

**Decision of the Appeal Division****Number: 2002-2402****Date: September 16, 2002****Panel: Paul Petrie****Subject: Whether a Panel Member's Prior Treatment of an Issue Constitutes a Reasonable Apprehension of Bias and Disqualifies Him From Participating on a Reconsideration Panel**

APPEAL DIVISION (RECONSIDERATION) (PRACTICE AND PROCEDURE) (APPREHENSION OF BIAS) – Worker seeks reconsideration of Appeal Division Decision No. 2001-1600 where a three person non-representational panel considered an allegation of an apprehension of bias against one of its members – The panel adopted the position that appeal commissioners' prior treatment of an issue does not necessarily require disqualification unless they are unable to approach the determination of the matter with an open mind – Analysis using an "objective standard based on what an informed, reasonable person would conclude, viewing the matter realistically and practically, and having thought the matter through" was accepted as applicable – Further, the panel concluded that a commissioner's participation on a panel that addressed the apprehension of bias objection regarding him, did not offend natural justice – The policy requiring no special perspective for non-representational appeal commissioners background training and experience of the panel member was considered consistent with prescribed qualifications of appeal commissioners and The Appeal Division panel rejected institutional bias arguments and determined the Appeal Division structure had sufficient institutional independence – Application for reconsideration denied.

**Law:** WCA (1996): s. 85(1), s. 96.1(1)**Policy:** Appeal Division Decision No. 93-0740, 10 *Workers' Compensation Reporter* 127; Appeal Division Decision No. 33, 17 *Workers' Compensation Reporter Appendix "O"*; *Appeal Division Code of Conduct*, 17 *Workers' Compensation Reporter Appendix "L"*; *Decision No. 2 of the Governors*, 7 *Workers' Compensation Reporter* 13**Decisions:** Appeal Division Decision No. 93-1687, 10 *Workers' Compensation Reporter* 211; *Committee for Justice and Liberty v. National Energy Board* (1976), 68 D.L.R. (3d) 716 per Laskin C.J.C.; [1978] 1 S.C.R. 369 per de Grandpré (S.C.C.); *Nfld. Telephone Co. v. Nfld. (Board of Commissioners of Public Utilities)* (1992), 89 D.L.R. (4th) 289 (S.C.C.); Appeal Division Decision No. 92-0818, 8 *Workers' Compensation Reporter* 211; *Van Unen v. B.C. (Workers' Compensation Board)* 17 *Workers' Compensation Reporter* 305, 87 B.C.L.R. (3d) 277 (B.C.C.A.); Appeal Division Decision No. 98-2016 (unreported decision); Appeal Division Decision No. 99-1074 (unreported decision); *Arsenault-Cameron v. Prince Edward Island*, [1999] 35 S.C.R. 851; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Suranyi v. W.C.B.*, 15 *Workers' Compensation Reporter* 491 (B.C.S.C.); *Regina v. Valente*, [1985] 2 S.C.R. 673; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; 2747-3174 *Quebec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919; Appeal Division Decision No. 96-0272, 12 *Workers' Compensation Reporter* 291; Appeal Division Decision No. 2001-0934-0935, 17 *Workers' Compensation Reporter* 383; *Baker v. Minister of Citizenship and Immigration*, [1999] 2 S.C.R. 81718 *Workers' Compensation Reporter* p. 871

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- (1) The worker seeks reconsideration of the August 14, 2001 Appeal Division Decision #2001-1600. In that decision a three-person panel of non-representational appeal commissioners considered an allegation of an apprehension of bias against one of the panel members advanced by the

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worker's counsel. Counsel for the worker alleged that the panel member, Mr. O'Brien, could not be expected to fairly and independently adjudicate the legal costs issue raised in the appeal. Counsel for the worker based the allegation on the contention that the panel member was "well known for . . . always deciding against awarding legal costs to disabled workers" (counsel's emphasis). In support of the allegation counsel submits that the panel member was on the panel that issued Appeal Division Decision #93-1687 (10 *Workers' Compensation Reporter* 211) which denied a worker's legal costs.

