

Decision of the Appeal Division**Number: 2001-0635****Date: April 3, 2001****Panel: Herb Morton****Subject: Whether Denial of Relief of Costs Involved a Contravention of Prior Appeal Division Decision or Prejudice to the Employer**

RELIEF OF COSTS (PRACTICE AND PROCEDURE) (BIAS) – Whether Board officer in considering request for relief of costs was bound by prior Appeal Division decision on termination of worker's wage loss benefits – Questionable whether response letter sent by Board amounted to a fresh appealable decision – Board officers not obliged to reconsider on demand – Appeal Division approval of request for withdrawal pending readjudication does not create right to readjudication – Allegations of bias not to be made lightly or without supporting extrinsic evidence – Complaints to senior management of the Board not a separate avenue of appeal – Employer appeal denied.

Law: WCA (1996): s. 39(1)(e), s. 96(2), s. 96(6), s. 96(6.1)**Policy:** RSCM: #106.10**Decisions:** Adams v. British Columbia (WCB) (1989), 42 B.C.L.R. (2d) 228 (C.A.)*Section 39(1)(e) [employer appeal, s. 39(1)(e) (comp. div.)]**Appeal Division Decision No. 2001-0635**17 Workers' Compensation Reporter 359*

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- (1) The employer appeals the October 10, 2000 decision by the director of Vancouver Island Operations of the Workers' Compensation Board. For convenience, I will not differentiate in this decision in my references to the employer or the employer's representative.
 - (2) The employer states that "The issue involves the applicability of Section 39(1)(e) to this claim. Grounds for the appeal are error of law, exacerbated by prejudicial reconsideration practice."

Issue(s)

- (3) At issue is whether the denial of relief of claim costs under section 39(1)(e) of the *Workers Compensation Act* involved an error of law. In particular, did this denial involve a contravention of a prior Appeal Division decision on this claim, or prejudice against the employer?

Jurisdiction

- (4) Subsections 96(6) and (6.1) of the Act provide employers with a right of appeal from certain categories of decisions to the Appeal Division "on the grounds of error of law or fact or contravention of a published policy of the governors." The employer relies on the ground of error of law.

Background

- (5) The worker was injured in a fall at work on January 25, 1994. An x-ray report dated January 26, 1994 was reported as showing that "There are two left-sided rib fractures which are old of the left 6th and 7th ribs."
- (6) The circumstances of the worker's January 25, 1994 injury were described in Appeal Division Decision #98-0106 dated January 20, 1998, as follows:

Evidence on file indicates the worker slipped and fell approximately 3–4 feet on January 25, 1994 when trying to straighten some lumber on the re-entry chain. Injuries to the back, left knee and left rib cage were reported. His physician diagnosed a chest wall contusion and an abrasion of his left knee.

- (7) Wage loss benefits were initially paid from January 26, 1994 until May 15, 1994. In a medical examination report dated March 23, 1994, Dr. L, medical advisor, found a number of pain behaviours and exaggerated reaction by the worker. He felt the current limiting factor was the worker's pain behaviour.
- (8) The worker appealed the termination of wage loss benefits to the Review Board. In a written submission to the Review Board dated February 6, 1995, the employer argued:

[Dr. C's] findings "the rib abnormalities have the characteristic appearance of fractures" simply confirms the X-Ray results taken after the incident of January 25, 1994. The X-Ray's at that time showed old fractures.

- (9) A bone scan was performed on September 6, 1994, which was interpreted as follows:

Delayed images of the axial and proximal appendicular skeleton were performed.

Focal areas of mildly increased uptake are seen in the anterior aspect of the left 8th, 9th and 10th ribs approximately and moderately increased uptake is seen in the posterior aspect of the left 10th, 11th and 12th ribs.

A focal area of mildly increased uptake is also seen in the left inferior pubic ramus, which may represent an old fracture. Mildly increased uptake is seen in the lower thoracic spine and both knees, most likely due to degenerative changes.

IMPRESSION:

The rib abnormalities have the characteristic appearance of fractures.

