

WORKERS COMPENSATION  
APPEAL TRIBUNAL

BETWEEN:

EMPLOYER  
CASE ID [personal information]

APPELLANT

AND:

WORKERS COMPENSATION BOARD OF  
PRINCE EDWARD ISLAND

RESPONDENT

AND:

WORKER

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DECISION #93

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Appellant	Employer, as represented by Keith Mullins Employer Advisor
Respondent	Brian Waddell, Solicitor representing the Workers Compensation Board
Worker	Worker, as represented by Shawn Shea, Worker Advisor
Place and Date of Hearing	February 15, 2008 Best Western Charlottetown Charlottetown, Prince Edward Island
Date of Decision	March 28, 2008

1. This is an appeal of the Internal Reconsideration Officer (“IRO”) Decision dated May 31, 2007, whereby the Appellant’s request for reconsideration was denied. The Reconsideration Issue was identified as follows:

R1-01: Was the inclusion of the Worker’s pre-existing osteoarthritis in the assessment conducted by Dr. G. Mockler appropriate?

2. The IRO Decision found in the affirmative and upheld a permanent impairment award for the Worker at 15%. The Appellant before this Appeal Tribunal is the Employer, as there is financial consequences to the Employer based on the IRO’s decision.
3. By way of background, the Worker was employed with the Appellant as a [personal information] and on [personal information], 2004, [personal information] causing injury to his legs. As a result, the Worker was accepted for temporary wage loss benefits effective [personal information], 2004.
4. The Worker was assessed by Dr. A. W. Profitt on [personal information], 2004. Dr. Profitt noted that the Worker’s right knee had fully recovered. With respect to the left knee, an MRI was arranged to determine if there was any surgical pathologies.
5. The Worker underwent an MRI of his left knee on [personal information], 2004. The abnormalities noted included a small possible fracture of the posterior tibial table with a small horizontal tear of the more posterior horn of the medial meniscus. Also a possible anterior cruciate sprain and minor degenerative changes were noted.
6. This resulted with Dr. Profitt scheduling the Worker for arthroscopic debridement/menisectomy of his left knee.

7. The surgery was performed on [personal information], 2005, with the post-operative diagnosis being “torn medial meniscus, left knee plus partial anterior cruciate ligament tear and osteoarthritis of the left knee”. Some mild degenerative changes were also noted.
8. On May 2, 2005, the Worker’s previous medical history in relation to his left leg was received by the Board. His file was reviewed and on [personal information], 2005, Dr. Steven O’Brien, WCB Medical Advisor, concluded that any pre-existing condition with respect to the Appellant’s left knee was not work related. This opinion was clarified and revised in a further medical opinion dated [personal information], 2007, in which Dr. O’Brien stated that the Worker’s underlying pre-existing condition of mild osteoarthritis was aggravated by the workplace accident.
9. The Appellant’s temporary wage loss benefits ended effective [personal information], 2005, as the Worker confirmed he would be returning to work with a new employer. The Worker’s medical aid benefits continued.
10. By correspondence dated November 14, 2006, the Appellant was referred for a permanent impairment assessment.
11. The Appellant underwent a permanent impairment assessment with Dr. Gordon Mockler on [personal information], 2006. Dr. Mockler recommended a 15% whole person impairment. This impairment resulted in the Board paying the Worker \$6,180.00 on January 10, 2007, which was equivalent to 15% of the Worker’s maximum annual earnings for 2004.
12. The permanent impairment award was charged to the Appellant’s account. The Appellant’s representative filed a Notice of Request for Internal Reconsideration which was received by the Board on April 10, 2007. The Employer was challenging the Board’s decision to charge the full amount of

the impairment award when a pre-existing condition existed prior to the accident.

13. The IRO in coming to her decision agreed that the Worker had a pre-existing degenerative condition in his left knee. However, she found that there was no evidence to suggest the pre-existing condition extended the recovery time. She also considered the fact that there was no medical history with respect to the left knee for at least one year prior to the workplace injury which initiated this claim and agreed that the injury caused a further progression of the pre-existing degenerative changes. Ultimately she determined:

*. . . it would be difficult to separate out the worker's pre-existing condition for the purpose of determining impairment when there was no frame of reference to which to evaluate the condition prior to the injury. Therefore, Dr. Mockler could not separate pre-injury versus post-injury degenerative changes based on the file information*

14. It should be noted that the IRO in the rationale/analysis for decision referred to Board policy on Apportionment 04-44 which states:

*Where a worker has a pre-existing condition and the normal period of recovery is extended due to the pre-existing condition the costs for compensation beyond the normal period of recovery for the work injury will be apportioned to the rate group of the employer rather than to the employer.*

15. The Appellant in making its arguments before WCAT takes issue with the IRO decision in general with respect to its failure to refer to specific sections of the Act and policies, as demonstrated by incorrect cross referencing sections of the Act and policies. The Appellant argues that the IRO is not in a position to make this determination of the impact of the degenerative changes and that Dr. Mockler should have been specifically requested to address this issue.

