November 1, 2007

Memo to: Jill Callan, Chair
Workers' Compensation Appeal Tribunal

Memo from: Heather McDonald
Vice Chair
Workers' Compensation Appeal Tribunal

RE: Section 251 Referral – Quantum of Claim Costs Levy
Policy Item #D24-73-1 of the *Prevention Manual*
Date of Decision: December 9, 2005 (*Review Decision #R0053011*)

This is a referral to the chair under section 251 of the *Workers Compensation Act* (*Act*). Under section 251(1) of the *Workers Compensation Act* (Act) I consider policy item #D24-73-1 of the *Prevention Manual* (Manual) to be so patently unreasonable that it is not capable of being supported by the Act and its regulations.

1.0 APPEAL BACKGROUND

This issue has arisen in the context of a prevention appeal. The appellant employer is a limited company. The appellant's principal and sole employee, "C", was working as a faller in July 2003 when a fatal accident occurred substantially as a result of the appellant's violation of section 26.24(1) of the *Occupational Health and Safety Regulation (*Regulation*).* In May 2005, with reference to the July 2003 accident, the Workers' Compensation Board, operating as WorkSafeBC (Board), imposed both an administrative penalty of $3,250.00 [under section 196 of the Act] and a claim cost levy of $45,485.92 [under section 73(1) of the Act] against the appellant.

I have confirmed that aspect of the Review Division decision that confirmed the Board's finding that the appellant violated section 26.24 of the Regulation. I have confirmed the Review Division's decision with respect to confirming the Board's decision to concurrently impose an administrative penalty and a claim cost levy against the appellant. I have also confirmed the quantum of the administrative penalty as $3,250.00.

The remaining issue for determination in the appeal proceedings is the quantum of the claim cost levy. The Board imposed the statutory maximum (the maximum at the time it made its decision in May 2005) under section 73(1) of the Act, namely, $45,485.92. In its submissions, as a submission in the alternative to requesting a cancellation of the claim cost levy, the appellant has argued that there are important factors in this case which justify a reduction in the claim cost levy. Specifically, the appellant has referred to the negligence of the deceased worker that also contributed to the cause of the accident, the appellant's small payroll and limited assets, and inability to pay the statutory maximum for a claim cost levy.

In *WCAT-2006-02784* (July 6, 2006), a WCAT panel granted the appellant a stay with respect to the claim cost levy. In that decision, the panel noted that the amount of the claim cost levy appeared to exceed the value of the appellant's assets and that immediate enforcement might well result in the appellant's bankruptcy. The panel also observed that the appeal raised a serious issue, namely, whether the wording in Manual policy item #D24-73-1 represents an unlawful fettering of the discretion in section 73(1) of the Act to levy "all or part" of the compensation payable.

The review officer's decision and the Board's submissions on appeal suggest that the Board did consider lowering the quantum of the claim cost levy in this case, and nevertheless decided that the circumstances of the July 2003 accident justified imposing the maximum levy specified in section 73(1) of the Act. The Review Division decision and the Board's submissions, however, do not explain the basis for the exercise of discretion with reference to the wording of Board policy, specifically Manual policy item #D24-73-1.

This is a case in which I have concluded that the circumstances justify the imposition of a claim cost levy less than the statutory maximum. However for reasons which I will explain in this memorandum, my interpretation of Manual policy item #D24-73-1 is that it constitutes an unlawful fettering of the Board's discretion in section 73(1) of the Act to levy "part" of the compensation payable "to a" maximum amount specified by the Act and regulation under section 25(4) of the Act. Because WCAT is required to apply Board policy, the policy also constitutes an unlawful fettering of WCAT's ability to vary the Board's decision by applying section 73(1) of the Act to impose a claim cost levy less than the statutory maximum. I find that this unlawful fettering of discretion renders Manual policy item #D24-73-1 so patently unreasonable that it cannot be supported by the Act and its regulations.

