WORKERS' COMPENSATION
REPORTER

Decision of the Appeal Division

Number: 92-0818
Date: April 14, 1992
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Section 59 – Medical Review Panel Appointments

A letter dated January 21, 1992 has been received from the ombudsman requesting reconsideration of a decision of the former commissioners not to convene a second medical review panel to examine the worker.

The governors' Decision No. 8 in the *Workers' Compensation Reporter*, Vol. 7(4): p. 171, gives the Appeal Division the authority to hear this request. The governors delegated to the Appeal Division, in certain circumstances, the Board's statutory discretion to reopen, rehear and redetermine decisions of the former commissioners. This additional authority was assigned to the Appeal Division in the following terms:

> 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*; and that the appropriate amendments be made to the *Rehabilitation Services and Claims Manual*, *Assessment Policy Manual* and *Occupational Safety & Health Division Policy and Procedure Manual*.

The resolution was effective as of January 6, 1992.

The worker was injured October 18, 1976. He underwent Board-authorized surgery but thereafter continued to complain of low back pain and weakness of both legs.

Dr. F. T, a neurological consultant to the W.C.B., examined the worker. In Memo No. 29 dated August 11, 1977, he described the worker in the following terms:

> He seems to be in a state of some psychological turmoil. There is abnormal dependence on the low back belt with the absence of corroborative abnormal objective evidence of low back disability. Much of his trouble is not organic insofar as his back and nerve roots are concerned but he got off to an unfortunate start when he tried to return to work and since then he has no confidence now that he can ever get back to the physical (sic) that he was at prior to the return to work in April. There might be some general metabolic cause for his complaint of generalized weakness which is not born (sic) out by the physical examination. I don't think that anything is gained now by further physiotherapy. In spite of his objections he should be encouraged to develop the muscles of his buttocks and abdomen by exercise and enable him to get along without the belt and also to take graduated walking exercises. However, if he persists in his complaint of gross weakness of both legs, he deserves to have a very complete medical checkup before trying to push him with the exercise regime.

On April 10, 1980, the worker requested examination by a medical review panel. He submitted a physician's certification that there was a bona fide medical dispute to be resolved. The worker stated in his application:

> Dr. F. T the Board's neurological consultant filed an incomplete report to the point that it showed a false picture of my condition. Or he is incompetent in his field of medicine.

It is the practice of the Board to send a copy of the worker's application to the medical review panel.

When the worker learned that his employer had chosen Dr. I. T to be a panel member, he inquired by telephone about the relationship of Dr. I. T to Dr. F. T. In a letter dated November 3, 1980, a solicitor from the Board's Legal Services Department confirmed the father/son relationship between the two physicians. He advised the worker that the *Workers Compensation Act* (the *Act*) did not specify a father/son relationship as a bar to membership on a medical review panel and said that he had no authority to change the membership.

On November 8, 1980, the worker wrote to the solicitor protesting Dr. I. T's inclusion on the panel.

On November 25, 1980, the solicitor wrote to Dr. K, the medical review panel chairman, referring to correspondence Dr. K had received from the worker and enclosing the correspondence between himself and the worker on the subject of the composition of the panel.

In a letter dated July 20, 1988, the worker's counsel wrote to the Board requesting that the worker be granted an examination by a newly constituted medical review panel partly on the basis that the proceedings leading to the medical review panel certificate of December 5, 1980 violated the principles of natural justice that a person called upon to judge a case be impartial or free from bias.

In a letter dated August 23, 1988, the Board's director of appeals administration advised the worker's counsel that the former commissioners had decided not to allow the worker to be examined by a newly constituted medical review panel.

In a letter dated February 1, 1990, an ombudsman officer wrote to the Board, proposing under subsection 14(2) of the *Ombudsman Act* that the worker be examined by a second medical review panel. It was submitted that the rules of natural justice override arguments that the inclusion of Dr. I. T as a panel member was within the strict legal interpretation of Section 58 (now Section 59).

In a letter dated June 19, 1990, the general counsel and secretary to the Board informed the ombudsman officer that the former commissioners were unable to accept her proposal and would not convene a second medical review panel to examine the worker.

In a letter dated January 21, 1992, Stephen Owen, then ombudsman, requested that the Appeal Division consider the worker's case under the grounds set out by the governors' *Decision No. 8*.

In a letter dated March 30, 1992, the worker made some further submissions.

