

## Decision of the Appeal Division

**Number:** 92-0817  
**Date:** April 15, 1992  
**Panel:** Connie Munro, Chief Appeal Commissioner  
**Subject:** Section 96(2) Application — M.R.P. Certificate

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This is an application pursuant to Section 96(2) on behalf of the worker with respect to the former commissioners' decision of June 5, 1987. The allegation by the worker's representative is that the commissioners' decision contains an error of law. This application is based on the January 6, 1992 resolution by the Board of Governors which provided:

RESOLVED THAT the Appeal Division of the Workers' Compensation Board of British Columbia shall exercise the authority of the Workers' Compensation Board of British Columbia under Section 96(2) of the *Workers Compensation Act* to reopen, rehear and redetermine any decision made by the former Commissioners prior to June 3, 1991, where the Chief Appeal Commissioner finds that the decision was based upon an error of law or involved or involves an issue under the *Canadian Charter of Rights and Freedoms*; . . .

The worker appealed to a medical review panel a 1985 decision denying him a permanent disability pension for compensable left knee problems. The medical review panel found that the worker was suffering from a disability which they described as "functional." The medical review panel certificate went on to say that the panel could not detect any physical abnormalities with regard to the knee but that the worker's disability

consists of a hypersensitivity to light touch over the left infra patella tendon, unrelated to any other detectable abnormality. This prevents him from climbing or kneeling and leads to an apprehension about height because of fear of losing his balance. This relates to a feeling of insecurity with respect to his left knee.

The panel also certified that the worker had no pre-existing problems with his knee and that the eventual outcome of his disability was unpredictable.

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The Board initially interpreted the certificate to mean that the worker had a psychological disability, however, he was denied a permanent partial disability award on the basis of an examination by a Board psychologist who felt that the worker was not psychologically disabled. That decision was appealed to a Review Board who contacted the original medical review panel. The chair of the medical review panel, Dr. S, wrote to the Review Board on November 3, 1986 stating:

. . . the term functional was used to describe a hypersensitivity to light touch over the left infrapatellar tendon, which prevented him from climbing, kneeling and caused an apprehension about working on heights because of the fear of losing his balance.

Dr. S also stated:

Such syndromes are known to occur following injury and they may not be associated with any psychological disability.

The Panel report did not mean to imply that his complaint was psychologically based, but merely that it interfered with function.

After reviewing the letter from Dr. S the Review Board found that the worker was in fact suffering from a real disability and that the Board should determine whether it was temporary or permanent, and if permanent, assess an appropriate pension.

The Review Board finding was referred to the commissioners on the basis of two criteria:

- 1) that the findings conflicted with the decision of the medical review panel on the same claim; and
- 2) that the findings amount to an original decision rather than a conclusion on the appeal.

Before proceeding further, I would comment that there is no apparent substance to the allegation that the Review Board decision constituted an original decision. Decision No. 403 in the *Workers' Compensation Reporter*, Vol. 6: p. 50, in which the criteria for referral are set out, indicates that the term *original decision* used in Decision No. 403 has the same meaning as in Decision No. 280 (*Workers' Compensation Reporter*, Vol. 4: p. 43). Decision 280 states:

There are occasions when a Board officer has made a decision on fundamental issues placed before him by the claim, such as whether the claimant is a worker under the *Act* or whether the

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injury arose out of and in the course of employment, but no decision has been made on some other issue which may still be part of the same claim. In those cases, where it is clear that the issue considered by the Board of Review, although not specifically referred to by the original decision-maker, is one which should properly have been considered on the occasion of the original decision, and as long as no new claim and no new original documentation is required, a Board of Review decision on that issue will not be objectionable as being “original.”

The allegation that the Review Board decision in this case was an “original decision” cannot be sustained.

I turn then to the allegation that the Review Board decision contravened the terms of the medical review panel certificate. The commissioners agreed with the claims adjudicator that the Review Board decision should not be implemented because:

The Commissioners consider that the Board is precluded from accepting your continuing complaints as being the result of your 1979 injury, in light of the binding effect of the Medical Review Panel’s decision.

The Review Board had taken the unusual step of going back to the medical review panel for clarification of their certificate as indicated in the letter from Dr. S referred to earlier. The findings of the Review Board only repeated the explanation by Dr. S clarifying the medical review panel certificate.