2.0 ACT and POLICY

Section 73(1) of the Act states:

> (1) If
>
> (a) an injury, death or disablement from occupational disease in respect of which compensation is payable occurs to a worker, and
>
> (b) the Board considers that this was due substantially to
>
> (i) the gross negligence of an employer,
>
> (ii) the failure of an employer to adopt reasonable means for the prevention of injuries, deaths or occupational diseases, or
>
> (iii) the failure of an employer to comply with the orders or directions of the Board, or with the regulations made under Part 3 of this Act,
>
> the Board may levy and collect from that employer as a contribution to the accident fund all or part of the amount of the compensation payable in respect of the injury, death or occupational disease, to a maximum of $46,684.83. [1]

Manual policy item #D24-73-1 states:

> This section may be applied if:
>
> - the grounds for an administrative penalty under Item D12-196-1 are met; and
> - a serious injury or disablement from occupational disease, or a death, results from a violation of the regulations.
>
> A claim may be reopened at any time in the future and further costs may be incurred after the decision under section 73(1). The Board will charge the employer:

[1] Note: This amount changes periodically by regulation under section 25(4) of the Act. At the time the Board levied the claim cost levy in this case, the statutory maximum was $45,485.92. The Board imposed the statutory maximum levy under section 73(1) of the Act against the appellant.

- the costs incurred up to the time of the decision; and

- any additional amounts that result from matters still under consideration by the Compensation Services Division, the Review Division or the Workers' Compensation Appeal Tribunal.

Where appropriate, the Board will apply the policies and practices set out in the following Items to the charging of claim costs under section 73(1):

- D12-196-1, -2, -3, -4;
- D12-196-8;
- D12-196-10, -11; and
- D16-223-1.

Policy item #D12-196-1 deals with the criteria for imposing administrative penalties. Policy item #D12-196-2 explains the meaning of high-risk safety violations, in the context of such violations being one criterion for considering the imposition of an administrative penalty. Policy item #D12-196-3 deals with considering prior violations and orders as a reason for imposing administrative penalties. Policy item #D12-196-4 deals with the Board's authority and its process for imposing financial penalties. Policy item #D12-196-8 deals with payment of interest on successful appeal of administrative penalties. Policy item #D12-196-10 deals with the concept of "due diligence" as a defence to an administrative penalty. Policy item #D12-196-11 deals with warning letters. Policy item #D16-223-1 deals with collection of administrative penalties by assessment or judgment.

Manual policy item #D12-196-6 is excluded from the policy items and practices that Manual policy item #D24-73-1 says the Board will apply to the charging of claim costs under section 73(1). Policy item #D12-196-6 describes basic amounts for administrative penalties based on an employer's payroll, and also provides a list of variation factors to apply in considering raising or lowering a basic administrative penalty amount by 30%.

There are no practice items related to Manual policy item #D24-73-1. Notes, found at the end of the policy, briefly summarize the history of the policy item. Those notes indicate the policy item was developed to implement the *Workers Compensation (Occupational Health and Safety) Amendment Act, 1998* [Bill 14] effective October 1, 1999. The Board's then Panel of Administrators created Manual item #D24-73-1, effective October 1, 1999, to be used in considering section 73(1) of the Act. Section 73(1) of the Act was itself a new statutory provision reflective of Bill 14's amendment of the former statutory provision dealing with claim cost levies.

Consequential changes were subsequently made to the policy statement to reflect the *Workers Compensation Amendment Act (No. 2), 2002*, on March 3, 2003. Effective December 31, 2003 a consequential change was made to include a reference to new policy item #D12-196-4 (describing the Board's authority to impose financial penalties) and the maximum amount referenced in section 73(1) was updated. The Manual notes state the policy item applies to all decisions to charge claim costs on and after March 3, 2003.

The explanatory notes to the policy item state that section 73 of the Act authorizes the Board to charge claim costs to the employer in certain circumstances. The maximum amount the Board may levy is adjusted annually in accordance with the Consumer Price Index under section 25 of the Act.