Issues

This application raises the following three questions:

1. What is the effect of the appointment provisions in Section 59 of the *Act* on the common law rules of natural justice relating to bias?

2. Did the inclusion of Dr. I. T as a member of the medical review panel which examined the worker in 1980 violate the common law rules of natural justice relating to bias?

3. If the inclusion of Dr. I. T violated the common law principle that an adjudicator be disinterested and unbiased, what is the effect of this on the validity of the certificate issued by the medical review panel?

In the letter dated July 20, 1988, the worker's counsel stated that:

> A reasonable apprehension of bias existed with respect to the panel that examined [the worker] and as such is a ground for quashing the certificate of December 5, 1980. The test is whether the apprehension is one that reasonably well informed persons could properly have.

Worker's counsel went on to argue that Section 59 of the *Act* does not derogate from the common law principle of natural justice and is not intended to be exhaustive of all the relationships that may give rise to an apprehension of bias. It is submitted that the prohibitions in Section 59 demonstrate recognition by the legislature of a reasonable apprehension of bias when there is a close association between a consulting or treating physician and a physician who is a panel member. Worker's counsel concluded that "there may be in fact be a greater real likelihood of bias resulting from a father/son relationship than from the relationships and associations specifically set out [in] section 59."

In the letter dated February 1, 1990, the ombudsman officer reiterated that Section 59 of the *Act* is not intended to be exhaustive of all the relationships that may give rise to bias. She noted that to suggest that there was a reasonable apprehension of bias in the composition of the medical review panel is not tantamount to suggesting that the medical review panel acted improperly or was partial in its decision. It is the appearance of neutrality at issue in the circumstances of this case and "The Panel should not only be impartial but should appear impartial."

In discussing the common law on bias, the ombudsman officer relied on a passage from de Smith's *Judicial Review of Administrative Action* (J.M. Evans, 1980) at p. 67:

> Family relationship between a judge and counsel does not appear to be exceptionable, but it has been suggested that judges are disqualified from sitting in cases where near relatives are witnesses. There is no reason for differentiating between the court and administrative tribunals in these matters. In a Canadian case the decision of a tribunal was set aside because the chairman was the husband of an executive officer of a body which was party to proceedings before the tribunal.

Reliance was also placed upon *Metropolitan Properties Co. (F.G.C.) Ltd.* v. *Lannon*, [1969] 1 Q.B. 577. The decision of a rent assessor was unanimously dismissed on the ground that he had in the past acted for his father and other tenants in disputes against the same landlord involved in the rent assessment dispute. Lord Denning's judgment stated at p. 599:

> . . . in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. *The court looks at the impression that would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit and if he does sit, his decision does not stand.* Nevertheless, there must appear to be real likelihood of bias. Surmise or conjecture is not enough . . . There must be circumstances from which a reasonable man would think it likely or probable that the justice or chairman as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: And confidence is destroyed when right-minded people go away thinking: "The judge was biased" (emphasis is added).

Lord Denning went on to state at p. 600:

> Everyone would agree that a judge, or a barrister or solicitor (when he sits as a member of a tribunal) should not sit on a case to which a near relative or a close friend is a party.

The Board's letter dated August 23, 1988 stated:

> The Commissioners consider that the provisions of section 59 are clear and do not extend to prohibit a father-son relationship such as the one that has occurred in the present case.

It also stated that the former commissioners did not consider that, in this particular case, there was evidence of bias. The narrative report which accompanied the 1980 certificate contained a recitation of all the medical evidence considered in the worker's case.

The Board's letter dated June 19, 1990 makes a number of points. It indicates quite clearly that the former commissioners were of the opinion that Section 59 of the *Act* is exhaustive of all the relationships that may give rise to bias. This conclusion was reached by relying on the principle of language that mention of one or more things of a particular class may be regarded as silently excluding all other members of the class. The maxim *expressio unius exclusio alterius* encapsulates this principle.

The June 19, 1990 letter also indicates that the former commissioners interpreted Lord Denning's judgment in the *Metropolitan* case narrowly. It is noted that the facts in the *Metropolitan* case were very different from those in this case:

> In the *Lannon* case, Mr. John Lannon was, in his appellate capacity, considering the appeal of a landlord *against whom he was assisting* his father in another case before the tribunal whose decision was the subject of the appeal. *In dealing with the appeal before him, Mr. Lannon was required to adjudicate on the very arguments he was seeking to controvert on behalf of the party in that other case.* Mr. Lannon would have been disqualified even if the party he was assisting before the tribunal of first instance had been a total stranger. The fact that the other party was his father was incidental.

