
Noteworthy Decision Summary

Decision: A1606663 **Panel:** Randy Lane **Decision Date:** April 16, 2018

Standing of personal representative to initiate a claim – Section 55 of the Workers Compensation Act – Death of worker.

This decision is noteworthy for its consideration of whether the personal representative of a deceased worker has standing to initiate a claim on behalf of the worker's estate for benefits during the period between the date of disability from an occupational disease and the date of death.

The worker was diagnosed with metastatic melanoma in October 2012. Despite treatment, the worker died from that condition in January 2013. The worker's surviving spouse filed a claim for survivor's benefits. The Workers' Compensation Board, operating as WorkSafeBC (Board), found that the worker's metastatic melanoma was an occupational disease due to the nature of his employment. In addition to benefits payable to her as a dependent survivor, the surviving spouse requested payment of temporary disability benefits for the period between October 2012 and January 2013. The Board denied that request on the grounds that the worker's estate, through the personal representative, did not have the right to claim compensation. A review officer confirmed that decision.

The panel noted that the *Workers Compensation Act* (Act) does not expressly permit a deceased worker's estate to apply for workers' compensation benefits; however, it found that did not preclude such an application. The panel then considered the nature of a claim for workers' compensation benefits and when entitlement to such benefits arises. The panel concluded that a workers' entitlement to benefits is not contingent on an application being made and does not flow from section 55(1) of the Act, but flows from section 5(1), section 5.1, or section 6(1) of the Act. Entitlement may be lost if an application is not made within one year. Entitlement under section 5(1) or section 5.1 arises on the occurrence of an injury, and under section 6(1) on the occurrence of an occupational disease.

The panel concluded that a claim for benefits was not lost on the worker's death following the legal maxim *actio personalis moritur cum persona* (a personal right of action dies with the person). The maxim does not apply because a claim for workers' compensation benefits is not founded in malfeasance or misfeasance of any person; rather, a claim under the Act is a statutory chose in action that forms part of the estate of a deceased worker even though the worker had not filed a claim at the time of his death.

The panel found that the words "worker" and "person" in the Act, either in their ordinary grammatical sense or as defined by the Act and the *Interpretation Act*, support the conclusion that under section 55 of the Act a personal representative can initiate a claim under the Act. The panel further concluded that other sections in the Act did not preclude the personal representative from initiating a claim.

DECISION OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL

WCAT Decision Number: A1606663
WCAT Decision Date: April 16, 2018

Introduction

- [1] This appeal concerns whether an estate may apply for workers' compensation benefits regarding the period prior to a worker's death.
- [2] The worker's estate appeals to the Workers' Compensation Appeal Tribunal (WCAT) from the October 13, 2016 decision of a review officer with the Review Division of the Workers' Compensation Board, operating as WorkSafeBC (Board). In *Review Decision #R0204850* the review officer concluded the worker's estate did not have the right to initiate a claim for compensation.
- [3] The estate filed a November 14, 2016 notice of appeal. The Employers' Advisers Office was invited to participate in the appeal, but it declined to do so. The Employers' Forum was invited to participate in the appeal; it agreed to do so and is represented by an employers' adviser.
- [4] The worker's estate filed a July 27, 2017 submission. The Employers' Forum provided a September 12, 2017 submission. While the worker's estate was offered an opportunity to provide a rebuttal, no rebuttal submission was received by the October 20, 2017 due date. By letter of October 31, 2017 submissions were declared complete.
- [5] While the notice of appeal asked that the appeal proceed by written submissions, the worker's estate observed it was willing to proceed via an oral hearing if the panel wanted to do so. I consider this appeal turns on legal issues that do not necessitate the holding of an oral hearing.

Issue(s)

- [6] Does the worker's estate have the ability to apply for workers' compensation benefits regarding the period prior to his death?

Jurisdiction

- [7] This appeal was brought pursuant to subsection 239(1) of the *Workers Compensation Act* (Act).
- [8] This is an appeal by way of rehearing. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.
- [9] WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law, and discretion arising or required to be determined in an appeal before it (section 254 of the Act).

Background and Evidence

- [10] In 2010 the worker, a machinist, underwent a left hip total replacement. In November 2011, while awaiting a right hip total replacement, he underwent an excisional biopsy of a melanoma on the instep of his left foot. He underwent a right hip total replacement in February 2012.
- [11] In June 2012 the worker returned to work after having been off work since July 2010.
- [12] In late September 2012 the worker noticed a left groin mass which appeared to be growing. Biopsies performed on October 22, 2012 confirmed metastatic melanoma. He underwent radiation and chemotherapy.
- [13] The worker died on January 8, 2013 due to his metastatic melanoma. He was 51 years old.
- [14] One year later, on January 8, 2014, the worker's widow advised the Board by telephone of the worker's death and her belief that his metastatic melanoma was due to the nature of his employment. On January 17, 2014 the Board received a widow's application completed by the worker's widow.
- [15] By decision of June 9, 2014 a case manager denied the widow's application for benefits. The worker's metastatic melanoma was not an occupational disease due to the nature of his employment. (While the widow's application was received by the Board more than one year after the worker's death, the case manager did not refer to section 55 of the Act which provides that an application by a dependant for benefits must be received within one year of the date of death.)
- [16] Over a year later, on August 31, 2015 a review officer concluded the worker's metastatic melanoma was due to the nature of his employment.
- [17] In a September 4, 2015 memorandum a case manager documented that during a conversation with the worker's widow on that date, she raised the issue of "entitlement to temporary wage loss benefits" (presumably associated with the worker's disability between October 2012 and January 2013). The case manager noted that the issue would be discussed at the next "Fatal Claim Team Meeting." (A September 4, 2015 entry in the communications log on the Board's file documents similar information.)
- [18] The claim file does not document the results of any such team meeting.
- [19] A September 8, 2015 letter to the Board from a law firm asserted it represented the worker's widow and the estate of the worker. Accompanying earnings information included a pay stub which appeared to suggest the worker began missing work on October 17, 2012. The law firm contended that temporary total disability benefits should be calculated at the maximum wage rate and asked that the Board pay such benefits for the period between the worker's disablement in October 2012 and his death on January 8, 2013

- [20] By letter of October 20, 2015 addressed to the law firm, the case manager noted the request for an adjudication of any potential entitlement to workers' compensation benefits prior to the worker's death. The case manager remarked that "the Board was not entirely sure if this can be accepted or not." He stated section 55 of the Act would be "an issue" as no application was received from the worker while he was alive.
- [21] The case manager stated he had been advised to provide the law firm with an "Application for Compensation and Report of Injury or Occupational Disease – Form 6." If the worker's widow wanted the Board to address the issue, he asked that the law firm assist her in completing the application and then return it to the Board.
- [22] By letter of November 9, 2015 the law firm advised the Board it no longer represented the worker's widow.
- [23] By decision of November 26, 2015 the case manager advised the worker's widow of her entitlement to a monthly pension based on a provisional wage rate. (By decision of January 13, 2013 the wage rate was increased after the Board received more earnings information.)
- [24] By letter of January 8, 2016 a lawyer advised the case manager he had been retained by the worker's estate. The lawyer asserted that the January 17, 2014 application submitted by the worker's widow was an application for compensation on behalf of the worker's estate.
- [25] By decision of January 12, 2016 the case manager noted the request that the Board pay the worker's estate temporary disability benefits for the period between the worker's disablement commencing in October 2012 and his death on January 8, 2013 and the request that the widow's application for compensation be considered as an application for compensation on behalf of the worker's estate.
- [26] The case manager observed that no claim for compensation was made, started or adjudicated prior to the worker's death. The case manager stated he was unaware of any authority that would give an estate the right to commence a claim on behalf of the deceased worker. Therefore, the case manager was unable to consider a claim for the worker's entitlement to compensation benefits for the period prior to the worker's death.
- [27] By decision of October 13, 2016 the review officer confirmed the Board's January 12, 2016 decision that the estate did not have the right to claim compensation.

Findings and Reasons

Scope of the Appeal

- [28] The appeal before me does not concern whether it is open to an estate of a worker to initiate or continue a review of a Board decision if a worker had submitted an application for compensation and then died at any point thereafter, such as (i) before the Board issued its decision, (ii) after the Board issued a decision and before the worker had a chance to submit a request for review, or (iii) after the worker had submitted a request for review. As well, the appeal does not concern whether an estate may initiate an appeal to WCAT from a Review Division decision if a worker submitted an application for compensation and then died at any point thereafter.

- [29] As will be noted later in my decision, there are various decisions from the former Workers' Compensation Review Board and the former Appeal Division of the Board which touch on such issues. Those earlier decisions contain comments that may be relevant to the narrow issue raised by the appeal before me.
- [30] The narrow issue before me arises out of the Board's January 12, 2016 decision that only dealt with the threshold question of the capacity of the worker's estate to apply for compensation regarding the period prior to the worker's death. That is the extent of the issue raised by the appeal.
- [31] For the reasons that follow, I am not persuaded by the estate's assertion in its July 27, 2017 submission that a further issue on this appeal is whether a claim for compensation was filed prior to the statutory deadline contained in section 55 of the Act.
- [32] I find that the case manager's January 12, 2016 decision did not expressly or impliedly address whether the widow's application could be considered as an application by the worker's estate and/or whether the statutory deadline contained in section 55 of the Act was met. Given that the case manager was not persuaded that the worker's estate could commence a claim, it was not necessary for the case manager to determine whether the widow's application could be considered to be an application by the worker's estate. I find that his January 12, 2016 decision did not contain any decision on that issue. He would have only addressed that issue if he considered that the estate had capacity to apply for compensation regarding the period prior to the worker's death.
- [33] I appreciate that one can infer from the case manager's October 20, 2015 letter which sent the law firm a Form 6 that the case manager did not consider the widow's application was an application by the worker's estate. It does not appear that as of October 2015 the case manager had concluded the worker's estate lacked the ability to initiate a claim for compensation. (It appears possible he considered he would address the matter further if a completed Form 6 were received by the Board.) Yet, such a potential implied decision in the October 20, 2015 letter that the worker's widow's application was not an application by the worker's estate does not form part of the January 12, 2016 decision that is the basis for the appeal to WCAT.
- [34] Given that the case manager's January 12, 2016 decision did not address whether the worker's widow's application for compensation was an application by the worker's estate, I do not consider the review officer could address the issue.
- [35] In making that comment, I note the review officer stated the issue before him was whether the Board "should have rejected the **applicant's application** for compensation for an occupational disease [emphasis added]" suffered by the deceased worker.
- [36] As the review officer referred to the estate as the "applicant," his formulation of the issue could suggest he considered the estate had filed an application for compensation. However, the review officer's decision does not expressly find that the widow's application constituted an application on behalf of the estate. Further, and more significant, he found that an estate lacked

the ability to initiate a claim. Given that conclusion, it was not necessary for him to consider whether the widow's application could be considered to be an application by the estate, and I do not consider he made any decision on that issue. Thus, it is unclear what the review officer meant by the "applicant's application for compensation."

- [37] Also, with regard to matters of the Review Division's jurisdiction, I refer to *WCAT-2004-04903* which found that, pursuant to section 96.2 of the Act, a review officer's jurisdiction is limited to matters decided by Board in the decision under review; a review officer exceeds his or her jurisdiction if he or she makes findings about a worker's claim other than those dealt with in the decision under review. That decision is designated as noteworthy.¹ I was the author of that WCAT decision, and I continue to hold that view of the Review Division's jurisdiction. Thus, it was not open to the Review Division to address whether the worker's widow's application for compensation was an application by the worker's estate.

Does the Act explicitly permit a worker's estate to apply for compensation?

- [38] There is no provision in the Act which expressly permits a worker's estate to apply for workers' compensation benefits.

- [39] The absence of such a provision does not, by itself, preclude an estate from applying for compensation. One must consider ordinary and grammatical meaning of words of the Act, the nature of a worker's claim for workers' compensation benefits, and what matters form part of a worker's estate following a worker's death.

What is the nature of a claim for workers' compensation benefits and when does entitlement to benefits arise?

- [40] An evaluation of this issue assists in determining whether a claim for workers' compensation benefits would survive a worker's death in a case in which a worker had not submitted an application for compensation.

- [41] Subsection 5(1) of the Act provides, "Where, in an industry within the scope of this Part, personal injury or death arising out of and in the course of employment is caused to a worker, **compensation as provided by this Part must be paid** by the Board out of the accident fund [emphasis added]."

- [42] Subsection 5.1(1) of the Act declares, "Subject to subsection (2), **a worker is entitled to compensation** for a mental disorder that does not result from an injury for which the worker is otherwise entitled to compensation...[emphasis added]."