3.0 HISTORY AND PRIOR CONSIDERATION OF THE ACT AND POLICY REGARDING CLAIM COST LEVIES

History of the Act and Policy

Immediately prior to the version of the statutory claim cost levy provision applicable in this case, namely the current section 73(1) of the Act, the claim cost levy was found in the former section 73(2) of the Act. That provision read as follows:

> Where an injury, death or disablement from occupational disease in respect of which compensation is payable occurs to a worker, and the board considers that this was due substantially to the gross negligence of an employer or to the failure of an employer to adopt reasonable means for the prevention of injuries or occupational diseases or to comply with the orders or directions of the board, or with the regulations made under this Part, **the board may levy and collect from that employer as a contribution to the accident fund the amount of the compensation payable in respect of the injury, death or occupational disease**, not exceeding in any case $11 160.08[2], and the payment of that sum may be enforced in the same manner as the payment of an assessment may be enforced.
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> [bold emphasis added]

Section 73(2) of the Act was substantially the same as its predecessor section, section 61(2) of the Act. Former governors' policy concerning the exercise of the

[2] Note: this amount was changed periodically by regulation pursuant to section 25(4) of the Act.

Board's authority under section 73(2) was set out in *Reporter Decision No. 251 - Re Penalties Under Section 61(2),* 3 W.C.R. 144*. Reporter Decision No. 251* concerned the imposition of a claim cost assessment under then section 61(2) of the Act. The policy decision stated that if the Board exercised its discretion to apply a claim cost levy under section 61(2) of the Act, the Board was required to levy the full amount of the costs of the claim up to the current statutory maximum.

Bill 14 created an entirely new Part 3 to the Act. The new Part 3 addressed occupational health and safety matters. Bill 14 also repealed the former section 73(2) of the Act and replaced it with section 73(1) of the Act. Section 73(1) is found in Part 1 of the Act.

When Bill 14 came into effect, the Board policies relevant to claim cost levies were found in item #115.20 of the *Rehabilitation Services & Claims Manual* (RSCM) and the new item #D24-73-1 in the Prevention Manual. Item #D24-73-1 is reproduced above.

RSCM item #115.20 had been in existence for many years and because it pre-dated Bill 14 of course it referred to the former section 73(2) of the Act as the claim cost levy provision. RSCM item #115.20 also stated in part as follows:

> The Board has a discretion whether to charge an employer with the costs of a claim under this provision, but once it has decided to exercise that discretion, it has no choice but to charge the whole of the costs of the claim up to the maximum amount. It has no authority to charge a lesser amount or to relieve the employer in part.

This language reflected the *Reporter Decision No. 251* and the mandatory language of the earlier statutory claim cost levy provisions in sections 61(2) and section 73(2) of the Act. The language in the (then) new Manual policy item #D24-73-1 was consistent with the directions in RSCM item #115.20, as it stated that the Board will charge the employer:

- the costs incurred up to the time of the decision; and

- any additional amounts that result from matters still under consideration by the Compensation Services Division, the Review Division or the Workers' Compensation Appeal Tribunal.

Both policies, therefore, reflected the former statutory provisions that required the Board, once it exercised its discretion to impose a claim cost levy, to impose the whole of the costs of the claim up to the statutory maximum amount.

Manual policy item #D24-73-1 was in existence at the time of the July 2003 accident in this case as well as in May 2005 when the Board imposed the claim cost levy against the appellant. It continues in existence today with the same language as when it came into effect on October 1, 1999.

In May 2005 when the Board imposed the claim cost levy against the appellant, RSCM policy item #115.20 was also in existence in Volume I, with the same language referring to the former section 73(2) of the Act and the direction that the Board must charge the whole of the costs of the claim, up to the statutory maximum amount, when imposing a claim cost levy. The current version of RSCM Volume I (last amendment August 2007) also reflects the same language in policy item #115.20.