- (2) In Decision #2001-1600 the panel concluded that the fact that an appeal commissioner has addressed a similar issue in the past does not necessarily disqualify him or her from addressing the issue again. The panel noted that Decision #93-1687 does not state that legal costs will never be awarded. The panel also concluded that the panel member's presence on the panel did not contravene the rules of natural justice or procedural fairness.
- (3) On August 31, 2001 counsel wrote to the chief appeal commissioner seeking reconsideration of Decision #2001-1600 on grounds that the panel member should not have participated in the decision on the issue of allegation of bias. He advised that a further detailed submission would be provided. He sought extensions of time to provide a submission in support of the reconsideration application on October 30, 2001, January 17, 2002 and April 2, 2002.
- (4) In the submission of April 19, 2002 counsel for the worker again advances the worker's position that Mr. O'Brien's participation in the appeal raises a reasonable apprehension of bias because of his participation in Decision #93-1687. This 1993 decision, counsel submits, adopted the restrictive test for considering legal costs. Counsel also submits that Mr. O'Brien should be removed from the panel because he has never granted legal costs in a previous decision. Counsel also argues that the panel member's lack of legal training and his prior involvement in management on behalf of employers raises a reasonable apprehension of bias. Counsel asserts that the panel in Decision #2001-1600 applied the wrong legal test. Counsel also raised the issue of "institutional bias" as a basis to find that:

. . . the structure of the Appeal Division and/or the WCB itself justifies a reasonable apprehension of bias.

## **Jurisdiction**

- (5) Section 96.1(1) of the *Workers Compensation Act* (the Act) provides that a decision of the Appeal Division is final and conclusive. Section 96.1(3) provides the chief appeal commissioner with jurisdiction to reconsider an Appeal Division decision where there is substantial and material new evidence provided that was not available at the time of the decision. In addition, Appeal Division Decision #93-0740 "Reconsideration of Appeal Division Decisions" (10 *Workers' Compensation Reporter* 127) provides that the chief appeal commissioner has the common law authority to reconsider Appeal Division decisions on the basis of clerical mistakes or omissions, fraud, or an error of law going to jurisdiction, including a breach of the rules of natural justice. In Appeal Division Decision #33 (17 *Workers' Compensation Reporter* Appendix "O") the chief appeal commissioner delegated to all non-representational appeal commissioners the

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authority to reconsider a matter pursuant to section 96.1(3) of the Act or the common law grounds for reconsideration in Decision #93-0740. The Code of Conduct for Appeal Commissioners (Decision #33, Appendix “L”) provides that the panel assigned to consider the appeal will decide an allegation of a conflict of interest in the first instance. Any application for reconsideration of the panel’s decision on the allegation of bias is referred to the deputy chief appeal commissioner for a final determination.

- (6) Because the application alleges a breach of natural justice in Decision #2001-1600 the standard of review is one of correctness. If I find a breach of natural justice on this reconsideration, the original panel’s decision can be set aside.

### **Issue(s)**

- (7) The issue is whether the assignment of the worker’s appeal to a panel which includes Mr. O’Brien gives rise to a reasonable apprehension of bias.
- (8) Counsel requested an oral hearing or a conference call. After considering the narrow issue raised in this application I find an oral hearing is not required to fully and fairly decide this reconsideration application.

### **Analysis and Reasons**

- (9) I have considered all of the issues, allegations and observations advanced by counsel on behalf of the worker. My analysis of the main issues is as follows:

#### **1. The Proper Legal Test for Determining a Reasonable Apprehension of Bias**

- (10) Counsel submits that the August 14, 2001 decision failed to articulate and apply the proper test:

The test is not whether the Appeal Commissioners subjectively consider there to be a reasonable apprehension of bias or a breach of the rules of natural justice.

