

Decision of the Appeal Division**Number: 2002-0160****Date: January 22, 2002****Panel: Gail Starr****Subject: Cross-Examination of Board Expert**

NATURAL JUSTICE (CROSS-EXAMINATION) (EXPERT EVIDENCE) – Two medical experts reached opposing conclusions on worker's condition – Worker's representative requested cross-examination of Board orthopedic consultant – When dealing with workers' compensation benefits a high standard of justice is required, but not necessarily breach of natural justice if cross-examination request denied – Panel's task to assess weight of opinions as well as other medical evidence on file – No need for cross-examination for assessment – Ample opportunity to file written material and no breach of natural justice in Review Board's refusal or current refusal to allow the cross-examination.

Decisions: Appeal Division Decision No. 33, 17 *Workers' Compensation Reporter*; *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105; *Innisfil (Township) v. Vespra (Township)*, [1981] 2 S.C.R. 145; *Napoli v. Workers' Compensation Board*, [1981] B.C.J. No. 972 (B.C.C.A.) (Q.L.); *Regier v. British Columbia (Securities Commission)*, [1997] B.C.J. No. 1915 (B.C.C.A.) (Q.L.); *Exchange Bank & Trust Inc. v. British Columbia (Securities Commission)*, [2000] B.C.J. No. 2098 (B.C.C.A.) (Q.L.); *Emery v. Alberta (Workers' Compensation Board, Appeals Commission)*, [2000] A.J. No. 1198 (Alta. Q.B.) (Q.L.).

Natural Justice – Conflicting Expert Evidence – Request for Cross-Examination [worker appeal (rev brd.)]
Appeal Division Decision No. 2002-0160

18 *Workers' Compensation Reporter* p. 123

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- (1) This is the worker's appeal from April 10, 2001 findings of the Workers' Compensation Review Board (the Review Board). The subject matter of the appeal arises out of a November 25, 1998 letter to the worker from a Workers' Compensation Board (the Board) case manager. The letter informed him that temporary benefits under his 1998 low back claim were terminated as of November 22, 1998 on the basis that he had recovered from the compensable condition. It was acknowledged he continued to be disabled due to elbow pain he attributed to overuse during treatment for his compensable injury, but it was reiterated that this condition was not accepted under the claim.
 - (2) In his appeal to the Review Board, the worker was unsuccessful and he has appealed to the Appeal Division under the provisions of section 91 of the *Workers Compensation Act* (the Act). Section 96(3) of the Act authorizes the Appeal Division to reopen, rehear and redetermine any matter that has been dealt with by the Review Board. An oral hearing was requested and denied, with the usual advice that the panel ultimately assigned the appeal might yet decide to hold an oral hearing. In reviewing the claim file and considering the appeal, I have concluded that an oral hearing is not necessary in order to fully consider and fairly decide the issues presented.

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- (3) In his request for an oral hearing, the worker's representative urged that, in view of the Review Board finding that the worker's history of the crucial incident was "flawed," he wished to provide further direct testimony concerning the incident. As the representative also requested that this panel listen to the audiotape of the Review Board hearing, I have done so. In view of the fact that I have now heard the worker's evidence as presented to the Review Board (as well as having reviewed the abundant evidence concerning the incident already on file), I do not find that yet another opportunity to provide this evidence is necessary.
- (4) The representative has also requested the opportunity to cross-examine a Board medical consultant concerning his opinion respecting the worker's elbow condition. I will address this sub-issue in the appeal more fully below; suffice it to say here that I have concluded such cross examination is not warranted. I have considered all relevant provisions respecting expert evidence contained in item #8.0 of Decision No. 33 of the Appeal Division. Of particular relevance are the following:

8.5 Rules for Expert Evidence

2. Objections to a person's qualifications as an expert will not generally cause a panel to exclude evidence. Such argument will be considered by the panel relative to the weight to be given to the evidence received.
 3. The evidence of an expert is admissible in the form of a written report by the expert, without the necessity of the expert attending an oral hearing before the Appeal Division. The correspondence requesting the written report of the expert should also be submitted. An expert's oral evidence will be admissible in a hearing, however, even if a written report has not been provided by them. It is expected that advance notice will be given to the Appeal Division of any expert who will be attending the oral hearing.
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 7. The Appeal Division will not require an expert to attend an oral hearing unless, in the panel's assessment, the attendance is necessary to a fair hearing of the issues or a failure to do so would prejudice a party to the proceeding.
- (5) Another reason supporting his request for an oral hearing was the representative's intention to call witnesses "on the issue of reporting." Again, the evidence of several witnesses is already part of the record and the representative has had ample opportunity to provide evidence from these witnesses in the form of statutory declarations.
- (6) Further, with respect both to the wish of the worker to testify again and to the possibility of hearing more from witnesses, I note that the event in question is alleged to have occurred on or about October 14, 1998. To now, over three years later, invite evidence concerning that incident could not be expected to produce evidence more reliable than the abundant contemporaneous evidence and the reflective evidence presented to the Review Board in its February 21, 2000 hearing (now nearly two years ago). In summary, I do not find that another

oral hearing is necessary in order to fully consider and fairly decide the issues presented by the appeal. I reach this conclusion having carefully reviewed the provisions respecting a request for an oral hearing contained in item #7.2 of Decision No. 33 of the Appeal Division.

Issue(s)

- (7) The principle issue in the appeal is whether the worker's right elbow condition, as it began to be described in medical reports commencing October 27, 1998, is acceptable under the claim as having been caused by his participation in a work conditioning program. A sub-issue concerns the request by the worker's representative to cross-examine the Board orthopedic consultant who provided a report in the course of administration of the claim.

Background and Evidence

- (8) No issue arises out of the low back injury for which the claim was established. It is undisputed that, on September 10, 1998, the worker, a firefighter, twisted and strained his low back while loading a high volume fire hose onto a truck following response to an emergency situation.
- (9) As the worker recovered, he received physiotherapy treatment. His initial visit was on September 16, 1998. He attended again on September 17, 21, 22, 23, 25, 29 and 30 and on October 2, 5, 13 (evidently twice on this day), 14 and 16. It is noted on an October 13, 1998 log entry that the worker's family physician had approved his commencement of a work conditioning program.
- (10) Claim log entries for October 14, 1998 indicate the worker contacted at least two Board officers concerning his claim on that day. In one of these conversations, the worker was made aware he had been referred to the S clinic for assessment. Another telephone memo of the same date indicates he was already aware of this from seeing his family physician the previous day. A further telephone memo of the same day indicates the worker had called the case assistant, apparently the second time on this date, to indicate he had updated his employer concerning his claim; he related that his employer had taken him off the payroll the previous day and marked him "absent without leave" until further notice from the Board. There is a fourth telephone memo dated October 14 and it describes telephone contact with the employer, who expressed some concerns about their ability to provide light duties for the worker. The employer was advised this could be discussed following the worker's attendance at the work conditioning program.
- (11) Although some of the worker's evidence (as described, perhaps mistakenly, in Dr. R's December 1, 1998 letter) suggests October 16, 1998 as the date of the incident, the great body of his evidence indicates that it was on October 14, 1998 that he experienced a sudden onset of right elbow symptoms while participating in the work conditioning program.
- (12) The worker does not dispute that he failed to mention this experience during visits on either October 14 or October 16, 1998, the last two times he saw that physiotherapist. Although the

October 20, 1998 intake assessment of the worker for the S clinic's work conditioning program contains no mention of elbow complaints or of the incident he now describes, it is the worker's evidence he did tell personnel at this new program about his elbow difficulties at that time.

