Noteworthy Decision Summary

Decision: WCAT-2005-01710 **Panel**: Jill Callan, Chair **Decision Date:** April 7, 2005

Meaning of Recurrence of Disability – Section 35.1(8) of the Workers' Compensation Act (Act) - Permanent change in the nature and degree of a worker's permanent disability – Policy item #1.03(b)(4) of Rehabilitation Services and Claims Manual, Volume I and II – Sections 96(2) and 32 of the Act – Section 251 of the Act – Patently unreasonable

Note: This decision of the Chair was provided to the Workers' Compensation Board (Board) pursuant to section 251(5) of the *Workers Compensation Act* (Act). In response, and pursuant to section 251(6) of the Act, the Board determined that policy item #1.03(b)(4) of the *Rehabilitation Services and Claims Manual* (RSCM), Volume I and II was not patently unreasonable and must be applied by the Workers' Compensation Appeal Tribunal (WCAT). The Board's decision can be found on WCAT's website.

In *Cowburn v. Worker's Compensation Board of British Columbia* (2006 BCSC 722), a judicial review from a Review Division decision, the British Columbia Supreme Court (BCSC) concluded that the Board of Directors' policy on recurrence of disability in policy item #1.03(b)(4) is a patently unreasonable interpretation of the Act. The court's decision may be found on the BCSC website at: http://www.courts.gov.bc.ca/jdb-txt/sc/06/07/2006bcsc0722.htm.

The element of item #1.03(b)(4) of RSCM, Volume I and II that characterizes a reopening of a worker's claim for "any permanent changes in the nature and degree of a worker's permanent disability" as a "recurrence" was referred to the chair under section 251(2) of the *Workers Compensation Act* (Act). In this decision the chair concluded that the policy is so patently unreasonable that it is not capable of being supported by the Act. Thus, section 35.1(8) of the Act cannot be rationally interpreted to mean that there is a "recurrence" when a permanent disability for which a pension was granted under the former Act permanently gets worse or deteriorates after June 30, 2002.

In this case, the Board accepted the worker's claim for asbestos-related pleural disease and in 2001 awarded him a permanent partial disability (PPD) award on a loss of function basis. The worker was 71 years old at the time. In 2003, the Board considered whether to increase the worker's PPD award. However, as the Act had been amended effective June 30, 2002 and the current Act provided that PPD awards ended at the age of 65, the Board concluded that the worker could not be granted an increase. Although not expressly stated in the decision, the rationale for the conclusion that the current provisions of the Act would be applicable to any increase in the worker's award was based on the application of item #1.03(b)(4) and the Board having characterized any permanent deterioration in the worker's permanent disability as a "recurrence" under section 35.1(8).

The Review Division upheld the Board's decision. On appeal, the worker argued that his PPD award should be reassessed and an increased PPD award paid under the former provisions of the Act on the basis that item #1.03(b)(4) is patently unreasonable. The vice chair who heard the appeal considered the policy patently unreasonable and referred the issue to the chair of WCAT for decision under section 251(2) of the Act.

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Section 35.1(8) provides that if on or after June 30, 2002 a worker has "a recurrence of a disability that results from an injury that occurred before [June 30, 2002], the Board must determine compensation for the recurrence based on the current sections of the Act". Item #1.03(b)(4) provides that a recurrence includes any claim that is re-opened for any "permanent changes in the nature and degree of a worker's permanent disability". Section 96(2) of the Act provides that the Board may reopen a matter that has been previously decided by the Board if since the decision was made in that matter (a) there has been a significant change in a worker's medical condition that the Board has previously decided was compensable, or (b) there has been a recurrence of a worker's injury.

The chair determined that item #1.03(b)(4) was patently unreasonable and not capable of being supported by the Act for the following reasons:

- The plain meaning of "recur" is "to occur again" and is a fundamentally different concept from a permanent change in a permanent condition. Such a permanent change should be characterized as a deterioration. "Deteriorate" means to "become progressively worse". Therefore, a deterioration is not synonymous with a recurrence. "Deterioration" and "recurrence" refer to fundamentally different processes.

- There is no reason to consider "recurrence" as having a specialized meaning in the worker's compensation context different from the ordinary dictionary meaning. Prior to the enactment of section 35.1(8), a "recurrence", in the context of the workers' compensation system, was not generally applied to a permanent deterioration of a permanent disability.

- It is consistent with the use of "recurrence" and "occurs" in section 32 of the Act to characterize a "permanent change in the nature and degree of a worker's permanent disability" as something that "occurs" rather than as a "recurrence".

- The application of the presumption against tautology leads to the conclusion that the Legislature clearly intended that there be a difference between "a significant change in a worker's medical condition that the Board has previously decided was compensable" (the phrase that appears in section 96(2)(a)) and "a recurrence of a worker's injury" (the phrase that appears in section 96(2)(b)). In order for section 96(2)(a) to be meaningful, it must be interpreted as referring to something other than a recurrence. While acknowledging interpretative difficulties resulting from the language of section 96(2), the chair determined that the better interpretation of section 96(2) is that a reopening for a permanent deterioration in a permanent disability falls into the category of "a significant change in a worker's medical condition" rather than "a recurrence of a worker's injury".

The chair determined that for the purposes of section 251, a policy is patently unreasonable and not capable of being supported by the Act where it cannot be "rationally supported" by the Act. The chair rejected the contention that the WCAT chair is to apply a less stringent patently unreasonable standard than that applied by the courts on judicial review.

This decision has been published in the *Workers' Compensation Reporter*: 21 WCR 131, #2005-01710, Referral to the Chair - Recurrence of Disability

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Panel: Jill Callan, Chair

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1. Introduction

This determination under section 251(3) of the *Workers Compensation Act* (Act) is made in the context of the worker's appeal, in which he seeks a reassessment of his permanent partial disability pension. The worker's appeal raises the question of whether item #1.03(b)(4) of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I) and *Volume II* (RSCM II) is so patently unreasonable that it is not capable of being supported by the Act.

Pursuant to the *Workers Compensation Amendment Act, 2002* (Bill 49), several of the entitlement provisions of the Act, including those related to permanent disability pensions, were amended effective June 30, 2002. Section 35.1 of the Act is a transitional provision that establishes whether the entitlement of workers to various benefits arises out of the former or current sections of the Act. Under section 35.1(8), if on or after June 30, 2002 a worker has "a recurrence of a disability that results from an injury that occurred before [June 30, 2002]", the current sections of the Act apply. Item #1.03(b)(4) states that, for the purposes of section 35.1(8), a reopening of a claim for "any permanent changes in the nature and degree of the worker's permanent disability" constitutes a "recurrence". In this determination, I will refer to that element of item #1.03(b)(4) as the "impugned policy".

The vice chair of the Workers' Compensation Appeal Tribunal (WCAT) assigned to hear the worker's appeal considered that item #1.03(b)(4) is so patently unreasonable that it should not be applied in the adjudication of the worker's appeal. As a result, on June 25, 2004, the vice chair referred the issue to me for determination in accordance with section 251(2) of the Act. Under section 251(3) of the Act, I must decide whether the impugned policy "should be applied" in adjudicating the worker's appeal. In accordance with section 251(1), this requires me to determine whether the impugned policy is "so patently unreasonable that it is not capable of being supported by the Act and its regulations". In this case, there is no relevant regulation.

