OMBUDSMAN OF BRITISH COLUMBIA

Special Report No. 12

to

The Legislative Assembly of British Columbia

THE WORKERS' COMPENSATION BOARD (No.2)

VOLUME 1

Legislative Assembly
Province of British Columbia

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June 18, 1985

The Honourable K. Walter Davidson
Speaker of the Legislative Assembly
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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 nine 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 nine investigations.

Yours sincerely,

Karl A. Friedmann
Ombudsman

OMBUDSMAN OF BRITISH COLUMBIA

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TO

THE LEGISLATIVE ASSEMBLY OF BRITISH COLUMBIA

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

VOLUME 1

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INTRODUCTION

This is my second Special Report to the Legislative Assembly concerning the Workers' Compensation Board. It contains nine new cases on which the Board and I have not been able to agree. One of the nine raises again an issue which was dealt with in my first report on the Workers' Compensation Board - the problem of disabling industrial allergies (Mr. Pipke's case). The Board's restrictive definition of disability means that workers who are exposed to disabling industrial allergies in their work place and who are not suitable prospects for retraining are denied compensation. Although I dealt with this issue in Special Report No. 8 (April 1984), the problem remains. I believe it is one which goes to the root of the purpose of workers' compensation.

For the first time I am also reporting on the difficult issue of the Board reimbursing workers for legal fees incurred in defending their claims as a result of improper Board conduct (Mr. Temnoff's case). Although the law allows the Board to make such payments, the Board's policy is never to pay legal fees under any circumstances. In my opinion, Mr. Temnoff's case is exceptional, the Board's fault is clear, and Mr. Temnoff's legal fees should be paid by the Board.

The same phenomenon - the Board's refusal to exercise its statutory discretion - is evidenced in the cases of Mr. Rahn and Mr. Relkoff. The Workers Compensation Act provides for two alternative methods of calculating pension awards. For years the Board refused to implement the second method, notwithstanding the duty imposed by the law. As a result Mr. Rahn and Mr. Relkoff were probably undercompensated for injuries they suffered.

Mr. Sorrenti's case is a classic Catch-22 situation. The Board denied his claim because Mr. Sorrenti could not produce doctors' reports. Mr. Sorrenti could not afford to pay for medical treatment because the Board refused to recognize his work-related injury. Therefore he did not go to a doctor.

The other five cases reported also raise important issues for the attention of the Legislative Assembly.

I submitted a report on these nine cases to the Lieutenant Governor in Council in January 1985. Subsequently, at the request of the Minister of Labour, The Honourable T. Segarty, I met with the Minister, Mr. Walter Flesher, Chairman of the Workers' Compensation Board, and other officials to discuss them in detail. However, these discussions did not lead to a change of the Board's position on any of these nine cases.

I am now asking the Legislative Assembly to assist in getting justice to these complainants.

Each complainant has agreed that I may use his name in this Special Report.

Mr. Ben Temnoff

Lawyer's Fees

Mr. Temnoff's wage loss payments had been suspended because his adjudicator wanted him to find and provide the Board with medical proof that his ongoing disability was still related to his work injury. Then his adjudicator told him that he expected to be charging him with fraud. Mr. Temnoff was also told that he could not appeal any of this until a decision was made either to cut off or to reinstate his wage loss. Mr. Temnoff then asked a lawyer to help him with his Workers' Compensation claim. He was especially concerned about the possibility of fraud charges.

Unaware that the adjudicator was seriously misrepresenting Board policy, the lawyer took the initiative in acquiring the appropriate medical reports, tried to deal with the allegations of fraud that the adjudicator kept repeating, and tried to bring the adjudicator to a decision on the claim. Mr. Temnoff had to rely on welfare in order to continue supporting his wife and children. In spite of his lawyer's efforts, a year passed with no further decision on the fraud charges and no decision on the medical information that had been sent to the Board. My office intervened at this point on the grounds of unreasonable delay by the adjudicator.

The Commissioners accepted that there was unreasonable delay and that the adjudicator was negligent in the performance of his duties. No fraud charges were laid. The adjudicator had never even referred the case for professional investigation (although Board policy required him to).