- (11) The panel in Decision #2001-1600 addressed the question of the legal test to be applied to the allegation of an apprehension of bias in this case in paragraphs 8 through 12 of that decision. The panel noted that the question of a reasonable apprehension of bias was raised by counsel in another decision of the Appeal Division involving the same worker (Appeal Division Decision #98-2016). The panel quoted from that decision with respect to the test commonly applied by the courts for determining whether a reasonable apprehension of bias exists and cited two key cases from the Supreme Court of Canada detailing the appropriate tests: *Committee for Justice and Liberty v. Canada (National Energy Board)* (1976), 68 D.L.R. (3d) 716 at 722, 723, per Laskin C.J.C. (S.C.C.); and *Nfld. Telephone Co. v. Nfld. (Board of Commissioners of Public Utilities)* (1992), 89 D.L.R. (4th) 289 (S.C.C.). It is well established in *Nfld. Telephone Co.* at 297:

The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.

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- (12) In the words of Mr. Justice de Grandpré in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369:

[T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is “what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude . . .”

- (13) This is the standard (or test) that has been incorporated in the Appeal Division’s Code of Conduct developed for the guidance of appeal commissioners (17 *Workers’ Compensation Reporter* Appendix “L”):

. . . an “apparent conflict of interest” exists when a reasonable, well-informed person could have a reasonable perception that the existence of a personal attitude, interest (either pecuniary or non-pecuniary), relationship or association (past or present) could impair the appeal commissioner’s ability to discharge her/his duties fairly and impartially . . .

- (14) After reviewing the panel’s analysis and reasons in Decision #2001-1600 I am satisfied they applied the appropriate legal test as detailed in the court decisions which they cited and in accordance with the test in the Code of Conduct.
- (15) Counsel provided an affidavit in which the worker objected to the August 14, 2001 decision being reached without the benefit of an oral hearing. I consider that the issue raised in the allegation of an apprehension of bias before the panel in Decision #2001-1600 could be fully and fairly considered by way of written submissions.
- (16) The worker alleged that:

[The] WCB Appeal Division members are concerned to cover for each other and keep their jobs and to avoid the appearance of any conflict amongst themselves.

- (17) No evidence was provided to support this allegation.
- (18) As noted by a former chief appeal commissioner in Appeal Division Decision #92-0818 (8 *Workers’ Compensation Reporter* 211):

While appearances are an essential part of the test of reasonable apprehension of bias, mere suspicion of bias does not suffice. The apprehension of bias must be a reasonable one, held by a reasonable person.

- (19) The worker’s unsupported suspicions are not sufficient to establish a reasonable apprehension of bias.

## 2. The Panel Member's Participation in Decision #93-1687

- (20) Counsel for the worker submits it was “an error in principle” for the panel to treat Decision #93-1687 as if it were just another decision. Counsel says:

This was a special panel adopting a broad policy rule which effectively denied all legal costs (for 8 years, as it turns out) by adopting a radically restrictive test (undefined and unillustrated) of “flagrant abuse of process”.

(reproduced as written)

- (21) Counsel submits that the court's decision in *Van Unen v. B.C. (Workers' Compensation Board)* 17 *Workers' Compensation Reporter* 305, also 87 B.C.L.R. (3rd) 277, (British Columbia Court of Appeal)

. . . reviewed and effectively amended Appeal Division decision #93-1687 (in which Commissioner O'Brien participated) and set new tests for when legal fees should be paid by the WCB.

- (22) In the B.C. Court of Appeal decision in *Van Unen* Mr. Justice Lambert had this to say about the application of Decision #93-1867 to the two Appeal Division decisions that denied legal costs in that case:

Those two sets of reasons reflect an application of the reasoning set out in the “generic” decision No. 93-1687. In my opinion, applying the standard of correctness, coupled with appropriate deference to the Appeal Division's expertise in relation to the objects and practical application of the legislation, the interpretation of s.100 which allows it to apply to claims for legal expenses, but does not require that they be paid in any case or class of cases, (with the possible exception of unusual cases where the claiming party was subjected to abuse of process or otherwise became subject to unique considerations), is an interpretation that meets the standard which I have described. It is an interpretation which rises above the *Rehabilitation Services and Claims Manual* by allowing for exceptions not indicated in the Manual.

