



Volume II
Chapter 4



The Scope of Compensation Coverage in British Columbia: Determining Work-Relatedness

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[Chapter 4]

The Scope of Compensation Coverage in British Columbia: Determining Work-Relatedness

Causal Connection between Employment and Injury, Death or Disease

Under the workers compensation system, harm to a worker is only compensable if it is caused, at least in part, by the worker's employment. This proposition is easy to state and, in a great many cases, relatively easy to apply. There are however, many circumstances in which determining the relationship between harm and employment presents difficult challenges. These include issues relating to claims for so-called chronic stress and other types of mental or psychological disability, as well as claims relating to other conditions which arise gradually over time and/or out of multiple causes. Before these are addressed in detail, an overview of the current approach to the causation issue is in order.

CURRENT APPROACH TO CAUSATION

The basic requirement of a causal connection between a worker's employment and personal injury, disease or death is set out in Sections 5(1) and 6(1) of the Act:

Compensation for personal injury

5. (1) Where, in an industry within the scope of this Part, personal injury or death arising out of and in the course of employment is caused to a worker, compensation as provided by this Part must be paid by the board out of the accident fund.

Occupational disease

6. (1) Where

(a) a worker suffers from an occupational disease and is thereby disabled from earning full wages at the work at which the worker was employed or the death of a worker is caused by an occupational disease; and

(b) the disease is due to the nature of any employment in which the worker was employed, whether under one or more employments,

compensation is payable under this Part as if the disease were a personal injury arising out of and in the course of that employment.

Thus, no compensation is payable under either provision unless the harm in issue is related to employment or, as it was put by the Tysoe Commission Report, is “truly work-caused.”

The commission is of the view that an important general principle underlying the workers compensation system is that industry should fund compensation for injury, death and disease of any type where such consequences arise from employment. If the work-relatedness criterion is met, it should not generally make a difference how the disability manifests itself or whether the disability arose gradually or from sudden trauma. So far as it is feasible within the overall system, workers and their dependants should not be called upon to bear losses caused by the worker's employment. A corollary to this is that employers should not be called upon to fund compensation for losses which are attributable to other factors unrelated to employment.

Therefore, the commission recommends that:

178. the Workers Compensation Act be amended to:

- a) set out the objective of providing compensation for injury, death and disease sustained by workers and arising out of the production process; and
- b) confirm the obligation upon industry to fully fund compensation for injury, death and disease sustained by workers and arising out of the production process.



On the issue of work-relatedness, as on all other issues, the workers compensation system operates on an inquiry model. In contrast to the adversarial model of the tort system, the onus does not fall upon a worker to prove entitlement to compensation on a balance of probabilities. Rather, the onus of gathering the relevant evidence is on the board. Pursuant to Section 99 of the Act, evenly balanced possibilities are resolved in favour of the worker. Thus, entitlement to compensation arises where it is determined to be as likely as not that the harm in question was caused by the worker's employment.

In terms of the degree of work-relatedness which is required to trigger entitlement to compensation, the essential focus is on whether the worker's employment was of "causative significance." This standard has not been clearly defined. Where there are both employment and non-employment factors at play, it is clearly not necessary that the employment be of 50% or greater significance in order to meet this test. It also appears clear that the employment must be outside the *de minimus* range, or more than tenuously or trivially connected to the harm in issue. Between these two points, there is a considerable grey area in which it is difficult to determine precisely what is necessary to satisfy the "causative significance" test. The commission is of the view that while it may not be feasible to define "causative significance" by reference to precise percentages, steps should be taken to ensure that adjudicators are defining the standard consistently and that affected parties are able to determine in general terms what standard is being applied.

There are two distinct questions relating to the causal relationship between injury and employment. First, there is the issue of whether the event or series of events giving rise to injury is work-related. Under the current system, that is generally treated as an all-or-nothing issue. If the requisite degree of connection to employment is not present, no compensation is paid. Thus, for example, if a worker has been injured in a motor vehicle accident, it must be determined whether or not the accident arose out of and in the course of employment. If it did not, then no compensation is payable.

Second, there may be an issue as to whether, or to what extent the harm experienced by the worker is work-related. Depending on the circumstances, that may present another all-or-nothing issue, or it may call for an apportionment between harm which is attributable to employment and to other non-employment factors. For example, a worker injured in a motor vehicle accident arising out and in the course of employment might already have been suffering some ill effects from an earlier non-work-related injury. In that case, it might be necessary to inquire into how much of the worker's present condition is attributable to the work-related injury.



Board policy currently distinguishes between situations where a worker would have suffered a disability even in the absence of work-related factors, situations where a non-disabling condition becomes disabling as a result of work-related factors, and situations where a worker's pre-existing condition is accelerated or worsened by a work-related factors.

In the first instance, the work-related factors are not of causative significance and no compensation is payable. See, for example, Item #15.10 of the *Rehabilitation Services and Claims Manual (RSCM)*:

There may be cases where an organ of the body is deteriorating, possibly through disease, and it has reached a critical point at which it is likely to become a manifest disability. Some immediate activity might trigger the final breakdown. But if it had not been one thing it would most likely have been another, so that it is only chance or coincidence whether it happened at work, at home, or elsewhere. The disability is one that the claimant would not have escaped regardless of the work activity, and hence the causative significance of the work is so slight that the disability is treated as having resulted from the deteriorating condition. The disability is the result of natural causes and is not compensable.

In the second type of situation, compensation is payable on the basis that the worker would not have become disabled had it not been for the work-related factors. See, for example, Item #22.20 of the *RSCM*:

Where a worker has a pre-existing non-compensable condition which is aggravated and rendered disabling by a work injury, the Board does not deny a claim for compensation just because the injury would have caused no significant problems if there had been no pre-existing condition. The Board accepts that it was the injury that rendered that condition disabling and pays compensation accordingly.

This approach is generally consistent with what is known as the "thin skull" principle in the tort law context. Under the thin skull rule, if a plaintiff would not have become disabled in the absence of a compensable event (i.e. tortious conduct), the full extent of the disability is compensable, even if it is unexpectedly severe as a result of a pre-existing susceptibility on the plaintiff's part.

In the third type of situation, an apportionment is made between the full extent of the worker's disability and the degree of disability which the worker would have suffered irrespective of the work-related factors. This approach is mandated by Section 5(5) of the Act:



5. (5) Where the personal injury or disease is superimposed on an already existing disability, compensation must be allowed only for the proportion of the disability following the personal injury or disease that may reasonably be attributed to the personal injury or disease. The measure of the disability attributable to the personal injury or disease must, unless it is otherwise shown, be the amount of the difference between the worker's disability before and disability after the occurrence of the personal injury or disease.

Section 5(5) is generally consistent with what is known in tort law as the "crumbling skull" rule, whereby a plaintiff who would have been disabled to some degree in any event by virtue of a pre-existing condition is compensated only for the extent to which the condition is worsened as a result of the tort. Board policy interprets "already existing disability" to refer to situations where the worker's pre-existing condition had already resulted in a reduced capacity to work and/or the worker had already been obtaining medical treatment for it. Detailed guidelines for adjudicators are set out at Item #44.10 of the *RSCM*:

#44.10 Meaning of Already Existing Disability

The mere fact that the worker suffered from some weakness, condition, disease, or vulnerability which partially caused the personal injury or disease is not sufficient to bring Proportionate Entitlement into operation. The pre-existing condition must have amounted to a disability prior to the occurrence of the injury or disease.

Three situations are distinguished:

1. In cases where it has been decided that the precipitating event or activity, and its immediate consequences, were so severe that the full disability presently suffered by the claimant would have resulted in any event, regardless of any pre-existing disability, Section 5(5) should not be applied.
2. In cases where the precipitating event or activity, and its immediate consequences, were of a moderate or minor significance, and where there is only x-ray evidence and nothing else showing a moderate or advanced pre-existing condition or disease, Proportionate Entitlement should not be applied. These cases should not be classified as a disability where there are no indications of a previously reduced capacity to work and/or where there are no indications that prior ongoing medical treatment had been requested or rendered for that apparent disability. In determining whether there has been ongoing treatment, regard will be had to the frequency of past treatments and how long before the injury they occurred.



3. Where the precipitating event or activity, and its immediate consequences, were of moderate or minor significance, but x-ray or other medical evidence shows a moderate to advanced pre-existing condition or disease, and there is also evidence of a previously reduced capacity to work and/or evidence of a request for and rendering of medical attention for that disability, Section 5(5) should be applied. ...

Section 5(5) only applies where an injury is “superimposed” on an already existing disability. The injury and existing disability must be in the same part of the body.

To illustrate, it appears that if a worker had very mild and non-disabling arthritis, and a work-related injury triggered severe and disabling arthritis, the worker would be compensated for the full extent of disability pursuant to the principles set out at item #22.20 above. In contrast, if the same worker had already been suffering from an advanced case of arthritis for which the worker was being treated and which had already resulted in some reduction of the worker’s capacity to work, Section 5(5) would be applied and compensation would be based on the difference between the worker’s pre- and post-injury condition.

All of the above causation principles may apply equally with respect to both personal injury and occupational disease. In the case of occupational disease, there is an additional set of rules for establishing the requisite degree of causal connection. In particular, the Act provides a possible short cut for establishing work-relatedness through the rebuttable presumptions created by Section 6(3) and Schedule B, and these will be discussed in detail later in this report. For the time being, the commission’s focus is on the onus and standard of proof regarding personal injury and occupational diseases in cases where no presumption applies.