¹ As set out in item #19.3 of the *Manual of Rules of Practice and Procedure*, noteworthy decisions may provide significant commentary or interpretive guidance regarding workers' compensation law or policy, comment on important issues related to WCAT procedure, or serve as general examples of the application of provisions of the Act, policies or adjudicative principles. Noteworthy decisions are not binding on WCAT. Although they may be cited and followed by WCAT panels, they are not necessarily intended to be leading decisions.

[43] Subsection 6(1) of the Act provides as follows:

Where

- (a) a worker suffers from an occupational disease and is thereby disabled from earning full wages at the work at which the worker was employed or the death of a worker is caused by an occupational disease; and
- (b) the disease is due to the nature of any employment in which the worker was employed, whether under one or more employments,

compensation is payable under this Part as if the disease were a personal injury arising out of and in the course of that employment. A health care benefit may be paid although the worker is not disabled from earning full wages at the work at which he or she was employed.

[emphasis added]

[44] Neither subsection 5(1) nor subsection 6(1) specifies to whom compensation “must be paid” or “is payable.” The obvious and unchallenged interpretation of these provisions is that the injured or ill worker is entitled to compensation. Those subsections also refer to compensation for the death of a worker; those references tie in with section 17 of the Act. As will be discussed later in my decision, section 17 provides for payments to dependants as a method of compensating for losses resulting from the death of a worker.

[45] The issue before me concerns a worker’s pre-death losses associated with an occupational disease and whether an estate may initiate a claim for such losses. I note that compensation cannot be paid directly to a deceased worker. I do not consider that such circumstances mean that the references in subsections 5(1) and 6(1) to the death of a worker address whether someone else other than the worker (such as his or her estate) could seek compensation regarding losses suffered by a worker who later dies. I consider that the references to the death of a worker in subsections 5(1) and 6(1) simply concern section 17.

[46] Subsection 5.1(1) specifies that the “worker” is entitled to compensation. One might argue that the difference in language could be interpreted to mean that the range of possible recipients of compensation is greater under sections 5 and 6 than under section 5.1. As the appeal before me does not involve a claim under subsection 5.1(1), I do not need to resolve the matter. Further given my later analysis of the word “worker,” I am not persuaded that the range of recipients is indeed different.

[47] For the purposes of this appeal, the important points are that compensation “must be paid” or “is payable” when the conditions set out in those subsections are met. None of those subsections, from which entitlement to compensation flows, specifically includes or excludes payment to a deceased worker’s estate. (As well, none of the sections of the Act dealing with temporary or permanent disability benefits specifically includes or excludes payment to a deceased worker’s estate.)

- [48] A worker's right to compensation is not absolute. Entitlement to compensation may be lost if a worker does not make an application for compensation within a year, subject to (i) the existence of special circumstances in connection with subsections 55(3) or 55(3.1) of the Act/concerns regarding sufficient medical or scientific evidence in connection with subsection 55(3.2)² and (ii) the ability of the Board to pay compensation without an application.
- [49] However, a worker's entitlement to compensation flows from subsections 5(1), 5.1(1) or 6(1), not from subsection 55(1).
- [50] I note the review officer stated that a worker who sustains an injury or disability arising out of or in the course of the employment "has entitlement to compensation under section 5 and 6 of the Act." I agree with that statement.
- [51] The review officer asserted later in his decision that compensation "does not automatically form part of the worker's assets upon the moment of injury." He stated that section 55 establishes a process that must be followed for making a claim and asserted that upon the worker's submitting an application "the entitlement **actually takes effect** [emphasis added]." (The Employers' Forum seemingly supports this assertion as part of its argument that compensation that is "payable," "owing" or "accrued" is compensation that meets all mandatory requirements which include the requirements found in section 55.)
- [52] I consider the review officer has seemingly declared two positions as to when entitlement arises. I accept his first position, but not his apparent revision of that position.
- [53] I find that the entitlement to compensation is not contingent on an application being made; rather, it comes into being when the injury or disablement from disease occurs but is subject to possible loss if an application is not made within a year. This is reinforced by the fact that subsection 55(1) provides that where the Board is satisfied that compensation is payable, it may be paid without application. If entitlement to compensation is contingent on making an application, the Board could never be satisfied that compensation is payable in the absence of an application, and subsection 55(1) would be nonsensical.
- [54] I appreciate that, subject to the exceptions in subsection 55(3), 55(3.1), and 55(3.2), subsection 55(2) states that "no compensation is payable" unless "an application is filed, or an adjudication made, within one year after the date of injury, death or disablement from occupational disease." I interpret subsection 55(2) as imposing a procedural limitation on payment of monies rather than being concerned with entitlement. That procedural limitation is notable as I agree with the review officer's statement that "[i]f a worker does not actualize the benefit by making an application in accordance with section 55 and the Board does not waive this requirement, the right is lost."
- [55] The review officer suggested that section 55 reflects respect for a worker's right to choose whether to seek compensation or not (by making or not making an application). With respect, this is not especially persuasive. There is nothing in the Act to support that contention (which

² Subsection 55(3.3) also contains an exception to subsection 55(2), but as it concerns reconsiderations rather than initial applications, I have not discussed it in my analysis.

seems to suggest that subsection 55(1) benefits a worker even though subsection 55(1) is rightly perceived as a procedural limitation). There is a better reason for permitting the Board to pay compensation without an application where it is satisfied that compensation is payable.

- [56] One need only consider the situation where a worker is rendered comatose or incompetent by a work-related injury. Such a worker would be entitled to compensation. The Board could be satisfied that compensation was payable, but the worker would be incapable of making a choice or filing an application. It would be contrary to the overall scheme and intention of the Act (to provide compensation to workers for injuries and occupational diseases) if the Board were prevented under such circumstances, or their equivalent, from paying compensation merely because the worker had not evinced an intention to seek compensation by filing an application.
- [57] I find that entitlement under sections 5 and 5.1 arises on the occurrence of an injury. Entitlement under section 6 arises upon occurrence of the occupational disease. I cite in support the comments of Mr. Winter, the author of the *Core Services Review of the Workers' Compensation Board*, (Winter Report)³ who stated at page 82, "When a worker suffers a disability arising from a work-related injury or illness, **the worker has an entitlement** to receive compensation benefits pursuant to the applicable provisions in the Act [emphasis added]."
- [58] I accept Mr. Winter's comments later on page 82 that "... there are procedural requirements specified in the Act which the worker must meet in order to crystallize his/her entitlement to compensation benefits." He referred to section 55 of the Act. I noted section 55 above and will address it further in my decision.
- [59] I do not consider that Mr. Winter's later use of the word "crystallize" detracts from his initial comment that entitlement arises upon the occurrence of a work-related injury or illness. I consider he determined entitlement arises **before** the need to satisfy procedural requirements. I do not interpret his later comments to mean he changed his mind regarding his initial determination as to when entitlement arises. I interpret his use of "crystallize" to mean that the entitlement becomes definite. That it becomes definite does not mean it did not exist before. However, the entitlement that arises upon the occurrence of the work-related injury or illness can, in effect, be defeated if the procedural requirements in section 55 are not satisfied. In that sense, a failure of a claim to satisfy the terms of section 55 means that a worker, although initially entitled to compensation, becomes disentitled.
- [60] I observe that at this juncture, I have concluded that a worker's entitlement to compensation arises from the occurrence of a compensable injury or occupational disease. That entitlement does not relieve a worker of the procedural requirements of the Act.
- [61] In making those comments, I am not saying that simply upon the assertion of a worker that he or she has sustained an injury or disease that a worker may demand that the Board issue compensation benefits. That entitlement arises when the injury or disease occurs does not mean there is no requirement for adjudication. It still falls to the Board to determine if the person claiming benefits is indeed a worker who either (i) suffered an injury arising out of and in the

³ *Core Services Review of the Workers' Compensation Board*, Alan Winter WCB Core Reviewer March 11, 2002. (<https://www.worksafefbc.com/en/resources/about-us/reports/core-services-review-workers-compensation-board?lang=en>).

course of their employment or (ii) suffered an occupational disease due to the nature of their employment. But in terms of entitlement, that vests upon the occurrence of the injury or disease that is later determined to be either an injury arising out of and in the course of employment or an occupational disease due to the nature of employment.

- [62] Such conclusions do not resolve such matters as (i) whether a worker's entitlement to compensation survives the worker's death and therefore forms part of the worker's estate or (ii) the extent to which the terms of the Act may affect the ability of an estate to apply for workers' compensation benefits. I now turn to the first issue flagged in the preceding sentence.

Does a claim for benefits form part of a deceased worker's estate such that a personal representative may initiate a claim after a worker's death?

- [63] I find that a claim for benefits forms part of a worker's estate **before** death. I use the word "estate" with regards to a person's financial affairs.

- [64] In support of that finding I note that if because of mental infirmity arising from disease, age or otherwise, a person is a "patient" and found to be incapable of managing their own affairs, a committee may be appointed pursuant to the *Patients Property Act*, R.S.B.C. 1996, chapter 349. The committee has "all the rights, privileges and powers with regard to the **estate** of the patient as the patient would have if of full age and of sound and disposing mind [emphasis added]."

- [65] I consider that if a worker became a patient because of an injury or became a patient after an injury (either due to the effects of an injury or due to some other cause), it would be open to a committee to apply for workers' compensation benefits on behalf of that worker. A worker's entitlement to workers' compensation would form part of the worker's estate while the worker was alive.

- [66] In making the above observations, I am not finding that because a claim for workers' compensation forms part of a worker's estate while the worker is alive it therefore **must** form part of a worker's estate once the worker dies. My point is that the notion that a workers' compensation claim forms part of a worker's estate while alive is a starting point in the analysis of what matters survive the death of a worker. I appreciate that, stated broadly, the estate of a live worker "needs" benefits in that a worker may have ongoing losses of income and medical treatment which require compensation whereas an estate of a dead worker does not "need" such benefits given that there would be no living worker. Such observations are perhaps relevant as to whether there is a policy rationale for treating the two types of "estates" differently.

- [67] In terms of what constitutes an estate following a worker's death, as noted in *Canada (Attorney General) v. Hyslop*, [2007] 1 S. C. R. 429, 2007 SCC 10, "an estate is just a collection of assets and liabilities of a person who has died."

- [68] At common law, the personal property of a deceased person vests in a personal representative. The personal representative includes an executor of the deceased person's will. Personal property includes choses in action, which are incorporeal interests that may require some legal action to realize. Choses in action would include rights to sue in tort or in contract.

- [69] Not all matters that could be pursued by a person while alive survive that person's death. If they do not survive the person's death, they cannot be pursued by a personal representative.
- [70] The Latin maxim *actio personalis moritur cum persona* (a personal right of action dies with the person) provides a basis for determining which matters do not survive an individual's death.
- [71] It is necessary to consider the scope of that maxim. If application of the maxim means that a workers' compensation claim dies with a worker, one would then need to determine if any statutory provisions found in such legislation as the Act or the *Estate Administration Act*, R.S.B.C. 1996, chapter 122/*Wills, Estates and Succession Act*, S.B.C. 2009, chapter 13 grant relief from the application of that maxim.
- [72] As workers' compensation benefits under the Act are statutory benefits, I consider it appropriate to start with an examination of what appears to be the earliest consideration by a Canadian court of the nature of a statutory claim in connection with the *actio personalis* maxim. I will then refer to other cases which address the maxim. I appreciate one can argue that an analysis of the matter could be informed by taking into account the fact that, owing to the historic trade-off at the heart of the workers' compensation system, statutory benefits under the Act are in lieu of common law remedies. Yet, the historic origin of benefits under the Act cannot alter the fact that they are indeed benefits payable under an act; they are statutory benefits. The appeal before me does not concern whether a tort claim based on an injury or a disease suffered by a work survives the death of a worker.
- [73] *Crewe-Read v. The Municipality of Cape Breton*⁴ arose out of the necessity to call in the militia to suppress riots in Cape Breton. A statute then in force provided that when a municipality was unable to quell unrest and found it necessary to call in the militia, the municipality was required to pay for the transportation and maintenance of the militia.
- [74] When the Municipality of Cape Breton refused to pay, the commanding officer, Lieutenant Colonel Crewe-Read, commenced an action based on that statutory entitlement. He died before the action was tried, but the administrator⁵ of his estate continued the action and received judgment for the amount due. That judgment was overturned on appeal, and the matter made its way to the Supreme Court of Canada.
- [75] The Supreme Court of Canada considered whether the right of action to recover the amount claimed "died" with Lieutenant Colonel Crewe-Read or passed to his estate. The court said the *actio personalis* maxim had never been extended to actions founded on "any obligation, contract, debt, covenant or any other duty to be performed, because all such actions survived; the maxim is peculiarly applicable to actions *ex delicto* [from a wrong]."