The interpretation I have described was actually applied in the passages from the two relevant decisions which I have quoted. In my opinion, it leaves an ample discretion for truly deserving cases without violating the harmony of a system that the Board has decided should be conducted without any customary liability of the Board to pay legal fees from the accident fund to every successful claimant who retains a lawyer.

- (23) As noted by the panel in Decision #2001-1600, and acknowledged by the Court of Appeal in *Van Unen*, Decision #93-1687 does not state that legal costs will never be awarded.

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- (24) The panel in Decision #2001-1600 provided detailed references on this point from decisions #98-2016 and #99-1074 to support their conclusion that the fact that an appeal commissioner has addressed a similar issue in the past does not necessarily disqualify him or her from addressing the issue again.
- (25) In Decision #98-2016 the panel cited the following excerpt from the text *Administrative Law* (David J. Mullan, 1996) at page 300:

The continuing nature of their responsibilities means that many statutory decision-makers deal with the same persons on more than one occasion and also the same or related issues. This is not of itself a basis for alleging a reasonable apprehension of bias.

We note a decision by the Canadian labour relations board, *VGH and BCNU [1982] 3 Can L R B R 349*, which referred to Mullan and stated at p.354 that “a reasoned decision setting out a particular principle in one case does not attach to that panel, or a member of it, a reasonable apprehension of bias when a similar issue arises later”. The decision also stated that “[t]he Legislature and labour relations community anticipate that panel members will be involved in many cases with similar facts and that their expertise is desirable because of their familiarity and experience with labour relations issues”.

We have found no authority that contradicts Mullan. That is, we have found no authority that would support counsel’s position that a decision-maker ought not to hear a case if he (or she) has decided a similar issue in the past.

- (26) The worker through his counsel sought a reconsideration of Decision #98-2016 which was considered by a former chief appeal commissioner in Decision #99-1074. In that decision the chief appeal commissioner addressed counsel’s reiteration of the same allegation as follows:

... However, counsel has only sought to answer in passing the original panel’s conclusion that it found no authority that would support counsel’s position that a decision-maker ought not to hear a case if he or she has decided a similar issue in the past. I do not find counsel’s comments in this regard persuasive. I agree with the statement from Mullan and the British Columbia Labour Relations Board decision cited by the original panel. I also agree with the original panel when they state:

While appeal commissioners will remove themselves from a panel if they consider that their participation would involve a reasonable apprehension of bias, having regard to the authorities cited above it is not generally contemplated that appeal commissioners will disqualify themselves simply because he or she has addressed a similar issue in the past. Given the number of related issues which come before the Appeal Division on a frequent basis, such an approach would quickly curtail the

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Appeal Division's capabilities for hearing appeals. Appeal commissioners have, therefore, a responsibility to proceed with the hearing of a matter, unless they consider that they are unable to approach the determination of the matter with an open mind.

- (27) Counsel has provided no further argument or authority that would undermine the analysis in decisions #98-2016 and #99-1074. I find that the above analysis in those decisions continues to apply in this application. I agree with the panel's conclusion in Decision #2001-1600 that Mr. O'Brien's participation in Decision #93-1687 does not create a reasonable apprehension of bias with respect to his participation in the worker's appeal from the Review Board finding of October 6, 2000.
- (28) I have also considered counsel's argument that Mr. O'Brien should not have participated in the August 14, 2001 decision which initially considered the worker's allegation of an apprehension of bias. His participation in that decision is consistent with the practice established in the Appeal Commissioners Code of Conduct (Appendix "L" item 2.7). Where the initial panel dismisses the allegation, parties have the opportunity to have the allegation considered afresh by the deputy chief appeal commissioner. Mr. O'Brien's participation in the initial consideration does not, in my view, offend natural justice. I note this practice of decision-makers first considering bias allegations against them has been used by the Supreme Court of Canada: *Arsenault-Cameron v. Prince Edward Island*, [1999] 35 S.C.R. 851. As noted by Mr. Justice Bastarache in that decision:

The test for apprehension of bias takes into account the presumption of impartiality. A real likelihood or probability of bias must be demonstrated.