RECOMMENDED APPROACH TO CAUSATION

There are two basic issues relating to causation. The first is an onus issue and relates to the degree to which work-related factors must be shown to have caused the harm in issue. The current approach requires causative significance which requires that work-related factors play more than a trivial or insignificant role, but does not require that they contribute to a degree of 50% or more. The second issue is one of standard of proof, and relates to the degree to which the evidence must establish that work-related factors were sufficiently causative. The current approach requires that it be at least as likely as not that work-related factors played a sufficient causal role.



Many employers charge that the current approach entitles workers to compensation upon proof of an even possibility that work may have played a role of some causal significance, and that this is too broad and often requires employers to pay for damages which are in fact unrelated or only tenuously related to the workplace. Many workers argue that, however generous to workers the current approach might seem on its face, the board has created artificial or unwarranted exceptions or otherwise failed to properly apply it.

The commission agrees that there is some merit in both of the above contentions. The concerns raised by employers are valid in that the current test, which requires a relatively low level of work-related contribution and proof on a relatively low standard may lead to unmanageable costs and unfair funding by industry of non-work-related disabilities if strictly and literally applied. However, it appears clear that workers are correct in arguing that the test is not always strictly applied. While one result of this has been cost-containment, this has at times been at the expense of a consistent and principled approach to determining compensability.

A good illustration of both concerns arises in connection with non-traumatic stress claims, which will be addressed in more detail in a separate section later in this report. Employers argue that everybody suffers some stress, both in and out of the workplace. Providing compensation anytime that it is as likely as not work-related stressors played more than a trivial role in disability is apt to lead to an unmanageable flood of claims. The board's response to such claims has been, in part, to disallow claims for psychological disability where the latter was not caused by a compensable physical injury or traumatic event. The latter approach draws distinctions between physical and psychological harm and gradual and sudden onset which do not arise from any provision in the Act and are not consistent with a literal application of general causation requirements.

A key challenge for the commission has been finding a principled approach which is consistent with the fundamental notion that industry should pay for work-related harm, and which is also workable in light of practical realities facing adjudicators. Particular challenges arise in regard to conditions which are largely subjective, arise gradually over a period of time and/or are the result of a number of contributing factors, some of which are work-related and some of which are not.

Having considered various alternative approaches, the commission is of the view that the causative significance test creates an appropriate onus and should not be varied. Subject to the discussion below regarding non-traumatic stress claims, the commission also endorses the current standard of proof on a balance of probabilities, with evenly balanced possibilities being resolved in the worker's favour. This onus and standard of proof represents, in most cases, the best compromise between competing considerations and best serves the underlying



goals of the system. The commission is of the view that problems identified by those representing worker and employer interests can be addressed to an acceptable extent by the less drastic measures outlined below of modifying the application of crumbling skull and proportionate entitlement principles in multi-causal cases, and imposing additional conditions in the case of non-traumatic stress claims.

With respect to the onus of proof, the commission considered whether a greater degree of causal significance or contribution should be required for work-related factors. Several other jurisdictions require in certain circumstances that work-related factors be the “dominant” or “predominant” cause of disability. For example, Manitoba and Prince Edward Island require that work be a “dominant cause” of occupational disease, and Newfoundland and California limit coverage of certain types of stress claims to cases where work-related stress is the “predominant cause” of disability.

Dominant or predominant cause tests generally require that work-related causes be of greater than 50% causal significance. The commission has concluded that such tests are not appropriate with respect to any type of disability in the workers compensation setting, whether it is manifested physically or psychologically, comes about gradually or by virtue of sudden onset, or is classified as injury or disease.

The dominant or predominant cause standards not only impose too high an onus, but are also administratively unworkable. In terms of fairness, there are many circumstances where a worker’s disability has come about as a result of multiple factors, but would simply not have arisen in the absence of work-related factors. If the predominant cause test were adopted, workers who would not have suffered any disability had it not been for their employment would go uncompensated if other factors were deemed to have played a 50% or greater causal role. In the commission’s view, such a result is inconsistent with the basic principle that industry should fund compensation for consequences arising from employment. If a consequence would not have come about had it not been for the employment, it should be compensable. The causative significance test leads to full compensation in such circumstances (subject to “crumbling skull” or “proportionate entitlement” considerations, if applicable) and is the more appropriate approach.

From an administrative perspective, the predominant cause test assumes that adjudicators will be able to allocate degrees of causal significance among multiple factors. That assumption is, at best, highly suspect. The commission agrees with the following comments by Terence Ison from *A Historical Perspective on Contemporary Challenges—Meredith Memorial Lecture* on this point:



For cases involving multiple etiology, it has often been suggested that one of the contributing causes should be classified as “predominant” or “dominant”, and compensation paid or denied according to whether the “predominant” or “dominant” cause was a feature of the employment. ... A problem with that approach is that where a disability has resulted from the interaction of two or more causative factors, and it would not have occurred in the absence of one of them, there is no scientific way in which any one of them can be classified as “predominant”. This classification can only be made by arbitrary choice or political judgment, and this is so, even if the decision is allowed to masquerade as a medical opinion. A decision either way would be hard to justify because it could not be supported by logical reasoning. The use of this ostensible criterion could also tend to clog the appeal system.

With respect to the standard of proof, the commission considered alternatives including the introduction of a “clear and convincing” standard of proof in some or all types of cases. The clear and convincing standard has very rarely been adopted in the workers compensation setting. (See, for example, Oregon’s legislation, which requires in certain types of stress claims that work-relatedness be proven by “clear and convincing evidence.”)

The “clear and convincing” standard is not terribly well defined as a matter of law, but it is clearly much more onerous than the approach currently applied by the board. It involves proof on a standard falling somewhere between the civil standard of preponderance of evidence or balance of probabilities and the criminal standard of proof beyond a reasonable doubt, with some sources suggesting that it falls closer to the latter. For example, “clear and convincing proof” is defined as follows in *Black’s Law Dictionary (Abridged 5th ed.)*:

Clear and convincing proof. Generally, this phrase and its numerous variations mean proof beyond a reasonable, i.e. a well-founded doubt. Some cases give a less rigorous, but somewhat uncertain, meaning, *viz.*, more than a preponderance but less than is required in a criminal case. Proof which should leave no reasonable doubt in the mind of the trier of the facts concerning the truth of the matters in issue.

Again, subject to the discussion below of non-traumatic stress claims, the commission is of the view that the clear and convincing standard is not appropriate in the workers compensation setting. The commission has found no reason why a more stringent standard than the balance of probabilities which applies in the civil system should become the rule in the workers compensation setting and



indeed, no submissions were made arguing for such a standard of general application. In addition, imposing such a standard is likely to have the practical effect of placing a high onus on workers and their dependants and would be inconsistent with the inquiry model which prevails in the workers compensation setting.

The commission also considered the less drastic alternative of eliminating the provision in Section 99 of the Workers Compensation Act which requires that evenly balanced possibilities be resolved in the worker's favour. This would result in an increase in the current level of proof of work-relatedness to the balance of probabilities test. Again, the commission is of the view that such a change is not appropriate. The current provision in Section 99 is designed in part to take account of the current inquiry model, and eliminating it would again interfere with that model and result in different practical requirements for workers and dependants. As this revision would only result in different outcomes in those cases where possibilities are evenly balanced, the commission does not feel that this warrants such a widespread change to the approach to proof of causation.

The thin skull and crumbling skull principles as they are applied in the tort context were recently summarized by the Supreme Court of Canada in Athey v. Leonati [1997]:

The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more than they would be for the average person.

The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position" [i.e. prior to the tort]. The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, *but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway*. The defendant is liable for the additional damage, but not the pre-existing damage. [Emphasis added.]

The commission is of the view that the thin skull principle as described above and as it currently appears to be applied by the board is appropriate and should not be varied. In the case of crumbling skull principles, some different considerations apply. As discussed in Athey, the focus of inquiry in multi-causal situations should



be on the extent to which a worker's symptoms would have been experienced anyway in the absence of work-related causal factors. If the worker would have experienced no disability in the absence of work-related factors, full compensation should be payable. That result is warranted on thin skull principles. If the worker would have experienced the same degree of disability in the absence of work-related factors, no compensation should be payable. That result is warranted on the basis that work-related factors were not of causative significance in bringing about the disability.

By far the more difficult situation arises where there is an issue as to whether a non-work-related disability would have arisen anyway, but has been accelerated or exacerbated by work-related factors. The commission is of the view that apportioning degrees of disability between multiple causes is generally unworkable for the same reasons that the predominant cause is unworkable and unrealistic. Where a variety of factors have contributed to a disability, there is often no reasonable, scientific method of apportioning the degree to which each factor is responsible for the severity of symptoms. Such an apportionment is apt to lead to arbitrary results and frequent appeals. The commission is therefore of the view that proportionate entitlement adjudication should be replaced by a simpler "all or nothing" test.

In the commission's opinion, a more workable approach is to inquire into the likelihood that the worker would have been just as badly off in the absence of the work-related factors, and apply the usual causal significance and thin skull principles to the result of that inquiry, without attempting to distinguish between degrees of disability sustained from various causes. If it is shown (on the usual balance of probabilities with evenly balanced possibilities resolved in the worker's favour), that the worker's condition would inevitably have resulted irrespective of work-related factors, no compensation would be payable. Otherwise, full compensation would be payable.