Mr. Temnoff's lawyer ultimately billed him $759.47 for his efforts over that year. As the adjudicator's improper actions had necessitated the hiring of a lawyer in the first place, I asked the Board to pay Mr. Temnoff's legal fees. I relied upon Section 100 of the Workers Compensation Act:

> The Board may award a sum it considers reasonable to the successful party to a contested claim for compensation or to any other contested matter to meet the expenses he has been put to by reason of or incidental to the contest ...

Although the Board has a discretion to pay such expenses, its policy to date has been simply never to pay legal fees. The Commissioners decided that they were not going to break with tradition in Mr. Temnoff's case. Never to allow an exception to a discretionary policy, no matter how compelling the circumstances, would mean that the Board was fettering its discretion and acting in a manner that was contrary to law. Moreover, such a policy is unjust because it results in the denial of meritorious claims. I pointed out that Mr. Temnoff's case was an exceptional one that merited such an exercise of discretion. The legal fees were reasonably incurred as the result of the negligent and improper action of the Board's own employee.

The final word of the Commissioners was that while they considered Mr. Temnoff's case to be exceptional, it was not exceptional in a way that justified Board payment of his legal fees.

More than three years has passed since his work injury, and Mr. Temnoff has been unable to return to work. He has not been receiving compensation. His appeal was heard recently, but no decision has been received to date. The lawyer is pressing for payment of his bill, but the Temnoff family is receiving welfare, and cannot afford to pay it.

Recommendation:

That the Board pay Mr. Temnoff's lawyer's bill in the amount of $759.47. (The amount has increased from my original recommendation because of more complete information as to the actual charges).

Anticipated Impact:

Payment of $759.47.

Mr. Michele Sorrenti

Catch - 22

Mr. Sorrenti's inability to jump through the appropriate bureaucratic hoops led to the denial of his workers' compensation claim. For over a year he was forced to subsist on income assistance until he was able to walk again.

Mr. Sorrenti's 1979 claim for lost wages was refused in part because he could not produce doctors' reports saying he had a back injury. To understand why he could not we have to go back to 1972.

Mr. Sorrenti's problems began when he suffered an injury to his back in June 1972 while working as a mechanic. New to the ways of his adopted Canadian homeland, Mr. Sorrenti failed to notify his employer of the incident until 10 months had passed. Nor did he mention to the doctor who treated him that the injury was work-related. Too much time had passed since the injury and the Board refused to accept responsibility for Mr. Sorrenti's back surgery, which became necessary in April, 1973. But it appears that this 1972 injury was the basis for his later back problems. Medical reports from his own physician and from the Workers' Compensation Board's Medical Advisor link his continuing problems to degenerative disc disease in his spine on the same side as his operation. However, because of Mr. Sorrenti's failure to report in time this 1972 injury was never accepted as a valid Workers' Compensation Board claim. However, this is not Mr. Sorrenti's current problem.

Mr. Sorrenti injured his back again on August 10, 1979 and had to stay off work until early 1981. His claim, which he submitted in time, was initially disallowed. He appealed to the boards of review and in January of 1981 the board of review determined that

Mr. Sorrenti "sustained an acute lumbosacral strain ... which was superimposed upon a pre-existing non-occupational back condition". The board of review recommended that the Board provide compensation for wage loss for the period August 11 to November 1, 1979 and medical aid benefits for the period August 14 to November 16, 1979. November 16, 1979, was the last day for which a doctor's report existed.

Mr. Sorrenti, who had been unable to work following his August 10, 1979 accident until sometime early in 1981, appealed the board of review decision to the Commissioners. He felt that he should have received compensation for all of his time off work. The problem was that Mr. Sorrenti had failed to see a doctor about his condition between November 16, 1979 and December 10, 1980. Without continuing medical reports supporting his claim the Commissioners could find no basis for extending his award beyond November 16, 1979.

Mr. Sorrenti found himself in a "Catch-22" situation. At the time of his injury (August 10, 1979) there was no indication that the Board would accept responsibility for this claim or the medical cost associated with it. Indeed the claim was at first denied by the Board until the board of review decision over a year later. In the meantime Mr. Sorrenti had no medical coverage and no income. He already owed his doctor almost $1,000.00 for other services performed. Consequently, Mr. Sorrenti chose to suffer in silence during this period of time rather than incur further medical expenses, which he could not afford. As it turned out, without such visits to the doctor he was not able to support his claim. He had to seek provincial income assistance to maintain himself and his family.