⁴ 14 SCR 8, 1887 CanLII 68 (SCC)

⁵ The administrator was Lieutenant Colonel Crewe-Read's widow. While the case refers to her as the "administratrix" of his estate, I have used the more modern gender-neutral term. I have also used "executor" rather than "executrix" when referring to other court cases.

- [76] The court found that the statutory obligation to pay was akin to a contractual debt (*ex quasi contractu*) to which the maxim did not apply. It was in the nature of a debt to be treated as a statutory contract with the deceased, “a statutory chose in action which, on his death, became parcel of his personal estate” which passed to his administrator.
- [77] Another statutory right was considered in *Barker v. Westminster Trust Co.*⁶ The case involved an executor of a deceased husband who sought a “just and equitable provision” out of the deceased husband’s wife’s estate pursuant to the *Testator’s Family Maintenance Act*. O’Halloran, JA concluded that application of the *actio personalis* maxim did not extend beyond actions in tort in which loss did not result to the estate or, at most, actions in contract founded on injury to the person or reputation only. He referred to the decision in *United Collieries Ltd. v. Simpson*⁷, in which Lord Shaw described the maxim as “of doubtful origin, has produced confusion rather than guidance in specific cases, and is used rather to dress up a conclusion already formed than as a safe guide towards a conclusion.”
- [78] O’Halloran, JA declared, “As this is not a case in tort or in contract arising out of tort, the maxim can have no application.” He stated, “We are concerned with an equitable right vested by statute.” The applicable right was the duty of the wife to her husband to provide adequately for his proper maintenance and support.
- [79] O’Halloran, JA cited the decision in *Peebles v. Oswaldtwistle Urban District Council*⁸ to the effect that the right to enforce a statutory duty owed to a deceased passed to the personal representative. He observed that *Peebles* referred to a note regarding *Wheatley v. Lane*,⁹ which

⁶ [1941] 4 D.L.R.514 BCCA, 1941 CanLII 252

⁷ Cited in *Barker* as (1909), 78 L.J.P.C. 129. Also citable as [1909] A. C. 383, 46 SLR 780, or [1909] UKHL 780. The cause of action in the final two reports is described as *Hendry (Simpson’s Executrix) v. The United Collieries Limited*, even though The United Collieries Limited was the appellant.

⁸ (1896) 65 L.J.Q.B. 499

⁹ 1 Wms. Saund 216; 85 ER 228.

Owing to the widespread distribution of legal resources on the Internet, the version of the case reported at 1 Wms. Saund 216 may be accessed on Common LII (<http://www.commonlii.org/>). The full version of the text regarding this case decided in the 20th year of the reign of Charles II (1669) with the accompanying note is instructive. The note described the *actio personalis* maxim as follows:

It was a principle of the common law, that if an injury were done either to the person or property of another, for which *damages* only could be recovered in satisfaction, the action died with the person *to whom*, or *by whom*, the wrong was done.

The note discussed a misconception or misapplication of the principle, before returning to a fuller discussion of the extent of the rule:

But where the cause of action was founded upon any *malfeasance* or *misfeasance*, was a *tort*, arose, *ex delicto*, such as trespass for taking goods, &c. trover, false imprisonment, assault, and battery, slander, deceit, diverting a water-course, obstructing lights, escape, and many other cases of the like kind, where *the declaration* imputes a tort done either to the person or property of another, and *the plea* must be not guilty, the rule was, *actio personalis moritur cum personâ*; and this rule still holds with respect to the person *by whom* the injury is committed; for if he dies, no action of this kind can be

recited the *actio personalis* maxim and declared, “But this rule was never extended to such personal actions as were founded upon any obligation, contract, debt, covenant, or any *other duty* to be performed; for there the actions survived.”¹⁰

- [80] I appreciate that the impact of the comments by O’Halloran, JA may be limited. While he determined the right of action survived the husband’s death, McDonald, JA determined the action did not survive. Sloan, JA found it unnecessary to decide that question; he allowed the appeal on another basis. Thus, O’Halloran, JA was not speaking for a majority of the court.
- [81] The *United Collieries* decision cited by O’Halloran, JA specifically concerned the nature of entitlement to compensation under the workers’ compensation legislation in the United Kingdom. A worker was killed in an accident. His mother, a dependant, died without making a claim. The mother’s executor made a claim.
- [82] Lord Macnaghten stated that the *actio personalis* maxim was “limited to actions in which a remedy is sought for a tort, or for something which involves at any rate the notion of wrongdoing.” He considered the liability under the *Workmen’s Compensation Act* was not such an action:
- Liability under the Workmen’s Compensation Act has no connection with any wrong doing on the part of the employer. It does not result from any neglect or any default on his part. Indeed, in the case of death, or “serious permanent disablement,” the event may be the consequence of “serious and willful misconduct” on the part of the workman while the employer is wholly free from blame, and yet compensation may be recoverable all the same.
- [83] Significantly, the Lord Chancellor (Loreburn) observed that the *Workmen’s Compensation Act* made an employer “liable to make compensation.” He observed that liability was irrespective of the dependants’ expectation of life, and the dependants were described as the persons for whose benefit the monies were to be paid. He stated that such circumstances made the liability look like a debt from the employer to dependants arising on the death of a worker.
- [84] The Lord Chancellor noted other provisions in the statute which did not proceed upon any other view than there was a definite right on the part of dependants, as a class, to the money. He concluded that such a right was treated by the statute as arising because of the worker’s death. He was not persuaded that the right arose only if the claim was filed within the six-month notice period. He considered that the notice requirement, while a possible bar to the remedy, was

brought *against* his executor or administrator, though in some of these cases, such as taking goods away, &c. a remedy may be had *against* the executor in another form.

At that point, the note stated, “But this rule never extended to such personal actions as were founded upon any obligation, contract, debt, covenant, or any *other duty* to be performed; for there the actions survived.”

¹⁰ My review of the *Peebles* decision establishes that one member of the court noted the argument that the cause of action did not survive because the duty was a statutory duty rather than a duty arising from contract. The judge was not persuaded.

analogous to numerous instances in which notice of action is required by statute, and it did not help in determining when the right to compensation arose.

- [85] The Lord Chancellor noted that one of the other members of the court considered that if the claim was made within the statutory period, and the dependant died before the award had been made, the right to an award of compensation vested in the dependant and passed to the legal personal representative. However, if the claim had not been made, the employer's liability was terminated by the death of the dependant.
- [86] The Lord Chancellor was not persuaded. He could not see why the claim by the dependant, instead of the death of the worker, was to be regarded as the signal for the right to compensation vesting. (I pause to note that the Lord Chancellor's view appears to be the one Mr. Winter embraced many decades later.)
- [87] Lord Shaw concluded that the liability was to be treated as a debt which passed to a personal representative.
- [88] Both *Barker v. Westminster Trust Co.* and *United Collieries Ltd. v. Simpson* were cited in *Retailers' Trust Company v. Regush (No. 2)*.¹¹ In that case, a worker was injured in the course of his employment. He commenced an action against the defendants for damages. After the trial but before judgment was delivered, the worker died as a result of an unrelated and non-work-related accident.
- [89] The administrator of the worker's estate, Retailers' Trust Company, was substituted as the plaintiff. Retailers' Trust Company argued that if the worker's action for damages was unsuccessful, he would nevertheless be entitled to compensation under the *Workmen's Compensation Act*, RSS, 1953, ch. 255, and asked the court to assess compensation in accordance with that statute. The worker's negligence action was dismissed.
- [90] The court in *Regush* considered whether the worker's claim under the *Workmen's Compensation Act* survived his death and passed to Retailers' Trust Company as his administrator. Notably, under that statute an employer was liable to pay compensation when a personal injury was caused to a workman. The court found that:
- ...the right to compensation conferred by *The Workmen's Compensation Act* is a statutory right in the nature of a debt which vests in the workman as of and from the time of the accident. In that case the cause of action would not abate and the plaintiff company, as the administrator of the estate of the deceased, would have the right to claim the compensation to which the deceased, but for his death, would have been entitled.
- [91] In *Currie Estate v. Bowen*,¹² the court considered a claim by administrators of the estate of a widow who had not been provided for under her husband's will. The widow died six weeks after her husband.

¹¹ 1958 CanLII 149 (SK QB), (1958) 26 WWR (New Series) 381.

¹² 1989 CanLII 2690 (BC SC)

- [92] Similar to the appeal before me, *Currie Estate* involved a matter commenced by an estate **after** the death of the individual. Hutchinson, J commented that the words “in an action by or on behalf of the wife” in the *Wills Variation Act* “authorize the **commencement** of this action by personal representatives [emphasis added].”¹³ I appreciate that the expression “or on behalf of” does not appear in the Act in connection with a claim by a worker.
- [93] In *Currie Estate v. Bowen* the executors of the husband’s estate argued that the action under the *Wills Variation Act* was a personal action subject to the *actio personalis* maxim and therefore it could not be prosecuted by the widow’s executors. The court noted the decision in *Barker* and several subsequent decisions. It determined that the *Wills Variation Act* granted the widow a right to claim an equitable share in her husband’s estate. Because that right to advance the claim was granted by statute, and was not founded in tort, and because it was broader than a claim for mere support or maintenance, it followed that the cause of action survived the widow and was not subject to the *actio personalis* maxim. The right vested in her at the time of her husband’s death.
- [94] In *Kirkpatrick v. Corporation of the District of Maple Ridge*,¹⁴ Southin, JA (in chambers) considered an action pursued by Mr. Kirkpatrick under the *Municipal Act*. Mr. Kirkpatrick died subsequent to delivery of the Supreme Court judgment. His executor and others sought to be substituted as the appellant in the Court of Appeal. The respondent sought to have the appeal dismissed on the basis the claim did not survive Mr. Kirkpatrick’s death and was caught by the *actio personalis* maxim.
- [95] Southin, JA did not accept the respondent’s argument. She commented that a proceeding by way of petition to set aside a bylaw on the ground of illegality, whatever the illegality assigned, was not within the rationale or philosophy of the “ancient rule.” She commented that any elector who wished to carry on the proceeding should be permitted to do so. She granted the request for substitution of whichever of the applicants was an elector. Thus, while she determined that the maxim did not apply, she did not go so far as to determine that the executor was the only one of the applicants who was permitted to be substituted or that the executor would be substituted in that capacity.

¹³ I am aware that in *Lawrence v. McGavin*, 1992 CanLII 2080 (BC SC), Spencer, J expressed concerns about such an approach:

I have a reservation about the plaintiff's standing to commence this action on behalf of a widow who has died before the action commenced. I realize that question has been decided in *Currie Estate vs. Bowen et al* (1989) 1989 CanLII 2690 (BC SC), 35 B.C.L.R. (2d) 46 (S.C.) and I am content to accept that case as authority for the purposes of this application. However I do not wish to be understood as necessarily concurring with that decision.

[underlining in the original; bold emphasis is mine]

¹⁴ 1991 CanLII 388 (BC CA)

[96] Turning from statutory rights/actions to consideration of the *actio personalis* maxim in general, I note that in *L.N.M. v. Green*,¹⁵ Southin, JA cited what she appeared to consider to be an authoritative statement as to nature of the *actio personalis* maxim:

[12] The common law rule is discussed in *Broom's Legal Maxims*, 10th ed. (London: Sweet & Maxwell, 1939), at pp. 611 et seq., in terms which I do not understand ever to have been questioned:

It is to actions in form *ex delicto* that the maxim, *actio personalis moritur cum persona*, was peculiarly applicable, and, in a few cases, still applies; for, as Lord Abinger observed [In *Raymond v. Fitch*, 2 Cr. M. & R. 588, at p. 597], this maxim “is not applied in the old authorities to causes of actions on contracts, but to **those in tort, which are founded on malfeasance or misfeasance** to the person or property of another: which latter are annexed to the person, and die with the person, except where the remedy is given to (or by) the personal representatives by the statute law.” And the general rule of the common law was, that **if an injury were done** either to the person or to the property of another for which unliquidated damages only could be recovered in satisfaction, the action died with the person to whom, or by whom, the wrong was done [*Wheatley v. Lane*, 1 Wms. Saund. (ed. 1845) 216 a, n. (1)].