It should be noted that questions as to whether a condition was brought on earlier involve somewhat different issues than the "degree of contribution" assessment and are generally less difficult to adjudicate. Where the evidence shows on the usual standard that a disability was brought on earlier than would have occurred in the absence of work-related factors, compensation should be paid for the additional time period during which the disability is experienced.



Therefore, the commission recommends that:

179. Section 5(5) of the Workers Compensation Act be amended to provide that in the case of permanent disability:

- a) (subject to (b), below) where disability occurs as a result of occupational disease or personal injury arising out of and in the course of employment, compensation is payable under this Part unless it is determined that such disability would in any event have occurred as a result of factors unrelated to such injury or disease; and
- b) where disability occurs as a result of occupational disease or personal injury arising out of and in the course of employment, compensation is payable for the period between the date on which disability occurred and the date on which it would have occurred in the absence of the occupational disease or personal injury.

As a matter of policy, the board does not currently take account of pre-existing disability in determining temporary disability and health care benefits (See *RSCM* Item # 44.20). The commission is of the view that this restriction should continue to apply. While this may result in the provision of some benefits to which workers would not be entitled if the above rules were strictly applied, the commission is of the view that the extra costs of providing benefits in such cases would be more than offset by escalating administrative costs associated with inquiries into the worker's hypothetical future condition had the work-related factors not arisen. Those costs are more justifiable when weighed against the costs of permanent or long term benefits.

SCHEDULE B AND SECTION 6(3) PRESUMPTIONS

Schedule B of the Act includes a list of diseases and corresponding descriptions of processes or industries. Section 6(3) creates a rebuttable presumption that where a worker employed in a specified process or industry contracts a specified disease, that disease was caused by the employment:

- 6. (3) If the worker at or immediately before the date of the disablement was employed in a process or industry mentioned in the second column of Schedule B, and the disease contracted is the disease in the first column of the schedule set opposite to the



description of the process, the disease is deemed to have been due to the nature of that employment unless the contrary is proved.

Schedule B has been amended over the years, and has expanded from a list of 6 diseases at its inception to a current list of 54 diseases which are grouped into 18 types. According to 1995 data provided by Occupational Disease Services, nearly 30% of occupational disease claims for the period studied were accepted through the application of Schedule B the Section 6(3) presumption. 1997 data provided to the commission during presentations by board representatives indicated that approximately 25% of accepted claims during the period studied (260 out of 1138) were accepted by reference to Schedule B. It is therefore clear that Section 6(3) and Schedule B play a substantial role with respect to claims adjudication.

The principal advantage of the Section 6(3) presumption is aptly described in the *RCSM #26.20*:

The fundamental purpose of Schedule B is to avoid the repeated effort of producing and analyzing medical and other evidence of work-relatedness for a disease where research has caused the Board to conclude that such a disease is specific to a particular process, agent or condition of employment. Once included in Schedule B, it is presumed in individual cases that fit the disease and process/industry description that the cause was work-related.

Although such schedules and presumptions are not universally employed in other Canadian jurisdictions, the commission is of the view that the current system provides a fair and effective means of assessing the causal connection between certain diseases and industries, while promoting administrative efficiency by avoiding the need for duplication of effort among adjudicators on the general issue of whether medical and scientific evidence establishes such connections. Given the likely volume and complexity of such evidence, substantial savings are likely to result from eliminating repetitious inquiry into the same general issues. A further by-product of the current approach is greater consistency in decision making.

METHODS FOR RECOGNIZING OCCUPATIONAL DISEASE

There are several methods whereby a disease may be recognized as an “occupational disease,” i.e. sufficiently causally connected to employment to trigger entitlement to compensation. “Occupational disease” is defined in Section 1 of the Act as follows:



“occupational disease” means any disease mentioned in Schedule B, and any other disease which the board, by regulation of general application or by order dealing with a specific case, may designate or recognize as an occupational disease, and “disease” includes disablement resulting from exposure to contamination

The means by which occupational diseases are recognized is further addressed in Section 6(4):

- 6.(4) (a) The board may, on the terms and conditions and with the limitations the board deems adequate and proper, add to or delete from Schedule B a disease which the board deems to be an occupational disease, and may in like manner add to or delete from the said Schedule a process or industry.
- (b) Notwithstanding paragraph (a), the board may designate or recognize a disease as being a disease peculiar to or characteristic of a particular process, trade or occupation on the terms and conditions and with the limitations the board deems adequate and proper.

There appears to be broad consensus, with which the commission concurs, that Section 6(4) and the Section 1 definition of occupational disease enables the board to recognize occupational disease by at least the following three methods:

- inclusion in Schedule B
- regulation of general application; and
- order dealing with a specific case.

Board policy is not consistent with respect to the methods whereby occupational diseases can be recognized and, in particular, the interpretation of Section 6(4)(b). In addition to the above three methods, a fourth method is identified in the *RSCM* at item #26.02, which refers to a “much more limited” designation or recognition purportedly authorized by Section 6(4)(b) and allowing for somewhat wider recognition than in a specific case, but without embodiment in regulations:

The Board may designate or recognize a disease as being a disease peculiar to or characteristic of a particular process, trade or occupation with respect to future claims in a broad sense, or it may impose a much more limited designation or recognition by specifying whatever terms or conditions or limitations it deems appropriate.

For example, the Board has recognized osteoarthritis of the first carpo-metacarpal joint of both thumbs under this section [Section 6(4)(b)] as being applicable to a physiotherapist who was involved in deep frictional massage which placed particular strain on those



joints. This recognition is limited to factual situations substantially the same as those that applied to the worker in that decision.

In contrast, several Appeal Division decisions have recognized only the three methods of designations listed earlier.

Recognition of an occupational disease has significantly different precedential value depending upon the method used. Inclusion in Schedule B is clearly the strongest type of recognition since this will give rise to the rebuttable presumption of work-relatedness. A regulation of general application does not go so far as to raise a presumption, but can provide useful guidance to adjudicators. At present, approximately three dozen diseases, ranging from emphysema to lyme disease to carpal tunnel syndrome have been recognized by general regulation as occupational diseases, without being specifically tied to a particular process, trade or occupation. Finally, recognition by order dealing with a specific case is limited to the particular claim in question. As described in the policy at Item #26.04 of the *RSCM*, the latter creates no “institutional memory” regarding the disease-work connection and simply creates “an avenue of recognition for unique, meritous [sic], individual disease claims.”

The commission is of the view that in addition to the foregoing three methods for recognition or designation of occupational disease, the fourth method described in Item #26.02 of the *RSCM* can also play a useful role. It goes further than the order limited to a specific case in that it would create “institutional memory,” while falling short of the formal recognition achieved through the Schedule B process or regulations of general application. The commission would expect this form of recognition to be useful in regard to claims of a certain nature which arise repeatedly, but for which there is not yet a sufficient medical and scientific basis for higher levels of recognition by way of Schedule B or regulation of general application.

Therefore, the commission recommends that:

180. Section 6(4)(b) of the Workers Compensation Act be amended to clarify that the board may designate or recognize a disease as being a disease peculiar to or characteristic of a particular process, trade or occupation:

- a) by regulation of general application;
- b) by order on terms, conditions and limitations which the board deems adequate and proper; or
- c) by order dealing with a specific case.



Who Determines the Contents of Schedule B

With respect to the issue of who makes determinations regarding the scheduling of diseases and industries or processes, a variety of different approaches have been taken over the life of the Workers Compensation Act and its predecessors. Currently, British Columbia is the only Canadian jurisdiction in which the board has such authority. All other Canadian jurisdictions confer such authority on the cabinet or legislature. This was also the approach in British Columbia prior to the report of the Tysoe Commission. At that time, the board had authority to amend the schedule, but this was subject to the approval of the Lieutenant Governor in Council. Tysoe recommended removal of the latter requirement for approval on the ground that the board had superior knowledge and expertise regarding such issues. That recommendation was implemented in 1968.

The commission agrees that the board's expertise, experience and access to expert research and relevant internal information make it an appropriate body to monitor, assess and update Schedule B designations. This is an important function. It is also one which has led to considerable controversy among employers, some of whom have criticized Schedule B as overinclusive and those representing workers' interests, such as the BC Federation of Labour, which charges that many occupational diseases, particularly occupational cancers, are profoundly undercompensated. In order to underscore the importance of these issues, the commission is of the view that a panel of the governing body should be designated to undertake Schedule B reviews, and that supervision of such decisions by elected officials should be facilitated by requiring that proposed revisions to Schedule B be gazetted prior to implementation.

Therefore, the commission recommends that:

181. the Workers' Compensation Board retain its current authority to revise Schedule B as authorized by section 6(4)(a);

182. the Workers Compensation Act require that an Occupational Disease Standing Committee be constituted as a committee of the governors in recognition of the importance of issues related to occupational diseases; and that

183. the Workers Compensation Act require the governors to gazette all additions and deletions to and from Schedule B before they take effect, in order to provide cabinet with sufficient opportunity to supervise the proposed changes.