If the impugned policy is applied (and recurrence is considered to include a permanent change in the nature and degree of a worker's permanent disability), under section 35.1(8) the vice chair must consider the worker's entitlement to an increased pension based on the current Act. If I find the policy to be patently unreasonable and,

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therefore, inapplicable and the board of directors agrees, the vice chair will determine the worker's entitlement to benefits based on the Act as it read prior to the Bill 49 amendments. The worker argues that his entitlement to an increased pension should be determined by applying the former provisions of the Act.

Item #1.03(b)(4) came into effect as of June 17, 2003 as a result of the renumbering of the former item #1.00(4) of RSCM I and II as item #1.03(b)(4) of RSCM I and II. Although the vice chair's referral memorandum refers to item #1.00(4) of RSCM II, I will refer to the policy under consideration as item #1.03(b)(4) of RSCM I and II throughout this determination (except when I am referring to the earlier versions of the policy or quoting from documents that refer to the policy as item #1.00(4)).

In this determination, where there is potential for confusion, I will refer to sections or provisions of the Act as they existed prior to the amendments that flowed from Bill 49 as "former sections" or "former provisions" and the sections or provisions of the amended Act as "current sections" or "current provisions". If I do not indicate whether a section or provision is a current or a former one, it should be assumed I am referring to a current section or provision.

2. Parties

The worker is represented by his trade union. As there is no employer of record, pursuant to section 248(1) of the Act, an employers' adviser of the Employers' Advisers Office has been deemed to be the employer and is participating in the appeal.

Section 246(2)(i) enables WCAT to "request any person or representative group to participate in an appeal if the tribunal considers that this participation will assist the tribunal to fully consider the merits of the appeal." As I view the question raised by the vice chair to be of considerable importance to the workers' compensation system, I directed that the following representative groups be invited to participate in this determination:

- B.C. Federation of Labour
- Business Council of B.C.
- Coalition of B.C. Businesses
- Employers' Forum to the WCB
- Workers' Compensation Advocacy Group
- Workers' Advisers Office

As the Employers' Advisers Office was already participating in this application as a deemed party, it was not invited to participate under section 246(2)(i). The Workers' Compensation Advocacy Group and the Workers' Advisers Office have provided submissions related to the matter before me.

WCAT will send copies of this determination to the parties, the chair of the board of directors of the Workers' Compensation Board (Board), the president of the Board, and the Board's vice president, Policy and Research. In addition, WCAT will send copies of this determination to the representative groups, with the worker's identifying information deleted.

3. Issue(s)

The issue in this determination is whether, for the purposes of the current section 35.1(8) of the Act, the element of item #1.03(b)(4) of RSCM I and II that characterizes a reopening of a claim for "any permanent changes in the nature and degree of a worker's permanent disability" as a "recurrence" is so patently unreasonable that it is not capable of being supported by the Act.

4. Policy-making Authority

Although the impugned policy was originally enacted by the panel of administrators, it became a policy of the board of directors as of February 11, 2003. The relevant governance history and the applicable decision of the board of directors are summarized below.

In 1991, a new governance structure for the Board came into effect and the policy-making authority was vested in the governors of the Board. In 1995, a panel of administrators was appointed to perform the functions of the governors of the Board and, accordingly, the policy-making authority was vested in the panel of administrators.

Bill 49 amended the governance structure of the Board effective January 2, 2003, establishing the board of directors under section 81 of the Act. Under the current section 82(1)(a) of the Act, the board of directors has the authority to "set and revise as necessary the policies of the board of directors, including policies respecting compensation".

In Board of Directors' *Decision No. 2003/02/11-04*, "Policies of the Board of Directors", February 11, 2003, published at 19 WCR 1[1], a policy, resolution, and bylaw relating to the policies of the board of directors was enacted, which stated in part:

> **1.0 Policies of the Directors**
>
> 1.1 As of February 11, 2003, the policies of the directors consist of the following:
>
> …
>
> (d) The *Rehabilitation Services and Claims Manual* Volume I and Volume II, except statements under the headings

[1] Policy resolutions are available at: http://www.worksafebc.com/publications/wc_reporter/default.asp.

> "Background" and "Practice" and explanatory material at the end of each Item appearing in the new manual format;
>
> …
>
> (f) *Workers' Compensation Reporter* Decisions No. 1–423 not retired prior to February 11, 2003; and
>
> (g) Policy decisions of the former Governors and the former Panel of Administrators still in effect immediately before February 11, 2003.

Pursuant to *Decision No. 2003/02/11-04*, the impugned policy, having formed part of the RSCM I and II prior to February 11, 2003, became a policy of the board of directors.

5. The Act and Policies

There is no definition of "recurrence" in the Act. However, the term "recurrence" is used in several current sections of the Act as well as in the board of directors' policies under the Bill 49 transitional provisions and those regarding reopenings of claims under the current section 96(2). Each of these is reproduced below.

(a) Section 32

Section 32 of the Act was not amended by Bill 49 or by *Workers Compensation Amendment Act (No.2), 2002* (Bill 63). It was previously numbered section 30 but essentially has not changed since July 1, 1974 (later in this determination, I will refer to decisions made in the 1970s regarding section 30). Section 32 provides:

> *Recurrence of disability*
>
> 32(1) For the purpose of determining the amount of compensation payable where there is a **recurrence** of temporary total disability or temporary partial disability after a lapse of 3 years following the occurrence of the injury, the Board may calculate the compensation as if the **recurrence** were the happening of the injury if it considers that by doing so the compensation payable would more nearly represent the percentage of actual loss of earnings suffered by the worker by reason of the **recurrence** of the injury.
>
> (2) Where a worker has been awarded compensation for permanent partial disability for the original injury and compensation for **recurrence** of temporary total disability under subsection (1) is calculated by reference to the average earnings of the worker at the date of the **recurrence**, the compensation must be without deduction of the compensation payable for

the permanent partial disability; but the total compensation payable must not exceed the maximum payable under this Part at the date of the **recurrence**.

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

[emphasis added]

(b) Section 96(2)

The current section 96(2) of the Act was enacted effective March 3, 2003 as a result of Bill 63. It provides:

96(2) Despite subsection (1), at any time, on its own initiative, or on application, the Board may reopen a matter that has been previously decided by the Board or an officer or employee of the Board under this Part if, since the decision was made in that matter,

(a) there has been **a significant change in a worker's medical condition** that the Board has previously decided was compensable, or

(b) there has been **a recurrence** of a worker's injury.

[emphasis added]

(c) Section 35.1

As stated earlier, Bill 49 resulted in changes to the benefit scheme under the Act that were effective as of June 30, 2002. The current section 35.1 specifies whether the current or former provisions of the Act apply to entitlement to various benefits. Section 35.1(8) is the statutory foundation for item #1.03(b)(4). It provides, in part:

Transitional

35.1 (1) In this section, "transition date" means the date that this section comes into force.