### 3. The Panel Member's Training and Experience

- (29) Counsel's submission with respect to Mr. O'Brien's training and work history implies that his employment as an appeal commissioner raises a reasonable apprehension of bias. Mr. O'Brien was first appointed as a non-representational appeal commissioner in June 1991 at the inception of the Appeal Division. As noted in the June 1992 Appeal Division annual report Mr. O'Brien had previously served as a member of the Boards of Review starting in December 1985, and became a vice chair of the Review Board in February 1988. Prior to joining the Boards of Review he had extensive experience in labour relations and hospital administration. He has also served as the administrative chair of the Review Board.
- (30) Section 85(1)(b) of the Act provides for the appointment of appeal commissioners by the chief appeal commissioner. Decision #2 of the governors (*7 Workers' Compensation Reporter* 13) establishes the policy for selection of appeal commissioners. That policy provides that non-representational appeal commissioners will have no special perspective although they may have had either an employer or worker perspective in their background. That policy also outlines a list of 13 qualifications that an appeal commissioner might possess.

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- (31) Mr. O'Brien's background, training and experience are consistent with the prescribed qualifications of appeal commissioners. His continuing contribution to the workers' compensation appeal system over the last 17 years is well established and exemplifies the level of expertise relied on by the courts in exercising deference to decisions of administrative tribunals (see, for example, *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227).
- (32) Counsel's submission on this point has little substance or merit and in my view requires no further analysis or comment.

#### 4. The Panel Member's Adjudicative History

- (33) Counsel seeks to establish that that Mr. O'Brien has never granted legal costs, which in his submission raises a reasonable apprehension of bias. A review of Appeal Division decisions publicly available on the internet since January 2000 (at <http://www.worksafebc.com>.) shows that Mr. O'Brien has considered seven cases involving "legal costs" and has not found sufficient exceptional circumstances to warrant granting legal costs in these cases. This fact, by itself, does not in my view establish a reasonable apprehension of bias. As noted below, the courts have recognized that legal fees are seldom granted under the *Workers Compensation Act* and policy unless there are exceptional circumstances that warrant granting such costs.
- (34) Counsel's argument if embraced would indicate that only appeal commissioners who had previously granted legal costs or who had never before considered the issue of legal costs would be untainted and thus immune from a bias allegation.
- (35) In an application by counsel for the worker under the *Judicial Review Procedure Act* the worker sought to have the court make an order for the Board to pay his legal fees in his claim. That application was considered by the British Columbia Supreme Court in the case of *Suranyi v. WCB* (B.C.S.C., published at 15 *Workers' Compensation Reporter* 491). In that May, 1999 judgment Mr. Justice Edwards concluded that the application for an order for reimbursement of legal fees and costs "must be dismissed." Mr. Justice Edwards stated:
- It should not come as a surprise to Mr. Suranyi and his advisors that the Board does not generally pay legal fees. It is apparently well known in the legal community, members of which deal with the WCB, that that policy has been in effect for some period of time and is seldom breached.
- (36) The British Columbia Court of Appeal in *Van Unen* approved the interpretation of s. 100 which allows for acceptance of legal costs in exceptional circumstances. The fact that the panel member has not yet granted legal costs in a particular case does not by itself raise a reasonable apprehension of bias. The panel's adjudicative history may simply be a reflection of the fact that in the small number of cases where this issue has been considered by the panel member, the requisite exceptional circumstances have not existed.

- (37) The panel member's adjudicative history on this issue is consistent with the court's approval of limiting acceptance of legal costs to exceptional circumstances and does not provide support for the allegation of an apprehension of bias.

