the event the Section 55 issue was resolved in the worker's favour. The Reconsideration Panel further stated that failure by a worker to disclose relevant evidence at the earliest opportunity can serve to defeat the claim being considered

under Section 55 because, the Panel stated, insufficiency of evidence may be a basis to decline the exercise of discretion to pay compensation in Section 55(3). The Reconsideration Panel found, in the circumstances of this case, that the worker not only had an opportunity but an interest in submitting any evidence or argument relevant to the issue of the occurrence of the injury prior to the Appeal Division decision.

The Reconsideration Panel also found it significant that the Review Board finding contained reference to a published Appeal Division decision regarding Section 55 of the *Act* (Decision No. 91-0851, 7 *Worker's Compensation Reporter* 211). This published decision, the Reconsideration Panel suggested, provides general notice that the Appeal Division may consider the merits of the case if it finds the claim timely under Section 55.

The Reconsideration Panel articulated its conclusions as follows, at pages 13-14:

After carefully considering the submissions on behalf of the worker in light of the circumstances of this particular case I find that there was not a denial of natural justice in the Appeal Division decision. I conclude that specific notice that the panel would consider the question of the occurrence of the injury was not required in this case for the following reasons. The question of the occurrence of the injury was implicitly present in the issue of whether the worker's application was filed within one year of the date of the injury. The Appeal Division has established by published decision that an appeal regarding an application under section 55 may include a determination of the merits. The worker had an opportunity to present evidence regarding the occurrence of the injury throughout the appeal process and, on some occasions, did so. It was open to both the claims adjudicator and the Review Board to decide whether or not the Board would pay compensation if they had determined that the claim otherwise satisfied the requirements of section 55. The worker had full disclosure of all the evidence on file considered by the panel and had an opportunity to correct or contradict that evidence. The worker gave no indication at the time of the appeal that further evidence or argument would be advanced. Although there is an assertion of new evidence and argument now, none has been put forward that would impugn the fairness of the Appeal Division decision.

On the basis of my review I conclude that the procedure followed by the Appeal Division panel gave the worker an adequate opportunity for a fair hearing. While I can appreciate the worker's wish to have an opportunity to make further submissions on the issue of the occurrence of an injury

after receiving the panel's decision, I do not find it necessary for the Appeal Division to provide separate, specific notice of each consequential question that the panel may consider when the issues are properly before the panel for decision. This is not a case where the panel is denying entitlement to compensation previously recognized without adequate notice that the question is in issue. In this case no entitlement had been previously established and the question of the occurrence of the injury is consequential to whether the appeal was filed within one year of the injury. It is not necessary in my view to engage in a time consuming procedural exercise of giving notice for each consequential question that is before the panel for decision. To do so would defeat the legislative intent to provide timely decisions generally within the 90 day timeframe provided in Section 92(3) of the *Act*. I conclude, therefore, that a reasonable standard of fairness has been reached in this case.

Reconsideration of a Reconsideration

As noted earlier, this is the worker's second application for reconsideration in this matter. Section 96.1(1) of the *Act*, which indicates in part that decisions of the Appeal Division are "final and conclusive", points to a general legislative intent that Appeal Division decisions should provide a great measure of finality and closure to matters decided. By providing generally final answers to matters before it, the Appeal Division is able to provide some certainty to the affairs of parties appearing before it. In addition, administrative efficiency argues against numerous reconsiderations and allows the Appeal Division to devote its limited resources to the consideration of fresh appeals and other matters brought before it, many of which must, by statute, be decided within a 90 day timeframe.