[bracketed material added by the court judgement;
bold emphasis is mine]

[97] Southin, JA noted statutory modifications of the effect of the *actio personalis* maxim:

- Exceptions to the rule permitting executors and administrators of estates to bring and maintain actions for damages for trespass were made by statutes promulgated as early as the reign of Edward III (1327-1376) and became part of the law of British Columbia in 1858.¹⁶ Those exceptions which concerned real estate were first printed in the statutes of British Columbia in the revision of 1897 to the *Administration Act*.
- In 1934 additional exceptions were added to the *Administration Act* regarding tort matters. Those exceptions permitted estates to pursue certain aspects of tort claims. Southin, JA cited the decision in *Dos Remedios v. Morey* (1966), 57 D.L.R. (2d) 550, 56 W.W.R. 21 (B.C.C.A.), which established that a tort action dies with the person unless the *actio personalis* maxim is otherwise modified by statute.

¹⁵ 1995 CanLII 8909 (BC CA).

¹⁶ I note that this continues to be the case. The *Law and Equity Act*, R.S.B.C. 1996, chapter 253 provides at section 2 that the Civil and Criminal Laws of England, as they existed on November 19, 1858, so far as they are not from local circumstances inapplicable, are in force in British Columbia, but those laws must be held to be modified and altered by all legislation that has the force of law in British Columbia or in any former Colony comprised within its geographical limits.

- [98] By the time of the 1995 decision in *L.N.M. v. Green*, the *Administration Act* had become the *Estate Administration Act*, and it permitted the personal representative of a deceased person to bring or continue an action founded in tort (with certain limitations) against a defendant, whether they be alive or also deceased.
- [99] The significance of the decision in *L.N.M. v. Green* is that it clearly identifies that the *actio personalis* maxim applies only to actions arising from malfeasance or misfeasance, or *ex delicto*.
- [100] That point is emphasized by the BC Court of Appeal in *Allan Estate (Executors of) v. Co-operators Life Insurance Co.*¹⁷ in which Lambert, JA opened his analysis by remarking as follows regarding the *actio personalis* maxim:
- [32] This legal maxim, though it is in Latin, does not have any pedigree in Roman law. Like all Latin maxims nowadays, its meaning is confusing for those who do not understand Latin, and even more confusing for those who do....
- [101] Lambert, JA commented that "...it is important to understand what actions of a plaintiff or potential plaintiff were barred at common law by the death of the plaintiff." He stated that the passage in *Broom's Legal Maxims* from the 1835 case of *Raymond v. Fitch* (cited by Southin, JA in *L.N.M. v. Green*) indicated that "the old authorities do not apply the maxim to actions in contract **but only to actions in tort** [emphasis added]."
- [102] I consider that *L.N.M. v. Green* establishes that the *actio personalis* maxim which existed in the civil laws of England as of November 19, 1858 would have been part of British Columbia law when the *Workmen's Compensation Act*, S.B.C. 1916, chapter 77 came into force in British Columbia in 1916 and 1917. The *Workmen's Compensation Act* is the ancestor of the Act.
- [103] I now turn to whether the *actio personalis* maxim applies to claims under the Act.
- [104] If a claim under the Act **is subject** to that maxim, then whether such a claim can be initiated by a personal representative would be a matter of whether a claim for workers' compensation benefits would satisfy the terms of the *Estate Administration Act* (or whether the Act itself empowers a personal representative to initiate a claim).
- [105] If a claim under the Act **is not subject** to the maxim, one does not need to look to the terms of the *Estate Administration Act* to determine if the claim may be pursued. As noted in *Allan Estate*, the *Estate Administration Act* only purports to confer a new right to bring an action in circumstances where no action could be brought at common law. One not need to look to the *Estate Administration Act* to initiate or continue an action that is not caught by the *actio personalis* rule. (One might need to look to the Act to determine whether it constrains the ability of a personal representative to initiate a claim for workers' compensation benefits.)
- [106] The review officer in *Review Decision #R0204850* distinguished the *Regush* decision on the basis it appeared the workers' compensation system in Saskatchewan created a debt obligation on employers which survived the worker's death.

¹⁷ 1999 CanLII 35 (BCCA)

- [107] The review officer considered the *actio personalis* maxim does not limit rights and obligations granted under the Act. He did not consider that “the non-application of the common law rule is sufficient reason for finding that an estate can exercise a statutory right granted to a worker.” He did not consider that an estate had a right to claim workers’ compensation “simply because the right to compensation creates some kind of ‘debt.’” He stated it was debatable whether the right to compensation is best considered as a right to unliquidated or liquidated damages and questionable whether these terms are even material.
- [108] The review officer asserted that the *actio personalis* maxim neither prevents an estate of a deceased worker from asserting rights under the Act nor does it create such a right for an estate in situations where it does not apply. He asserted that rights and obligations created by a statute can only be defined in accordance with the wording of the intentions of the statute in accordance with the normal rules of statutory interpretation.
- [109] I consider it is well-recognized that the workers’ compensation system established by the Act is a “no fault” system (*Pasiechnyk v. Saskatchewan (Workers’ Compensation Board)*).¹⁸ As noted by Lord Macnaghten in the *United Collieries* case, and recognized by Thomson, J in the *Regush* case, malfeasance or misfeasance is not a consideration in the workers’ compensation system.
- [110] Consequently, I find that the *actio personalis* maxim has no application in relation to claims for benefits under the Act. The maxim is inapplicable for the simple fact that a claim under the Act is not a claim in tort. It is not a claim for a wrong, and does not arise from malfeasance or misfeasance.
- [111] I agree with the review officer that the *actio personalis* maxim does not prevent an estate from asserting a right under the Act. Further, I agree that the *actio personalis* maxim does not **create** a right for an estate, and I agree that the inapplicability of the maxim **does not by itself** create a right.
- [112] In my examining of the ramifications of the non-application of the *actio personalis* maxim to claims under the Act, I consider that the review officer appears to have misunderstood the *actio personalis* maxim. He appears to have considered the rule to be a general principle subject to limited exception for debt or debt-like obligations. However a review of the case law establishes that the rule is an exception (for claims arising “*ex delicto*”) to the more general principle that the rights of the deceased, including choses in action, pass to the personal representative.
- [113] I am aware that, unlike the legislation considered in *United Collieries* and *Regush*, the Act does not describe compensation as a debt owed by an employer to a worker. I do not think it is necessary to categorize compensation to which an injured worker is entitled under the Act as a debt in order to avoid the application of the maxim. The application of the maxim is avoided by the fact that a claim under the Act is not a claim in tort.

¹⁸ 1997 CanLII 316 (SCC)

- [114] A claim for benefits under the Act is a claim for a statutory chose in action. In that regard, I note that in *Arvelin v. Arvelin*¹⁹ the court considered whether a spouse's entitlement to workers' compensation benefits was family property. At the date of valuation of family property, the worker/spouse had applied for but been denied workers' compensation benefits, but her claim was ultimately allowed on appeal. Thus, at the material time, entitlement to benefits had not yet been proven. The court concluded that the worker/spouse's claim under the Ontario *Workers' Compensation Act* "constituted a legal chose in action," which was a "specie of property which existed as of the valuation date."
- [115] I appreciate that the *Arvelin* case did not address the status of a claim in the absence of an application for benefits; however, I consider that the court's determination as to a claim constituting a legal chose in action is not dependent upon whether an application had been submitted. In the absence of an application, an unperfected claim is still a legal chose in action.
- [116] I find that a claim under the Act is a statutory chose in action. In finding so, I am aware it is not open to workers to sue the Board in court for entitlement which they may believe is owed to them by the Board. This is so because section 96 of the Act gives the Board exclusive jurisdiction to determine such matters as whether an injury has arisen out of or in the course of an employment within the scope Part 1, the existence and degree of disability by reason of an injury, the degree of diminution of earning capacity by reason of an injury, and the average earnings of a worker for purposes of payment of compensation.²⁰
- [117] Thus, a claim under the Act differs from the court actions considered in the *Barker, Currie Estate*, and *Kirkpatrick* decisions. However, such circumstances do not alter the fact that a claim under the Act is a statutory chose in action. I further find that the death of a worker does not alter the status of such a claim as a statutory chose in action.
- [118] Given that a claim under the Act is a statutory chose in action not subject to the *actio personalis* rule, I find a claim under the Act forms part of the estate of a deceased worker who had not filed an application for workers' compensation benefits before his death.
- [119] That finding would appear, **by itself**, to provide the basis for a further finding that a personal representative may apply for compensation on behalf of that estate. I say that because a personal representative would be able to assert a claim for workers' compensation benefits in a manner similar to which a personal representative asserts **any other matter** that is not a claim *ex delicto*. If the claim was *ex delicto*, one would likely need to find authority in the *Estate Administration Act* (or perhaps the Act) to permit a personal representative to pursue the matter.
- [120] Before reaching a conclusive finding that a claim under the Act forms part of the estate of a deceased worker who had not filed an application for workers' compensation benefits before his or her death (such that a personal representative may indeed apply for compensation on behalf of that estate), I consider it necessary to examine whether the Act **precludes** a personal

¹⁹ 1996 CanLII 8077 (ON SC)

²⁰ A worker can seek a review of a Board decision by the Review Division, appeal a Review Division decision to WCAT, and seek a judicial review of a WCAT decision. Even on judicial review, "...the Court does not have the power to actually decide issues under the Act" (*Von Rummelhoff v. Workers' Compensation Appeal Tribunal*, 2015 BCSC 246, at paragraph #38).

representative acting in such a fashion. In addition, it is appropriate to consider whether the Act contains provisions upon which a personal representative could rely as part of pursuing a claim on behalf of an estate.

- [121] In the following 16 pages I review the Act and ultimately conclude it contains language (notably found in sections 1 and 55) that a personal representative could rely upon as part of initiating a claim on behalf of an estate. I also conclude that even if I am incorrect on that point, the Act does not contain language that precludes a personal representative from initiating a claim for benefits—a course of action that it appears a personal representative could pursue based on the fact a claim under the Act is a statutory chose in action not subject to the *actio personalis* maxim.

Does the Act implicitly preclude a personal representative from initiating a claim for benefits or permit a personal representative to initiate a claim for benefits?

- [122] I note that as part of his asserting the need to look to how rights and obligations created by a statute can only be defined in accordance with the wording and intentions of that statute (and that the *actio personalis* maxim is not determinative), the review officer referred to the decision in *Stinson (Estate of) v. British Columbia*.²¹ In that case the court held that the personal representative of a deceased person could not challenge the constitutionality of certain provisions of the Act on the basis that those provisions were contrary to section 15 the *Canadian Charter of Rights and Freedoms*. The court held that the equality rights conferred by section 15 of the *Charter* are personal rights that terminate on death of the individual and do not pass to the personal representative. As the *Charter* remedy being sought was not an action for loss or damage to the person or property of the deceased, it was not preserved by section 59 of the *Estate Administration Act*. The *Charter* remedy was a claim for declaratory relief under the *Charter*.
- [123] I note that the *Stinson* case was cited in *Canada (Attorney General) v. Hyslop*, referred to earlier in my decision. The court remarked that an estate was not an individual; it had no dignity that could be infringed. The court remarked that the use of “individual” in subsection 15(1) of the *Charter* was intentional. Therefore, estates did not have standing to commence subsection 15(1) *Charter* claims. In that sense, it might be said that section 15 rights die with the individual.
- [124] The review officer referred to *Stinson* decision and asserted that the analysis was based on the terms of the *Charter* and the nature of the rights it provides, without reference to the common law regarding abatement of rights of action on death (that is, the *actio personalis* maxim).
- [125] I agree that is the nature of the analysis in the *Stinson* case, but I do not think it is relevant or helpful in determining whether a personal representative can initiate a claim under the Act. I do not see a parallel between the equality rights conferred by section 15 of the *Charter* and the entitlement to workers’ compensation benefits under the Act. Consequently, I do not think the *Stinson* decision provides any support for the conclusion that entitlement to benefits abates on death and is not capable of passing to a personal representative by operation of law.

²¹ 1999 BCCA 761 (CanLII)

- [126] I consider that a detailed analysis of the terms of the Act is required.
- [127] While as noted later, there are other sections of the Act relevant to this issue, I start with section 55 given that its terms loom large in consideration of this issue.
- [128] Section 55 provides, in part, as follows:
- 55** (1) An application for compensation must be made on the form prescribed by the Board or the regulations and must be signed by the worker or dependant; but, where the Board is satisfied that compensation is payable, it may be paid without an application.
- (2) Unless an application is filed, or an adjudication made, within one year after the date of injury, death or disablement from occupational disease, no compensation is payable, except as provided in subsections (3), (3.1), (3.2) and (3.3).
- (3) If the Board is satisfied that there existed special circumstances which precluded the filing of an application within one year after the date referred to in subsection (2), the Board may pay the compensation provided by this Part if the application is filed within 3 years after that date.
- [129] Section 55 requires an application for compensation to be signed by the worker or dependant. It does not explicitly contemplate an application being signed by a personal representative.
- [130] In considering whether a personal representative may initiate a claim by a worker's estate, I note that the modern principle of statutory interpretation provides that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."²² However, where the meaning of a word is defined in the statute such a meaning prevails over other possible meanings.²³
- [131] Another relevant general consideration is found in section 8 of the *Interpretation Act* which provides, "Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."
- [132] Turning to the scheme and object of the Act, I note that unlike Part 3 of the Act which expressly states in section 107 what the purposes of Part 3 are ("promoting occupational health and safety and protecting workers and other persons present at workplaces from work related risks to their health and safety"), Part 1 of the Act dealing with sections 1 to 101 does not contain an express statement as to its purposes. Notably, several sections in Part 1 are relevant to a review of the issue raised by this appeal.