(2) Subject to subsection (7), this Act, as amended by the *Workers Compensation Amendment Act, 2002*, applies to an injury that occurs on or after the transition date.

> (3) Subject to subsections (4) to (8), this Act, as it read immediately before the transition date, applies to an injury that occurred before the transition date.
>
> (4) Subject to subsections (5) to (8), if a worker's permanent disability first occurs on or after the transition date, as a result of an injury that occurred before the transition date, this Act, as amended by the *Workers Compensation Amendment Act, 2002*, applies to the permanent disability.
>
> …
>
> (8) If a worker has, on or after the transition date, a **recurrence** of a disability that results from an injury that occurred before the transition date, the Board must determine compensation for the **recurrence** based on this Act, as amended by the *Workers Compensation Amendment Act, 2002*.
>
> [emphasis added]

In this case, the worker's claim relates to an occupational disease. Although section 35.1(8) refers to an "injury", in light of sections 6(1) and (2) of the Act, I interpret "injury" to include an occupational disease. Section 6(1) of the Act provides compensation is payable for an occupational disease "as if the disease were a personal injury arising out of and in the course of that employment" and section 6(2) provides "[t]he date of disablement must be treated as the occurrence of the injury".

(d) Item #1.03(b)(4)

Item #1.03(b)(4) (previously item #1.00(4)) has the following history:

- Item #1.00(4) was among the many policies that the panel of administrators brought into effect through Resolution of the Panel of Administrators' *Decision No. 2002/06/18-02*, "Policies in Regard to the *Workers Compensation Amendment Act*, 2002", June 11, 2002, published at 18 WCR 363. From June 30, 2002 to October 15, 2002, item #1.00(4) read as follows:

  > **A recurrence is to be distinguished from a deterioration.** An example of a **recurrence** is where there has been total recovery from a disability and wage-loss payments have been terminated. Subsequently, there is a **recurrence** of the disability and the claim is reopened. **An example of a deterioration is where a disability award has been assessed and the disability subsequently worsens.**
  >
  > [emphasis added]

The worker, the vice chair who has referred this matter to me, and all participants who have made submissions, other than the employers' adviser, take the view that characterizing a deterioration as different from a recurrence reflects the appropriate interpretation of section 35.1(8).

- By Resolution of the Panel of Administrators' *Decision No. 2002/10/16-08*, "Recurrence of Disability", October 16, 2002, the panel of administrators amended item #1.00(4) effective October 16, 2002. The resolution states, in part:

> WHEREAS:
>
> > Pursuant to section 82 of the *Workers Compensation Act*, RSBC 1996, Chapter 492 and amendments thereto *("Act"),* the Panel of Administrators ("Panel") must approve and superintend the policies and direction of the Workers' Compensation Board ("Board"), including policies respecting compensation, assessment, rehabilitation and occupational safety and health, and must review and approve the operating policies of the Board;
>
> AND WHEREAS:
>
> > Effective June 30, 2002, the *Act* was amended by the *Workers Compensation Amendment Act*, 2002, resulting in changes to compensation benefits for injured workers;
>
> AND WHEREAS:
>
> > Section 35.1(8) of the *Act* provides a transitional provision to address situations where a worker suffers a **recurrence** of a disability;
>
> AND WHEREAS:
>
> > The Board's policy regarding the transition rules is provided in policy item #1.00 of the *Rehabilitation Services & Claims Manual,* Volume II, ("*RS&CM II")*;

AND WHEREAS:

> Policy item #1.00 distinguishes a **recurrence of a disability** from a **deterioration of a permanent disability** with no further explanation;

AND WHEREAS:

> Clarification is required with respect to whether compensation for the **recurrence** of a disability includes a **deterioration of a permanent disability** is to be determined under the current provisions of the *Act*;

…

THE PANEL OF ADMINISTRATORS RESOLVES THAT:

1. **Policy item #1.00 of the *RS&CM II* is amended to remove the distinction between a deterioration of a permanent disability and a recurrence of a disability, and to clarify the application of section 35.1(8) of the *Act*.**

…

5. The amendments to policy items #1.00, #70.10, and #70.20 of the *RS&CM II*, as attached, are approved.

6. The amended policies are effective October 16, 2002, and will apply to all adjudication decisions made on or after that date.

[emphasis added]

As a result of the resolution, effective October 16, 2002, item #1.00(4) was amended to read as follows:

> If an injury occurred before June 30, 2002, and the disability **recurs** on or after June 30, 2002, the current provisions apply to the **recurrence**.
>
> For the purposes of this policy, a **recurrence** includes any claim that is re-opened for:
>
> - any additional period of temporary disability where no permanent disability award was previously provided in respect of the compensable injury or disease;

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

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

The following are examples of a **recurrence**:

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

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

[emphasis added]

This is the version of item #1.00(4) that has been applied by the Board and the Review Division in adjudicating the worker's claim.

- By Resolution of the Board of Directors, *Decision No. 2003/06/17-03*, "Amendments to Chapter 1, Volumes I and II, *Rehabilitation Services & Claims Manual*", 19 WCR 15, item #1.00(4) was renumbered as item #1.03(b)(4) of RSCM I and RSCM II. It continued to otherwise be identical to the version that came into effect on October 16, 2002.

(e) Policy on Reopenings

The board of directors' policy on reopenings is contained in item C14-102.01 (Re: Changing Previous Decisions – Reopenings) of the RSCM II. It provides, in part:

(c) Grounds for reopening

A decision may be reopened if, since it was made:

- there has been a significant change in a worker's medical condition that the Board has previously decided was compensable; or
- there has been a recurrence of a worker's injury.

. . .

A "significant change" would be a physical or psychological change that would, on its face, warrant consideration of a change in compensation or rehabilitation benefits or services. **In relation to permanent disability benefits, a "significant change" would be a permanent change outside the range of fluctuation in condition that would normally be associated with the nature and degree of the worker's permanent disability.**

A claim may be reopened for repeats of temporary disability, irrespective of whether a permanent disability award has been provided in respect of the compensable injury or disease. **A claim may also be reopened for any permanent changes in the nature or degree of a worker's permanent disability.**

(d) Recurrence of injury

A recurrence of an injury may result where the original injury, which had either resolved or stabilized, occurs again without any intervening new injury. A recurrence of an injury may result in a claim being reopened for:

- an additional period of temporary disability benefits where no permanent disability award was previously provided in respect of the compensable injury;

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

- **an additional permanent disability award being provided due to a change in the nature and degree of the worker's permanent disability resulting from the original work injury.**

An example of a recurrence of an injury is where a worker has a compensable injury for which temporary disability benefits are paid. The injury resolves and the claim is closed, but later becomes disabling again without any intervening new injury. In these situations it is considered that the original injury has recurred. The result is that the worker may be entitled to an additional period of temporary and/or consideration for permanent disability compensation under the original claim.