This general rule of finality is expressly tempered, however, by a limited statutory avenue for reconsideration of an Appeal Division decision based on new evidence. In addition, common law grounds for reconsideration based generally on jurisdictional error, including a breach of natural justice, have also been recognized. Application of these various grounds for reconsideration must appreciate the context within which they arise, and particularly the value of finality in decision-making. This context is particularly significant in those few instances where a party seeks reconsideration on a second or further occasion. While the Appeal Division has not found it necessary in the past to emphasize the discretionary nature of the chief appeal commissioner's statutory and common law reconsideration powers, it may be appropriate to articulate and apply further limitations on the exercise of the discretionary reconsideration

powers in cases, like the present, when multiple reconsideration requests have been made. One might expect, for example, that the grounds for reconsideration may become progressively more limited on a second request for reconsideration in the same matter. The availability of an equally efficacious avenue of possible redress may also be a relevant consideration.

One specific limitation on a second request for reconsideration should be noted. The focus of any inquiry on a second reconsideration application relying upon the common law reconsideration grounds will normally be whether the first reconsideration panel fell into jurisdictional error. Similarly, when the new evidence provisions of Section 96.1 are relied upon for a further reconsideration, the operative time for the existence of the evidence under Section 96.1(3)(b) will be the date of any hearing the first reconsideration panel held, or otherwise the date of its decision. In short, the original Appeal Division decision is only of very tangential significance in consideration of a second reconsideration request.

An exception to this general rule of focusing on the first reconsideration decision may arise in cases where the original Appeal Division panel breached the rules of natural justice, which breach was not cured or made irrelevant by the first reconsideration decision. The suggestion that an Appeal Division panel has breached the rules of natural justice tends generally to be an allegation that goes to the heart of the fairness of the Appeal Division's adjudicative process. Depending on whether good reasons are provided as to the nature and significance of the alleged breach of natural justice, and the particular circumstances of the case, a second reconsideration may be warranted.

Analysis and Decision

Counsel for the worker objects to the Appeal Division decisions on a variety of grounds. He suggests that the Original Panel exceeded its statutory jurisdiction as set out in Section 96(3) of the *Act* by deciding a matter which had not been dealt with by the Review Board, and, in addition, that the Original Panel erred when it decided that the issue of the merits of the worker's claim was implicit in the issue of the timeliness of his claim. The worker's third ground for reconsideration is based on his assertion that the Original Panel breached the rules of natural justice or procedural fairness by making a decision on the merits of the claim without notifying the worker of its intention to do so, and without allowing him an opportunity to be heard on the issue.

In light of my conclusions in relation to the third ground for reconsideration, it is not necessary to specifically address the first two grounds articulated by counsel for the worker.

Natural Justice

Appeal rights would provide hollow opportunities if a fair procedure is lacking in the consideration of those appeals. Common law doctrines of procedural fairness and natural justice are intended to provide a common framework of rights to ensure fair play in the exercise of judicial and quasi-judicial functions. For example, natural justice requires that all those with a legally material interest in a matter to be decided by a quasi-judicial tribunal be provided reasonable notice that the matter is to be considered and a reasonable opportunity to be heard in that process. Of more relevance to this case is the related aspect of natural justice which requires that parties be provided adequate notice of the case to be met and the issues under review by the quasi-judicial body. See, for example, *Murphy v. Newfoundland (Workers' Compensation Commission)* (1995), 136 Nfld. & P.E.I.R. 135, 423 A.P.R. 135 (Nfld. T.D.) at para. 48, and W.W. Pue, *Natural Justice in Canada* (Scarborough, Ont.: Butterworths, 1981) at 97. This aspect of natural justice is specifically contemplated in Governors' Decision No. 75, *Appeal Division Administration, Practice and Procedure* (1994), 10 *Worker's Compensation Reporter* 753 [replacing Governors' Decision No. 1 (1991), 7 *Worker's Compensation Reporter* 7, to the same effect] which states: "[t]he Appeal Division will adopt a procedure that ensures the issues in an appeal are identified during the course of the appeal so that all parties may understand and have an opportunity to respond."

This aspect of natural justice has particular significance in light of the broad *de novo* jurisdiction of the Appeal Division in considering appeals from Review Board findings. Governors' Decision No. 75 also states "[t]he Appeal Division has the discretion to initiate and conduct a full inquiry into all of the issues arising out of an appeal once the matter is before it." See also Appeal Division Decision No. 92-0634, *Section 91(1) - Remedial Jurisdiction* (1992), 8 *Worker's Compensation Reporter* 151. In that context the issue may arise more frequently for the Appeal Division than other administrative tribunals as to whether the parties have fair notice of the issues on the table before an Appeal Division panel.