Criteria Governing Inclusion in Schedule B

With respect to the factors which are considered in determining inclusion in or exclusion from Schedule B, the commission heard various submissions arguing that Schedule B is too broad and includes diseases and industries for which no adequate causal connections have been established. For example, counsel representing employers cited evidence which suggested that firefighters do not suffer an increased incidence of heart disease, and noted that employers have therefore questioned why Schedule B includes various forms of heart disease where the worker is employed as a firefighter.

On the other hand, it was argued by those representing the interests of labour and disabled workers that Schedule B is seriously deficient and fails to include a host of occupational diseases. For example, counsel representing organized labour referred to evidence from various sources suggesting that anywhere from 4% to 38% of all cancers are thought to be employment-related. It was further submitted that claims compensated as occupational diseases in the past year or so represent only about 0.1% of cancers arising in British Columbia and noted that only a limited number of cancers and related processes have as yet been included in Schedule B.

In the course of hearing submissions and undertaking research in this area, the commission found reference to various types of evidence which, it was argued, ought to be considered in connection with determining the contents of Schedule B. Some of these factors included the use of statistical data regarding incidence of disease in the population generally in comparison with incidence in those exposed to particular processes or industries, and consideration of multiple factors causing disease. It was not contended that multi-causal conditions should be automatically excluded from Schedule B, but that the likelihood of exclusion would increase with reference to such factors as a high incidence rate among the general public, a lack or scarcity of objective proof or validation mechanisms for subjective conditions, or a high degree of causal connection to psycho-social or socio-economic factors.

It is, of course, outside the commission's mandate to consider whether particular diseases should or should not be included in Schedule B. However, what emerged from the debate in this area is the need for clear and carefully designed guidelines to be used in determining additions to and deletions from Schedule B.



Therefore, the commission recommends that:

184. the Workers' Compensation Board undertake a study of the factors which should guide additions to, and deletions from Schedule B; and that

185. the Workers Compensation Act be amended such that periodic comprehensive reviews of Schedule B be undertaken and that the results of such reviews be included in the board's *Annual Report*.

Apart from issues relating to specific diseases such as the heart disease example cited above, the commission heard from board representatives and stakeholders alike that occupational diseases tend to be undercompensated, at least in part because they are under-reported by workers and dependents who may be unaware of connections between disease and employment. The commission was advised of the board's creation of an endowment fund and sponsoring of research into occupational disease, commends such initiatives, and encourages further efforts in this regard.

Rebuttal of the Section 6(3) Presumption

Section 6(3) provides that in the circumstances specified, a disease is deemed to be due to employment "unless the contrary is proved." The latter phrase has given rise to some controversy. For example, counsel representing employers and counsel representing organized labour apprised the commission of a case involving an issue as to whether a worker's skin cancer had been caused by coal tar products. Schedule B relates primary cancer of the skin to prolonged contact with coal tar products. In the example cited, the employer had sought to rebut the Section 6(3) presumption by showing that skin cancer is in fact not caused by contact with coal tar products. This raises the general issue of whether the "science" underlying a decision to include a disease and related process or industry should be open to attack in the context of adjudication of an individual claim.

In the commission's view, rebuttal of the general co-relation between disease and process or industry recognized in Schedule B should not be undertaken in the context of the adjudication of individual claims. As long as Schedule B acknowledges the relationship, adjudicators are not free to depart from it. Among the benefits of the Schedule B presumption is that adjudicators are not called upon to review and decide the same issue which was considered by the board in arriving at the decision as to whether to include a disease and related process in Schedule



B. Schedule B also promotes predictability and consistency in decision making. These objectives are all undermined if adjudicators are free to depart from Schedule B designations.

Issues as to the alleged inaccuracies in Schedule B should be addressed through Section 6(4)(a) of the Act which permits revisions to the schedule. The commission is of the view that in addition to allowing for periodic reviews of the contents of Schedule B, the Act should also include a specific provision allowing interested parties to apply for a review of Schedule B presumptions. In such circumstances, the claim in issue would be put on hold pending the outcome of the application. In the commission's view, such an application should be made to the Occupational Disease Standing Committee (ODSC) and should be available only with leave. This will mean that a single body adjudicates all matters relating to the contents of Schedule B and the leave requirement will ensure that the Committee is not called upon to adjudicate the same issues over and over again in the absence of, for example any new scientific evidence or new studies reinterpreting studies previously considered by the Committee. The commission believes that the ODSC may well benefit from a broader-based consultation with reference to these cases.

Therefore the Commission recommends that:

186. the Workers Compensation Act be amended to include a provision allowing parties to request that the Occupational Disease Standing Committee reconsider a relationship recognized in Schedule B between a disease and process or industry.

The other principal issue raised with respect to rebutting the Section 6(3) presumption involves the standard which is required in order to preclude application of the presumption and necessitate the usual inquiry into and adjudication of causation issues. (In light of the foregoing discussion and recommendation, the commission is assuming that the causation inquiries will focus not on the "science" underlying the Schedule B designations, but an inquiry into whether, although a disease may in some cases be caused by the specified process or industry, it was instead caused by different factors in the case of the particular worker in question.)

It should be noted that evidence where the worker was not involved in the specified process or industry or did not have the extent of exposure or contact specified by Schedule B would go to the question of whether the Section 6(3) presumption would apply at all, rather than to rebutting it. Employers argue that in order to



rebut the Section 6(3) presumption, adjudicators generally require proof on a balance of probabilities that the disease was caused by other non-work-related factors. In effect, this puts the onus on employers to prove causation.

The commission agrees that it is not appropriate to impose such an onus of proof on employers, any more than it would be appropriate to impose the contrary onus on workers. Such an interpretation of the requirement for “proof to the contrary” is at odds with the usual approach to presumptions in other areas of law such as criminal and regulatory legal regimes. In those contexts, a presumption typically applies unless evidence is presented which raises a reasonable doubt as to whether the presumption is appropriate on the particular facts of the case. In the commission’s opinion, this is the better approach. It can be accomplished by providing that the presumption will only apply in the absence of evidence putting causation in issue. Thus the presumption would not apply and there would be an adjudication on the merits where there is evidence to the contrary regarding causation, as opposed to evidence proving that the process or industry listed in Schedule B is not what caused the worker’s disease.

Therefore, the commission recommends that:

187. the concluding words of Section 6(3) of the Workers Compensation Act be amended to provide that the disease should be deemed to have been due to the nature of that employment “unless there is clear and convincing evidence to the contrary.” (Dissent: Commissioner G. Stoney)

DISSENT: RECOMMENDATION # 187

The presumption extended to workers in Section 6 (3) of the Workers Compensation Act has stood for over eighty years. The wording of Section 7 (2) of the 1916 Workmen’s Compensation Act was as clear as that found in the current Act:

If the workman at or immediately before the date of the disablement was employed in any process mentioned in the second column of the Schedule hereto, and the disease contracted is the disease in the first column of the Schedule set opposite to the description of the process, *the disease shall be deemed to have been due to the nature of that employment unless the contrary is proved.* (emphasis added)



In reviewing the presumption in the mid-1960s, Mr. Justice Tysoe stated that:

I cannot ignore the presumption in favour of the workman.... That presumption has been in the Act since it was first enacted in 1916, and it is in the Acts in some of the other Provinces. It is of definite benefit to workmen. Compensation payments for deaths of several firemen who died from heart disease would not have been permissible had it not been for the presumption, and there maybe other instances of a like nature.

Tysoe then goes on to say that he will leave the section alone as "It is eminently fair to labour and industry."

Amending Section 6(3) as proposed will remove the presumption. Every claim will then be open to challenge. The benefits of administrative efficiency and consistency in what *Workers' Compensation 1993 – Occupational Disease, Continuing Legal Education* refers to as highly specialized areas of scientific knowledge will be lost as adjudicators go back to what the *Rehabilitation Services and Claims Manual* describes as the:

repeated effort of producing and analyzing medical and other evidence of work-relatedness for a disease where research has caused the board to conclude that such a disease is specific to a particular process, agent or condition.

A positive amendment to the presumption would have been the adoption of the BC Federation of Labour's suggestion that this province follow Ontario's lead and establish non-rebuttable presumptions for diseases such as Mesothelioma and silicosis. This would have simplified the process while recognizing the work-relatedness of these diseases. Instead, the current proposal threatens to extend an often overly long process and to increase the opportunity to challenge clearly work-related diseases.

WAGE LOSS REQUIREMENT IN SECTION 6(1)

Section 6(1) provides for compensation where a worker is "disabled from earning full wages" as a result of occupational disease. This provision was also the subject of some criticism. In particular, it was argued on behalf of workers that an anomaly results in the case of workers who have retired prior to the onset of an occupational disease. In such circumstances, the retired worker receives no compensation because there has been no earning loss, either in terms of pre-retirement wages or post-retirement pension earnings. This situation was contrasted with that of a worker who suffers the onset of an occupational disease following retirement and dies from the disease. In those circumstances, the workers' dependents are entitled to survivor benefits pursuant to Section 17 of the Act.



While this was characterized as an anomaly in some of the submissions made to the commission, Sections 6(1) and 17 in fact appear to result in consistent treatment of income loss. A worker whose pre- and post-retirement income is unaffected by occupational disease may have suffered a wide range of injuries and damages, but income loss is not among them. On the other hand, a surviving dependent will generally have lost support provided through the worker's post-retirement income. Thus, the Act provides for compensation in the instance where income loss is likely to have arisen and no compensation where it clearly has not.

