Noteworthy Decision Summary

Decision: WCAT 2004-04880 **Panel:** Herb Morton, Steven Adamson, James Sheppard **Decision Date:** September 20, 2004

Whether former section 96(6)'s requirement to establish grounds for appeal, of an error of law or fact or contravention of a published policy, in certain employer appeals applies to transitional appeals – Grounds need not be established for appeals filed on or after March 3, 2003 (whether filed within the time limit for such appeals under section 41 of Bill 63's transitional provisions, or for which an extension of time to appeal is granted pursuant to section 2(2) of the Transitional Review and Appeal Regulation) - However, the grounds apply to appeals filed to the Appeal Division prior to March 3, 2003, which were transferred to WCAT for completion under section 39 of Bill 63's transitional provisions

The Workers' Compensation Board (Board) issued a section 39(1)(e) relief of cost decision in mid-February 2003, and the employer appealed to the Workers' Compensation Appeal Division (Appeal Division). The 30 day time limit for appealing the decision had not expired prior to the March 3, 2003 changes to the *Workers Compensation Act* (Act)contained in the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). Under section 41 of Bill 63's transitional provisions, a party may appeal to the Workers' Compensation Appeal Tribunal (WCAT) where there was an unexercised right of appeal to the Appeal Division that expired after March 3, 2003. Section 96(6) of the former Act required that the employer in certain kinds of appeals to establish grounds for appeal, of an error of law or fact or contravention of a published policy, but under Bill 63 this requirement was removed. The main issue before WCAT was whether grounds for appeal, of an error of law or fact or contravention of a published policy, under the former section 96(6) has to be established as a prerequisite in the employer's appeal, which was filed to WCAT after March 3, 2003 under section 41 of Bill 63's transitional provisions.

Section 41(4) provides strong direction that appeals under section 41 are governed by Part 4 of the Act, which does not require that grounds be established for an appeal. The panel found the wording of section 41(4) provides sufficient basis to support a decision to this effect. While section 41 concerns cases where the time frame did not expire prior to March 3, 2003, section 2(2) of the *Workers Compensation Act Transitional Review and Appeal Regulation* (Regulation) concerns extensions of time for cases where the time period expired prior to March 3, 2003. As the Regulation may be viewed as supplemental to section 41 in that both concern unexercised appeal rights to the Appeal Division, the panel considered that its analysis regarding section 2(2) had to be consistent with its analysis regarding section 41. Accordingly, it found that grounds need not be established for appeals filed on or after March 3, 2003 (whether filed within the time limit for such appeals under section 41, or for which an extension of time to appeal is granted pursuant to section 2(2) of the Regulation). However, the grounds for error of law or fact or contravention of a published policy apply to appeals filed to the Appeal Division prior to March 3, 2003, which were transferred to WCAT for completion under section 39 of Bill 63's transitional provisions. The panel's decision specifically concerned an appeal brought under section 41. It concluded that grounds for appeal, of an error of law or fact or contravention of a published policy, need not be established as a prerequisite to considering whether any change in the February 2003 decision was warranted.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

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Panel: Herb Morton, Vice Chair
Steven Adamson, Vice Chair
James Sheppard, Vice Chair

Introduction

The employer has appealed the February 18, 2003 decision by the case manager. That decision denied relief of claim costs under section 39(1)(e) of the *Workers Compensation Act* (Act).

The worker suffered a back injury at work on September 16, 2002. She had a prior compensable injury to her back in 1991, for which a permanent disability award was granted. The employer submits the worker's permanent partial disability is evidence of an underlying or pre-existing condition that predisposed the worker to injury where none might otherwise have arisen. Alternatively, the employer submits that the worker's disability was made greater by reason of her pre-existing condition.

The February 18, 2003 decision was appealable to the Appeal Division within 30 days. The 30 day time frame for appealing the February 18, 2003 decision had not expired prior to the March 3, 2003 changes to the Act contained in the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). Under Bill 63's transitional provisions, a party may appeal to the Workers' Compensation Appeal Tribunal (WCAT) where there was an unexercised right of appeal to the Appeal Division.

The employer's request for review of the February 18, 2003 decision was received by the Review Division on March 25, 2003, and forwarded to WCAT. Item #3.40 of WCAT's *Manual of Rules, Practices and Procedures* (MRPP) provides that WCAT will treat receipt of a written notice of appeal (or request for review) by the Review Division or any office of the Workers' Compensation Board (Board) as receipt by WCAT. Taking into account the time permitted for mailing of the decision to the employer (Appeal Division practice permitted 10 days under section 101 of the former Act), the employer's appeal was initiated in time under section 41 of Bill 63's transitional provisions.

The employer requested that this appeal be considered on a "read and review" basis. We agree that the issues raised in this appeal can be properly considered on the basis of the written evidence and submissions, without an oral hearing. This decision does not affect the worker, and she is not participating (although invited to do so).

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The WCAT chair has appointed this panel of three vice chairs under section 238(5) of the Act. (We have not been appointed as a precedent panel under section 238(6) of the Act.)

Issue(s)

A preliminary issue arises as to whether grounds under the former section 96(6) of the Act are required for the employer's appeal (filed to WCAT after March 3, 2003 under section 41 of Bill 63's transitional provisions). The central issue in this appeal concerns whether the worker's disability under her 2002 claim was prolonged or enhanced by reason of a pre-existing disease, condition or disability.

Jurisdiction

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (section 250(1) of the Act). WCAT must make its decision based on the merits and justice of the case, but in so doing must apply a published policy of the Board of Directors that is applicable (section 250(2) of the Act).

1. Preliminary Issue – Grounds for Appeal

The employer completed a notice of appeal, in which it stated the appeal was being filed on the basis of an error of fact. The employer has identified grounds for the appeal, as previously required by the Appeal Division under section 96(6) and (6.1) of the Act. We have addressed, however, as a preliminary issue, the question as to whether such grounds must be applied to our consideration of the employer's appeal. In other words, must we find an error of law or fact or contravention of a published policy of the governors, as a prerequisite to considering whether any change in the February 18, 2003 decision is warranted? Prior WCAT decisions have reached different conclusions on this issue (see *WCAT Decisions #2003-03595*, *#2004-01641*, and *#2004-01651*). This case concerns section 41 of the Bill 63 transitional provisions. However, we will consider this issue in the larger context of the different situations addressed by the transitional provisions (to better address the proper interpretation of section 41).

(a) Policy-Making Authority — Background

Prior to June 3, 1991, the Act did not expressly refer to the power to make policy. The commissioners of the Board constituted the final level of appeal under the Act (apart from appeals to Medical Review Panels), as well as having responsibility for the administration of the Board and provision of policy guidance.