(10) By report dated March 1, 1995, Dr. C, the worker's attending physician, advised:

Xarays [sic] of [the worker's] ribs on January 26 and May 27, 1994 revealed no acute abnormalities although [the worker] continued to complain bitterly of left sided chest pain. Eventually a bone scan was performed on September 6, 1994 which showed increased uptake on the left 8th, 9th and 10th ribs anteriorly and increased uptake posteriorly of the left 10th, 11th, and 12th ribs. These abnormalities were in keeping with rib fractures. In retrospect a fairly strong case can be made that the pain from these fractures would have prevented [the worker] from working during May and June in spite of the relative extended period after the accident. Normally one would expect this type of pain to resolve within 3 months but obviously there are no hard and fast rules.

(11) By finding dated June 19, 1995, the Review Board allowed the worker's appeal. In its findings and reasons, the Review Board panel stated:

The panel has reviewed medical reports on file in particular [Dr. S's] report of June 3, 1994 in which [Dr. S] felt that [the worker] would be fit to return to work in the mill by July. Also the panel has considered the report of [Dr. C] who based his opinion on a September 7, 1994 C.T. scan report stating that in retrospect given the recorded rib fractures a thoroughly strong case could be made that the pain from these fractures would have prevented [the worker] from working during May and June in spite of the relative extended period after the accident. The panel finds that given the objective findings of the C.T. scan report [the worker] was still disabled from returning to his regular duties when his wage loss benefits were finalized on May 15, 1994. . . .

(12) The employer did not appeal the June 19, 1995 Review Board finding. Based on the finding, by letter dated September 8, 1995 the claims adjudicator awarded further wage loss benefits to the worker from May 16, 1994 until July 3, 1994.

(13) The employer first contacted the Board on August 26, 1996 to seek consideration of relief of costs under sections 39 or 42 of the Act. By decision of October 22, 1996, the claims adjudicator advised:

. . . [the worker's] file has been reviewed with a Board Medical Advisor and it has been determined that there was no evidence of any pre-existing condition, disease, and/or disability which prolonged his recovery from the injury sustained 25 January 1994 under this claim.

(14) On October 29, 1996, the employer appealed the October 22, 1996 decision to the Appeal Division "on contravention of law, policy and the evidence on file."

(15) The worker appealed the termination of wage loss benefits effective July 3, 1994 to the Review Board. The employer provided extensive submissions to the Review Board concerning the “rib fractures,” questioning “what did the previous panel accept from the reports of Drs. [C] and [S] and did they accept rib fractures?”

(16) In its finding dated February 17, 1997, the Review Board panel noted that the employer “also raised the question of whether the previous panel accepted anterior and posterior rib fractures, and/or anterior rib pain as being part of the claim.” In its findings and reasons, the Review Board panel denied the worker’s appeal for further wage loss benefits. The Review Board further noted:

The panel declines to address the issue raised by [the employer] regarding what has been accepted under the claim. We confine our finding to whether the effects of the injury remained disabling beyond July 3, 1994 and we find that they did not.

(17) On March 11, 1997, the employer wrote to the claims adjudicator requesting further consideration of relief of costs under section 39(1)(e) of the Act, based on the February 17, 1997 Review Board finding. By letter of March 20, 1997, the appeal commissioner/manager of the Appeal Division approved the employer’s request for a withdrawal of their appeal of the October 22, 1996 claims adjudicator’s decision pending further adjudication (withdrawal #1).

(18) The worker appealed the February 17, 1997 Review Board finding to the Appeal Division. The employer provided submissions to the Appeal Division concerning this appeal. These submissions did not further pursue the issue of rib fractures. The Appeal Division denied the worker’s appeal on January 20, 1998 (Decision #98-0106). The evidence considered in the Appeal Division decision included the following (at pages 2–3):

In his report of March 23, 1994, Board medical advisor [Dr. L] indicates that the worker was reviewed in December for uncontrolled hypertension and diabetes and was off work from December 13, 1993 until his return to work on January 14, 1994, about two weeks prior to the January 25, 1994 compensable injury.

On June 3, 1994, orthopaedic surgeon [Dr. S] examined the worker and concluded:

This patient sustained a contusion of his chest and thoracic area. He has no obvious clinical findings. He has slight O.A. of the thoracic spine which is inconsequential. This patient requires no further investigation. In my opinion he is capable of returning to work in the mill, by July.

In his report from the examination of July 4, 1994, the worker's physician, [Dr. C], noted that the worker was fit to return to work and said:

Informed patient that a slight flare up of pain is to be anticipated and that he will have to work through this pain. If possible a graduated return to work should be instituted.