In July 2003, at the time of the fatal accident in this case, Volume II of the RSCM still contained policy item #115.20 with the same language referring to the former section 73(2) of the Act. In May 2005 when the Board imposed the claim cost levy against the appellant, Volume II of the RSCM no longer contained policy item #115.20. Policy item #115.20 was deleted from Volume II of the RSCM by *Resolution 2003/12/16-02* of the Board of Directors. The deletion was effective December 16, 2003. That *Resolution* states that RSCM II policy item #115.20 would be replaced, effective December 31, 2003 by RSCM II policy item #113.00. Policy item #113.00 discusses the significance of an employer's conduct in producing injury and refers in general terms to charging the class or subclass of employers of which an injured worker's employer is a member. Policy item #113.00, however, has nothing relevant to say about quantum of a claim cost levy imposed under section 73(1) of the Act.

Prior Consideration of the Act and Policy by WCAT and Appeal Division

Apart from *WCAT-2006-02784* (July 6, 2006), the stay decision applicable to the claim cost levy in this case, I have not found any prior WCAT decision concerning a levy of claim costs under section 73(1) of the Act, nor concerning Manual policy item #D24-73-1 in the context of section 250(2) of the Act.

In *Appeal Division Decision #2001-1547* (August 3, 2001), the panel was dealing with the (then) new version of the statutory provision authorizing the Board to impose a claim cost levy, the current section 73(1) of the Act. The panel referred to *Reporter Decision No. 251*, observing that the former Board commissioners had concluded that the former section 61(2) of the Act appeared to leave the Board no discretion as to the amount of the penalty. The panel stated: "This is not the case under the new section 73(1). The Board may now levy all or part of the amount of the compensation payable in respect of an injury up to a maximum amount." The Appeal Division panel did refer, in general terms, to RSCM policy item #115.20 and to Manual policy item #D24-73-1, but did not comment on the aspects of those policies indicating the Board was required to charge the whole of the costs of the claim up to the maximum of the statutory amount. Unlike

WCAT, the Appeal Division was not faced with a provision akin to the current section 250(2) of the Act that required it to apply relevant Board policy. The Appeal Division treated Board policy as in the nature of general guidelines, and the Appeal Division could veer from those guidelines when it considered that the policy did not reflect the language, purpose or intent of the Act.

In *Appeal Division Decision #2002-0589* (March 6, 2002), the Board had imposed a claim cost levy at the quantum of the statutory maximum in section 73(1) of the Act. The reviewing officer had lowered the quantum, referring to the employer's small size. The reviewing officer imposed a claim cost levy of only $3,500.00. At the time of the appeal, the former section 96(6) of the Act required grounds for employers' appeals. The Appeal Division panel, in the context of determining whether there were grounds for appeal, found no error in the reviewing officer's decision to impose a claim cost levy lower than the statutory maximum. There was no argument or analysis regarding the Board's jurisdiction to impose a claim cost levy lower than the maximum amount specified in section 73(1) of the Act. The panel did not refer to RSCM policy item #115.20 or to Manual policy item #D24-73-1. Again, in those days, the Act did not contain a provision akin to the current section 250(2). The Appeal Division was not required to apply Board policy.

In *Appeal Division Decision #2002-1540* (June 21, 2002), the employer's appeal of a claim cost levy was also considered in the context of whether grounds for appeal had been established under section 96(6) of the Act. In that context, the panel stated:

> As to the quantum of the claims cost levy, the reviewing officer is correct that the published policy does not give much guidance on what the amount should be. The reviewing officer acknowledged that the worker could have used a ladder but chose not to. He imposed the costs shown in the notice letter [$5,905] rather than the amount at the date of his hearing [$14,917.99]. I do not find an error of law, fact or contravention of published policy in this decision. In the absence of an error as specified in section 96(6) of the *Act,* it is not open to me to substitute my own judgement as to the quantum for that of the reviewing officer. Having found no error of fact, law or contravention of published policy by the reviewing officer, I uphold the quantum of the claims cost levy imposed by the reviewing officer.

The Appeal Division panel referred to Manual policy item #D24-73-1 but not to RSCM policy item #115.20. But again, there was no argument or analysis regarding the Board's jurisdiction to impose a claim cost levy lower than the maximum amount specified in section 73(1) of the Act. Once more I note that the Act at that time did not require the Appeal Division to apply Board policy.