Other persons (not doctors) gave me testimony as to Mr. Sorrenti's continuing disability. These were friends and neighbours who had contact with Mr. Sorrenti during his time off work. All agreed that

Mr. Sorrenti's back condition was seen to be painful and debilitating. I recommended that the Board accept Mr. Sorrenti's claim. The Board, however, felt that these statements were too uncertain to provide a proper basis for determing the extent of any disability that might have existed. The Board refused to pay further compensation. The Board said it could not conjecture about a workman's disability even on the basis of sympathy.

I am not asking for any consideration of sympathy in Mr. Sorrenti's case. The available evidence supports his claim. If evidence is missing, it is at least in part due to the Board's initial error in rejecting the claim and placing an undue burden of proof on Mr. Sorrenti.

Recommendation:

That the Board accept Mr. Sorrenti's claim for his 1979 back injury from November 16, 1979 to December 10, 1980.

Anticipated Impact:

Payment of about one year's wage loss benefits.

Mr. Stanley McKay

Defeated by a Technicality

Confusion about the correct way to report his injury led to the rejection of Stanley McKay's otherwise valid claim.

In December 1978, Mr. McKay was injured at work when he slipped on a piece of electrical conduit and fell heavily on his left side. This injury caused an aggravation of a pre-existing condition (in 1972 he had a total left hip replacement) and resulted in numerous operations. The Board did not receive Mr. McKay's application for compensation until February 1980. This application was rejected because it was submitted outside the one year limitation period.

Following the Board's refusal of this claim, things went rapidly downhill for Mr. McKay. His health deteriorated. His family life was disrupted. With no income and being unable to work, he was forced to liquidate his assets and then seek income assistance.

The circumstances of Mr. McKay's case are quite unique. In January 1979, Mr. McKay filled out a compensation form and left it with his supervisor as he thought he was required to do. The supervisor was supposed to submit Mr. McKay's and the company's application to the Board. It was not until October 1979 that Mr. McKay discovered that his application had not been submitted to the Board. However, since he was under the mistaken impression that an application for compensation must be submitted through a worker's supervisor, he attempted to track him down so that he could submit another application. Unfortunately, he was not able to locate the supervisor, who had been transferred, until February 1980. At that time a new compensation application was submitted for Mr. McKay. Mr. McKay's story is confirmed by a letter from the supervisor dated August 19, 1981 which states:

> He came after the Christmas and New Year's holidays to pick up his tools and discussed the matter with me and requested that I submit a report to the W.C.B., I agreed to do this, however, I said I didn't have time at the present but I would fill it out later. Somehow or another we became busy and I was transferred to another project in Victoria in February and in the process the letter became forgotten... There was a form made out at the time. It must have been lost or misplaced.

One of the reasons for Mr. McKay's initial lack of concern about his workers' compensation benefits related to his mistaken belief that his company's private insurance would cover the entire period of his disability. He was not initially aware of the seriousness of his injury.

In response to my recommendation, the Commissioners stated that they found it difficult to attribute the failure of Mr. McKay to apply to the fact that the supervisor had failed to make a report. Since Mr. McKay had previous compensation claims, the Commissioners felt he had a general awareness of the procedural requirements for a claim. In their opinion he should have pursued the matter further when he received no benefits or notification from the Board regarding his claim.

Furthermore, in order to utilize their statutory discretion for an extension of time, their policy required that there must first exist special circumstances which precluded the filing of an application. In this particular case it was their opinion that such special circumstances did not exist. The Commissioners stated that the fact that the claimant had an otherwise meritorious claim could not be said to be a special circumstance justifying the use of their statutory discretion. In my opinion, the supervisor's loss of Mr. McKay's initial application was a special circumstance sufficient to justify the Commissioners' extension of the filing

limitation period. Once the Commissioners decide that special circumstances exist, Board policy allows a "very wide discretion to accept claims regardless of how tardy the application".

The Board initially felt that the supervisor's statement of August 19, 1981 was ambiguous concerning whether Mr. McKay had actually submitted his compensation application to him to be submitted to the Board. As a result I received a further statement from the supervisor confirming this information. However, this was still not enough to convince the Commissioners. It was their opinion that from the time Mr. McKay was aware that his application had not been submitted he still had time to submit a second application before the one year time period expired. However, as stated earlier, Mr. McKay held the erroneous belief that he could only submit another application through the supervisor. Following his previous accidents he had submitted his compensation applications through his supervisor. He regarded this as a necessary step in applying for compensation. This mistaken belief should not disentitle Mr. McKay to his rightful compensation benefits.