As the Reconsideration Panel suggested, however, the specific content of natural justice rights in a given case will often depend upon the context within which they are asserted. Among contextual factors the Reconsideration Panel found relevant in determining no natural justice breach occurred was the presumed knowledge of the

community, through publication of an earlier decision (Appeal Division Decision No. 91-0851, 7 *Worker's Compensation Reporter* 211) in the *Workers' Compensation Reporter*, that the Appeal Division may go on to consider the merits of a claim in a time limits case. With respect, any such presumed knowledge cannot be relied upon with a great deal of weight. Assuming the community has convenient access to the *Reporter*, knowledge that the Appeal Division proceeded in a particular way in the past must reasonably be weighed against other factors. For example, without examining the claim file underlying Decision No. 91-0851, one may not be able to conclude with confidence whether some form of notice was expressly or implicitly provided that the merits may also be examined. In this regard, I note Appeal Division Decision No. 91-0851 stated in its recitation of facts that the claims adjudicator in that case had already advised the worker his disease was not related to his employment.

More importantly, another factor for consideration is how the current case proceeded through the system. From the outset of the Board's consideration of the present case, until the Original Panel issued its decision two years later, the only issue identified had been the timeliness of the worker's claim application. That was the only issue raised in the decision of the claims adjudicator, and that was the only issue identified by the Review Board in its finding. Further, the timeliness issue was the only issue addressed by the parties in their submissions to the Original Panel. Against that background, it is difficult to conclude that the parties should reasonably have been aware the merits of the claim itself was an issue on the table before the Original Panel. This should, of course, not be taken to suggest disagreement with the comments of the Reconsideration Panel indicating workers should disclose all relevant evidence at the earliest opportunity. But this responsibility could not have reasonably informed the worker in the present case that the merits would be reviewed by the Original Panel without further notice.

I agree with the Reconsideration Panel's general principle that it is not necessary for the Appeal Division to provide separate, specific notice of each consequential question that the panel may consider when the issues are properly before the panel for consideration. However, I must depart from that panel's application of the principle in the present case. When a panel concludes the decision will turn upon a consequential question of which the parties have not expressly been made aware, the panel must consider whether that question raises an issue of a fundamentally different character than the issue addressed by the parties. If the question is of a fundamentally different character, then parties should be expressly advised that the question is on the table for determination.

That would appear to be the underlying reasoning to the Newfoundland court's decision in *Murphy v. Newfoundland (Workers' Compensation Commission)*, *supra*. In that case the worker appealed a Commission award of 10% Permanent Functional

Impairment. The grounds stated for the appeal was the view that the PFI award was too low. The Appeal Tribunal issued a decision which dealt with the PFI issue, but also ordered the Commission to retroactively reimburse the worker for past chiropractic care. The Commission had earlier reimbursed for some chiropractic care following a change of its policy so that it recognized chiropractic treatment as a form of medical aid. The Newfoundland legislation provides standing to the Commission in appeals to the Appeal Tribunal. The notice the Commission received of the Appeal Tribunal hearing did not indicate the reimbursement issue was under review. The issue was not mentioned in the Notice of Appeal and nothing was directed to the Commission by the worker or her representative suggesting a dispute over those costs. The only live issue was the degree of PFI. In this context the Commission decided not to participate in the Appeal Tribunal hearing, which is where the reimbursement issue was first raised. The court concluded the Appeal Tribunal commissioner lacked jurisdiction to deal with the reimbursement issue without having given the Commission notice that the issue was under review.

In my view, the issue in the present case is whether a question of the timeliness of an application is of a fundamentally different character than a question of whether an injury arose out of and in the course of employment. I would conclude that an issue of whether time limits under legislation have been met — a largely procedural issue — is of a fundamentally different character than an issue of whether a claim succeeds on its merits — a substantive issue.

