

**Decision of the Appeal Division****Number: 2001-1414****Date: July 18, 2001****Panel: Herb Morton****Subject: Application for Extension of Time to Appeal  
Denial of Relief of Costs**

**APPEAL DIVISION (EXTENSION OF TIME, APPEAL DIVISION) (RELIEF OF COSTS)** – Decision letter denying relief of costs provided to employer with no copy to representative despite specific request by representative – Representative sought extension of time to appeal – Panel departs from reasoning in Appeal Division Decision No. 2001-0304 – Employer bears some responsibility to preserve appeal rights by communicating with representative but this does not negate unfairness – Initial error made by Board officer in failing to provide the representative a copy – Contravenes general intent of policies – Exceptional circumstance – Extension of time granted.

**Policy:** RSCM: #99.10, #99.20, #114.43; *Claims Adjudication Handbook*, s. 060-008; Governors' Decision No. 75, 10 *Workers' Compensation Reporter* 753

**Decisions:** *Conde Michaud v. WCB* (6 October 1987), Vancouver CA005993 (B.C.C.A.); *Re Caputo and Workers' Compensation Board of British Columbia* (1987), 38 D.L.R. (4th) 458 (B.C.C.A.); Appeal Division Decision No. 2000-1228; Appeal Division Decision No. 2001-0304; Appeal Division Decision No. 2001-0791

*Application for an Extension of Time* [employer application, time extension]  
*Appeal Division Decision No. 2001-1414*

17 *Workers' Compensation Reporter* 435

**Introduction**

- (1) The employer seeks an extension of time to appeal the claims adjudicator's decision, which bears the date September 14, 1998, to deny relief of claim costs under section 39(1)(e) of the *Workers Compensation Act* (the Act). The employer's application for an extension of time to appeal was initiated by letter dated December 19, 2000 from an external consultant representing the employer ("the representative").

**Jurisdiction**

- (2) Under sections 96(6) and (6.1) of the Act, an employer may appeal a decision by a Workers' Compensation Board (Board) officer to the Appeal Division "not more than 30 days after receiving the notice or within a longer period the chief appeal commissioner may allow." These provisions permit an appeal to the Appeal Division from certain types of decisions, on the grounds of error of fact or law, or contravention of a published policy of the governors.

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- (3) This application for an extension of time to appeal has been assigned to me for consideration under paragraph 8(c) of a delegation of authority from the chief appeal commissioner (Decision No. 32, June 1, 2001).

### **Practice and Procedure Guidelines**

- (4) Appeal Division Decision Number 1 (Practice and Procedure, 7 *Workers' Compensation Reporter* 33) summarized the factors considered in an application for an extension of time to appeal a Review Board finding (at page 39):
- (i) substantial and material new evidence has arisen or has been discovered subsequent to the Review Board hearing;
  - (ii) exceptional circumstances prevented the party from initiating an appeal in time.

It would weigh against the granting of an extension of time to appeal if the party delayed in initiating an appeal after they became aware of the new evidence referred to in (i), or after the exceptional circumstances referred to in (ii) came to an end.

This list is not exhaustive and other factors may be taken into account. None will be considered determinative. An extension of time to appeal may be granted, for example, where the appellant was outside the province for a holiday when the Review Board finding was sent out and they acted expeditiously in initiating an appeal when they received the finding.

- (5) Similar factors apply to an employer's request for an extension of time to appeal under sections 96(6) and (6.1).

### **Background**

- (6) The worker suffered a left shoulder injury at work on April 19, 1996. Wage loss benefits were paid from April 23, 1996 to August 29, 1997, and from December 4, 1997 to August 15, 1999. He underwent surgery on February 26, 1998 for an acromioplasty. Further surgery was performed on February 12, 1999 for an open biceps tenodesis. The worker has been referred for a permanent functional impairment examination.
- (7) By letter dated August 17, 1998, the representative wrote to the claims adjudicator requesting relief of claim costs, and providing a letter of authorization from the employer dated November 18, 1997. The representative's letter noted:

Please direct your reply to myself at the above address. Please reference the employer by name.

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- (8) The August 17, 1998 letter is stamped as having been received by the area office of the Board on August 20, 1998.
- (9) A telephone memo dated November 3, 1998 is also on file, documenting a phone inquiry by the employer. The caller was the same person who signed the April 22, 1996 *Form 7 Report of Injury* on behalf of the employer. The phone message notes:

- inquiring re 39(1)(e)
- discuss [with] M.A. → not applicable
- call [employer] – [illegible] re deny of 39 & 42  
Letter to follow.