Pursuant to the *Workers Compensation Amendment Act, 1989* (Bill 27), policy-making authority for the workers' compensation system was given to a board of governors effective June 3, 1991. This was part of a restructuring of the powers of the former board of commissioners, which divided the functions of the former commissioners among the board of governors (policy-making), the president and chief executive officer (administration), and the Appeal Division under the chief appeal commissioner (appeals).

Section 82 of the Act provided, in part:

> The governors must approve and superintend the policies and direction of the board, including policies respecting compensation, assessment, rehabilitation and occupational safety and health. . . .

Decision of the Governors No. 3 (7 WCR 17) provided that as of June 3, 1991 the published policies of the Governors consisted of the *Assessment Policy Manual*, *Occupational Safety and Health Division Policy and Procedure Manual*, *Rehabilitation Services and Claims Manual*, and *Workers' Compensation Reporter Decision Nos. 1-423*. *Decision No. 3* further provided that after June 3, 1991, published policies would consist of the documents listed above, amendments to the manuals, any new or replacement manuals issued by the governors, and all decisions of the governors declared to be policy decisions. A re-statement of what documents were published policy was provided by *Decision of the Governors No. 86* (10 WCR 781).

Pursuant to Bill 56 (*Workers Compensation Amendment Act, 1995*), section 83.1 was added to the Act. This provided, in part:

> The Lieutenant Governor in Council may appoint a panel of public administrators consisting of one or more persons to discharge the powers, duties and functions of the governors under this Act, the *Workplace Act* and the *Criminal Injury Compensation Act,* if the Lieutenant Governor in Council considers this to be necessary in the public interest.

The panel of administrators came into existence on July 13, 1995. *Decision of the Panel of Administrators No. 1*, dated July 17, 1995 (11 WCR 465) provided in part:

> 1. they will discharge the powers, duties and functions of the governors with respect to policy matters arising under legislation administered by the Workers' Compensation Board;
>
> 2. all policies of the governors in effect immediately prior to the appointment of the Panel will continue to apply;

3. policy decisions made by the Panel of Administrators are policies of the Governors for purposes of the legislation administered by the Workers' Compensation Board; and

4. governors' "published policy" includes decisions of the Panel of Administrators declared to be policy decisions.

Since July 1995, published policies of the governors were issued by the panel of administrators.

In 2002, the *Workers Compensation Amendment Act, 2002* (Bill 49) established a new governance structure for the Board. The interim panel of administrators was replaced by a board of directors composed of a chair, one worker representative, one employer representative, a professional who provides health care or rehabilitation services to persons with disabilities, an actuary and two directors who represent the public interest (under section 81 of the Act). On December 12, 2002, the Minister of Skills Development and Labour announced the members of the new board of directors. The board of directors came into effect on January 2, 2003. (B.C. Reg. 346/02 brought the following provisions of the *Workers Compensation Amendment Act, 2002* (Bill 49) into force effective January 2, 2003: sections 1 (b) and (d), 5, 26 to 32, 33 (b), 35, 37, 39 and 47).

By resolution dated February 11, 2003 (*Re: Policies of the Board of Directors*, 2003/02/11-04, 19 WCR 1, accessible at: http://www.worksafebc.com/publications/wc_reporter/default.asp), the board of directors established the published policies of the board of directors effective February 11, 2003. The bylaw approved by the board of directors replaced *Decision No. 86* of the Governors, and *Decision No. 1* of the panel of administrators. The bylaw states, in part:

1.0 Policies of the Directors

1.1 As of February 11, 2003, the policies of the Directors consist of the following:

(a) The statements contained under the heading “Policy” in the *Assessment Manual;*
(b) The *Occupational Safety and Health Division Policy and Procedure Manual*;
(c) The statements contained under the heading “Policy” in the *Prevention Manual;*
(d) The *Rehabilitation Services & Claims Manual* Volume I and Volume II, except statements under the headings “Background” and “Practice” and explanatory material at the end of each Item appearing in the new manual format;

(e) The *Classification and Rate List*, as approved annually by the Directors;
(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.

1.2 After February 11, 2003, the policies of the Directors consist of the documents listed in paragraph 1.1, amendments to policy in the four policy manuals, any new or replacement manuals issued by the Directors, any documents published by the Workers' Compensation Board that are adopted by the Directors as policies of the Directors, and all decisions of the Directors declared to be policy decisions.

Effective March 3, 2003, the Act was amended by the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63), to require the Board, and WCAT, to apply an applicable policy of the board of directors. Section 99(2) provides:

> (2) The Board must make its decision based upon the merits and justice of the case, but in so doing the Board must apply a policy of the board of directors that is applicable in that case.

Section 250(2) provides:

> (2) The appeal tribunal must make its decision based on the merits and justice of the case, but in so doing the appeal tribunal must apply a policy of the board of directors that is applicable in that case.

Section 251 provides, in part:

> **251** (1) The appeal tribunal may refuse to apply a policy of the board of directors only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations.

Section 251 sets out a detailed process for the referral of an issue of lawfulness of policy to the chair, and the board of directors, for determination.

Part 2 of Bill 63 contained transitional provisions, with respect to the statutory requirement to apply an applicable policy of the board of directors, and the restructuring of the review and appeal processes under the Act. Section 42 of the transitional provisions states:

> As may be necessary for the purposes of applying sections 250(2) and 251 of the Act, as enacted by the amending Act, in proceedings under sections 38(1) and 39(2) of the amending Act, published policies of the governors are to be treated as policies of the board of directors.

The specific transitional provisions concerning different categories of appeals will be addressed below.

(b) Requirement for Grounds for Appeal — Prior to March 3, 2003

Prior to March 3, 2003, section 96(6) and (6.1) of the Act provided:

> (6) An employer who has received notice of
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> (a) an assessment under section 39 or 40,
> (b) a classification, special rate, differential or assessment under section 42, or
> (c) a levy under section 73
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> may, not more than 30 days after receiving the notice or within a longer period the chief appeal commissioner may allow, appeal the assessment, classification, special rate, differential or additional assessment, levy or contribution to the appeal division on the grounds of error of law or fact or contravention of a published policy of the governors.
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> (6.1) An employer who has received a notice relating to
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> (a) an assessment, other than an assessment under section 223(1)(a),
> (b) a classification,
> (c) a monetary penalty, or
> (d) an apportionment or shifting of cost between classes
>
> under this Act not referred to in subsection (6) but designated in the policies of the governors, may, not more than 30 days after receiving the notice or within a longer period the chief appeal commissioner may allow, appeal the assessment, classification, monetary penalty or apportionment or shifting of cost between classes to the appeal division on the grounds of error of law or fact or contravention of a published policy of the governors.

