OMBUDSMAN OF BRITISH COLUMBIA

Special Report No. 8

to

The Legislative Assembly of British Columbia

THE WORKERS' COMPENSATION BOARD

VOLUME 1

Legislative Assembly
Province of British Columbia

OMBUDSMAN

8 Bastion Square
Victoria
British Columbia
V8W 1H9
Telephone: (604) 387-5855
Zenith 2221

April 12, 1984.

The Honourable K. Walter Davidson,
Speaker of the Legislative Assembly,
Province of British Columbia,
Parliament Buildings,
Victoria, B.C.
V8V 1X4

Mr. Speaker:

I have the honour to submit herewith a special report to the Legislative Assembly, pursuant to section 30(2) of the Ombudsman Act, R.S.B.C. 1979, chapter 306.

The report deals with eleven complaints arising out of decisions, practices or procedures of the Workers' Compensation Board of British Columbia. It summarizes my findings and recommendations and the responses of the Board in each case.

This report consists of two volumes. Volume 1 contains my actual report and Appendix A. Volume 2 contains Appendix B, the documentation pertaining to each of the eleven investigations.

Respectfully yours,

Karl A. Friedmann
Ombudsman

OMBUDSMAN OF BRITISH COLUMBIA

SPECIAL REPORT No.8

TO

THE LEGISLATIVE ASSEMBLY OF BRITISH COLUMBIA

THE INVESTIGATION BY THE OMBUDSMAN INTO ELEVEN COMPLAINTS ABOUT THE WORKERS' COMPENSATION BOARD

VOLUME 1

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VOLUME 1

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INTRODUCTION

This is a report on eleven specific problems I have found in the practices of the Workers' Compensation Board or in the Workers Compensation Act. In each case individual men or women are suffering as a result of the deficiency which I have identified. These injustices are serious and warrant consideration by the Legislative Assembly, with a view to bringing about corrective action.

The Workers Compensation Act grants exclusive jurisdiction to the Commissioners of the Board to inquire into, hear, and determine all matters and questions of fact and law arising under the Act. In view of the extremely limited role played by the courts in reviewing decisions and procedures of the Workers' Compensation Board, I feel a special responsibility towards those British Columbians whose complaints about the Workers' Compensation Board I have investigated and found substantiated, and towards the Legislative Assembly that established the Board as an independent organization largely outside judicial supervision.

From October, 1979 until the end of 1983, I dealt with and closed 1633 complaints against the Workers' Compensation Board and the boards of review. Of these 1094 have not been fully investigated by my office, usually because the complainant had a right of appeal available. Some 206 complaints were resolved during the course of investigation. Some 227 complaints were found not substantiated after full investigation.

In 91 cases I made recommendations to the Board which were ultimately accepted. In four cases I found the complaint substantiated but did not proceed further even though the complaints were not rectified. The remainder, apart from those complaints covered in this report, are presently in the process of investigation or referral.

It will be apparent therefore that most of my recommendations to the Workers' Compensation Board have been accepted. The purpose of this report is to bring to the attention of the Legislative Assembly those cases in which my recommendations have not been accepted by the Chairman and other Commissioners of the Board. After carefully considering the reasons given by the Board for its refusal to implement my recommendations in these cases, I concluded that the Board's actions were not adequate or appropriate.

On August 24, 1983, I submitted a report to the Cabinet with respect to these eleven cases, and prepared to make a more detailed report to the Legislative Assembly early in the 1984 session. (As the present Report contains all the information in my Report to Cabinet I have not included a copy of the Cabinet Report in the Appendix.) On January 1, 1984, a new Chairman, Mr. Walter Flesher, was appointed to the Workers' Compensation Board. I delayed making this Report in order that Mr. Flesher might have the opportunity to review the cases and discuss them with me. We have now finished our discussions. While they were helpful, there was no change in the Board's position in ten of the eleven cases, but a satisfactory resolution was reached

in case #3 (Apprehension of Bias). Relevant comments from Mr. Flesher are discussed at the end of each case in the body of this report.

The eleven cases can be divided into two groups: 1. Substantive, and 2. Procedural.

In the "substantive" cases I disagree with the correctness of the Board's decisions concerning the eligibility of particular individuals either because the Board has given a wrong interpretation to provisions of the Workers Compensation Act, or it has misapplied those provisions to the facts of the case, or the Act itself produces an injustice. For example, in two cases (#1 and #5) the Workers' Compensation Board has adopted a restrictive definition of the concept of "disability". In case #11 the Board has wrongly classified the complainant as an employer. In case #8, which shows how children of deceased workers can be deprived of the benefit of their parent's pension, the problem derives from an unjust provision in the Act or perhaps an illiberal interpretation of it. Other cases in this category are #2- Impossible Burden of Proof, and #7 - Piercing the Corporate Veil.

The five remaining cases are in the "procedural" group. In cases #4 and #10 my concern is that valid claims may be defeated as a result of inflexible time limits imposed by the legislation. In case #9 I criticize the Board for its practice of reopening issues which are not in dispute in medical appeals. The failure of the Assessment

Department of the Board to provide information concerning an employer's right of appeal is, in my opinion, a breach of a basic principle of administrative fairness (case #6). Case #3 concerns the Board's failure to adopt procedural safeguards against bias on the part of Board doctors, and is the one in which Mr. Flesher agreed to my recommendation. I nevertheless kept the case in this Report, although I am not requesting any response or action from the Legislative Assembly on this case now.

The brief summaries found herein are supplemented by an appendix listing my recommendations (Appendix A). Appendix B contains the correspondence between myself and the Commissioners and includes a detailed account of my recommendations and the Commissioner's reasons for refusing to accept them.

In ten of these eleven cases there is still a substantial disagreement between myself and the Workers' Compensation Board which the Board and I were unable to resolve. I have tried to present the position of the Board fairly. However, this is a report of the Ombudsman, not of the Workers' Compensation Board. Before reaching any conclusion concerning which position is the more meritorious, fairness requires that each be given proper attention. To the extent that the Legislative Assembly wishes to decide for itself, there ought to be a detailed examination of each case presented in this report. Unfortunately, there is no mechanism which would conveniently permit this.