²² Adopted by the Supreme Court of Canada in *Rizzo and Rizzo Shoes Ltd. (Re)* [1998] 1 S.C.R. 27. The court revisited the modern principle in *Bell ExpressVu Limited Partnership v. Rex* 2002 SCC 42.

²³ Sullivan, *Statutory Interpretation*, 2nd ed. (Toronto: Irwin Law, 2007) at p. 68.

[133] A general understanding of the purposes of Part 1 of the Act can be gleaned from *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)* which noted the historic trade-off:

Sir William Meredith also proposed what has become known as the “historic trade-off” by which workers lost their cause of action against their employers but gained compensation that depends neither on the fault of the employer nor its ability to pay. Similarly, employers were forced to contribute to a mandatory insurance scheme, but gained freedom from potentially crippling liability.

[134] *Pasiechnyk* cited the following summary of the purposes of workers' compensation:

- (a) compensation paid to injured workers without regard to fault;
- (b) injured workers should enjoy security of payment;
- (c) administration of the compensation schemes and adjudication of claims handled by an independent commission, and
- (d) compensation to injured workers provided quickly without court proceedings.

[135] While *Pasiechnyk* concerned a workers' compensation case from Saskatchewan, I do not interpret the court's comments as being applicable only to the workers' compensation scheme in that province. Notably, *Pasiechnyk* was cited in the most recent decision of the Supreme Court of Canada which concerned compensation claims under the Act.²⁴

[136] Turning to more specific matters of statutory interpretation, I note that section 12 of the *Interpretation Act* provides that definitions in an enactment, unless the contrary intention appears in the enactment, apply to the whole enactment including the section containing a definition or interpretive provision. In the case before me, this provision means that a definition in the Act of a word would normally apply to each instance in which the word is used in the Act.

[137] Section 1 of the Act is a list of definitions. It provides that “‘worker’ includes (a) a person who has entered into or works under a contract of service or apprenticeship....” That is but one definition of a “worker”; the definition contains clauses (a) though (g). Section 1 also provides that “‘person’ includes, for the purpose of section 10, his or her personal representative.” The use of the word “includes” means that both definitions are non-exhaustive. Thus, the words must be interpreted as including the statutory definition, but the words may carry additional meaning.

[138] Section 29 of the *Interpretation Act* provides that in an enactment (such as the Act) “‘person’ includes a corporation, partnership or party, and the personal or other legal representatives of a person to whom the context can apply according to law.” Further, “personal representative” is defined in the *Interpretation Act* as including “an executor of a will and an administrator with or without will annexed of an estate....”

²⁴ *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, [2016] 1 SCR 587, 2016 SCC 25 (CanLII).

- [139] Section 2 of the *Interpretation Act* provides that every provision in it applies to every enactment, unless a contrary intention appears in the *Interpretation Act* or the enactment. That provision means that generally the definitions in the *Interpretation Act* (such as that dealing with “person”) apply to words in the Act.
- [140] Were it not for the definition of “person” in the Act, it might be argued simply that, given sections 29 and 2 of the *Interpretation Act*, the word “worker” includes in clause (a) a “person” and “person” includes the personal representative. Thus, a “worker” includes the personal representative of a person who has entered into or works under a contract of service or apprenticeship. In that case, it could be argued that the personal representative of a deceased worker could make an application for compensation under section 55.
- [141] In making those comments, I note I am aware that the clause (a) definition of a “worker” is not simply a “person.” There is additional modifying language (“a person who has entered into or works under a contract of service or apprenticeship...”). Further, I appreciate that the definition of “person” in the *Interpretation Act* is not absolute in that it contains the phrase “to whom the context can apply according to law.” In addition, as noted above, section 2 of the *Interpretation Act* establishes that its provisions do not apply to an enactment if a contrary intention appears in the enactment.
- [142] Does the additional modifying language mean that “person” in the clause (a) definition of a “worker” must be the **actual individual** who has entered into or works under a contract of service and that clause cannot include the worker’s personal representative?
- [143] In examining this issue, I have considered the limiting phrase in the definition of “person” in the *Interpretation Act*. I find that the absence of a comma after the word “person” suggests that the object of the phrase “to whom the context can apply according to law” is the person, not the personal representative. If one takes the context to be the definition of “worker” in clause (a) of the definition of a worker in section 1 of the Act, the question is whether the modifying words “who has entered into or works under a contract of service or apprenticeship” render inapplicable the definition of “person” in the *Interpretation Act* to the clause (a) definition of a worker.
- [144] I note that rarely in an enactment would the word “person” be used without additional modifying language. By that, I mean a reference in an enactment to a “person” would normally say something about that person, such as a person who is affected by some conduct or a person who wishes to receive a benefit. The additional language is included to establish the relevance of the legislative scheme to the “person” referred to.
- [145] If the presence of additional language meant that the expansive definition of “person” in the *Interpretation Act* was inapplicable, that definition would rarely apply, which would seem to defeat the point of the Legislature promulgating a definition. I appreciate that some forms of additional modifying language might be such that the expansive definition in the *Interpretation Act* could not apply. However, I am not persuaded that the modifying language in clause (a) of the definition of “worker” precludes “person” in that definition from the application of the definition of a “person” in the *Interpretation Act*.

- [146] A somewhat related consideration regarding the meaning of the word “person” in the clause (a) definition of “worker” is that the definition of “person” in the *Interpretation Act* may be excluded by contrary intention in the *Interpretation Act* or in the Act. It might be argued that the words “who has entered into or works under a contract of service or apprenticeship” in clause (a) indicate a contrary intention. Considered that way, the definition of “worker” in clause (a) would be taken to mean “a person who has entered into or works under a contract of service or apprenticeship **but** not a corporation, partnership or party, or the personal or other legal representatives of the person.”
- [147] A significant difficulty with such an interpretation would be its potentially unintended consequences. By that I mean there are decisions, and longstanding practice based on them, which permit personal representatives of deceased workers to bring and maintain appeals of decisions made in respect of claims initiated by the workers while alive. They would arguably be implicitly overturned. Subsection 241(1) of the Act gives appeal rights to a “worker,” a deceased worker’s dependant, and an employer. If the word “worker” does not include a personal representative, appeals could not be maintained following the death of a worker.
- [148] I note that the Act uses the word “worker” many times, and there may be instances where, owing to the context, “worker” was not intended to include a worker’s personal representative. As a general principle, the same word should have the same meaning throughout the Act. However, the context in which the word is used in a particular section is relevant to the interpretation. If one concludes that “worker” as defined clause (a) includes a “person” as defined in the *Interpretation Act*, the expansive interpretation could apply to the term “worker” wherever it is used in the Act, unless the specific context makes it clear that meaning is not intended.
- [149] Just as there are instances where including a personal representative in the meaning of “worker” might be problematic in the particular context of some provisions of the Act, there are also instances where excluding the personal representative would also be problematic.
- [150] In making that comment, I have taken into account the fact that living persons may also have personal representatives. A worker may appoint a representative under the *Representation Agreement Act*, R.S.B.C. 1996, chapter 405. The purpose of the *Representation Agreement Act*, is “to allow adults to arrange in advance how, when and by whom, decisions about their health care or personal care, the routine management of their financial affairs, or other matters will be made if they become incapable of making decisions independently.”
- [151] Leaving aside whether a representative appointed in a representation agreement under the *Representation Agreement Act* could initiate a claim for compensation under section 55 of the Act, there are other provisions of the Act in which an interpretation of the word “worker” that excludes personal representatives would be problematic. For example, subsection 13(1) of the Act prohibits a worker from agreeing with his or her employer to waive or to forego any benefit to which the worker is or may become entitled under Part 1 of the Act. Excluding personal representatives from the meaning of “worker” in subsection 13(1) would mean the representative of an incapacitated worker (whether the incapacity related to work injuries, or non-work-related conditions) could enter into such an agreement with the worker’s employer.

- [152] As noted above, there is still the possible concern presented by the definition of “person” in the Act, which includes, for the purpose of section 10 of the Act, a person’s personal representative. If, by virtue of the *Interpretation Act*, “person,” as used in the Act, includes the personal representative, why did the Legislature consider it necessary to specify that “person” includes the personal representative for the purposes of section 10? One possibility is that the Legislature did not intend “person” to include a personal representative for the purpose of other sections of the Act. Another possibility requires a closer examination of section 10.
- [153] Section 10 bars actions by an injured worker against another worker or an employer where the cause of action arose out of and in the course of employment. The word “person” is used only in subsection 10(2), which provides:
- Where the cause of the injury, disablement or death of a worker is such that an action lies against some person, other than an employer or worker within the scope of this Part, the worker or dependant may claim compensation or may bring an action. If the worker or dependant elects to claim compensation, he or she must do so within 3 months of the occurrence of the injury or any longer period that the Board allows.
- [154] The effect of subsection 10(2) is to give an injured worker a choice between claiming compensation under the Act and bringing an action against a person who is neither a worker nor an employer. By virtue of the definition of “person” in section 1, an injured worker has the same choice of claiming compensation under the Act or maintaining an action against the personal representative of a deceased person who was neither a worker nor an employer. If a worker chooses to claim compensation as permitted by subsection 10(2), the Board is subrogated to any claim the worker has against the other person. The specific inclusion of personal representative in the definition of “person” for the purposes of section 10 may have been intended to ensure preservation of the Board’s subrogated claim against the estate of a deceased person.
- [155] The panel in *Review Board Decision #904050-D and E*,²⁵ which was constituted as a so-called “chair’s panel” in order to enhance consistency of Review Board decision-making regarding the issue of whether a deceased worker’s personal representative could maintain an appeal to the Review Board commenced by a worker, discussed at some length the significance of the definition of “person” in the Act. The panel concluded that the definition was included out of an abundance of caution. The definition of “person” in section 1 of the Act was intended to clarify the application of section 10, rather than to limit the meaning of the word elsewhere in the Act.
- [156] I am aware that the panel in *Review Board Decision #904050-D and E* was concerned with the meaning of the word “person” as it was used in subsection 90(1) of the Act in force at the time, which set out who had standing to initiate appeals to the Review Board. Subsection 90(1) permitted the worker, or if the worker was deceased “the worker’s dependants, or the worker’s employer, or a person acting on behalf of the worker, the dependants or employer...” to initiate an appeal. Although the panel’s reasoning does not address the meaning of “person” as included in the definition of “worker,” it does support a broad, inclusive interpretation over a narrow, exclusive interpretation.

²⁵ 4 W.C.R. 375

- [157] A subsequent chair's panel of the Review Board (*Review Board Decision #963219-C and D*),²⁶ considered the issue of whether a deceased worker's personal representative could initiate or maintain an appeal to the Review Board. The panel agreed with the decision in *Review Board Decision #904050-D and E* which it described as based "primarily on the definition of 'person' in section 1 of the Act and on the definitions of 'person' and 'personal representative' in section 29 of the *Interpretation Act*."
- [158] Section 19(1) of the Act also defines "person" for the purposes of that section. Section 19 concerns persons "whose monthly payments were discontinued by application of a former subsection." For the purposes of section 19, "person" excludes a widow, widower, or former common law spouse of a deceased worker. While this exclusion is not relevant to the broader question of whether "person" includes "personal representative", it may suggest that the Legislature understood "person" to have a broader meaning, either in its ordinary grammatical sense, or in the extended sense provided by the definition in the *Interpretation Act*, and where necessary specifically excluded aspects of the broader meaning. That would support a broader interpretation of "person" for purposes other than section 19.
- [159] After reviewing the matter, I find that a "worker" as defined in clause (a) includes the personal representative of a person who has entered into or works under a contract of service or apprenticeship.
- [160] Even if I have erred and as a matter of law the clause (a) definition of a worker does not include a personal representative, such a conclusion would not resolve whether the word "worker" can include a personal representative. I say that because the definition of "worker" is not exclusive or exhaustive. Clauses (a) to (g) are included definitions but do not amount to all possible definitions. It would be necessary to consider whether a personal representative is part of the residual definition of a worker—that part of the definition of a worker that is not represented by clauses (a) to (g).
- [161] I consider that in its grammatical and ordinary sense the word "worker" is capable of meaning a personal representative. Certainly if the definition of "worker" was exclusive and exhaustive, and used language that inescapably established that a "worker" is **a specific live person**, the word "worker" might not be capable of meaning a personal representative. But the definition of "worker" is not exhaustive. It directs inclusion, but does not exclude.
- [162] I find that the meanings of the words "worker" and "person" in the Act, either in their ordinary grammatical sense or as defined by the Act and the *Interpretation Act*, support the conclusion that under section 55 a personal representative can initiate a claim under the Act. I stress that I am not reading the expression "the worker's estate" into the Act as some form of statutory interpretation. I am finding that the words "worker" and "person" in the Act support the conclusion that under section 55 a personal representative can initiate a claim.