- (13) The first documentation of the incident and elbow difficulty is in the family physician's October 27, 1998 physician's progress report. It is there described as an incident on the rowing machine at the physiotherapist clinic. The diagnosis was of right medial and lateral epicondylitis and the worker's physiotherapy was to be expanded to include treatment to the elbow.
- (14) The Board was first notified of a problem concerning the worker's elbow on October 30, 1998. This is noted in an October 30, 1998 memo in the claim log. The condition is there described, apparently based on communication from the worker, as right elbow tendonitis, and it is described as having arisen while using a rowing machine at physiotherapy. It is recorded that the worker advised the case manager he had been on the rowing machine without a good warm-up when the pain occurred. He did not report it then, he said, thinking it was not too serious. When he began exercises at S clinic, however, he experienced limitations.
- (15) Following the conversation with the worker, the case manager contacted personnel at S clinic and, without recording reasons, the case manager does record that he was inclined to treat the elbow condition as secondary to the supervised treatment. However, after a further conversation with the S clinic's physiotherapist, he decided to defer a decision on acceptability of the condition. The physiotherapist at S clinic advised the case manager that the worker had had significant elbow injuries in the past and that she was not convinced tendonitis or epicondylitis were accurate diagnoses; she seemed to suspect arthritis or some other problem related to old injuries. The claim log entry concludes with an understanding the S clinic physiotherapist would contact the worker's family physician for a prior history and the case manager would consider assessment of the elbow on an investigative basis.
- (16) The further investigation authorized by the case manager was carried out by S clinic physician Dr. R (physical and rehabilitation medicine). For some reason (later described in his December 1, 1998 letter as arising from misplacement of dictation) Dr. R's first consultation report was not immediately available, although follow-up letters dated November 16 and 19, 1998 were available. Neither of those included either a history or a diagnosis. Both letters reported discomfort at or about the elbow.
- (17) On the basis of this information, the case manager recorded in November 23 and November 25, 1998 memos on the file, compensability was denied with the proviso that further information might yet lead to acceptance. The reasons recorded by the case manager in these memos are substantially identical to those given in the November 25, 1998 letter which is here appealed. The late reporting, the lack of any specific incident to account for the condition, the fact that the worker was accustomed to exercise on a regular basis and, in particular, to the use of the rowing machine all led the case manager to conclude there was insufficient evidence to support that the elbow condition was a result of treatment for his compensable injury. It was recorded in the memos, although not in the letter, that the case manager noted a perceived conflict in the worker's having told him he had no history of previous problems while the S clinic physiotherapist was apparently told he had injured the elbow in the past. As stated above, it was not disputed that the worker was disabled due to the elbow condition.

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- (18) Later, in a November 23, 1998 letter, Dr. R recorded his concern that, as there was very little trauma to initiate the pain and it basically “came on spontaneously,” there might be some other cause, especially in view of the fairly lengthy period of reduced activity and rest. He contemplated a tomogram and/or a bone scan.
- (19) In his December 1, 1998 physician’s progress report, Dr. G reported that the worker’s back condition had resolved. He also recorded that he had been the worker’s family physician since 1986 and had never treated him for lateral epicondylitis during that time.
- (20) A December 8 memo by the case manager suggests that it was only then he had seen Dr. R’s November 23 letter. Dr. R’s December 1 letter was eventually received and in it Dr. R thought it “unclear” how the elbow had been injured. The exercise the worker described to him was characterized as brief and non-strenuous.
- (21) At the request of Dr. R, the worker was seen by Dr. Y (orthopedic surgeon). In his February 1, 1999 letter to Dr. R, Dr. Y wrote the following:

Thank you for asking me to see this 46-year-old, . . . regarding his right elbow atypical extensor/flexor tendinitis as a result of his working out on a rowing machine as part of his back rehab program October 14/98.

. . . .

DX: Extensor/flexor tendinitis right elbow.

RX: With appropriate technique in the office today, injection of extensor origin bursa with ½ cc Kenalog 40, 2.5 cc 0.5% plain Marcaine.

Illustrated exercise routine.

To begin physio at [S] specifically for right elbow.

Tennis elbow band.

Return 2 months – if no better, would then consider decompression tenolysis.

Symptoms likely related to injury using rowing machine as part of his back rehab program October 14.

- (22) In a February 18, 1999 memo, the case manager records a telephone conversation with Dr. G, the worker’s family physician. Dr. G informed the case manager that he and Dr. Y (orthopedic surgeon) both thought the diagnosis was a straight forward epicondylitis and that it was related to the rowing activity at physiotherapy. The case manager records that he advised Dr. G he would review Dr. Y’s report; however, he also advised there were non-medical facts (including delays in reporting, previous elbow problems or underlying pathology and no specific incident, all while performing accustomed activity).