[reproduced as written]

- (10) A handwritten file memorandum (#26) dated November 4, 1998, by the claims adjudicator, states as follows:

The employer call Nov 3/98 requesting this file be reviewed for consideration of Sec 39(1)(e).

I've discussed this matter with [Dr. K] – M.A., on Nov 4/98.

It was noted the worker has no prior clms with WCB for his L shldr/wrist.

Medical information provide to file does not provide evidence of a pre-existing condition, disease or disability.

I see no other reason for relief of costs. Sec. 39 & 42 will be denied.

[reproduced as written]

- (11) A decision letter is on file, dated "September 14, 1998," addressed to the employer. The decision letter notes, in paragraph two:

This claim has been reviewed with respect to Section 39(1)(e) of the *Workers Compensation Act*, given your request made on November 3, 1998.

- (12) The decision letter refers to the review of the worker's claim with a Board medical advisor and concludes by advising that the request for relief of claim costs is denied. The letter was sent directly to the local office of the employer where the worker was injured. No copy was provided to the representative, nor was there any reference to the representative's letter of inquiry. There is nothing in the contents of the letter or the file memoranda to indicate that the claims adjudicator was aware of the letter from the representative, at the time the "September 14, 1998" decision was issued.

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(13) The file copy of the decision letter is signed by the claims adjudicator, with a date stamp of November 6, 1998 beside her signature. This suggests that the true date of the decision was November 6, 1998, which is consistent with the other evidence noted above. The “September 14, 1998” decision date appears to be in error, inasmuch as the letter refers to both the employer’s inquiry, and the review by the Board medical advisor, in November 1998.

(14) By letter of November 23, 2000, the representative wrote again to the claims adjudicator, noting that no reply had been received to his August 17, 1998 letter of inquiry and requesting a response. A handwritten notation by a Board officer on the bottom corner of the letter states:

Sent them a copy of our Sept 14/98 letter (retyped version) Dec 7/00.

(15) There are, in fact, three “yellow” copies of the “September 14, 1998” decision letter on file:

- The first one is described above.
- The second copy is altered in pen, to mark out the date of the employer’s inquiry of “November 3, 1998” in the second paragraph of the letter, to replace it with the handwritten date of August 17, 1998 in an apparent reference to the letter of inquiry from the representative. A handwritten note in the bottom right corner of the decision states: “Retyped [with] correction of date,” and is initialed by the claims adjudicator.
- The third copy of the decision is dated September 14, 1998 at the top, and refers in the second paragraph of the decision to the representative’s inquiry of August 17, 1998. It appears that this third copy was the one ultimately sent to the representative. On its face, there is nothing to reveal the letter was not sent on September 14, 1998, as a reply to the representative’s August 17, 1998 letter, although this does not appear to have been what actually occurred.

(16) The amended copy of the “September 14, 1998” decision letter, retyped to appear to be a response to the representative’s August 17, 1998 inquiry, was sent to the representative on December 7, 2000. The representative’s letter of appeal to the Appeal Division was dated December 19, 2000, and notes they first received the “September 14, 1998” decision letter on December 11, 2000.

(17) No comments are provided by the representative concerning the sequence of events concerning the various dates described above. The representative is likely unaware of these details, as the employer is not eligible to obtain disclosure in connection with a request for an extension of time to appeal (unless the extension of time to appeal is granted).

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## Submissions

- (18) The representative requests an extension of time to appeal, as they were not notified of the “September 14, 1998” decision until December, 2000. The representative relies on the policy at #99.10 of the *Rehabilitation Services and Claims Manual*, which provides:

The Board will cooperate with and notify claimants’ or employers’ advocates or representatives of any decisions which have been made and communicated to the claimant or employer.

- (19) In his submission of May 24, 2001, the representative comments:

Our work for this employer proceeds with authority from head office. We have not met nor have we spoken with [location] divisional management. When they received the September 14, 1998 letter there was no cue for them to question why the letter was generated and in response to whom. We had no idea that a decision had been made on this case until, in response to our followup, we were sent a copy of the September ’98 letter.

The recent change at the Appeal Division pertaining to the denial of extension of time involves the viewpoint that there is an onus on the employer receiving such out-of-the-blue correspondence that they should take steps to appeal the matter that they know nothing about, or bring it to the attention of the inquiry representative, whom they also may know nothing about. This is very unfair, especially given the Board’s own decision notification requirements (Policy #99.10) . . .