²⁶ 17 W.C.R 173

- [163] In making that finding, I note I am aware that the panel in *Appeal Division Decision #95-0991*²⁷ noted an argument as to section 55 posing a possible limitation on the ability of a personal representative to file an application for compensation:

While it may be argued that the section does not authorize a deceased worker's estate to file an application for compensation since it requires a worker (or his dependant) to sign the application form, once the worker (or his dependant) has signed the form, there is a valid claim. The wording of the section gives no reason to infer that the death of a worker would invalidate the claim – i.e., that the estate would have no standing to continue the proceedings initiated by the worker. There is no explicit or implicit requirement in the section that the worker remain alive throughout the proceedings.

[emphasis added]

- [164] The issue before the panel in *Appeal Division Decision #95-0991* was whether a worker's estate could maintain an appeal to the Review Board commenced by a worker. While the panel determined that the estate could maintain an appeal, the panel observed earlier in its decision that some of the questions as to the abilities of an estate might have different answers, "depending on whether the proceedings involved concern an appeal or adjudication in the first instance." As noted by the Employers' Forum, the panel stated that "finding an estate may initiate an appeal need not entail finding the estate could have filed the claim in the first instance."
- [165] Notably, the question of whether a deceased worker's estate had standing to initiate a claim in the first instance was not before the Appeal Division panel. While the panel acknowledged it could be argued subsection 55(1) might prevent a personal representative from initiating a claim, it did not endorse that argument.
- [166] Further, and more important, I note the panel's analysis did not address the definitions of "person" and "worker" and what ramifications they might have for the ability of a personal representative to initiate a claim under section 55. Thus, I attach little weight to the Appeal Division panel's observations regarding section 55 and the ability of an estate to initiate a claim for compensation.
- [167] I do not consider that the requirement in section 55 of the Act for a worker's signature is sufficient to extinguish a personal representative's common law right to stand in the worker's shoes with respect to the claim for compensation. If the worker's signature on the application was an absolute requirement, such an argument might be sustainable, but the worker's signature is not an absolute requirement. As noted above, the Board may pay compensation without the signature of a worker, indeed without an application at all, if it is satisfied that compensation is payable.
- [168] I previously used the example of a worker rendered by a work-related injury or occupational disease incapable or incompetent to sign an application for compensation. One could equally envision a situation where a worker is permanently disabled by a work-related injury, and

²⁷ 11 W.C.R. 507

though capable of signing an application for compensation does not do so immediately; then, still within the year permitted for filing an application, the worker is rendered incapable by a subsequent, non-work-related injury or illness. Would the requirement for the worker's signature on an application extinguish the worker's entitlement to compensation during his or her life for the work-related disability?

- [169] The wording of section 55 gives no reason to infer that the subsequent incapacity of the worker would invalidate the claim. If, in this hypothetical situation, the worker died without regaining the capacity to sign an application but still within one year of the work-related injury, there does not appear to be any greater reason to infer that the worker's death invalidates a claim for benefits that were payable, albeit not applied for, from the date of the work-related injury.
- [170] These hypothetical examples highlight the potential unfairness, if not outright absurdity, of treating an application signed by the worker as determinative of the status of the worker's personal representative after death. It is accepted as established that if a worker applies for compensation before death, his or her personal representative may initiate a review or appeal of a decision made after the worker's death. In such a situation the worker may have died before any decision was made regarding entitlement to compensation. On the date of death, the worker's claim was just that—a claim—yet the worker's personal representative is entitled to continue to seek adjudication of the deceased worker's entitlement, not on behalf of dependants but on behalf of the worker's estate.
- [171] I have considerable difficulty seeing a principled difference between that situation and the situation where the worker did not make an application before he or she died. As noted previously, the worker's intention to seek or not seek compensation does not, in my view, provide a sound basis for differentiating between these situations.
- [172] In my opinion, section 55 of the Act is far from the clear and unambiguous language necessary to negate the passing of a deceased worker's claim for compensation by operation of common law to his or her personal representative. As noted above, the definitions of "worker" and "person" provide a basis for finding that a personal representative may indeed initiate a claim for compensation. Further, even if the definitions of "person" and "worker" do not provide robust support by themselves for concluding a personal representative may initiate a claim under section 55, I find those definitions and the wording of section 55 do not preclude a personal representative from acting in such a manner.
- [173] There are other sections of the Act that might be relevant to a consideration of the ability of a personal representative to initiate a claim for benefits.
- [174] Section 15 provides as follows regarding a sum payable as compensation passing to a personal representative:

A sum payable as compensation or by way of commutation of a periodic payment in respect of it is not capable of being assigned, charged or attached, nor must it pass by operation of law except to a personal representative, and a claim must not be set off against it, except for money advanced by way of financial or other social welfare assistance owing to the Province or to a municipality, or for money owing to the accident fund.

- [175] The review officer noted that *Appeal Division Decision #95-0991* considered section 15 of the Act. The Appeal Division considered that section 15 that was not restricted to dealing with cases where an award was made before a worker's death:

...The words "a sum payable as compensation" could be taken to mean a sum already awarded. In that case, Section 15 merely states that, where a compensation award was made before the worker's death, a sum payable to the worker during his lifetime becomes payable to his personal representative after his death. **On the other hand, if the words "a sum payable as compensation" mean a sum that must be paid as compensation by virtue of the worker's entitlement under the Act, then whether or not an award was actually made before the worker's death is irrelevant. Once a worker has an injury or contracts a disease for which the statute provides compensation, benefits accrue to a worker and are, therefore, payable. On that footing, Section 15 implies that the personal representative of a deceased worker may assume the role of the deceased until the award is made and paid.** The worker's right to compensation passes to the personal representative. Accordingly, a deceased worker's estate may continue proceedings to have the worker's right to compensation recognized and to collect the compensation payable.

[emphasis added]

- [176] The review officer observed that the Appeal Division preferred the second interpretation to the first, narrower interpretation, on the basis that the former could mean that deliberate or inadvertent delay would deny benefits to the worker or his estate. It supported this by a similar analysis of section 35(4) of the Act, which states that any compensation owing or accrued to a worker or pensioner for a period not exceeding three months before his death may, at the discretion of the Board, be paid to a widow, widower or a person who takes charge of the funeral arrangements, free from debts of the deceased.
- [177] The review officer observed that while there may have been merit in the Appeal Division panel's conclusion regarding section 15 with regard to the specific issue it was examining, he did not consider the conclusion had merit regarding the question whether an estate can file a claim. He asserted that there is no "sum payable as compensation" unless a worker has submitted an application under section 55 of the Act or the Board has waived the need for this before the worker's death.
- [178] The review officer stated that the Appeal Division decision was concerned that deliberate or inadvertent delay might result in the estate being denied benefits if its interpretation were not adopted. However, this was not a sufficient reason for creating a right to compensation for an estate that would otherwise not exist. There was an obvious intention in the Act that delays by workers and others will sometimes result in a loss of benefits. That was evident from section 55 and the sections providing time limits on reviews and appeals and reconsideration of Board decisions.

- [179] The review officer declared that if section 15 of the Act did not exist, personal representatives of the deceased worker would not be able to claim benefits which had been adjudicated, determined, and were owing to the worker at the date of death but had not yet been paid. He asserted that to interpret section 15 broadly to grant a personal representative a right to claim compensation for which a worker had never made a claim went far beyond what was needed to meet the purpose of the section.
- [180] In considering the review officer's comments regarding section 15 of the Act, I find I do not need to rely on section 15 to create a right in a personal representative to initiate a claim. I consider that right exists owing to (i) the nature of what assets form part of a worker's estate and (ii) a personal representative's ability to initiate a claim as a "person."
- [181] I do rely on section 15 as providing some support for the notion that a worker's entitlement to compensation benefits under the Act is capable of passing to a personal representative on the death of the worker. That section explicitly recognizes that sums payable as compensation may pass by operation of law to a personal representative.
- [182] It appears the review officer assumed that section 15 grants authority to a personal representative as opposed to ensures that a personal representative (who already had such authority regardless of the existence of section 15) is the only individual to whom a sum payable could pass.
- [183] I do not share the review officer's assumption. I start by noting that it is presumed that the Legislature does not intend to change the common law.²⁸ A corollary of that presumption is that if the Legislature intends to eliminate a common law right, it must do so clearly and unambiguously. Section 10 of the Act is a good example of clear, unambiguous language that eliminates the common law right to sue an employer or worker.
- [184] Similarly, section 15 of the Act clearly and unambiguously restricts or eliminates (i) the right of a worker to assign compensation to a third party; (ii) the right of a third party, such as a creditor, to charge or attach the compensation, or (iii) the passing of compensation by operation of law. It is noteworthy that in preventing the passing of compensation by operation of law, the Legislature specifically excepted the passage by operation of common law to a personal representative. In eliminating certain effects of common law, the Legislature was careful to preserve the passage to a personal representative of a sum payable as compensation. I find that, contrary to the assertion of the review officer, section 15 does not grant authority to a personal representative. I find that it ensures a personal representative's common law authority is unaffected.
- [185] The review officer stated that his discussion of sections 15 and 55 might be seen as simply highlighting the negative fact that the Act included no express or implied right to claim.
- [186] I am not persuaded by the review officer's analysis of sections 15 and 55. As established above, I find that the definitions of "person" and "worker" provide a basis for concluding that a personal representative may initiate a claim under section 55. Notably, the review officer's analysis did not include any discussion of the definitions of "person" and "worker." Such an absence significantly undermines the persuasiveness of the review officer's consideration of the matter.

²⁸ Sullivan, *Statutory Interpretation*, 2nd ed. (Toronto: Irwin Law, 2007) at p. 244.

Further, I do not consider that if there were no express or implied right to claim in the Act, such circumstances would affect the personal representative's ability at common law to pursue a claim under the Act. The absence of an express or implied right to claim does not preclude a claim from being made.

- [187] The review officer considered the Act included "provisions providing positive indications of an intent that an estate does not have a right to claim compensation where the deceased worker failed to do so."
- [188] The review officer referred to sections 17 to 20 of the Act.
- [189] In considering the significance of sections 17 to 20, I note the Board is required to pay compensation to surviving dependants²⁹ of a worker who dies as a result of a workplace injury or occupational disease. Dependants are defined in section 1 of the Act as members of the worker's family who were wholly or partly dependent on the worker's earnings at the time of the worker's death.
- [190] It could be argued that in providing compensation to a disabled worker during his or her lifetime, and to the worker's surviving dependants after the worker's death, the Act creates a comprehensive scheme for compensating those directly affected by work-related injuries and diseases. Put another way, it could be argued that by providing for payment of compensation directly to surviving dependants, who might otherwise have to look to the deceased worker's estate, the Act has removed any need to preserve any ability for the worker's estate to seek payment of benefits.
- [191] Notably, the review officer asserted that to the extent that an estate represented people, it would typically include the same people who are entitled to receive benefits under section 17 if the death resulted from a worker's injury or occupational disease. He commented that if the beneficiaries of the estate are not persons covered by those sections of the Act or the death does not result from the worker's injury disease, there appears to be no reason under the Act why they should be allowed to make a claim in a situation where the worker failed to make a claim. He stated that even if sections 17 to 20 cannot be used to show positive intention that the estate should not be entitled for the pre-death period, they do not derogate from the fact that the Act is otherwise silent on the issue and provides no basis for such entitlement.
- [192] The analysis of the review officer appears to overlook that the claim in question is a claim by the worker's estate; it is not a claim by the beneficiaries of the estate. Further, his inclusion of a reference to a death not resulting from the worker's injury or disease is curious. Would his analysis as to the ability of the estate to claim be different if the death in fact resulted from the worker's injury or disease? In such a case should an estate be allowed to claim where the worker failed to make a claim? The comment by the review officer raises this issue but does not deal with it.