The worker's fitness to return to work was confirmed by [Dr. C] in his subsequent reports of July 6, 14 and 20, 1994. In his letter of March 1, 1995, [Dr. C] advised the worker's union representative that a fairly strong case could be made and that the findings of the September 6, 1994 bone scan would support a conclusion:

... that the pain from these fractures would have prevented [the worker] from working during May and June in spite of the relative extended period after the accident. Normally one would expect this type of pain to resolve within 3 months but obviously there are no hard and fast rules.

[The worker] is now on L.T.D. as a result of complications from Hypertension and Diabetes. Although his chronic chest wall pain has persisted this is not the reason for his ongoing disability.

I do not believe that these findings are pertinent (sic) to his W.C.B. claims.

(19) The Appeal Division panel concluded as follows:

The medical evidence indicates that the worker sustained relatively minor injuries in his fall of January 25, 1994. Prior to that injury, he was off work from December 13, 1993 to January 14, 1994, apparently for problems related to hypertension and diabetes. The evidence from the specialist, [Dr. S], and the family physician, [Dr. C], indicate that the worker had recovered sufficiently from the effects of the compensable injuries to return to work by early July 1994. The evidence also indicates that the worker's continuing problems beyond that time related more directly to complications from his non-compensable hypertension and diabetes, as confirmed by [Dr. C]. As the employer's representative pointed out, there is no medical evidence on file to the contrary.

(20) On March 26, 1999, the case manager responded to the March 11, 1997 letter from the employer. He advised:

The Claims Medical Advisor reviewed the file on March 26, 1999. There is no indication that the hypertension or diabetes enhanced the level of disability or delayed recovery prior to July 3, 1994. In fact, it was [the worker's] contention

that he remained disabled after July 3, 1994 due to the fractured ribs. It was felt that as of July 4, 1994 he could commence a return to work program but he was unable to due to non-compensable reasons.

The initial Review Board findings of June 19, 1995 clearly indicate that they preferred the opinion of [Dr. S] and [Dr. C] and that [the worker] was disabled up to July 3, 1994 as a result of the injury accepted under this claim. This issue was not in dispute at the hearing of January 22, 1997 (Findings of February 17, 1997). Therefore, relief of cost will not be applied to this claim.

- (21) On April 6, 1999, the employer re-established their appeal to the Appeal Division. On August 24, 1999, the employer again requested their appeal be withdrawn pending further adjudication and this was approved by the acting chief appeal commissioner on September 29, 1999 (withdrawal #2). By letter of November 12, 1999, the client services manager advised:

The Claims Medical Advisor has now detailed his opinion on file by way of a Memo dated November 5, 1999.

As noted in the Case Manager's letter of March 6, 1999 the opinion of the Medical Advisor was that the period of disability was no [sic] delayed by the presence of any pre-existing disease or disability.

Therefore, the decision of the Case Manager is upheld.

- (22) On November 18, 1999, the employer re-established its appeal to the Appeal Division.
- (23) On January 27, 2000, the employer requested their appeal be withdrawn pending further adjudication. This was approved by the acting chief appeal commissioner on February 3, 2000 (withdrawal #3).
- (24) By decision dated April 11, 2000, the director, Vancouver Island Operations, undertook a further review of the claim and denied the employer's request for relief of costs. The employer re-established their appeal to the Appeal Division on May 9, 2000. On August 8, 2000, the employer requested their appeal be withdrawn pending further adjudication. This request was approved by the deputy chief appeal commissioner on August 31, 2000 (withdrawal #4).
- (25) By letter of September 15, 2000, the director, Vancouver Island Operations, advised the employer they had provided no new evidence or argument to support reconsideration, and their remedy would be to pursue their appeal.
- (26) Following the September 15, 2000 decision, the employer wrote again to the director, Vancouver Island Operations on September 25, 2000. The employer did not utilize the procedure of re-establishing the employer's appeal to the Appeal Division within 30 days of the September 15, 2000 decision, or obtain approval from the Appeal Division for pursuing a request for further adjudication.