Section 99 of the Act requires the Board to decide "according to the merits and justice of the case". In my opinion, the Board has failed to observe the spirit of this provision in Mr. McKay's case.

(I addressed the problem of valid claims being denied because of a breach of technical requirements in my first Special Report on the Workers' Compensation Board: Special Report No. 8 to the Legislative Assembly of B.C., April 1984, Case No. 4)

As a result of a further operation his health problems were finally overcome, and Mr. McKay, I am happy to say, is now getting back on his feet.

Recommendation:

That the Board allow Mr. McKay an extension of time to file his application.

Anticipated Impact:

Payment of Mr. McKay's claim.

Mr. Harold Berrow

No Compensation for Small Business Owner

The Board's collection practices result in harsher treatment of workers who own their own business than it does for employees of larger enterprises. Mr. Berrow has felt the brunt of these practices. The Board held back Mr. Berrow's wage loss benefits for two weeks, since he is the principal owner of a small limited company. The company had not paid the Board its first quarter's assessment. It was my opinion that the Board's refusal to pay Mr. Berrow's wage loss benefits until his company had paid its first quarter's assessment was oppressive. An authority acts oppressively when it uses its superior position or knowledge to place the citizen at an unreasonable disadvantage. As a worker, Mr. Berrow was entitled to payment of wage loss benefits. Such benefits take the place of lost livelihood, which a worker ought not be deprived of for the purpose of enforcing a debt to the Board in a matter unrelated to his claim.

The Commissioners responded to my recommendation by stating that it is the Board's practice, if a small limited company does not pay its assessment liability, to deduct the amount owed by the company from wage loss benefits payable to the principal. In Mr. Berrow's case the Board was simply giving him the opportunity to pay his outstanding assessment before it deducted the amount owing from his wage loss benefits. It was the Commissioners' opinion that it was fairer to give the principal an opportunity of this nature rather than simply deduct the amount owing without warning. Furthermore, the Board stated, since assessment money is a source of compensation benefits, it was not reasonable to other employees to allow company principals to be paid full benefits when their company has an outstanding assessment liability.

I responded that in my view an injured worker should not be treated differently just because he is also principal of the employer company. The two are legally separate. (I recommended that the Board observe this principle in my first Special Report on the Workers' Compensation Board: Special Report No. 8, April 1984, Case No. 7.) However, since the Commissioners stated they did not withhold wage loss benefits (as opposed to long-term pensions) as a technique for forcing employers to pay outstanding assessments, I modified my recommendation. It was my new recommendation that the Board should not attach a worker's benefits to recover his company's outstanding assessment debt until the collection remedies enumerated in Division 4 of the Act had been unsuccessfully pursued. These are (i) suing in court, and (ii) filing a certificate of the debt in court.

The Board disagreed with my recommendation. It said that my proposal would result in the Board paying money out with one hand and attempting to collect an assessment owed with the other. In my opinion, the same would be true if Mr. Berrow worked for a large corporation that had failed to pay its assessments.

It is my opinion that the entitlement of a worker to wage loss benefits and the Assessment Department's collection of assessment debts are two separate matters altogether and should be kept separate. The Board's practice treats small businesses more harshly than large companies and their employees and is improperly discriminatory.

Recommendation:

That the Board adopt the practice of not attaching a worker's benefits to recover his company's outstanding assessment debt until the other available collection remedies have been unsuccessfully pursued.

Anticipated Impact:

Unfair shortcuts to collecting outstanding assessments would be eliminated.

Mr. John Rahn and Mr. William Relkoff

The "Dual System"

The Board has a choice of two methods of calculating the value of an injured worker's disability--1. the physical impairment method and 2. the loss of earnings method. The worker is usually awarded the larger sum produced by these two calculations. The first method is based on a list of percentages of total disability assigned to the loss of use of particular parts of the body. Under the second method the Board measures disability by awarding 75% of the difference between the worker's average earnings prior to the injury and the average amount he is able to earn after the injury. The process of making both calculations and awarding the higher amount is called "the dual system" by the Board.