- (23) On March 12, May 21 and September 13, 1999 Dr. Y wrote to Dr. G describing the worker's progress. The following information appears in substantially identical language in all three letters:

This 46-year-old, right-handed, 5'11", 220-lb firefighter . . . returns for review of his right elbow tendinitis symptoms as a result of injury working out on a rowing machine as part of his rehab program October 14/98 for a back injury September/98 trying to unload large hose at work for which he has been off work since.

WCB has rejected elbow claim saying that it is unrelated to his back, although clearly he was working out on the rehab program as recommended for his back when he injured his right elbow.

- (24) Although Dr. Y would later come to recommend and to carry out surgery on the elbow (from which the worker had a very good result) the March 12 letter included the following:

DX: Resolving extensor tendinitis right wrist due to injury as part of rehab program for WCB back injury September/98.

- (25) The foregoing represents the medical information available at the time the Review Board commenced consideration of the worker's appeal. (Not all of it is referred to in their findings.) They requested further medical advice and this was provided, first, in a memo from Board medical advisor Dr. A dated May 3, 2000.
- (26) Dr. A described his review of the information on file. He understood the Review Board to be considering the question "whether it is likely that exercising on a rowing machine could cause right extensor tendinitis." He recorded his awareness that the diagnosis of Dr. G at the time of first reporting the condition was of right medial and lateral epicondylitis. He reviewed the investigations undertaken by Dr. R, and it is not necessary to further describe those here. He also noted that the results of Dr. R's investigations were inconclusive. And he noted that Dr. Y had assessed the worker on July 8, 1999 but found his right limb injuries complicated by a subsequent non-compensable injury to two of the worker's right fingers. Following this review by Dr. A, which seems to express no conclusion at all, the file was referred to Board orthopedic consultant Dr. K.
- (27) Dr. K's memo of June 12, 2000 shows he understood the Review Board's concern to relate to "any relationship between exercising on a rowing machine and extensor 'tendonitis' or lateral epicondylitis involving the dominant right elbow." Dr. K provides his own review of the file and then turns his attention to the incident which forms the subject matter of the appeal. He wrote the following:

I have personally assessed the Concept II rowing machine and used it at various resistance settings up to maximum. I have also discussed with Mr. [B] of [the first treating physiotherapy clinic] the machine used by the patient back in October 1998. I have also reviewed relevant literature concerning lateral epicondylitis about the elbow and extensor tendonitis about the forearm and wrist.

Based on the above, it is highly unlikely that this patient's lateral epicondylitis or "tennis elbow" involving the dominant right elbow is in any way related to his use of the rowing machine.

There is a condition of chronic soft tissue irritation, which does involve rowers, canoeists, and weight lifters, called the "intersection syndrome". This involves the extensor tendons just above the wrist and cannot be confused with lateral epicondylitis at the elbow.

In answer to the question set down in the memo of March 15, 2000 it is not likely that exercising on a rowing machine could cause right extensor tendonitis at the elbow. In fact, it is most unlikely.

Argument, Reasons and Decision

- (28) The worker's representative argued before the Review Board, and he argues here, that Dr. K should be called so that he can be available for cross-examination. He observed in his notice of appeal to the Appeal Division that Dr. K's opinion is in direct conflict with the opinion of the treating specialist, Dr. Y. As the Review Board relied so heavily on Dr. K's opinion, the representative argues, the denial of an opportunity to cross-examine him is a breach of natural justice. He refers to section 88(2) of the Act, which gives the Review Board the same power the Board (including the Appeal Division) has under section 87 to compel the attendance of witnesses and examine them under oath. The Review Board recorded in their findings that Dr. K was no longer employed by the Board and that they were, therefore, unable to obtain a copy of his curriculum vitae or to have him available for cross-examination. The representative had also requested that the Review Board (and now the Appeal Division) obtain Dr. K's opinion as to what might have caused the worker's right elbow symptoms if it was not the rowing machine.
- (29) First, I note in passing that the Review Board panel was mistaken to think Dr. K was no longer with the Board. His report in this claim file and the current directory of Board personnel both show him as the Board's orthopedic consultant. The latest edition (like numerous previous editions) of the directory of the British Columbia College of Physicians and Surgeons shows Dr. K to be at the Board. I must consider this as public knowledge which could be confirmed, by anyone who did not have direct access to the above sources of the information, by telephone to any Board office. I also observe that nothing about the power of the Board or of the Review Board to compel the attendance of witnesses is limited to employees of the Board.
- (30) It has also been requested by the worker's representative that a curriculum vitae of Dr. K be made available. I do not find this is warranted in the context of this appeal. I must take the worker's representative to be aware that Dr. K is and has been one of the Board's orthopedic consultants for some time. His reports are to be found in a great proportion of current claim files which involve the need for orthopedic examination and for complex orthopedic opinion. The signature block on his report in this claim file shows that he holds appropriate medical degrees to be performing that function. The directory of the B.C. College of Physicians and Surgeons reveals that he is a qualified orthopedic surgeon who received his training in the