- (27) Up to this point, by utilizing the procedure for requesting a withdrawal of the appeal pending further adjudication, and then re-establishing their appeal within the stipulated 30 days following the new decision, the employer had kept alive their appeals of decisions dated October 22, 1996, March 26, 1999, November 12, 1999, and April 11, 2000. However, the employer failed to contact the Appeal Division within 30 days of the decision dated September 15, 2000. This has the effect that the employer's appeal of the decisions dated October 22, 1996, March 26, 1999, November 12, 1999, and April 11, 2000 lapsed. There is no appeal of the September 15, 2000 decision. Any appeal of a subsequent decision must be addressed as a new matter. The employer's prior relief of claim costs appeal, relating to the decisions dated October 22, 1996, March 26, 1999, November 12, 1999, and April 11, 2000 was abandoned (i.e. as a consequence of the failure to re-establish the appeal to the Appeal Division within 30 days of the September 15, 2000 decision). In view of this, I have not included in my summary of the evidence set out above, the contents of the medical opinions provided by board medical advisors concerning whether there was any prolongation or enhancement of the worker's disability by reason of a pre-existing disease, condition or disability.
- (28) On October 10, 2000, the director, Vancouver Island Operations, responded to the employer's September 25, 2000 letter. By letter dated October 31, 2000, the employer filed an appeal of the October 10, 2000 letter to the Review Board. By letter dated November 30, 2000, the Review Board deputy registrar advised the employer that the decision was not appealable to the Review Board. She advised that it did not contain any new decision affecting the worker's entitlement. She noted that even if it did, the Review Board was *functus* on the issue (i.e. that in view of its prior finding(s), it had no further jurisdiction to address the matter).
- (29) On December 7, 2000, the employer wrote to the Appeal Division concerning the November 30, 2000 decision by the Review Board and inquiring as to the appropriate avenue of appeal. By letter of December 13, 2000, the deputy chief appeal commissioner of the Appeal Division responded to the employer's letter. He noted the October 10, 2000 letter contained the statement ". . . that the length that [sic] the recovery was not enhanced by any pre-existing condition." He noted:

On the basis of my preliminary review of this matter (without the file), it appears that this matter is most appropriately considered as a relief of cost appeal. I have therefore forwarded your correspondence to the intake officer to initiate your December 7, 2000 letter as a notice of appeal on that basis.

By way of this letter, I confirm that it will not be necessary to make application for an extension of time to appeal in light of your October 31, 2000 letter to the Review Board which indicates grounds for your disagreeing with the October 10, 2000 letter. The employer's appeal will be processed in due course on the basis of your October 31, 2000 and December 7, 2000 letters regarding this matter.

- (30) A submission dated February 13, 2001 has been provided by the employer in support of their appeal.

Law and Policy

- (31) Section 96.1(1) of the Act provides:

Subject to this section and sections 58 to 66, a decision of the Appeal Division is final and conclusive.

- (32) Section 96(2) of the Act provides:

Notwithstanding subsection (1), 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.

Findings and Reasons

- (33) As noted above, the employer did not appeal the September 15, 2000 decision. Nor has the employer sought to re-establish its appeal to the Appeal Division from decisions dated October 22, 1996, March 26, 1999, November 12, 1999, and April 11, 2000. The employer has not requested those appeals be re-established, or sought an extension of time for this purpose. While the employer's letter of October 31, 2000 to the Review Board was accepted as providing timely notice of the employer's objections to the October 10, 2000 letter, the October 31, 2000 letter was outside the 30-day time limit for appealing the September 15, 2000 decision or for re-establishing the employer's appeal from the decisions dated October 22, 1996, March 26, 1999, November 12, 1999, and April 11, 2000. Accordingly, the employer's appeal for relief of claim costs in relation to those prior decisions is considered to have been abandoned.
- (34) The further letter dated October 10, 2000 is the subject of this appeal. The employer argues this letter involved an error of law, due to a contravention of the Appeal Division Decision #98-0106 dated January 20, 1998. The employer points out that under section 96.1(1) of the Act, the Appeal Division decision is "final and conclusive." The Board's reconsideration authority under section 96(2) is expressly limited as not encompassing a decision of the Appeal Division.
- (35) I have considered, therefore, whether the October 10, 2000 decision involved a contravention of the Appeal Division decision. The employer argues:

With respect to the initiating incident, the panel specified: "**The medical evidence indicates that the worker sustained relatively *minor* injuries in his fall of January 25, 1994.**"

[emphasis added by employer]

- (36) The worker's claim involved a period of six months of wage loss benefits. I do not consider that the Appeal Division panel's reference to the worker having sustained relatively minor injuries can be considered determinative on the issue as to whether or not the worker suffered rib fractures in his fall.