The requirement for grounds for appeals under section 96(6) and 96(6.1), of error of law or fact or contravention of a published policy of the governors, was established by the *Workers Compensation Amendment Act, 1989* (Bill 27) effective June 3, 1991. This requirement only applied to appeals by employers concerning the specific categories of decisions listed in section 96(6) and 96(6.1) of the Act. No similar requirement applied

to appeals by workers or employers on issues dealing with a worker's claim for compensation.

The requirement for grounds also applied to employer appeals on prevention issues, effective June 3, 1991. The *Workers Compensation (Occupational Health and Safety) Amendment Act, 1998* (Bill 14), removed the requirement for grounds for prevention appeals effective October 1, 1999.

Decision No. 1 of the Governors, *Appeal Division Administration, Practice and Procedure*, 1991, 7 WCR 7, (#1.0, *Scope of Proceedings Before the Appeal Division*), provided:

> In appeals commenced under Sections 96(6) and 96(6.1), the appellant should be required to outline the error of law or fact or contravention of the published policy of the Governors in the decision under appeal.

Similar policy was provided in *Decision No. 75* of the Governors, *Appeal Division Administration, Practice and Procedure*, 1994, 10 WCR 753.

Decision No. 1 of the Appeal Division, *Practice and Procedure*, May 29, 1991, 7 WCR 33, provided (#7.0, *Other Employer Appeals*, at page 48*)*:

> An appellant is required to outline the error of law or fact or contravention of the published policy of the Governors in the decision under appeal.

Decision No. 4 of the Appeal Division, *Employer Appeals for Relief of Costs under Section 39*, August 8, 1991, 7 WCR 79, provided at page 80:

> Section 96(6) of the Act and the policy of the Governors require that the appellant outline the error of law or fact or contravention of the published policy of the Governors in the decision under appeal. If grounds for the appeal are not provided within 21 days following a request for these from the Appeal Division, the appeal will normally be considered to have been abandoned.

Appeal Division Decision No. 33, *Appeal Division Practice and Procedure*, effective September 1, 2001, published in Volume 17 of the *Workers' Compensation Reporter*, involved a consolidation and replacement of Appeal Division practice and procedure. *Appendix F*, which dealt with relief of costs appeals, provided as follows:

1.2 Grounds for Appeal

> Section 96(6) of the Act and the policy of the governors require that the appellant outline the error of law or fact or contravention of the published policy of the governors in the decision under appeal. If grounds for the appeal are not provided within 21 days following a request for these from the Appeal Division, the appeal will normally be considered to have been abandoned.

Appendix E concerning Assessment Appeals similarly noted under the heading of Introduction (page E-2):

> Governors' published policy, in the *Assessment Policy Manual* (Policy 10:40:00), provides the following information regarding appeals to the Appeal Division on assessment matters:
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> . . .
>
> - An appellant is required to outline the error of law or fact or contravention of the published policy of the governors in the decision under appeal.

(c) Bill 63 — March 3, 2003 Amendments

Effective March 3, 2003, the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63), removed the requirement to establish grounds for an appeal. This change followed a recommendation contained in the March 11, 2002 *Core Services Review of the Workers' Compensation Board* (the Winter Report), accessible on the Internet at: http://www.labour.gov.bc.ca/wcbreform/WinterReport-Complete.pdf. At page 26, Winter concluded there was "an overwhelming need for the current appeal processes and structures within the workers' compensation system to be reformed." The first of the reasons provided in support of this conclusion was as follows:

> **First**, and foremost, is the complexity associated with the existing processes and structures. Depending on the issues in dispute, the *Act* (and, to a lesser degree, the published policies of the WCB) specify different review/appeal processes to be followed, with differing time frames, standards of review and levels of appeal. In my opinion, a much simpler appellate process must be established to deal with all disputed issues within the workers' compensation system in a fair, effective and timely manner.

Winter recommended the creation of an internal review process and an external appeal tribunal. At pages 27 to 28, Winter identified the general principles on which he

envisioned the internal review process would be premised. These included the following:

(i) The overriding intent is to establish a simplified and flexible process for the WCB to conduct an internal review of a disputed determination in a timely manner.
(ii) The internal review process would become an essential component of the WCB's overall strategy to develop and maintain quality adjudication by initial decision-makers within the WCB.
(iii) The same internal review process would apply to all determinations made by WCB Officers, regardless as to whether the matter involved a claims, occupational health and safety, or assessment issue.

At pages 33 to 34, Winter recommended that the internal review process be conducted on the basis of a broad substitutional standard of review. Winter similarly recommended (at page 50), that the external appeal tribunal conduct an appeal on a substitutional basis.

Under the Bill 63 amendments, the requirement to establish grounds for certain categories of employer appeals (of error of law or fact or contravention of the published policy) was removed. As recommended in the Winter Report, the same requirements apply for requesting review by the Review Division, and for appealing to WCAT, in relation to decisions on claims, assessment and prevention matters. The avenues of review and appeal are the same for all matters (apart from the direct right of appeal to WCAT in relation to a decision on an application for reopening of a claim under section 96(2), or on a discriminatory action complaint under section 153, as set out in section 240 of the Act).

(d) Transitional Provisions

The requirement to establish grounds for an appeal was removed in connection with matters on which the Board decision was issued on or after March 3, 2003. With respect to cases in which the Board decision was issued prior to March 3, 2003, it is necessary to consider the effect of the transitional provisions contained in Part 2 of Bill 63, and the regulations provided under section 44 of the transitional provisions. In completing an appeal filed to the former Appeal Division, should WCAT address it on the basis of the grounds for appeal on which it was filed? In providing a right of appeal to WCAT under section 41 of the transitional regulations and section 2(2) of the *Workers Compensation Act Transitional Review and Appeal Regulation*, B.C. Reg. 322/02, was it the intent of the legislature that this:

- be a new right of appeal (unencumbered by the requirement to establish grounds), or,

- permit the exercise of the former right of appeal, including the requirement to establish grounds (subject to the new WCAT provisions such as the requirement to apply the policy of the Board of Directors)?

(e) Analysis on Preliminary Issue

With respect to initial decisions rendered by the Board on or after March 3, 2003, the legislature has simplified the processes for review and appeal. In general, the same processes apply. The requirement to establish grounds, which previously applied to the categories of employer appeals listed in section 96(6) and 96(6.1) of the former Act, has been removed. With respect to the transition between the old and new appeal legislation, it would seem that various approaches might have been considered. These include:

- Requirement to apply grounds in relation to all appeals from Board decisions rendered before March 3, 2003, where such decisions would have been appealable under section 96(6) or 96(6.1) (regardless of when appeal was or is initiated); no grounds in relation to requests for review or appeals from decisions made on or after March 3, 2003. This approach is straightforward: the requirement for grounds would apply to such appeals in all such cases where there was no review by the Review Division.