In the commission's view, the primary issue underlying the submissions on this point really relates to whether the system should be providing compensation for other types of loss or damage besides income loss. In particular, it was noted that workers who succumb to occupational diseases after retirement often suffer extensive damages in terms of suffering, loss of enjoyment and amenities and reduced life expectancy, and they receive no compensation for this. This is equally true of non-retired workers who suffer work-related injuries and occupational injuries. While the latter may receive compensation for wage loss, they are in the same position as workers who experience the onset of occupational disease after retirement in that they receive no compensation under the Act for these other types of damages.

The submissions on this point thus appear to pertain to the broader issue of compensation for non-pecuniary loss generally, and not simply the wage loss requirement in Section 6(1). The matter of compensation for non-pecuniary loss is dealt with elsewhere in this report and applies equally to workers who experience the onset of occupational disease after retirement.

TIMING REQUIREMENT BETWEEN EXPOSURE AND ONSET OF DISEASE

The commission heard submissions regarding the requirement in Section 6(3) that the worker be employed in an industry or process specified in Schedule B "at or immediately before the date of disablement," in order for the presumption to apply. This requirement has not been consistently interpreted. The issue tends to be of particular importance in connection with various diseases such as certain forms of cancer which may have a lengthy latency period.

The policy stated in the *RSCM* indicates that the words "immediately before" generally refer to a situation where a worker has left a listed industry or process a very short time prior to the onset of the listed disease, but that they can be stretched to cover a situation where a number of years have passed between employment in the specified industry or process and onset of the disease. Item #26.21 of the *RSCM* states that this may be appropriate where medical and scientific evidence



establishes a long latency period between exposure to the Schedule B process and manifestation of the disease.

For example, the manifestation of an infection caused by staphylococcus aureus or of a respiratory irritation resulting from the inhalation of an irritant gas can be expected to occur within a short period of time following the relevant exposure. In the circumstances of such a claim, the presumption would normally be considered only where the condition became manifest within a short period of time following the exposure. However, in a claim filed by a worker who suffers from a recent onset of a cancer listed in Schedule B but who has not worked in the process or industry described opposite such cancer for a number of years, it may be appropriate to conclude that such worker was employed in such process or industry "immediately before the date of disablement" by virtue of the long latency period which is known to exist with respect to such cancer.

A contrasting point of view can be found in Appeal Division Decision No 96-0727. That decision dealt with a claim arising from bladder cancer which had become manifest some 19 years after the worker had left the employment alleged to have caused the cancer. The Appeal Division reviewed the wording of Section 6(3) and the above policy set out in the *RSCM*, and concluded that "immediately before" could not reasonably be interpreted to include a lapse of 19 years. Thus the Section 6(3) presumption was not applicable.

The commission was advised by representatives of the board that notwithstanding the Appeal Division's conclusion, adjudicators generally continue to apply the policy set out in Item #26.21 of the *RSCM* in cases involving occupational diseases known to have long latency periods.

The commission considers that as a general rule, it is appropriate to require some reasonable time limit between the exposure and the onset of disease. The longer the lapse of time, the more intervening factors may become relevant and the less clear the connection between the disease and the process or industry may become. The lapse of time should not operate to defeat a worker's entitlement to compensation, but it may well make it less appropriate to address the causation issue by beginning with the Section 6(3) presumption of causation.

However, the commission is also of the view that it is appropriate to create exceptions to such general time limits where medical or scientific evidence warrants doing so. The commission agrees with the Appeal Division that the current *RSCM* policy appears to conflict with a plain reading of Section 6(3) as it is currently drafted. "Immediately before the date of disablement" would not appear to include a situation where exposure occurred many years before the date of disablement.



The current *RSCM* policy, in the commission's view, allows for application of the Section 6(3) presumption in many instances where the presumption is most useful and consistent with the underlying purposes for which it was designed. These include circumstances where there is a sufficiently strong connection between industry and disease to warrant inclusion in Schedule B, and where there is proven to be a long latency period between exposure and onset.

It was noted by counsel representing organized labour that, for example, many of the cancers listed in Schedule B are known to have lengthy latency periods, and that if Section 6(3) is read literally, the presumption would only apply with respect to those workers who are still employed in the process or industry in question at the time the cancer manifests itself. The commission does not believe that it makes sense for the presumption to apply so narrowly. Changing jobs and occupations is common practice in the modern workplace and limiting the presumption to that extent would mean that the same evidence which went into the making of the Schedule B designation would have to be canvassed in detail in a great many individual cases. That is apt to create considerable and unnecessary delay, expense and consumption of the system's resources, as well as the risk of inconsistency in decisions.

The commission therefore recommends that the requirement of "immediacy" in Section 6(3) be either eliminated or qualified by a general discretion to depart from it in appropriate cases. The board may wish to consider whether a discretion to apply the presumption in the absence of "immediacy" between exposure and onset of the disease should be open-ended or subject to a specified limit. The commission did not hear any submissions about whether any particular number of years between exposure should be specified as the maximum in order for the Section 6(3) presumption to apply. That is a matter which may vary depending upon what is known about the latency periods of various diseases specified in Schedule B, and may be an area warranting further study by the board.

Therefore, the commission recommends that:

188. the Workers Compensation Act be amended to authorize the Workers' Compensation Board to either:
- a) depart from the "at or immediately before" time requirement in section 6(3) in the case of occupational diseases with long latency periods; or
 - b) specify the time interval associated with the phrase "at or immediately before" within which a particular disease listed in Schedule B must arise in order for the section 6(3) presumption to apply.



TIME LIMITS FOR OCCUPATIONAL DISEASE CLAIMS

Section 55 of the Act requires a worker or dependent to file a claim within one year after the date a worker is disabled or dies from occupational disease. However, the section allows the board to pay compensation in certain circumstances where this time limit is not met. In particular, the board may pay benefits retroactive to the date of disablement or death if new medical or scientific evidence becomes available which permits the board to recognize the disease in question as an occupational disease. This requires that an application be filed within three years of the date on which sufficient new evidence became available. Otherwise, compensation is only payable retroactively to the date of the application.

The commission is of the view that Section 55 in its current form strikes a fair and appropriate balance in encouraging due diligence in the timely pursuit of claims arising from occupational diseases, while at the same time acknowledging that many aspects of occupational disease claims are not within a claimant's control. As medical and scientific knowledge is constantly evolving, it is important that workers and dependents not lose their right to compensation solely because of deficiencies in the state of general knowledge about a disease at any particular point in time.

SUSPENDED CLAIMS

The commission was advised in the course of presentations by board representatives that in 1997, 2,867 claims for occupational disease were registered with the board. Of those, 1,173 were accepted and 927 were rejected. The remaining 767 claims were described as "suspended" claims and little information appears to be available as to what this means. Did the workers give up? If so, for what reasons? Were the claims put on hold with an expectation that they would be revived later? If so, why and at whose behest were the claims put on hold? What has to happen in order for a claim to be classified as "suspended"?

The commission is of the view that the board should do a more thorough analysis of suspended claims. Otherwise, an incomplete picture emerges of the system's response to occupational disease claims.

Therefore, the commission recommends that:

189. the board undertake a more detailed analysis and reporting of "suspended" occupational disease claims.



EXPOSURE REPORTING

It was suggested during the commission's public hearings, that in some instances, workers may file occupational disease claims with the board not because they have yet suffered any disability, but because they fear that they have suffered exposure which may result in disability in the future. In such circumstances, workers may seek to create a record with the board of their exposure in case this might assist in connection with future claims. (Depending upon how widespread this practice might be, it may provide some explanation for some of the "suspended" occupational disease claims discussed in the previous section of this report.)

It may be helpful for both workers and the board to provide some avenue for creating a timely record of exposure in case it is needed for future reference. The claims process seems ill-suited for such a purpose, and the commission considers that an "exposure registry" designed to fulfill such a function would be more appropriate. Such a registry might be useful for other purposes such as gathering data to better understand the incidence of occupational diseases and their relationship to particular industries. In addition, the registry might be of some use for prevention purposes, as it could provide a means for bringing levels or incidence of exposure on a particular work site to the board's attention.

The board should give consideration to whether a single registry would be suitable for all of these purposes, and how information might be reported and tracked. For example, a registry designed to create a record of exposure for prospective use in connection with future claims would have to track specific information regarding the worker involved. However, if the registry is to serve a "policing" and prevention function, reports of potentially harmful exposure might be encouraged by guarantees of anonymity. The commission is of the view that these issues merit further study.

Therefore, the commission recommends that:

190. the Workers' Compensation Board investigate the merits of recording exposures for purposes which might include:
- a) record-keeping regarding individual workers' exposure;
 - b) data collection regarding the incidence of occupational disease; or
 - c) monitoring of the levels and incidence of potentially harmful exposure on particular work sites.



Protective Reassignment and Compensation

Another area of controversy involves workers who have developed work-related allergies or sensitivities as a result of exposure to certain substances in the workplace. A common example cited to the commission involves sawmill workers who have developed cedar dust allergies. In such cases, the worker develops over time an asthmatic condition as a result of exposure to cedar dust and each time the worker is exposed to cedar dust, the condition worsens. Thus, continuing exposure creates an ever-increasing threat to health. However, when exposure ceases, the worker recovers and suffers no lasting ill-effects as long as exposure is not resumed.