Moreover, the former commissioners were of the view that the case law underlying the de Smith passage quoted earlier did not assist the worker's case. They stated:

> The "Canadian case" [mentioned in the last sentence of the de Smith passage] was *Sacred Heart* v. *Armstrong's Point*, a decision of the Manitoba Court of Appeal. In the case, a panel of the Manitoba Municipal Board was dealing with an appeal by an unincorporated association of home owners against a decision by the Winnipeg Zoning Board to permit a non-conforming use of property by a private school in a Winnipeg neighbourhood. The chairman of the Manitoba Municipal Board panel lived in that neighbourhood and the chairman's wife was an executive officer of the Association. In other words, not only did the chairman have a personal interest in the outcome of the appeal, but a close family member was, in essence, one of the parties to the dispute before him. As stated previously, there is no evidence that Dr. F. T is related to either party of [the worker's] medical review panel appeal.
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> The Commissioners note that the first sentence in the passage from de Smith was, according to the footnote, taken from a 1954 volume of the *South African Law Journal*. It is a reference to a mere "suggestion"

> only. In the circumstances, the Commissioners do not consider that this passage constitutes binding authority upon the Workers' Compensation Board in making decisions under British Columbia law.

On the nature of the medical review panel proceedings, the former commissioners found that, although the traditional notion of a "witness" most closely approximates Dr. F. T's position in the medical review panel appeal, the use of this term in connection with the medical review panel proceedings "strains it interpretation." The former commissioners suggested that "[t]he medical review panel is not a decision-making body confined to weighing the evidence of 'witnesses' and coming to a conclusion . . . the essence of the appeal is the *examination* of the claimant by the medical review panel, itself."

The governors' resolution adopted in *Decision No. 8* empowers the Appeal Division to reopen, rehear and redetermine the former commissioners' decisions where the chief appeal commissioner finds that they were based upon an error of law or involve an issue under the *Canadian Charter of Rights and Freedoms*. The question arises as to what constitutes the proper standard of review where decisions of the former commissioners are involved. By virtue of the governors' resolution, does the Appeal Division have the power to redetermine a decision where there has been any error of law — be it a minor procedural error, an error hardly likely to have had any real influence on the decision reached, or a reasonable error? Alternatively, is "patently unreasonable" the proper standard to apply?

In light of the fact that the former commissioners' decisions were protected by a privative clause, I find that, in general, the test must be whether their decision was so patently unreasonable that it cannot be rationally supported by the relevant legislation. However, in the case of decisions pertaining to natural justice issues, it is my view that the Appeal Division's scope of review is broader. In such cases, the Appeal Division must have the power to redetermine decisions of the former commissioners on the grounds that they misinterpreted the law, irrespective of whether the misinterpretation can be characterized as "patently unreasonable." This is consistent with various judicial pronouncements on the standard of review applicable to decisions involving natural justice issues.

In the context of judicial review, the view that the "patently unreasonable" test does not apply to decisions bearing on natural justice issues was put forth (in what is admittedly *dicta*) by Lysyk J. in *Funaro* v. *Workers' Compensation Board* (1985), 66 B.C.L.R. 308 (B.C.S.C.). Lysyk J.'s view appears to have secured the support of the B.C. Court of Appeal in *Murphy* v. *Dowhaniuk* (1986), 7 B.C.L.R. (2d) 335 (B.C.C.A.).

There is substantial judicial authority for the proposition that questions of jurisdiction must be answered correctly and that a statutory delegate who breaches the provisions of natural justice commits a jurisdictional error, thereby losing the protection of a privative clause (see *Service Employees' Int. Union, Locl 333* v. *Nipawin Dist. Staff Nurses Assn.*, [1975] 1 S.C.R. 382).

In the case before me, the former commissioners' decision concerned the question of whether the medical review panel was properly constituted or whether it had the jurisdiction to engage in the inquiry it did. Because the former commissioners' decision concerned a jurisdictional question there is no room for error, whether the error is reasonable or not. Section 59 of the *Act* provides that the Board shall appoint the two specialists on the three-member medical review panels. Under this section, the Board, for this purpose the former commissioners, had the responsibility to ensure that the medical review panel was properly constituted.

I conclude that an error concerning a natural justice issue puts the former commissioners' decisions outside of the protective ambit of the privative clause.