- Removal of requirement to apply grounds for all pending appeals effective March 3, 2003, whether initiated before or after March 3, 2003. This would also be simple and clear in its application. Given the legislative intent to remove the requirement for grounds, this purpose would be accomplished most quickly by this approach, and would avoid creating two classes of appellants.

- Some combination of the foregoing, such as a requirement to apply grounds for appeals initiated prior to March 3, 2003, but not in relation to appeals filed after March 3, 2003.

We consider that the question as to whether grounds apply to the consideration of appeals is a substantive, rather than procedural, matter, as it affects the consideration of the merits of the appeal. The removal of grounds has the potential to increase the "exposure" of prior decisions to being changed on appeal.

Section 250(2) requires that WCAT must make its decision based on the merits and justice of the case. The question may be posed as to whether it would be fair to allow employers, who did not appeal earlier, the opportunity to now pursue an appeal without the requirement to establish grounds. Why should such employers be eligible for more favourable or liberal consideration, as compared to employers who were more diligent in exercising their appeal rights under the former Act?

We consider that our analysis must begin by focussing on the wording of the Act, including the transitional provisions. The choices made by the legislature in amending the Act required consideration of competing values. To illustrate, the move to increased finality of decisions was intended to benefit workers and employers in general, but may appear harsh in the context of a particular case. The imposition of a 75 day time limit on the Board's reconsideration authority effective March 3, 2003 had far-reaching consequences for workers and employers. In some cases, the Board had promised or undertaken a process of reconsideration, but was prevented from completing the process by the imposition of this 75 day time limit on the Board's authority. Where a party had not initiated an appeal prior to March 3, 2003, the stringent new statutory requirements apply to any request for an extension of time to obtain a review or appeal under section 96.2(4) or section 243(3) of the Act. It is evident from these examples that the statutory amendments may significantly impact the consideration available to parties under the Act. To the extent it may be determined that the legislature has addressed a matter, the legislative intent must be given effect. Our consideration of the merits and justice of the case must be within the framework established by the Act.

The transition from one set of legislative requirements to another may be achieved in various fashions. While there may be a presumption against retroactivity, it is open to the legislature to amend the Act on a retroactive basis. Where a statutory amendment is intended to remedy a problem or defect in the prior legislation (i.e. the "mischief" or "evil" addressed by the amendment), the legislature may choose to make the new provision applicable on a retroactive or retrospective basis, rather than being limited to a prospective application.

In the text *Sullivan and Driedger on the Construction of Statutes*, 4th edition, (Ontario: Butterworths, 2002), at page 590, Professor Sullivan summarizes the rules governing the temporal application of legislation as follows:

1. It is presumed that legislation is not meant to have a retroactive application. This presumption applies to procedural provisions and provisions designed to protect the public interest. Arguably it applies to beneficial provisions as well. In most circumstances the presumption is strong, but it may be rebutted either expressly or by necessary implication.

2. It is presumed that legislation is not meant to interfere with vested rights. When the impact of applying legislation is an arbitrary or unfair diminishment of a protected interest, the legislation is presumed not to apply. The greater the unfairness, the stronger the presumption. By definition, provisions that are purely procedural or beneficial do not interfere with vested rights.

3. It is presumed that legislation is meant to have an immediate effect if it is not retroactive and does not interfere with vested rights. However,

> this presumption may be subject to qualification when applying legislation that would have a retrospective effect.

For individual employers seeking to appeal a decision concerning an assessment, or concerning a denial of relief of costs, the removal of the requirement to establish grounds for an appeal would be beneficial. It permits the decision-maker to reweigh the evidence and substitute a new decision, without the need to identify an error of law or fact or contravention of policy as a statutory prerequisite.

Professor Sullivan comments concerning "beneficial legislation" at page 589 as follows:

> The claim often is made that the presumption against the retroactive application of legislation does not apply to beneficial legislation. The following passage from the judgment of MacKay J. in *Placer Dome Inc.* v. *R.* is typical:
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> > Generally, legislation is applied with prospective effect only. The presumption against retrospective application is ignored where the statute is deemed beneficial in its effects, or where it is merely procedural without affecting substantive interests. . . .
>
> Nearly always what is meant by such assertions is that beneficial legislation, like purely procedural legislation, is presumed to have an immediate effect. It applies immediately and without restriction because generally there is no reason to limit it. Few people are likely to complain that the benefit they received was unfair or upset their legitimate expectations.
>
> Although beneficial legislation should normally be given immediate effect, there is no reason to exempt it from the presumption against retroactive application. When the impact of legislation is purely beneficial, the presumption against retroactivity may be easy to rebut. However, considerations such as stability, certainty and predictability remain relevant even when the surprise is pleasant. Moreover, legislation that is beneficial to the public is not necessarily cost free. A responsible legislature will have given some thought to the range and extent of the benefits it wishes to confer. The courts cannot infer from mere silence that the legislature intended retroactive as well as prospective benefits.

At pages 581 to 582, Professor Sullivan also explains the rationale for applying a purposive analysis:

> The fact legislation is judged to be remedial rather than penal is also insufficient to rebut the presumption against interference with vested

> rights. To adopt such a principle would effectively negate the presumption in a majority of cases. However, where the rights sought to be preserved are part of the mischief at which the legislation is aimed, the presumption is readily rebutted.
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> . . .
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> Whenever the application of new legislation is restricted to protect a vested right, the benefit sought by the legislature in enacting the new legislation is delayed and the court effectively establishes two classes of subjects, one governed by the new legislation and one by the old. On the face of it, these are undesirable consequences. Unless the unfairness of the interference is still more undesirable, these consequences may suffice to rebut the presumption.

The British Columbia Court of Appeal applied the presumption against the retroactive application of legislation in *MacKenzie v. British Columbia (Commr. Of Teachers' Pensions)*, (1992) 94 D.L.R. (4th) 532. That decision is of interest as it involved a pension fund (which may be compared to the accident fund established under the Act). The Court of Appeal reasoned:

> . . . it seems manifestly clear that if the 1988 amendment was given retroactive effect it would destroy the actuarial integrity of the pension fund administered by the trustees under the Act for the benefit of the teachers. There is an obvious actuarial link between the contributions made by teachers and employers, the length of time over which those contributions are paid into the fund, the nature of the election made when retirement is taken and the amount that is paid out in response to that election. To intercede in this scheme, by retroactively changing the election of individual retirees after payments have been made to them, would leave the plan underfunded and thus destroy its actuarial integrity, something which the whole scheme of the present Act, and its predecessors, has sought to maintain since 1929. Thus, it can be seen that to apply the 1988 amendment retroactively would be inconsistent with the entire scheme of the Act, and therefore something which it must be presumed the Legislature would not have intended. In the circumstances, I must conclude that there is nothing about the overall purpose or scheme of the statute, or the amendment, which would overcome the presumption that the 1988 amendment to the Pension (Teachers) Act should be confined to a prospective application.