The situation under consideration here is to be distinguished from circumstances where workers have pre-existing allergies or other conditions which make them sensitive to substances or conditions in the workplace. In such cases, workers may be affected by exposure to substances in the workplace, but it is not the exposure itself which creates the sensitivity. The latter type of case should be dealt with by the application of the ordinary rules regarding the existence of a disability, causative significance of workplace factors, etc. The following discussion relates only to circumstances where it is the accumulated workplace exposure which has caused the sensitivity and attendant risks to health.

The commission considered whether employers should be obliged to accommodate workers whose health is placed at risk as a result of accumulated workplace exposure by "protective reassignment", for instance, providing them with alternative employment which does not expose them to the triggering substance. The commission considers that it is appropriate to impose such obligations on employers, but only in limited circumstances. As with re-employment obligations discussed elsewhere in this report, the commission is of the view that an employer's obligation to protectively reassign should be limited by hardship considerations and should arise only where an affected worker has at least one year of tenure with the employer (see *Volume Two, The Adequacy of Benefits*).

The commission is also of the view that a schedule should be developed of workplace contaminants which can give rise to situations such as the above cedar dust example (including for example certain chemicals, metals, radiation, etc), and that the right to protective reassignment should be limited to situations covered by this schedule. The schedule would not raise a presumption of causation between contaminants and sensitivities. It would function more like the regulations of general application under Section 6(4)(b) than it would like Schedule B, in that it would guide adjudicators to recognized substances which can create health risks upon accumulated exposure. It may also provide a vehicle for identifying safe



accumulated exposure levels for the various substances, if applicable. In that regard, the prevention and compensation agencies may be able to work co-operatively toward reducing situations of this nature.

Therefore the commission recommends that:

191. the Workers Compensation Act be amended such that:

- a) an employer offer alternative employment to a worker at significant risk of deterioration to health who has at least one year tenure with the employer, if the risk is medically certified to arise directly from only the worker's accumulated exposure to specific workplace contaminant(s) designated by the board pursuant to a schedule designed for that purpose; and
- b) the employer be relieved of the obligation to reassign a worker where such reassignment imposes undue hardship on the employer or affected co-workers.

Further issues arise in regard to the entitlement to benefits of workers affected by accumulated exposure. Since such workers are fully recovered while away from the triggering substance, they are not generally considered to be disabled. Nonetheless, they cannot return to their prior employment without undue risk of further health problems arising from continued exposure. The commission is of the view that in circumstances where a worker's ability to earn income is adversely affected, this should be recognized as a form of work-related disability and benefits under the Act should be available accordingly.

Current policy permits preventative vocational rehabilitation for a worker in such a position, in order to facilitate a transition to new employment. The commission approves of this approach as generally consistent with the overall scheme of the Act, under which other disabled workers are expected to mitigate losses by taking reasonable steps to obtain alternative employment.

However, a worker who is protectively reassigned or pursues a new line of employment may end up earning less than in the previous employment to which allergies or sensitivities prevent the worker's safe return. In those circumstances, which the commission anticipates would arise relatively infrequently, the commission considers it appropriate to compensate the worker for that wage loss. This practice has been adopted in some other jurisdictions. Ontario, for example, allows compensation for a worker who "has a medical condition that in the opinion of the Board requires the worker to be removed either temporarily or permanently from exposure to a substance because the condition may be a precursor to an industrial disease."

Such a practice results in similar treatment of workers whose earnings are affected by changes in employment which are due to existing disease on the one hand, and due to steps taken in order to avoid the onset of disease on the other. The commission considers this sound practice in terms of both compensation and prevention. If no compensation is available to workers who incur earnings loss in order to preserve their health, some workers may persist in injurious exposure until their conditions become much more severely disabling than would be the case with timely re-assignment or alternative employment. That would lead to unnecessary harm to workers and perhaps higher overall compensation costs to the system.

Therefore, the commission recommends that:

192. the Workers Compensation Act be amended such that where a loss of earnings is caused by an underlying work-related sensitization or allergy which is medically diagnosed and results solely from accumulated exposure to specific workplace contaminant(s) designated by the board pursuant to a schedule designed for that purpose, compensation for such loss is payable in the same fashion as compensation for occupational disease.

On another prevention-related point, the commission notes that the system currently restricts payment for preventative or curative measures. As stated in Item #32.60 of the *RSCM*:

No matter how appropriate it may be for a worker to be provided with prophylactic health care, particularly following an exposure to an infectious agent, the Board does not have the statutory authority to pay for such health care where the worker has not sustained a personal injury or is suffering from an occupational disease, even if the exposure places the worker at risk for developing an occupational disease.

The *RSCM* goes on to give contrasting examples of an ambulance attendant who has the blood of a suspected Hepatitis B carrier splashed onto a hand which had pre-existing cuts from gardening at home, and a lab technician who is exposed to disease after cutting a finger on a broken specimen bottle at work. The board would be authorized to pay for preventative treatment *only* in the latter case, because (unless and until the ambulance attendant developed Hepatitis B) only the lab technician would have suffered a work-related injury or disease.



This seems clearly at odds with the board's prevention mandate, as well as contrary to the principle that workers should not be called on to bear costs associated with workplace injuries. It also seems generally counter-productive in that the board may end paying substantial compensation for conditions which could have been prevented altogether by minimal expenditures on preventative measures. Where a work-related incident places a worker at risk of injury or disease, the commission considers it appropriate that the board should pay for reasonable health care measures aimed at eliminating or reducing that risk.

Therefore, the commission recommends that:

193. the Workers Compensation Act be amended such that the Workers' Compensation Board may prescribe policies governing the provision of prophylactic healthcare to workers who are otherwise qualified to receive it, notwithstanding that the workplace exposure has not yet produced an injury or occupational disease.

"STRESS" OR PSYCHOLOGICAL INJURY CLAIMS

A widespread practice has developed in B.C. and elsewhere of referring to certain types of claims involving non-physical injuries or conditions as "stress" claims. The commission has adopted this term as a convenient form of "shorthand" for a rather complex group of situations. It should be noted at the outset, that the term refers to a much wider range of injuries than those which are caused by, or manifest themselves as, stress *per se*, and encompasses a wide variety of psychological and emotional disabilities. It should also be emphasized that the term should not be taken to trivialize or downplay the seriousness of non-physical injuries or disabilities.

The workers compensation system aims to compensate workers for "truly work-caused" injuries and disease. It is therefore the causal relationship between employment and the harm sustained by a worker which should determine entitlement to compensation, and not the nature of the harm itself. "Occupational disease" is the subject of an open-ended definition in Section 1 which, in the commission's view, is already broad enough to encompass diseases with non-physical symptoms and manifestations. It should be clarified that "personal injury" as used in Section 5(1) is similarly not limited to physical injury.



Therefore, the commission recommends that:

194. the definition of “personal injury” found in the Work-ers Compensation Act be amended to include both physical and mental or psychological harm.

Distinctions are generally drawn between three different situations involving injuries of a psychological nature. These are often referred to as “physical-mental,” “mental-physical” and “mental-mental.” They are aptly described in the following terms in the board’s Policy and Regulation Development Bureau’s Briefing Paper entitled *Compensation for Chronic Stress*.

Physical-mental claims are those where a physical injury or disability results in a mental condition, e.g., a serious physical disability such as loss of a limb leads to clinical depression;

Mental-physical claims are those where a mental stimulus results in a physical condition, e.g. witnessing a hostage taking results in a heart attack; and

Mental-mental claims are those where a mental stimulus leads to a mental condition, e.g. witnessing an industrial accident leads to psychosis or stress at work leads to exhaustion.

“**Mental-mental**” claims can be further subdivided into two other categories:

Traumatic stress claims, in which psychological injuries are caused by a specific disturbing event or series of events; and

Chronic stress claims, in which psychological injuries are caused by mental stimuli acting over time.

Mental-physical injuries that are caused by factors acting over time (such as a heart attack resulting from occupational stress) are sometimes also discussed under the rubric of chronic stress claims.

The commission has adopted the terms defined above throughout the following discussion.

The board’s current policies allow for compensation in some, but not all of the above circumstances. The relevant policies are cited in detail in the Briefing Paper and in a discussion paper by the former Chief Appeal Commissioner, Connie Munro on *Psychological Disabilities and Workplace Stress* (1993). Board representatives confirmed to the commission that the following provides an accurate summary of the policies which are currently applied by adjudicators:



The most common reading of the governors' policies as regards claims involving mental (i.e. psychological/emotional) aspects of the work environment is as follows:

1. The Board does not recognize any form of psychological impairment as an industrial disease.
2. To be compensable the psychological impairment must come within the meaning of the word "personal injury" or, alternatively, be the consequence of a compensable physical injury or disease.
3. The definition of "personal injury" includes psychological impairment but the psychological impairment must be traumatically-induced to be compensable. Therefore, the stress of work could not give rise to compensable psychological impairment.
4. A state of emotional and physical exhaustion due to the stress of work over time is neither compensable as an injury nor as an industrial disease. It is not compensable as an injury *because it is not traumatically-induced*; it is not compensable as an industrial disease because the Board does not recognize any psychological or emotional conditions as industrial diseases.