I therefore respectfully suggest that the Legislative Assembly consider the practice of the Provincial Parliament in Ontario which has established a Select Committee to receive and discuss the reports of the Ombudsman. That forum has proven to be an effective way of resolving differences between the Ombudsman of Ontario and the Ontario Workman's Compensation Board, as well as dealing with administrative injustices identified by the Ombudsman in other reports. I believe it is a model which is worth study by the Legislative Assembly of British Columbia. I am confident that the Commissioners of the W.C.B. would change their decisions and practices in these individual cases if the Legislative Assembly or a Committee of the Assembly found itself in agreement with the recommendations I have made to the Board. Equally, of course, if my recommendations are rejected by the Assembly or a Committee of the Assembly I will end my consideration of these cases and inform my complainant that no change can be expected in his or her case. If we fail to settle the issues presented in this Report we risk the perpetuation of individual injustices, as well as the loss of an opportunity to learn the important lessons which these eleven cases present.

DECISION-MAKING STRUCTURE OF THE WORKERS' COMPENSATION BOARD

The Board is responsible for compensating and rehabilitating injured workers and for industrial health and safety. Officers of the Board make decisions concerning the worker's right to compensation, the duration of compensation, and the worker's eligibility for a pension.

Three appeal bodies are established under the Act to hear appeals by workers and employers against unfavourable decisions. The first appeal is to the boards of review which were created as administrative appeal tribunals independent of the Board.

A second appeal is to the Medical Review Panel. Panels are composed of a Chairman, who is a doctor, and two medical specialist. A claimant may appeal to a Medical Review Panel from either a decision of a Board officer, a board of review, or the Commissioners. The decision being appealed must relate to a medical matter, and the decision of the Medical Review Panel is final.

The third appeal is to the Commissioners of the Board. Employers and workers may appeal board of review decisions to the Commissioners. In addition, employers may appeal decisions by the Assessment Department directly to the Commissioners.

The Assessment Department is responsible for collecting sufficient funds to cover the cost of administration of the Workers' Compensation Board and the cost of work-related accident and disease claims. Funds are collected by charging employers a percentage of their payrolls based on the risk of accident associated with the employers' business.

Case #1 - Rigid Definition of Disability

Chromates have many industrial applications, and, in either powder or paint form, are particularly useful for protecting metal from rust and corrosion. They are also toxic, and suspected as carcinogens.

As a sheet metal worker, Mr. Emery worked with a chromate compound for twenty years without realizing it. He is now 70 years old, and has not worked since he was 51 - not because he lacked any initiative, but because, in his late forties, he developed an acute allergic skin reaction to chromates.

Although his physician was able to identify chromates as the cause of his allergy, no one could determine where he was coming into contact with them. His physician suspected that they were present in his workplace, but the Workers' Compensation Board asserted that chromates were not used in the sheet metal industry. For three years Mr. Emery's health deteriorated steadily. Because the source of contact was unknown he was only able to treat his increasingly severe reactions instead of preventing their occurrence.

Eventually, Mr. Emery scraped off some of the powdery coating commonly found on sheet metal and sent it to Spokane, Washington, for analysis. The powder was found to be zinc chromate. But by then his reactions to the substance had become so severe that he could no longer continue with his trade. At the age of 51, with a limited education, no training in any other industrial skills, and some

physical limitations due to general health problems, he tried to find work in another field. He sold his home and moved his family to different towns in search of better job opportunities, but he was unable to find full-time employment, and has had to rely upon occasional work as a bartender for the Canadian Legion for financial support.

The Board decided that Mr. Emery did not have a permanent disability as his incapacitating reaction only occurred when he was exposed to chromates and ceased several days after his exposure to them. He would not be similarly hampered in a "chromate-free" work environment. The fact that this limitation upon his employability made a crucial difference to his prospects was viewed as unfortunate but irrelevant; although the Workers Compensation Act does not define "disability" at all, the Board's policy is that a permanently increased sensitivity to an industrial substance should not be considered a disability. Thus, although the allergy entitled Mr. Emery to wage loss compensation for time lost from his sheet metal work when he was ill, it did not entitle him to a disability pension when he was forced to terminate his employment in that field for health reasons. In view of Mr. Emery's other limitations, the Workers' Compensation Board also decided that it would be unrealistic to sponsor him for any rehabilitation or retraining.

Mr. Emery was caught in a frustrating dilemma; he could no longer work in his area of expertise, but the Board felt that he was physically capable of starting a new career in another field. He could not find

comparable employment in another field because he lacked the appropriate skills. The Board did not want to enroll him in one of its own retraining courses to learn new job skills as his age and education made it unlikely that he would be a good candidate for re-employment. Catch-22.

During the twenty years that have passed since he had to leave the sheet metal industry Mr. Emery has lobbied the Board in an attempt to change its position on industrial allergy claims. Physicians, lawyers, Members of Parliament and Members of the Legislative Asembly have also written on his behalf. He has been unsuccessful, but he has never given up, as he feels that his case represents an important principle.

I have recommended that the full range of compensation be available for workers who develop allergic industrial diseases. This would not necessarily mean a pension in every case: many workers will be able to find comparable employment away from the irritant - especially if retraining is offered by the Board - but in cases such as Mr. Emery's, a pension would remedy the severe injustice that has been caused by the Board's present definition of disability.

Mr. Flesher, the new Chairman of the Board, had no further comment to add to the Board's position; the policy regarding allergies to industrially used substances has not been changed.

Case #2 - Impossible Burden of Proof

The medical profession has long recognized that back pain can prove to be extremely frustrating for both patients and their physicians; the pain can come to dominate a patient's life, the reason for the pain can often elude diagnosis, and the best treatment methods available cannot always guarantee relief.