[emphasis added]

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6. The History of the Worker's Claim

The worker was born in 1930 and retired from work as an ironworker in 1989. In February 2001, he submitted a claim to the Board for asbestos-related pleural disease. The Board accepted his claim and, by decision dated May 9, 2001, awarded him a functional pension based on impairment of 20% of total disability effective September 29, 2000.

In a decision dated February 28, 2003, a disability awards officer stated that the worker's claim had been referred to the Disability Awards Department to determine if he was entitled to an increase in his permanent partial disability pension. The disability awards officer noted the Act had been amended effective June 30, 2002 pursuant to Bill 49. Although the former section 23(1) of the Act provided that permanent partial disability pensions assessed on a functional basis were payable for life, the current section 23.1 operates to generally end those pensions at age 65 or the date the worker would have retired (if the latter date is beyond age 65). As the worker had retired, the disability awards officer concluded that, as a result of the operation of the current section 23.1 of the Act, the worker could not be granted an increase in his permanent partial disability pension. The disability awards officer also informed the worker that his existing pension would continue and be payable for life.

Although not expressly stated in the February 28, 2003 decision, the rationale for the disability awards officer's conclusion that the current provisions of the Act would be applicable to any increase in the worker's pension was based on the application of the impugned policy. In other words, the disability awards officer characterized any permanent deterioration in the worker's permanent disability as a "recurrence" under section 35.1(8).

In *Review Decision #3773,* dated October 21, 2003[2], a review officer confirmed the February 28, 2003 decision. The worker's appeal of that decision is now before the vice chair, who has referred this matter to me. The worker takes the position that, as his pensionable condition has deteriorated, his pension should be reassessed and an increased pension paid under the former provisions of the Act. The worker argues that the impugned policy is patently unreasonable under the Act.

7. The Vice Chair's June 25, 2004 Referral

In order to determine whether the impugned policy can be supported by the Act, namely the current section 35.1(8), it is necessary to examine the phrase "recurrence of a disability" found in that section and determine whether it is patently unreasonable to interpret it as including a reopening of a claim for "permanent changes in the nature and degree of a worker's permanent disability". Accordingly, the vice chair's referral memorandum is largely focused on that question.

[2] Review Division decisions are available at: http://www.worksafebc.com/review_search/advanced_search.asp

The vice chair noted the worker's representative had relied on a dictionary definition of "recurrence" in support of her position. In reviewing the dictionary definitions of "recurrence", the vice chair's referral memorandum stated:

> [In her submissions, the worker's representative noted "recurrence"] is defined by the Merriam-Webster dictionary as "to occur again after an interval." [She submits the] worker's disability did not recur, but rather it worsened or deteriorated, an entirely different process.
>
> I add that the *Oxford Concise Dictionary* defines "recur" as to "present itself again; occur again, be repeated." That dictionary defines "recurrent" as "occurring again or often or periodically." Notably, *Dorland's Illustrated Medical Dictionary*, 26th ed. defines "recurrence" as "the return of symptoms after a remission."

The vice chair agreed with the worker's representative's view that the interpretation of "recurrence" in the current section 35.1(8) that was the basis for the impugned policy could not be supported when the use of "recurrence" in sections 32 and 96(2) was taken into account.

The vice chair concluded by stating:

> [W]here there is an ongoing permanent partial disability and there is a deterioration of that disability in the absence of a further period of temporary disability, I do not think that the permanent disability has recurred.

8. Standard of Patent Unreasonableness

Section 250(2) of the Act provides:

> The appeal tribunal must make its decision based on the merits and justice of the case, but in so doing the appeal tribunal must apply a policy of the board of directors that is applicable in that case.

Section 251(1) provides:

> The appeal tribunal may refuse to apply a policy of the board of directors only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations.

Pursuant to section 251(2), if, in the course of deciding an appeal, a vice chair considers that a policy should not be applied, the issue must be referred to me, in my

capacity as chair of WCAT, for a determination as to whether the policy should be applied.

I have previously made a determination under section 251 in *WCAT Decision #2003-01800-ad*[3]*,* dated July 30, 2003. In discussing the standard of patent unreasonableness set out in section 251(1), I stated:

> The standard of patent unreasonableness is frequently used by the courts in considering applications for judicial review of decisions of administrative tribunals. Accordingly, the Legislature's choice of the patent unreasonableness standard means that the test in section 251(1) can be interpreted through reference to judgments that have considered that standard.
>
> In *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the Supreme Court of Canada noted that the three standards of review for judicial review of administrative decisions are patent unreasonableness, reasonableness *simpliciter*, and correctness. These standards have come to reflect the degree of deference that a court is granting to the administrative tribunal. The least degree of deference is granted where the correctness standard is applied. The standard of patent unreasonableness involves a significant degree of deference.
>
> For instance, in *Canada (A.G.)* v. *Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at 964, the Court explained that under the patently unreasonable test a court should only interfere with the decisions of a tribunal if the decision is "clearly irrational". Cory J., writing for the majority, stated:
>
> > It is said that it is difficult to know what "patently unreasonable" means. What is patently unreasonable to one judge may be eminently reasonable to another. Yet any test can only be defined by words, the building blocks of all reasons. Obviously, the patently unreasonable test sets a high standard of review. In the Shorter Oxford English Dictionary "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "[n]ot having the faculty of reason; irrational … . Not acting in accordance with reason or good sense". Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that

[3] WCAT decisions are available at http://www.wcat.bc.ca/research/appeal-search.htm.

> there was a loss of jurisdiction. This is clearly a very strict test.
>
> …
>
> It is not enough that the decision of the Board is wrong in the eyes of the court; it must, in order to be patently unreasonable, be found by the court to be clearly irrational.

In *Law Society of New Brunswick v. Ryan*, (2003), 223 D.L.R. (4th) 577 (S.C.C.) at 596, Iacobucci J. made the following comments concerning the standard of patent unreasonableness:

> … a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective… A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

Recent commentary on the standard of patent unreasonableness has been provided by the Supreme Court of Canada in *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92* [2004] 7 W.W.R. 411. Mr. Justice LeBel stated (at pages 424 to 425):

> 40 … Patent unreasonableness is an inadequate standard that provides too little guidance to reviewing courts, and has proven difficult to distinguish in practice from reasonableness *simpliciter*. This difficulty persists despite the many permutations it has gone through (*C.U.P.E., Local 79*, at paras. 78-83). With respect, adding yet another definition of patent unreasonableness would not make its application any easier nor its conceptual validity more obvious.
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> 41 It is illuminating in this respect to consider the definition of patent unreasonableness by Dickson J. (as he then was) in *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.,* [1979] 2. S.C.R. 227 (S.C.C.), at p. 237, which is the seminal judgment of our Court in the development of a modern law of judicial review. Rather than contemplating the metaphysical obviousness of the defect, he explained that a decision will only be patently unreasonable if it "cannot be rationally supported by the relevant legislation". This is consistent with what Iacobucci J. observed in *Ryan v. Law Society (New Brunswick),* [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.), in discussing what the reasonableness standard of review entails at para. 49: "the reasonableness standard requires a reviewing court to stay close to the reasons given by the tribunal and 'look to see' whether

> any of those reasons adequately support the decision". The "rationally supported by the relevant legislation" standard is one that not only signals that great deference is merited where discretion has been exercised, but also makes clear that a reviewing court cannot let an irrational decision stand. As I observed in *C.U.P.E., Local 79, supra,* at para. 79, this approach should apply to judicial review on any reasonableness standard.