Appeal Division Decision #2002-1769/1770 (July 11, 2002) concerned an administrative penalty imposed under section 196 of the Act and a claim costs levy under section 73(1) of the Act. The Appeal Division panel noted that on its face, RSCM policy item #115.20 was concerned with the relationship between the former section 73(1) and (2). The panel found it "evident" that RSCM policy item #115.20 had not been reviewed, in the context of the Bill 14 amendments effective October 1, 1999, by the Board's panel of administrators. The Appeal Division panel found RSCM policy item #115.20 to be "obsolete", stating that it could not reasonably be assumed to reflect the "current intention of the panel of administrators in terms of providing policy guidance concerning the relationship between the current s. 73(1) and s. 196 of the Act." At paragraph 42 of the decision, the Appeal Division panel concluded as follows:

> In view of our conclusion that the policy at #115.20 is obsolete, based on its reference to the authority in s. 73(2) to impose a claim costs levy, a review of #115.20 is clearly required. The chief appeal commissioner will bring this concern to the attention of the panel of administrators. It may well be desirable, in any review of #115.20, **to provide additional policy guidance** as to the general circumstances in which consideration will be given to levying the costs of a claim against an employer under section 73(1) of the *Act***, and concerning the situations in which the maximum amount under s. 73(1) should be levied**. This might include policy direction as to the meaning and application of the situations in section 73(1)(b) of the *Act*.
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> [bold emphasis added]

The Appeal Division panel did not refer to Manual policy item #D24-73-1.

In *Appeal Division Decision #2002-2211* (August 22, 2002), the panel was considering the Board's decision to impose both an administrative penalty and also a claim cost levy. The Board imposed the statutory maximum in quantum for the claim cost levy. The Appeal Division panel confirmed the Board's decision. The Appeal Division panel also found RSCM policy item #115.20 to be obsolete. The panel referred to Manual policy item #D24-73-1 by stating that the policy clarified the criteria for when the Board's discretion to impose a claim cost penalty may be exercised. The panel did not analyze the quantum issue with respect to the claim cost levy except to state as follows:

> The employer's legal counsel has not submitted in his June 21, 2002 written submission that the requirements of section 73(1) of the Act, and the policy criteria for exercising this discretion as outlined in Prevention Division policy D24-73-1 [or Decision 251, 3 WCR 144] have not been met. He has also not addressed the issue of the quantum of the claims cost levy imposed by the reviewing officer. I acknowledge that there is

> little policy guidance given as to how to determine what the quantum should be for a claims cost levy. Even if I were to address these issues in this appeal, I would also have found no error in law, fact or contravention of published policy by the reviewing officer in finding that the Act and policy criteria for imposing a claims cost levy have been met, or in the quantum that he imposed.

In *WCAT-2006-02784*, the panel referred to the significant changes made by Bill 14 regarding the calculation of quantum for administrative penalties imposed under section 196 of the Act. The panel noted as follows:

> Prior to the Bill 14 changes, the Act contained no maximum as to the amount of an administrative penalty which could be imposed. The Bill 14 changes included the introduction of a $500,000.00 maximum administrative penalty. The former board of governors embarked on a lengthy review and consultation regarding the effect of this statutory maximum. Consideration was given as to whether this was a statutory "cap", which did not necessarily impact the schedule of penalties, or whether it signalled a need to revise the penalty schedule to provide a range of penalties which incorporated this maximum. The highest amount in the former recommended schedule of sanctions was $30,000, for a "Type IV" violation by an employer with a payroll over $11,440,000. By resolution of September 21, 1999, the panel of administrators approved the extension of the former schedule while the policy was reviewed. The panel of administrators subsequently approved new policy effective May 1, 2000, with a range of penalties linked to the seriousness of the violation, the size of the employer's payroll, and a range of "variation factors". The new policy further provided that with the approval of the President or delegate, the Board could levy an administrative penalty up to $250,000 where the employer had committed a high risk violation wilfully or with reckless disregard, and a worker had died or suffered serious impairment as a result. In the case of multiple fatalities or systemic disregard by the employer for worker safety, the statutory maximum penalty could be imposed.