United Kingdom, successfully completing it in 1963, and that he has been authorized to practice in British Columbia for over 25 years. Again, I must consider all of this to be readily accessible public knowledge. Under the provisions of paragraph 8.2 of Appeal Division Decision No. 33, I specifically find that Dr. K is an expert whose opinion in areas covered by his expertise (medicine generally and orthopedics in particular) must be accepted as expert opinion. I also specifically recognize that the opinion of Dr. Y is entitled to the same status, on the basis of his formal education and his certification by the British Columbia College of Physicians and Surgeons. I therefore deny the worker's representative's request for a copy of Dr. K's curriculum vitae, as it is completely unnecessary to have it in order to assess the relevance and weight of Dr. K's opinion.

- (31) As to the request for Dr. K's opinion concerning what caused the worker's elbow condition if rowing did not, I find the request without merit. There is no indication Dr. K – not having examined him – knows any more about the worker's activities in late October 1998 than appears on the file. This paucity of evidence was referred to at the time by the case manager. This panel does not require Dr. K's speculation in response to such a question.
- (32) To continue now with the general sub-issue in the appeal, the worker's representative has argued that to deny him the opportunity to cross-examine Dr. K concerning his opinion in this appeal is a breach of natural justice. In brief, I do not accept this argument, and I will offer a number of reasons. In doing so, I will refer to several judicial authorities. These references need not include extensive explanations of the way those cases arose or the facts to which they related. Most of them are well known leading cases in the field of administrative law. I will deal somewhat more extensively with a recent Alberta case which the worker's representative cites and which he argues should be applied in the present appeal.
- (33) Since even before the now leading decision of the Supreme Court of Canada in *Kane v. University of British Columbia* [1980] 1 S.C.R. 1105 it has been well understood as a matter of the general law of the province (and of Canada) that an administrative tribunal must observe natural justice. This concept of natural justice includes, according to *Kane* and other authorities, giving the parties a fair opportunity to correct or contradict or otherwise examine relevant statements prejudicial to their interests in the case. Examples of prohibited conduct by the tribunal are holding private interviews with witnesses or showing actual or potential prejudice to a party.
- (34) Further, and also from the Supreme Court of Canada, the decision in *Innisfil (Township) v. Vespra (Township)* [1981] 2 S.C.R. 145 stands for the proposition that the right to cross-examination is solely that of the rights holder. By implication, the perception that cross-examination will not assist the cross-examiner's case is no reason to deprive the rights holder of that right. Thus, a tribunal's possible view that exercise of the right would produce no result favourable to the rights holder is not a permissible basis for denying exercise of the right.
- (35) From the same era as *Kane* and *Innisfil*, a landmark case concerning natural justice in the British Columbia workers' compensation context is *Napoli v. Workers' Compensation Board* [1981] B.C.J. 972. This case involved the appeals of two workers at a time when claim files were

not yet available to workers through the present disclosure process. In the course of the appeal, one of the workers had been given summaries of medical reports on his file, some of which cast aspersions on his honesty and on the *bona fides* of aspects of his condition. One worker was not even given summaries. The case resulted in a holding by the B.C. Court of Appeal that claim files should be disclosed to workers. In articulating this decision, the court observed that the worker's counsel would want to challenge some of the statements contained in the summaries. It is of significance that the court in *Napoli* referred to *Kane* and considered that workers' compensation benefits, like the right to continue in one's profession or employment, required "a high standard of justice." The issue of cross-examination of the authors of medical reports was not before the court in *Napoli*, but it is clear from the reasons that at least one of the purposes of making claim files available to workers was to allow challenge to the information contained in them.