16. The Employer submits that the IRO failed to properly apply s.6 (11) of the Act which states:

*Where a worker's impairment or loss of earning capacity is, in the opinion of the Board, due in part to an accident and in part to a cause other than an accident, the Board shall*

*(a) determine what portion of the worker's impairment or loss of earning capacity is a result of a cause other than an accident; and*

*(b) charge the portion determined under clause (a) against the rate group to which the worker's employer belonged to at the time of the accident.*

17. The Employer noted the specific reference to "shall" in this section and is challenging the IRO's decision suggesting the section was not considered as it was not referred to in her decision.
18. The Board argued the IRO is not required to cite every section considered and in the Board's opinion there is only one cause related to the worker's impairment or loss of earning capacity and therefore there is no requirement to apportion under s. 6(11).
19. The Worker also attended the hearing with the Worker Advisor. He did not present any filed materials and made brief oral representations. The Worker argued that although the IRO decision may not have been accurate with respect to process, the ultimate decision reached was correct. Certainly the Worker does not want to be subjected to any claw back provisions by the Board.

### **Analysis**

20. This Appeal Tribunal is subject to a standard of review of correctness as endorsed by the *Workers' Compensation Board (P.E.I.) v. MacDonald* 2007 P.E.S.C.A.D. 4.

21. The issue in this case really is whether the determination of the Board not to consider the pre-existing condition with respect to the Permanent Impairment Assessment was correct. The Appeal Record provides relevant medical documentation to consider.
22. It is important to draw particular attention to the medical comments to file as provided by Dr. Steven O'Brien. By medical comment to file dated [personal information], 2005, he states the following:

*You ask if the degenerative changes are related to the injury accepted under this claim. The mild degenerative changes present would be pre-existing and not related to the injury sustained under this claim, which are the torn medical meniscus of the left knee, partial anterior cruciate ligament tear and possible fracture of the posteromedial plateau, as reported on the MRI of [personal information], 2005.*
23. This medical file comment was used in the Worker's claim review which ultimately determined that he was no longer qualified for ongoing Workers Compensation benefits. The Case Coordinator in her written decision referred to Dr. O'Brien's medical comment as a factor in favour of her decision.
24. The referral for the impairment assessment was made on May 31, 2006. It should be noted that on the referral no other medical conditions were listed, no known medical conditions accepted under this claim were listed and no known medical conditions not accepted under this claim were listed. It would appear that Dr. Mockler was not advised in advance to look for the pre-existing left knee osteoarthritis.
25. The Impairment Assessment was completed on [personal information], 2006, by Dr. Mockler. He confirmed the diagnosis to include osteoarthritis in the left knee but did not provide for any type of history indicating whether this was disclosed as a pre-existing condition or not. He specifically referenced in his Impairment Assessment that he considered the meniscus tear, the

osteoarthritis, the anterior cruciate tear and the utilization of an external device being the knee brace for stability of the left knee. He also noted that when using the Gait Derangement Assessment on table 36, he also arrived at 15%. It would appear that Dr. Mockler was comfortable to find 15% whole person impairment.

26. An x-ray completed on [personal information], 2007, noted an osteophyte formation. It appears that the Worker's pain had increased and that degenerative changes were the cause.
27. The second medical comment from Dr. Steven O'Brien originated from a request from the Worker by Memo dated May 16, 2007. In this memo, the Worker confirmed that he agreed with the initial findings of mild osteoarthritis being present before the accident, but stated in his opinion that the post- accident effects of this condition, which included the aggravation and worsening of this condition, was related to the injury sustained in the work accident of [personal information], 2004. Dr. O'Brien responded by Memo dated [personal information], 2007. Dr. O'Brien agreed with the Worker's assessment that he did have mild osteoarthritis of his left knee prior to the injury and that this would have been "aggravated as a result of his injuries to his left knee which included meniscal tear, possible fracture of the posterior medial tibial plateau and a partial anterior cruciate ligament tear".
28. Dr. O'Brien also referred to *ODG Treatment in Workers Comp 2007*, 5<sup>th</sup> Edition, published by the Work Loss Data Institute, whereby it states that a meniscectomy is a surgical procedure associated with a high risk of knee osteoarthritis.
29. It is clear that the Internal Reconsideration Officer was off track when she continued to approach the issue of appeal as that being a wage loss benefit issue which is demonstrated by her quoting of that policy. Although we agree

with the Board that the IRO is not required to cite every possible applicable section or policy considered, it is significant that nowhere in the decision was there a reference to s.6(11) of the Act which deals with permanent impairment or the permanent impairment policy.

30. The Board terminated the Worker's benefits and the fact that the pre-existing condition was used as a factor, so at that time the Board was of the opinion that the potential loss of earning capacity resulting from the pre-existing osteoarthritis was due in part "to a cause other than an accident". It follows then that the Board should have arranged to determine what portion of the Worker's impairment or loss of earning capacity was a result of a cause other than an accident when charging the full amount of the permanent impairment award to the Employer as per s. 6(11) of the Act.
31. There also seems to be a further disconnect after listing the pre-existing condition as a factor to cease the Worker's benefits. There is no indication in the referral for the permanent impairment assessment of this pre-existing condition. This Appeal Tribunal assumes that Dr. Mockler would have been provided that document in order to complete his impairment award.
32. As this Appeal Tribunal has no ability to determine what part of the impairment was related to the pre-existing osteoarthritis it is remitting the matter back to the Board to arrange for this to be determined.
33. With respect to the Worker's concern about clawback, we find that Policy 04-11, Statement #6 applies. It provides that repayment action shall not be pursued when an Entitlement Decision is overturned by Appeal.
34. In conclusion, the Employer's Appeal is granted and the matter is remitted back to the Board to determine the allocation of the permanent impairment assessment that was as a result of the pre-existing condition.



Dated this 28th day of March, 2008.

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Pamela J. Williams  
Vice Chair of the Workers Compensation Appeal Tribunal

Concurred:

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Gary Paynter, Worker Representative

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Ray Hann, Employer Representative