There is no question that statutes may exclude all or some of the principles of natural justice either by express words or by necessary implication. The difficult question is whether statutes which outline some procedures for the tribunals they create should be taken as implicitly excluding any procedural requirement which would otherwise arise from common law.

Subsection 59(1) of the *Act* provides for the following procedure:

> 59. (1) On receipt of the expression in writing made under section 58(3) or (4), or on a decision being made under section 58(5), the board shall, within a reasonable period of time, by notice by registered mail, require the worker and his employer each to nominate, from the list mentioned above, within 8 days after receipt of the notice, one specialist in the particular class of injury or ailment in respect of which the worker has claimed compensation, but no specialist may be a member of a medical review panel who
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> (a) examines workers on behalf of the employer;
> (b) has treated the worker;
> (c) has acted as a consultant in the treatment of the worker; or
> (d) is a partner of, or practises medicine together with such specialist,
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> and there shall not be on the same panel specialists who are partners or who practise medicine together.

The former commissioners took the view that the Board's compliance with this provision was its sole duty. According to this view, where a detailed code of procedure is provided, there is no room to "supply the omission of the Legislature." The underlying assumption is that the Legislature has addressed the question of fair procedures and that it is not for the Board to amend the section by adding provisions which would define a more complete set of such procedures. This view rests, therefore, on the interrelated arguments that the *expressio unius* doctrine applies to the interpretation of subsection 59(1), that it limits the requirements of natural justice in medical review panel proceedings, and that this represents the intention of the Legislature.

An English line of cases has endorsed this approach: *Malloch* v. *Aberdeen Corporation*, [1971] 2 All E.R. 1278 at 1287 (H.L.), *Wiseman* v. *Borneman*, [1971] A.C. 297 at 315 per Lord Donovan (H.L.) and *Furnell* v. *Whangarei High Schools Board* [1973] 2 W.L.R. 92(P.C.) at 105 per Lord Morris.

Some Canadian cases followed this approach. In *Labour Relations Board* v. *Traders' Service Ltd.*, [1958] S.C.R. 672, Judson J. for a majority of the Supreme Court of Canada said at p. 677: "A board such as the Labour Relations Board is required to do its duty but that duty is defined by the *Act* and the regulations. What more can a board do in a case of this kind?" In *Calgary Power Ltd.* v. *Copithorne*, [1959] S.C.R. 24 at p. 33 Martland J. expressed similar views. He stated:

> [I]t is significant that there is no requirement as to the giving of notice or the holding of any inquiry in relation to the expropriation itself, although there are specific provisions as to notice and as to arbitration proceedings in relation to the determination of the compensation to be paid in respect of the land or interest in land expropriated.

In all of the above cases, the judges who applied the *expressio unius* maxim were of the opinion that the common law principles of natural justice either had not been breached or were not applicable, quite apart from the possibility of exclusion by code. Their statements were *obiter dicta* but that is not to say that they should be disregarded. They do not, however, settle the question of whether the *expressio unius* maxim ought to govern in the area of natural justice.

A number of Canadian decisions have not allowed the application of the *expressio unius* maxim in respect of the area of natural justice.

In *Re Nicholson* (1978), 88 D.L.R. (3d) 671 (S.C.C.), Nicholson served as a constable for 15 months and was discharged by the Board without being given an opportunity to make submissions. He sought review and succeeded in the Divisional Court. An appeal by the Board was allowed, and Nicholson appealed to the Supreme Court. Arnup J.A. of the Ontario Court of Appeal had relied on the *expressio unius* maxim by noting that "the Legislature has expressly required notice and hearing for certain purposes and has by necessary implication excluded them for other purposes."

Chief Justice Laskin, speaking for a majority of the Supreme Court of Canada overruled the application of the maxim by the Court below. He stated at p. 678:

> In so far as the Ontario Court of Appeal based its conclusion on the *expressio unius* rule of construction it has carried the maxim much too far. This court examined its application in *L'Alliance des Professeurs Catholiques de Montreal* v. *Labour Relations Board of Quebec* . . . 2 S.C.R. 140, 107 C.C.C. 183, and rejected an argument for its application to deny notice and hearing in that case. Rinfret C.J.C. referred *inter alia* to the judgment of Farwell L.J. in *Lowe* v. *Dorling and Son*, [1906] 2 K.B. 772 at p. 785, where mention is made of *Colquhoun* v. *Brooks* (1888), 21 Q.B.D. 52, and of the statement of Lopes, L.J., at p. 65, that "the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is applied, leads to inconsistency or injustice". This statement commends itself to me . . .