Similar provisions in workers' compensation legislation have been in effect since 1943, and in that year the provisions were made retroactive to 1917. However, despite the legislation, the Board did not institute a "dual system" policy until 1973 (and then for spinal injuries only). The "dual system" was extended in 1977 to other types of injuries. Until then only the physical impairment method was used to calculate awards.

I have investigated two cases in which the Board's failure to exercise its discretion to apply the loss of earnings method prior to 1973 may have adversely affected claimants, as their pensions were calculated only according to the physical impairment method and no consideration was given to their actual loss of earnings.

One such worker is Mr. Rahn, who suffered a back strain at work in 1951, while working as a faller and bucker. In 1955 and 1958 Mr. Rahn underwent back surgery and was awarded a pension by the

Board. After this operation, Mr. Rahn changed his occupation to that of light mechanical work and stated that his income was reduced by more than 50% as a result.

Mr. Rahn's pension was based on a functional award of 7.5% of total disability and the Board did not consider his reported loss of earnings as a result of his injury. Because of my recommendation, the Board agreed to assess Mr. Rahn's pension under the loss of earnings method as of 1973 when the "dual system" (for spinal disabilities) came into effect. However, the Board refused to assess his pension under this method beyond 1973.

Another complainant, Mr. Relkoff, was severely injured at work in 1945 in a logging accident when he was 21 years old. This accident resulted in leg, vision and hearing disabilities. In 1948 he was injured in a second logging accident. The Board awarded him a pension for his injuries. However, after the second accident Mr. Relkoff was not able to return to logging and instead operated a grocery store with his wife for many years, and worked as a security guard for two years. He has been on a Handicapped Persons Income Allowance from the Ministry of Human Resources since 1973. The Board did not consider, in awarding Mr. Relkoff a pension, whether he had suffered a loss of earnings as a result of his injury, as provided by the legislation.

I found that the Board's failure to make and choose between the two calculations when determining the amounts of Mr. Rahn's and Mr. Relkoff's pension awards was contrary to law. The Workers Compensation Act requires the Board to make a genuine choice. Its failure to consider both alternatives and choose one constituted an unlawful fettering of the Board's discretion. I recommended that the Board reconsider Mr. Rahn's and Mr. Relkoff's pension awards taking into account the two methods of calculating awards.

The Commissioners replied that when the Workers Compensation Act is changed, or the Board alters its previous practice so as to increase the benefits payable to workers, the question always arises as to whether the change should be made retroactive or should only apply after a certain date. The Commissioners felt that as the previous claims were properly dealt with on the basis of the law and practice as it then was, it cannot be said that claimants have been dealt with unfairly. They stated that there would be enormous practical problems and costs associated with continually changing old decisions in light of changing practices and laws.

I pointed out, contrary to the Board's claim, that in these cases the law had not changed since the claimants were awarded their functional pensions, but rather it has been the Board's practice or policy that has changed. Policies must follow the law. Therefore, I do not see why these claimants should be treated any differently from a person who was assessed for a pension after the Board adopted a new policy. In my view the complainants had been treated unfairly because, although their claims were dealt with on the basis of the practice as it then was, the practice did not conform with the law.

The Commissioners also objected to my recommendation on the ground that no exception could be made in an individual case without also doing the same for all persons receiving spinal pensions at the time the dual system was introduced. My response to this is that the impossibility of doing justice for every claimant in a particular class cannot justify the refusal to do justice for any of them.

Recommendation:

That the Board reconsider Mr. Rahn's and Mr. Relkoff's pension awards under the "dual system" of calculating awards.

Anticipated Impact:

Payment of increased pensions to Mr. Rahn and Mr. Relkoff.

Mr. Warren Ross

Correcting an Old Error

The worker who believes that his claim has been unfairly denied is left with a sense of injustice that does not readily dissipate; and that worker will try to seize every possible opportunity to have that perceived injustice corrected - months, years, even decades after the precipitating event.

Mr. Ross reported an injury while employed at the Elk Falls Company Ltd. pulp mill in Campbell River on December 29, 1966. He felt a pain in his lower back when he pulled a short block off a loading conveyor with a picaroon while leaning over a waist-high railing. He received heat treatment for twenty minutes at the first aid station and returned to a different job for the remainder of the shift. Mr. Ross was unable to report to work the following day because of pain and stiffness in his back. His doctor referred him to the Campbell River General Hospital, where he remained until January 13, 1967. His doctor indicated that Mr. Ross was able to resume his usual employment as of April 1, 1967.