Mrs. Hanney is a classical example of an individual caught in the above dilemma. She had been a practical nurse for three years with no history of back problems until 1975 when she fell while lifting a heavy patient, suffering a painful and severe back sprain in the process. For the next year she received wage loss benefits as she was unable to return to her work. During this period she received conservative treatment as x-rays and myleograms did not reveal any condition that would warrant surgical intervention. In 1976 she registered for a hairdressing course, in an attempt to change to a less strenuous occupation. Unfortunately, the pain was still so severe that she was unable to complete the course, and shortly thereafter she was examined by the Board for a permanent pension award. While no physician questioned the genuineness of her pain, and the reason for its onset seemed obvious, the Board chose to rely upon the lack of any concrete diagnosis as an indication that her impairment was not significant enough to warrant a pension.

After several years of different treatments, including surgery in 1978, Mrs. Hanney was still without either relief or diagnosis for her problem. Her own physicians have all agreed, however, that her back pain is genuine, severe, and related to and caused by her work injury of 1975.

Nonetheless, her claim has been consistently refused on the basis that she has been unable to provide any conclusive, objective proof that her disability was caused by that injury. In 1978 she was turned down by the boards of review. In 1979 her request for a Medical Review Panel was refused on the grounds that no medical dispute existed. In 1980 her appeal to the Commissioners was denied.

Mrs. Hanney has been unable to provide the conclusive proof required by the Board because current medical knowledge is simply not able to give a specific reason for her pain. Thus, the Board's standards place her in an impossible position of having to provide information that does not exist.

I have proposed to the Board a sequence of prerequisites that could be considered for application in cases such as Mrs. Hanney's:

1. The worker has suffered a compensable work injury which affects a part of the body not previously the cause of complaints.
2. There is no evidence of a pre-existing condition, either psychological or physical, which accounts for the continuing condition.

3. The condition is continuous from the time of injury and no intervening factors account for it.

If all these factors are met, the worker should be eligible for a pension. In situations with any residual ambiguity, I have recommended that the Commissioners apply Section 99 of the Workers' Compensation Act which reads as follows:

> "The Board is not bound to follow legal precedent. Its decision shall be given according to the merits and justice of the case and, where there is doubt on an issue and the disputed possibilities are evenly balanced, the issue shall be resolved in accordance with that possibility which is favourable to the worker."

The Commissioners did not agree with either of my proposals, and maintain that I was merely attempting to substitute my weighing of the evidence for theirs. I feel that by placing an impossible burden of proof upon Mrs. Hanney the Commissioners are unjustly denying her claim.

During our most recent discussions, Mr. Flesher confirmed that the Commissioners will not reverse their decision. He also stated that a decision of the Supreme Court of British Columbia on Mrs. Hanney's case confirmed the Board's position. I would disagree. The Court decided in 1981 that, as the Board's decision not to award compensation to Mrs. Hanney "was not a perverse decision", the Board

was acting within its jurisdiction, and the court could thus not intervene. This was not a decision on the merits of Mrs. Hanney's claim.

There are very few grounds upon which judicial review of a Board decision is possible, and the court's judgment is a reflection of its limited jurisdiction rather than the validity of Mrs. Hanney's claim. I believe the Board ought to aspire to a higher standard in its decisions, such as having fair, correct and just decisions, not merely an absence of perversity.

Case #3 - Apprehension of Bias

In 1973 Mr. Downey (not the complainant's real name) was assaulted by a customer while at work. The assault was so traumatic, and his fear of further reprisals by his assailant so strong, that I was pressed by Mr. Downey to conceal any further details of the assault in order to protect his identity. Already the victim of a physical attack, Mr. Downey then became a victim of bias when he applied for compensation to the Workers' Compensation Board.

Four months of increasing pain followed the assault, and Mr. Downey was admitted to hospital for surgery. In the opinion of his surgeon, the assault had aggravated a pre-existing degenerative condition. He received compensation for his lost wages while recovering, until two of the Board's doctors, Dr. Maple and Dr. Firth (also not their real names), decided that his problems were completely unrelated to his injury. In their opinion, they related instead to a non-compensable operation that had been performed the previous year.

Mr. Downey found it physically difficult to resume his previous duties and appealed to a Medical Review Panel. The three doctors on the Panel all certified that his fairly severe disability had indeed been significantly aggravated by the injury at work. He was then referred back to a Board doctor for a pension assessment. To his dismay he discovered that his examiner was to be the same Dr. Maple who had earlier decided that his problems were not work related at all.

As it turned out Mr. Downey's concern was justified. In his assessment Dr. Maple referred several times to his previous review, belittled the assault by describing it as a "scuffle", and questioned Mr. Downey's veracity by referring to an "alleged" injury, and "claims" of back problems. In conclusion, he repeated his belief that none of Mr. Downey's problems were related to the 1973 "incident", and in contrast to the findings of the Medical Review Panel, described his disability as minimal. Mr. Downey was limited to 5% of total disability, which translated into a pension of less than $8 per month. The assessment was appealed to the boards of review in 1977, and to the Commissioners in 1978, but Mr. Downey lost on both occasions. The issue of bias was not raised.

By the time my office began an investigation, Mr. Downey had been unable to work for several years, had almost depleted his savings, and had become reliant upon pain killing drugs. As a result of my recommendations, the Board re-evaluated his disability and substantially increased his pension to almost $200 per month. As this increase was retroactive to 1974, he also received a lump sum of $16,000. Dr. Maple was not consulted during this latest reappraisal.

This case suggests that professionals can, occasionally, take unkindly to reversal of their decisions by colleagues, and can attempt to minimize or undo the effects of such reversals if they are in a position that allows them to do so. Even if bias occurs only rarely, it is my opinion that the Board should take administrative precautions to ensure that it cannot happen at all.