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- (37) I note, in this regard, that the medical issues concerning the rib fractures were specifically raised in the employer's February 6, 1994 submission to the Review Board. Inasmuch as the June 19, 1995 Review Board finding allowed the worker's appeal "given the objective findings of the C.T. scan report," it may be inferred that the Review Board accepted those findings as resulting from the worker's 1994 work injury.
- (38) While not expressly stated, it is readily apparent from the June 19, 1995 Review Board finding that the panel accepted Dr. C's opinion that the rib fractures identified in the bone scan report dated September 7th, 1994 were a result of the injury. It was on the basis of these "objective findings" that the Review Board accepted the worker's claim for a longer period of disability. The medical decision on that issue was contained in the June 19, 1995 Review Board finding, which the employer did not appeal to the Appeal Division. The employer was advised of this in the March 26, 1999 decision by the case manager.
- (39) It appears that a major part of the employer's efforts have had the effect of indirectly questioning the medical decision contained in the June 19, 1995 Review Board finding. However, as that Review Board finding was not appealed, the medical decision provided in that finding stands as a decision on this claim.
- (40) Subsequent decisions on the claim concerned the date by which the worker had recovered from these fractures so as to be able to return to work. The worker appealed to the Review Board concerning the July 3, 1994 termination of wage loss benefits. In participating in this appeal, the employer attempted to raise the issue addressed in the prior Review Board finding of June 19, 1995.
- (41) As noted above, in its finding dated February 17, 1997, the Review Board panel noted that the employer "also raised the question of whether the previous panel accepted anterior and posterior rib fractures, and/or anterior rib pain as being part of the claim." The Review Board panel denied the worker's appeal for further wage loss benefits. The Review Board further noted:

The panel declines to address the issue raised by [the employer's representative] regarding what has been accepted under the claim. We confine our finding to whether the effects of the injury remained disabling beyond July 3, 1994 and we find that they did not.

- (42) The January 20, 1998 Appeal Division decision (#98-0106) must be read in this context. The issue before the Appeal Division concerned whether wage loss benefits were appropriately terminated July 3, 1994. The prior Review Board finding with respect to the worker being disabled for a further period of time beyond May 15, 1994, based on the objective evidence of rib fractures in the bone scan report, was not in issue in the appeal to the Appeal Division. Rather, the new issue concerned the time of the worker's recovery from these injuries.
- (43) In this appeal, the employer's primary submission is that the Board officers must, in considering the employer's request for relief of claim costs, have regard to the binding effect of the Appeal Division decision. I do not read Appeal Division Decision #98-0106 as overturning the

prior unappealed Review Board finding of June 19, 1995. I do not consider that the description of the worker's injuries as "relatively minor" is such that it can be taken to have overturned the prior unappealed Review Board finding of June 19, 1995 as to the nature of the worker's injuries. Having regard to the context of this appeal, I would interpret this statement as simply indicating that the worker's injuries were not such as to support a finding of disability beyond July 3, 1994.

(44) I would, therefore, point out to the employer that in the absence of an Appeal Division decision overturning the June 19, 1995 Review Board finding, the obligation of the Board officer in considering the application for relief of costs was to give effect to the medical decision contained in the June 19, 1995 Review Board finding. The efforts of the employer appear to have been directed at contesting that medical decision, but it was never appealed to the Appeal Division.

(45) For the reasons set out above, to the extent the October 10, 2000 letter is viewed as a decision to deny relief of claim costs to the employer, I find no error of law in terms of the employer's argument that it was in contravention of the Appeal Division decision.

(46) The employer further submits:

The pre-existing conditions/disabilities of hypertension and diabetes are known enhancements for soft tissue injury and are the likely rationale for the prolonged recovery, especially given that they were disabling, of themselves, from the day following recovery from the compensable injury.

(47) This argument was addressed in prior decisions, on which the employer's appeal has lapsed. I note, in this regard, that by memo dated November 5, 1999, the Board medical advisor commented:

It is not unusual for an individual who has fractured a number of ribs to be very uncomfortable and in fact disabled for more than 3 months. I believe this to be the case in this situation and do not consider that the diabetes or hypertension had any role of significance to play in this man's disability.