²⁹ Section 17 also give the Board the ability in some circumstances to pay benefits to a spouse, child or parent who, though not dependent on the worker's earnings at the time of the worker's death, had a reasonable expectation of pecuniary benefit from the continuation of the life of the worker.

- [193] If the legislative intention of the Act is to provide compensation to injured workers during their lifetime, and to their dependants after their death, the question remains: what benefits was the worker entitled to during his or her lifetime, and can the worker's estate, standing in the deceased worker's shoes, claim those benefits? I do not consider that an examination of whether the beneficiaries of the estate are the same individuals as the worker's dependants adds anything to the analysis.
- [194] In interpreting the Act, I am aware the Act is entitled the *Workers Compensation Act*, a title that suggests the underlying purpose is to compensate workers. Against the backdrop of such a title and such an underlying purpose, the Legislature has identified dependants as another group of individuals to be compensated. Can it be argued that recognition of dependants is the extent to which the Legislature has included individuals other than workers, and that it is intended that no one else be compensated?
- [195] Yet, given that estates (and not workers) will be eligible for compensation if a worker dies shortly after applying for compensation and given it is not generally argued that upon the death of a worker all adjudication must stop, the workers' compensation system already countenances the payment of compensation other than to workers and dependants. The question would then be whether an interpretation of the Act supports a finding that estates should be eligible to receive compensation if a worker applied for compensation before death but should not be permitted to apply for compensation in a case in which a worker died before applying. How defensible would such an interpretation be? Employing such an interpretation would mean that even if a worker died minutes after his or her completed application for compensation is received by the Board, monies could be paid to his estate.
- [196] Should an interpretation of the Act be driven by excluding claims when there is necessarily never any prospect of a worker receiving compensation from the outset? I am not persuaded that that is a principled basis upon which to find the Act does not permit an estate to apply for compensation. If one wanted to take into account such a consideration, it could be argued that other considerations should be taken into account. For example, it could be argued that denying any adjudication of a claim by the worker's estate in the case before me means that the accident fund does not pay out monies that might otherwise be paid, assuming section 55 is satisfied. By that I mean that given the worker's widow was awarded a dependant's pension, there is no doubt the disease that disabled the worker before his death was an occupational disease that was due to the nature of his employment. The accident fund would realize something of a saving in a case where, but for the worker's failure to apply for benefits while he was alive, monies should have been paid out of the accident fund—a fund which is intended to compensate for the effects of occupational diseases.
- [197] I appreciate that as noted in *Sneddon et al v. B.C. Hydro et al*, 2004 BCCA 292 public policy issues may be relevant to the interpretation of statutory provisions. Sullivan³⁰ comments, "In determining the meaning of a provision in relation to particular facts, courts invariably engage in policy analysis." She remarks that courts "...take into account extratextual values or preferences that tend to favour one outcome over another." She expands on that by observing that those values and preferences "...form part of the basis for inferring the meaning and purpose of legislation in textual and purposive analyses and for distinguishing good from bad

³⁰ Sullivan, *Statutory Interpretation*, 2nd ed. (Toronto: Irwin Law, 2007) at p. 218.

consequences in consequential analysis.” Thus, the policy considerations noted in the paragraphs immediately above are of some relevance. They are certainly not determinative of the matter.

- [198] The review officer’s comments regarding sections 17 to 20 were followed by his reference to significant elements of compensation entitlement involving (i) the exercise of discretion and (ii) the need for assessment of the worker’s intention and circumstances.
- [199] The review officer made the following comments regarding the Board’s discretion regarding vocational rehabilitation assistance and the related matter of entitlement to permanent disability awards on a loss of earnings basis. Such matters are difficult to deal with without the worker’s personal involvement. It is sometimes necessary that these decisions be made without such involvement, for example, if a living worker declines to cooperate. If the worker is still living he or she can challenge errors in the Board’s conclusion.
- [200] The review officer stated the difficulties for making assessments without the worker’s cooperation would be significantly increased if estates could file claims for compensation. Such claims could be made many years after the events, which would heighten the difficulties of making meaningful decisions. The specific provisions in the Act for paying compensation after worker’s death avoid this problem to some extent by making specific provision in subsection 16(2) for providing vocational assistance to surviving dependents spouses.
- [201] While not explicitly articulated, it appears the review officer considered that difficulty in making decisions could provide a defensible reason for concluding that an estate lacks the ability to initiate a claim for compensation. Yet, he acknowledged that difficulties occur even in the case of living workers.
- [202] His assertion, that if still living a worker can challenge errors in the Board’s conclusions, does not provide, for me, a persuasive basis to conclude that the estate lacks the ability to initiate a claim. I consider that an estate could also challenge errors in the Board’s conclusions.
- [203] I consider the case of a worker who completed an application for compensation but died at some point later in the adjudication of his claim. His estate could challenge errors in the Board’s conclusions. If the fact that the worker is no longer living does not prevent his estate from challenging errors in such circumstances, why should the fact he is no longer living prevent his estate from initiating a claim in the first place? In both instances, there may be difficulties in decision-making.
- [204] Unless one wants to conclude that an estate should not be permitted pursue any matter once a worker dies, difficulties in decision-making will persist. I do not read the review officer’s analysis as saying that all proceedings should conclude once a worker dies.
- [205] Notably, the review officer commented that his conclusion as to the inability of an estate to claim compensation did not mean that estates would have no right to continue appeals commenced by a worker before his death or even commence appeals of decisions that a worker did not appeal. He stated that the analysis of the meaning and intention of the Act could result in

different conclusions for those issues. He considered that section 15 of the Act envisioned that estates would receive benefits for the pre-death period. Under claims initiated by the deceased worker it might be reasonable for estates to be able to exercise rights of review and appeals in those situations.

[206] Yet, if that should be so, there will continue to be cases in which decision-making will be difficult. I am not persuaded that difficulties in decision-making provide a justification for finding that an estate cannot initiate a claim.

[207] The fact that subsection 16(2) of the Act provides the Board the ability to give vocational rehabilitation assistance to dependants of a deceased worker does not address what benefits were payable to the worker pre-death, and by no means can that subsection pose a bar to the estate initiating a claim for compensation.

[208] I appreciate that if an estate cannot claim compensation, vocational rehabilitation benefits paid to dependants could, in some fashion, make up for monies that did not form part of the estate and thus were unable to be paid to dependants who may have been beneficiaries of the estate. Yet, vocational rehabilitation monies are intended for vocational rehabilitation. Their purpose is not to make up for a finding that an estate cannot claim compensation. I do not consider that subsection 16(2) provides a basis for finding an estate cannot initiate a claim.

[209] The review officer considered that subsection 35(5) of the Act was another provision that might support an intention to limit the rights of estates. That subsection contains several provisions regarding the Board's discretion regarding periodical payments of compensation due to a worker:

Where a worker is receiving custodial care in a hospital or elsewhere, periodical payments of compensation due to the worker under this Part may be paid to or for the benefit of

(a) the worker to the extent the worker is able to make use of the money for his or her personal needs or is able to manage his or her own affairs; or

(b) any person who is dependent on the worker for support,

or in a case of temporary disability of the worker may be

(c) applied to the maintenance of a home to which the worker is likely to return on his or her recovery; or

(d) accumulated by the Board for payment to the worker on his or her recovery,

or in a case of permanent disability may be applied toward the cost of the worker's maintenance, but, in that case and where the worker is conscious, there must be paid to, or for the use of, the worker a comfort allowance of at least \$242.52 out of each periodic payment. [The dollar amount is subject to consumer price index adjustments referred to in section 25.2 of the Act]

- [210] The review officer declared, “**One of the purposes** of this section is to prevent the accumulation of assets by a worker undergoing long-term care for the ultimate benefit of persons other than the worker [emphasis added].” He stated that the section showed an intention that dependants of the worker would not suffer while the worker was under care. He stated that the death of the worker would not affect dependants’ rights to make a claim under section 17. He commented that to the extent that the worker’s benefits were not needed by a dependant, they might be used to pay the cost of the worker’s maintenance “as opposed to being accumulated for his recovery or for payment into his estate on death.”
- [211] In considering this matter, I note that policy item #49.14 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) declares that in the case of permanent disability, unlike the discretionary authority associated with cases of temporary disability pursuant to which the Board may pay to a worker who is capable of managing money sums than required for personal needs, the Board will not pay a worker an amount greater than what the worker requires for personal needs. The policy item declares that “in the case of permanent disability, the exercise of this authority [to pay the worker an amount greater than the worker requires for personal needs] would conflict with **the object of the section to prevent the accumulation of estates** [emphasis added].” Thus, the Board considers this section of the Act ensures that workers in certain circumstances do not receive monies that exceed their immediate expenses and would simply pile up in a bank account and be paid out to beneficiaries upon the death of the worker.
- [212] The policy item proceeds to note that any balance remaining after paying the worker an amount required for personal needs will be applied for the benefit of any dependants of the worker, and any balance remaining after the application of the first two forms of payment will be applied toward the cost of the worker’s maintenance if the Board is paying the cost of maintenance as part of the costs of a compensation claim. One can envision that in the case of a worker who has no dependants and whose maintenance is not part of the cost of a compensation claim, it is possible the Board might retain thousands of dollars. I would hope that if the worker was personally funding his or her custodial care in a private facility, all of the permanent disability benefits would be paid to the worker on the basis that the cost of such a private facility would represent monies required for the worker’s “personal needs.”
- [213] I accept that the object or an object of this subsection of the Act is the prevention of the accumulation of estates. Yet I am not persuaded that such a subsection resolves the analysis of the issue raised by this appeal. As noted above, other aspects of the Act are relevant to the analysis.
- [214] I am aware that the Act contains limitations on compensation. By that, I mean that a worker is not fully compensated dollar for dollar when he or she is disabled. Subsection 33(1) sets a maximum wage rate (\$82,700 as of January 1, 2018). Thus, high earners are not fully compensated. The Act contains a 90% of net formula for setting a wage rate. A worker’s gross earnings play a role in calculating compensation benefits, but a worker is not paid for his or her gross loss of earnings. Section 23.1 envisions that generally workers under the age of 65 at the time of their injury or disablement due to an occupational disease will not be paid benefits (other than health care benefits) beyond the age of 65. Generally workers over the age of 65 at the time of their injury or disablement due to an occupational disease will not be paid benefits (other than health care benefits) for more than two years after the date of injury.

- [215] Yet, I find that such limitations say little to nothing about whether an estate has the ability to initiate a claim and apply for compensation under the Act. Those limitations concern benefit levels once benefits commence and do not concern limitations on who should receive benefits in the first place.
- [216] As noted above, I find that the meanings of the words “worker” and “person” in the Act, either in their ordinary grammatical sense or as defined by the Act and the *Interpretation Act*, support the conclusion that under section 55 of the Act a personal representative can initiate a claim under the Act. My finding is not altered by my consideration of other sections of the Act such as section 15, subsection 16(2), sections 17 to 20, subsection 35(5), and other sections as noted above. Once the worker’s claim passes to his or her personal representative (unaffected by the *actio personalis maxim*), the Act does not preclude the personal representative from initiating a claim for compensation for benefits regarding the period prior to the worker’s death. In fact, I find the Act contains provisions which support the ability of a personal representative to initiate a claim.

No amendment of the Act to address the Issue

- [217] The Act was substantially amended following the *Royal Commission on Workers’ Compensation in British Columbia*³¹ (1999) (Royal Commission) and the 2002 Winter Report noted earlier in my decision.
- [218] The Royal Commission addressed the rights of a deceased worker’s estate, with specific reference to *Appeal Division Decision #95-0991*. The Royal Commission reached the following conclusion at pages 88-89 of chapter 9 in Volume I:

The commission adopts a general principle that the benefits the estate may be able to claim initially or be granted on appeal would be those that normally would have accrued to the worker prior to his death. Our primary concern, however, is that **the Act should be amended so that it is clear that the death of a worker does not extinguish the rights of the estate to file or pursue claims**, including rights of appeal, as if the worker were still alive. A calculation of the applicable compensation benefit would, of course, end on the date of the worker’s death.

[emphasis added]

- [219] Accordingly, the Royal Commission recommended that the Act be amended:
- ...to ensure that the death of a worker does not extinguish the right of the estate of the deceased worker to stand in the worker’s shoes and:
- (a) file a claim or pursue a claim already filed; or
 - (b) file an appeal or pursue an appeal already filed for compensation benefits under the Act that would have accrued to the worker until his death.