Despite their recognition of the injustice that had occurred in Mr. Downey's case, the Commissioners refused to implement my recommendation that a doctor whose original medical opinion has been overturned be excluded from any further review of that worker. I based my recommendation on the important legal principle that a reasonable apprehension of bias is cause for disqualifying an individual from making a decision. The Board's decisions can significantly and permanently affect an individual's rights and future. Justice must not only be done, but must also be seen to be done.

Mr. Flesher has agreed with me that the possibility of bias is a concern, and has issued a guideline to Board staff requiring that (where possible) Board Medical Advisors whose opinions have been disagreed with by Medical Review Panels not be involved in the immediate implementation of the Panel's certificate. I am satisfied with this action, and consider this complaint rectified.

#4 - Rigid Appeal Periods

Every worker who disagrees with a Board decision on his claim has to be attentive to the appeal limitation periods set out in the Workers Compensation Act. Unfortunately, some deadlines are missed, but if the appeal was to have been to a board of review or the Commissioners, the legislation allows the reviewing body the discretion to consider applications for extensions of their appeal periods. In considering extension applications, first the reasons for the delay are examined. If the reasons are compelling, the extension will be allowed; if they are weak, the reviewing body will examine the merits of the appeal itself before making a decision on whether to allow the extension.

This discretionary safety net, which theoretically ensures that no meritorious claim is rejected on merely technical grounds, does not apply to the Medical Review Panels. If a worker is late with an appeal to a Medical Review Panel the Act does not allow for any extensions of the 90 day appeal limitation period. Even if the reasons for delay are compelling and the merits of the appeal are strong there is no recourse. Since Medical Review Panels are independent bodies which, by statute, make final and binding decisions on complex medical disputes, it is a serious deprivation for any worker to lose this right of appeal. I have received several complaints illustrating the inequity of the present statutorily prescribed rigid appeal period.

For instance, Miss Phillips (not her real name) had developed numbness on her left side in 1978, but the Board had denied any causal relationship between the numbness and her work. Due to the circumstances of her disability and the context of her particular work environment, the issue had the potential to affect other claimants in the future. The question of how her numbness had been caused was therefore an important one. As she had been unsuccessful with appeals to the board of review and the Commissioners and as the issue was essentially a medical question, Miss Phillips decided to appeal to a Medical Review Panel, but left the handling of the procedural details to the union representative who had previously presented her case to the Board. Unfortunately, the union representative went on maternity leave for six months and through some oversight the letter declaring Miss Phillips' intention to appeal to a Medical Review Panel sat on the representative's desk throughout this period.

When the representative's maternity leave ended, immediate attempts were made to rectify the situation, but as the Act does not allow an extension for late Medical Review Panel appeal applications, these attempts were unsuccessful.

Another frustrating case was that of Mr. James (not his real name). He received an adverse decision from the Commissioners on June 5, 1979, and requested the appropriate forms for an appeal to a Medical Review Panel on July 18, 1979. The Board sent these to him on July 19th, along with a letter informing him of the 90 day limitation period and asking him to return the forms before that period expired.

The letter did not mention that the 90 days had started running as soon as the June 5th decision had been made. Not unreasonably, Mr. James assumed that it started with the July 19th letter, and he returned the necessary papers in accordance with the latter interpretation. His application was several weeks over the correct time limit. Because the Board failed to advise him correctly he was misled by the Board's letter and lost his chance to challenge a decision that had cost him more than three months of income.

After considering these and other cases, I concluded that the 90 day time limit was oppressive because of its rigidity and I recommended that the Board and the Minister of Labour initiate reconsideration of the statutory limit with a view to proposing changes to the Legislative Assembly giving the W.C.B. some discretion to waive the time limit in suitable cases.

In response to my recommendation the Commissioners stated their concern that the worker's condition might be completely changed if a Medical Review Panel were to take place substantially after the making of a medical decision. They recognized, nevertheless, that the strict limitation period could cause hardship and proposed an amendment allowing them the discretion to extend the time limit by 30 days. In presenting my recommendation to the Minister of Labour I disagreed with the Board's proposal as I felt that it would still not provide the needed flexibility.

While the legislation has not been changed to date, the Commissioners decided in response to my investigation to interpret the 90 day limitation period as running from the date on which the claimant received the appealable Board decision. This interpretation allows workers a few more days, but does not really meet the substance of the problem. Mr. Flesher has agreed that, under the present legislation, the Board cannot legally go beyond this. Only the Legislative Assembly can give the Commissioners the statutory authority to extend the time limit for appeals to Medical Review Panels. Under my proposal the Board would still retain the final decision-making power about what would constitute a suitable case for showing flexibility on appeal deadlines. Claimants with deserving cases would be protected, and the requirements for justice would be met.

Case #5 - Unjust Reduction of Pension

"In this realm, while disability must be related to hard physical labour, cases must be treated on an individual and not a mass average basis. Moreover, I respectfully suggest to all doctors concerned that they remember that medically no 100 per cent perfect creature exists, and so perfection of body is not the norm."

Commission of Inquiry
Workmen's Compensation Act
Report of the Commissioner
The Honourable Mr. Justice Charles W. Tysoe
1966

The above quotation is relevant to the story of Mr. Walker (not his real name), who worked as a logger for twenty years. It was a dangerous and physically demanding occupation. Mr. Walker maintained an excellent work record until 1966, when a log rolled onto his feet and bent back his left foot, fracturing and dislocating the bones.

Surgical correction was not completely successful, and the disability Mr. Walker was left with did not allow him to pursue employment involving strenuous use of his foot. This meant that he was unable to return to logging or most other forms of manual labour. Although the Board worked closely with him in providing rehabilitation and job opportunities, his foot proved to be more of a handicap than had been expected. Further surgery was carried out, but in spite of high expectations and enthusiasm, Mr. Walker ultimately had to face a

discouraging reality: his employment prospects had become quite limited. Since 1974, Mr. Walker has been on income assistance.

In ordinary circumstances, Mr. Walker would have been entitled to a significant pension because his accident had impaired his earning capacity. But the Board decided that Mr. Walker's circumstances were not ordinary, and his pension was reduced because he had been born with a club foot.