The foregoing sets out some of the legal principles to be taken into account in addressing such transitional issues. These make it clear that a range of approaches are possible. However, the first consideration must be whether the legislature has, by the wording of the transitional provisions, provided direction.

(i) Section 39 — Completion of Appeals Filed to the Appeal Division

The first category to be considered is appeals filed to the former Appeal Division prior to March 3, 2003. Section 39 of the transitional provisions concerns appeals and other applications filed to the former Appeal Division prior to March 3, 2003, and provides:

> **39** (1) In this section, **"proceedings"** means
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> (a) appeal proceedings,
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> (b) proceedings for reconsideration of decisions,
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> (c) proceedings in requests under section 11 of the Act that were assigned to the appeal division, and
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> (d) proceedings under section 28 (5) and (6) of the *Crime Victim Assistance Act.*
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> (2) Subject to subsection (4) of this section, all proceedings pending before the appeal division on the transition date are continued and must be completed as proceedings pending before the appeal tribunal, except that section 253 (4) of the Act, as enacted by the amending Act, does not apply to those proceedings.
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> (3) In proceedings before the appeal tribunal described in subsection (2) of this section, instead of making a decision under section 253(1) of the Act, as enacted by the amending Act, the appeal tribunal may refer a matter to the Board, with or without directions, and the Board's decision made under that referral may be reviewed under section 96.2 of the Act, as enacted by the amending Act.
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> (4) If, in a proceeding pending before the appeal division on the transition date, the appeal division has
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> (a) completed an oral hearing, or
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> (b) received final written submissions and begun its deliberations,
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> the appeal division must continue and complete those proceedings, acting with the same power and authority that the appeal division had under the Act before the provisions of the Act granting that power and authority were repealed by the amending Act.

> (5) The appointments of the appeal commissioners who are sitting on proceedings described in subsection (4) are continued until those proceedings are completed.

Section 39(2) specifies that all proceedings pending before the Appeal Division on the transition date are continued and must be completed as proceedings pending before WCAT, except that section 253(4) of the Act, as enacted by the amending Act, does not apply to those proceedings (apart from those cases where the Appeal Division was considered seized under section 39(4) of the Act). A literal reading of this wording might suggest that proceedings under section 39(2) should be treated in identical fashion to other WCAT appeals, except that no statutory time frame for decision-making applies. However, that interpretation would frustrate one of the purposes of this provision, which was to permit the completion of appeals pending before the former Appeal Division. Section 239(2) provides that Review Division decisions concerning vocational rehabilitation, or commutations, or certain pension decisions (respecting the application under section 23(1) of rating schedules compiled under section 23(2) where the specified percentage of impairment has no range or has a range that does not exceed 5%) are not appealable to WCAT. If WCAT's authority in completing these appeals were to be strictly defined by WCAT's current jurisdiction, parties with appeals involving these issues would lose their right of appeal. We consider that this could not have been the intent of this provision. We consider that the completion of such appeals as proceedings pending before WCAT has the effect of making certain new statutory provisions applicable. For example, policy must be applied, WCAT has authority to request assistance from an independent health professional under section 249, and WCAT precedent decisions under sections 238(6) are binding to the extent set out in section 250(3) of the Act.

We are reinforced in this conclusion by the statements of the Minister concerning the intent of the amendments. At the Second Reading of Bill 63 in the Legislature, the Minister of Skills Development and Labour commented concerning the purposes and effect of the legislative changes (*Hansard*, 2002 Legislative Session: 3rd Session, 37th Parliament, Vol. 9, No. 3, October 22, 2002, at page 3935):

> **Hon. G. Bruce:** Mr. Speaker, Bill 63 amends the workers compensation appeal process. It replaces Bill 56, Workers Compensation Amendment Act (No. 2), 2002, introduced May 30 of this year. The new legislation has the same policy goals as Bill 56, but we have made improvements to the legislation. . . . Transitional provisions were made more comprehensive to ensure that appeal rights are retained.

With respect to appeals filed under section 96(6) or 96(6.1) prior to March 3, 2003, the requirement for grounds applied at the time the appeal was initiated. Section 39 refers to the continuation and completion of appeals. The application of grounds to such appeals means that they are being decided on the same basis on which they were filed

(subject to certain changes involving WCAT's decision-making processes and authority).

This interpretation is consistent with the analysis provided by the chair in *WCAT Decision #2003-01108*. The chair noted that section 41(2) of Part 2 of Bill 63 and section 2(2) of the Regulation specifically provide that the new extension of time criteria in section 243(3) of the Act apply to appeals commenced after March 3, 2003 involving unexercised appeal rights to the Appeal Division. However, there is no corresponding reference to the new extension of time criteria in section 39 of the Act. She concluded, therefore, that applications for an extension of time to appeal under the general discretion contained in section 91(1), or section 96(6) and 96(6.1) of the Act, should be decided under the former statutory provision. She found that if the legislature had intended that the new extension of time criteria be applicable to appeals decided by WCAT under section 39, there would be a specific provision to that effect in section 39 of the Act.

In other words, in terms of WCAT's jurisdiction to address the substantive merits of an appeal, WCAT's jurisdiction stems from the original provisions giving rise to the appeal to the Appeal Division. This permits WCAT, in addressing appeals filed to the Appeal Division prior to March 3, 2003, to address issues such as vocational rehabilitation or commutation requests, which are no longer appealable to WCAT. It also permits applications for an extension of time to appeal, filed to the former Appeal Division prior to March 3, 2003, to be addressed under the former general discretion of section 91(1) or 96(6) and 96(6.1).

Section 39(4), dealing with Appeal Division seized matters, refers to the Appeal Division panel "acting with the same power and authority that the appeal division had under the Act". We appreciate that our interpretation, as set out above, treats WCAT as having similar authority as well, despite the difference in wording in section 39(2). We attribute the difference in wording to the requirement that the new provisions involving WCAT decision-making apply under section 39(2), such as the requirement to apply the policy of the board of directors (and all the other new provisions in the Act concerning WCAT's authority, such as sections 246 and 249).

Section 42 provides that in completing appeals under section 39(2) of the transitional provisions, WCAT will treat policies of the governors as policies of the board of directors. This direction is provided in connection with the requirement that WCAT apply the policies of the board of directors under sections 250 and 251 of the Act. This provision acknowledges the fact that in completing such appeals, WCAT will be applying the policies of the governors. In the case of appeals filed under section 96(6) or 96(6.1), this would include consideration as to whether the decision involved a contravention of a published policy of the governors.

We consider, therefore, that appeals filed with the former Appeal Division prior to March 3, 2003, on the grounds of error of law or fact or contravention of a published

policy of the governors, must be decided on the basis of such grounds. We note that WCAT decisions to date have been consistent in applying grounds to the consideration of such appeals.