The exclusion of psychological conditions from occupational diseases appears to stem from the policy set out at what is now Item #32.10 *RSCM*, which indicates that the board has not recognized any psychological or emotional conditions as occupational diseases related to employment. As Ms. Munro and others have noted, that policy can be read as simply stating a fact, rather than creating a prohibition on recognition of any such conditions as occupational diseases. In the commission's view, the latter reading of the policy may result in undue fettering of discretion. The commission expresses no opinion as to whether any particular psychological or emotional conditions should be recognized as occupational diseases, but simply notes that in its view the Act does not prohibit such recognition and policy should not either.

With respect to the requirement that psychological impairment be traumatically induced, there is nothing in the current Act which warrants such a restriction on compensability of non-physical harm. The Act does not distinguish between physical and psychological conditions, nor does it distinguish between conditions which result from traumatic events and those which arise gradually.

A review of other jurisdictions shows a wide variety of approaches to stress claims. As noted in Ms. Munro's discussion paper, physical-mental claims are compensable in all Canadian jurisdictions as long as the original injury which results in the mental condition is itself compensable. British Columbia's approach is consistent



with this and does not appear to be the subject of any significant controversy. Similarly, most jurisdictions allow for compensation in the case of traumatic stress claims, whether these arise in the context of mental-physical or mental-mental claims.

Thus the principal area of controversy arises in connection with chronic stress claims (i.e. the so-called mental-mental stress claims, where a non-physical disability is said to have resulted from mental stimuli acting over time rather than from traumatic occurrences or compensable physical disability). One of the major issues raised in connection with stress claims generally and particularly chronic stress claims, is the matter of cost and the concern that unrestricted entitlement to compensation for work-related stress will open the floodgates. Policy constraints on compensation for stress claims in British Columbia have unquestionably served to contain costs. Because they have always been in place, there is no direct information on what the effect would be in British Columbia if these constraints were reduced or eliminated altogether. The commission has received varying accounts of the experiences in other jurisdictions where such constraints were removed. Based on that information, it appears that the floodgates concern is a valid one.

For example, having expanded coverage to include previously excluded conditions such as chronic stress, California experienced increases in stress claims alternatively reported as of a magnitude of 500% between 1980 and 1986. Oregon's experiences were quite similar. Both of these jurisdictions subsequently imposed constraints on stress claims, which appear to have effectively contained the flood. For example, California excludes stress claims resulting from lawful personnel actions and, in the case of claims arising from "regular and routine" employment stressors, requires, among other things, that the stressors be the predominant cause of injury. Oregon requires, among other things, that the injury in issue be a medically recognized disorder, that employment stressors exist in a "real and objective sense," and that work-relatedness be proven by clear and convincing evidence.

Many of the measures adopted in California and Oregon have also been adopted in various Canadian jurisdictions. Many Canadian jurisdictions have excluded coverage for chronic stress claims altogether and have limited coverage for mental-mental claims to injuries arising from traumatic or sudden and unexpected events (e.g. Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, Yukon). Various other measures have been adopted to limit the circumstances in which such disability is compensable. Several jurisdictions have excluded coverage for stress arising from work processes such as employers' decisions regarding transfer, layoffs, terminations, etc. (e.g. Manitoba, Newfoundland Ontario,



Saskatchewan). In Newfoundland and Saskatchewan, job stress must be the predominant cause of injury, and the work-related stressors must be unusual or excessive. Some jurisdictions require that the condition be a well-defined or medically recognized condition (e.g., New Brunswick, Prince Edward Island).

American jurisdictions are similarly varied in their approaches to stress claims. According to Larson's *Workers' Compensation Law*, nine states exclude coverage for mental-mental stress claims altogether. Six states provide compensation if a mental-mental claim involves a "sudden stimulus." Twelve states require that the stressors be "unusual," in the sense that they are greater than the stress of everyday life or ordinary employment. Seven states place no special restrictions regarding sudden or unusual stimulus on coverage for such claims.

While the requirement of a sudden or traumatic triggering event or events is a relatively common one, the commission was able to find little justification for it apart from pure cost containment considerations. Other types of compensable physical conditions are not subject to similar restrictions, and the commission is concerned about whether it is appropriate and indeed lawful to draw such distinctions between physical and non-physical injury. The commission can see nothing specific to psychological injuries which warrants different rules regarding gradual versus traumatic onset. However, there are unique features associated with stress claims which may make several of the other conditions referred to above appropriate in connection with chronic stress claims.

In the commission's view, the most important feature distinguishing chronic stress claims from all other types of claims is the pervasive nature of stress in everyone's life. Unlike other forms of workplace hazards and conditions which might lead to injury or disease, stress is omnipresent. It acts on all workers in various contexts both inside and outside the workplace, often in ways which cannot be disentangled. While many multi-causal situations may present difficulties in adjudicating work-relatedness, chronic stress claims are uniquely challenging in that almost all claimants will have experienced stressors both related and unrelated to the workplace which may have played a causative role.

Coupled with the pervasive nature of stress, several other factors add further challenges to the area of chronic stress claims. For example, unlike most forms of physical injury, psychological injury is a highly subjective complaint and is not readily observable (at least to lay adjudicators and even many medical practitioners who do not specialize in psychology or psychiatry). The commission therefore considers it appropriate that chronic stress be compensable only where the condition in question is a medically accepted one and diagnosed by reference to a widely acknowledged resource such as the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition*.



Further, stress is a part of every workplace which is not necessarily undesirable (unlike most types of workplace hazards), and may be associated with necessary and unavoidable aspects of doing business (such as, for example, discipline or termination of employees). Employers cannot be called upon to eliminate all forms of stress from the workplace, as this would be neither possible nor desirable. However, the system should encourage employers to eliminate unusual, excessive or unlawful stressors and should compensate workers who suffer recognized disability as a result of the latter, just as it currently compensates those injured as a result of traumatic stressors. The commission therefore considers it appropriate to restrict chronic stress claims to circumstances involving stressors which are excessive or unusual and which are unrelated to generic work processes such as disciplinary actions, transfers, layoffs and labour relations issues undertaken lawfully and in good faith.

With respect to the unusual or excessive nature of the workplace stressors in issue, the commission considered various alternatives whereby such stressors might be assessed by comparison to those experienced in everyday life, those experienced by the average worker in any type of employment and those experienced by the average worker in the same type of employment as the claimant. The commission concluded that the latter provides the best basis for comparison in assessing whether stressors are unusual or excessive. Otherwise, all workers employed in high stress occupations such as policing, air traffic control or emergency medical aid would meet the threshold. The commission is concerned that this might open the floodgates to claims from those who do this type of work and might also eliminate a disincentive for those who are constitutionally ill-suited to high stress work from undertaking such forms of employment.

The commission also gave particular consideration to requirements imposed in other jurisdictions that the work-related stressors be the predominant cause of disability and/or that there be clear and convincing evidence that the disability is work-related. As noted, these were among measures adopted in California and Oregon to control what has been described as a flood of stress claims experienced in those two jurisdictions. These measures would modify the usual onus of proof requiring causal significance and modify the usual standard of proof requiring proof on a balance of probabilities with evenly balanced possibilities being resolved in the worker's favour. Either measure would result in a reduction of the number of claims allowed, as compared to a situation where such modifications do not apply. However, even if both modifications were introduced in British Columbia more chronic stress claims would be allowed than under the current policy which essentially eliminates all such claims by requiring a traumatic triggering event.



It appears to the commission that the predominant cause test poses the more difficult hurdle and would result in the allowance of fewer chronic stress claims than the introduction of a higher standard of proof. Be that as it may, for the same reasons as those discussed earlier in this report in relation to general issues relating to proof of causation, the commission does not consider the predominant cause test appropriate in the case of chronic stress claims. In a great many, if not most cases, there is simply no reasonable scientific method of allocating degrees of causation between work-related and non-work-related factors, and that is true whether one is considering physical or non-physical causes and effects. The result would therefore be either an arbitrary allocation of degrees of causation or a denial of most chronic stress claims on the basis that the predominant cause simply cannot be determined. Neither result can be justified on the basis of principles underlying the Act.

The commission has therefore concluded that the usual causal significance test should be retained with respect to chronic stress claims. There is nothing unique or specific to such claims, apart from cost containment concerns, which justifies subjecting them to a higher threshold of workplace causation than applies with respect to other types of claims. In the commission's opinion, the cost containment concerns can be addressed by the other measures discussed above and the introduction of a higher standard of proof that work-related factors are of causal significance.

The commission is of the view that in the case of the applicable standard of proof, distinctions *can* be made between chronic stress claims and other types of claims on a principled basis. Applying the current standard of "as likely as not" to the causal significance onus is apt in the commission's view to lead to an unacceptable flood of claims and the potential for widespread compensation for conditions which meet the current low standard of proof but have actually resulted from non-work-related stressors. Increasing the level of certainty which an adjudicator must have regarding the causal significance of work-related stressors is warranted in light of the uniquely pervasive nature of stress in and out of the workplace, and the subjective nature of reactions to stressors.

While it is not generally desirable to interfere with the inquiry model by effectively imposing burdens of proof upon claimants, the practical reality in the case of chronic stress claims is that adjudicators are limited in their ability to independently gather relevant and necessary information relating to the worker's psychological experiences in and out of the workplace and must rely upon claimants as the source of much of that information. There is thus already a *de facto* onus upon workers to provide information necessary to establish their claims irrespective of any legal burden. While that is also true from time to time of other types of claims, it is a feature true of all or nearly all chronic stress claims.



