

# Ulrich, Miles

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## BOARD

### **Binding examinations**

The procedure for binding examinations is designed to assure the objectivity of the examiner by restricting contact between advocates and the examiner, by reducing the possibility of an ambiguous result by providing the physician with the necessary historical background through records mutually selected by the parties and by directing the examiner to respond to specific questions concerning the worker's condition. ...*In re Miles Ulrich, BIIA Dec., 93 1363 (1994)*

### **Remand for additional evidence**

Where parties had agreed to be bound by the results of a Board-sponsored medical examination, the industrial appeals judge did not follow the ordinary procedures for obtaining the examination, the worker asked for the opportunity to cross-examine the physician, and the industrial appeals judge issued a proposed decision and order without ruling on the motion, the Board vacated the proposed decision and order and remanded for further proceedings. ...*In re Miles Ulrich, BIIA Dec., 93 1363 (1994)*

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**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON**

1     **IN RE: MILES R. ULRICH**                             )     **DOCKET NO. 93 1363**  
2   )  
3   )     **ORDER VACATING PROPOSED DECISION**  
4   )     **AND ORDER AND REMANDING APPEAL**  
5     **CLAIM NO. K-380854**                             )     **FOR HEARING**  
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7 APPEARANCES:

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9             Claimant, Miles R. Ulrich, by  
10            Prediletto, Halpin, Scharnikow, Bothwell & Smart, P.S., per  
11            Darrell K. Smart, Attorney

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13            Employer, Yakima Pallet and Industries, by  
14            None

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16            Department of Labor & Industries, by  
17            The Office of the Attorney General, per  
18            Robert S. Young, III, Assistant, and Jane Downey, Paralegal

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20            This is an appeal filed by the claimant, Miles R. Ulrich, on March 30, 1993 from an order of the  
21 Department of Labor and Industries dated February 11, 1993 which denied the claimant's application  
22 to reopen his claim for aggravation of his physical condition causally related to the industrial injury of  
23 September 3, 1986. The Proposed Decision and Order is vacated and this matter is **REMANDED TO**  
24 **THE HEARING PROCESS.**

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27   **DECISION**

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29            Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
30 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order  
31 issued on January 31, 1994 in which the order of the Department dated February 11, 1993 was  
32 affirmed.

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35            This matter was submitted for decision based on the results of a "binding exam to be paid for  
36 by the Board." 9/21/93 Tr. at 4. The Board's authority to pay for medical examinations of claimants  
37 derives from WAC 263-12-093. That section provides that when the parties agree that an Order on  
38 Agreement of Parties or Proposed Decision and Order will result from an examination, an industrial  
39 appeals judge may arrange for the examination and the Board will pay for the reasonable and  
40 necessary expenses involved. The Board has adopted a procedure for making a record in cases  
41 where it takes on the expense of such an examination.  
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1 When parties request a binding examination paid for by the Board, a conference is held at  
2 which they identify medical records to be submitted to the Board for transmittal to the examiner. At the  
3 same time, the parties identify on the record the specific questions which are to be addressed to the  
4 examining physician. Additionally, the industrial appeals judge obtains advance permission from the  
5 parties to submit additional, written follow-up questions if the resulting narrative medical report is in  
6 any way ambiguous. The list of questions submitted to examiners frequently includes a question  
7 regarding multiple causation of conditions. The Board arranges for examination and, if applicable,  
8 further medical testing by an examiner agreed to by the parties. The Board arranges in advance for  
9 the examiner to submit an invoice voucher to secure payment of expenses associated with the  
10 completed report and testing. The examiner submits the completed report to the assigned industrial  
11 appeals judge, who then informs the parties of the results of the examination and the nature of the  
12 order to be issued based on those results.

13 In the present case, after indicating on the record that the claimant was to undergo a binding  
14 examination paid for by the Board, the industrial appeals judge and the parties did not follow the  
15 ordinary procedures for obtaining such an examination. The parties agreed to abide by the outcome  
16 of a report to be prepared by Dr. Max Bocek based on an MRI scan to be performed in Spokane.  
17 They did not identify any other records to be submitted to Dr. Bocek. They did not make a record of  
18 questions to be submitted to Dr. Bocek along with the MRI results. The record is unclear as to how  
19 the MRI scan was arranged or by whom. Apparently, no provisions were actually made for Board  
20 payment to the radiologist or to Dr. Bocek. Dr. Bocek's report was submitted to the Assistant Attorney  
21 General assigned to this appeal rather than to the Board.

22 Dr. Bocek's report supported the Department's denial of Mr. Ulrich's reopening application  
23 based on the presence of pre-existing damage to Mr. Ulrich's right knee. In his Petition for Review,  
24 the claimant expressed concern that Dr. Bocek did not understand the legal concept of multiple  
25 proximate causes. At oral argument on December 21, 1993, claimant's counsel requested the  
26 opportunity to cross-examine Dr. Bocek on that point or, at least, have stipulated written questions  
27 submitted to him on that point. The industrial appeals judge took the matter under advisement and  
28 then issued the Proposed Decision and Order without ruling on the motion.

29 The purpose of the Board's procedure on a binding examination is two-fold. First, it assures the  
30 objectivity of the examiner by restricting contact between the advocates for the parties and the  
31 examiner. Second, it reduces the possibility of an ambiguous result by (1) providing the examiner with  
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1 necessary historical background through records selected by the parties and (2) directing the  
2 examiner to respond to specific questions concerning the nature and extent of any injury, causation,  
3 worsening in the case of aggravation, and any resulting disability. These safeguards were absent in  
4 Mr. Ulrich's case.  
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7 Under the circumstances, we believe the claimant is entitled to inquire further of Dr. Bocek.  
8 The Proposed Decision and Order should be vacated and this appeal remanded to the hearing  
9 process. On remand, written questions should be submitted to Dr. Bocek in accordance with our  
10 standard procedure in connection with binding examinations paid for by this Board. The parties should  
11 participate in determining which questions are submitted. Dr. Bocek may incorporate his December 1,  
12 1993 report by reference as appropriate in his responses.  
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15 It is so ORDERED.  
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17 Dated this 23rd day of May, 1994.  
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19 BOARD OF INDUSTRIAL INSURANCE APPEALS  
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21  
22 /s/ \_\_\_\_\_  
23 S. FREDERICK FELLER Chairperson  
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26 /s/ \_\_\_\_\_  
27 FRANK E. FENNERTY, JR. Member  
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30 /s/ \_\_\_\_\_  
31 ROBERT L. McCALLISTER Member  
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