

## Decision of the Appeal Division

**Number:** 92-0857, 92-0858  
**Date:** April 21, 1992  
**Panel:** Connie Munro, Derrick Spooner, Walter N. Peain  
**Subject:** Section 96(4) Referral

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This matter comes before the Appeal Division both as a referral from the president and chief executive officer and by way of a worker's appeal from the Review Board findings. As the appeal and the referral involved different issues, these were separately considered by the panel as follows.

### **(a) Appeal by the Worker: Amount of his Pension Award**

An appeal from the August 12, 1991 Review Board finding was filed by the worker's representative. The appeal disputes the Review Board finding that only 70% of the worker's hearing loss was a responsibility of the B.C. Board. The argument is that the worker, upon leaving the military in 1968, had no evidence of hearing loss. The submission acknowledges that the discount of 14%, referring to the time that the worker was employed in Alberta for three years, is correct but expresses the opinion that it is a relatively insignificant number so that the worker ought to have been granted a 100% hearing loss award. The issue is also raised that the worker had a serious injury under another claim which is recorded as a neck injury but involved a severe blow to the head. It is requested that the 1979 file be reviewed to determine if the worker's hearing problems are a result of that trauma.

Dealing first with the latter issue, the panel has reviewed the 1979 claim in detail. It arose as a result of a motor vehicle accident August 2, 1979. Given that the vehicle in which the worker was a passenger rolled over in a ditch before striking a telephone pole it is reasonable to presume that some trauma to the head was involved. There is, however, no evidence of head injury, per se, nor is there any indication on the file that complaints of hearing problems followed the accident. Moreover, the audiometric test results were interpreted by the registered audiologist at the W.C.B. as suggesting a hearing loss due to occupational noise exposure, that is, non-traumatic hearing loss. Although the degree of loss did, in the opinion of the audiologist, appear excessive in view of the worker's age and history of noise exposure, the Board accepted that the entire loss was a result of the non-traumatic exposure. No evidence has been provided or is on file that would lead to a different conclusion.

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With respect to the calculation of the percentage of the worker's loss that is attributable to employment in British Columbia, there is no discernable error in the conclusions of the adjudicator and the Review Board. Although the worker may not have had a noticeable hearing loss upon leaving the Armed Forces, it is apparent from the 1968 audiograms performed by the Canadian Forces Medical Service that the results between the right and left ear were not the same, even at that time.

The submission on behalf of the worker suggests that the non-B.C. exposure ought to be ignored or that the time he was in the Armed Forces in British Columbia ought to be accepted as a W.C.B. responsibility. Members of the Armed Forces are not covered by the *Workers Compensation Act* so that any such exposure would not be compensable. The governors' policy #30.22 provides that if the B.C. responsibility is 90% or greater that the Board will assume total liability. In this case, however, the worker has not met that threshold as his B.C. exposure accounts for only 70% of the hearing loss.

The panel finds, therefore, that the amount of the worker's functional award has been correctly calculated. The worker's appeal is denied.

**(b) Referral by the President: Commencement Date of the Worker's Pension Award**

In a letter to the worker dated September 12, 1991, Kenneth M. Dye stated:

The question is whether the Review Board finding regarding the commencement of your award is in contravention of the published policy of the Governors. I refer you to paragraph 4 of #30.28 of the *Rehabilitation Services and Claims Manual* (Copy enclosed). Under this paragraph, your award cannot commence prior to the date your application for compensation was received by the Board, namely March 20th, 1990.

While this last sentence correctly reflects paragraph 4 of the governors' policy, it should be noted that paragraph 3 in the governors' policy authorizes the payment of hearing loss pensions "in respect of a loss of earnings or impairment of earning capacity" from the date the worker first suffered same.

Mr. Dye's letter had earlier stated that the Review Board findings of August 12, 1991:

... confirmed the decision as to the amount of the pension awarded to you for your hearing loss but directed the Board to review the commencement date of your award in light of Dr. C's report of July 8, 1987.

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The Review Board stated, on page 4 of its “Findings and Reasons,” that:

In regards to the commencement date of the worker’s loss of hearing pension award, we would refer the file back to the Board’s Disability Awards Department to re-assess the award, taking into consideration Dr. C’s audiologic assessment report of July 8, 1987. *If the degree of hearing loss recorded on that report entitles the worker to a loss of hearing pension award his award should commence on the date of this report which is the first evidence of industrial hearing impairment.* The worker’s loss of hearing pension award will then be assessed in accordance with Board policy as contained in Section 30.28 of the *Rehabilitation Services and Claims Manual*.