The employers' adviser contends that the patently unreasonable standard requires me to grant a significant degree of deference to the board of directors.

The Workers' Compensation Advocacy Group has submitted that "the standard of review under section 251 is not as strict as that which a court must apply in judicial review proceedings where it is faced with a privative clause". They provide the following arguments in support of their contention that, when the chair of WCAT is determining whether a policy of the board of directors is patently unreasonable, he or she should apply a less stringent test:

- Unlike the courts, WCAT is integral to the workers' compensation system and not outside of it.

- "WCAT has far greater expertise in interpreting and applying the provisions of the Act than the WCB's Board of Directors, whose policies are under review when section 251 is invoked". As this is the opposite of the situation on judicial review where the tribunal whose decision is being reviewed is generally considered to have greater expertise than the court, the chair should be less deferential to the board of directors on issues of policy than the courts would be.

- There is a difference between the consequences of a court finding a policy to be patently unreasonable and those that flow from a similar finding by WCAT. In the former situation, the Board must discontinue its application of the policy whereas, if WCAT finds a policy to be patently unreasonable, the consequence is merely that the board of directors must review the policy and determine whether WCAT may refuse to apply it. In this way, the power of the chair to determine that a policy is patently unreasonable is tempered by the fact that the chair's determination is not binding on the Board.

The section 251 process and the standard of patent unreasonableness largely arises out of the recommendations made by Alan Winter in the *Core Services Review of the Workers' Compensation Board* (March 2002), which I will call the Core Review (see discussion from pages 92 to 96 of the report). The significant difference between the core reviewer's recommendations and what ultimately became section 251 is that the core reviewer contemplated that the board of directors would refer the matter to the British Columbia Court of Appeal if it disagreed with the WCAT chair's conclusion that a policy was patently unreasonable. The core reviewer discussed the standard of patent

unreasonableness at pages 94 to 96 and provided the following description of the standard (at page 94):

> The "patently unreasonable" standard – The focus under this approach is whether the applicable policy involves an interpretation of the *Act* which could not be rationally supported. This standard would tolerate a possible interpretation of the *Act*, no matter how strained that interpretation might be, if otherwise lawful under the *Act*.

He also noted the panel minority in *Appeal Division Decision #99-0734* and the three-member panel chaired by the chief appeal commissioner in *Appeal Division Decision #2001-2111* (18 WCR 33)[4] had determined that the standard of patent unreasonableness should be applied when the Appeal Division was considering the lawfulness of policies. In determining that the appropriate standard would be the patently unreasonable standard, the core reviewer considered the following:

(i) The power to create and approve published policies will, under the *Act*, expressly reside with the Board of Directors – not the Appeal Tribunal. The patently unreasonable standard recognizes the precedence to be given to this responsibility of the Board of Directors.

(ii) Many provisions in the *Act* confer a broad measure of discretion, leaving room for a broad range of options for consideration by the Board of Directors in adopting policy. It is not appropriate for the Appeal Tribunal to call a published policy unlawful on the basis that some other option (than that accepted by the Board of Directors) might better fulfill the objectives of the *Act*.

(iii) Policy-making generally involves a consideration of a broad range of factors, such as the legal interpretation given to the applicable provisions of the *Act*; an evaluation of the impact which various permissible options may have on the workers' compensation system; the application of values on the part of the policy-makers in selecting the preferred policy; the consideration of the views of the interested stakeholders; and a balancing of the benefits and costs of the various options. The Board of Directors' balancing of these often competing interests should not be second-guessed by the Appeal Tribunal.

[4] Published decisions are available at: http://www.worksafebc.com/publications/wc_reporter/default.asp.

I have reviewed the debates of the Legislature regarding Bill 63[5]. However, I have not identified any statements that assist me in analyzing the standard of review under section 251.

I find that the comments and analysis of the core reviewer are of assistance in interpreting the standard of review set out in section 251 and that they support the conclusion that it is a high standard requiring significant deference to the board of directors. In my view, the core reviewer took into account the appropriate principles in arriving at his recommendation of the patently unreasonable standard. I find his definition of the meaning of patently unreasonable to be consistent with the Supreme Court of Canada jurisprudence.

I do not accept the contention that the WCAT chair is to apply a less stringent standard than that applied by the courts on judicial review. In my view, if the Legislature had intended that the WCAT chair would apply a less stringent standard, it would not have used the term contained in the core reviewer's analysis, which has been the subject of such extensive judicial commentary. I find the application of the patently unreasonable standard requires the determination of whether the policy in question can be rationally supported by the Act and regulations.

In considering the application of the standard of patent unreasonableness to the matter before me, I must accept that statutory provisions are often capable of more than one interpretation and that there may be a variety of viable policy options through which a statutory provision may be implemented. It is clear from the use of the patent unreasonableness standard in section 251 that the Legislature did not intend that the section 251 process be invoked where a policy of the board of directors fails to reflect the most correct interpretation of the relevant statutory provisions but is not patently unreasonable. The first version of item #1.00(4) made a distinction between a permanent deterioration of a permanent condition and a recurrence and the impugned policy does not. However, the fact that there were two significantly different approaches to the application of section 35.1(8) does not, in and of itself, lead to the conclusion that one version is patently unreasonable. It is certainly possible that both versions could be characterized as viable.

9. Analysis

The question of whether the current section 35.1(8) of the Act supports the impugned policy requires consideration of whether it is patently unreasonable to interpret "recurrence" as including "any permanent changes in the nature and degree of a worker's permanent disability".

While the first version of item #1.00(4) recognized that a "recurrence is to be distinguished from a deterioration" in which a permanent disability worsens, the

[5] British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly (Hansard)*

impugned policy (which resulted from the October 2002 amendment) characterized "any permanent changes in the nature and degree of a worker's permanent disability" as a "recurrence". The resolution that resulted in the October 2002 amendment does not include a rationale for characterizing a deterioration as a recurrence. The matter before me turns on the question of whether "recurrence" can be interpreted to include a permanent deterioration of a permanent condition.

(a) The Positions of the Parties

The thrust of the submissions provided by the worker's representative, the Workers' Compensation Advocacy Group, and the Workers' Advisers Office is that it is patently unreasonable to interpret "recurrence" in section 35.1(8) as applicable to a deterioration in a worker's permanent condition. Their submissions are based on the plain meaning of "recurrence" and the use of "recurrence" in sections 32 and 96(2) of the Act.

The employers' adviser states, in part:

> We submit that the wording under policy item [1.03(b)(4)] can be viewed as being consistent with the legislative intention to transfer new events on old claims into the amended Act as a transitional objective. Furthermore, we submit that policy [1.03(b)(4)] is also consistent with the government's intention to ensure that workers who were injured prior to June 30, 2002 will receive benefits under the provisions of the Act as it read at the time of injury. Although, the current policy now ensures that all recurrences of a disability (temporary and permanent conditions) are adjudicated under the current provision, there would be no reduction in benefits that were awarded prior to the transition date.