In the Board's opinion, he had been working with a non-compensable pre-existing and disabling impairment before his accident, and was therefore only entitled to compensation for a portion of his ultimate post-injury disability. This interpretation would have been reasonable if Mr. Walker's club foot had limited his job performance before the accident. But this had most certainly not been the case. He had performed heavy manual labour for twenty years - more than adequately meeting the Board's usual standard for determining whether or not a worker's condition could be described as a disability. Nonetheless, the Commissioners supported their position with an isolated excerpt from Mr. Justice Tysoe's 1966 inquiry into the Workers Compensation Act which mentions that any condition apparent to the eye (such as the loss of a limb) must cause some impairment in a worker's ability to perform manual labour.

Without any apparent embarrassment, the Commissioners of the Board used this excerpt to arrive at a rigid and archaic interpretation that penalizes workers with visible conditions regardless of their

pre-accident work performance. The Board's literal interpretation of Mr. Justice Tysoe's statement ignores his admonition, quoted in the opening paragraph, that "cases must be treated on an individual and not a mass average basis," and "perfection of body is not the norm." Paradoxically, if Mr. Walker's club foot had been visible only on x-ray, and not apparent to the eye, Board policy would have allowed him his full pension. In the eyes of the Commissioners the obviousness of his imperfection was the key variable rather than its effect. Mr. Flesher has indicated that the final position of the Commissioners has not changed. I cannot agree with their reliance upon appearance instead of ability, and have concluded that the Board should not have reduced Mr. Walker's pension as his performance of heavy manual labour had not been affected by his club foot for twenty years before his accident.

I have not used Mr. Walker's real name at his request because, ironically, his logging co-workers never knew that he had a club foot. As a matter of pride he does not want them to find that out now.

Case #6 - Inadequate Notification of Appeal Information

It is often assumed that workers are the only focus of the Workers' Compensation Board, but employers can also be significantly affected by Board decisions. For example, rates that businesses pay to the Board for covering compensation costs can vary widely, and are based upon the "risk category" in which the Board's Assessment Department places different business activities. These rates are used to fund accident and disease claims as well as the Board's administrative costs.

Employers who do not fulfill their financial obligations to the Board can find the consequences devastating. Amongst its arsenal of remedies, the Board can charge a defaulting employer with the full cost of a worker's claim; it can file a certificate with the Court Registrar which is then enforceable by the sheriff as an order of the court; and it can apply to the court for an order restraining an employer from carrying on business. With economic conditions as difficult as they now are, decisions by the Board affecting employers have achieved a new significance and can, in some instances, determine whether a business will survive or fail.

One of my complainants, the principal of a small company, owed the Board $6,000. The Board filed a certificate with the court and ultimately a Sheriff seized equipment valued in excess of $80,000 and sold it for less than $10,000. Not only did the sale not satisfy the

total debt after court and sheriff's costs had been added on, but the Company no longer had the machinery with which to carry on business, and for which it still owed a finance company $64,000. (The issues involved are rather complex and this case is still under investigation.)

The Board's extensive powers have been somewhat balanced by the provision of an employer's right to appeal decisions to the Director of the Assessment Department, and from the Director to the Commissioners of the Board. But this right is flawed by unequal access; information regarding the appeal mechanism is not automatically provided.

This flaw has been slightly ameliorated by the Board's agreement, in response to my recommendation, to advise all employers who have already appealed to the Director, of their further right to appeal to the Commissioners. But Assessment Department personnel, who make all initial decisions, are only required to provide appeal advice if an employer expresses dissatisfaction with an assessment decision. The Board's reason for this less than halfway measure is that full notification would strain its resources for the benefit of a very few dissatisfied employers. In my view, this is not a sufficient reason for denying employers knowledge of their basic rights, and it constitutes an unfair procedure. I have recommended that employers be informed of their right to appeal decisions made by any staff member, and not merely those made by the Director.

Mr. Flesher has informed me that the Board has begun a complete review of the appeal procedures for assessment matters, and our recommendations will be taken into consideration. Of course, this does not necessarily mean that they will be accepted. I believe that an expression of the Legislature's support for my recommendation would ensure that the Board changes this unfair practice and procedure.

#7 - Piercing the Corporate Veil

Mr. Mochinski had worked at an unusual range of jobs in the past - a self-employed prospector, a used car dealer, and an agent for a Native jade carver, among others. Then he experienced a windfall. He won several thousand dollars in a lottery, and seized the opportunity to start his own business, a company that would sell all-terrain vehicles. But in May of 1975, less than a month after his company was started, one of his vehicles slipped while he was moving it up a ramp. It landed on Mr. Mochinski, injuring him quite badly, and although his ultimate recovery was fairly satisfactory, he never regained the sight of one eye.

Usually, there would have been no problem with eligibility for compensation, but Mr. Mochinski was not in the usual situation. He was both employee and principal shareholder of a one-man company that had apparently failed to register with the Workers' Compensation Board. If he had simply been the sole employee of such a company he would have been compensated. The costs would have been charged back to his employer, who might have also been charged by the Board for past unpaid premiums as well as an additional penalty. But when the injured worker is both employee and employer the Board's policy has been not to pay compensation if the company has not registered with the Board. Mr. Mochinski claimed that he had telephoned the Board two weeks before the accident occurred in order to start the registration

procedure, and that he had been assured of interim coverage before completion of the paperwork. Unfortunately, the Board could not confirm this as they could find no record of his call. By September of 1975, Mr. Mochinski had appealed the issue of his eligibility for compensation to the Commissioners, and his appeal had been rejected. In 1980 he asked my office for assistance.

I recommended that the Board treat all unregistered companies in the same manner, whatever their size, by compensating injured employees and charging the costs back to the company. This approach would also be consistent with that of the common law, which makes the distinction between corporations and their shareholders. I also feel that the Workers Compensation Act already provides an adequate range of penalities for failure to register, and that the additional hardship imposed upon Mr. Mochinski has been improperly discriminatory. I described his case, and others of a similar nature, in my 1980 Annual Report (CS 80-100, pages 68 and 69).