(emphasis added)

In referring to the governors’ policy, the Review Board findings stated:

The Board’s policy regarding the commencement of awards for hearing loss claims of non-traumatic origin is contained in Section 30.28 of the *Rehabilitation Services and Claims Manual*. It states:

. . . payments shall be calculated to commence as of the date upon which the worker first became disabled from earning full wages at work at which he was employed.

That is not, however, a statement of policy with respect to all non-traumatic hearing loss claims. The aforementioned quote from paragraph 2 of *Rehabilitation Services and Claims Manual* (the *Manual*) #30.28 is prefaced by the words:

Where compensation is being awarded under Section 6, then, subject to Section 55, periodical (payments shall. . .)

The governors’ policy quoted by the Review Board was from paragraph 2 of #30.28, which is only concerned with applications under Section 6 of the *Workers Compensation Act*. The governors’ policy set out in #30.20 of the *Manual* provides:

(b) If the hearing loss has developed gradually over time as a result of exposure to industrial noise, it is treated as an industrial disease. However, *the provisions of Section 6 do not apply unless the claimant ceased to be exposed to causes of hearing loss prior to September 1, 1975. In all other cases, Section 7 of the Act applies.*

(emphasis added)

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The worker's exposure to industrial noise in British Columbia continued to the date of his application to the Board in 1990. The policy cited by the Review Board dealing with applications under Section 6 of the *Act* is, therefore, not applicable.

In the governors' Decision No. 1 in the *Workers' Compensation Reporter*, Vol. 7(1): p. 7, "Appeal Division Administration, Practice and Procedure," the governors created the following policy under #6.0:

The Appeal Division may exercise its discretion pursuant to Section 91(2) to direct the Review Board to reconsider in any case where it considers it appropriate and will generally do so where it finds an error of law or contravention of published policy of the Governors in a referral from the President under Section 96(4).

An error has been identified in the reasoning expressed by the Review Board, inasmuch as they relied upon a passage from the governors' policy which was not applicable to this claim. There has, therefore, not been consideration of the worker's claim by the Review Board based upon the appropriate policy of the governors. The panel has concluded that, in light of the governors' policy quoted above concerning the Appeal Division's use of its discretion under Section 91(2) in referrals, the matter should be returned to the Review Board for reconsideration on this issue. In light of this action, the panel has refrained from addressing the conclusion of the Review Board with respect to the commencement date of the worker's pension.

The panel would note that, in reviewing this matter, they considered whether there was any ambiguity in the Review Board finding which would allow it to be interpreted in accordance with the policy of the governors. Where a Review Board finding is capable of more than one interpretation, the view of the findings consistent with the governors' policy ought to be adopted. As well, it would appear from the direction in the Review Board finding that the worker be "assessed in accordance with Board policy as contained in Section 30.28 of the *Rehabilitation Services and Claims Manual*" that there was no intent to contravene the policy of the governors. The panel considered, therefore, whether the Review Board intended, in accordance with paragraph 3 of the governors' policy #30.28, that there be a further assessment as to the worker's "loss of earnings or impairment of earning capacity," and that any resulting award be retroactive.

Having regard to its overall content and effect, this did not appear to be a possible interpretation of the Review Board finding. The Review Board had confirmed the level of the worker's pension award at 1.05% of total. The only issue on which the further assessment was to be undertaken concerned the commencement date of this award. There did not appear to be anything in the Review Board finding to support the

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conclusion that it intended the worker be assessed for any “loss of earnings or impairment of earning capacity.” The panel concluded, therefore, that the Review Board finding could not be upheld on this basis.

The panel has some concerns as to the appropriateness of the referral in this case. The statutory amendments made by Bill 27 (the *Workers Compensation Amendment Act, 1989*) restricted the Board’s power to initiate “own motion” appeals of Review Board findings to the grounds of error of law or contravention of a published policy of the governors.

The legislative changes contained in Bill 27 were based in large measure on the October 31, 1988 report of the *Advisory Committee on the Structures of the Workers’ Compensation System of British Columbia*, chaired by Donald R. Munroe, Q.C. The Committee stated in its report as follows:

It is Section 96(2) of the *Workers Compensation Act* which has generated some of the more outspoken criticism of the present structure . . .