(b) Relevant Principles of Statutory Interpretation

Statutory interpretation in Canada is governed by the "modern principle". This principle was formulated in 1974 by Professor Elmer Driedger in the first edition of the *Construction of Statutes*[6] as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

In 1998, the Supreme Court of Canada in *Re Rizzo and Rizzo Shoes Ltd.*[7], declared the modern principle as the preferred approach to statutory interpretation. In 2002, in *R. v. Jarvis,*[8] the Court restated the modern principle in this way (at paragraph 77):

[6] Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974) at p.67

> The approach to statutory interpretation can be easily stated: one is to seek the intent of Parliament by reading the words of the provision in context and according to their grammatical and ordinary sense, harmoniously with the scheme and the object of the statute.

The Supreme Court of Canada has repeatedly cited and applied the modern principle in a wide variety of cases.[9] Most recently, Bastarache J., writing for the dissent in *Marche v. Halifax Insurance Co.*[10], said this about the "ordinary meaning" analysis:

> The interpretation begins with the ordinary meaning. But what does this first stage involve? Professor Sullivan, at p. 21, explains:
>
> > The expression "ordinary meaning" is much used in statutory interpretation, but not in any consistent way. Sometimes it is identified with dictionary meaning, sometimes with literal meaning and sometimes with the meaning that results after the words to be interpreted are read in total context. Most often, however, it refers to the reader's first impression meaning, the understanding that spontaneously emerges when words are read in their immediate context ...
>
> Hence, as expressed by Gonthier J. in *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735, the ordinary meaning is "**the natural meaning which appears when the provision is simply read through**".
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> [emphasis added]

Regarding the contextual analysis, Bastarache J. stated[11]:

> I will examine this second factor of the modern approach in three steps. First, I will scrutinize the immediate context of the impugned words: the provision in which the words appear and any closely related provisions. Second, I will follow with an inquiry into the broader context of the section, i.e., the Act as a whole to determine the intention of the legislator. Finally, I

[7] [1998] 1 S.C.R. 27, at 41, per Iacobucci J.
[8] [2002] 3 S.C.R. 757, 2002 SCC 73, per Iacobucci J. and Major J.
[9] See *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, per Estey J. (taxation); *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, at p. 1134, per Dickson C.J. (administrative); *R v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, per McLachlin C.J. (criminal); *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 28, per Iacobucci J. (admiralty); *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27, per Iacobucci J. (immigration); *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 .C.R. 559, 2002 SCC 42, at para. 26, per Iacobucci J. (radiocommunication); *Marche v. Halifax Insurance Co.*, 2005 SCC 6, per dissent by Bastarache J.
[10] 2005 SCC 6, at para 59. The majority of the court in this case did not disagree with the dissent on its expression of the basic statutory interpretation framework, although Bastarache J. did disagree with the majority on the emphasis it placed on certain interpretative factors
[11] *Marche,* supra, at para 66

> will review the external context, that is the historical settings in which [the section] was enacted (see Sullivan, at pp. 260-62)

The types of external contextual factors to consider vary from case to case, but often include information about the legislative evolution and history of the provision and Act such as previous versions of the provision, legislative debates about its enactment, and government commissioned reports related to the proposed amendments.

In British Columbia, the modern principle is buttressed by section 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 which provides:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

I will now apply these statutory interpretation principles to section 35.1(8) of the Act. I will start by considering the objects of the Act and section 35.1. I will then turn to the ordinary meaning of "recurrence" and the question of whether it has a special meaning within the workers' compensation context. Finally I will consider the use of "recurrence" in sections 32 and 96(2) of the Act to assist in determining its meaning in section 35.1(8).

(c) The Object of the Act

The object of the Act is to provide "no fault" compensation to workers who sustain injuries arising out of and in the course of their employment or develop occupational diseases due to the nature of their employment. The Act establishes that the accident fund is funded through employer assessments. It also establishes the Board's important role in the prevention of workplace injuries and occupational diseases.

I have reviewed the debates of the Legislature regarding Bills 49 and 63 and the Core Review and have not found any references to the transitional provisions in section 35.1 or any excerpts relevant to the specific question before me. However, it is useful to consider some of the general comments of the Minister of Skills Development and Labour regarding Bill 49. During the May 16, 2002 second reading of the Bill (*Hansard*, Volume 8, No. 3), the Minister raised concerns about the financial impact on the Board of the continuation of the benefit scheme then in place and outlined the following goals of Bill 49 (at page 3547):

> The goals of this bill are to restore the system to financial sustainability by bringing costs under control, to make the system more responsive and to maintain benefits for injured workers, which are among the highest and best in Canada, while ensuring fairness for workers and employers.

Thus, one of the purposes of the Legislature in enacting Bill 49 was to reduce the costs of workers' compensation benefits in order to support the ongoing sustainability of the Board's accident fund. Generally speaking, the cost of benefits awarded under the current Act after June 30, 2002 is less than under the former Act. Therefore, to the extent that the transitional provisions, such as section 35.1(8), result in benefits being awarded under the current provisions, the object of reducing global compensation costs is met.

At page 3548, the Minister stated:

> Let me emphasize again that **this bill does not reduce any benefits already awarded to injured workers**. I just want to say that again for people to understand, because there could be people who are fearful that these changes relative to the benefit they're receiving today will be changed. That is not correct. I will say it again. This bill does not reduce any benefits already awarded to injured workers. **The new method of calculating benefits applies only to those benefits awarded after this legislation comes into force.**
>
> [emphasis added]

Section 35.1(2) provides that the current Act applies to all injuries that occur on or after June 30, 2002. Taken on its own, it could be argued that the Minister's statement supports the conclusion that the Legislature intended that Bill 49 would also apply to any benefits awarded by the Board under pre-June 30, 2002 claims after June 30, 2002. However, if this were the case, it seems that section 35.1(2) would have stated that the current Act applies to all benefits awarded after June 30, 2002. In addition this argument is not consistent with the ordinary meaning of section 35.1(4). It provides that, if a worker who was injured prior to June 30, 2002 is awarded a permanent disability pension after that date, the factor that determines whether the former or current provisions apply is whether the "permanent disability first occurs on or after [June 30, 2002]". If so, subject to sections 35.1(5) to (8), the current provisions will apply to the pension.

If the object of section 35.1 were to ensure that all benefits awarded after June 30, 2002 were payable under the current Act, this would help support the goal of reducing the global cost of compensation benefits. However, in my view, the object of section 35.1 is to distinguish between those benefits which are to be adjudicated under the former and the current sections of the Act.

(d) The Ordinary Meaning of Recurrence and its Meaning in the Workers' Compensation Context

The submissions in support of the position that the impugned policy is patently unreasonable rely heavily on the dictionary definitions of "recur". I have therefore reviewed the discussion starting at page 26 of *Construction of Statutes* regarding the pitfalls of relying on dictionary definitions to interpret statutes. Although the authors note that judges frequently rely on dictionary definitions, they also identify a variety of problems associated with doing so. For instance, the meanings of words may vary from dictionary to dictionary and even minor differences may become significant when a statute is being interpreted. In addition, they note that there is no official or standard dictionary in Canada. They also comment that words have different meanings depending on the context but the meanings provided in dictionaries tend not to be contextual.