- (20) The representative further submits that the use of the word “will” in the policy at #99.10, in providing that the Board “will cooperate with and notify . . . employers’ advocates,” establishes “an absolute requirement on the decision maker as opposed to other policies where the officers “may” take a suggested action.” He argues that the failure to provide them with a copy of the “September 14, 1998” decision letter involved a clear contravention of policy. He submits: “Such direct errors, which then prejudice the stakeholder’s legislated appeal rights, cannot be swept aside by some later misplaced assumption that the employer should have been more vigilant.”

## Prior Appeal Division Decisions

- (21) Appeal Division decisions since January 1, 2000 are accessible on the internet at <http://www.worksafebc.com/>. The general practice of the Appeal Division is to not utilize such prior decisions (or prior unpublished decisions) in a decision unless the parties have specifically been advised of the accessibility of Appeal Division decisions on the internet, or the particular decisions have been disclosed for comment. I consider, however, that in the circumstances of this case no prejudice arises from my reference to such decisions, and have included these in my consideration. (In fact, 12 of the 15 cases listed below were ones in which the representative’s office was involved.)

- (22) In view of the representative's reference to a change in Appeal Division practice, I conducted a search of past Appeal Division decisions on applications for an extension of time to appeal where the decision letter had been sent only to the employer with no copy to the representative. This search was not exhaustive — it was based on references to either the policy at #99.10 of the Manual or practice item 060-008 of the *Claims Adjudication Handbook*. There may be additional decisions concerning applications for an extension of time to appeal where the panel did not find it necessary to cite these references, in connection with the exercise of the chief appeal commissioner's discretion to grant an extension of time to appeal. The following decisions were identified:

Decision Number	Date	E.O.T. Result
1. 00-0011	January 6, 2000	Allowed
2. 00-0906	June 16, 2000	Allowed
3. 00-1047	July 11, 2000	Allowed
4. 00-1064	July 13, 2000	Allowed
5. 00-1228	August 10, 2000	Allowed
6. 00-1281	August 18, 2000	Allowed
7. 00-1393	September 7, 2000	Allowed
8. 00-1423	September 14, 2000	Allowed
9. 00-1746	November 2, 2000	Allowed
10. 00-1928	December 4, 2000	Allowed
11. 2001-0304	February 13, 2001	Denied
12. 2001-0374	February 22, 2001	Allowed
13. 2001-0414	February 28, 2001	Denied
14. 2001-0466	March 6, 2001	Denied
15. 2001-0791	April 25, 2001	Allowed

- (23) In sum, 15 cases were identified involving a request for an extension of time to appeal to the Appeal Division, where an representative had requested relief of claim costs, but the decision letter was only provided to the employer with no copy to the representative representing the employer. Twelve applications were granted, and 3 were denied.
- (24) It is useful, in this regard, to set out excerpts from a few of these decisions to illustrate the reasoning applied. (I note that the representative's office was involved in all three cases quoted at length below). In Appeal Division Decision #00-1228, the panel reasoned as follows:

It is apparent the employer's representative was waiting for a decision from the claims adjudicator regarding the relief of costs issue and when not received, contacted the Board requesting advice whether the cost relief provisions in accordance with section 39(1)(e) of the *Act* were applicable.

I note that section 060-008 of the *Claims Adjudication Handbook* provides, "Decision letters concerning section 39(1)(e) are forwarded to the employer only." This could be interpreted as indicating the employer's representative is

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not sent a copy, but could also mean a copy of the decision is not sent to the worker. Item 060-023 refers to sending copies of decisions to advocates whose written authorization is on file.

In this case, the employer has relied on their representative to actively pursue an appeal. The claims adjudicator's December 11, 1998 letter did not indicate the decision had been communicated to the representative. There is no copy noted on the letter and nothing in the text to suggest the representative would know of the decision. There is no indication in the representative's January 24, 2000 letter to the Board that the employer ever contacted the representative regarding the decision letter. From this, it would appear, the employer has not been active in protecting its interest.

I have decided to accept the reasons as provided by the employer's representative constitute exceptional circumstances which prevented the party from initiating an appeal in time. However, I have come to this decision with some hesitation, given that the employer should have systems in place to communicate with their representatives and ensure that appeals are filed within the statutory 30-day time limit. While the employer may have relied on the representative to actively pursue an appeal, there is an underlying responsibility on workers and employers to take reasonable measures to protect their own interest. The employer did not know whether the representative received a copy of the December 11, 1998 decision letter. The decision letter also enclosed an appeal pamphlet containing details of the appeal procedures and statutory time limits in which to do so.

The grounds upon which an extension of time to appeal will be granted have been satisfied. The employer's application for an extension of time to appeal the claims adjudicator's December 11, 1998 decision is granted.