Although the Commissioners have not agreed with my recommendations, Mr. Flesher has notified me that they have decided to review their treatment of small limited companies and obtain a legal opinion on the matter from the Board's Legal Department. Unfortunately, this will be of no assistance to Mr. Mochinski. He lost all his capital and had to close down his business shortly after his accident.

Case #8 - Support of Children

A great deal of public and media attention has been focussed on the financial problems faced by single parents (usually mothers) and their children after marriage breakdown. For reasons that are various and complex, payments for child support or maintenance are frequently in default, and reliance upon legal enforcement of these maintenance orders is often not a realistic solution. Needless to say, children are the victims of these often acrimonious adult manoeuvres, and their plight is obvious even though it is publicly not very visible.

Mr. and Mrs. Worth's situation is probably fairly typical. (Their real name is not being used because of the personal nature of their story.) They were divorced in 1962, and a Family Court order set child support at $40 a week for the two children. But the parents reconciled almost immediately and a third child was born two years later. In 1969, Mr. Worth left the family. Over the next three years he paid only a fraction of the support ordered by the court in 1962. Although he occasionally mentioned reconciliation, Mrs. Worth wanted him first to show that he could control his drinking problem and work steadily. She found part-time work at an isolated logging camp the family had moved to in 1968, and did not press for enforcement of the support order as she did not want to upset the rather precarious balance that was developing between her husband and herself.

In 1972 Mr. Worth took out a small insurance policy, naming his wife as beneficiary. One week later he was killed in a logging accident.

Mrs. Worth applied to the Workers' Compensation Board for dependents' benefits. The widows and children of workers killed as a result of their employment are automatically entitled to compensation under Section 17 of the Workers Compensation Act. The amount will reflect factors such as the wages earned at the time of death, as well as the age and relationship of the surviving dependents.

But separated spouses and their children are treated differently. Their level of compensation reflects the level of financial support that the deceased worker had been giving to his legal dependents. If one spouse is either unwilling or unable to enforce maintenance orders and the other, for whatever reasons, has not fulfilled his or her obligations, the Board perpetuates the legally incorrect situation by reducing or denying compensation after the death of the obligated spouse.

The Commissioners of the Board defend this position by stating that when enforcement of maintenance is a problem, it is family law that should be changed, not compensation law; they do not wish to create what they describe as a "privileged" group of separated spouses and children whose maintenance orders will be fulfilled by the Board when they were not fulfilled by the worker during his life.

Nonetheless, if Mr. Worth had been disabled instead of killed, and had been eligible for compensation, the legislation would have allowed the Board to intercede on behalf of his wife and children and divert part or all of his compensation to them in accordance with the terms of the maintenance order even if it had not been successfully enforced before the accident. If he had been killed in a car accident, instead of at work, the Insurance Corporation of British Columbia would have considered Mrs. Worth and her children fully eligible for death benefits as Mr. Worth had been legally liable for their support. The fact that he had not met his legal obligations would be immaterial. Thus, Board policy is not only internally inconsistent, but also inconsistent with the policy of the other major provincial compensation plan. In my 1981 Annual Report (page 15) I described the ultimate effect of the Board's policy:

> When a worker is injured or killed in an industrial accident the Board will only pay that worker's dependents those amounts of maintenance payments that the dependents actually received from the worker before the accident, instead of the full amount ordered by a court. If the worker was successful in evading his court-imposed responsibilities the Workers' Compensation Board... ends up being the beneficiary of the irresponsible conduct of the former spouse and the beneficiary of our inadequate system of enforcing maintenance payments. Women and children end up shortchanged.

The Worths never became "privileged". Since Mrs. Worth did not enforce the order for support while her husband was alive, the Board took the view that her children were not his dependents and had forfeited their rights to any benefits after his death. Because of my intervention nine years later, the Board ultimately conceded that Mr. Worth's insurance policy demonstrated some "reasonable expectation of pecuniary benefit" on the part of his children. While this still did not entitle them to the usual dependents' benefits, it did mean that the family qualified, under yet another part of Section 17, for a one-time lump sum payment of $1500. They received this, as well as nine year's interest, in 1981.

Mrs. Worth vividly remembers the hopelessly isolated position that she and her children were in after her husband's death. She had very little money, three children, no job skills and no prospects. The camp owner had offered her part time work at very low wages, which she had gratefully accepted. She was eventually able to increase her working hours to full time but this meant that she could no longer effectively supervise her children's correspondence courses; they had to take turns boarding away from the family in order to attend school.

Mrs. Worth suffered severe personal deprivation and abuse. The family wanted desperately to move away but it seemed impossible without any financial security. They stayed in the camp for nine years. Mrs. Worth still feels angry, helpless and guilty about that period; her children - now young adults - refuse to discuss that part of their

lives. They all believe that their lives would have been very different if the Workers' Compensation Board had accepted their claim as dependents.

It is my belief that the children of separated spouses are treated in an unjust and improperly discriminatory manner by the Board. I recommended that the Commissioners re-interpret the legislation (which is somewhat ambiguous) as meaning that the only criterion for awarding benefits to a child of a deceased worker would be the legal liability of the worker to support the child. Mr. Flesher believes the Act would need to be changed. He does not wish to change the Board's present practice or interpretation of the legislation. The protection of such children now rests with the Legislative Assembly.

Case #9 - Questions put to Medical Review Panels

Workers who disagree with a Board decision on their claim have several avenues of appeal. If the issue is a purely medical one, the choice may be to apply to a Medical Review Panel.

For this purpose, the worker will need a statement from a physician confirming that there is a genuine medical dispute, as well as a clear description of just what that disputed medical issue is. As the findings of Medical Review Panels are final and legally binding, the decision to appeal to a Medical Review Panel must be weighed very carefully.