³¹ *FOR THE COMMON GOOD: Final Report of the Royal Commission on Workers’ Compensation in British Columbia January 20, 1999*, (British Columbia: Ministry of Labour, 1999) (Chair: Judge Gurmail S. Gill)

- [220] The Winter Report also addressed the issue. Mr. Winter referred to the Royal Commission's recommendation, and agreed that an estate should have standing to initiate or continue an appeal for compensation benefits on behalf of a worker. However, he made a distinction between (i) the situation where a worker filed an application for compensation before death, and the (ii) situation where a worker is injured but dies before filing an application for compensation. Mr. Winter noted that in the former case, the worker clearly demonstrated an intention to claim compensation, but in the latter case, no such demonstrable intention exists. While in the latter case there was no demonstrable intention, he did not think the absence of such a demonstrable intention was sufficient to deny the estate any standing to initiate an application for compensation on behalf of the deceased worker.
- [221] As noted earlier in my decision, Mr. Winter observed that when a worker suffers a disability arising from a work-related injury or illness, the worker has an entitlement to receive compensation benefits pursuant to the applicable provisions in the Act. However, he noted there are procedural requirements in the Act which the worker must meet in order to crystallize his/her entitlement, particularly section 55. Mr. Winter then posed the question: "If a worker is disabled by a work-related injury, but dies before the expiry of the one year period specified in Section 55(2), why should the estate not be able to 'stand in the worker's shoes' (as per the Royal Commission's recommendation)?"
- [222] Mr. Winter envisioned the example of a worker who suffers severe head injuries as a result of a work-related accident, which requires immediate hospitalization and extensive surgical intervention. The worker's cognitive abilities are severely affected, and he has no recollection of the circumstances leading to his injuries. Two months after the accident, the worker, who has remained in hospital throughout this period, dies from complications associated with his injuries. The employer did not report the injury to the Board, nor did the worker submit an application for compensation.
- [223] Mr. Winter commented that in the above circumstances, the worker was clearly not in a position to bring an application for compensation, on his own motion, prior to his death. He queried, "What merit is there in denying the estate the right to initiate the application for compensation benefits on behalf of the deceased worker for the two month period between the date of the worker's accident and the date of his death?"
- [224] Mr. Winter's opinion was that the worker's estate should be able to "stand in shoes" of the deceased worker, and have the right to initiate an application for compensation on behalf of the deceased worker. He went on to recommend that the Act specify that such an application by the estate must be brought within one year of the worker's death, with no discretion to extend the time.
- [225] Despite the recommendations of the Royal Commission and the Winter Report, no substantial changes were made to section 15 or section 55 of the Act, and no specific provisions respecting the rights of a deceased worker's estate were added. Neither the recommendations nor the standing of a deceased worker's estate to claim compensation or initiate appeals was mentioned during the passage of the amending statutes through the Legislature.

[226] It might be argued that by not addressing the recommendations of the Royal Commission or the Winter Report, the Legislature indicated its intention to deny the estate of a deceased worker any standing to initiate a claim or an appeal. However, it must be borne in mind that the Legislature's silence on this point occurred against the backdrop of *Appeal Division Decision #95-0991*. The recommendations of the Royal Commission and the Winter Report were **not to amend** the Act to change the law as interpreted by the Appeal Division, **but to clarify** the Act to ensure that interpretation was articulated in the legislation. On that basis, it could be argued, perhaps more strongly, that the Legislature understood how the Act had been interpreted, and by its silence agreed with that interpretation.

[227] I am not persuaded that the fact the Act was not amended following the recommendations of the Royal Commission or the Winter Report establishes that under the Act a personal representative lacks the ability to initiate a claim for benefits. I am not persuaded by the Employers' Forum's argument that the decision not to follow Mr. Winter's recommendations supports an interpretation that the terms of the Act and the legislative intention behind them do not allow an estate to initiate a claim for compensation.

The Estate Administration Act

[228] Earlier, I concluded that (i) the *actio personalis* maxim does not apply to a claim under the Act and (ii) a claim under the Act is like a chose in action that would pass from a deceased worker to a personal representative and could be pursued by a personal representative in a fashion similar to the manner in which any other claim not subject to the *actio personalis* maxim may be pursued. Thus, it is not necessary that I determine whether a claim under the Act could be pursued via the *Estate Administration Act*.

[229] However, in the interests of thoroughness I have reviewed the issue.

[230] I start by noting that the *Estate Administration Act* was repealed and replaced by the *Wills Estates and Succession Act*. The relevant part of the *Wills Estates and Succession Act*, Part 6, applies in respect of deaths occurring on or after March 31, 2014. Given that the worker died in January 2013, the *Estate Administration Act* applies.

[231] Section 59(2), 59(3), and 59(4) of the *Estate Administration Act* provide as follows:

(2) Subject to subsection (3), the executor or administrator of a deceased person may continue or bring and maintain an **action** for all loss or damage to the person or property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, be entitled to, including an action in the circumstances referred to in subsection (6).

(3) Recovery in an **action** under subsection (2) must not extend to the following:

- (a) damages in respect of physical disfigurement or pain or suffering caused to the deceased;
- (b) if death results from the injuries, damages for the death, or for the loss of expectation of life, unless the death occurred before February 12, 1942;

(c) damages in respect of expectancy of earnings after the death of the deceased that might have been sustained if the deceased had not died.

(4) The damages recovered in an **action** under subsection (2) form part of the personal estate of the deceased, but nothing in this section, section 60 or 61 derogates from any rights conferred by the *Family Compensation Act*.

[emphasis added]

- [232] These provisions preserve the right of a personal representative, subject to some limitations, to bring or continue an action for damages that would otherwise be extinguished due to the *actio personalis maxim*.
- [233] If I am incorrect and a claim for workers' compensation benefits is caught by the *actio personalis maxim*, I find that a personal representative would **not** be able to rely on the *Estate Administration Act* to be able to initiate a claim under the Act.
- [234] In *Review Board Decision #904050-D and E* the panel concluded that the word "action" in the *Estate Administration Act* meant a court action, and did not include proceedings before an administrative tribunal. That conclusion was based on the BC Supreme Court decision in *Vancouver (City) v. Reid*,³² which considered the word "action" as used in the *Human Rights Code*. The court concluded that the word "action" meant court proceedings and not proceedings before a tribunal.
- [235] In *Vancouver (City) v. Reid* the court's interpretation was grounded in the definition of "action" in the *Supreme Court Act* in effect at the time the *Human Rights Code* was passed. In that version of the *Supreme Court Act*, "action" was defined to mean a civil proceeding commenced by writ of summons. That definition was incorporated by reference in the *Interpretation Act* (subsection 40(1)), and through the *Interpretation Act* was incorporated into the *Human Rights Code*. The court also concluded that the interpretation was consistent with the ordinary meaning of "action" (in the legal context). The court rejected an argument that the definition of "action" in the *Supreme Court Act* no longer applied because at the time of the hearing, it no longer appeared in the statute, but had been moved to the *Supreme Court Rules*, with the result that it was no longer incorporated by reference into the *Interpretation Act*. The court concluded that the meaning of "action" in the *Human Rights Code* should be interpreted in the context of the law at the time of enactment, which included the version of the *Supreme Court Act* that defined "action." *Vancouver (City) v. Reid* was followed in *HMTQ v. Gregoire*.³³
- [236] Section 59 of the *Estate Administration Act* was enacted before the definition of "action" was removed from the *Supreme Court Act*, and incorporated by reference in the *Interpretation Act*. Consequently, the court's reasoning in *Vancouver (City) v. Reid* would be applicable to interpreting the word "action" in the *Estate Administration Act*.

³² 1996 CanLII 3261 (BC SC)

³³ 2005 BCSC 154 (CanLII)

[237] Given the above, I find that **if** a personal representative were forced to rely on the *Estate Administration Act* **alone**, a worker's estate would not have the ability to initiate a claim under the Act.

[238] However, I have found that a personal representative does not need to look to the *Estate Administration Act* for authority to initiate a claim for workers' compensation benefits. Such a claim is not subject to the *actio personalis* maxim.

Implementation

[239] My decision that the worker's estate may apply for compensation regarding the period prior to his death does not resolve all matters. In fact, it appears to raise additional issues that seemingly must be considered by the Board as part of implementing my decision.

[240] The following are not findings but merely observations as to matters that might need to be considered.

When did the one-year time period in section 55 commence: November 2011 or October 2012 or both?

[241] The worker underwent surgery in November 2011 for his melanoma and that melanoma apparently recurred in 2012. Such circumstances raise the question of whether the one-year time period in section 55 of the Act for any claim by the worker (or his estate) for an occupational disease due to the nature of his employment commenced in November 2011.

[242] As part of addressing when the one-year period commenced, the Board might wish to consider whether in November 2011 the worker was disabled by his occupational disease. Relevant to that would be the fact that in November 2011 he was already off work due to his first hip surgery.

[243] I appreciate that one can argue that even if a worker does not apply in a timely manner regarding an initial period of disability due to an occupational disease, a worker may still be considered for entitlement for disabling recurrences of that disease if the worker applies within one year of commencement of any later periods of disability. Others might argue that as the claim is for an occupational disease, acceptance of such a claim and entitlement to benefits for **any period** of disability due to that disease turns on whether an application was filed within one year of the initial period of disablement due to the occupational disease. The Board might wish to consider which position is correct.

[244] Even if the worker was disabled by his occupational disease in November 2011, it may be that the one-year period in section 55 for a claim by the worker (or his estate) commenced in October 2012 on the basis that the melanoma that disabled him at that time was an occupational disease that developed separate and apart from the earlier melanoma. That might be so on the basis that while the melanoma in 2011 was due to occupational exposure prior to his going off work in July 2010, the melanoma of 2012 (i) was not a recurrence of that earlier

melanoma and (ii) was independently due to the pre-July 2010 exposure or was due to the exposure between his return to work in June 2012 and his going off work in October 2012. Any conclusion as to the cause of the melanoma of 2012 would, of course, be based on a weighing of the relevant medical evidence.

The Board's ability to adjudicate without an application

- [245] While subsection 55(1) of the Act permits the Board to adjudicate a claim and pay compensation without an application, it appears from the wording of subsection 55(2) that such a power lasts for only a year following the onset of disablement due to an occupational disease.
- [246] In this case, it appears that the one year period started no later than October 2012 when the worker became disabled due to his occupational disease. As the Board was not aware of the worker's disablement due to his occupational disease until January 2014, the Board had no opportunity to adjudicate the claim within one year of the commencement of the worker's disablement (October 2012 to October 2013). After October 2013, it appears that the Board seemingly lost the ability to adjudicate a claim for temporary disability benefits in the absence of an application. This is a matter that would still need to be resolved by the Board.

Has the Board received an application from the worker's estate?

- [247] In many cases a personal representative will also be a dependant. Read in the context of the provisions of the Act providing for compensation payable to dependants after a worker's death, an application for compensation signed by a dependant who happens to also be the deceased worker's personal representative should likely be understood to be an application for dependant's benefits, rather than an application on behalf of the worker's estate. However, it falls to the Board to determine at first instance if the widow's application should be considered to be an application by the estate, a position urged by the estate's lawyer.
- [248] Even if the worker's widow's application of January 2014 could be considered to be an application by the worker's estate, the application was not received within one year of the onset of the worker's disability which appears to have commenced no later than October 2012. Section 55 would need to be considered.
- [249] If the widow's application is not an application by the estate, did the Board receive an application for compensation within the three-year period following the commencement of the worker's disability, which may have commenced as late as October 2012? Would the September 4, 2015 telephone conversation between the case manager and the worker's widow amount to an application? Would the September 8, 2015 letter from the law firm acting on behalf of the estate amount to an application?
- [250] If neither the conversation nor the letter can be considered to be an application by the worker's estate, it would be necessary to consider whether there had been an application before the expiration of the three-year limitation found in subsection 55(3). If no application was received within three years, could any benefits be paid to the worker's estate from the date of receipt of any application made more than three years after the commencement of disability? It is possible that despite encountering success in this appeal, the worker's estate may receive no monies as part of the Board implementing this decision.

[251] Speaking more generally with regard to matters of implementation, it would be open to the Legislature to amend the Act to expressly address the ability of an estate to apply for compensation regarding the period prior to a worker's death.

Conclusion

[252] I allow the worker's estate's appeal. I vary the review officer's decision. I find the worker's estate has the ability to apply for compensation regarding the period prior to his death.

[253] As noted above in the section entitled "Implementation," there may be a number of issues for the Board to consider as part of implementing my decision.

[254] There has been no request for reimbursement of appeal expenses. Therefore, I make no order in that regard.

Randy Lane
Vice Chair