Other cases adopting a view similar to that propounded by Laskin C.J.C. in *Nicholson* include: *Knapman* v. *Board of Health for Saltfleet Township 919560*, 6 D.L.R. (2d) 81 at 83, per Cartwright J. (S.C.C.), *Copithorne* v. *Calgary Power Limited* (1957), 22 W.W.R. 406 at 425 per Porter J.A. (Alta. S.C.A.D.), *Howarth* v. *National Parole Board* (1975), 50 D.L.R. (3d) 349 at 363 (S.C.C.), *Kane* v. *Board of Governors of the University of British Columbia* (1980), 31 N.R. 214 (S.C.C.), *Law Society of Upper Canada* v. *French*, [1975] 2 S.C.R. 767 (Ont.) (per Laskin dissenting), *Labour Relations Board* v. *Traders' Service Ltd.*, [1958] S.C.R. 672 at 687 and 688 (per Locke J. dissenting), *Toronto Newspaper Guild, Local 87* v. *Globe Printing Co.*, [1953] 2 S.C.R. 18 at 38, per Kellock J.

In his text, *Natural Justice in Canada*, (Butterworth & Co. 1981), Professor W. Wesley Pue stated at p. 76:

> . . . it would seem that the issue is not whether or not the Legislature has laid down a procedure but rather, whether in creating a new statutory power, adequate steps were taken to ensure that it is exercised fairly. The appropriate presumption is that Parliament

> intends that the powers it confers are to be exercised fairly not merely that the decision-making body should observe a statutory procedure which may or may not be comprehensive enough to ensure a standard of fair play equal to that which the common law would impose.

Professor Pue pointed out that several principles of statutory interpretation militate against permitting the application of the *expressio unius* maxim to narrow the scope of natural justice. Such an application allows no play to the presumption against changes in the common law. Natural justice is a rule of common law. The Legislature is presumed to know the existing law and to follow it unless clearly stating the contrary. The Legislature is also presumed to intend to act fairly. If there is any ambiguity about the extent to which a statute derogates from common law rights, the ambiguity is to be resolved in favour of maintaining common law rights unless they are clearly taken away (see Pue's text on p. 77-78).

Professor Pue concluded that the *expressio unius* maxim cannot prevail over these strong presumptions, noting that *Maxwell on the Interpretation of Statutes* describes the maxim as a subordinate principle of interpretation.

Other academic commentators have objected to the use of the *expressio unius* maxim to displace the principles of natural justice. In view of the requirement that Parliament make its intention to exclude natural justice unambiguously clear, they have argued that the use of the *expressio unius* maxim to discover this intention is an unsafe guide at any time.

It is my view that, in their approach to Section 59(1), the former commissioners erred in law. The error stemmed from an undue reliance on a general principle of language, namely the *exclusio unius* maxim, at the expense of the idea of justice. To suppress well-entrenched common law rights on the basis of a general maxim that suggests that a Legislature *may* have wished to affect these rights adversely is unjustified.

The foregoing considerations have led me to conclude that a redetermination of the former commissioners' decision is in order. To view Section 59(1) as defining the complete set of prohibited appointments on a medical review panel constitutes an error of law bearing on a fundamental principle of natural justice and as such is reviewable, irrespective of whether it is patently unreasonable. Furthermore, it is arguable that this error is patently unreasonable. The blind application of the *exclusio unius* maxim to Section 59 would allow aberrations that are very difficult to countenance. For example, a husband and wife might be on the same medical review panel when the provisions prohibit specialists who are partners or who practice medicine together to be on the same panel. Similarly, it would allow for a specialist married to the claims adjudicator

whose decision is under appeal to be on the medical review panel. An interpretation of Section 59(1) sanctioning these situations is not viable, in light of what must be the purpose of the explicit statutory exclusions, namely, minimizing the possibility of bias in medical review panel deliberations.

The exclusions enumerated in Section 59(1) pertain to special situations germane to the conduct of medical review panel appeals in the institutional setting created by the *Act*. These special situations could conceivably escape the reach of the common law rules of natural justice. I consider that the list of exclusions under Section 59(1) simply ensures that these special situations be prohibited. The correct approach to Section 59(1) is to view it as filling possible gaps of the common law.