Mr. Wright (not his real name) appealed to a Medical Review Panel on the question of whether or not the residual symptoms of a 1975 work related injury were severe enough to be disabling, and correspondence and submissions to the Board's solicitor centred on this issue. But the Board presented the Medical Review Panel with an extensive list of questions which went far beyond the issue which had prompted the appeal. (These questions are set out in Section 61 of the Workers Compensation Act, and, without any significant variations in their content, are asked by the Board of every Panel.) In response to the Board's questions, the Panel agreed with Mr. Wright that he had a disability and agreed that his disability was brought on by lifting heavy objects such as television sets, which he was required to do at

work. However, the Panel also declared that his disability was not caused by his work.

Although the Panel's answers may sound somewhat contradictory, their ambiguity gives small comfort to Mr. Wright. He lost his appeal because of the Panel's reversal of an issue that had previously been decided in his favour by the Board, had never been in dispute, and had not been foreseen as an area that he should pay any particular attention to in his submissions to the Medical Review Panel.

I am concerned about the procedural unfairness of the Board's failure to inform Mr. Wright of the necessity that he address all possible medical issues in his appeal; this same procedural unfairness would also apply to all other appellants. But of even more concern to me is the Board's practice of applying the same extensive range of questions in every case.

The Commissioners of the Board have stated that the Workers Compensation Act requires them to put all these questions to the Panel, even those pertaining to issues not disputed by anyone. I disagree with their interpretation. Section 61 is ambiguous on this point and could be interpreted as giving the Board discretion to ask one, some or all of the questions. There is significant judicial support for my position. In my opinion, only questions necessary for resolving the disputed medical issue should be put to the Panel. While it might be reasonable for the Commissioners to pose the full

range of available questions in some cases, it is, in my opinion, an improper exercise of the discretion they are given by the Workers Compensation Act for them to do so with every appeal.

Moreover, some claimants could be discouraged from appealing by the realization that any previously undisputed medical aspects to their claims could be jeopardized by a Medical Review Panel appeal. By presenting claimants with such a difficult choice the Board is using its power in a manner I consider oppressive.

I have recommended to the Commissioners that the Board only ask the Panel questions relevant to the medical issue in dispute. To date, the Commissioners have not agreed with my position, and continue to require of Medical Review Panels that they make fresh medical decisions in response to questions on all the medical issues of each claim.

Mr. Flesher informed me of a recent Supreme Court case which (in the Board's opinion) supported the Board's present interpretation of the Act. My office contacted one of the lawyers acting on the case for further information. He stated that the Court did not give any reasons for its decision to permit a Medical Review Panel to proceed with an examination. The issue may or may not come before the Court again. My priority is that the injustice I have identified be resolved.

Two alternative resolutions are available to the Legislature:

1. to consider amending the Workers Compensation Act to clarify Section 61, or

2. to recommend to the Lieutenant Governor in Council that he exercise his power under Section 66 to make regulations "for the effectual working of sections 58 to 65" and prescribe a flexible procedure for the Board which would allow Section 61 to work better.

Case #10 - Cut-Off Date Discriminatory

Few people have the specialized training to understand the rules of compensation for employees injured at work. Unfortunately, this lack of knowledge may make the difference between an injured worker receiving full compensation or none at all. By failing to meet a procedural requirement, a worker could be barred by the Workers Compensation Act from ever receiving compensation for an injury, regardless of how serious the ensuing disability or how understandable the reason for not fulfilling that procedural requirement.

Mr. Burton is one such worker. He is now 67 years old and a resident of the Comox area. From 1965 to 1969 he worked in a Prince Rupert pulp mill. During his last year there, Mr. Burton was frequently exposed to poisonous gases such as chlorine, chlorine dioxide and sulphur dioxide, as the plant experienced problems with its control procedures. Although more than 10 per cent of the accidents recorded at that mill during 1969 were cases of gas inhalation, Mr. Burton states that gas masks were never issued. More and more frequently, Mr. Burton experienced nausea, coughing, headaches, giddiness and chest pain, and when his health deteriorated and hospitalization became necessary, it was discovered that irreversible coronary artery disease had developed. This was followed by psychomotor seizures, heart failure and diabetes. He was declared completely disabled in 1969 and has never been able to work since then. His physician's

opinion was that conditions in the mill had triggered and contributed to these physical problems.

Fortunately - or so it seemed at the time - Mr. Burton was covered until the age of 65 by a disability plan offered through his employer. As this income appeared to be adequate, he saw no need to file a claim with the Workers' Compensation Board right away. Although employers are required under the Workers Compensation Act to notify the Board when their employees are injured or disabled as a result of their work, the pulp mill had not done this in Mr. Burton's case. Thus, due to the two reporting oversights, the first notification to the Board of Mr. Burton's disability was in 1979, when, realizing that the value of his insurance had been reduced considerably by inflation, and that its term was fast coming to a close, Mr. Burton applied to the Board for a pension.

Only then did he discover that Section 55 of the Workers Compensation Act prevented the Board from considering his claim. This section requires the worker to apply for compensation within one year of an injury. Section 55(4) allows the Board to extend the one year period if special circumstances exist, but this discretion can only be applied if injury or death occurred on or after January 1, 1974. The Burton family must now survive on small federal pensions, and will never receive the compensation to which they would normally have been entitled.

The passage of time certainly increases the difficulty of establishing claims, but section 55(4) does not allow the Board the discretion to consider claims for injuries which occurred before 1974 even when ample evidence exists to support their validity. I have recommended that the Board seek a reconsideration of this section with a view to allowing the Commissioners to review the special circumstances of any case that comes to their attention. While the Commissioners have sympathized with my recommendation, the solution is ultimately one that can only be brought about by the Legislative Assembly through a change in Section 55 of the Workers Compensation Act.