(ii) Section 41 — Unexercised appeal rights to Appeal Division

The second category to be considered is appeals for which a right of appeal existed to the former Appeal Division under section 96(6) or 96(6.1), which was not exercised prior to March 3, 2003. Section 41 of the transitional provisions provides:

> **41** (1) If, before the transition date,
>
> (a) a person has not exercised a right under the Act
>
> (i) to appeal a decision of the Board to the appeal division, or
>
> (ii) to appeal a finding of the review board to the appeal division, and
>
> (b) the time period within which that right must be exercised would not have expired but for the repeal of that right on the date the section of the amending Act repealing that right came into force,
>
> that person may appeal the decision or finding to the appeal tribunal before the time period referred to in paragraph (b) of this subsection has expired.
>
> (2) Section 243 (3) of the Act, as enacted by the amending Act, applies to the time period referred to in subsection (1) (b) and to the 30 day time period referred to in subsection (3) of this section.
>
> (3) If, on or after the transition date and at the conclusion of a proceeding referred to in section 38 (3) of the amending Act, a person would have had a right to appeal the finding of the review board in that proceeding to the appeal division under section 91 (1) of the Act but for the repeal of that right on the date the section of the amending Act repealing that right came into force, that person may appeal the review board's finding to the appeal tribunal within 30 days after the finding is sent out.
>
> (4) If a person appeals a decision or finding as permitted in this section, the appeal is governed by Part 4 of the Act, as enacted by the amending Act, except that section 253 (4) of the Act, as enacted by the amending Act, does not apply.

Section 41(1) establishes a right to appeal to WCAT on or after March 3, 2003, where the time frame for appealing to the Appeal Division under section 96(6) or 96(6.1) had

not expired (calculated as 30 days plus 10 days for mailing under the former section 101 of the Act). Where the appeal is late, however, section 41(2) provides that the stringent new criteria of section 243(3) apply regarding an application for an extension of time to appeal. Under section 42, there is no reference to applying the published policies of the governors in relation to appeals filed under section 41.

The express reference in section 42 to the policies of the governors, in connection with appeals under sections 38(1) and 39(2), and the lack of any such reference in relation to appeals under section 41, appears significant. This would, at least on initial impression, seem to indicate the legislature did not contemplate the application of governors' policy to appeals under section 41. The policies of the board of directors were established on February 11, 2003, shortly before the March 3, 2003 amendments which required the application of the policy of the board of directors.

A similar situation arises under section 40 of the transitional provisions. Section 40 concerns unexercised appeal rights to the Review Board, and provides:

> **40** (1) If, before the transition date,
>
> (a) a person has not exercised a right under the Act to appeal a decision of the Board to the review board, and
>
> (b) the time period within which that right must be exercised would not have expired but for the repeal of that right on the date the section of the amending Act repealing that right came into force,
>
> that person may request a review of that decision under section 96.2, as enacted by the amending Act, before the time period referred to in paragraph (b) of this subsection has expired.
>
> (2) Section 96.2 (4) applies to the time period referred to in subsection (1)(b) of this section.

Section 99(2) of the Act would seem to require the Review Division to apply a policy of the board of directors that is applicable in such cases.

To a large extent, the policies of the former governors were adopted by the board of directors without amendment. There may be situations, however, where the initial decision was made under a former policy of the governors, and the policy was amended by the board of directors. The question may arise as to which policy should apply.

This raises a question as to whether the lack of any reference to section 41 in section 42 was inadvertent. In cases where an extension of time to appeal is granted, the decision by the Board will have been rendered in a past time period, under the policy of the governors in effect at that time. Applicable policies of the board of

directors, as approved on February 11, 2003, or later amended, must be applied by the Review Division and WCAT pursuant to sections 99(2) and 250(2) of the Act. The question may arise as to how the requirement "to apply a policy of the board of directors that is applicable in that case" relates to a decision made under a former policy. One possibility might be that in such situations, the former policy may be viewed as having been adopted by the board of directors for such situations (based on item 1.1(g) of the board of directors' policy which adopted policy decisions of the former governors and the former panel of administrators still in effect immediately before February 11, 2003). An alternative possibility is that the legislature intended that the policies of the board of directors have retroactive application. As clear legislative language is required to overcome the presumption against retroactivity, it may be that a liberal interpretation of item 1.1(g) of the board of directors' policy (in identifying a policy of the board of directors that is applicable in a case under section 250(2)), would permit a reconciliation of these concerns. For reasons set out below, it is not necessary that we resolve that issue for the purposes of this decision. We consider it prudent to refrain from attempting to decide an issue which is not necessary to our decision. That issue might be better addressed by way of policy clarification, or regulation under section 44 of the transitional provisions. Alternatively, that issue may need to be addressed by WCAT where the circumstances of a particular case expressly raise that issue for decision.

Professor Sullivan comments (at page 136):

> **Absence of jurisdiction to fill gaps.** While courts are willing to correct drafting errors, they are reluctant to fills gaps in legislation. This reluctance is grounded in two factors. First, unlike mistakes, which are always inadvertent, a gap in legislation may be deliberate. Gaps may result from faulty drafting but equally they may result from factual misconceptions, poor planning or even a considered policy choice. For this reason, gaps are taken to embody the actual intentions of the legislature, which the courts are bound to respect. It is up to the legislature rather than the courts to effect any desired change. Second, whether inadvertent or not, gaps result from provisions or schemes that are under-inclusive, and correcting under-inclusiveness would require courts to legislate. . . .

Professor Sullivan notes at page 138 to 139 that courts sometimes fill gaps when the absurdity that flows from the gap is too severe to tolerate.

A second important consideration is subsection 41(4) of the transitional provisions. This states that an appeal under section 41 "is governed by Part 4 of the Act, as enacted by the amending Act" (except that no statutory time frame for decision-making applies under section 253(4) of the Act). The phrase "governed by" does not appear anywhere else in Bill 63 or the current Act. The *Concise Oxford Dictionary* provides "rule with authority" as the first meaning of the word govern. We consider that the phrase "governed by Part 4" provides a strong direction that appeals filed under section 41 are

to be addressed within the framework provided by Part 4. This wording differs from that of section 38 and section 39, which direct that appeals pending before the Review Board or Appeal Division on March 3, 2003 be completed as proceedings pending before WCAT. This is different language than the direction that new appeals under section 41 be governed by Part 4 of the Act. We consider that the stronger wording in section 41 supports the conclusion that the new regime or framework established by Part 4 applies to such appeals. This may be viewed as including, in the words of the Winter Report, "a much simpler appellate process...to deal with all disputed issues", without the requirement to establish grounds.