- (25) Similar reasons were provided in the other cases which granted an extension of time to appeal.
- (26) In Appeal Division Decision #2001-0304, the panel set out its reasons for reaching a different conclusion:

The employer's representative provided a submission dated January 29, 2001. He noted his firm's October 6, 1998 inquiry and that the Board did not send his firm a copy of the March 25, 1999 decision until June 8, 2000. He submitted:

W.C.B. policy requires that, where an employer representative inquires on a claim, any decision will be copied to the representative. This did not take place in March of 1999, therefore the need for extension of time now.

[reproduced as written]

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The employer's representative has not provided a specific policy reference. I note items #99.10 and #99.20 of the *Rehabilitation Services and Claims Manual* refer to particular circumstances in which Board officers are to provide copies of decisions to advocates. Item #99.10, which deals with situations in which an employer has protested a claim, states in part:

The Board will cooperate with and notify claimants' or employers' advocates or representatives of any decisions which have been made and communicated to the claimant or employer. Unions or other similar associations may appoint specific officers as designated advocates and list their names with the Board. Information may be disclosed to such advocates when acting on behalf of claimants. Written authorization is required in order to release information to any other advocate, representative or other person designated by the claimant.

Item #99.20, which is entitled "Notification of Decisions" states, in part:

Where a claim is allowed and there has been no protest from the employer, no reasons are given. The Board simply sends the cheque. Notification of the allowance is sent to any advocate designated by the claimant's designated union or association who is acting on behalf of the claimant. Information may also be disclosed to any other advocate, representative or other person where authorized in writing by the claimant.

When a decision is made to allow a claim that has been protested by an employer, the employer will be notified of the decision and reasons, where possible by telephone. Only personal information which is relevant to the claim and the issues involved will be provided to the employer. A letter explaining the decision and reasons will be sent in any case where the employer cannot be contacted by telephone, or where in the course of the telephone conversation the employer indicates that in spite of the explanation there is a dissatisfaction with the decision. The letter is sent to the employer, with a copy to the worker. The guidelines outlined in the following paragraph, with regard to letters sent to workers, should be followed to the extent that they apply. Employer advocates are notified in the same manner as workers' representatives.

Since items #99.10 and #99.20 relate to circumstances in which entitlement under a claim is being adjudicated, in my view, their application appears to be limited to circumstances involving the adjudication of workers' claims. Item #114.43, which is entitled "Procedure Governing Applications under

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Section 39(1)(e),” applies specifically to the adjudication of relief of costs matters. It states:

The Claims Adjudicator, Disability Awards Officer or Adjudicator in Disability Awards have the responsibility to initiate consideration with or without a specific request or application by an employer, and to decide upon the applicability of the subsection on a claim. If a decision is made to apply this subsection, the employer will be notified. *If relief has been requested, the employer will be advised if it has been denied.* If there is a disagreement with such a decision, the employer may appeal to the Appeal Division.

[emphasis added]

Unlike items #99.10 and #99.20, item #114.43 does not specify that a copy of the decision is to be sent to the employer’s representative (although it is certainly open to the Board to do so, and providing a copy to the representative appears to be a desirable practice). Accordingly, I do not find that, as a matter of policy, the Board is required to send a copy of a decision concerning relief of costs to the representative of the relevant employer.

Appeal Division Decision No 1 (Practice and Procedure, 7 *Workers’ Compensation Reporter* 33) summarized the factors considered in an application for an extension of time to appeal a Review Board finding. The factors include exceptional circumstances which prevented the appellant from initiating the appeal on time. Other factors may also be taken into account and none is considered determinative. These factors are also considered in respect of extension of time requests pertaining to appeals under sections 96(6) and 96(6.1) of the *Act*.]

In this case, the March 25, 1999 decision was sent to the employer and the employer was notified of the time limit to appeal. It is evident on the face of the decision that the Board did not send a copy of the decision to the employer’s representative. Accordingly, it would not be reasonable for the employer to have assumed that the Board had done so. In my view, an employer which was acting in a responsible manner in order to preserve its right of appeal would have sent a copy of the decision to its representative with instructions to initiate an appeal within the prescribed time period. The employer’s representative has not provided any evidence concerning the employer’s reasons for not taking steps in this regard. In these circumstances, I am not persuaded that exceptional circumstances prevented the employer from initiating the appeal on time or that there are any other factors that support an extension of time.