The Board denied Mr. Ross' claim in a letter dated February 2, 1967. The adjudicator wrote:

> ... it would appear that you were doing your normal work and as nothing unusual has been described as occurring it is our opinion that this work activity on December 29, 1966, was not responsible for the back disability for which you complained and sought medical attention.

Mr. Ross' claim was considered by a Board of Review on August 23, 1973. In a letter of that date the Chairman of the Board of Review stated:

> It should be pointed out that at the time your claim was initiated, the Workman's Compensation Act only authorized compensation for "personal injury by accident." [original emphasis] The Board has advised you on different occasions that you have not established entitlement in accordance with this requirement.

The Commissioners confirmed the decisions of the Claims Department and Board of Review.

In January 1983, Mr. Ross' legal aid advisor submitted a request for the Commissioners to reconsider his file. She argued that the Board of Review erred in law in 1973 when it took the position that Mr. Ross' claim should be denied because no specific accident had occurred at the time of Mr. Ross' injury.

The Commissioners agreed with this argument. However, they also noted that Mr. Ross' claim was denied in 1967 because the Board adjudicator decided that Mr. Ross' injury did not result from his work. Since the original decisions on the claim were not based on an error of law, they concluded that these decisions could only be reviewed by the Commissioners if new evidence was submitted in support of Mr. Ross' claim. Since no new evidence had been submitted, the review was dismissed and the denial of Mr. Ross' claim was upheld.

After investigation, I found that the evidence supported Mr. Ross' claim that his back problems resulted from his work. The pain developed while he was at work and was reported to the employer. On all occasions Mr. Ross was working as a loaderman in the Groundwood Department which involves the lifting and pulling strain to the back. Mr. Ross reported back pains on several occasions but made no claim for compensation until after the final injury on December 29,

1966. Mr. Ross' previous back complaints are consistent with a condition which developed over time as the result of work-required motion.

The Commissioners responded to my Preliminary Report stating:

> There is no dispute that Mr. Ross suffered an onset of back complaints while at work. The question at issue is whether those complaints resulted from his work. The Board denied his claim on the basis that at the time in question he was doing his normal work and nothing unusual occurred. It appears to the Commissioners that this decision was basically one of judgment reached by the Board at the time and can see no grounds for their reconsidering it.

I argued that certain jobs could result in injury by the performance of certain work required motions. The Commissioners had recognized this principle when they set down Reporter Decision #145. However, the position of the present Commissioners on this point was:

> It does not seem to the Commissioners that the Board's policies of today should be used as criteria for reconsidering Board decisions made when the same policies were not in effect. A decision can only be judged on the basis of the law and policy in effect when it is made. The Commissioners consider that the decision on Mr. Ross' claim was reasonable by the standards of the time and should, therefore, be left unchanged.

In my view Mr. Ross' injury arose out of and in the course of his employment. The accident which caused Mr. Ross' injury was identified. It occurred at work. There is no evidence in the claim file to contradict the presumption that because the accident occurred in the course of the employment, it arose out of the employment. Even if a specific incident or accident could not be

identified, the evidence supports the conclusion that on the balance of probabilities Mr. Ross suffered a compensable injury on December 29, 1966.

The Commissioners objected that I was simply reweighing the evidence and substituting my judgment for that of the Board. They contended that the Board had made a legitimate decision to deny this claim for which there was supporting evidence and which was in accordance with the practice and policy of the time. The Commissioners maintained that I had provided no grounds which would justify a change in that decision and thus the disallowance of this claim would be maintained.

In my view it is not good enough to deny justice simply because it was acceptable to do so at the time the decision was made. If we can correct erroneous decisions, there is no good reason for refusing to do so. The Workers Compensation Act provides that the Board shall decide "according to the merits and justice of the case". The Board is also empowered to reconsider any of its previous decisions. In Mr. Ross' case justice requires that an erroneous decision be corrected, and the law allows the Board to do so.

Since the incident in 1966 Mr. Ross has had to engage in lighter, less well paying work, and has continued to experience problems with his lower back.

Recommendation:

That the Board accept Mr. Ross' claim.

Anticipated Impact:

Retroactive payment of Mr. Ross' claim.