The June 5, 1987 commissioners’ decision stated:

Section 61(1) of the *Workers Compensation Act* provides the Medical Review Panel Chairman with the legal authority to certify on behalf of the Panel. The Commissioners accept the 3 November 1986 letter from Dr. S as clarifying the Panel’s Certificate of 23 September 1984.

The commissioners purportedly accepted the legally binding effect of the medical review panel certificate, as clarified by the medical review panel chairman. The question to be determined, therefore, is whether their determination of the worker’s compensation entitlement, in implementation of the medical review panel certificate, was so patently unreasonable as to amount to a failure to implement the medical review panel decision or otherwise constituted an error of law.

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The medical review panel clearly stated in its certificate that the worker had a disability. The panel's response to Issue #6, as to whether there were two or more causes of this disability, was "not applicable." The effect of these findings was to establish that the worker had a disability, and that this disability was solely due to the compensable injury.

Entitlement to compensation will normally be established by a finding that a worker has a disability as a result of a compensable injury. In this case, however, the commissioners appear to have focused on two separate statements by the panel in coming to the conclusion the worker had no compensation entitlement. These were the statements that:

**Clause 5 of the Certificate:**

All physical aspects of his injury have resolved, but he remains abnormally apprehensive.

**November 3, 1986 Letter of clarification:**

Such syndromes are known to occur following injury and they may not be associated with any psychological disability. The Panel report did not mean to imply that his complaint was psychologically based, but merely that it interfered with function.

The commissioners evidently took these two phrases, namely, that all physical aspects of the injury had resolved, and that there was no psychological disability, and concluded that this left no room for a finding of compensation entitlement. In so doing, however, the former commissioners appear to have lost sight of the fact that the worker was suffering from a disability as a result of his compensable injury.

It would seem that the commissioners were presuming that in order to be compensable the worker's disability had to be one which could be clearly characterized as either physical or psychological in nature. In the context of the panel's decision, however, it is evident that the worker's disability was one which could not be easily categorized. This does not negate the fact that this "syndrome," as it was described by the medical review panel, resulted in an impairment of function, constituted a disability, and was due to the compensable injury. The worker is entitled to compensation for his disability. The conclusion that he has a disability is binding on the Board.

In concluding that the worker had no compensation entitlement, the commissioners failed to implement the finding by the medical review panel that the worker was suffering from a disability as a result of his compensable injury. Their decision

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represented a patently unreasonable interpretation of the medical review panel certificate. It was, therefore, contrary to Section 65 of the *Workers Compensation Act*, which provides that a medical review panel certificate is conclusive as to the matters certified and is binding on the Board.

I have concluded that the June 5, 1987 decision of the former commissioners, to overturn the December 4, 1986 Review Board finding, was unlawful. I have, therefore, proceeded to “reopen, rehear and redetermine” the matters addressed in that decision pursuant to Section 96(2) of the *Act*.

Having reviewed the entire matter, I am in agreement with the December 4, 1986 Review Board finding.

A decision dated June 12, 1989 was made by the Claims Division in implementation of the December 4, 1986 Review Board finding. This was to fulfill the requirement that the Review Board finding be given effect up to the date of the former commissioners’ decision pursuant to Section 92. This decision was appealed to the Review Board, which allowed the worker’s appeal in a finding dated February 20, 1990. This Review Board finding was in turn implemented by the claims adjudicator on June 7, 1990. The worker appealed that decision to the Review Board, which denied his appeal in a finding dated February 28, 1992 (mailed on March 2, 1992).

A Notice of Appeal dated April 7, 1992 has been received from the worker, together with a letter of the same date from his representative with reasons for the delay in appealing. An extension of the 30-day time limit for appealing the Review Board finding to the Appeal Division is granted. Once that appeal is considered by the Appeal Division, this decision can be given full force and effect by the appropriate permanent partial disability award being paid subsequent to the June 5, 1987 commissioners’ decision.

In the result, the commissioners’ June 5, 1987 decision overturning the findings of the Review Board dated December 4, 1986 is declared unlawful. The findings of the Review Board are to be given full force and effect as if the commissioners’ decision had not occurred.

*Editors’ note: This decision has been edited for publication.*