The Reconsideration Panel relied heavily on the fact that it was always open to the claims adjudicator and the Review Board to make a decision on the merits of the claim. With respect, the fact the adjudicator and Review Board had the jurisdiction to decide the merits does not advance the inquiry as to whether a party has been provided adequate notice of the issues that will be addressed by the Appeal Division panel. By the time the matter had reached the Appeal Division it would appear clear to the parties that the significant issue for determination was whether the application was timely. Being the final level of appeal on non-medical issues, parties have a stronger claim for natural justice before the Appeal Division. This is not a case where the issue upon which the Appeal Division decision turned was sufficiently incidental to the issue specifically addressed by the parties that notice of the secondary issue need not be provided. The issues of timeliness and the merits of the claim are sufficiently distinct and separate that, in my view, it was incumbent upon the Original Panel to inform the parties that it would be dealing with the merits of the claim in the decision.

The employer argues that the worker had been heard on the merits because he filed the appropriate applications and there is nothing in the worker's submission to indicate he has more to say on the merits. Further, the employer says the worker has always known the evidence affecting him on the merits. First, when the issue on

reconsideration is whether a natural justice right has been breached, it is not expected the party alleging the breach will articulate what further argument or evidence they may wish to provide on a merits adjudication. Second, knowledge by the worker of the evidence on the merits which exist on the claim file is of little use if the worker is not reasonably made aware that the merits are specifically on the table for determination.

The employer also relies on a submission by the worker's representative before the Review Board as set out in the Review Board finding at page 7 suggesting the claims adjudicator had all the information required to make an adjudication. This submission from the then-representative of the worker was made in the context of his argument under Section 55 and cannot reasonably be taken to indicate the worker was somehow waiving his natural justice rights before the Appeal Division in the event the Original Panel went on to determine the merits, or that he would not wish to provide more evidence and argument if he was reasonably aware the Original Panel would deal with the merits.

The Reconsideration Panel referenced the 90 day timeframe for Appeal Division decision-making as part of its basis for decision on the natural justice issue. That Panel suggested it would defeat the legislative intent to provide such timely decisions if the Appeal Division had to engage in a time-consuming procedural exercise of giving notice for each consequential question. As suggested above, I do not believe natural justice requires notice for each consequential question, so long as notice is provided when the consequential question raises an issue of a fundamentally different character. While it is open to a legislature to displace or limit natural justice rights with sufficiently strong wording in legislation, the inclusion of the 90 day timeframe in the *Act* cannot be taken as indicating such an intent.

In conclusion, I disagree with the Reconsideration Panel and instead conclude the Original Panel's decision involved a breach of the rules of natural justice in relation to its consideration of the merits of the claim. That aspect of the Original Panel's decision ruling on the merits of the claim is hereby set aside. The claim file will be returned to the Compensation Services Division to provide an adjudication of the claim on the merits. The parties will then have their usual appeal rights from the decision of the claims adjudicator.

Editor's Note: This decision has been edited for publication and for the purposes of complying with the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165.

Decision of the Appeal Division

Number: 97-1032
Date: July 31, 1997
Panel: Anne-Marie Drosso
Subject: Reconsideration of an Appeal Division decision —
a missed issue

The worker submits that Appeal Division Decision No. 97-0188 [unpublished] dated February 10, 1997 is incomplete and seeks a remedy accordingly.

The employer has gone into receivership. The employer's trustee was given the opportunity to participate in the proceedings initiated by the worker but has not provided submissions.

There have been instances of files being sent back to an Appeal Division panel because the panel had failed to deal with an issue before it (for example, unpublished Decision No. 95-0539). Also, there has been an instance in which a missed issue was referred to a fresh panel for consideration because the original panel could not be reconvened (unpublished Decision No. 96-0786).