Although I am mindful of the potential pitfalls, in this determination I find that it is appropriate to consider the dictionary definitions of "recur" that were included in the vice chair's referral memorandum because they are sufficiently clear, consistent, and unambiguous. I find it compelling that the plain meaning of "recur" is "to occur again". In my view, this is a fundamentally different concept from a permanent change in a permanent condition. Such a permanent change can be characterized as a deterioration (as it was in the first version of item #1.00(4)). In the *Concise Oxford English Dictionary* (10th ed. revised), "deteriorate" is defined as "become progressively worse". Therefore, I find that a deterioration is not synonymous with a recurrence. In fact, I find that "deterioration" and "recurrence" refer to fundamentally different processes.

In concluding that I may rely upon the dictionary definition of "recurrence", I have considered whether there is a basis on which to conclude that it has a different meaning in the workers' compensation system that would render its common use inapplicable. I recognize that there are other terms that have a different meaning in the workers' compensation context than are attributed to them in normal circumstances. For instance, in the *Concise Oxford Dictionary* (10th ed. revised), the word "permanent", which is used in section 23 (as well as other sections of the Act), is defined to mean "lasting or remaining unchanged indefinitely, or intended to be so; not temporary". However, item #34.54 of the RSCM II provides that a condition is permanent if it is not likely to change over a 12-month period. Accordingly, the word "permanent" is illustrative of the concept that the manner in which a term is used in the workers' compensation system may differ from common parlance.

I have reviewed the history of the use of "recurrence" to determine whether there is support for such a specialized definition for this term in the workers' compensation context. Prior to the 1991 changes in the governance structure of the Board, the commissioners of the Board were charged with the policy-making function. They issued a series of decisions entitled "The Recurrence of Disability" regarding section 32 of the

Act (formerly section 30). Section 32 deals with the amount of compensation payable in certain circumstances where further benefits are payable three or more years after the injury. Sections 32(1) and (2) deal with recurrences of temporary partial or total disability after the lapse of three years and section 32(3) deals with situations in which a permanent disability or an increased degree of permanent disability occurs more than three years after the injury.

In *Decision No. 81,* dated December 12, 1974 (1 WCR 308), the former commissioners used the word "recurrence" in connection with a recurrence of temporary partial or total disability and, significantly, in connection with "an increase in residual permanent disability" under the then section 30(3). This decision taken alone might support the argument that the meaning of the word "recurrence" in the workers' compensation system differs from the common meaning and includes a deterioration of a permanent disability. One could then argue that, in enacting section 35.1(8), the Legislature was aware of this meaning of recurrence and intended it to be applicable. In those circumstances a policy, such as the impugned policy, that characterizes "any permanent changes in the nature and degree of a worker's permanent disability" as a "recurrence" could be supported by the Act.

However, subsequently, in *Item No. 249*, dated July 15, 1977 (3 WCR 137), the commissioners used "recurrence" in connection with other aspects of the then section 30 but used the term "occurrence" of disability in connection with section 30(3) (now 32(3)). In *Decision No. 406*, dated January 16, 1986 (6 WCR 57), the commissioners continued to use the word "occur" in connection with an increased degree of permanent disability by entitling the policy related to section 32(3) as "Permanent Disability Occurring or Increasing More Than Three Years After Injury". This use of "occur" rather than "recur" has been maintained in item #70.20 of RSCM I and II.

Accordingly, although the former commissioners, in their decisions entitled "The Recurrence of Disability", outlined policies under section 32(3) for compensation for an "increased degree of permanent disability" more than three years after the injury, they did not specifically use the term "recurrence" in that regard after July 15, 1977. I am not of the view that, prior to the enactment of section 35.1(8), a "recurrence" in the context of the workers' compensation system, was generally applied to a permanent deterioration of a permanent disability.

In light of the ordinary meaning of "recurrence", I conclude section 35.1(8) cannot be rationally interpreted to mean that there is a "recurrence" when a permanent disability for which a pension was granted under the former Act permanently gets worse or deteriorates after June 30, 2002. In other words, I find the impugned policy to be patently unreasonable under the Act.

(e) Sections 32 and 96(2)

My determination that the impugned policy cannot be rationally supported by section 35.1(8) is strengthened when I consider the wording of the current sections 32 and 96(2) of the Act. In considering these provisions, the following principles of statutory interpretation enunciated in *Construction of Statutes* are relevant:

- The presumption of consistent expression, which is discussed at pages 162 to 163 as follows:

> It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to avoid stylistic variation. Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended. Given this practice, it then makes sense to infer that where a different form of expression is used, a different meaning is intended.

- The presumption against tautology, which is discussed at pages 158 to 159 as follows:

> It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose. In *Hill v. William Hill (Park Lane) Ltd.,* [[1949] A.C. 530, at 546 (H.L.)], Viscount Simons wrote:
>
> > [Al]though a Parliamentary enactment (like parliamentary eloquence) is capable of saying the same thing twice over without adding anything to what has already been said once, this repetition in the case of an Act of Parliament is not to be assumed. **When the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately**

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> **before.** The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which would not be there if the words were left out.
>
> [emphasis added]

As stated earlier, section 32 provides for the manner in which a worker's compensation is calculated when a claim is reopened more than three years after the injury. While sections 32(1) and 32(2) use the term "recurrence" in the context of further periods of temporary partial or temporary total disability, the term "recurrence" does not appear in section 32(3), which deals with the occurrence of a permanent disability or an increased degree of permanent disability. Section 32(3) characterizes "an increased degree of permanent disability" as something that "occurs". It does not refer to it as something that "recurs". It is clear to me that a deterioration in a permanent disability is "an increased degree of permanent disability". The application of the presumption of consistent expression leads to the conclusion that the Legislature would have used the word "recurs" rather than "occurs" to refer to "an increased degree of permanent disability" in section 32(3) if it had intended such an increase to be characterized as a recurrence.

Since the title of section 32 is "Recurrence of disability", I have considered whether that alone is sufficient to support the conclusion that "an increased degree of permanent disability" under section 32(3) can be said to be a recurrence. Section 11(1) of the British Columbia *Interpretation Act* provides:

> 11(1) In an enactment, a head note to a provision or a reference after the end of a section or other division
>
> (a) is not part of the enactment, and
>
> (b) must be considered to have been added editorially for convenience of reference only.

The question that arises is whether the title of section 32 is a "head note" for the purposes of section 11. The B.C. Court of Appeal considered the meaning of this section in *Peters v. Chilliwack (District)* (1987), 43 D.L.R.(4th) 523. In light of that judgment, I find section 11(1) of the *Interpretation Act* applies to the title of section 32. Accordingly, I find the title "Recurrence of disability" cannot support the conclusion that an "increased degree of permanent disability" in section 32(3) constitutes a recurrence. However, as two of the three subsections of section 32 address recurrence of temporary disability, I note the title of the section properly applies to most of the provision.