The lack of broad-based confidence in “own motion” appeals could easily be finessed by not permitting them to occur; by saying that an appeal against a finding of the Review Board can only be initiated by the worker or the employer. However, that would assume that *serious issues of law or policy* are always fully argued at the Review Board level; that claims issues always arise between separate parties who are as likely as not to utilize existing appeal mechanisms.

Those assumptions do not stand up under scrutiny. It is common for one of the parties not to appear at hearings of the Review Board. In the result, *important issues* can go unargued . . .

We do not think that “own motion” appeals from findings of the Review Board are inherently bad. Rather, it is a question of control and structure . . .

With respect to the grounds for an “own motion” appeal, it is fair to observe that *the interests of the system (as well as of the immediate parties) may be at stake where questions of law or policy arise*, but that there is no real systemic interest in questions of fact. Thus, there is no clear justification for “own motion” appeals based on alleged factual errors, while justification does exist for “own motion” appeals based on law or policy . . .

(emphasis added)

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It was thus apparent from the context in which the legislative changes were made that the intent was to restrict such referrals to important issues of law or policy of general significance beyond the particular claim. Objections to a decision which only concern the particular claim can be pursued by the worker or the employer by way of an appeal.

In other words, the intent behind the statutory amendments was to change the system whereby the Board set itself up to scrutinize Review Board findings for possible error, with the Board acting much like an appellant with a stake in the outcome of each decision. The decision by the legislature to restrict the grounds for referrals was indicative of an intent that, in the absence of an appeal from one of the parties, the Board would generally accept and implement Review Board findings. As an exception to this, the legislature granted to the president the power to initiate referrals of Review Board findings on important issues of law or policy of significance to the workers' compensation system.

While the referral on this claim was found by the panel to be technically valid, it may be questioned whether it warranted the use of the "own motion" referral power of the president. Respect for the spirit and intent of Section 96(4) requires consideration not only as to whether there has been a technical breach of policy, but whether the Review Board finding gives rise to a need for guidance to the Board and to the Review Board from the Appeal Division. If so, the intent of Section 96(4) is that the Appeal Division exercise its interpretive authority with respect to the *Workers Compensation Act* and the policy of the governors to provide guidance to the system. It is for this reason that virtually all decisions of the Appeal Division on referrals under Section 96(4) have been published in the *Workers' Compensation Reporter*.

It is quite apparent from the Review Board finding on this particular claim that their error was inadvertent, in referring to an inappropriate passage of the governors' policy. There was no indication that the Review Board intended to depart from the governors' policy or to contravene the *Act*. The quantum involved was not significant, as it involved the possible backdating of a pension award of 1.05% of total. (The pension award was made effective March 20, 1990, and the Review Board requested a reassessment of the worker's hearing loss with reference to a medical report dated July 8, 1987). Finally, and most significantly, there is no documentation on the claim file to show that the reassessment requested by the Review Board would have led to any change in the commencement date of the worker's pension award in any event. If the reassessment did not support an earlier date for the commencement of the worker's pension award, the entire referral process would have been undertaken as an academic or moot exercise. The panel is convinced that this would not be in keeping with the legislative intention behind the enactment of Section 96(4).

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We do not question the authority or jurisdiction of the president and chief executive officer to make a referral under Section 96(4) on the grounds of error of law or contravention of a published policy of the governors in a case such as this. Rather, the foregoing discussion is intended to serve as a reminder of the problems experienced with the approach formerly taken to the referral of Review Board findings, and to provide guidance as to the proper interpretation of Section 96(4). The purpose or intent of Section 96(4) is to ensure that important issues of law and policy are addressed for the benefit of the system as a whole, rather than for the Board to act as an appellant seeking to correct minor errors which only affect the individual claim.

In conclusion, the worker's appeal with respect to the level of his pension award is denied. With respect to the referral by the president under Section 96(4) as to the commencement date of the worker's pension award, the Panel has found that the Review Board erred in utilizing a policy of the governors' which did not apply to the circumstances of this claim (paragraph 2 of #30.28). The matter is remitted to the Review Board for reconsideration on this issue. The matter will not be further considered by the Appeal Division, unless a new appeal or referral arises in connection with the further finding which is to be made by the Review Board.

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