- (36) Two recent British Columbia Court of Appeal decisions have dealt with this issue, although they are less directly relevant in the present context than an Alberta Queen's Bench decision to be discussed below.
- (37) One of these is a case of some relevance to the present issue, although in the securities regulation context, is *Regier v. British Columbia (Securities Commission)* [1997] B.C.J. 1915. In this case the Court of Appeal found there was no breach of natural justice in the commission's denial to a party of the opportunity to cross-examine the source of hearsay evidence. The primary reason for this was that the Court of Appeal saw nothing in the commission's ultimate reasons that suggested the hearsay evidence had played any role in their decision.
- (38) The Court of Appeal again found no breach of natural justice in the commission's refusal to order commission staff be produced for cross-examination on their affidavits in respect of matters in dispute. This is *Exchange Bank & Trust Inc. v. British Columbia (Securities Commission)* [2000] B.C.J. 2098.
- (39) A recent case before the Alberta Court of Queen's Bench has been brought to this panel's attention by the worker's representative. This case is *Emery v. Alberta (Workers' Compensation Board, Appeals Commission)* [2000] A.J. 1189. At first blush, it is quite similar to the present fact situation in that the worker's request for an opportunity to cross-examine the Alberta Commission's medical consultant was denied. Following a commission hearing, the Commission sought the opinion of a Dr. H. The worker's counsel was allowed to respond to Dr. H's opinion by way of written submission. The commission relied heavily on Dr. H's opinion in reaching its decision, which was contrary to the worker's interest. The worker's counsel challenged the credibility of Dr. H in court, at least partly on the basis that he was a former employee of the Alberta Board. The court allowed the appeal, finding the denial of the opportunity to cross-examine Dr. H was, in the context of all factors, a denial of natural justice by the Commission.
- (40) The Alberta Court briefly reviewed the legal implications of the rules of natural justice in this context. They observed that, where the right of cross-examination was not required by the applicable statute, the tribunal governs its own procedure, subject to the rules of natural justice. They went on to say that courts will determine the refusal by a tribunal to allow cross-examination in such circumstances on the basis of whether the procedure was fair, whether

the tribunal exercised its discretion in good faith and whether the tribunal listened to both sides. Numerous authorities are cited. Other cases are also referred to show that factors tending to support a right to cross-examine include important issues of credibility, the vital importance of evidence to the matter at hand (including situations where evidence has been offered through a special relationship) and combinations of these factors. I am advised the Alberta Appeals Commission has not appealed that decision.