The WCAT panel went on to observe, as I have noted earlier in this memorandum, that Manual policy item #D24-73-1 was initially approved effective October 1, 1999, as part of the policy changes for implementing Bill 14. On its face, the policy appears to require that when the Board has exercised its discretion to impose a claim costs levy, the Board will charge the employer the claim costs incurred up to the time of the decision and any additional amounts that result from matters still under consideration by the Compensation Services Division, the Review Division or WCAT. The WCAT panel noted that the wording of Manual policy item #D24-73-1 does not appear to

address the Board's discretion under section 73(1) of the Act to impose a levy of "all or part" of the amount of the compensation payable, up to the statutory maximum specified.

4.0 ANALYSIS

Canadian law is clear that when discretion is conferred upon an administrative tribunal, the tribunal may not restrict it or fetter it in scope. See *Testa v. British Columbia (Workers' Compensation Board*), 58 D.L.R. (4th) 676, where the British Columbia Court of Appeal found a Board decision to be patently unreasonable in that it ignored the "broad statutory basis upon which the discretion of" the Board was to be exercised, and it involved the "blind application of a policy laid down in advance."

Sara Blake points out in *Administrative Law in Canada*, 4th ed (2006) at page 99 that if a statute requires the application of policies or directives, then they must be applied because they have the status of law. However, she also notes that the decision-maker retains discretion to consider whether the policy applies in the circumstances of the case before it. Further, at page 98, Ms. Blake states that where discretion is given by statute, the formulation and adoption of general policy cannot confine it. She observes that "A policy may not contradict the statute or regulation." See *Maple Lodge Farms Ltd. v. Canada* (1980), 114 D.L.R. (3d) 634 (F.C.A.), affd [1982] 2 S.C.R. 2, 44 N.R. 354 at 358. See also *Fairhaven Billiards Inc. v. Saskachewan (Liquor & Gaming Authority)*, [1999] S.J. No. 307 (C.A.). A tribunal, upon whom discretion is conferred by statute, may not refuse to exercise that discretion.

Under the former claim costs levy provisions, the Act provided the Board with a discretion to impose a claim cost levy, but the quantum was specified as the "**the amount** of the compensation payable" to the statutory maximum. Former Board policy in *Reporter Decision No. 251* and RSCM item #115.20 recognized that there was no discretion to charge less than the whole of the costs of the claim up to the statutory maximum.

Section 73(1) of the Act constituted a distinct change from its predecessor provision, section 73(2), in that for the first time, the claim costs levy provision referred to the Board's discretion to charge "**all or part of the amount** of the compensation payable" in respect of the claim injury, death or occupational disease, to a maximum set by the Act and changed periodically by regulation.

When Bill 14 was introduced, including the new claim cost levy provision in section 73(1), RSCM policy item #115.20 was not immediately amended or replaced although it was clearly obsolete in its outdated references to the former claim cost levy provision and the mandatory quantum of the whole of the costs of the claim up to the statutory maximum. Despite recommendations from the Appeal Division to "fix" RSCM

policy item #115.20, it remained in place throughout the March 3, 2003 legislative and policy changes. Indeed, policy item #115.20 continued to be found in Volume II of the RSCM until December 31, 2003.

Manual policy item #D24-73-1 is consistent with the directions in the obsolete RSCM II item #115.20. Policy item #D24-73-1 states that when the Board imposes a claim costs levy, the Board "will charge the employer" the costs incurred up to the time of the decision, and any additional amounts that result from matters still under consideration by the Board or WCAT. The policy indicates that where appropriate in the claim costs levy context, the Board will apply policies and practices related to administrative penalties, with one notable exception. That exception is the Manual policy in item #D12-196-6 involving calculation of basic amounts for administrative penalties, and the variation factors involved when considering lowering or raising the basic amount of administrative penalties.