(48) A decision was subsequently issued dated November 12, 1999, and the appeal of that decision has lapsed. This was not an issue further addressed on the merits in the October 10, 2000 letter, and will therefore not be addressed in this decision.

(49) I have, as set out above, addressed the employer's objections to the October 10, 2000 decision as though it were an appealable decision. I would, however, question whether the October 10, 2000 letter constituted a fresh appealable decision. Board officers are not obliged to undertake a reconsideration simply because they are asked to do so. Nor does a decision by the Appeal Division to approve the employer's request for a withdrawal of their appeal for the purpose of seeking readjudication signal that any readjudication is in order. Such a letter simply confirms to the employer that the appeal is considered withdrawn and provides an assurance to the employer that they may re-establish their appeal to the Appeal Division within 30 days of the

decision or letter responding to their application for reconsideration (even if that decision is to deny the request for reconsideration on the basis that grounds for reconsideration are not established). Every request for readjudication must be considered on its own merits pursuant to section 96(2) of the Act, and the applicable policies concerning any managerial review process or the requirements for obtaining reconsideration.

- (50) It appears to me that the October 10, 2000 letter was simply providing the courtesy of a response, and additional comments, in connection with the September 15, 2000 letter which advised that grounds for reconsideration were not established.
- (51) I note, in this regard, that I do not read the December 13, 2000 letter by the deputy chief appeal commissioner as constituting a decision to accept that the October 10, 2000 letter was appealable to the Appeal Division. Rather, it was stated to be provided on the basis of a preliminary review without the file. It advised the employer that their appeal would not be considered out of time, and that it would be forwarded to the intake officer for handling as a notice of appeal. The October 31, 2000 letter of objection to the October 10, 2000 letter was accepted as a letter expressing an intent to appeal the October 10, 2000 letter even though it was addressed to the Review Board rather than the Appeal Division. However, I do not read this as amounting to a decision as to the validity of the appeal.
- (52) I have noted the complaints by the employer of prejudice, discrimination, and obstructionism by Board officers. Certainly, the employer is entitled to full and fair consideration of their request for relief of costs. However, it appears evident that the employer has pursued multiple reconsideration applications, while not appealing the central Review Board finding of June 19, 1995. Obviously, such repeated applications for reconsideration place a burden, perhaps an undue one, on decision-makers with ongoing responsibilities for adjudication of new matters. The policies in Chapter 14 of the *Rehabilitation Services and Claims Manual* evince an intention to limit the resources which will be applied to applications for reconsideration. #108.00 provides that an application for reconsideration will not be considered where the amount involved is slight compared with the resources that would be required to consider the application. #108.10 provides that an application for reconsideration will not be considered unless grounds for reconsideration such as are set out in Chapter 14 are specified. It is, in this context, quite justifiable for a Board officer to decline to further address a matter and to advise the applicant that their remedy is to proceed with an appeal (as was done in the September 15, 2000 decision).
- (53) To summarize, the employer's August 26, 1996 request for relief of claim costs was addressed in a decision dated October 22, 1996. Subsequent reconsideration applications, and resulting letters or decisions, were as follows:

Reconsideration application	Decision/letter
March 11, 1997	March 26, 1999
August 24, 1999	November 12, 1999
January 27, 2000	April 11, 2000
August 8, 2000	September 15, 2000
September 25, 2000	October 10, 2000

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- (54) The employer raises allegations of prejudice and discrimination. The employer submits “our client’s right to fair adjudication/reconsideration of Section 39(1)(e) has been prejudiced by the disdain held for representatives, who are former employees, by Compensation Services.” The employer submits it is wrong for compensation services to ignore and distort evidence to force the employer into an appeal situation.
- (55) I would point out that an allegation of bias is a serious matter, not to be made lightly. Different individuals may reasonably reach differing conclusions on issues of interpretation of law and policy, or in relation to the weighing of evidence. One need only look to the judgments of the highest court, the Supreme Court of Canada, in which dissents are often expressed, to illustrate this point. It is appropriate for a party to advance full arguments on behalf of their case. It is unseemly for a party such as this employer, whose arguments are unsuccessful, to attribute this outcome to bias or prejudice. It is perhaps understandable, that a person without prior experience or understanding of the decision-making process, might (albeit erroneously) express their disappointment with the outcome by attributing it to bias. It is, however, inappropriate for the employer to cast aspersions of prejudice in a reckless fashion, as a means of attempting to influence the decision-making in a case. I refer, in this regard, to the reasons expressed by the British Columbia Court of Appeal in the case of *Adams v. B.C. (W.C.B.)* (1989) 42 B.C.L.R. (2d) 228. The Court of Appeal reasoned in that case (at pages 231 and 232):