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- (27) The last decision (#2001-0791) of the 15 listed above gave the following additional reasons (quoted in part):

In this case, the employer relied on the representative to actively pursue an appeal. The case manager's August 3, 1999 decision did not indicate a decision had been communicated to the representative as specifically requested in the representative's letter dated June 30, 1999 to the Board requesting relief of costs. There is no copy noted on the case manager's August 3, 1999 letter to the employer and nothing in the text suggests the representative would know of the decision. There is no indication in the representative's June 21, 2000 letter to the Board that the employer ever contacted the representative regarding the decision. From this, the employer has not been active in protecting its interests.

I have decided to accept the reasons as provided by the employer's representative constitute exceptional circumstances which prevented the party from initiating an appeal on time. However, I come to this decision with some hesitation noting the employer should have systems in place to communicate with the representative to ensure that appeals are filed in the statutory 30-day time limit. While the employer has relied on their representative to actively pursue an appeal, there is an underlying responsibility on workers and employers to take reasonable measures to protect their interests. The decision letter did enclose an appeal pamphlet containing details of the appeal procedures and statutory time limits in which to do so. The employer should be more diligent in their communications with their representative regarding appeals of Board decisions related to their firm.

I cannot dismiss the employer representative's initial June 30, 1999 letter requesting a relief of costs on behalf of the employer and specifically requesting the Board to direct the reply to the employer's representative.

Item 114.43 of the *Rehabilitation Services and Claims Manual* "Procedures Governing Applications Under Section 39(1)(e)" provides:

The Claims Adjudicator, Disability Awards Officer or Adjudicator in Disability Awards have the responsibility to initiate consideration with or without a specific request or application by an employer, and to decide upon the applicability of the subsection on a claim. If a decision is made to apply this subsection, the employer will be notified. *If relief has been requested, the employer will be advised if it has been denied.* If there is a disagreement with such a decision, the employer may appeal to the Appeal Division.

[emphasis added]

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Although item 114.43 of the *Rehabilitation Services and Claims Manual* does not specify that a copy of the decision is to be sent to the employer's representative, I find it entirely reasonable and desirable the Board would respond to a specific request from the employer's representative regarding the adjudication of relief of costs matters.

The grounds upon which an extension of time to appeal will be granted have been satisfied. The employer's application for an extension of time to appeal the case manager's August 3, 1999 decision is granted.

- (28) Another decision (#00-0023, January 7, 2000) which I did not include in the list set out above concerned a somewhat different situation where the employer requested relief of costs and received a decision dated May 6, 1999 to deny relief of costs. A representative subsequently wrote on July 5, 1999 to inquire concerning relief of costs, and was promptly informed of the prior decision letter on July 16, 1999. Following further correspondence, on August 11, 1999 the representative requested an extension of time to appeal the May 6, 1999 decision. The application for an extension of time to appeal was denied.

### **Court Decisions**

- (29) In *Conde Michaud v. WCB* (1987, Vancouver Registry CA005993, unreported), the B.C. Court of Appeal considered an appeal by a petitioner from a decision of the British Columbia Supreme Court, which had dismissed an application for judicial review of a decision by the former commissioners of the Workers' Compensation Board. The facts of the case were that the Board of Review had allowed an appeal by the worker on July 18, 1983. On April 1, 1985, the employer applied for an extension of time to appeal. At that time, there was a 60-day time limit for appealing a Board of Review decision to the commissioners of the Board. The commissioners granted the employer's request for an extension of time to appeal, and the worker sought judicial review. The Court of Appeal reasoned, in part:

In my perusal of the appellant's very extensive argument it would appear to me that there are two matters which have not perhaps been borne in mind. The first is that the Board has in s. 91(1) been given an express discretionary power to enlarge the time. . . .

- (30) The Court of Appeal further noted:

The Board has not an unfettered discretion. It has a duty to act judicially. A number of arguments were made in an attempt to show it did not do so, and that the decision was patently unreasonable as relevant factors were not considered. The first factor was that the Board ignored its own policy: while this is not self-evident, even if it did it was entitled to do so as a matter of law.

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- (31) The Court of Appeal stated that the power to extend time for an appeal was a discretion which is only reviewable by the court “if the evidence demonstrated that there was some classic ground, such as fraud or bias or total unreasonableness, or other such matters.”
- (32) The discretion to extend time for an appeal from a Review Board finding to the former commissioners of the Board was one of the powers listed by the British Columbia Court of Appeal in the case of *Re Caputo and Workers’ Compensation Board of British Columbia* (1987), 38 D.L.R. (4th) 458. That case concerned the use of the Board’s discretion to refer a worker for examination by a Medical Review Panel under section 58(5) of the Act. However, at page 465, the Court of Appeal referred to section 91(1) concerning “appeal to commissioners,” in enumerating the various grounds in the Act by which “the Legislature has given the Board power to grant relief from non-compliance with other procedural requisites by granting the Board specific curative powers.” The Court of Appeal also cited section 99 of the Act, which provides:

The board is not bound to follow legal precedent. Its decision must be given according to the merits and justice of the case and, where there is doubt on an issue and the disputed possibilities are evenly balanced, the issue must be resolved in accordance with that possibility which is favourable to the worker.