The commission considered whether introduction of a balance of probabilities test (i.e. eliminating the Section 99 provision that evenly balanced possibilities be resolved in the worker's favour) would be appropriate. However, the commission concluded that this is too minor a modification to the current standard and, in the absence of more stringent thresholds such as a predominant cause test of causation, would not suffice to address floodgates concerns.

The commission has therefore concluded that chronic stress claims should instead be subject to a standard of proof by clear and convincing evidence. As discussed earlier in this report, the latter standard has not been consistently defined and it does not seem feasible to define it by reference to a specific percentage. The commission has in mind a standard which is substantially higher than the 50% balance of probabilities, but does not go so far as requiring proof beyond a reasonable doubt.

In summary, the commission is of the view that special restrictions should be placed on chronic stress claims. This is both appropriate in light of the unique features of such claims and necessary in light of the escalating costs which are likely to result in the absence of such restrictions if the current policy restrictions are discontinued. The commission is of the view that the current policy restrictions based on the non-physical nature of the injury or traumatic versus gradual stressors are not justifiable on any basis other than cost containment. The commission recommends that the focus of restrictions should instead be on whether the stress issue is distinguishable from that experienced by other workers both in and out of the workplace and whether it is sufficiently clear that disability exists and that work-related stressors, as opposed to ubiquitous non-employment stressors, played a causally significant role. Such measures address many of the same cost containment concerns while being more rationally connected to features specifically identified with chronic stress claims.

Therefore, the commission recommends that:

195. non-physical conditions arising from non-physical and non-traumatic stimuli or stressors be compensable under the Workers Compensation Act under the following conditions:

- a) the condition is medically recognized in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV)*;
- b) the condition is established by clear and convincing evidence to have arisen out of and in the course of employment;



- c) the stressors leading to the psychological disability are objectively verifiable and are excessive or unusual in comparison with the stressors experienced by the average employee in that type of employment; and
- d) the stressors leading to the psychological disability are not related solely to generic work processes, such as labour relations issues, disciplinary actions, demotions, layoffs, termination or transfer, when done in good faith and in a lawful and non-discriminatory manner; (Dissent: Commissioner O. Exell); and that

196. Section 99 of the Workers Compensation Act be amended to add the exception that where there is doubt on an issue “except for an issue related to whether a non-physical condition arising from non-physical and non-traumatic stimuli or stressors arose out of and in the course of employment,” evenly disputed possibilities must be resolved in a worker’s favour. (Dissent: Commissioner O. Exell)

DISSENT: RECOMMENDATIONS #195 AND 196

The reader will find it paradoxical that the commission’s discussion of chronic stress claims sets out so persuasively the reasons why such claims are problematic but then does an about-face and recommends their allowance as long as certain conditions are met.

As the discussion states,

- the most important feature distinguishing chronic stress claims from all other types of (compensatory) claims is the pervasive nature of stress in everyone’s life;
- (stress) acts on all workers ... both inside and outside the workplace, often in ways which cannot be disentangled;
- almost all claimants will have experienced stressors both related and unrelated to the workplace;
- psychological injury is a highly subjective complaint and is not readily observable;
- stress is a part of every workplace which is not necessarily undesirable;
- in a great many, if not most cases, there is simply no reasonable scientific method of allocating degrees of (chronic stress) causation between work-related and non-work-related factors; and



- in assessing chronic stress claims adjudicators have limited ability to gather relevant and necessary information relative to the worker's psychological experiences in and out of the workplace, and must rely on the claimant as the source of much information.

Regardless of the foregoing, my commission colleagues recommend that chronic stress claims be allowed if, among other things, there is "clear and convincing evidence" that the chronic stress disability was work-related. However, they temper this by saying the evidence would not have to be so convincing as to establish "proof beyond a reasonable doubt." One is tempted to add that such proof might indeed be difficult to establish given the adjudicator's reliance on evidence provided by the person who would be the beneficiary of it.

I fear that my colleagues, though well-intended, offer a proposal that would do damage to the workers' compensation system in British Columbia for a number of reasons. Not the least of these is that they give too little consideration to the burden which such a proposal, if accepted, would place upon the adjudicator in seeking to determine whether chronic stress was wholly work related. He or she would be required to differentiate between undefined "unusual, excessive or unlawful stressors" directly attributable to an employer, and definitive, recognized factors which may cause or contribute to stress in the workplace similar perhaps to those set out by the American Medical Association in its Guidelines for the Management of Occupational Stress. These are: excessive workloads; insufficient work or work control; lack of training, supervision or stability; unresolved personal conflict; inappropriate management practices; lack of support from management or peers; ambiguous role; harassment (sexual, physical, racial etc.); isolation, and physical discomfort.

Further, the adjudicator may feel it necessary to look for other mitigating factors, perhaps including the claimant's personal affairs.

Stress, chronic or otherwise, is inherent in today's workplace, and one might assume it has been with us always. Yet there is no clear scientific and objective evidence acknowledging it should be labeled as an industrial disease. The commission's research shows that among those jurisdictions which have studied the issue, few have implemented compensatory policies. Together with the aforesaid reasons are considerations of cost and duration. The National Council on Compensation in the United States reports that the average cost of a chronic stress claim is 52 per cent greater than the average traumatic injury claim and that chronic stress claims last, on average, 16 weeks longer than physical injury claims and three weeks longer than occupational disease claims.

My colleagues acknowledge that there is no way of calculating the costs of their proposal and that it might open the floodgates to a multitude of claims. But these considerations too are shunted aside.



I accept most of the rationale set out in this section of the report. But from it I draw a different conclusion. Therefore I cannot concur in the attendant recommendations.

The case has not been made for such a fundamental departure from British Columbia's compensatory system—one which could ultimately act to the detriment of those the system is designed to serve by the diversion of existing resources, the requirement for additional revenues, and the potential for creating a whole new arena for conflict and/or the development of sustained adversarial relationships between claimants and their advocates, on the one hand, and the Workers' Compensation Board and its officers, on the other.

Legislative Authority to Restrict Scope of Coverage

One of the most contentious issues surrounding claims relating to psychological disability and other conditions which may arise from multiple causes relates to the potential for skyrocketing costs if such claims are not restricted. This may be an unspoken consideration which has driven the development of limiting factors such as the requirement in mental-mental stress claims that psychological disability be caused by a traumatic event—a requirement which is apparently widely applied by adjudicators, but does not appear on the face of the Act or by necessary implication.

The commission cannot predict with any great certainty the extent to which cost issues may become a concern if various recommendations made in this report are adopted. While the experiences of other jurisdictions are to some extent instructive, there are always differences among jurisdictions which may lead to different results. In addition, many of the issues addressed by the commission have emerged relatively recently and available data is therefore limited.

In light of these concerns, the commission considers it advisable that legislative authority be granted to restrict coverage for certain types of injury or disease as a pure cost containment measure should this become necessary for the continued functioning of the system. In light of the extraordinary nature of such a power, the commission considers it appropriate that such authority be given to cabinet.

"Twenty-Four Hour Coverage"

While the commission has attempted to identify issues and propose solutions, there is no doubt that problems will continue to arise in the adjudication of workers compensation claims. Many of these problems relate to the nature of the inquiry itself rather than to correctable flaws in the manner in which such inquiry is undertaken. The current system might function ideally if one could objectively determine which conditions are work-related and which are not. As discussed



above, there are many situations where such determinations are not possible. If work-relatedness is to remain the criterion for establishing eligibility for benefits, issues will continue to arise regarding the extent to which work must be a causal factor and how causation is to be measured. Lines and boundaries must be drawn where possible, but this is a highly subjective exercise and few boundaries will satisfy all interested parties as fair.

The basis for the criterion of work-relatedness stems back to the historic compromise whereby employers took on the obligation of funding the workers compensation system, primarily in exchange for immunity from actions in tort. Thus, cost distribution lay at the root of the requirement that harm be work-related in order to be compensable. Most of the issues which loom largest today were not considered in the early part of the century when the current system took shape. Great strides have been made since then toward recognizing relationships between the workplace and the development of various diseases. Trends toward increased technology and automation in the workplace as well as toward service and information industries have resulted in fewer of the more causally straightforward types of claims involving workplace injuries, and increases in more causally problematic claims such as those involving repetitive strain injuries, chronic lower back pain and chronic stress.

As a result of these concerns, the commission gave some consideration to more sweeping reforms, including the elimination of the workers compensation system as it is presently constituted. In particular, the commission considered the alternative of a comprehensive no-fault system, under which individuals would be compensated for the consequences of their injuries and illnesses, irrespective of the cause. The commission understands that such a system has been implemented in New Zealand, where it gave rise to considerable controversy and gained both strong proponents and opponents. It has been proposed from time to time in various Canadian jurisdictions (see, for example, Paul Weiler, *Protecting the Worker from Disability: Challenges for the Eighties*, a 1983 report prepared for the Ontario Ministry of Labour), although none have moved toward implementing such a scheme.

Detailed examination of twenty-four hour coverage is beyond the commission's mandate. While the commission is by no means recommending such a drastic change at this time, the commission's conviction grew over the course of its deliberations that a resolution to the problems arising in connection with claims adjudication and particularly the issue of "work-relatedness" may require some expanded access to disability compensation beyond the workers compensation system, either through public policy or through the courts. Whether twenty-four hour coverage would present a better solution would depend upon the design features of such a system. The commission is of the view that this merits further study.