Mr. John Gray

Policy not Applied

Sometimes I come across situations where people have to use their own money to pay for the consequences of a work injury when the consequences are really a Board responsibility. This was the case with Mr. Gray.

Prior to February 1980 Mr. Gray had no significant back problems. On February 25, 1980 he fell off a ladder and landed on his buttocks. His claim was accepted and he received wage loss. However, he developed persistent back complaints, and a defect of the vertebrae was ultimately diagnosed in March 1982. Surgical treatment was recommended by his orthopedic specialist. The Board refused to accept responsibility for this surgery and held that the need for the surgery was due to a pre-existing condition. Mr. Gray underwent surgery in September 1982 and he was unavailable for work due to post-operative recovery for six months. During this time the family cashed in their RRSP and other savings in order to keep their house. Mr. Gray now reports only minor stiffness and considers the operation a success.

Mr. Gray complained that the Board should have compensated him for his surgery and for the period he was unable to work due to convalescence from the surgery. I recommended to the Board that Mr. Gray's claim be accepted. I based my recommendation on Section 14:10 of the Board's Claims Adjudication Manual. This Section states that it is not normal Board policy to pay compensation in respect of a surgical operation without also accepting the condition which leads to it, which would seem to disqualify Mr. Gray. However, an exception to this is where a worker with a serious non-compensable pre-existing condition suffers

a minor work injury which aggravates that condition. The apparent purpose of this Section is to cover a situation in which an injury may cause an onset of symptoms which, though primarily caused by the underlying condition, would not have been felt at that time without the injury. In this kind of situation, where the injury had "triggered" the immediate symptoms following the injury, the Board may authorize the surgery and pay for a reasonable period of post-operative recovery. I also pointed out that Mr. Gray's pre-existing condition became symptomatic as a result of the trauma of the work injury.

The Commissioners maintained that the surgery was not necessitated by the 1980 injury and therefore the "triggering" policy has no application. On this point the Board is clearly wrong. If the 1980 injury had never happened Mr. Gray would not have required surgery to correct this underlying condition.

Following my report to Cabinet, I discussed this case further with the Chairman of the Workers' Compensation Board. No change resulted.

Recommendation:

That the Board accept Mr. Gray's claim.

Anticipated Impact:

Payment of Mr. Gray's claim.

Mr. Albert Pipke

Disabling Allergy

Mr. Pipke worked as an auto mechanic for thirty-four years. During his later years of employment he developed headaches and blurring of vision which were eventually attributed to exposure to carbon monoxide fumes at his place of work. Therefore he was forced to take the only logical course of action - he resigned. However, no comparable work was available to him, and at sixty years of age Mr. Pipke could not be considered a good candidate for an industrial apprenticeship in some other field. Yet the Workers' Compensation Board does not consider him to be disabled.

Mr. Pipke was forced to engage in a fruitless and frustrating search for work for two years after his turn-down by the Board. During that period he had to use a considerable portion of the savings he and his wife had put aside for retirement. A heart attack then ended his job seeking efforts; he now subsists on a veteran's disability pension.

This case is tragically similar to that of Mr. Emery. In Special Report No. 8 to the Legislative Assembly on the Workers' Compensation Board, I outlined the case of Mr. Emery, a sheet metal worker who late in his career developed an acute allergic skin reaction to chromates - the substance which coated the sheet metal with which he worked. With limited education and no training in any other industrial skill area, Mr. Emery was unable to find comparable employment away from the irritant. However, the Board would neither consider him for a permanent partial disability award, nor, because of his age, would the Board enrol him in an appropriate retraining course. The Board's definition of disability did not cover Mr. Emery's condition.

In Mr. Pipke's case I could only repeat the recommendation that I had made in the earlier situation - that the full range of compensation be available for workers who develop allergic industrial diseases. I reiterated that this would not necessarily mean a pension in every case; many workers would be able to find suitable alternate employment - especially if retraining was offered by the Board. But in cases such as Mr. Emery's and Mr. Pipke's a pension would remedy the severe injustice which resulted from the Board's present limited view of what constitutes a work-related disability.

The Board agreed with me to this extent - they would have their Rehabilitation Consultants make special efforts to assist workers caught in this predicament. But the Board would not budge on the pension issue.

Recommendation:

i. That the Board recognize disabling allergies as compensable disabilities.

ii. That the Board accept Mr. Pipke's claim.