For the purpose of considering the specific issue before us, which is whether grounds are required for appeals under section 41, we do not consider that any of the various approaches which might have been selected by the legislature is inherently absurd. Each has its merits. The removal of grounds for appeals under section 41 would be perceived as beneficial to the particular appellants. This interpretation brings about more quickly one of the goals of the statutory reforms, which was to simplify the appeal processes and allow similar rights of review and appeal for all decisions. In most appeals under section 96(6) and 96(6.1), there is no respondent who will be directly affected. (There is no respondent in a relief of costs appeal under section 96(6), but there is a directly affected respondent employer in an appeal under section 96(6.1) concerning the transfer of costs under section 10(8) of the Act. As well, some assessment appeals concern the status of multiple individuals, as to whether they are workers or independent operators). The number of appeals filed under section 41 is small (and any further appeals would have to meet the stringent requirements of section 243(3) of the Act for obtaining an extension of time to appeal).

This is a difficult interpretive issue. The absence of any reference in section 42, to the application of the policy of the governors in appeals under section 41, suggests that the legislature did not have the application of grounds for appeal in mind in relation to section 41. If it had been the intent of the legislature that appeals under section 41 be brought on the grounds of error of law or fact or contravention of a published policy of the governors, this would seem to have required the inclusion of a reference to section 41 in section 42. However, we need not rely on this point in our decision. We consider that subsection 41(4) provides additional strong direction that appeals under section 41 are governed by Part 4 of the Act, which does not require that grounds be established for an appeal. We find the wording of section 41(4) provides sufficient basis to support a decision to this effect.

Thus, just as the new grounds for an extension of time to appeal apply to appeals under section 41 (unlike appeals filed under section 39), so too can an appeal be filed on the new basis which does not require grounds. We read section 41, in its provision of a right of appeal to WCAT "governed by Part 4", as conveying a new right of appeal unfettered by grounds (rather than meaning that the prior right of appeal to the Appeal Division under section 96(6) and 96(6.1), on the grounds of grounds of error of law or fact or contravention of a published policy of the governors, is continued).

(iii) Section 2(2) of the Transitional Review and Appeal Regulation

The third situation to be considered concerns cases where the time frame for appealing to the Appeal Division under section 96(6) or 96(6.1) expired before March 3, 2003. This situation is addressed by section 2(2) of the *Workers Compensation Act Transitional Review and Appeal Regulation*, B.C. Reg. 322/02 (Regulation). This Regulation was provided under section 44 of the transitional provisions, which states:

> The Lieutenant Governor in Council may make regulations respecting any matters that, in the opinion of the Lieutenant Governor in Council, are insufficiently provided for, or not provided for, in Part 2 of the amending Act and that are necessary
>
> > (a) for the orderly transition to the appeal tribunal of proceedings before the review board and the appeal division, . . .

Section 2(2) of the Regulation provides:

> (2) If, before the transition date,
>
> > (a) a person has not exercised a right under the Act to appeal
> >
> > (i) a decision of the Board to the appeal division, or
> >
> > (ii) a finding of the review board to the appeal division, and
> >
> > (b) the time period within which the person must exercise that right has expired,
>
> the person may apply to the chair under section 243 (3) of the Act, as enacted by the amendment Act, to extend the time to file a notice of appeal under that section and the chair may extend the time to file the notice of appeal under that section.
>
> (3) A person who is granted an extension of time to file a request for review or a notice of appeal under subsection (1) or (2) may request a review or appeal the decision or finding, as the case may be, within the extended period.

We read section 2(2) as clarifying section 41 of the transitional provisions, as both concern unexercised appeal rights to the Appeal Division. Section 41 concerns cases where the time frame did not expire prior to March 3, 2003, and section 2(2) of the Regulation concerns cases where the time frame expired prior to March 3, 2003. As the Regulation may be viewed as supplemental to section 41, we consider that our analysis regarding this situation must be consistent with our analysis regarding section 41.

Accordingly, we find that grounds need not be established for appeals filed on or after March 3, 2003, which involve unexercised appeal rights to the Appeal Division under the former section 96(6) or 96(6.1).

2. Merits of Employer's Appeal for Relief of Costs

On September 16, 2002, the worker was pulling a box of filed route sheets from under a shelf at floor level when she felt pain in her lower back. Wage loss benefits were paid for 144 days between September 17, 2002 and April 6, 2003.

Under the worker's 2002 claim, she was examined at the Board by Dr. K, medical advisor, on November 26, 2002. Dr. K noted that the worker presented with a 12 year history of episodic low back pain with radiation to the right leg, and that she had a body mass index greater than 40. Dr. K found it was probable the worker had mechanical low back pain exacerbated by her obesity. He noted, however, that he could not completely rule out disc pathology given some of her examination findings. He found the worker's range of motion was significantly decreased since her permanent functional impairment examination of 1991.

By memo dated January 20, 2003, the case manager requested a medical opinion "in order to determine the relative significance of any pre-existing disease, condition or disability". By memo dated February 4, 2003, Dr. K, medical advisor, commented:

> **Question**: As there is an indication of a pre-existing back condition, is it prolonging the period of recovery from the accepted compensable injuries? Has it enhanced the injury? What is the degree to which the disability is affected?
>
> **Response**: There is certainly a history of previous episodes of low back pain. On reviewing her previous claims, there were numerous investigations with non specific findings. An X-ray in 1991 indicated a moderate scoliosis. This was not confirmed clinically at examination November 2000. There were small disc protrusions noted on the right and left at various times.
>
> None of these radiologic findings would constitute a pre-existing disease of the back which would in any way alter the degree of disability or period of recovery.
>
> As I stated in my at Board examination conclusions, it is difficult without current imaging to propose a diagnosis other than mechanical low back pain. This is not caused by or exacerbated by any of the previous radiologic findings.

> This woman appears to be prone to episodes of recurrent lumbosacral muscle spasm. It would be fair to propose a recovery period of two to three months from an episode of non specific low back pain.
>
> **Question**: What is the usual [period] of recovery from the accepted condition in a person of similar occupation without the pre-existing condition or disease?
>
> **Response**: See #1

As wage loss benefits had been ongoing since September 17, 2002 (and in fact continued until April 6, 2003), Dr. K's suggestion of a two to three month recovery period would appear to have supported granting of relief in relation to the worker's ongoing disability. It appears that neither the case manager nor Dr. K expressly addressed the worker's obesity in considering whether relief of costs should be granted.

The February 18, 2003 decision by the case manager provides the following reasons for the denial of relief of costs:

> I have reviewed the evidence of the initiating incident and find the severity was minor. On September 16, 2002, [the worker] bent over at the hips to pull a banker's box, which was at floor level, from under a shelf and experienced an onset of low back pain.
>
> There is no evidence of a pre-existing disease, condition or disability that enhanced (prolonged or made greater in extent) the disability accepted under this claim.