- (33) The Court of Appeal found (at page 465):

The above-quoted sections demonstrate, in my opinion, a legislative intent that the compensation scheme outlined in the Act be administered by the board in accordance with practical, equitable and non-technical principles, “according to the merits and justice of [each] case.” It follows, therefore, that by granting the board broad and general powers in s. 58(5) the Legislature intended that the board should be empowered to grant curative relief in respect of “appeals” made by workmen and employers under s. 58(3) and (4). It could not have been the intention of the Legislature that there be strict adherence to the procedural requirements set forth in s. 58(3) and (4) but not in respect of mandatory procedures prescribed in other parts of the Act.

## **Findings and Reasons**

- (34) In this case, the initial request for relief of costs came from the representative. The representative specifically asked that the Board officer direct a reply to the representative. Notwithstanding this written request, the “September 14, 1998” decision letter was provided only to the employer. The employer was a large organization, and the letter was sent to one of its divisions. The representative advises they had been retained by the employer’s head office. The representative had not had communication with the division of the employer to whom the letter was sent. In addition, it appears there was a subsequent change in ownership, as the representative has furnished a fresh authorization dated July 5, 2000 from the health and safety director for the new employer.

- (35) In his submissions, the representative refers to a change in Appeal Division practice. In light of this assertion, I performed a search of prior decisions with the results listed above. I agree that the decisions seem to show a difference in approach in relation to whether the discretion to extend to appeal should be exercised in favour of the applicant, in circumstances where a representative requests relief of claim costs, the decision letter is sent only to the employer with no copy to the representative, and the representative does not learn of the letter until the time of a further inquiry some considerable time later.
- (36) I think, however, it may be overstating the matter to refer to a “changed practice” of the Appeal Division. None of the decisions is published in the *Workers’ Compensation Reporter*. The decisions granting extensions of time to appeal were made by one appeal commissioner, and the decisions denying an extension of time to appeal were made by a second appeal commissioner. Following the decisions which denied an extension of time to appeal, another decision was issued to allow an extension of time to appeal.
- (37) All of the decisions involve an exercise by an appeal commissioner exercising the delegated authority of the chief appeal commissioner to extend time for an appeal, pursuant to section 85(8) of the Act. It was not evident from this brief review as to whether the reasoning expressed in these decisions has been considered or applied by other appeal commissioners or the chief appeal commissioner, so as to show a general “practice.” In my view, these decisions all show a reasoned and judicious exercise of discretion, notwithstanding the different outcomes. The different outcomes appear to have involved an exercise of judgment as to the relative significance to be attached to various factors, including particular items in policy.
- (38) This does not, to my mind, necessarily indicate the existence of any “practice” or “changed practice.” Given the differences in the prior decisions listed above, I am not persuaded that there is any clearly established current Appeal Division “practice.” I will proceed to exercise the discretion in the fashion which I consider best suits the circumstances of this case and the purposes of the Act, and will endeavour to provide reasons for the conclusion reached which take into account the reasoning expressed in prior decisions, the policies of the panel of administrators, and the guidance provided in practice and procedure decisions of the chief appeal commissioner.
- (39) While the reasoning of the British Columbia Court of Appeal in the *Michaud* and *Caputo* decisions concerned different provisions, I consider that the reasoning remains valid. In particular, the reasoning of the Court of Appeal in the *Caputo* case is meaningful, in referring to “a legislative intent that the compensation scheme outlined in the *Act* be administered by the Board in accordance with practical, equitable and non-technical principles, ‘according to the merits and justice of [each] case’.”
- (40) In considering this matter, I have also taken note of another published policy of the governors/ Panel of Administrators. Decision No. 75 (Appeal Division Administration, Practice and Procedure, 10 *Workers’ Compensation Reporter* 753, December 1, 1994) states:

## 2.0 Representation Before the Appeal Division

The procedure of the Appeal Division shall recognize and facilitate the appearance and participation by workers and employers acting for themselves or lay advocates acting on their behalf.