The authority to refer a missed issue to an Appeal Division panel for consideration is a logical extension of the chief appeal commissioner's authority to direct the reconsideration of Appeal Division decisions as set out in Section 96.1 of the *Act* or to set them aside in accordance with common law principles. In Decision No. 20 [12 WCR 361] dated November 29, 1996, the chief appeal commissioner delegated to me the power to direct the reconsideration of Appeal Division decision as set out in Section 96.1 and the power to set them aside in accordance with common law principles. Such powers implicitly include the power to refer a missed issue to an Appeal Division panel. The question arises, therefore, as to whether the panel in Decision No. 97-0188 missed an issue that was clearly before it.

The worker suffered a compensable injury to her right wrist on August 23, 1986. She underwent several surgical procedures for her wrist problems over the years. Some of these procedures required bone grafts and, for that purpose, bone material was

harvested from the worker's iliac crest. The panel noted in Decision No. 97-0188 that, following these surgeries, the worker began to experience numbness in her thighs.

The Review Board findings which the worker appealed to the Appeal Division dealt with three issues:

1. whether wage loss benefits were payable to the worker for her wrist condition as of June 7, 1994;
2. whether the worker's permanent functional impairment award was appropriate; and
3. whether the worker was entitled to a loss of earnings pension.

The Review Board panel found that the worker was temporarily totally disabled from June 7, 1994 to July 5, 1994 and, therefore, wage loss benefits were payable to her for that period. The panel found that the permanent functional impairment award was correctly assessed and the worker was not entitled to a loss of earnings pension.

In her Notice of Appeal from the Review Board findings, the worker stated that she disagreed with the Review Board findings because:

1. [she] was temporarily totally disabled from June 7, 1994 - January 23, 1995.
2. The Review Board erred in concluding that [she] could find alternate employment to earn an income equal to or higher than [her] pre-injury earnings. Evidence shows [she is] maximizing [her] earnings in a \$7.00 an hr. job.
3. Subjective complaints/re numbness in the thigh area should be recognized by the Board.

In a letter dated June 4, 1996, the director of compensation advisory services, workers' advisers, specified that the worker was seeking additional wage loss benefits from June 7, 1994 to January 23, 1995 and provided a letter from Dr. A dated May 22, 1996 in support of this request. The director also provided arguments regarding the adequacy of the permanent functional award and the worker's entitlement to a loss of earnings pension.

In Decision No. 97-0188, the Appeal Division panel dealt with the following issues:

1. whether the worker was entitled to a loss of earnings pension; and
2. whether the worker was entitled to an additional permanent functional impairment award for complaints associated with numbness in her thighs as a result of the bone harvesting from her iliac crest.

The panel allowed the worker's appeal with respect to her entitlement to a loss of earnings pension. The panel also allowed the worker's appeal with respect to the adequacy of her permanent functional award. More specifically, the panel increased the worker's pension award, taking into account the numbness in her thighs and its effect on sexual functions. The panel did not, however, deal with the issue of wage loss benefits.

In a letter dated February 28, 1997 addressed to the appeal commissioner/manager of the Appeal Division, the director of compensation advisory services suggested that the Appeal Division panel appears to have overlooked the issue of whether the worker is entitled to additional wage loss benefits. The appeal commissioner/manager informed the director that his letter would be treated as a request to have Decision No. 97-0188 reconsidered.

I agree with the director that the panel overlooked the issue of whether the worker is entitled to additional wage loss benefits. In neglecting to address an issue that was before it and within its jurisdiction, the Appeal Division panel could be said to have committed an "error of law going to jurisdiction." However, the remedy for that type of error is not to invalidate the whole of the decision. The remedy is to remit the missed issue to the panel. Remitting a missed issue to a panel so as to permit it to complete its consideration of the appeal before it will generally have no effect on issues already decided by the panel.

As the issue of whether the worker is entitled to wage loss benefits is entirely separate from the other issues dealt with by the Appeal Division panel, I do not need to consider the basis of its findings with respect to these other issues.

The issue which the panel in Decision No. 97-0188 failed to address will be remitted to it or another Appeal Division panel for consideration.

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