

## Decision of the Appeal Division

**Number:** 92-0924  
**Date:** April 29, 1992  
**Panel:** Connie Munro, Chief Appeal Commissioner  
**Subject:** Section 96(2) — Natural Justice

---

By letter dated May 30, 1991, the worker's representative requested reconsideration of the May 24, 1991 decision of the prior commissioners. The worker had appealed the April 27, 1989 Review Board finding to the prior commissioners.

In considering her appeal, the commissioners obtained a new medical opinion from the director of the Board's Occupational Health Department. This report was disclosed to the worker on April 11, 1991 by the appeals officer and she was given until May 2, 1991 to provide a response. A submission dated April 30, 1991 was provided by the worker's representative which enclosed an extract from the clinical records of Dr. G with respect to the worker's treatment on November 24, 1986. Unfortunately, however, this submission was addressed to "Workers Compensation Review Board, 6951 Westminster Highway. . . ." Although the Board's street address was correctly written, there was an erroneous reference to the Review Board rather than to the commissioners of the Workers' Compensation Board. The representative's submission is stamped as having been received at the Review Board on May 6, 1991 and then at "20 file" on May 30, 1991. The Review Board is an independent tribunal located at a different address than the W.C.B.

The prior commissioners rendered a decision on the worker's appeal dated May 24, 1991 in which they specifically noted:

While you, your representative, and your employer were provided with a copy of a 01 April 1991 opinion obtained from the Director of the Board's Occupational Health Department, no further submissions were received.

It is evident that the submissions on behalf of the worker were not considered by the commissioners in making their decision on her appeal.

---

A request for reconsideration before the Appeal Division must proceed under Section 96.1 of the *Workers Compensation Act*.

- 96.1** (1) Subject to this section and sections 58 to 66, a decision of the appeal division is final and conclusive.
- (2) A worker, the worker's dependants, the worker's employer or the representative of any of them may apply to the chief appeal commissioner for reconsideration of a decision of the appeal division on the grounds that new evidence has arisen or has been discovered subsequent to the hearing of the matter decided by the appeal division.
- (3) Where the chief appeal commissioner considers that the evidence referred to in subsection (2)
- (a) is substantial and material to the decision, and
  - (b) did not exist at the time of the hearing or did exist at that time but was not discovered and could not through the exercise of due diligence have been discovered,
- he may direct that
- (c) the appeal division reconsider the matter, or
  - (d) the applicant may make a new claim to the board with respect to the matter.

I consider that the submission and medical report of the worker's representative constitute new evidence, on the basis that they were not before the prior commissioners at the time of their decision. This new evidence may be considered substantial and material to the decision. This would leave, however, the final requirement to be addressed under Section 96.1(3)(b) which is whether the new evidence did not exist at the time of hearing or did exist at that time but was not discovered and could not through the exercise of due diligence have been discovered.

As the evidence existed at the time of the hearing, the issue is simply whether the evidence "was not discovered and could not through the exercise of due diligence have been discovered." I interpret the requirement of "due diligence" as applying to the applicant for reconsideration. It would not appear tenable to suggest that the applicant could not through the exercise of due diligence have discovered their own submission. The requirements of Section 96.1 do not seem to contemplate a situation such as has arisen in this case.

---

The basis of this application for reconsideration is not, in reality, that new evidence has been discovered which was not previously known to the applicant. Rather, the basis for this request is that the applicant's submission was not included in the prior commissioners' consideration. It may be argued that the failure to consider the submission was occasioned by the error of the worker's representative in forwarding it to the Review Board. It may, conversely, be argued that the fault lay with the Board or the Review Board, inasmuch as the Board's correct street address was used and the mistaken reference should have been caught in time to refer the submission to the prior commissioners.

I do not consider that any useful purpose is served in attempting to determine by whose "fault" the submission on behalf of the worker was not considered by the commissioners. I am concerned that the circumstances outlined above give rise to an apparent breach of natural justice. Due to a combination of circumstances, the worker was denied the opportunity to respond to the new medical evidence obtained by the prior commissioners, prior to a decision being made on an appeal.

On January 6, 1992 the Board of Governors approved the following:

RESOLVED THAT the Appeal Division of the Worker's 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 on an error of law or involved or involves an issue under the *Canadian Charter of Rights and Freedoms*; . . .

Section 96(2) of the *Act* provides:

. . . the board may at any time at its discretion reopen, rehear and redetermine any matter, except a decision of the appeal division, which has been dealt with by it or by an officer of the board.

It is well established that a breach of natural justice would constitute an error of law within the meaning of the governors' resolution. Therefore, while the application for reconsideration of this case based on Section 96.1 cannot succeed, I consider that the worker's appeal should be reopened, reheard and redetermined pursuant to Section 96(2) of the *Act* on the basis that the worker was denied a sufficient opportunity to be heard.

---

The decision of the prior commissioners will be set aside and the matter assigned to a panel of the Appeal Division to consider the appeal from the April 27, 1989 Review Board finding.

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