Therefore, based on my analysis of the presumption of consistent expression, I conclude that the term "recurrence" in the current section 35.1(8) cannot be rationally interpreted to include "any permanent changes in the nature and degree of a worker's permanent disability". It is consistent with the use of "recurrence" and "occurs" in section 32 to characterize a "permanent change in the nature and degree of a worker's permanent disability" as something that "occurs" rather than as a "recurrence".

The wording of section 96(2) is problematic as it refers to the "recurrence of a worker's injury" rather than "a recurrence of a disability" (the phrase used in section 35.1(8)) thus signaling that the Legislature intended that a distinction would be drawn between two different types of recurrence. (I also note that sections 32(1) and (2) refer to the recurrence of disability but section 32(1) introduces the concept of calculating "the compensation as if the recurrence were the happening of the injury".) I find the existence of these two different concepts (that is, recurrence of disability and recurrence of injury) to be troublesome and difficult to interpret. However, I do not find the question before me turns on resolving this distinction. Therefore, I find it unnecessary to do so for the purposes of this determination.

The application of the presumption against tautology leads to the conclusion that the Legislature clearly intended that there be a difference between "a significant change in a worker's medical condition that the Board has previously decided was compensable" (the phrase that appears in section 96(2)(a)) and "a recurrence of a worker's injury" (the phrase that appears in section 96(2)(b)).

I note item C14-102.01 (RE: Changing Previous Decisions – Reopenings) appears to some extent to treat sections 96(2)(a) and (b) as if they have overlapping meanings. The policy discusses a reopening of a claim for a permanent change in a permanent disability under both sections. This seems to ignore the presumption that the Legislature would not have intended section 96(2)(b) to have the same meaning as section 96(2)(a). In order for section 96(2)(a) to be meaningful, it must be interpreted as referring to something other than a recurrence.

In my view, the better interpretation of section 96(2) is that a reopening for a permanent deterioration in a permanent disability falls into the category of "a significant change in a worker's medical condition" rather than "a recurrence of a worker's injury". However, I would not find strong support for my conclusion that the impugned policy is patently unreasonable on the basis of a review of section 96(2) alone, given the interpretive challenges I have identified, and in the absence of my analysis regarding the dictionary definition of "recur" and section 32 and the ordinary meaning of "recur".

(f) Summary

In summary, I agree with the position of the employers' adviser that the standard of patent unreasonableness is a very high standard that demands significant deference to the board of directors. However, I find the impugned policy cannot be rationally supported by section 35.1(8) of the Act. I find that the impugned policy is so seriously flawed that it cannot be allowed to stand. My conclusion is based largely on my analysis of the ordinary meaning of "recur" and the application of the presumption of consistent expression. While my analysis of section 96(2) supports my conclusion, I acknowledge the interpretive difficulties related to that section. For the purposes of section 35.1(8) of the Act, I find it patently unreasonable to characterize a reopening of a claim for "any permanent changes in the nature and degree of a worker's permanent disability" as a "recurrence".

In making this determination, I have been mindful of the Supreme Court of Canada's judgment in *Canada (Director of Investigation and Research) v. Southam Inc.,* [1997] 1 S.C.R. 748, in which the Court commented:

> The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.
>
> (para. 47 (QL))

In this case, it may be debatable as to whether the defect is obvious or required further searching. It could be considered obvious in the sense that the use of "recurrence" in the impugned element of the policy is not consistent with common parlance. However, consideration of whether the policy is patently unreasonable also required consideration of the use of the word "recurrence" in the workers' compensation context and the interpretation of section 35.1(8) in the general context of the Act. Therefore, a degree of searching and testing was required in order to confirm that the use of "recurrence" in the impugned policy is not rational. The more recent judgment of the Supreme Court of Canada in *Voice Construction* (cited earlier) indicates a growing dissatisfaction with any test requiring an analysis of the "metaphysical obviousness of the defect". This judgment suggests that the Supreme Court of Canada is moving away from the notion that the defect must be immediately apparent. In addition, it is arguable that any analysis of the current Act requires "significant searching" or "testing" due to the complex interplay between provisions.

On this basis, I conclude the essence of the question before me is whether the impugned policy can be rationally supported by section 35.1(8) the Act. I find that it cannot be supported. I find the impugned policy should not be applied in the adjudication of the worker's entitlement, if any, to an increased permanent partial

disability pension. In other words, I find that such entitlement should be adjudicated under the former provisions of the Act.

(g) Item C14-102.01

My determination may draw certain elements of item C14-102.01 (Re: Changing Previous Decisions – Reopenings) of the RSCM II into question. That policy is not before me in this determination and I make no determination in that regard. However, I note that it appears that the element of that policy that characterizes a reopening for an increased permanent disability award due to a deterioration of a permanent disability as a reopening for a "recurrence of injury" can be supported by section 96(2)(a) regarding "a significant change in a worker's medical condition that the Board has previously decided was compensable" without any need to characterize such a deterioration as a "recurrence" under section 96(2)(b). In fact, the policy provides that under section 96(2)(a), "[a] claim may also be reopened for any permanent changes in the nature or degree of a worker's permanent disability".

10. The Operation of Section 251

Section 251 prescribes a series of steps that must be taken as a result of my determination that the impugned policy should not be applied. Those steps include the following:

- In accordance with section 251(5), WCAT will suspend any other appeal proceedings that can be affected by the impugned policy.

- In accordance with section 251(5), I will send notice of this determination and my reasons to the board of directors in care of the chair of the board of directors. I will enclose with the notice a list of the parties to the appeal that has led to this referral and the parties to the appeals that WCAT has suspended under section 251(5).

- In accordance with section 251(6), within 90 days of receipt of notice of this determination, the board of directors must review the policy and determine whether WCAT may refuse to apply the policy. The date for receipt of the notice is a matter to be determined by the board of directors. However, I note that WCAT's task of identifying the appeals that are to be suspended under section 251(5) may be logistically demanding. In fact, it may require a review of each appeal involving a post-June 30, 2002 reopening of a claim for a permanent deterioration of a permanent disability for which a pension had been awarded under the former provisions. Accordingly, there may be a delay between the date of this determination and the date I give formal notice of this determination to the board of directors.

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- In accordance with section 251(7), the board of directors must allow the parties to this appeal and the parties to all appeals suspended by WCAT to make written submissions.

- In accordance with section 251(8), WCAT will be bound by the board of directors' determination.

11. Conclusion

For the purposes of the current section 35.1(8) of the Act, I find the characterization in item #1.03(b)(4) of RSCM I and II (formerly item #1.00(4)) of a reopening of a claim for "any permanent changes in the nature and degree of a worker's permanent disability" as a "recurrence" to be patently unreasonable under the Act. In accordance with section 251(5) of the Act, I will send notice of this determination and my reasons to the board of directors of the Board. In addition, I will provide the board of directors with a list of the parties to the appeals that WCAT suspends under section 251(5).

Jill Callan
Chair

JC/dlh

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