This case is an exemplification of what appears to have become general and common practice, that of accusing persons vested with the authority to decide rights of parties of bias or reasonable apprehension of it without any extrinsic evidence to support the allegation. It is a practice which, in my opinion, is to be discouraged. An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and the doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation easily made but impossible to refute except by a general denial. It ought not to be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause. As I have said earlier, and on other occasions, suspicion is not enough.

- (56) I consider that the employer received full and fair consideration of their request for relief of costs. It is only to be expected that repeated reconsideration applications, after reasoned decisions have been provided, will at some point be found to not warrant further consideration on the merits. The administrative costs in responding to such repeated reconsideration applications are ultimately borne by the employers of the province. Board officers have a responsibility to those other employers not to be drawn into an inordinate expenditure of administrative resources where a proper basis for further consideration is not provided. I find no error of law in the October 10, 2000 letter, in respect of the allegation of prejudice.

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- (57) The employer further complains that they had written to the WCB president on September 28, 2000 (apparently on another matter). The employer states:

To our amazement he responded on November 15, 2000 (attached) that:

Senior management will refer letters back to the original officer or manager for response when it appears that a correspondent repeatedly escalates issues “up the line” trying to get a different response, and we have repeatedly not found his/her argument to have merits. This approach is more likely to be taken when the correspondent is considered knowledgeable about the reconsideration and appeal processes.

- (58) That correspondence is not on file and a copy was not provided as indicated. It is not strictly necessary that I address this matter for the purposes of my decision. I would, however, comment briefly on this argument. Senior management of the Board do not provide a separate avenue of appeal as a matter of entitlement under the Act. It is appropriate for senior management to exercise judgment to determine when it is appropriate, or inappropriate, to intervene on the basis of the Board’s section 96(2) discretionary authority to respond to an applicant’s concerns. I see nothing objectionable in the notion that this discretion might be more readily exercised to respond with additional explanation or consideration to an unrepresented or unsophisticated party on an exceptional basis, particularly where the individual feels their concerns are not being heard and they are not familiar with the avenues for obtaining further consideration under the Act. Where a representative appears to be using complaints to senior management of the Board as being analogous to a further avenue of appeal on a routine basis, I see nothing objectionable in the type of response described above. To the extent this involves “differential” treatment, I consider this represents a reasonable general guideline in exercising the plenary independent discretion contained in section 96(2) of the Act. I note, in this regard, the policy at #106.10 of the Manual, concerning the *Discretionary Nature of Power to Reopen and Reconsider*:

Not only is the reopening of a matter discretionary, but the Legislature has used the emphatic phrase “full discretionary power.” This authorizes the Board to determine when it will reopen previous decisions, and the criteria by which it will do so.

...

The Board is not required in every circumstance to reopen an erroneous decision, and it is not required in every circumstance to substitute the decision which ought to have been made on the earlier occasion. Section 96(2) authorizes the Board to consider its own judgment on what is fair in deciding whether that decision should be reopened or reversed.

Conclusion

- (59) The employer's appeal of the October 10, 2000 letter is denied. I do not consider the October 10, 2000 letter constituted an appealable decision. Even if I consider it as an appealable decision, I would deny the employer's appeal. Having regard to the medical decision contained in the Review Board finding of June 19, 1995, which was never appealed, I find no error of law has been established in relation to the decision to deny relief of claim costs under section 39(1)(e) of the Act. In particular, I do not accept the argument by the employer that this denial of claim costs involved a contravention of Appeal Division Decision #98-0106. As well, the allegation of prejudice is of the type criticized by the court in the *Adams* decision, as being made without any extrinsic evidence to support it.

Editors' Note: The names of the parties have been removed for privacy considerations. The text of the decision is otherwise unchanged.