Anticipated Impact:

Increased pension costs for workers who suffer disabling industrial allergies and who cannot be re-trained.

Mr. Dale Jones

Onset of Symptoms Delayed

Not every case is clear-cut. In some cases the Board has to make a judgment call. When that judgment is later proved to be wrong, however, the Board sometimes refuses to change its decision. Mr. Jones' is such a case.

Mr. Jones was working as a buckerman in a logging area some 80 miles west of his residence. He was picked up early one morning by a fellow employee in a company truck and headed off to work. Before leaving he loaded three power saws, a five gallon gas can, a tool box, clothing and other supplies for a weeks' stay at the logging camp. Later he transferred this gear to another company truck. He did this while standing on the ground by swinging each item up over the respective tail-gates, which were left in upright position, into the box of the second truck. The gas cans weighed roughly 35 pounds each. The tool box weighed in excess of 50 pounds.

After three to four hours the worker noted a developing pain in the lower back and upper thigh area. He did not report this as he ascribed it to a pulled muscle. He mentioned the pain later that evening to another worker. However, he felt that a hot shower and a night's rest would resolve what he thought was a muscle strain.

The following morning this worker noted no specific pain upon arising. However, after just a short period of work the pain increased in intensity until just prior to noon when the worker reported the pain to the foreman and explained that he would not be able to carry on. Arrangements were made by radio-phone for the worker to see a chiropractor in a nearby town at 4:00 p.m. that

day. The problem was diagnosed as a pinched nerve and misalignment of the lower back. Eventually the condition was diagnosed further as left low lumbar disc disease. Mr. Jones was treated for this condition for approximately one year following the incident. Although he is now working once again, Mr. Jones has continued to have some difficulties with his back.

The worker's claim for compensation was denied by the claims adjudicator on the basis that the injury related to an incident which took place before his work shift began. This decision was upheld by the boards of review on the basis that there was insufficient evidence that the injury occurred as a result of work related activities. When the matter was appealed to the Commissioners, the Commissioners concluded that the claim should not be allowed in view of the length of time between the incident, onset of symptoms, and the seeking of treatment.

It should be noted that the worker had no history of previous back problems, nor did x-rays reveal any degenerative condition of his spine.

Under the circumstances it appeared to me that the Commissioners may have erred in concluding that the time separation between the work incident, the symptoms, and the treatment was too great, particularly in view of the fact that back injuries do not always develop immediately after the occurrence of the incident which causes them. I therefore recommended to the Commissioners that they apply Section 99 of the Workers Compensation Act to this situation and accept the claim for compensation. I was supported in my position by a comment by the worker's doctor that it is very common for patients to have a delay in the onset of symptoms and that this delay can range from a few hours to a few days.

The Commissioners maintained that consideration of the significance of a delay involves an exercise of judgment and they can see no reason why my judgment of the matter should be preferred to that of the Board. This response did not answer my criticism. The Commissioners were not able to say why my judgment was not acceptable. I pointed out clearly where the Commissioners had erred and why. They chose not to answer my arguments. My criticism and my recommendation stand.

Recommendation:

That the Board accept Mr. Jones' claim.

Anticipated Impact:

Payment of Mr. Jones' claim.

APPENDIX A

Summary of Recommendations

Case No. 1 - Mr. Ben Temnoff

That the Board pay Mr. Temnoff's lawyer's bill in the amount of $759.47.

Case No. 2 - Mr. Michele Sorrenti

That the Board allow Mr. McKay an extension of time to file his application.

Case No. 3 - Mr. Stanley McKay

That the Board adopt the practice of not attaching a worker's benefits to recover his company's outstanding assessment debt until the other available collection remedies have been unsuccessfully pursued.

Case No. 5 - Mr. John Rahn and Mr. William Relkoff

That the board reconsider Mr. Rahn's and Mr. Relkoff's pension awards under the "dual system" of calculating awards.

Case No. 6 - Mr. Warren Ross

That the Board accept Mr. Ross' claim.

Case No. 7 - Mr. John Gray

That the Board accept Mr. Gray's claim.

Case No. 8 - Mr. Albert Pipke

i. That the Board recognize disabling allergies as compensable disabilities.

ii. That the Board accept Mr. Pipke's claim.

Case No. 9 - Mr. Dale Jones

That the Board accept Mr. Jones' claim.