- (41) This 1994 policy confirmed a policy with identical wording on this point provided in 1991 (Decision No. 1, Appeal Division Administration, Practice and Procedure, *7 Workers' Compensation Reporter* 7, at page 8). While the policy concerns representation before the Appeal Division, the general intent of the policy is to support or facilitate the participation of parties acting alone, or lay advocates acting on behalf of workers and employers on workers' compensation matters.
- (42) In considering this matter, I agree with the reasoning in the three decisions which found some responsibility rests with an employer to protect their own interests and appeal rights, when they receive a decision which has not been copied to their representative. Similar reasoning was expressed, in fact, in all 15 of the decisions listed above. I also agree with the reasoning in the decisions which focussed on the Board officer's failure to provide the representative with a copy of the decision even though the request for a decision came from the representative.
- (43) It is unfortunate that there is an appearance of inconsistency between the two lines of analysis reviewed above. However, it will sometimes be the case that differences of approach will occur during a period of development of analysis. As well, there cannot be rigid consistency in the exercise of discretion, particularly where this involves a weighing of the various elements or factors in a case which is necessarily somewhat subjective in nature. It seems to me that all the decisions agree as to the competing elements to be considered in such situations, and the difference in outcome derives from an exercise of judgment as to the relative weight to be given to these competing factors.
- (44) In considering this matter, I am only required to determine how I consider the discretion should be exercised in the particular case(s) before me. My review of prior decisions, in this regard, was primarily for the purpose of ensuring that the reasons given in those cases might be included in my consideration.
- (45) I would, however, question the reasoning quoted above from Appeal Division Decision #2001-0304, with respect to the interpretation of the policies in the Manual. That decision suggested that the policies at #99.10 and #99.20 are concerned with specific circumstances dealing with the adjudication of compensation entitlement, in which Board officers are required to provide copies of decisions to advocates. The decision found that #114.43, dealing with consideration of relief of costs under section 39(1)(e) of the Act, contained no similar direction to provide copies of decisions to representatives. Accordingly, it was concluded that policy does not require that copies of relief of claim costs decisions be provided to representatives, although the panel noted the desirability of such a practice.

- (46) The policies at #99.10 and #99.20 are contained in Chapter 12 of the Manual. Chapter 12 is entitled “Claims Procedures,” and begins by stating at item #92.00, under the heading of “Introduction”:

This chapter relates to the roles and responsibilities of workers, employers, physicians, and the Board in the making and adjudicating of compensation claims.

- (47) It seems to me that the policy at #92.00 was intended to provide general guidance concerning claims procedures, which would encompass the adjudication of relief of costs under section 39(1)(e) of the Act. Although not expressly stated, it would seem that in Decision #2001-0304 the panel was applying the principle of interpretation contained in the maxim *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another). This is a general principle of statutory construction which must be applied with caution, as stated by P.A. Cote in *The Interpretation of Legislation in Canada*, second edition, at pages 283–285. Much depends on the context, as the wording may be the result of inadvertence on the part of the drafter. This approach will not be applied if other indications reveal that its consequences go against the statute’s purpose, are manifestly unjust, or lead to incoherence and injustice that could not have been the desire of the legislature.

- (48) In the *Construction of Statutes*, second edition, E.A. Driedger states at page 123:

Where there are overlapping provisions it is usually a situation where one provision is general and the other provision is a special one within the general. If they can stand together, the question is whether the legislature intended the special provision to be additional or exclusive and the answer of course depends on the context. It would seem that where powers are granted to some authority . . . the courts are likely to hold that the special provision is addition. But where a special procedure or *modus operandi* is prescribed for a special case . . . the courts are likely to regard it as exhaustive, namely, that the legislature has manifested an intention to create a complete legislative code governing the subject-matter.

- (49) I consider that the policy in Chapter 12 concerning claims procedures was intended to express the general position of the Board concerning cooperation with representatives. I further consider that the policy at #114.43, dealing with particular issues concerning relief of costs, was intended to be additional rather than exhaustive. Accordingly, I do not agree with the reasoning in #2001-0304 concerning the intended effect of the policies. As well, using a purposive analysis, I cannot think of any reason why the Board would intend to cooperate with representatives in one context but not in another. This reinforces the conclusion that the guidance provided in Chapter 12 was intended to be general in nature. I read the general intent of the policies as supporting recognition of the role of representatives. This is consistent with the intent shown in the policy direction provided to the Appeal Division quoted above from Decision No. 75. Where, through oversight, a decision is not provided to the authorized representative, it is evident there is a clear potential for prejudice to the worker or employer.