Having found that Section 59(1) does not override the common law principles of natural justice, I turn to the question of whether, in this worker's case, there was a breach of natural justice.

The common law regarding bias has two branches. The first enunciates that a decision maker must not have a material interest in the result. The second is that the context must not create a reasonable likelihood of bias, or a reasonable apprehension or suspicion of bias in a decision-maker.

Both the first and the second branch of the law on bias are essentially an inquiry into appearances. A demonstration of actual bias is not necessary. Lord Denning clearly enunciated the importance of appearances in the *Lannon* case.

Stewart J. of the Ontario High Court put the matter succinctly when he said in *R.* v. *Moore, ex parte Brooks* (1969), 6 D.L.R. (3d) 465 at p. 472: "It is of vital importance to our system of justice that all such steps as possible should be taken to eliminate both injustice or the fear of injustice."

While appearances are an essential part of the test of reasonable apprehension of bias, mere suspicion of bias does not suffice. The apprehension of bias must be a reasonable one, held by a reasonable person. In *Committee for Justice and Liberty* v. *National Energy Board*, [1978] 1 S.C.R. 369, the Supreme Court of Canada formulated the relevant test. Although dissenting as to the disposal of the appeal, de Grandpre J. nonetheless expressed the point of view of his colleagues in his statements concerning the chairman of the National Energy Board, Mr. Crowe at p. 394:

> The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying

> themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly.
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> I can see no real difference between the expressions found in the decided cases, be they "reasonable apprehension of bias", "reasonable suspicion of bias", or "real likelihood of bias". The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

The case law recognizes that bias can be conscious or unconscious. In *R.* v. *Moore, ex parte Brooks* at p. 476, Stewart J. stated: "I think here that the danger of subconscious bias . . . has been established." Wilson J. of the Manitoba Court of Queen's Bench added in *R.* v. *Pickersgill, ex parte Smith* (1970), 14 D.L.R. (3d) 717 at 722 (Man. Q.B.): "Bias, of course, is a question of fact, however conscious or unconscious of its existence may be he whose conduct is impugned."

In the case before me, I find that there were grounds for a reasonable apprehension of bias. I disagree with the former commissioners' characterization of the panel proceedings and of Dr. F. T's position therein. In their decision letter dated February 1, 1990, the former commissioners stated that the essence of a medical review appeal is the *examination* of the claimant by the medical review panel itself. Nonetheless, in some instances, such as where the injury is an old one, or where the worker is claiming compensation for a further period of temporary disability that occurred in the past, the medical review panel will rely substantially on the medical evidence that is in the worker's file. The examination itself will be of secondary importance. The evidence of a specialist, such as Dr. F. T, can be of primary importance. To characterize Dr. F. T as an expert "witness" in the medical review panel appeal is entirely reasonable.

Dr. F. T's association with Dr. I. T was, in my opinion, close enough to raise a reasonable apprehension of bias in a reasonable person. Taking into account the fact that the law contemplates both conscious and unconscious bias, a father/son relationship is a prime candidate for the unconscious element of bias. In coming to this conclusion, I also take into account the written comments made by the worker in the notice requesting a medical review panel examination. This notice and, hence, the worker's pejorative comments regarding Dr. F. T, were bound to come to the attention of the medical review panel.

The fact that the decisions of medical review panels are protected by a privative clause under Section 65 if the *Act* does not exempt, in this case, the certificate issued by the medical review panel from review.

As stated in Decision No. 17, *Workers' Compensation Reporter*, Vol. 1: p. 79–80):

> Under Section 79(1) [now 96(1)], the Board has exclusive jurisdiction to determine all matters of fact and law arising under Part 1 of the *Act*. The authority conferred upon the Medical Review Panels to review the medical decisions of the Board is an exception carved out of that general jurisdiction. But it is an exception limited to the terms of section 55 [now sections 58, 59, 60 and 61]. Thus the Board is left with an *overall residual jurisdiction which includes authority to determine the jurisdiction of other tribunals established under Part 1* (emphasis added).

A certificate issued by an improperly constituted medical review panel is not conclusive as to the matters certified and is not binding on the Board. The former commissioners erred in law in accepting the certificate issued by the medical review panel and in refusing to convene a new medical review panel to examine the worker.

THE WORKER WILL, THEREFORE, BE EXAMINED BY A NEW MEDICAL REVIEW PANEL.

Editors' note: This decision has been edited for publication.