- (41) In *Emery*, the court concluded that several factors indicated that the worker should have had an opportunity to cross-examine Dr. H. With regard to his challenged credibility, the court saw issues in the absence of any information as to whether Dr. H had experience with the disease in question and/or any appropriate special qualifications. Importantly, the court thought that “the answers to such questions could have had a significant impact on the *weight* to be given [Dr. H’s] evidence” [emphasis added].
- (42) The court also observed that Dr. H was requested to provide an opinion in the first place because the previously received opinion of a Board medical advisor had been found inadequate or unsatisfying. Further, there was little evidence either the first opinion or Dr. H’s opinion was based on known, published standards concerning the noxious material to which the worker was exposed. The court went on to describe other factors peculiar to the facts of the *Emery* case, none of which diminish the evident distinctions which may be drawn between *Emery* and the present appeal.
- (43) I have carefully reviewed the *Emery* decision and have concluded it does not apply to the facts of the present appeal. The facts of *Emery* involve a rare disease (Wegener’s Granulomatosis). The worker saw a number of specialists following his uncommon exposure to aviation fuel (doused with 10 to 20 gallons of the fuel and unable to shower for seven or more hours). Dr. H, from whom an opinion was requested when previous medical opinion was found inconclusive, apparently had no specialist qualifications, while previous material on file suggested an immunologist’s opinion should have been sought.
- (44) I find the facts of the present appeal markedly different from those in *Emery*. As I have found above, both Dr. K and Dr. Y are accepted as experts within the meaning of Appeal Division Decision No. 33. They share the same appropriate specialization. With slightly different information available, they have come to different conclusions concerning causation of the worker’s elbow difficulties as investigated in 1999 and 2000. We are not dealing with a complex, highly technological question here. The question is a relatively simple one, one that might be regarded as a garden variety orthopedics question of the likely causation of a given injury. Two experts have come to different opinions. Each is entitled to that opinion and it is the panel’s task in this appeal to assess the weight of those, and other, medical opinions on the file. Neither needs to be cross-examined to do that.
- (45) Following a review of the medical opinion available to me and of the authorities canvassed above, I do not find there has been any breach of natural justice in the refusal of the Review Board or in my own refusal to allow the cross-examination of Dr. K. The worker’s representative has had ample opportunity to file written material, including the specialized opinion of Dr. Y as expressed in several of his routine reports and, more particularly, in the medical legal opinion letter of July 24, 2000.

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- (46) I turn now to the substantive issue in the appeal, namely the issue of the likely causation of the worker's elbow condition.
- (47) I have considered carefully the factors set out by the case manager in the November 25, 1998 letter to the worker which is here appealed. The case manager, as the foregoing has shown, did not have available all the medical opinion which is now available on the issue. However, I regard as thorough the assessment offered by the case manager of the various factors about the worker's background suggesting that the rowing machine activity was not likely to have caused the condition complained of and diagnosed. I have concluded that the concern about previous elbow injuries raised by the physiotherapist at the S clinic was a red herring; I accept the worker's evidence, supported by his family physician, that he had not had a significant elbow injury before. However, in addition to the factors considered by the case manager (and by the Review Board) I find I am not able to accept the worker's evidence, offered as a challenge to the case manager's view, that he was inadequately warmed up before using the machine. It is the worker's own evidence that this was the last activity of the session. He had already attended 12 previous sessions at that clinic, and I do not find it plausible that he would not have known to warm up or that he would not have been warmed up as he approached the rowing at the end of his session. This, together with the delays in reporting, no specific acute onset, the accustomedness of the worker to that exercise on that machine, the inconsistent evidence offered to those eventually told of the incident – all these factors together make it impossible for me to accept the worker's opinion that exercise on the rowing machine was the cause of his diagnosed condition.
- (48) Turning to the medical opinion as to causation, I note that it is not simply a contest between the opinion of Dr. Y and the opinion of Dr. K. I will state here that I prefer and accept the opinion of Dr. K in this matter. I find his report is well supported by recited facts and by his own investigation concerning the treatment being provided to the worker and the precise equipment being used. His opinion is reasoned and supported by medical description of other conditions which might be caused by such activity, and he is clear in saying that it is "most unlikely" such activity would have caused the condition complained of and diagnosed.
- (49) I find support in my view of Dr. K's opinion in the overall opinion of Dr. R, as documented on the file in November 23 and December 1, 1998 letters. Dr. R was obviously reluctant to believe that the condition he saw and diagnosed would have been caused by the non-strenuous and accustomed activity of this worker using the rowing machine. In both his letters, Dr. R records that it is unclear how the injury could have occurred as described by the worker.
- (50) With regard to the opinion of Dr. Y, I am unable to consider it a strong and supported opinion. As I have noted above, his several letters state the worker's history of the event. He even expresses his opinion as being "from history." His medical/legal report does, in terms, concede that Dr. K has more direct sources supporting his opinion than he, Dr. Y, does.
- (51) I acknowledge that the opinion of Dr. G supports the worker's position, but I give more weight to the opinion of specialists in this case and, as I have indicated, I find the greater weight should be given to the opinion of Dr. K.

(52) For the reasons indicated, the worker's appeal is denied.

Editors' Note: The names of the parties have been removed for privacy considerations. The text of the decision is otherwise unchanged.