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Notwithstanding the different wordings, I do not consider that the different policies were intended to support such differential treatment of employer representatives depending on whether or not the worker's entitlement is affected.

- (50) To review the key dates in this matter, the representative's inquiry was on August 17, 1998, the decision was provided to the employer alone on "September 14, 1998" (likely November 6, 1998), the representative's follow-up inquiry was on November 23, 2000, a copy of the decision was sent to the representative on December 7, 2000, and the appeal was initiated on December 19, 2000. There was a delay in follow-up by the representative of over two years between his August 17, 1998 inquiry and his follow-up letter of November 23, 2000. As well, it appears that the local office of the employer requested relief of claim costs directly, and received a decision which they did not appeal. There was no coordination between the local office of the employer, and the representative retained by the employer's head office. It should have been evident to the employer that the decision letter had not been copied to their representative. The employer must accept some responsibility for their internal communications, for communicating with their representative, and for ensuring that any decision letters which they might wish to appeal are forwarded on to their representative for advice and assistance if so required. In particular, the employer runs certain risks in failing to ensure coordination between their external representative and the employer's own management personnel. The two-year delay by the representative in sending a follow-up letter appears excessive. Fault or blame can be properly laid at the door of the party receiving a decision who does nothing to bring the decision to the attention of their representative, or to otherwise take steps on their own behalf to protect the employer's interest. These factors tend to support a denial of the application for an extension of time to appeal.
- (51) However, I am not inclined to exercise the discretion under section 96(6) on this basis. I return to the fact that the initial error was made by the Board officer in failing to provide the representative with a copy of the decision letter. To my mind, the proper communication of decision letters is fundamental. The failure to communicate a decision to a representative undermines the representative's ability to participate and to assist their client. I consider this contravenes the general intent of the policies. A sense of unfairness arises in connection with the Board officer's failure to provide a copy of the decision letter to the representative who first requested the decision.
- (52) The fact that some fault may be laid at the door of the employer does not, to my mind, completely negate the sense of unfairness which attaches to the failure to furnish a copy of the decision to the representative at the time the decision was issued. I find it significant that the representative acted immediately to file an appeal once he obtained a copy of the decision. While delay by the representative at that point might have been fatal to this application, there was no delay after the exceptional circumstances which prevented the party from initiating an appeal in time came to an end.
- (53) I further note the circumstances surrounding the incorrect dating of the decision letter, as well as the re-typing of the decision letter so as to make it appear that the decision was provided in response to the representative's letter of August 25, 1998. It may be the case that the

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representative's letter was overlooked at the time the decision was provided in response to the employer's inquiry. By the time the representative's follow-up letter was received two years later, it may be that the initial circumstances had been forgotten. A cursory review of the file might have lead to the erroneous conclusion that the letter contained a typographical error as to the date of the representative's inquiry which required correction. While I am not inclined to regard this as revealing any sinister intent, it is the sort of situation which is best addressed by permitting full disclosure and further review based upon the granting of an extension of time for the employer's appeal.

- (54) I note, as well, that a decision concerning the relief of claim costs under section 39(1)(e) does not affect the worker. There is no competing interest involving the worker requiring consideration. Here, the error originated with Board, and the error is capable of being remedied through the granting of an extension of time to appeal. Having regard to the principles outlined in the *Caputo* case, I find that there is sufficient basis to support exercising the discretion in favour of granting an extension of time for the employer's appeal.
- (55) In conclusion, I find that the failure to communicate the "September 14, 1998" decision to the representative precluded the representative from assisting the employer in ensuring that a timely appeal was filed in respect of the decision. I accept that this constituted an exceptional circumstance which tended to prevent the employer from initiating an appeal in time. The representative acted immediately to file an appeal once the decision was communicated to him. I find that an extension of time for the employer's appeal should be granted.
- (56) Having engaged in a limited review of prior Appeal Division decisions, and identified 15 prior cases involving the same circumstances as are presented in this case, I would express concern as to the number of occasions this scenario has repeated itself. The list of cases set out above is suggestive of a possible systemic problem which may warrant review by the administration as to whether any corrective measures might be taken. A copy of this decision will be forwarded to the attention of the chief appeal commissioner. It may be appropriate to bring this concern to the attention of the Board's administration, for consideration as to whether any additional steps might be taken to ensure that authorized representatives are provided with copies of decision letters concerning relief of claim costs under section 39(1)(e) of the Act.

## **Conclusion**

- (57) The employer's request for an extension of time to appeal the case manager's decision dated "September 14, 1998" is granted. The file will be returned to the appeal officer to provide disclosure and proceed with the handling of the appeal.

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