#11 - Wrong Person Identified as Employer

It is not always easy to determine who the employer is in a business relationship, but it is a determination that must be made, as employers pay for their employees' compensation coverage. An example of a difficult case is that of Ridgecrest Investment Consultants Ltd. It was Ridgecrest's business to find framing contractors for owner/builders. Instead of taking a "finders fee", Ridgecrest claimed the difference between what the owner/builder was willing to pay to have the work done and the lower price that the framing contractor was willing to work for. When the owner/builder paid Ridgecrest the amount agreed upon, Ridgecrest deducted part and passed the remainder on to the contractor, who then paid his workers. The payments by the owner/builder to the contractor, via Ridgecrest, were usually made in installments as the work progressed. Ridgecrest deducted a portion of its profit from each installment. Did this relationship make Ridgecrest a broker or an employer?

The Board maintains that Ridgecrest was an employer in the construction business; it paid the workers, its fee was based on the difference between the owner/builder's and the contractor's price, and the payments were disbursed gradually, thus prolonging Ridgecrest's involvement. In 1981, on the basis of this decision, the Assessment Department of the Board charged Ridgecrest for overdue employer's assessment payments. The principal of the company appealed, but the

Commissioners confirmed the original interpretation by the Board and refused the appeal in 1982.

I disagree with the Board for the following reasons:

> The owner/builder was the source of payment to the workers and, although he was not necessarily aware of how the payment was distributed, neither was Ridgecrest, whose role was simply to pass the agreed upon amount on to the contractor.
>
> Ridgecrest exercised no control over the workers. It did not hire them and could not fire them, and it neither supervised nor evaluated the quality of their workmanship.
>
> Regardless of how Ridgecrest's fee was collected, its function was that of a broker. Although it had enough knowledge of the construction industry to function in that milieu, it could not have been considered as a part of the construction industry.

In short, Ridgecrest acted as a broker, putting the owner/builder in touch with a needed framing crew and receiving a fund out of which wages were paid once its own fee had been deducted. I recommended to the Board that owners and builders should be charged with the assessments instead of the middle-man or broker, who would be in no position to ensure safety and good workmanship. The Commissioners have disagreed with my interpretation, and insisted that Ridgecrest pay assessments to the Workers' Compensation Board as an employer.

There has been no change in their position after our most recent discussions. The financial stress placed upon Ridgecrest by the Board made its operation non-viable, and the company went out of business. The principal has not worked since.

APPENDIX A

LIST OF RECOMMENDATIONS

Case #1 - Rigid Definition of Disability

Recommendation:

1. Where a worker is forced to seek alternate employment as a result of a reactive industrial disease, rehabilitation should be offered when practicable; then a pension should be assessed on the basis of the loss of earnings method.
2. Mr. Emery should be assessed for a pension based on the fact that, due to his dermatitis he was capable of earning only a minimum wage from the date at which he was not able to continue his employment in the sheet metal industry.

Case #2 - Impossible Burden of Proof

Recommendation:

The Commissioners should allow Mrs. Hanney's claim for compensation.

Case #3 - Apprehension of Bias

Recommendation:

That Board doctors whose decisions regarding a worker's claim are appealed to a Medical Review Panel, should not later make a medical decision or an assessment related to the same claim.

Case #4 - Rigid Appeal Periods

Recommendation:

That the Ministry of Labour reconsider Section 58(3) of the Workers Compensation Act with a view to providing discretion to the Board to extend the time for appeal in appropriate circumstances.

Case #5 - Unjust Reduction of Pension

Recommendation:

That the Board recalculate Mr. [Walker's] pension without applying proportionate entitlement.

Case #6 - Inadequate Notification of Appeal Information

Recommendation:

That the Board amend its present unfair procedure and advise employers of their right to appeal to the Commissioners in all decision letters and Assessment Notice forms.

Case #7 - Piercing the Corporate Veil

Recommendations:

1. That the Board pay Mr. Mochinski's claim for injuries incurred while he was in the course of employment. The Board may then proceed, pursuant to section 47(2), to recover the money paid to the worker from the employer corporation. The Board may also charge the employer with an offence under the Workers Compensation Act pursuant to section 38(4), and is obliged to levy a penalty against the employer pursuant to section 38(2).

2. That the Board amend its decision of April 27, 1981, to conform with the provision and spirit of the Workers Compensation Act, and with the procedure I have outlined in recommendation #1 above.
3. If the Board feels that it should have the option of refusing to pay a worker's claim where the worker has been responsible for the employer company's deliberate failure to register, it should seek an appropriate amendment to the Workers Compensation Act.

Case #8 - Support of Children

Recommendation:

That section 17 of the Workers Compensation Act be reconsidered with a view to amending it so that the only criteria to be considered in awarding benefits to a child of a deceased worker is the legal liability of the worker to support the child.

Case #9 - Questions Put to Medical Review Panels

Recommendation:

That the Commissioners refrain from submitting questions to the Panel under section 61(3) where the questions concern issues which have already been decided and are not disputed by the claimant or his employer.

Case #10 - Cut-Off Date Discriminatory

Recommendations:

1. That section 55(4) of the Workers Compensation Act be reconsidered and that the Ministry of Labour and the Workers' Compensation Board seek its repeal.

2. That the Board consider Mr. Burton's claim for compensation upon the repeal of section 55(4) of the Act.

Case #11 - Wrong Person Identified as Employer

Recommendations:

1. That Ridgecrest not be compelled to register as an employer with the Workers' Compensation Board.
2. That assessments be levied on and collected from the framing subcontractors and, failing that, from the building contractor in accordance with section 51 of the Workers Compensation Act.
3. That the outstanding assessments charged to Ridgecrest not be collected.

VOLUME 2

Table of Contents

(Volume 2 contains Appendix B of this report and includes the correspondence and other documents related to my investigations and subsequent action on the individual complaints discussed in this report. The page numbers for this appendix are in the top right hand corner of each page. Not all claimants have consented to publication of their names. In order to protect their privacy, I have either disguised or deleted material which might reveal their identities.)