The worker had prior compensable back injuries. Her April 24, 1989 back claim involved 104 days of wage loss benefits (April 25 to September 17, 1989). Her February 23, 1991 low back claim involved 609 days of wage loss, including a reopening from September 15, 1998 until August 8, 1999. Her July 10, 2000 low back claim involved 74 days of wage loss benefits (July 11 to October 29, 2000).

In memo #5 dated May 29, 1991, under the worker's 1991 claim, the claims adjudicator requested medical advice as to whether the worker's weight had enhanced or prolonged the worker's recovery. In memo #6 dated May 30, 1991, the medical advisor commented:

> I think the claimant's weight, which she gives as 186 lbs on a height of 5' 1½" may well be a significant contributing factor to the prolongation of her symptoms. It is difficult to say when a particular individual might have recovered had they not been overweight, but I think one can say that 80% of people normally recover from simple back pain within twelve weeks in the absence of any other significant conditions.

By decision dated June 12, 1991, the claims adjudicator granted relief of costs under section 39(1)(e) after 13 weeks under the 1991 claim. A pension award of 2.0% of total disability was made under the worker's 1991 claim. Memo #72 dated August 4, 1999 notes:

> In September of 1998, this claim was re-opened after [the worker] bent over to pick up a piece of paper off the floor. She has been on wage loss ever since. [The worker] has had numerous tests done, and injections, with no relief. MRI results of January 1999 revealed central bulging at L4-5 and small disc herniation at L5-S1 on the left. [Dr. N], in April of 1999, advised there was no specific treatable pathology and all medical treatment should now stop.

The worker's July 10, 2000 low back claim resulted from an incident when she bent down in an awkward position (on all fours, leaning under a desk while reaching upward to plug in a cord). The 2000 claim was accepted on the basis of a temporary aggravation of her chronic low back pain. By decision dated July 3, 2002, the case manager granted relief of costs after 13 weeks of disability.

It is clear that the worker had pre-existing back problems. The 1991 claim involved both a pension award and a reopening in 1998 with further medical investigations including the MRI. As well, the Board medical advisor diagnosed obesity based on the worker's body mass index. Relief of costs (in relation to the worker's temporary disability) was granted under both the 1991 and 2000 claims.

A review of the medical literature concerning obesity was provided in *Appeal Division Decision #00-1315*. Body mass index is determined by the following formula:

> Weight (in kilograms) divided by the square of the height (in meters)
> or
> Weight (in pounds) divided by the square of the height in inches, with the quotient multiplied by 703.1

On the worker's application for compensation for her 2002 injury, she stated her weight was 200 pounds. Her height is 61.5 inches. We calculate the worker's BMI as 37. The *Cecil Textbook of Medicine*, 18th edition, volume 2, edited by James B. Wyngaarden, M.D. and Lloyd H. Smith, Jr., M.D., 1988, W. B. Saunders Company, at Volume 2, pages 1219 to 1228, (F. Xavier Pi-Sunyer); lists the grades of obesity as defined by body mass index as follows (at page 1220):

> Grade 0 = less than 25
> Grade I = 25-29.9
> Grade II = 30-40
> Grade III = more than 40

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This indicates the worker has Grade II obesity.

Practice Directive #67, *Relief of Costs: Determining the Amount* (accessible at: http://www.worksafebc.com/law_and_policy/practice_directives/rehabilitation_and_compensation/default.asp) lists obesity as one of the conditions for which relief of costs may be considered:

> The Board officer first determines whether the worker has a pre-existing disease, condition or disability in the area of injury or elsewhere. The Form 6, Form 7 and Form 8 may note prior problems. The medical reports should be carefully reviewed for information that would indicate the presence of any of these. Evidence may include prior treatment and surgeries, fractures, dislocations, tears, depression, obesity, diabetes, degenerative conditions such as degenerative disc disease, chondromalacia, prior WCB claims, and prior motor vehicle accidents.

Practice Directive #67 notes that although it took effect February 1, 2004, the earlier use of the table and guidelines contained in it was and continued to be appropriate as this method of calculating relief had been in use by the Board since 1995.

By policy resolution dated April 23, 1998, decision of the panel of administrators *#98/04/23-03*, "*Section 39(1)(e)*", 14 WCR 107, the panel of administrators stated in paragraph 3(a) and (b) that the Board will apply section 39(1)(e) relief in "same employer" situations, where the date of injury or disease on which relief is sought is on or after July 1, 1998. As the employer seeks relief of costs in relation to the 2002 claim, it does not matter whether the worker's prior claims were with the same or different employers. In fact, the worker's 1991 claim was with a different employer. The worker's injuries in 2000 and 2002 occurred while she was employed by the appellant.

By resolution dated June 11, 2002, the panel of administrators approved policy relating to the changes to the Act contained in the *Workers Compensation Amendment Act, 2002* (Bill 49). Item #114.40B of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II), effective September 28, 2002, provides that the minimum time frame prior to consideration being given to relief of costs was reduced from 13 weeks to 10 weeks.

Having regard to the minor nature of the incident on September 16, 2002, and the substantial body of medical evidence concerning the worker's pre-existing back problems and obesity, we find that the worker's disability was prolonged or enhanced as a result of these pre-existing problems. We find that the employer should be relieved of the costs of the worker's temporary disability under this claim after the first 10 weeks of disability. The employer's appeal is allowed.

Conclusion

To assist in deciding this appeal, we reviewed the preliminary question as to whether grounds for appealing were required with reference to the larger framework of appeals under section 39 and 41 of Bill 63's transitional provisions, and section 2(2) of the Regulation. We found that the grounds of error of law or fact or contravention of a published policy of the governors:

- apply to appeals filed to the former Appeal Division prior to March 3, 2003, which were transferred to WCAT for completion under section 39 of the transitional provisions;

- do not apply to appeals filed to WCAT on or after March 3, 2003 (whether filed within the time limit for such appeals under section 41 of the transitional provisions, or for which an extension of time to appeal is granted under section 243(3) of the Act, pursuant to section 2(2) of the *Workers Compensation Act Transitional Review and Appeal Regulation*).

Our decision is specifically concerned with an appeal brought under section 41 of Bill 63's transitional provisions. We concluded that grounds for appeal, of an error of law or fact or contravention of a published policy of the governors, need not be established as a prerequisite to considering whether any change in the February 18, 2003 decision was warranted.

Upon consideration of the merits of the employer's appeal, the February 18, 2003 decision by the case manager was varied. Relief of costs related to the worker's temporary disability is granted after the initial 10 weeks of disability.

Herb Morton
Vice Chair

Steven Adamson
Vice Chair

James Sheppard
Vice Chair

HM/dc/ml