Manual policy item #D24-73-1 gives no guidance regarding when, in imposing a claim costs levy, the Board might find it appropriate to impose less than the full costs of a compensation claim. The policy does not refer to variation factors to consider when considering imposing less than the statutory maximum and/or less than the full costs of a compensation claim.

My view is that the clear intent of Manual policy item #D24-73-1 is that the Board will not exercise any discretion to lower the quantum of a claim cost levy: it will charge the whole of the costs of the claim up to the statutory maximum. Thus in any given case, the quantum of a claim costs levy will be the whole of the costs of the claim or the statutory maximum, whichever is less.

I have researched the appropriate interpretation of the word "will" as used in Manual policy item #D24-73-1. The *Interpretation Act* and texts on the construction of statutes focus on the differences between the words "may" and "shall". I have not found them helpful with respect to the word "will" when used in statutes or regulations.

QuickLaw research in "*Words and Phrases Judicially Considered*" revealed two decisions interpreting the word "will" in a document. The first decision is an Alberta grievance arbitration decision: *Weldwood of Canada Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 855*, [2001] A.G.A.A. No. 28 (QL). This dealt with a scheduling grievance involving language in a collective agreement that stated "all tour workers *will* rotate shifts", and that "The shift schedule for each department *will* be as outlined in this Memorandum." The arbitrator found that the word "will" should be interpreted as mandatory, citing the definition of the word as "An auxiliary verb commonly having the mandatory sense of 'shall' or 'must'" in *Black's Law Dictionary*, 5th ed., p. 1433.

The other decision, *Re Criminal Code*, [2002] S.J. No. 216 (QL), also involved the Court referring to dictionary definitions of the word "will". The Court noted that the word "will" expresses a strong intention about inevitable events and that the word, in its past tense as "would", is often interchangeable with the word "should" but not with the word "could".

My interpretation of the word "will" in Manual policy item #D24-73-1 is that it reflects a mandatory direction akin to "shall" or "must" and that it should be construed as imperative.

For example, if the compensation costs of a claim were $20,000.00, Manual policy item #D24-73-1 requires the Board to charge the employer that full cost, without any discretion as indicated in section 73(1) to charge the employer "part of" the costs of the compensation. In the case at hand, the policy requires the Board to impose the statutory maximum because the compensation costs of the deceased worker's claim exceed the statutory maximum. Manual policy item D24-73-1 does not permit the Board to exercise the discretion in section 73(1) to levy "**part of the amount of** the compensation payable…**to**…" the statutory maximum, so that an amount less than the statutory maximum could be established as the quantum of the levy.

My finding is that the use of the word "will" in Manual policy item #D24-73-1, together with the exclusion of any considerations, factors or guidance regarding quantum including when it is appropriate to charge less than the full costs of a compensation claim and/or less than the statutory maximum, illustrate that the policy requires the Board always, in every case, to impose the full costs of a claim provided that it does not exceed the statutory maximum. This policy fetters the Board's discretion in section 73(1) of the Act to consider imposing a claim costs levy in a quantum that is less than the total compensation costs of the claim and/or less than the statutory maximum.

5.0 CONCLUSION

For the foregoing reasons, pursuant to section 251(1) of the Act, I consider Manual policy item #D24-73-1 to be so patently unreasonable that it is not capable of being supported by the Act and its regulations. Pursuant to section 251(2) of the Act, I refer this section 251(1) issue to the WCAT chair. I have severed the issue of quantum of the claim costs levy from these appeal proceedings and have issued my decision with respect to the other appeal issue. I suspend the appeal proceedings only with respect to the severed issue regarding quantum of the claim costs levy, pending the outcome of the process under section 251 of the Act.

RE: Section 251 Referral – Quantum of Claim Costs Levy
Policy Item #D24-73-1 of the *Prevention Manual* Date of Decision:
Date of Decision: December 9, 2005 (*Review Decision #R0053011*)

Heather McDonald
Vice Chair

HM/dw