## 5. Institutional Bias

- (38) Counsel notes that the worker had not previously argued "institutional bias." However, counsel submits that there are a number of factors that would support an argument of institutional bias including:
- The contract terms of the commissioners being very limited;
  - The fact that the commissioners are WCB employees with WCB benefits, including pensions, paid by the WCB;
  - The Appeal Division is physically located inside the WCB's main office and the appeal commissioners and their support staff interact with the rest of the WCB in meetings, conferences, the lunch room, and seminars.
- (39) Counsel submits that the structure of the Appeal Division and the Workers' Compensation Board (the Board) justifies a reasonable apprehension of bias. Counsel has raised similar allegations in this case in 1999 when he sought reconsideration of Decision #98-2016 which denied this worker's previous application that a member of that panel remove himself on the basis of a reasonable apprehension of bias. In the 1999 application for reconsideration, counsel for the worker also belatedly raised the issue of institutional bias. In that prior application (Decision #99-1074) the chief appeal commissioner dismissed the allegation with detailed reasons. In that decision, the chief appeal commissioner addressed counsel's arguments regarding institutional independence and the allegation of institutional bias with reference to Supreme Court of Canada decisions on institutional independence (*Regina v. Valente*, [1985] 2 S.C.R. 673, *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, and 2747-3174 *Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919).
- (40) The chief appeal commissioner provided detailed reasons to support her conclusion that counsel's assertions did not provide a sufficient basis to establish a reasonable apprehension of bias with respect to institutional independence. I agree with her analysis and conclusions.
- (41) Counsel also raised similar arguments regarding the issue of independence of the Appeal Division in a separate matter (see Decision #96-0727 published in the *Workers' Compensation Reporter* Vol. 12, p. 291). The panel in Decision #96-0727 dismissed counsel's application with reasons. That panel's analysis and conclusions are publicly available and I do not propose to repeat them here.
- (42) Counsel for the worker seeks support for his application in Appeal Division Decision #2001-0934/0935 (17 *Workers' Compensation Reporter* 383). Counsel notes that that decision dealt with WCB occupational safety officers, not with Appeal Division commissioners. That decision analyzed a complex set of disputed facts arising in the context of an oral hearing. That

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decision analyzed in detail the issue of procedural fairness and relied on the Supreme Court of Canada's decision in *Baker v. Minister of Citizenship and Immigration*, [1999] 2 S.C.R. 817. The panel reviewed the conduct of Board officers in arriving at decisions affecting the employer. The panel found a lack of procedural fairness in the Board's failure to give notice to the employer about new information provided to the initial decision maker and the resulting failure to provide the employer with an opportunity to respond to that new information. The panel concluded that the lack of procedural fairness in the context of evidence suggesting a lack of impartiality on the Board's part raised a reasonable apprehension of bias. I consider the facts and circumstances of Decision #2001-0934/0935 can be distinguished from the reconsideration application before me. Counsel has not established any basis to find a failure of procedural fairness in the panel's decision that is the subject of this reconsideration application.

- (43) I have considered whether there is any other basis to find institutional bias in this matter, aside from the issues addressed in the decisions cited above. The Appeal Division is a separate division of the Workers' Compensation Board, accountable to the Board's governing body (the Panel of Administrators) with respect to administrative issues. The Appeal Division is structured in accordance with the provisions of the Act and operates independently with respect to its quasi-judicial functions in deciding appeals under the Act. A number of specific provisions of the Act underscore the independent decision making role of the Appeal Division.
- (44) Section 85 is among those provisions and provides that the governing body of the Board appoints the chief appeal commissioner, and the chief appeal commissioner selects appeal commissioners in accordance with policies established by the Board's governing body. The governing body may not remove the chief appeal commissioner or any appeal commissioner because they have made a decision on an appeal with which the governors do not agree. Section 96.1(1) provides that a decision of the Appeal Division is final and conclusive.
- (45) After considering the arguments raised by counsel and the provisions of the Act I find there is sufficient institutional independence in the structure of the Appeal Division to allow the panel to fully and fairly consider the issues raised in the worker's appeal.

## **Conclusion**

- (46) After considering the submissions raised by counsel on behalf of the worker, I deny the application for reconsideration of Decision #2001-1600. The test is an objective standard based on what an informed, reasonable person would conclude, viewing the matter realistically and practically, and having thought the matter through. I find that counsel has failed to meet this test in the circumstances of this case.
- (47) The application for reconsideration is, therefore, denied.

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